Bathaee :: Dunne :: LLP

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May 31, 2023 **Via CM/ECF**

Re: *Klein v. Meta Platforms, Inc.*, No. 3:20-cv-08570-JD (N.D. Cal.)

Dear Judge Donato:

Advertiser Plaintiffs ("Advertisers") respectfully request that the Court find that a *prima facie* case exists under the crime-fraud exception with respect to certain communications currently being withheld by Defendant Meta Platforms, Inc. ("Facebook") as attorney-client privileged. The communications at issue relate to Facebook's so-called In-App Action Panel ("IAAP") program, which existed between June 2016 and approximately May 2019. The IAAP program, launched at the request of Mark Zuckerberg, used a cyberattack method called "SSL man-in-the-middle" to intercept and decrypt Snapchat's—and later YouTube's and Amazon's—SSL-protected analytics traffic to inform Facebook's competitive decisionmaking. As described below, Facebook's IAAP program conduct was not merely anticompetitive, but criminal—the program violated 18 U.S.C. § 2511(a) and (d), the so-called "Wiretap Act," with no applicable exception. Facebook's attorneys were pervasively involved in the design, execution, and expansion of this program. On May 15, 2023, Advertisers sent Facebook a nineteen-page single-spaced letter providing screenshots, quotations from documents, and evidentiary citations setting forth the company's applicable conduct; analyzing that conduct under 18 U.S.C. § 2511, *et seq.* and under the Ninth Circuit's crime-fraud test, *see In re Grand Jury Investigation*, 810 F.3d 1110, 1113 (9th Cir. 2016); and seeking a prompt meet-and-confer.[1] Over the next two weeks, Advertisers sent additional letters and emails. On May 31, the parties met and conferred and reached impasse.

I. Facebook's IAAP Program Targets Competition By Wiretapping Competitors

On June 9, 2016, Mark Zuckerberg emailed three of the company's top executives a message titled "Snapchat analytics." PX 2255 (PALM-016564834) at 3. According to Zuckerberg:

> Whenever someone asks a question about Snapchat, the answer is usually that because their traffic is encrypted we have no analytics about them. . . .
>
> Given how quickly they're growing, it seems important to figure out a new way to get reliable analytics about them. Perhaps we need to do panels or write custom software. You should figure out how to do this.

Id. Javier Olivan, now Facebook's COO, promptly replied, "fully agree[ing] that this was one of the most important market analysis questions we need to answer." *Id.* However, Olivan "ha[d] been looking into this with the onavo team" and the technology to look inside Snapchat's SSL-protected analytics traffic "[wa]s really complicated," likely "requir[ing] legal approval." *Id.* Five minutes later, Olivan forwarded Zuckerberg's email to Facebook's Onavo team, asking for "out of the box thinking" on a task that "is really important." *Id.* at 2. Olivan suggested potentially paying users to "let us install a really heavy piece of software (that could even do man in the middle, etc.)." *Id.* Later that morning, Onavo founder Guy Rosen replied: "we are going to figure out a plan for a lockdown effort during June to bring a step change to our Snapchat visibility. This is an opportunity for our team to shine." *Id.* at 1. Two days later, Olivan forwarded the whole email thread to then-General Counsel Colin Stretch, saying "[w]e should move as fast as possible on this (budget will not be an issue assuming Colin greenlights this type of research on the thread @ Colin

[1] Advertisers stand ready to provide full briefing, exhibits, and/or Advertisers' letters to Facebook at the Court's request.

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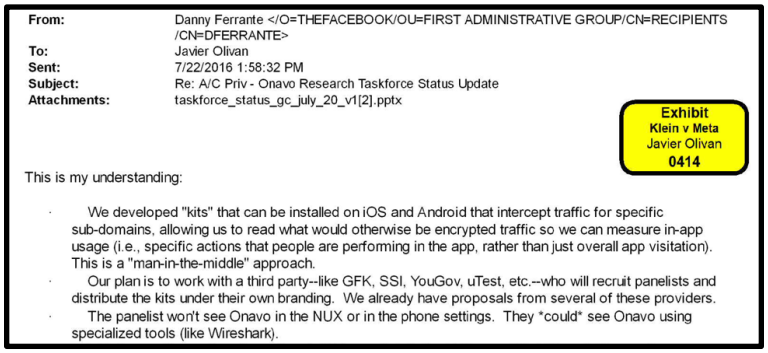
– correct?). Answering this is really important to give the product teams direction right now." *Id.* On June 17, 2016, the Onavo team created a "kickoff" presentation for the "Ghostbusters project"—an apparent reference to Snapchat's corporate logo, a white ghost on a yellow background. PALM-011630680, at slide 14. This presentation recited Zuckerberg's questions about Snapchat usage, *id.* at slide 22, and analyzed a technological "[s]olution space" that included "SSL bumping," *id*. at slide 3. By July 22, 2016, the Onavo team—under the guidance of in-house counsel—came to a proposed solution for senior leadership. In an email and presentation sent to (among others) Olivan, Rosen, and in-house counsel Dustin St. Clair (who was added "for A/C Priv"), the Onavo team provided details on its "current technical solution," PX 414 (PALM-010629831), at 2: "develop[ing] 'kits' that can be installed on iOS and Android that intercept traffic for specific sub-domains, allowing us to read what would otherwise be encrypted traffic so we can measure in-app usage," *id.* at 1. This was, a Facebook executive told Olivan, "a 'man-in-the-middle' approach," *id.*; *see generally* https://en.wikipedia.org/wiki/Man-in-the-middle_attack.



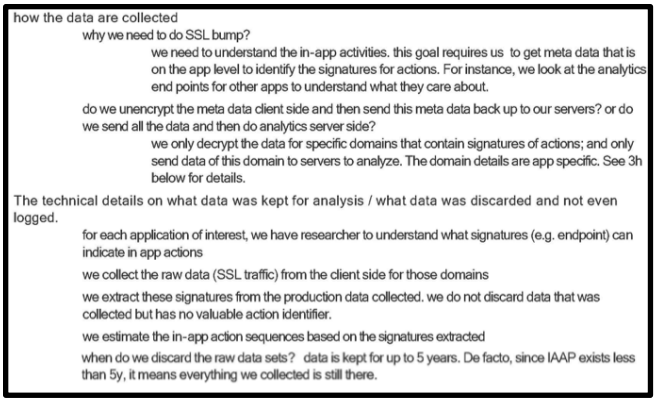
From: Danny Ferrante </O=THEFACEBOOK/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS /CN=DFERRANTE>
To: Javier Olivan
Sent: 7/22/2016 1:58:32 PM
Subject: Re: A/C Priv - Onavo Research Taskforce Status Update
Attachments: taskforce_status_gc_july_20_v1[2].pptx

Exhibit
Klein v Meta
Javier Olivan
0414

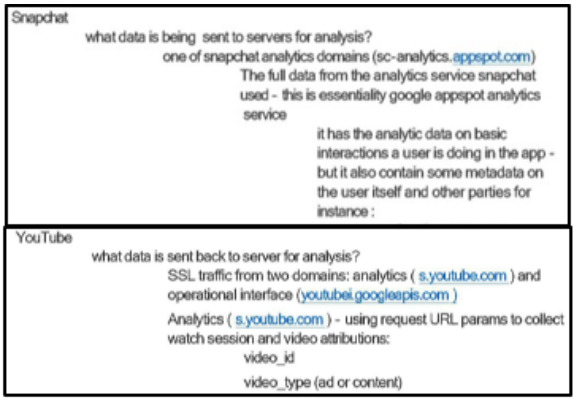
This is my understanding:

- We developed "kits" that can be installed on iOS and Android that intercept traffic for specific sub-domains, allowing us to read what would otherwise be encrypted traffic so we can measure in-app usage (i.e., specific actions that people are performing in the app, rather than just overall app visitation). This is a "man-in-the-middle" approach.
- Our plan is to work with a third party--like GFK, SSI, YouGov, uTest, etc.--who will recruit panelists and distribute the kits under their own branding. We already have proposals from several of these providers.
- The panelist won't see Onavo in the NUX or in the phone settings. They *could* see Onavo using specialized tools (like Wireshark).

Documents and testimony show that this "man-in-the-middle" approach—which relied on technology known as a server-side SSL bump performed on Facebook's Onavo servers—was in fact implemented, at scale, between June 2016 and early 2019. *See* PX 2256 (PALM-012863799) at 1-4. Facebook's SSL bump technology was deployed against Snapchat starting in 2016, then against YouTube in 2017-2018, and eventually against Amazon in 2018. *Id.* at 2-3. The goal of Facebook's SSL bump technology was the company's acquisition, decryption, transfer, and use in competitive decisionmaking of private, encrypted in-app analytics from the Snapchat, YouTube, and Amazon apps, which were supposed to be transmitted over a secure connection between those respective apps and secure servers (sc-analytics.appspot.com for Snapchat, s.youtube.com and youtubei.googleapis.com for YouTube, and *.amazon.com for Amazon). *Id.*



how the data are collected
why we need to do SSL bump?
we need to understand the in-app activities. this goal requires us to get meta data that is on the app level to identify the signatures for actions. For instance, we look at the analytics end points for other apps to understand what they care about.
do we unencrypt the meta data client side and then send this meta data back up to our servers? or do we send all the data and then do analytics server side?
we only decrypt the data for specific domains that contain signatures of actions; and only send data of this domain to servers to analyze. The domain details are app specific. See 3h below for details.
The technical details on what data was kept for analysis / what data was discarded and not even logged.
for each application of interest, we have researcher to understand what signatures (e.g. endpoint) can indicate in app actions
we collect the raw data (SSL traffic) from the client side for those domains
we extract these signatures from the production data collected. we do not discard data that was collected but has no valuable action identifier.
we estimate the in-app action sequences based on the signatures extracted
when do we discard the raw data sets? data is kept for up to 5 years. De facto, since IAAP exists less than 5y, it means everything we collected is still there.



Snapchat
what data is being sent to servers for analysis?
one of snapchat analytics domains (sc-analytics.appspot.com)
The full data from the analytics service snapchat used - this is essentiality google appspot analytics service
it has the analytic data on basic interactions a user is doing in the app - but it also contain some metadata on the user itself and other parties for instance :

YouTube
what data is sent back to server for analysis?
SSL traffic from two domains: analytics (s.youtube.com) and operational interface (youtubei.googleapis.com)
Analytics (s.youtube.com) - using request URL params to collect watch session and video attributions:
video_id
video_type (ad or content)

In order to SSL bump Snapchat—and later YouTube and Amazon—Facebook employees created custom client- and server-side code based on Onavo's VPN proxy app and server stack. PX 1205

at 1-4. This code, which included a client-side "kit" that installed a "root" certificate on Snapchat users' (and later, YouTube and Amazon users') mobile devices, *see* PX 414 at 6, PX 26 (PALM-011683732) ("we install a root CA on the device and MITM all SSL traffic"), also included custom server-side code based on "squid" (an open-source web proxy) through which Facebook's servers created fake digital certificates to impersonate trusted Snapchat, YouTube, and Amazon analytics servers to redirect and decrypt secure traffic from those apps for Facebook's strategic analysis, *see* PX 26 at 3-4 (Sep. 12, 2018: "Today we are using the Onavo vpn-proxy stack to deploy squid with ssl bump the stack runs in edge on our own hosts (onavopp and onavolb) with a really old version of squid (3.1)."); *see generally* http://wiki.squid-cache.org/Features/SslBump.

The intended and actual result of this program was to harm competition, including Facebook's then-nascent Social Advertising competitor Snapchat. Facebook's own documents credit its "Snapchat In-App Panel" with "inform[ing] internal product development" and "[i]ncreas[ing] leadership understanding of Snapchat use cases and the need for different Facebook products to address different Snapchat use cases." PX 20 (PALM-016175119). As one Facebook strategist put it, "SC's struggles as of late due to competition are likely connected to product efforts I have informed via my [Onavo] analysis." *Id.* As a Snap executive testified, Facebook's IAAP-informed product redesigns "hamper[ed] Snap's ability to sell ads." Levenson Dep. 50:12-22.

Between June 2016 and May 2019, Facebook's lawyers were near-constantly involved in the design, deployment, and expansion of the company's IAAP program. Facebook's then-General Counsel was brought in from the outset to "greenlight the type of research on this thread." PX 2255 at 1. Associate General Counsel Dustin St. Clair was involved in the July 2016 Onavo Research Taskforce analysis explaining the final "technical solution" to senior management, PX 414 at 2, then involved again—along with ***approximately 41 other lawyers***—in a January 2019 "IAAP Technical Analysis" document to evaluate whether to continue the program in the face of press scrutiny about Onavo, PX 2256 at 9-10. A September 2018 discussion about "context on IAAP and MITM" stated that the program was "closely monitored" by lawyers in Facebook's "Privacy XFN" team, PX 26 at 3, and was "approved by legal for sure," *id.* at 3-4.

II. Facebook's IAAP Program Violated the Wiretap Act[2]

18 U.S.C. § 2511(1)(a) criminalizes "intentionally intercept[ing] . . . any electronic communications," and subsection (d) of the same statute criminalizes "us[ing]" such intercepted communications. Facebook's IAAP program conduct squarely meets the statutory proscriptions in subsections (a) and (d), including as to "person," "intercept," "intentionally," and "use" within the meaning of the statute. *See generally* PROSECUTING COMPUTER CRIMES, Computer Crime and Intellectual Property Section Criminal Division, U.S. Dep't of Justice (2d ed.) (2010), at 59-87.

Moreover, Facebook's intentional interception of SSL-protected analytics traffic from Snapchat, YouTube, and Amazon did not fall within any statutory exception or defense. In particular, Facebook did not have the consent of Snapchat to intercept its encrypted analytics traffic, and it intercepted this traffic for avowedly tortious purposes, *see* 18 U.S.C. § 2511(2)(d), including to intentionally interfere with Snap, Inc.'s contractual relations with its app users, *see* https://snap.com/en-US/terms (prohibiting all sorts of behaviors that Facebook's IAAP program solicited and paid Snapchat users to engage in).

[2] Advertisers provided Facebook with a six-page version of this analysis, and would be happy to provide a lengthier analysis to the Court if the Court desires it.

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Respectfully submitted,

By: *Brian J. Dunne*
On Behalf of Interim Co-Lead Counsel for the Advertiser Classes

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FILER ATTESTATION

I am the ECF user who is filing this document. Pursuant to Civil L.R. 5-1(h)(3), I hereby attest that each of the other signatories have concurred in the filing of the document.

Dated: May 31, 2023

By: */s/ Brian J. Dunne*
Brian J. Dunne

Bathaee :: Dunne :: LLP

[redacted]

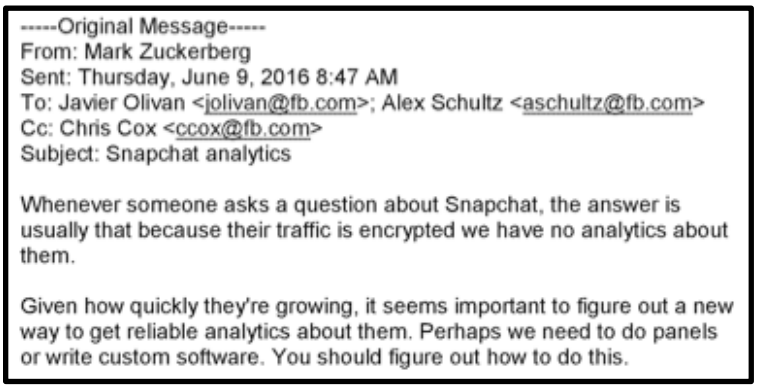
May 31, 2023 **Via CM/ECF**

Re: *Klein v. Meta Platforms, Inc.*, No. 3:20-cv-08570-JD (N.D. Cal.)

Dear Judge Donato:

Advertiser Plaintiffs ("Advertisers") respectfully request that the Court enter an order compelling Mark Zuckerberg's deposition for an additional three hours. As set forth in this letter, Zuckerberg has unique, personal knowledge about issues pertinent to Advertisers' case. On March 17, 2023, the Court entered an order limiting Zuckerberg's deposition to three hours for both classes, and stated, "if plaintiffs have a good-faith basis for seeking additional time, they may advise the Court." Dkt. 477. On May 19, after deposing Zuckerberg for 90 minutes three days prior, Advertisers sent Meta a letter requesting additional time with Zuckerberg and setting forth the reasons why. The parties met and conferred on May 31 and reached impasse.

On May 16, 2023, Advertisers deposed Mark Zuckerberg for slightly under 90 minutes before Meta's counsel cut off questioning. *See* Zuckerberg Tr. 144:6-8. Most of this time was devoted to an attempt, frustrated by Meta's counsel, to elicit Zuckerberg's testimony on an anticompetitive—and potentially criminal[1]—"In-App Action Panel" (IAAP) program designed and executed at Meta between 2016 and 2019 at Zuckerberg's direct request. Specifically, in 2016, Meta's advertising hegemony was threatened by nascent rival Snapchat, which was aggressively expanding its advertising business ahead of a 2017 IPO. *See, e.g.*, PX 557 (PALM-014640328) at 4 (S. Sandberg: "Snapchat . . . [c]ame up in every ads meeting and every casual ads conversation" at 2016 Davos conference). To counteract this competitive threat, Zuckerberg obsessively sought to redesign Meta's products in a way that would—to use a Snap executive's testimony in this case—"cause advertisers to not have a clear narrative differentiating Snapchat from Facebook and Instagram." Levenson Dep. 50:12-22. However, Meta's efforts in this regard were blocked by a technical barrier: Snapchat's in-app analytics (the information about what specifically Snapchat users were doing, when, and how—the key to effectively stealing away the "secret sauce" behind Snapchat's engagement and differentiating features) were encrypted and sent to a secure analytics server, sc-analytics.appspot.com. As Zuckerberg put it in an email to three senior executives on June 9, 2016:



-----Original Message-----
From: Mark Zuckerberg
Sent: Thursday, June 9, 2016 8:47 AM
To: Javier Olivan <jolivan@fb.com>; Alex Schultz <aschultz@fb.com>
Cc: Chris Cox <ccox@fb.com>
Subject: Snapchat analytics

Whenever someone asks a question about Snapchat, the answer is usually that because their traffic is encrypted we have no analytics about them.

Given how quickly they're growing, it seems important to figure out a new way to get reliable analytics about them. Perhaps we need to do panels or write custom software. You should figure out how to do this.

PX 2255 (PALM-016564834) at 3

[1] It is Advertisers' position—backed up by voluminous evidentiary background and analysis, which Advertisers would welcome the opportunity to share with the Court should Meta dispute any aspect of Advertisers' contention—that Meta's IAAP program didn't just harm competition, but criminally violated 18 U.S.C. § 2511(1)(a) and (d) by intentionally intercepting SSL-protected analytics traffic addressed to secure Snapchat, YouTube, and Amazon servers.

Within hours of Zuckerberg's June 9, 2016 email, Meta's highest-level executives, including its now-COO and then-General Counsel, organized an "Onavo Research Taskforce" to find a "technical solution" to obtain and analyze Snapchat's encrypted analytics traffic for Meta's competitive gain. *See* PX 2255 at 1-3, PALM-011630850. This new IAAP project, termed "Ghostbusters" by an Onavo project manager, proposed incredibly aggressive technological measures—including intercepting and decrypting SSL-protected traffic from the Snapchat app—to answer a list of questions taken directly from Zuckerberg's June 2016 emails. *See* PALM-011630850, at slides 4-11 (proposed technology, including "incentivized SSL bump"), 14 ("Ghostbusters"), 22 ("participation rate questions from Zuck below").

In July 2016, the Onavo team's proposed solution was presented to senior management, including now-COO Javier Olivan: Facebook developed "'kits' that can be installed on iOS and Android that intercept traffic for specific sub-domains, allowing us to read what would otherwise be encrypted traffic so we can measure in-app usage . . . . This is a 'man-in-the-middle' approach." PX 414 (PALM-010629831) at 1. In November 2016, the head of the Onavo IAAP team created a "note & deck to Mark" explaining to Zuckerberg that "[w]e now have the capability to measure detailed in-app activity," which came from "parsing snapchat analytics collected from incentivized participants in Onavo's research program." PALM-016563837, at slide 1; *see also* PALM-016453836 (email attaching presentation). Over the next two-and-a-half years, Facebook expanded its IAAP program to also intercept, decrypt, and analyze encrypted analytics from YouTube and Amazon. *See* PX 2256 (PALM-012863799) at 2-3.

On January 30, 2019, in response to an enforcement action by Apple implicating the above conduct, Meta engaged in a companywide fire drill to analyze and describe its IAAP program to Mark Zuckerberg. Dozens of documents from across the company reveal that Zuckerberg had spoken to the company's head of security, its then-CTO, and others about the risks and rewards of the IAAP program—which involved the interception and decryption of secure analytics traffic from Snapchat, YouTube, and Amazon for competitive reasons—and would personally make a decision about whether to continue it. *See* PALM-012927762 (Jan. 30, 2019 chat: "We are trying to reach decision with Mark ASAP to stop doing SSL decryption in the Android Facebook Research app (@Javier Olivan)."); PALM-012927513 (Jan. 30, 2019 chat between J. Parikh and then-head of security Pedro Canahuati: "We are talking to mark about stopping this panel and research on google android as well."); PALM-012154501 (Jan. 30, 2019: "Framing for MZ . . . Should we STOP doing SSL decryption in the Android Facebook Research app, and lose the ability to see in-app actions?"); PALM-016924589 (Jan. 30, 2019: "We are waiting for guidance from Mark about removing SSL decryption . . . . We need to give Mark more information"). A detailed document—a four-page long "IAAP Technical Analysis" prepared by Meta executives, Onavo team members, and ***forty-one lawyers***—was created laying out the history and technical details of the IAAP program in response to "Mark's questions, so that everything that goes to Mark is in one place." PALM-016606121, at 6125; *see generally* PX 2256 (IAAP Technical Analysis). And an email was sent directly to Zuckerberg expressly saying ***his*** "DECISION [was] NEEDED" regarding, among other things, whether Meta "[s]hould . . . STOP doing SSL decryption . . . and lose the ability to see in-app actions?" PALM-016895582, at 5584-85.

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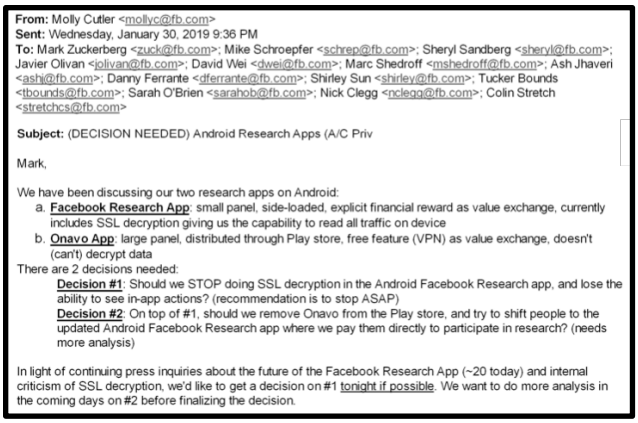


From: Molly Cutler <mollyc@fb.com>
Sent: Wednesday, January 30, 2019 9:36 PM
To: Mark Zuckerberg <zuck@fb.com>; Mike Schroepfer <schrep@fb.com>; Sheryl Sandberg <sheryl@fb.com>; Javier Olivan <jolivan@fb.com>; David Wei <dwei@fb.com>; Marc Shedroff <mshedroff@fb.com>; Ash Jhaveri <ashj@fb.com>; Danny Ferrante <dferrante@fb.com>; Shirley Sun <shirley@fb.com>; Tucker Bounds <tbounds@fb.com>; Sarah O'Brien <sarahob@fb.com>; Nick Clegg <nclegg@fb.com>; Colin Stretch <stretchcs@fb.com>

Subject: (DECISION NEEDED) Android Research Apps (A/C Priv

Mark,

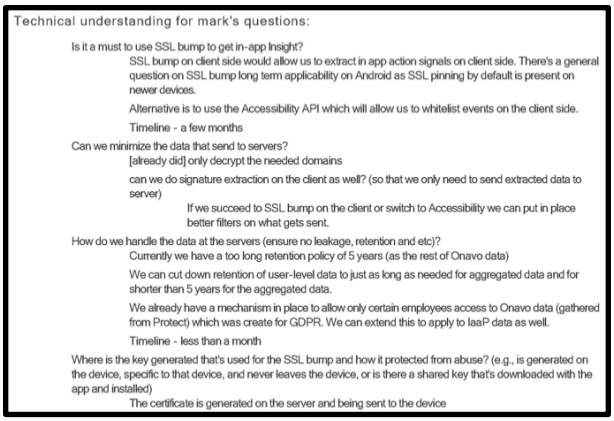
We have been discussing our two research apps on Android:

a. **Facebook Research App**: small panel, side-loaded, explicit financial reward as value exchange, currently includes SSL decryption giving us the capability to read all traffic on device
b. **Onavo App**: large panel, distributed through Play store, free feature (VPN) as value exchange, doesn't (can't) decrypt data

There are 2 decisions needed:

Decision #1: Should we STOP doing SSL decryption in the Android Facebook Research app, and lose the ability to see in-app actions? (recommendation is to stop ASAP)
Decision #2: On top of #1, should we remove Onavo from the Play store, and try to shift people to the updated Android Facebook Research app where we pay them directly to participate in research? (needs more analysis)

In light of continuing press inquiries about the future of the Facebook Research App (~20 today) and internal criticism of SSL decryption, we'd like to get a decision on #1 tonight if possible. We want to do more analysis in the coming days on #2 before finalizing the decision.



Technical understanding for mark's questions:

Is it a must to use SSL bump to get in-app Insight?
SSL bump on client side would allow us to extract in app action signals on client side. There's a general question on SSL bump long term applicability on Android as SSL pinning by default is present on newer devices.
Alternative is to use the Accessibility API which will allow us to whitelist events on the client side.
Timeline - a few months

Can we minimize the data that send to servers?
[already did] only decrypt the needed domains
can we do signature extraction on the client as well? (so that we only need to send extracted data to server)
If we succeed to SSL bump on the client or switch to Accessibility we can put in place better filters on what gets sent.

How do we handle the data at the servers (ensure no leakage, retention and etc)?
Currently we have a too long retention policy of 5 years (as the rest of Onavo data)
We can cut down retention of user-level data to just as long as needed for aggregated data and for shorter than 5 years for the aggregated data.
We already have a mechanism in place to allow only certain employees access to Onavo data (gathered from Protect) which was create for GDPR. We can extend this to apply to IaaP data as well.
Timeline - less than a month

Where is the key generated that's used for the SSL bump and how it protected from abuse? (e.g., is generated on the device, specific to that device, and never leaves the device, or is there a shared key that's downloaded with the app and installed)
The certificate is generated on the server and being sent to the device

PALM-016895582 at 5584-85 (left); PX 2256 at 4 (right)

However, when Advertiser counsel sought to examine Zuckerberg on some of these documents—including Zuckerberg's email initiating the IAAP program and the "IAAP Technical Analysis" (PX 2256) prepared specifically to brief Zuckerberg on the program—Meta's counsel stepped in. From the first introduction of the technical analysis document, Meta's counsel raised a "standing objection to the extent that Mr. Zuckerberg is not on this document," Zuckerberg Tr. 108:18-21, and the witness took this coaching to avoid answering questions about PX 2256 (even though evidence shows it was prepared for him, and even included "mark's questions"), *id.* at 116:16-25 ("I haven't actually read most of the document because you just directed me to a specific paragraph we're now well beyond. But my understanding from my counsel's objection is that I wasn't included on this document, so I don't believe I've ever seen this until now. So I'm not sure why you would infer from the existence of someone in the company giving some analysis that I would necessarily be aware of it."). Zuckerberg later complained on the record about not "ha[ving] time to read the whole thing" in reference to PX 2256, *id.* at 118:10-15, and was combative about a list of ***his own questions*** in PX 2256, repeating his lawyer's intonation that Zuckerberg "wasn't on this document," *id.* at 125:6-9. Zuckerberg stated, with respect to two of the three exhibits Advertisers had time to introduce, that he "wouldn't be surprised if with more time going through this email and then the one that you showed me after," he might have substantive testimony on the documents' contents. *Id.* at 131:15-25.

Advertisers did not have adequate time to examine Zuckerberg on important documents and subjects about which he plainly had (and has) personal, unique knowledge.[2] And in what time Advertisers did have—and the documents that were introduced to Zuckerberg within it—Meta's counsel interfered with the witness's testimony, including repeated coaching with baseless protective order objections. Advertisers respectfully request three hours of additional deposition time with Mark Zuckerberg—which can be done remotely if that is Meta's wish.

[2] As Meta correctly points out in its fictional, race-to-the-courthouse motion for a protective order, Dkt. 564—filed eleven minutes after a meet-and-confer on Advertisers' letter motion at which Meta never once mentioned it would be seeking affirmative relief—Advertisers do indeed have remaining questions regarding, for example, Zuckerberg's direct involvement in an anticompetitive deal with Netflix/Reed Hastings and in Meta's market division agreement with Google, beyond Advertisers' additional questions about Zuckerberg's personal involvement in his company's multiyear scheme to wiretap competitors.

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Respectfully submitted,

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On Behalf of Interim Co-Lead Counsel for the Advertiser Classes

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I am the ECF user who is filing this document. Pursuant to Civil L.R. 5-1(h)(3), I hereby attest that each of the other signatories have concurred in the filing of the document.

Dated: May 31, 2023

By: */s/ Brian J. Dunne*
Brian J. Dunne

Bathaee :: Dunne :: LLP

[redacted]

April 4, 2023 **Via CM/ECF**

Re: *Klein v. Meta Platforms, Inc.*, No. 3:20-cv-08570-JD (N.D. Cal.)

Dear Judge Donato:

Plaintiffs respectfully request relief from a serious, ongoing discovery problem that has already prejudiced them, and that Meta has refused to remedy. Pursuant to this Court's order, Meta certified on December 19, 2022, that it had (with a discrete exception) substantially completed its document production. The parties then began scheduling depositions. Yet despite certifying that it had substantially completed its document production, Meta has for approximately two years withheld from review and production in this case several hundred thousand documents, based on a privilege review Meta now concedes to be badly flawed. Meta's partial re-review of these same documents in the FTC's antitrust suit led to a ***60% downgrade rate***, and ended up with an 11th-hour (March 21, to be precise) production in this case of nearly 30,000 previously withheld documents—thousands of which were pertinent to then-imminent, and in some cases, already completed, depositions. Yet when Plaintiffs asked Meta to review the rest of the wrongfully withheld documents and to work with Plaintiffs to mitigate the prejudice, Meta called Plaintiffs' proposal a "nonstarter." The parties met and conferred on March 30, 2023, and reached impasse.

On April 2, 2021, Judge Koh, then presiding over this action, ordered Meta to "produce to Plaintiffs the documents Facebook produced to the Federal Trade Commission and the United States House of Representatives within 30 days." Dkt. 11. In early May 2021, Meta made that production ("FTC CID production"), which comprised approximately 3 million, already-produced documents collected from several dozen current and former Meta employees' files during the FTC's prior antitrust investigation into Meta. In June 2021, Meta served on Plaintiffs a privilege log with 1,046,992 entries, representing documents withheld or redacted from its FTC CID production based on supposed claims of attorney-client privilege, work product, or both.

The FTC CID production's contours have impacted Plaintiffs' discovery strategy throughout this action. Meta insisted its FTC CID production be the foundation from which all other document discovery in this case must flow. When Plaintiffs served document requests—Advertiser-specific, Consumer-specific, and joint—Meta insisted it would not search for and produce documents covering substantive topics Meta claimed were the subject of its FTC CID production. When the parties negotiated custodians and search terms, Meta asserted it would not repeat search parameters it used to collect, search, and review the documents ultimately produced as part of the FTC CID production. Meta affirmatively pressed Plaintiffs to identify custodians whose documents had not "already been collected" as part of the FTC investigation, carved out responsiveness dates for "overlapping" custodians to remove date ranges already collected in the FTC CID production, and used that production as a shield in the parties' search term negotiations.

Plaintiffs now know why Meta took the above positions—which continue to this day. When Meta collected, reviewed, and produced documents to the FTC during its investigation, Meta improperly withheld ***hundreds of thousands of documents*** as allegedly privileged or work product, when in fact they were not. As Meta's own lawyers conceded two weeks ago in federal court, Meta's privilege calls throughout its 1-million-entry investigational privilege log were badly flawed. *See FTC v. Meta Platforms, Inc.*, No. 1:20-cv-03590-JEB (D.D.C.), Dkt. 257. Indeed, a court-guided re-review of approximately 100,000 entries from this log revealed that ***sixty percent*** of the re-reviewed documents—ninety percent of which were withheld completely—were non- or less-privileged. *See id.* at 11-15. It is not clear (yet) the precise date on which Meta and its lawyers

discovered that Meta had improperly designated hundreds of thousands of documents during its FTC investigation review, but by taking the position in ***this case*** that it would not re-review any documents previously reviewed as part of the FTC investigation, Meta has kept the near 1 million documents on its FTC privilege log from ever being independently reviewed for this case.

And Meta ***continued*** to keep the deficiencies in its FTC investigation privilege calls—and the hundreds of thousands of not-actually-privileged documents implicated by these deficiencies—out of this case for ***months*** after Meta indisputably ***knew*** its privilege log from the FTC investigation was irredeemably flawed. A recent status report in the FTC case (*id.* at 13) reveals that Meta agreed to re-review more than 100,000 documents on its investigation log—the same log covering the same FTC CID production Meta re-produced to Plaintiffs—in or around late November 2022, and that this review was actively underway when Meta told the *Klein* Plaintiffs and this Court that its document production was substantially complete, for all custodians.

It was at this time—when Meta was engaging in a re-review of its FTC investigation log but also certifying its document production in *Klein* was substantially complete—that Meta demanded Plaintiffs schedule and start fact depositions. Plaintiffs did indeed start fact depositions, deposing (among other witnesses) Meta's Dan Rose, David Wehner, Guy Rosen, Jay Parikh, Keval Patel, John Fernandes, and Josh Grossnickle between February 2 and March 20, 2023. In the middle of this, Plaintiffs made a discrete privilege challenge regarding a document redacting as privileged a description by Sheryl Sandberg of her January 2018 visit to Netflix to "shadow" Reed Hastings. The response from Meta was problematic: it produced the Sheryl Sandberg email along with 20 GB of other redaction downgrades on March 20, and produced ***27,857 previously withheld documents*** on March 21. Among the previously withheld documents were ***several thousand*** that included or referenced already-completed Meta deponents (2,795 for Mr. Wehner, 2,505 for Mr. Rose, 795 for Mr. Rosen, 461 for Mr. Parikh, 335 for Mr. Grossnickle, 269 for Mr. Patel, and 68 for Mr. Fernandes). And these were hardly irrelevant or of even secondary importance.

For example, Advertiser Plaintiffs assert as part of their monopoly maintenance claims that between late 2016 and early 2018, Meta used deceptively-obtained competitive intelligence—including information about users' SSL-protected in-app actions on Snapchat obtained through "man-in-the-middle" decryption on Onavo servers—to cripple the then-nascent advertising business of Meta's principal would-be social advertising rival, Snap. *Compare* PALM-014640328 (Jan. 2016 Sheryl Sandberg email: "Snapchat[] came up in every ads meeting and every casual ads conversation" at Davos), *with* PALM-0093631966 (Apr. 2018 chat between Meta executives describing Snapchat as "struggling on revenue, esp around the vertical stories ad format," while "Instagram will crush 1B this year" from stories ads); *see also* PALM-010629831 (July 22, 2016 email) ("We developed 'kits' that can be installed on iOS and Android that intercept traffic for specific sub-domains, allowing us to read what would otherwise be encrypted traffic so that we can measure in-app usage . . . . This is a 'man-in-the-middle' approach."), and PALM-010629833 (attached presentation, discussing "Detection Avoidance (Masking)"). A consistent argument from Meta about the foregoing scheme—repeated as recently as last month, in a brief to this Court—was that Meta's highest-level executives had nothing to do with it, such that Plaintiffs' time deposing those executives should be limited. But among the documents produced for the first time on March 21, 2023, were:

- A June 2016 email thread in which Mark Zuckerberg asks for "what data or research we have on the relative participation rates and usage in Snapchat for sending individual snaps vs sharing your story," eliciting a response from now-COO Javier Olivan, copying C-suite executives

such as Colin Stretch and Chris Cox: "I will get back to this thread ASAP with an ETA to get that level of granularity in the data with some scale. In-app actions for apps that use SSL are not visible with our onavo apps but we are looking into other solutions." PALM-016802538.

- An email thread one week later in which Zuckerberg, Olivan, Sheryl Sandberg, Cox, Stretch, and other C-suite executives (including David Wehner and Dan Rose, both of whom had already been deposed at the time of Meta's production) discuss how to obtain "valuable analytics" to help "trying to build a clone of Snapchat." PALM-016805173.

The above are just specific examples, on a single relevant subject, of documents produced for the first time by Meta on March 21, 2023. These documents had nearly 28,000 companions—thousands of which are clearly relevant to issues cutting across both Advertisers' and Consumers' cases. Worse yet, Meta still hasn't re-reviewed ***several hundred thousand*** documents it withheld as privileged in the FTC investigation and thus never reviewed for responsiveness in this case. There are, based on Meta's own analysis and admissions regarding its FTC investigation log, no doubt hundreds of thousands of non-privileged documents in that group. And it unquestionably includes thousands upon thousands of relevant—indeed, hot and unique—documents responsive to Advertisers' discovery requests, Consumers' discovery requests, or both. Yet Meta to this day refuses to re-review the remainder of its FTC investigation privilege calls—or even to engage meaningfully on a protocol for doing so. This is despite Meta's concession that its prior privilege review and logging of the same, at-issue documents was flawed. When Plaintiffs contacted Meta about this issue, Meta asserted it had no obligation to produce in this case anything it downgraded from its FTC CID production—the same universe of documents Meta had insisted for two years could not be re-reviewed, in any circumstance, for responsiveness here.

Plaintiffs have incurred and will continue to incur significant prejudice from Meta's conduct with respect to its FTC investigation privilege calls. Depositions are underway. Many of Meta's downgrade productions that have occurred have come on the eve or near-eve of a witness's deposition (such as with Meta COO Javier Olivan), or worse, ***after*** that witness's deposition. That Meta has already downgraded so many of these documents suggests that many more would be downgraded were Meta to complete re-review of the log's remainder. This conclusion is also consistent with Meta's erroneous over-designation in the first place: another court recently observed that Meta, as a company, apparently has engaged in a practice of over-designating documents as privileged, whereby Meta "employees are taught to improperly 'privilege' documents based on their perceived sensitivity." *Cambridge Analytica MDL*, No. 18-md-2843-VC (N.D. Cal.), Dkt. 1104 at 47. Given Meta's refusal to work cooperatively to mitigate this prejudice, Plaintiffs respectfully request that the Court order that Meta:

1. Promptly re-review all remaining entries—*i.e.*, all entries not yet rereviewed—on its FTC investigational privilege log.
2. Provide a date certain by which an amended privilege log will be produced, and complete production of all newly-identified downgraded documents will be made, in this case.
3. Answer the following questions, which Meta has to-date refused to answer: (i) When did Meta internally determine that the documents it reproduced to Plaintiffs on March 20, 2023, and March 21, 2023, were non- or less-privileged? (ii) If Meta's internal determinations differ for different documents or groups of documents, when was each respective downgrade decision made?
4. Engage in good faith negotiations with Plaintiffs for appropriate deposition and schedule relief to mitigate the prejudice from Meta's delayed production of downgraded documents.

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Dated: April 4, 2023

By: */s/ Brian J. Dunne*
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April 13, 2023 **Via CM/ECF**

Re: *Klein v. Meta Platforms, Inc.*, No. 3:20-cv-08570-JD (N.D. Cal.)

Dear Judge Donato:

On February 9, 2023, near the beginning of fact depositions in this case, Advertiser Plaintiffs ("Advertisers") took the Rule 30(b)(6) deposition of defendant Meta Platforms, Inc. ("Meta") on a single topic addressing Meta's AI/ML systems used in ad ranking and delivery. Meta's designee was unprepared (indeed, by his own admission)—a problem that has become even more glaring as fact depositions have proceeded since. However, Meta has refused Advertisers' requests to return the deposition time wasted by Meta's unprepared deponent and to produce a properly prepared designee. Advertisers now respectfully request this relief from the Court. The parties met and conferred on March 16, 2023, and are at impasse.

This is a monopoly maintenance case brought on behalf of people and companies that bought advertising on Meta properties from December 2016 onwards. As Advertisers' operative First Amended Complaint, Dkt. 391 ("FAC") explains, and as fact discovery in this case is confirming, Meta's ad business dominates a distinct submarket of online advertising that uses a particular type of data—"social data" generated within an identity-linked, signal-rich online environment—and powerful machine learning ("ML")/artificial intelligence ("AI") systems designed specifically for this data, to offer a unique product: personalized online advertising tailored to a particular, identified person. *See* FAC ¶¶ 782-88, 804-13. Meta's multibillion dollar online advertising business is built on providing this capability as a distinct value proposition, one not generally available from other online platforms (let alone offline ads). A powerful barrier to entry surrounding Meta's advertising business has allowed Meta to increase prices without losing market share nearly every year since the company began selling advertising.

Meta's journey has not been without speedbumps, however. For example, after Meta scuttled its public developer Platform in 2015, restricting access to a handful of whitelisted developers, it was faced with a paucity of "signals"—data used as inputs to targeting and ranking models—needed to train its ML/AI systems that personalize ads and other content for users. FAC ¶¶ 316-33. This led to a slowdown in ad pricing growth by Q4 2015/Q1 2016, PALM-016960475, and a companywide reckoning about how to maintain Meta's market dominance, including against then-nascent social advertising entrant Snapchat, *see, e.g.*, PALM-014640328; PALM-004974882. Advertisers' case stems from what happened next. Beginning in 2016, Meta made a companywide transition to a new generation of AI systems, called deep neural networks, that allowed Meta to make highly accurate predictions about users at scale. Cox Rough Tr. 107:5-20, 108:5-111:12; PALM-014243279, at 4. To obtain signals for these new AI systems, and to maintain Meta's data targeting barrier to entry against new entrants like Snapchat, Meta undertook an aggressive campaign of exclusionary conduct. For example, to obtain critical eCommerce signals from longtime Meta advertiser eBay—which was threatening to prevent its signals' use in Meta's AI models—Meta agreed to weaken its directly competitive Marketplace product in early 2017. *See* FAC ¶¶ 334-78, 429-72. Between late 2017 and early 2018, after Meta's direct competition with Netflix through its video streaming product Watch threatened Meta's special relationship with one of its most important signal sources, Meta agreed—apparently at the apex level—to withdraw from Netflix's streaming market in exchange for continuing and expanded signals access. *See* FAC ¶¶ 473-536; PALM-013469126; PALM-005487488; PALM-0998848850. In late 2019, Meta began integrating data features (engineered data used in AI systems) from across its lines of

business into a central repository called F3, FAC ¶¶ 728-748, while simultaneously telling the FTC there was no new integration of its products and "nothing left to divest" in the FTC's then-ongoing antitrust investigation. *See* Parikh Tr. 151:10-13; PALM-014317772. Like clockwork, Meta's ad prices started charging back up in response to Meta's exclusionary efforts. From 2016 to 2018, Meta's North America ad prices rose 60% on a cost per mille (cost per thousand impressions) basis, from $4.95 in 2016, to $6.54 in 2017, to $7.91 in 2018. PALM-014094553. Meta's North American ad prices rose by a near-identical amount, 59%, on a cost per click basis over that same period. *Id.* (from $0.22 in 2016 to $0.35 in 2018). Meta's market share remained consistent despite these massive price increases. Internally, Meta attributed its price increases to a so-called "revenue/supply gap"—a hallmark of monopolistic economics—and specifically referenced "neural nets," but not competitors, in discussing its price history and forecasts. PALM-006832735.

In short, Meta's AI/ML systems are central to Advertisers' case. They lie at the heart of market definition, of barriers to entry, of Meta's market power, and indeed of the supracompetitive price increases suffered by the Advertiser Plaintiffs since December 2016. Moreover, Advertisers will prove at trial, among other things, that Meta (a) changed the data sources for its neural network models as part of agreements with eBay and with Netflix, including in ways that were technically and economically irrational but for the anticompetitive effect of the agreements, FAC ¶¶ 468-72, 515-536; (b) gathered and integrated signals/features/user data from across its business, including from WhatsApp and Instagram, into F3, all while contemporaneously misleading the FTC to avoid divestiture, *id.* ¶¶ 728-42; 750-64; and (c) used sensitive data deceptively taken from users' mobile devices to validate Meta's offsite identity-matching AI/ML systems, *id.* ¶¶ 537-42. Given the foregoing, to streamline discovery and reduce the need for 30(b)(1) depositions covering Meta's AI/ML systems, Advertisers sought a 30(b)(6) deposition on the following topic: "The artificial intelligence and machine learning algorithms, software, and systems used in connection with Meta's ad and content targeting during the Relevant Period, including the data sources used by them." In a January 19, 2023 letter sent after Advertisers served the above 30(b)(6) topic, Meta wrote that it disagreed that "content targeting" was within an appropriate scope of deposition, but agreed to designee prepare to testify "about the types of machine learning . . . Meta has used since April 30, 2015 to deliver rank advertisements, including generally the types of algorithms, software, systems and source data used in connection with that machine learning."

On February 9, 2023, Meta produced Santanu Kolay as its 30(b)(6) representative for Advertisers' AI/ML topic. Over the course of a frustrating 6+ hour deposition, Kolay could not provide any specific testimony on any aspect of the noticed topic—nor even Meta's narrowed proposal as to what its designee would be reasonably prepared to cover. For example, Kolay could not identify the specific neural network models used by Meta's advertising systems, *see* Kolay Tr. 194:9-12[1] ("I would not be able to give you names of specific models"), nor could he provide information about what "features" and data were used by Meta's ad ranking systems, other than to state that they use some combination of "first and third-party data," *id.* at 196:7-197:1; *see also id.* at 190:11-15 ("[W]e did not discuss exactly what specific tables, what are the feature names."); 91:15-21 (data used to train models in first half of 2017 "not something we discussed in the preparation and is not something my team works on"); 96:2-12 (same for logs of data from that

[1] Given space constraints, Advertisers have been minimalistic in their quotations throughout this letter brief. Advertisers can and will provide any document cited in this motion, including relevant excerpts (or the entirety, should the Court so desire it) of Mr. Kolay's deposition transcript, to the Court as exhibits should the Court wish a more detailed evidentiary record for this motion.

period); 123:17-124:10 (no knowledge of data used to train models in 2018); 190:5-19 (same for 2019); 192:14-193:9 (no knowledge about metadata for features used to train models from 2017-2020—data that Meta's head of Products later testified was used to train AI/ML models and was readily available upon request, Cox Rough Tr. 127:5-128:9). Kolay could not provide any specifics on how AI/ML models were trained, including the hyperparameters used for them. *See* Kolay Tr. 27:4-6 ("I cannot tell you the parameters"); 90:7-8 ("I do not know the specific features that were used"); 261:13-14 (same for pipelines). He could not testify about ad ranking models used before he began working at Meta in early 2019. *See id.* at 65:7; 67:16-19; 237:3-4. He had no knowledge of how the data inputs to Meta's models were derived. *See id.* at 90:24-25; 93:11-16; 238:4-7 (when asked about feature definitions and descriptions: "I am not prepared")). At one point, Kolay made clear that he had not prepared to testify on an issue despite acknowledging it was within the scope of the deposition as he understood it. *See id.* at 93:17-25 (stating certain data was not "outside the scope," but rather "outside the preparation"). Kolay could not testify about which data/features were stored in F3, nor how those features could be identified and accessed (and by whom). *See id.* at 216:22-25 ("I do not have that specific information, whether all of that data is going into F3 or not"); 260:12-13 ("I did not do any specific preparation related to F3 internals"); Kolay had not even heard of the "Intent Platform," F3's predecessor. *See id.* at 125:14-15.

A 30(b)(6) witness must "give complete, knowledgeable, and binding answers on the corporation's behalf." *In re Facebook, Inc.*, 2023 WL 1871107, at *26 (N.D. Cal. Feb. 9, 2023). Meta's designee fell far short of this standard. To begin with, Kolay's knowledge, including about Meta's AI/ML systems for ad ranking, included only the period after he began working at Meta—early 2019. But a 30(b)(6) designee has a "duty to prepare . . . beyond matters personally known to the witness or to matters in which the designated witness was personally involved." *Great Am. Ins. Co. of New York v. Vegas Const. Co.*, 251 F.R.D. 534, 538-39 (D. Nev. 2008) (cleaned up). Moreover, as described above, with respect to topics plainly within the scope of the deposition, Kolay admitted he lacked preparation. Kolay could not provide knowledgeable testimony about the features/data used to train AI/ML models for ad ranking systems; how inputs to these models were maintained, engineered, and accessed; anything specific regarding Meta's F3 integration; or anything at all regarding the Intent Platform, F3's predecessor. Meta has argued that Kolay spoke generally on the types of "algorithms" it uses, and generally described the "types" of data used to train its AI/ML models, but such testimony is trivially available from public sources, and patently insufficient for the noticed topic. Stated simply, it is unremarkable that Meta uses an unspecified combination of first- and third-party data to train its neural network models—but that is largely the extent of what Kolay could say over six hours of testimony. Further exacerbating the problem, Meta made long speaking objections at Kolay's deposition—at one point reading an entire letter into the record, Kolay Tr. 96:15-98:10; 104:19-105:10; 142:12-144:7; 153:7-20; 175:9-13, and at another having the deponent leave the room during a lengthy speaking objection, *id.* 151:1-152:19. This is the sort of conduct for which Meta has (in part) recently been sanctioned. *In re Facebook, Inc.*, 2023 WL 1871107, at *26 (speaking objections and evasive testimony at a 30(b)(6) deposition). Many of the facts Kolay could not provide—and that Meta did not prepare him to provide—have now been obtained through 30(b)(1) depositions, but this is precisely the sort of expenditure of limited fact deposition time that Advertisers' 30(b)(6) deposition was noticed to avoid. Meta's conduct has wasted hours of preparation and hours of 30(b)(1) deposition time. Advertiser Plaintiffs respectfully request that Meta be required to prepare another witness (or witnesses) on its noticed topic, and that the time used for Kolay's deposition be restored to Plaintiffs' deposition time allotment in this case.

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I am the ECF user who is filing this document. Pursuant to Civil L.R. 5-1(h)(3), I hereby attest that each of the other signatories have concurred in the filing of the document.

Dated: April 13, 2023

By: */s/ Brian J. Dunne*
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April 14, 2023 **Via CM/ECF**

Re: *Klein v. Meta Platforms, Inc.*, No. 3:20-cv-08570-JD (N.D. Cal.)

Dear Judge Donato:

Advertiser Plaintiffs ("Advertisers") in the *Klein* litigation respectfully request that the Court compel Reed Hastings, the founder and ex-CEO of Netflix and a longtime member of Defendant Meta Platforms, Inc.'s ("Facebook") board of directors, to produce documents in response to a subpoena served upon him several months ago. Hastings has refused to produce any documents in response to Advertisers' subpoena, even though Advertisers' requests are plainly relevant and proportional, given the factual and procedural context. Advertisers and Hastings's counsel have exchanged multiple letters, have met and conferred, and are at impasse.

* * *

For nearly a decade, Netflix and Facebook enjoyed a special relationship. Netflix bought hundreds of millions of dollars in Facebook ads; entered into a series of agreements sharing data with Facebook; received bespoke access to private Facebook APIs; and agreed to custom partnerships and integrations that helped supercharge Facebook's ad targeting and ranking models. It is no great mystery how this close partnership developed, and who was its steward: from 2011-2019, Netflix's then-CEO Hastings sat on Facebook's board and personally directed the companies' relationship, from advertising spend, to data-sharing agreements, to communications about and negotiations to end competition in streaming video. Hastings directly communicated with Facebook executives, principally Mark Zuckerberg and Sheryl Sandberg, to do so.

In June 2011, Hastings joined Facebook's board of directors. PALM-009329663. Facebook was, at the time, a private company led by Zuckerberg, founder and CEO, and Sandberg, COO. *Id.* Within a month, Netflix had announced a Facebook integration to share Netflix user data internationally, and began lobbying Congress to allow this sort of data-sharing in the United States. PALM-014525328 (Hastings email to Facebook executive Elliot Schrage). By 2013, Netflix had begun entering into a series of "Facebook Extended API" agreements, including a so-called "Inbox API" agreement that allowed Netflix programmatic access to Facebook's user's private message inboxes, in exchange for which Netflix would "provide to FB a written report every two weeks that shows daily counts of recommendation sends and recipient clicks by interface, initiation surface, and/or implementation variant (*e.g.*, Facebook vs. non-Facebook recommendation recipients)." PALM-010305928 (agreement); PALM-010305927 (email). In August 2013, Facebook provided Netflix with access to its so-called "Titan API," a private API that allowed a whitelisted partner to access, among other things, Facebook user's "messaging app and non-app friends." PALM-008242886. Once again, this access required that data be shared back to Facebook—and every Extended API agreement was to be kept confidential, including "the existence and content of the Extended APIs." PALM-010305928.

In January 2014, when an issue about the two companies' data-sharing API agreements came to a head, Hastings personally emailed Zuckerberg, "writing as Netflix CEO, not FB board member," asking him to "look into" Facebook's use of Netflix data shared through APIs. PALM-006289050. After several 1-on-1 emails between Zuckerberg and Hastings, Facebook executive Mike Vernal described to Zuckerberg the depth of the companies' historical partnership, including Facebook's building a custom API for Netflix "after a meeting between you and Reed":

> We have historically gone out of our way to give Netflix the very best level of service and access—they are one of two partners . . . we allowed to build a custom GDP experience. We've given them access to our messaging APIs . . . . We've given them a special version of the Coefficient API after a meeting between you + Reed. We gave thousands of dollars in free ad impressions to support their UK roll out . . . . We lobbied for them in DC to get the VPPA act updated. . . . [W]e've tried to prioritize things . . . important to them.

PALM-006289050. By February 2015, Netflix was spending $40 million per year on Facebook advertising, and had entered into an agreement allowing Netflix user data to be used for "targeting/optimization" in Facebook's ads systems. PALM-006162373. However, Netflix wanted a custom deal—one offered to no other advertiser—restricting the ways in which Facebook could use its data for targeting. PALM-016986654. To implement this deal, Hastings reached out directly to Facebook CTO Andrew Bosworth, cc'ing Facebook's then-Chief Revenue Officer David Fischer, with another "Netflix (not FB board member) question" email. PALM-009797163. A week later, Hastings had dinner with Sandberg, where he "asked me what # advertiser they are on FB and if they spent $100M in a few years, what # would they be[?]" PALM-016986654.

By late 2015, Facebook had other concerns in its ads business. The demise of its public developer Platform had left a companywide dearth of "signals"—data used as inputs to targeting and ranking models—needed to train Facebook's ML/AI systems that personalize ads and other content for users. FAC ¶¶ 316-33. This led to a slowdown in ad pricing growth by Q4 2015/Q1 2016, PALM-016960475, and a companywide reckoning about how to maintain Facebook's ad market dominance, PALM-014640328; PALM-004974882. Against this backdrop, Facebook began entering distinct "verticals" to obtain signals for the AI/ML systems powering its ad business. FAC ¶¶ 316-393. One of these new verticals was streaming video, with a product called Facebook Watch. *Id.* ¶¶ 379-93. Over the course of 2016 and 2017, Facebook spent more than a billion dollars on its new Watch product, eventually signing deals for original, premium video content starring Elizabeth Olsen, Bill Murray, and Catherine Zeta-Jones. FAC ¶¶ 488-98. By mid-2017, Facebook and Netflix were approaching potentially ruinous competition in streaming video. Employees, industry observers, and the press all took notice. At a May 2017 Recode conference, Hastings was asked about competition between Facebook and Netflix and publicly downplayed the situation, saying, "[t]here's not a big conflict yet. . . . We're not bidding on the same shows." However, privately, Hastings promptly emailed Zuckerberg, Sandberg, and Schrage, stating, "[l]et me know if you think there was a better way to handle. In hindsight, I wish I added a materiality qualifier like 'not generally bidding on the same content.'" PALM-013469126. In January 2018, Sandberg went to Netflix for a "Fireside Chat" in front of "500 senior [Netflix] people" (with "Strict no recording") in which she and Hastings carefully deflected, using scripted banter, the companies' "direct video competition" and "FB professional video strategy." PALM-003207836.

In Facebook's Watch division itself, business continued as usual. In March 2018, Watch content executives discussed licensing "library" content—specifically, the 1990s teen drama Dawson's Creek—in competition with Netflix, and Watch's head executive Fidji Simo responded, "I wouldn't limit yourself on budget – I can convince Zuck to give us more for this." PALM-007912956. But behind the scenes, an agreement was being struck. After numerous documented Hastings-Sandberg and Hastings-Zuckerberg touch points in late 2017 and early 2018, *see* PALM-0016919272 (Sandberg, Feb. 13, 2018: "I spent the day on Wednesday shadowing Reed Hastings

at Netflix"), Zuckerberg blindsided Simo with an email personally cutting nearly $1 billion from Watch's budget for originals and sports for the coming year. PALM-013499085 (Zuckerberg, May 25, 2018: "Knowing what I know today about our strategy and financial outlook, I would invest . . . much less in originals and sports. Specifically, when modeling this out with [now-CFO] Susan [Li], we suggested considering cutting $750M from originals + sports for next year"). Despite Simo's protestations, Zuckerberg's abrupt new Watch strategy became policy—Facebook began dismantling the multi-billion dollar original content business it had built over the past two years, suddenly withdrawing from direct competition with Netflix in video streaming. FAC ¶¶ 525-35.

Amidst the sudden pivot in Facebook's video strategy, the data partnership between Netflix and Facebook reached new heights. Facebook and Netflix entered into a series of new data-sharing agreements between August 2017 and April 2018, FAC ¶¶ 509-512, and another in July 2018, *id.* ¶¶ 515-22. Netflix also further increased its Facebook ad spend, agreeing to a guaranteed 2017 ad spend of $150 million. These new agreements provided Facebook's ad targeting systems with rich signals from Netflix, including "cross-device intent signals," while expressly unhooking Watch from the benefits of this bounty. *Id.* ¶¶ 515-24. Hastings appears to have been personally involved in these new data-sharing efforts; in January 2019, Facebook's Bosworth reported:

> I was at Sundance over the weekend and happened to grab lunch with Reed Hastings. He was wondering what he could do with us to make subscription ads more successful. His sense is that they are doing the data sharing now that we asked them to do . . . .

PALM-009949950. In April 2019, Hastings left Facebook's board. Nonetheless, in October 2019, when Hastings and Sandberg were about to fly on the same jet, Hastings emailed Sandberg to tell her that Netflix's "Greg Peters who spends about $200m with you" would be on board, allowing Sandberg to make a written plan to sell more ads to Hastings's own company. PALM-012193982.

Despite the above indications that Hastings personally directed Facebook/Netflix relations, including through seemingly near-constant communications with Facebook executives like Zuckerberg, Sandberg, Schrage, and Bosworth, Facebook has in fact produced comparatively few communications involving Hastings, at one point telling Advertisers (who requested him as a Facebook custodian) that Hastings had too few Facebook-custodial documents to merit such a designation. Similarly, when Advertisers subpoenaed Netflix specifically requesting Hastings's custodial communications with and about Facebook, Netflix produced essentially nothing. Advertisers know from circumstantial evidence that Hastings spoke, including in writing, regularly with Zuckerberg, Sandberg, Schrage, and Bosworth—often from his personal email and likely using his personal mobile devices—yet no production of any such documents has been made by either of Hastings's companies. Left with no other alternative, Advertisers subpoenaed Hastings directly for documents (Ex. A), and were met with a flat refusal to produce ***anything*** (Ex. B).[1] In view of the facts set forth above, and the uncontroversial Rule 45 document production standard, *see, e.g., Erickson v. Builder Advisor Grp. LLC*, 2022 WL 1265823, at *1-2 (N.D. Cal. Apr. 28, 2022), Advertisers respectfully submit that Hastings should be compelled to produce documents responsive to their subpoena to him.

[1] Advertisers have also sought Hastings's deposition. He has moved to quash it. Dkt. 505.

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Respectfully submitted,

By: */s/ Brian J. Dunne*
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Dated: April 14, 2023

By: */s/ Brian J. Dunne*
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April 17, 2023 **Via CM/ECF**

Re: *Klein v. Meta Platforms, Inc.*, No. 3:20-cv-08570-JD (N.D. Cal.)

Dear Judge Donato:

Advertiser Plaintiffs ("Advertisers") in the *Klein* litigation respectfully request that the Court compel Netflix, Inc. ("Netflix") to produce documents in response to a subpoena served upon it nearly a full calendar year ago. After numerous letters and multiple meet-and-confers, Netflix has produced, in response to Advertisers' year-old subpoena, just ***fifty-four*** documents, all of which are collateral (at best) to the issues Advertisers asked for documents on, and ***none*** of which fall within the clearly defined categories of documents that Advertisers repeatedly told Netflix were at the core of what was sought for Advertisers' case. Netflix has repeatedly delayed proceedings, implying it was working on a substantial production or was planning to produce documents responsive to Advertisers' subpoena as part of its production to Defendant Meta Platforms, Inc. ("Facebook"), but that has been definitively revealed at this point to have been purely a ruse. Netflix has produced ***nothing*** among the topics and types of documents Advertisers have specifically targeted in correspondence, and (given the 54-document universe of Netflix's entire production) next to nothing ***at all***. In view of the importance of Netflix's documents and actions to the monopoly maintenance scheme at issue in Advertisers' case—Netflix is specifically alleged, at some length and with details from Facebook-internal documents, to have entered an anticompetitive agreement with Facebook as one of the exclusionary acts in Advertisers' monopoly broth—there can be no serious dispute that Netflix has improperly refused to search for, review, and produce relevant, reasonably proportional documents in response to Advertisers' eleven-month-old subpoena. Advertisers and Netflix are at impasse after several meet-and-confers, forcing Advertisers to seek relief from this Court.

* * *

This is a monopoly maintenance case. As set forth in Advertisers' First Amended Complaint ("FAC") and in other recent filings by Advertisers, *see, e.g.,* Dkt. 501 & 512, Facebook's ad business dominates a distinct submarket of online advertising, and a powerful data targeting barrier to entry has emerged around that business, allowing the company to charge a significant price premium for its AI-personalized "social advertising," FAC ¶¶ 766-813. Indeed, Facebook has been able to—and has in fact—significantly raised prices nearly every year since it began selling ads, without ceding substantial market share to would-be rivals like Snapchat, Twitter, LinkedIn, Pinterest, and Foursquare.

This case stems from a pattern of anticompetitive behavior beginning in 2016, after Facebook's social advertising monopoly was threatened by a paucity of "signals"—data used as inputs to targeting and ranking models—as well as a new social advertising entrant, Snapchat. FAC ¶¶ 316-33; PALM-014640328. In order to obtain signals and maintain Facebook's DTBE against new entrants like Snapchat, Facebook undertook an aggressive campaign of exclusionary conduct.

As relevant here, between late 2017 and early 2018, after Facebook's direct competition with Netflix through its newly launched video streaming product Watch threatened Facebook's special relationship with one of its most important advertisers and signal sources, Facebook agreed—apparently at the apex level—to withdraw from Netflix's streaming market in exchange for Netflix's agreement to continue to purchase large quantities of Facebook advertising and

provide Facebook with continued and expanded access to its proprietary signals. *See* FAC ¶¶ 473-536; PALM-013469126 (Jun. 2017 Reed Hastings email to M. Zuckerberg, S. Sandberg, and E. Schrage about "not bidding on [the] same [original video] content"); PALM-005487488 (May 2018 M. Zuckerberg email to head of Facebook Watch proposing "cutting $750M from originals + sports for next year"); PALM-0998848850 (Jan. 2019 A. Bosworth email: "I was at Sundance over the weekend and happened to grab lunch with Reed Hastings. . . . His sense is that they are doing the data sharing now we asked them to do").

Advertisers will prove at trial that the signals data that Facebook obtained from Netflix in conjunction with Facebook's agreement to withdraw from direct video streaming competition with Netflix meaningfully contributed to the barrier to entry protecting Facebook's advertising business, and thereby to monopolistic price inflation paid by Facebook advertisers, during the relevant period.

In short, between 2017 and 2018, as part of a scheme to maintain its monopoly in the United States Social Advertising Market, Facebook entered into an anticompetitive agreement with Netflix that materially contributed to its Social Advertising monopoly. ***And Facebook's monopoly maintenance scheme succeeded***. Between 2016 and 2018, Facebook raised its North American ad prices a staggering 60% on a cost per mille (CPM) basis, from $4.95 in 2016, to $6.54 in 2017, to $7.91 in 2018, PALM-014094553 (2018 Q4 "Key Quarterly Metrics"),[1] while still maintaining a 92% market share, CRC-000774 (Dec. 16, 2020, Cleveland Research Company analysis of "social advertising market share" calculating 92.4% and 92.2% market share for Facebook in 2018 and 2019, respectively); PALM-004971449 (Feb. 2019 Goldman Sachs analysis stating that "'status quo' path" is "Facebook maintains ~90% share of the social advertising market"). Advertiser Plaintiffs and the ad purchaser classes they seek to represent paid these inflated prices—prices inflated by, among other things, Facebook's agreement with Netflix, which fortified the barrier to entry surrounding Facebook's ad business.

The above is pleaded with particularity in Advertisers' FAC. On May 5, 2022, Advertisers served on Netflix a subpoena with sixteen document requests. Ex. A. Closely hewing to the details of Advertisers' FAC allegations—themselves carefully sourced from and indeed citing to specific Facebook-produced documents—Advertisers' subpoena to Netflix seeks (i) documents regarding Netflix's communications with Facebook relating to Facebook Watch (Request Nos. 1-2); (ii) documents regarding Netflix's communications with Facebook regarding data sharing (Request Nos. 3-4); (iii) documents regarding Netflix's communications with Facebook regarding Facebook's APIs (Request Nos. 5-6); (iv) documents regarding Netflix's agreements with Facebook regarding Facebook's Developer Platform, APIs, advertising, advertising measurement, data access/exchange, analytics, content, or video streaming (Request Nos. 7-9); (v) documents regarding Netflix's communications with Facebook about Netflix's purchase of Facebook advertising (Request Nos. 10-11); (vi) documents regarding Netflix's communications with Facebook regarding Reed Hastings's role as a member of Facebook's board of directors (Request Nos. 12-13); (vii) documents regarding Reed Hastings's communications with Facebook related to competition in online video streaming, advertising on Facebook, data collection/exchange, or Netflix's business relationship/agreements with Facebook (Request Nos. 14-15); and (viii)

[1] Facebook's North American ad prices rose by a near-identical amount, 59%, on a cost-per-click (CPC) basis over this same time period. *Id.* (from $0.22 in 2016 to $0.35 in 2018).

documents produced by Netflix to regulators in connection with Facebook (Request No. 16). *See id.*

Advertisers' subpoena to Netflix focuses on documents pertaining to Facebook-facing issues relevant to Advertisers' monopolization claims, and expressly limits its reach to documents that could not be produced by Facebook. Thus, Request Nos. 2, 4, 6, 9, 11, 13, and 15 explicitly seek only "***internal communications*** relating to any Communication between You and Facebook relating to" specified relevant subjects. Ex. A at 1-3 (emphasis added). And Request Nos. 1, 3, 5, 8, 10, and 12 seek documents relating to "Communication[s] between You and Facebook . . . ***except for any Documents that were shared with or communicated with Facebook***" on specific relevant subjects. *Id.* (emphasis added).

Despite the obvious relevance and limited scope of Advertisers' subpoena, Netflix has spent the past calendar year playing games. In June 2022, Netflix objected to producing ***any*** documents due to a then-pending motion to dismiss. *See* Ex. B. Netflix stood on those objections for months, refusing to produce a single document to Advertisers even as Advertisers explained in letters and via Zoom Netflix's relevance to Advertisers' case and the specific types and categories Advertisers wished Netflix to prioritize in order to minimize any unnecessary burden. In November 2022—six months after being served with Advertisers' subpoena—Netflix produced its first fifty-four documents (purportedly) in response to Advertisers' subpoena. These comprised, with almost no exceptions, documents regarding Netflix's privacy policies (many publicly available), a handful of 2020-2022 documents about Netflix's video streaming competition with (*e.g.*) Amazon, Hulu, and YouTube, and a handful of third-party analyst reports about the video streaming market. The production did include eight emails (none with responses) from late 2018 forwarding or discussing news reports on other video streamers, including four emails stating (with no analysis) that Facebook had launched group video watching on its platform. No other documents were in Netflix's production. Essentially, Netflix's initial production was completely unresponsive—and indisputably irrelevant. ***Netflix has never made another one.***

When Advertisers raised this to Netflix, they were met either with surprise (even though Advertisers had previously explained exactly what was sought by their subpoena—to the extent there could ever have been any lack of clarity), indifference, or an exhortation to wait and see, as Facebook had also subpoenaed Netflix. However, by the start of fact depositions, it had become clear that Netflix was simply choosing not to produce any meaningful documents in this case.[2] Advertisers and Netflix again met and conferred, and reached impasse. Advertisers submit, based on the straightforward relevance and proportionality of its document requests, and the indisputable fact that Netflix has in practice simply refused to perform any reasonable search for, review, and production of documents in response to Advertiser' as-written subpoena, that Netflix should be compelled to do so, and request an order to that effect here.

[2] By Advertisers' count, Netflix produced 17 documents in response to Facebook's subpoena—all irrelevant to Advertisers' case.

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Respectfully submitted,

By: *Brian J. Dunne*
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Dated: April 17, 2023

By: */s/ Brian J. Dunne*
Brian J. Dunne

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May 31, 2023 **Via CM/ECF**

Re: *Klein v. Meta Platforms, Inc.*, No. 3:20-cv-08570-JD (N.D. Cal.)

Dear Judge Donato:

Advertiser Plaintiffs ("Advertisers") respectfully request a reasonable evidentiary sanction for a knowingly incomplete interrogatory response by Meta that caused Advertisers to expend hours of deposition time finding out the answer to a highly material question Advertisers had already asked directly in an interrogatory served in July 2022: what was ***all*** the information and data Meta obtained through or derived from its Onavo team, program, apps, or technology? The parties met and conferred on May 31, 2023, and are at impasse.

This is a monopoly maintenance case centering upon Meta's dominance of the United States market for social advertising, an economically distinct submarket of online advertising. Since 2016, Meta has engaged in an aggressive campaign of anticompetitive conduct to retain its monopoly power—and the supracompetitive prices it has been able to charge as a result—in this market. As Advertisers' operative complaint, Dkt. 391 ("Ad FAC"), explains, one important piece of Meta's monopoly maintenance apparatus between 2016 and 2019 was Onavo, an in-house team and associated technology dedicated to gathering analytics and competitive intelligence. *See* Ad FAC ¶¶ 12-14, 165-66, 193, 225-45, 537-69.

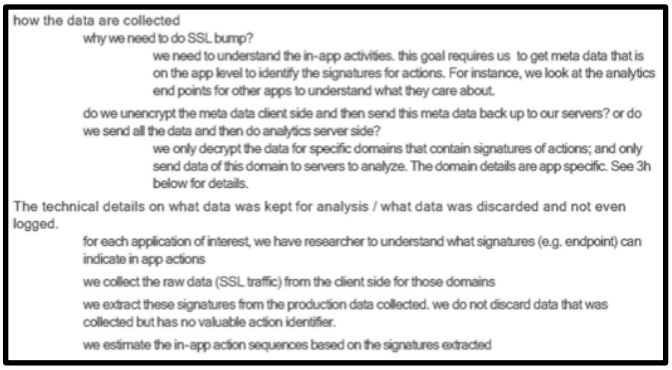
During acquisition talks in 2012, Onavo's then-CEO Guy Rosen (now Chief Information Security Officer at Meta), a former signals intelligence officer, "described [his company's] core skill set as 'reverse-engineering.'" PX 68 (PALM-008674349) (Dec. 20, 2012 email to c-suite executives including S. Sandberg, J. Olivan, C. Cox, M. Schroepfer, and Colin Stretch). And over the next several years, Meta would deploy the Onavo team's unique talents to a variety of competitive intelligence tasks, with incredibly impactful results. *See, e.g.,* PX 69 (PALM-005154871) (Mar. 17, 2017 chat: "Sheryl (unprompted) at biz ops on Onavo 'let's take a moment to remember what a great acquisition this was. It's the gift that keeps on giving.'"); A. Schultz Tr. 198:14-15 ("I found Onavo valuable, and I wanted it to continue to exist."); J. Olivan Tr. 177:20-25 ("I believed we were really good at market research. And some of the capabilities we had, thanks to the Onavo data set, were pretty unique and pretty good. And that's not something I would want competitors to know and imitate . . . ."). Advertisers' complaint alleges that Meta used Onavo in a way that wasn't just valuable, but anticompetitive. However, Meta has frequently been less than forthcoming about what its Onavo team was and what Meta used Onavo technology for, going up to the company's highest levels. *See, e.g.,* PX 409 (PALM-016900228) (Apr. 2016 email from then-GC Stretch to J. Olivan: "[In-house counsel] highlighted that you've been hesitant to discuss Onavo publicly." Olivan's reply: "We certainly should not be proactively bragging about it.").

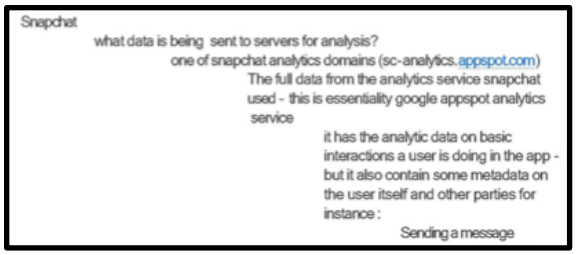
Given Onavo's relevance to Advertisers' case and the deliberately occlusive, even obfuscatory, atmosphere surrounding the team and its technology at Meta, one of the first interrogatories Advertisers served in this case—served on Meta on July 25, 2022—stated as follows (Ex. A):

> NO. 4: Identify and describe, with specificity, all information and data—including but not limited to call logs, video logs, text message content, app usage information, and battery or power consumption logs—that Facebook obtained through, or derived from, Onavo, Onavo apps (*e.g.,* Onavo Protect), or Meta's Onavo team.

Meta responded twice—first, on August 24, 2022 (Ex. B) and then, after substantial letter-writing by Advertisers pointing out the importance of getting a complete answer to Interrogatory No. 4 and a meet-and-confer ahead of potential motion practice, with a December 16, 2022, supplemental response (Ex. C) served after the Court's December 6, 2022 order denying Meta's motion to dismiss. Dkt. 396. These responses by Meta—and in particular Meta's December 2022 supplemental response—did not contain a single reference to or identification of the fact that Meta used Onavo between June 2016 and early 2019 (during the Advertiser Class Period) to wiretap selected competitors, including Snapchat, for strategic gain. *See generally* Ex. C at 3-8.

Fact depositions began shortly after Meta served its supplemental response to Interrogatory No. 4 (Advertisers took their first Meta employee deposition on February 2, 2023), and Meta's sworn response to Advertisers' Onavo interrogatory helped frame Advertisers' deposition strategy—an important consideration given sharply limited deposition time due to split classes and a hard cap on deponents insisted upon by Meta. However, as fact depositions proceeded, it became clear that Meta used its Onavo team for a breathtakingly anticompetitive—and indeed, criminal—course of conduct targeting its principal Social Advertising rival, Snapchat during the heart of the Advertiser class period. As Advertisers now know, beginning with a June 9, 2016, email from Mark Zuckerberg, Meta used its Onavo team and technology to deploy an "SSL man-in-the-middle" attack on encrypted traffic addressed to Snapchat's analytics server. Meta solicited and paid Snapchat users to install "root" digital certificates on their mobile devices, created fake digital certificates on its servers that would present these Meta-controlled servers as "sc-analytics.appspot.com" to the Snapchat application, and then intercepted, decrypted, and analyzed Snapchat's competitively valuable[1] analytics to redesign Meta's products and outflank Snapchat's advertising business. *See, e.g.,* PX 2256 (PALM-012863799), at 1, 2-3.





This program of competitive intelligence, which Meta called its "In-App Action Panel" (IAAP) program, was ultimately extended to YouTube and Amazon—and perhaps Twitter—during the Advertiser class period. *See id.* at 2-3; PALM-004982075 (Jan. 2018 email describing Twitter "SSL bump"). The intelligence Meta gleaned from this project was described both internally and externally as devastating to Snapchat's ads business, PX 20 (PALM-016175119) (internal analysis), Levenson Dep. 50:12-22 (Snap executive testimony), allowing Meta to hike North American ad prices companywide 60% between 2016 and 2018, *see* PALM-014094553 (2018 Q4 Key Quarterly Metrics showing a Meta-wide 60% price increase on a CPM basis, and 59% price increase on a CPC basis, in North America over this time period).

[1] *See* Andreou Tr. 15:4-17:7 (Snap executive testifying that "the internal analytics [Snap] generates about in-app behavior of its users" are "confidential" and "competitively valuable").

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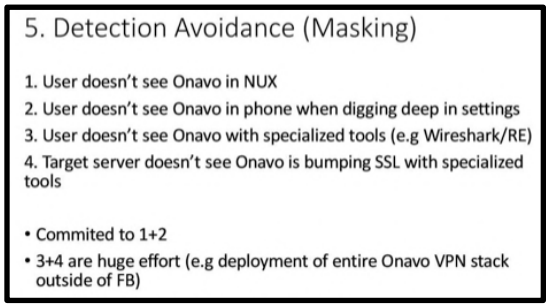
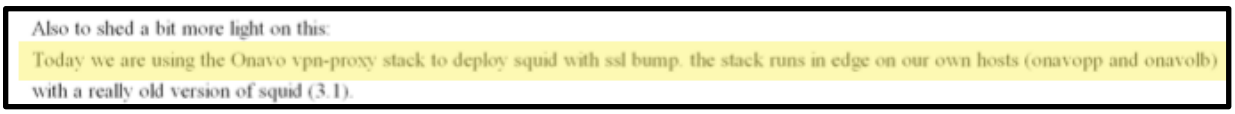
And the entire IAAP program, from its inception in June 2016 to its apparent shuttering in early 2019, was designed and deployed by Onavo—by the Onavo team, using Onavo application code, using Onavo servers, and using Onavo technology to intercept encrypted traffic from Meta's rivals. *See, e.g.,* PX 2255 (PALM-016564834) at 2 (Jun. 9, 2016 J. Olivan email, forwarding Zuckerberg email on Snapchat encrypted analytics, to Onavo's Nimrod Priell and making him "point for this"); *id.* (email from Onavo's Calvin Chin suggesting Meta "white-label an Onavo SSL-enabled iOS and Android app to get in-app actions"); *id.* (email from Onavo founder Guy Rosen saying "[t]his is an opportunity for the team to shine"); PALM-011630850 (Jun. 2016 presentation by Priell titled "Onavo Research Taskforce project kickoff"); PX 414 (PALM-010629831) ("Onavo Research Taskforce Status Update" discussing how to "mask" Onavo in the new IAAP program) at 1-2, 6-10; PX 26 (PALM-011683732) at 4 ("Today we are using Onavo vpn proxy stack to deploy squid with ssl bump the stack runs in edge on our own hosts (onavopp and onavolb).").



PX-414 at 10



PX 26 at 4

Moreover, there is no question that Meta—and its lawyers—knew about the Onavo IAAP program when Meta provided its misleadingly incomplete interrogatory response. A January 30, 2019 "IAAP Technical Analysis" document (PX 2256), which sets forth in painstaking detail the history, purpose, and details of the IAAP program, was created by the Onavo team, Meta's then-CTO, Meta's then-head of security engineering, ***and more than forty one-different attorneys***, *see* PX 2256 at 4, including fourteen in-house counsel (at least one of whom has appeared at depositions in this case) and ***twenty-five lawyers from WilmerHale—the law firm that prepared and signed Meta's responses to Interrogatory No. 4***. *See* Ex. C. In view of the evidence, there is no other reasonable conclusion than that Meta's lawyers knowingly omitted the IAAP program from Meta's response to Interrogatory No. 4 to make discovery more difficult for Advertisers.

And that is exactly what happened. It took Advertisers weeks of fact depositions, and untold hours of needle-in-a-haystack document review, to lock in on the reality of the IAAP program—that Meta used Onavo to wiretap its competitors, including Snapchat, during the class period, for competitive gain. This despite the fact that ***Advertisers served an interrogatory asking for this exact information ten months ago, before a single deposition had been taken (or even scheduled)***. Advertisers respectfully seek an evidentiary sanction to help cure the prejudice from Meta's knowingly incomplete response to Advertisers' Interrogatory No. 4: an additional three depositions of Meta employees, and an additional 15 hours on Advertisers' deposition cap. This will help to place Advertisers back in the place they would be, as far as deposition time and witness limits, had it not been for Meta's discovery misconduct.

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Respectfully submitted,

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FILER ATTESTATION

I am the ECF user who is filing this document. Pursuant to Civil L.R. 5-1(h)(3), I hereby attest that each of the other signatories have concurred in the filing of the document.

Dated: May 31, 2023

By: */s/ Brian J. Dunne*
Brian J. Dunne

Bathaee :: Dunne :: LLP

[redacted]

June 14, 2023 **Via CM/ECF**

Re: *Klein v. Meta Platforms, Inc.*, No. 3:20-cv-08570-JD (N.D. Cal.)

Dear Judge Donato:

Advertiser Plaintiffs in the *Klein* matter ("Advertisers") respectfully—and regretfully—return to the Court to seek relief in connection with their document subpoena to Netflix, served more than a year ago. In April of this year, after Netflix produced zero documents in response to Advertisers' subpoena, Advertisers sought an order compelling Netflix to conduct a reasonable search for and production of documents. Netflix's counsel told the Court, "[w]e searched for – we did a custodial search of . . . documents" in connection with Advertisers' subpoena, and the Court then ordered Advertisers and Netflix to meet and confer on the scope of that search. Dkt. 545. At this meet-and-confer and communications leading up to it, Netflix admitted that ***it conducted no search at all for fourteen of Advertisers' sixteen requests for production***. As to the search it did conduct, Netflix admitted that it "covered the date range November 2018 . . . to October 2022"—***a date range that does not include actual Netflix allegations in the Advertiser FAC***. In short, Netflix never actually searched for documents responsive to Advertisers' subpoena, despite telling the Court six weeks ago that it did so to avoid an order compelling production. Now, as fact discovery is closing, Netflix has ***still*** refused to conduct any further search for documents, requiring Advertisers to return to the Court for essentially the same relief it asked for six weeks ago, only now with more urgency: an order compelling Netflix to actually conduct a reasonable search for and production of documents in response to Advertisers now year-old subpoena. Advertisers and Netflix met and conferred on June 13, 2023, and reached impasse.

* * *

The relevance of Netflix to Advertisers' monopoly maintenance case is summarized in Advertisers' letter briefs at Dkt. 512 and 515, and set forth in detail in the Advertiser FAC, Dkt. 237, at ¶¶ 379-93, 394-417, 473-536. Put as succinctly as possible, Advertisers allege that in mid-2017, Facebook's Watch product became directly competitive with Netflix, a longtime Facebook ally and advertiser headed by then-Facebook board member Reed Hastings. Over the next year, in a period of high apex-level communications between Hastings and Facebook's CEO and COO (Mark Zuckerberg and Sheryl Sandberg), the companies struck an agreement in which Facebook abruptly cut original programming from Watch beginning in May 2018, withdrawing from direct competition with Netflix, in exchange for increased signals (specific types of data used for Facebook's ad models) sharing and ad purchases by Netflix. This agreement hurt one Facebook product (Watch) in order to serve the company's primary goal of protecting its monopoly position in the United States Social Advertising Market, a digital advertising submarket in which Facebook commanded a substantial price premium and worked to maintain its competitive moat through any means at its disposal.

On May 5, 2022—more than a year ago—Advertisers served Netflix with a subpoena for documents relevant to this action. *See* Ex. A. Advertisers' subpoena contained sixteen document requests. Request Nos. 1 and 2 sought documents relating to Netflix's competition with Facebook Watch. *Id.* at 1. Request Nos. 3 and 4 sought documents relating to Netflix's data sharing with Facebook. *Id.* at 1-2. Request Nos. 5 and 6 sought documents relating to Netflix's use of Facebook's APIs and user data. *Id.* at 2. Request No. 8 sought agreements between Netflix and Facebook on certain defined issues—the Facebook Developer Platform, Facebook's APIs, advertising, data access/exchange, analytics, and content creation/online video streaming—and

Request Nos. 8 and 9 sought documents and internal communications regarding these agreements. *Id.* at 2-3. Request Nos. 10 and 11 sought documents relating to Netflix's decision to purchase Facebook ads. *Id.* at 3. Request Nos. 12-15 sought documents relating to certain issues regarding Reed Hastings, who simultaneously sat on Facebook's board and was Netflix's CEO, even as the companies moved into direct competition in the streaming video space in 2017 and 2018. Request No. 16 sought documents Netflix had produced to regulators in connection with Facebook.

For months, Netflix promised Advertisers it was in the process of searching for and producing responsive documents. But in fact, Netflix didn't produce anything. By early 2023, as fact depositions were in full force in this action, Netflix hadn't produced a single document responsive to Advertisers' subpoena. On April 17, Advertisers moved to compel Netflix to perform a reasonable search and production in response to their subpoena. The Court took the issue up at the April 27, 2023 Case Management Conference.

At that hearing, the Court asked Netflix's counsel if Netflix had looked for documents, asking: "Did you look? If you didn't look, you are going to look. Did you take searches, look through Netflix documents, and determine that you did nothing responsive or did you not even look?" Apr. 27, 2023 Hearing Tr. at 30:14-17. Netflix's counsel responded:

> We searched for – we did a custodial search of the documents for Netflix's director of competitive intelligence, and we also surveyed the team responsible for analyzing competition. And so the custodial search that we did involved a word search for words like Meta or Facebook or Instagram or other things and competition.

Id. at 30:18-24. The Court then directed "advertisers and Netflix . . . to meet and confer about the scope of Netflix's search for responsive documents." Dkt. 545 at 2.

After the April 27 Case Management Conference, Advertisers reached out to Netflix to discuss the scope of its document search, and on May 21, were informed that ***Netflix did not conduct any search at all for Request Nos. 3-16 in Advertiser Plaintiffs' subpoena***. May 21, 2023 J. Sessions email. As to Request Nos. 1 and 2, which sought documents regarding Facebook Watch in connection with an alleged course of conduct between approximately early 2017 and approximately mid-2018, *see* Advertiser FAC ¶¶ 379-93, 394-417, 473-536 (Netflix allegations); *see also* PALM-013469126 (Jun. 2017 Reed Hastings email to M. Zuckerberg, S. Sandberg, and E. Schrage about "not bidding on [the] same [original video] content"); PALM-005487488 (May 2018 M. Zuckerberg email to head of Facebook Watch proposing "cutting $750M from originals + sports for next year"),[1] Netflix's counsel explained that the company's search "covered the date range November 2018 . . . to October 2022," May 21, 2023 J. Sessions email. As a result, ***zero*** documents were identified or produced responsive to ***any*** Advertiser request for production, and ***Netflix never actually tried***.

Advertisers sought to meet and confer regarding these quite distressing—and frankly, surprising, given the representations made at the April 27 Case Management Conference—revelations, and after weeks of back-and-forth, and a no-warning change in Netflix's lawyer, the

[1] The quoted excerpts come from documents designated "confidential" or "highly confidential" by Facebook, but were included in this exact form in Advertisers' letter brief at Dkt. 515 (at 2), and Meta did not seek to seal them. *See* Dkt. 538 at 2. Out of an abundance of caution, Advertisers are filing this information provisionally under seal here.

parties met and conferred on June 13. At that meet-and-confer, Netflix's counsel confirmed that the company conducted ***no search***—none—in connection with fourteen of Advertisers' requests for production, and limited the only search it did conduct to ***a time period after the Netflix allegations in Advertisers' FAC***. Advertisers asked if Netflix would conduct a reasonable search of any scope, for any request for production, and were told no.

So now Advertisers are forced, again, to return to the Court, after Netflix told Advertisers in private that it didn't actually do what it told the Court in public it did—conduct a search for responsive documents. No reasonable search was conducted. Under any definition of "reasonable." For fourteen requests for production, there was no search at all. For two, there was a fake search—a search of one custodian ***for a time period that didn't include the conduct at issue in Advertisers' case.*** Unsurprisingly, no documents were produced in response to Advertiser Plaintiffs' subpoena.

Given the case history here—a subpoena served thirteen months ago; months of statements by Netflix's counsel that it was in fact doing the work of search and production in response to that subpoena; then statements to the Court at a hearing that a reasonable search was conducted, and there just wasn't anything relevant to Advertisers' claims; and then an out-of-court refusal to actually conduct such a search upon the revelation that none had been conducted; it would be legally justified to order Netflix to respond to all requests, as phrased, without objection, as a reasonable evidentiary sanction. But Netflix is still, despite its behavior, a non-party (albeit an allegedly co-conspiring one), and Advertisers just want Netflix to actually look and produce the documents most relevant and impactful to Advertisers' case—as soon as possible, given the date in the procedural schedule. So Advertisers simply seek, as relief, an order compelling Netflix to conduct a reasonable search and production in response to Request Nos. 12-15, regarding Reed Hastings issues,[2] and for an order compelling Netflix to search and respond to Request Nos. 1-2 (regarding Facebook Watch) with parameters that actually include the dates of the conduct at issue in connection with Advertisers' Netflix allegations.

[2] At 3 pm Pacific time on June 14, as this letter brief was being finalized, Netflix produced the results of its court-ordered Reed Hastings document production. There were twelve documents in it, spanning 140 pages—62 of which were withheld in their entirety on the basis of "Meta Privilege." As of the date of this letter, no time has been offered for Mr. Hastings's deposition.

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Respectfully submitted,

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I am the ECF user who is filing this document. Pursuant to Civil L.R. 5-1(h)(3), I hereby attest that each of the other signatories have concurred in the filing of the document.

Dated: June 14, 2023

By: */s/ Brian J. Dunne*
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[redacted]

June 15, 2023 **Via CM/ECF**

Re: *Klein v. Meta Platforms, Inc.*, No. 3:20-cv-08570-JD (N.D. Cal.)

Dear Judge Donato:

Three months ago, Defendant Meta Platforms, Inc. ("Facebook") moved for and was granted time limitations on the depositions of several senior executives. Dkt. 476, 477. One of these executives was Mark Zuckerberg, Facebook's founder, Chief Executive Officer, and controlling shareholder. After Facebook told the Court that "Plaintiffs have not identified a single issue that Mr. Zuckerberg . . . is uniquely knowledgeable about," Dkt. 476 at 2, the Court granted the company's request to limit Zuckerberg's deposition to three hours between the two groups of plaintiffs in this consolidated case, and stated that "[i]f, after the depositions have concluded, plaintiffs have a good-faith basis for seeking additional time, they may advise the Court." Dkt. 477.

On May 19, 2023, after deposing Mark Zuckerberg for 87 minutes three days prior, Advertiser Plaintiffs ("Advertisers") informed Facebook that they would do just that, explaining why in a seven-page letter filled with evidentiary analysis and citations to Zuckerberg's (short) transcript. The parties met and conferred on Advertisers' motion for more deposition time with Zuckerberg on May 31, and the result was that Facebook told Advertisers to file their request with the Court. But instead of actually waiting for that, Facebook filed its own motion for a protective order eleven minutes after the parties met and conferred—a motion Facebook never told Advertisers it was contemplating filing, over the course of multiple written communications and a meet-and-confer. Facebook's motion was yet another work of fiction from the company's lawyers in this case.

The central premise of Facebook's motion is two-fold: first, that Zuckerberg has no unique and personal knowledge of any sort that is material to Advertisers' case, and second, that the principal subject that Advertisers need more time to depose Zuckerberg about—Facebook's three-year program to intercept its competitors' encrypted analytics for use in competitive decisionmaking—had nothing to do with Zuckerberg and represents "an entirely new allegation about conduct that appears nowhere in [Advertisers'] nearly 1000-paragraph complaint." Dkt. 564 at 2. Both these contentions are demonstrably wrong.

Advertisers will start with the latter: Facebook's argument that its so-called "In-App Action Panel" (IAAP) Program is not something that Zuckerberg needs to be deposed about in this case. This is the central thrust of Facebook's motion, and it is incorrect backward and forward. First, Facebook's IAAP Program is obviously material to Advertisers' antitrust case: in this program, Facebook paid contractors to install kits that would allow its Onavo servers to intercept and decrypt secure analytics traffic from Snapchat—Facebook's primary would-be price check in the United States Social Advertising Market in 2016-2018—in order to use Snapchat's proprietary data for competitive product redesign. This isn't surmise—a document prepared for Mark Zuckerberg by Facebook's Onavo team and reviewed for accuracy by no less than Facebook's then-CTO, its then-Chief of Security, and forty-one lawyers said as much. *See* PX 2256 (PALM-012863799) at 1-4.

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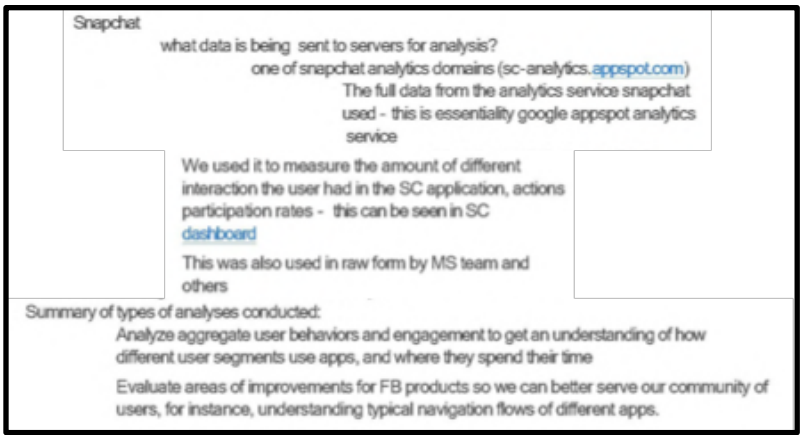

PX 2256 at 2-3 (excerpted by Advertisers)

Facebook's IAAP Program used nation-state-level hacking technology developed by the company's Onavo team, in which Facebook paid contractors (including teens) to designate Facebook a trusted "root" Certificate Authority on their mobile devices, then generated fake digital certificates to redirect secure Snapchat analytics traffic (and later, analytics from YouTube and Amazon) from Snapchat's servers to Onavo's; decrypted these analytics and used them for competitive gain, including to inform Facebook's product strategy; reencrypted them; and sent them up to Snapchat's servers as though it came straight from Snapchat's app, with Facebook's Social Advertising competitor none the wiser. *See* PALM-011683680 ("we install a root CA on the device and MITM all SSL traffic"). The company's highest-level engineering executives thought the IAAP Program was a legal, technical, and security nightmare. *See* PALM-017114236 ("Jay [Parikh, then-head of infrastructure engineering] flagged long ago that we should not do man in the middle."); PALM-016606121 (Pedro Canahuati, then-head of security engineering: "I can't think of a good argument for why this is okay. No security person is ever comfortable with this, no matter what consent we get from the general public. The general public just doesn't know how this stuff works."); PALM-016895614 (Mike Schroepfer, then-CTO: "If we ever found out that someone had figured out a way to break encryption on [WhatsApp] we would be really upset.").

But Facebook deployed the program, expanded it, and kept it running for almost three years ***because Mark Zuckerberg personally asked for it, and the program worked—it helped to maintain Facebook's Social Advertising dominance against Snapchat and other potential entrants***. Again, this comes from the mouths of Facebook's own executives (and from Snapchat's executives too). *See* PALM-016564836 (Zuckerberg, June 2016, to Facebook's now-COO Javier Olivan: "Whenever someone asks a question about Snapchat, the answer is usually that because their traffic is encrypted we have no analytics about them. Given how quickly they're growing, it seems important to figure out a new way to get reliable analytics about them. Perhaps we need to do panels or write custom software. You should figure out how to do this."); PALM-017114236 (Olivan: "Unfortunately this was the only way to see in-app behavior (which we really wanted to understand back in the day for certain apps)."); Levenson Dep. 50:12-22 (Snap executive: Facebook's Onavo-informed product redesign "cause[d] advertisers to not have a clear narrative differentiating Snapchat from Facebook and Instagram").

Much of this was already in Advertisers' own motion for more deposition time, Dkt. 569: the IAAP Program's relevance to Advertisers' monopoly maintenance case; the program's documented origin from Zuckerberg himself; Zuckerberg's January 2019 request for a detailed technical

analysis of the program; and his subsequent, in-writing personal decision to pause, but not halt it. In the face of overwhelming written evidence to the contrary, Facebook's assertions in its motion that "Advertisers have not, and cannot, show that Mr. Zuckerberg has unique and personal knowledge" to justify more than 87 minutes of deposition time, Dkt. 564 at 2, ring hollow.

Just as hollow is Facebook's assertion that its IAAP Program is "an entirely new allegation about conduct that appears nowhere in their nearly 1000-paragraph complaint or in any of their discovery responses." *Id.* This argument is a head-scratcher, even by Facebook's standards: the Advertiser FAC contains detailed allegations about Onavo, *see* Dkt. 237 ("Ad FAC") ¶¶ 12-14, 165-66, 193, 225-45, 537-69, including an entire screenshot on page 134 about the use of Onavo to "SSL bump" Snapchat, YouTube, and Twitter in 2018, *see id.* ¶ 551. And an April contention interrogatory response by Advertisers provides chapter and verse (based on what Advertisers knew at that point, midway through fact depositions) about the IAAP Program and its impacts on the United States Social Advertising Market, including its origins ("a June 2016 email thread from Mark Zuckerberg asked for 'what data or research we have on the relative participation rates and usage in Snapchat for sending individual snaps vs sharing your story,' and in response, now-COO Javier Olivan . . . promised to expand Facebook's existing Onavo acquisition capabilities to get '[i]n-app actions for apps that use SSL . . . .'") and its impact on Snapchat ("As a member of Keval Patel's Market Strategy team put it in an Excel summary, the team's Onavo-driven analysis of Snapchat for Facebook's C-suite executives appeared to have directly contributed to Snapchat's competitive decline leading into 2017."). *See* Advs. First Supp. Resp. to Interrogatory No. 11, at p. 92-100.

To the extent that Facebook's actual "New Allegations" complaint is that Advertisers learned key details about the IAAP Program—including its apparent criminality; the specific information (competitors' encrypted analytics) that Facebook intercepted through the program; and the depth of Zuckerberg's personal involvement in the program's origin, expansion, and use—through fact depositions in this action, this doesn't exactly help Facebook's case. As an initial matter, this is what fact depositions are for, and the fact that Facebook did everything in its power to try to roadblock the usefulness of fact depositions in this action does not mean that they were not allowed, in practice, to be useful. Second, Advertisers were forced to learn things about what information Onavo actually collected and used—including that Onavo intercepted and decrypted competing apps' secure analytics using potentially criminal cyberattack methods—through depositions and witness-specific document review ***because Facebook hid this information through other discovery methods, including an interrogatory specifically and directly asking Facebook to identify all information collected by Onavo and the Onavo team***. *See* Dkt. 575.

In any event, back to Mark Zuckerberg: there can really be no doubt, on an objective record, that Zuckerberg has substantial, indeed irreplaceable, unique and personal knowledge on issues material to Advertiser Plaintiffs' case—from Facebook's anticompetitive IAAP program, to its C-suite-level deal with Netflix regarding Watch, to its API scheme, to its companywide centralization of machine learning models and data that it hid from the FTC. The default under the Federal Rules is seven hours for a knowledgeable witness, and given the record here, Zuckerberg probably should be sitting for a full seven hours (his personal knowledge merits it). But Advertisers ask only for an additional three hours, beyond the 87 minutes they already spent with Zuckerberg under oath. It is Facebook's burden to justify a departure from the default deposition limits, and it hasn't come close to doing so here.

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Respectfully submitted,

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FILER ATTESTATION

I am the ECF user who is filing this document. Pursuant to Civil L.R. 5-1(h)(3), I hereby attest that each of the other signatories have concurred in the filing of the document.

Dated: June 15, 2023

By: */s/ Brian J. Dunne*
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