

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

REVEAL CHAT HOLDCO LLC, et al.,
Plaintiffs,
v.
FACEBOOK, INC.,
Defendant.

Case No. 20-cv-00363-BLF

ORDER GRANTING MOTION TO DISMISS

[Re: ECF 71]

United States District Court
Northern District of California

Three web developers—Reveal Chat Holdco LLC (“Reveal Chat”), USA Technology and Management Services, Inc. (“Lenddo”), and Beehive Biometric, Inc. (“Beehive”) (collectively “Plaintiffs”)—have brought this lawsuit against Defendant Facebook, Inc. (“Facebook”) for removing access to a set of application programming interfaces (“APIs”) in 2015 that Plaintiffs relied on for their mobile applications. *See* Am. Compl., ECF 62. Plaintiffs allege that Facebook’s removal of these APIs was part of an elaborate scheme that violates Section 2 of the Sherman Act. *See id.* The Court previously found that Plaintiffs’ claims were time-barred and granted them leave to amend their complaint. *See* Order (“Prior MTD order”), ECF 61. Facebook has again filed a motion to dismiss that includes the threshold issue of whether Plaintiff’s claims are time-barred. *See* Mot., ECF 71. Plaintiffs oppose this motion. *See* Opp’n, ECF 73. The Court held a two-hour oral argument on December 3, 2020, giving Plaintiffs ample opportunity to discuss the viability of their claims. *See* Min Entry, ECF 78. For the reasons detailed below, the Court GRANTS Facebook’s motion.

I. BACKGROUND

Plaintiffs allege that between 2004 and 2010, Facebook vanquished a number of rivals in order to emerge as the dominant social network in the United States. Am. Compl. ¶ 76. “By 2010,

1 Facebook stood alone as the dominant player in the newly emergent market for social data (the
2 ‘Social Data Market’)—a market in which Facebook’s own users provided Facebook with a
3 constant stream of uniquely valuable information, which Facebook in turn monetized through the
4 sale of social data (for example, through advertising, monetizing APIs, or other forms of
5 commercializing access to Facebook’s network).” Am. Compl. ¶ 90. Facebook sold access to
6 social data to developers and sold advertisements targeting Facebook’s network of engaged and
7 active users. Am. Compl. ¶ 91. Because user data made Facebook’s network more valuable and
8 thus attracted more customers, which then led to more data and more customers, a feedback loop
9 emerged. Am. Compl. ¶¶ 92-95. Data provided by users made Facebook’s network more valuable,
10 thereby attracting more users to the network. Am. Compl. ¶ 92. A barrier to entry emerged from
11 this feedback loop—to compete with Facebook, a new entrant would have to rapidly replicate both
12 the breadth and value of the Facebook network by building its own vast network and duplicating
13 the active user engagement on the same massive scale. Am. Compl. ¶ 95. Plaintiffs allege that this
14 “Social Data Barrier to Entry” allows Facebook to control and increase prices in the Social Data
15 and Social Advertising Markets without the pressures of price competition from existing
16 competitors or new entrants. Am. Compl. ¶ 96.

17 In 2012, Facebook coined the term “Open Graph” “to describe a set of tools developers
18 could use to traverse Facebook’s network of users, including the social data that resulted from user
19 engagement.” Am. Compl. ¶ 131. Open Graph contained a set of APIs, which “allowed those
20 creating their own social applications to query the Facebook network for information.” Am.
21 Compl. ¶ 132. Beginning in the fall of 2011, to allegedly address the threat posed by mobile
22 applications, Facebook devised a scheme to attract third-party developers to build for their
23 platform and then remove access to the APIs that were central to these applications. Am. Compl. ¶
24 157. For example, the “Friends API” allowed third-party developers to search through a user’s
25 friends, as well as their friends of friends. Am. Compl. ¶ 158. Plaintiffs consider the Friends API,
26 News Feed API, and certain Messaging APIs the “Core APIs.” Am. Compl. ¶ 5. Without access to
27 this data, third-party applications “would be abruptly left with none of the social data they needed
28 to function.” Am. Compl. ¶ 159. By August 2012, Facebook planned to prevent competitive third-

1 party applications from buying social data from Facebook. Am. Compl. ¶ 167. Facebook even
2 identified direct, horizontal competitors in the Social Data and Social Advertising Markets. Am.
3 Compl. ¶ 168. In November 2012, Facebook announced that it would block competitors or require
4 full data reciprocity for continued access to its data. Am. Compl. ¶ 176. Plaintiffs allege that
5 Facebook’s statements from September 2011 through April 2014 about the functionality of the
6 Core APIs were false, half-truths that created a duty to speak fully and truthfully about the Core
7 APIs. Am. Compl. ¶ 450.

8 In April 2014, Facebook announced that it would remove access to several “rarely used”
9 APIs, including the Friends and News Feed APIs. Am. Compl. ¶ 242. Plaintiffs allege that these
10 APIs were in fact quite popular and relied on by tens of thousands of third-party applications. Am.
11 Compl. ¶ 243. After this announcement and through the full removal of the APIs in April 2015,
12 Facebook entered into Whitelist and Data Sharing Agreements with certain third-party developers
13 that allowed continued access to the Friends or News Feed APIs and included a provision
14 acknowledging that the covered APIs were not available to the general public. Am. Compl. ¶¶
15 247-248. These agreements “were only offered in exchange for massive purchases of Facebook’s
16 social data through mobile advertising and/or through the provision of the developer’s own social
17 data back to Facebook (so-called ‘reciprocity’).” Am. Compl. ¶ 249. Plaintiffs allege that
18 Facebook covered up the real reason for the removal of the APIs—while Facebook publicly stated
19 that the change was made to give users more control over their data, Plaintiffs allege that the real
20 reason for the change was to kill applications that were competitive or potentially competitive
21 with Facebook. Am. Compl. ¶¶ 461-62, 469. Plaintiffs allege that they first learned that
22 Facebook’s purported reasons for the removal of the APIs was false on November 6, 2019, when
23 NBC News posted a trove of internal Facebook documents seized by the United Kingdom
24 Parliament that allegedly showed that Facebook internally viewed the purported withdrawal as
25 lacking any legitimate business or technical justification and that the scheme had a broad impact
26 on competition. Am. Compl. ¶ 475.

A. Reveal Chat

1 Plaintiff Reveal Chat¹ was a dating platform whose business model was to consume social
 2 data through Facebook’s APIs to provide match-making services and create a platform from which
 3 it could sell advertising. Am. Compl. ¶ 21. Reveal Chat learned in late 2014 that Facebook had
 4 slated APIs it relied on for removal. Am. Compl. ¶ 24. In 2015, Reveal Chat allegedly contacted
 5 Facebook “to determine if there was a way forward.” Am. Compl. ¶ 25. Facebook allegedly
 6 referred Reveal Chat to its official policy documents and developer documentation, which
 7 suggested that the APIs were being removed for user control and privacy reasons. Am. Compl. ¶
 8 25. Reveal Chat then allegedly “contacted acquaintances that worked at Facebook to get more
 9 clarity as to the APIs and to determine whether [Reveal Chat] could obtain an exemption from the
 10 decision.” Am. Compl. ¶ 26. Reveal Chat never obtained an exception and accepted Facebook’s
 11 explanation that the APIs were being removed due to user privacy concerns. Am. Compl. ¶ 27.
 12 One of Reveal Chat’s founders reviewed Facebook’s blog post in December 2018, which
 13 responded to documents released as part of a United Kingdom Parliament investigation that again
 14 allegedly misled him into believing the APIs had been removed due to user privacy and control
 15 concerns. Am. Compl. ¶ 30. Reveal Chat alleges that it did not and could not learn the true reasons
 16 for the removal of the APIs until November 6, 2019, when internal Facebook documents were
 17 publicly released. Am. Compl. ¶ 31.

B. Lenddo

19 Plaintiff Lenddo developed a mobile application that used social data to assess a user’s
 20 creditworthiness based on studies showing that a person’s network of associations is predictive as
 21 to credit risk, fraud, and likelihood of loan repayment. Am. Compl. ¶¶ 32-33. Lenddo’s business
 22 model was based on consuming social data from Facebook. Am. Compl. ¶ 39. Lenddo learned in
 23 April 2015 that Facebook was eliminating the Core APIs and the Messaging APIs for all
 24 companies that were not given exemptions. Am. Compl. ¶ 43. On April 23, 2015, Lenddo entered
 25 a developer ticket, seeking to obtain an exemption from the new policy. Am. Compl. ¶ 44. Lenddo
 26

27 ¹ Reveal Chat is the successor in interest to Reveal Chat, Inc. (f/k/a LikeBright, Inc.), pursuant to
 28 an April 2015 merger between Reveal Chat and Reveal Chat, Inc. Am. Compl. ¶ 18. The Court
 will refer to this company both pre- and post-merger as Reveal Chat.

1 alleges it communicated with Facebook’s Neil Hiltz and Simon Cross, and Cross informed
2 Lenddo that it could not have access to the Core APIs and the Messaging APIs because the its
3 application was credit-related and was part of a business that provided credit. Am. Compl. ¶¶ 45-
4 46. Lenddo alleges that this explanation is false, as Royal Bank of Canada had allegedly obtained
5 an exemption after having purchased large amounts of advertising from Facebook. Am. Compl. ¶
6 47. Lenddo allegedly spoke with other developers, reviewed documentation from Facebook, and
7 spoke to “other acquaintances at Facebook” and concluded that Facebook’s policy change was for
8 legitimate reasons. Am. Compl. ¶ 48. Lenddo alleges that it did not and could not learn the true
9 reasons for the removal of the APIs until 2019 when internal Facebook documents were publicly
10 released. Am. Compl. ¶ 52.

11 **C. Beehive**

12 Plaintiff Beehive had devised an algorithm that would analyze a user’s social connections
13 and interactions to determine whether the individual’s identification was authentic and thus
14 establish whether a Facebook user was a real person. Am. Compl. ¶¶ 55-56. Beehive targeted its
15 product to dating sites, and as a result, the dating sites saw immediate increases in reliability of
16 users on their platforms and a significant drop in fraud risk. Am. Compl. ¶ 58. Beehive’s business
17 was halted in 2015 when it discovered that Facebook was removing the APIs, including the
18 Friends and News Feed APIs, that Beehive’s business depended on for its functionality. Am.
19 Compl. ¶ 60. Beehive sought an exemption from Facebook but never received a response. Am.
20 Compl. ¶ 61. “Beehive sought an exemption from Facebook but received no answer. Beehive then
21 contacted an acquaintance that worked at Facebook, who advised them that they would never
22 receive an exemption.” Am. Compl. ¶ 61. Beehive allegedly spoke to other developers, read
23 documentation by Facebook, and viewed developer message boards and did not find any
24 explanation other than the one Facebook had offered regarding user privacy for the API removals.
25 Am. Compl. ¶ 63. Beehive alleges that it did not and could not learn the true reasons for the
26 removal of the APIs until 2019 when internal Facebook documents were publicly released. Am.
27 Compl. ¶ 65.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17

D. Prior Order Granting Facebook’s Motion to Dismiss

This Court previously granted a motion to dismiss filed by Facebook on July 8, 2020. *See* Prior MTD Order; *see also Reveal Chat Holdco, LLC v. Facebook, Inc.*, 471 F. Supp. 3d 981 (N.D. Cal. 2020). The Court found as a matter of law that Plaintiffs’ claims were time-barred by the four-year statute of limitations for antitrust claims and that Plaintiffs had not adequately pled fraudulent concealment in part because they had not plausibly alleged they were without actual or constructive knowledge of the facts giving rise to their claims. Prior MTD Order 10, 14. The Court found that, “[t]o allege fraudulent concealment, Plaintiffs must establish that ‘its failure to have notice of its claim was the result of [Facebook’s] affirmative conduct.’” Prior MTD Order 9 (quoting *Conmar Corp. v. Mitsui & Co. (U.S.A.)*, 858 F.2d 499, 505 (9th Cir. 1988)). The Court found that Plaintiffs had notice as of April 30, 2014, that access to the Friends and News Feed APIs would be removed, and Plaintiffs had notice of the Whitelist and Data Sharing Agreements in September 2015 via an article published in the Wall Street Journal. Prior MTD Order 10. “Thus, at the very least, Plaintiffs had constructive knowledge of the facts that give rise to their claims.” Prior MTD Order 10. The Court also found that Facebook’s decision to keep “tightly underwraps” the “real reason for the removal of the APIs” is not affirmative conduct that necessarily tolls the statute of limitations. Prior MTD Order 10.

18
19
20
21
22
23
24

The Court further found that Plaintiffs had failed to allege how they had acted diligently in trying to uncover facts giving rise to their claims. Prior MTD Order 10-11. “Here, the publicly available facts regarding Facebook’s allegedly anticompetitive conduct would excite the inquiry of a reasonable person, and therefore Plaintiffs must plead diligence with particularity. They have failed to do so here.” Prior MTD Order 11. The Court granted Plaintiffs leave to amend on the issue of fraudulent concealment, which if applicable, would toll the statute of limitations. Prior MTD Order 14.

25
26

II. LEGAL STANDARD

27

A. Rule 12(b)(6)

28

“A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a

1 claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation*
2 *Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d
3 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts as
4 true all well-pled factual allegations and construes them in the light most favorable to the plaintiff.
5 *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the Court
6 need not “accept as true allegations that contradict matters properly subject to judicial notice” or
7 “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
8 inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation
9 marks and citations omitted). While a complaint need not contain detailed factual allegations, it
10 “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible
11 on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550
12 U.S. 544, 570 (2007)). A claim is facially plausible when it “allows the court to draw the
13 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “However, as the
14 Supreme Court has noted precisely in the context of private antitrust litigation, ‘it is one thing to
15 be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to
16 forget that proceeding to antitrust discovery can be expensive.’” *Feitelson v. Google Inc.*, 80 F.
17 Supp. 3d 1019, 1025 (N.D. Cal. 2015) (quoting *Twombly*, 550 U.S. at 558-59). “As such, ‘a
18 district court must retain the power to insist upon some specificity in pleading before allowing a
19 potentially massive factual controversy to proceed.’” *Feitelson*, 80 F. Supp. 3d at 1025–26
20 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983)
21 *quoted with approval in Twombly*, 550 U.S. at 559). On a motion to dismiss, the Court’s review is
22 limited to the face of the complaint and matters judicially noticeable. *MGIC Indem. Corp. v.*
23 *Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578,
24 581 (9th Cir. 1983).

25 In deciding whether to grant leave to amend, the Court must consider the factors set forth
26 by the Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962), and discussed at length by the
27 Ninth Circuit in *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2009). A district
28 court ordinarily must grant leave to amend unless one or more of the *Foman* factors is present: (1)

1 undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by
2 amendment, (4) undue prejudice to the opposing party, or (5) futility of amendment. *Eminence*
3 *Capital*, 316 F.3d at 1052. “[I]t is the consideration of prejudice to the opposing party that carries
4 the greatest weight.” *Id.* However, a strong showing with respect to one of the other factors may
5 warrant denial of leave to amend. *Id.*

6 **B. Rule 9(b)**

7 Claims sounding in fraud are subject to the heightened pleading requirements of Federal
8 Rule of Civil Procedure 9(b), which require that a plaintiff alleging fraud “must state with
9 particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b); *see also Kearns v. Ford*
10 *Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). To satisfy the heightened standard under Rule
11 9(b), the allegations must be “specific enough to give defendants notice of the particular
12 misconduct which is alleged to constitute the fraud charged so that they can defend against the
13 charge and not just deny that they have done anything wrong.” *Semegen v. Weidner*, 780 F.2d 727,
14 731 (9th Cir. 1985). Thus, claims sounding in fraud must allege “an account of the time, place,
15 and specific content of the false representations as well as the identities of the parties to the
16 misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam)
17 (citation omitted). “A plaintiff must set forth what is false or misleading about a statement, and
18 why it is false.” *In re GlenFed, Inc. Secs. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc),
19 *superseded by statute on other grounds as stated in SEC v. Todd*, 642 F.3d 1207, 1216 (9th
20 Cir.2011). However, “intent, knowledge, and other conditions of a person’s mind” need not be
21 stated with particularity, and “may be alleged generally.” Fed. R. Civ. P. 9(b).

22 **III. DISCUSSION**

23 **A. Request for Judicial Notice**

24 Defendants request judicial notice of three documents: the Complaint in *Six4Three, LLC v.*
25 *Facebook, Inc.*, No. CIV 533328 (San Mateo Cnty. Super. Ct. April 10, 2015), *see Ex. 1*, State
26 Court Complaint, ECF 71-2; a September 21, 2015 *Wall Street Journal* article, *Facebook’s*
27 *Restrictions on User Data Cast a Long Shadow*, *see Ex. 2*, Data Sharing Article, ECF 71-3; and an
28

1 October 20, 2020 *Wall Street Journal* article, *Snapchat Nears 250 Million Daily Users as*
 2 *Advertisers Lift Spending on Platform*, see Ex. 1, Snapchat Article, ECF 74-2. Courts may take
 3 judicial notice of matters either that are “generally known within the trial court’s territorial
 4 jurisdiction” or that “can be accurately and readily determined from sources whose accuracy
 5 cannot reasonably be questioned.” Fed. R. Evid. 201(b). “Specifically, a court may take judicial
 6 notice: (1) of matters of public record, (2) that the market was aware of information contained in
 7 news articles, and (3) publicly accessible websites whose accuracy and authenticity is not subject
 8 to dispute.” *In re Facebook, Inc. Sec. Litig.*, 405 F. Supp. 3d 809, 827 (N.D. Cal. 2019) (internal
 9 citations and quotation marks omitted). Plaintiffs do not object to judicial notice of these
 10 documents. The Court grants Defendants’ request and finds the state court complaint judicially
 11 noticeable as a publicly available court document, see *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*,
 12 442 F.3d 741, 746 n.6 (9th Cir. 2006) and the *Wall Street Journal* articles judicially noticeable “as
 13 an indication of what information was in the public realm at the time,” see *Van Saher v. Norton*
 14 *Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010).

15 **B. Statute of Limitations**

16 Facebook argues that Plaintiffs’ claims are time-barred, as the Court found in its prior
 17 order, and the amendments do not cure the identified deficiencies in the pleading. Mot. 4-5.
 18 Plaintiffs chose to not address this threshold issue until the last section of their brief and argue that
 19 there is an intra-circuit split as to whether a “discovery rule” or an “injury rule” applies to antitrust
 20 claims, and if this Court chooses the discovery rule, then Plaintiffs’ claims have not accrued.
 21 Opp’n 20-21.

22 The Court disagrees with Plaintiffs and finds that the Supreme Court and Ninth Circuit
 23 have clearly stated that the injury rule applies to antitrust cases. See *Klehr v. A.O. Smith Corp.*,
 24 521 U.S. 179, 188 (1997) (finding that the ordinary Clayton Act rule, applicable in private
 25 antitrust treble damages actions holds “a cause of action accrues and the statute begins to run when
 26 a defendant commits an act that injures a plaintiff’s business.”) (quoting *Zenith Radio Corp. v.*
 27 *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)); *Hexcel Corp. v. Ineos Polymers, Inc.*, 681
 28 F.3d 1055, 1060 (9th Cir. 2012) (“We do not require a plaintiff to actually discover its antitrust

1 claims before the statute of limitations begins to run.”) (citing *Beneficial Standard Life Ins., Co. v.*
 2 *Madariaga*, 851 F.2d 271, 274–75 (9th Cir. 1988)). The statute of limitations under the Sherman
 3 Act is four years. *Hexcel*, 681 F.3d at 1057 (citing 15 U.S.C. § 15b). To the extent that Plaintiffs
 4 are seeking injunctive relief, the Court reiterates its previous finding that “the doctrine of laches
 5 applies to the instant case”, Prior MTD Order 7, and the same “four-year statute of limitations in
 6 15 U.S.C. § 15b furnishes a guideline for computation of the laches period.” Prior MTD Order 7
 7 (quoting *Samsung Elecs. Co. v. Panasonic Corp.*, 747 F.3d 1199, 1205 (9th Cir. 2014)).

8 Plaintiffs admit that they had notice of their injury by April 30, 2015 when the Core APIs
 9 that their businesses relied on were withdrawn. Am. Compl. ¶¶ 6, 13, 245.² Plaintiffs did not
 10 commence this lawsuit until January 16, 2020. *See* Compl., ECF 1. Therefore, Plaintiffs’ claims
 11 are time barred unless the Sherman Act statute of limitations is properly tolled. The Court finds
 12 that it is not.

13 **i. Continuing Violation**

14 Plaintiffs argue that Facebook’s conduct restarted the statute of limitations under the
 15 “continuing violation” doctrine. Opp’n 21-22. Plaintiffs argue that Facebook continued to operate
 16 its Onavo spyware to spy on mobile application users as part of its scheme to prevent the advent of
 17 a rival social advertising platform or generator of social data. Opp’n 21. This allegedly prevented
 18 Snapchat from evolving into a viable platform that would allow Plaintiffs to reacquire the social
 19 data they needed for their original business models, as Facebook “cloned” Snapchat’s
 20 functionality in 2016. Opp’n 21-22. Plaintiffs also argue that Facebook continued to operate under
 21 Whitelist and Data Sharing Agreements that allowed some companies to continue having access to
 22 the necessary APIs in exchange for social data sharing or advertising purposes. Opp’n 22.

23 Facebook argues that Plaintiffs did not allege in their complaint that Facebook’s purported
 24 “cloning” of Snapchat’s features caused them injury. Reply 4, ECF 74. Facebook argues that since
 25 Plaintiffs were already allegedly excluded from the social data market as of April 2015, when they
 26

27 ² Plaintiffs do not allege that they signed any Whitelist or Data Sharing Agreements with
 28 Facebook, but they had notice of those agreements by September 2015. *See* Prior MTD Order 10;
 Ex. 2, Data Sharing Article, ECF 71-3.

1 lost access to the Core APIs, Plaintiffs have failed to plead how any alleged cloning in 2016
2 somehow worsened their pre-existing injury or constituted a new injury. Reply 4. Facebook also
3 argues that the continued existence of the Data Sharing Agreements, which Plaintiff had notice of
4 by September 2015, do not establish a continuing violation. Reply 4.

5 “To state a continuing violation of the antitrust laws in the Ninth Circuit, a plaintiff must
6 allege that a defendant completed an overt act during the limitations period that meets two criteria:
7 1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and 2)
8 it must inflict new and accumulating injury on the plaintiff.” *Samsung Elecs. Co. v. Panasonic*
9 *Corp.*, 747 F.3d at 1202 (9th Cir. 2014); *accord Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086
10 (9th Cir. 2014) (stating limitations begins to run from date of each “new overt act causing injury”).

11 Here, Plaintiffs were allegedly injured when they were excluded from the social data
12 market by virtue of losing access to the Core APIs by April 30, 2015. Am. Compl. ¶¶ 6, 13, 245
13 The Court has reviewed the allegations concerning Facebook cloning Snapchat features, *see* Am.
14 Compl. ¶¶ 311-12 and agrees with Facebook that Plaintiffs have not pled facts demonstrating that
15 this alleged cloning inflicted any new and accumulating injury on Plaintiffs beyond their pre-
16 existing injury via exclusion in April 2015. Accordingly, these allegations do not constitute a
17 “continuing violation.”

18 The Court also agrees with Facebook that the relevant act concerning the Data Sharing
19 Agreements occurred in April 2015, the latest start date Plaintiffs allege for the agreements. Am.
20 Compl. ¶¶ 247, 256. Accordingly, the continued existence of these Data Sharing Agreements does
21 not constitute new and independent acts that restart the statute of limitations. *See Ryan v.*
22 *Microsoft Corp.* (“*Ryan II*”), 147 F. Supp. 3d 868, 884 (N.D. Cal. 2015) (where the defendant
23 entered into an allegedly unlawful contract prior to the limitations period, the defendant still must
24 take an unlawful ‘new and independent act that is not merely a reaffirmation of a previous act’
25 during the limitations period.”) (citing *Pace Indus. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th
26 Cir.1987)).

27 In conclusion, the Court does not find that the continuing violation doctrine applies here to
28 toll the statute of limitations. Plaintiffs already received an opportunity to amend their complaint

1 to properly plead this theory, and they have not suggested that a third attempt would be more
2 productive than the first two. The Court finds that further amendment would be futile and
3 accordingly dismisses this theory with prejudice.

4 **ii. Fraudulent Concealment**

5 Plaintiffs argue that the doctrine of fraudulent concealment applies to toll the statute of
6 limitations in this case. Opp'n 22-25. Plaintiffs allege that Facebook had a duty to speak fully and
7 truthfully about its plans for removing the APIs, and Facebook affirmatively lied about the real
8 reasons for removing the APIs. Opp'n 22-24. Plaintiffs also argue that, if the Court finds that
9 "facts exist that would excite the inquiry of a reasonable person" regarding Facebook's
10 misconduct, they were diligent in trying to discover the misconduct. Opp'n 25. Facebook argues
11 that Plaintiffs have not cured the deficiencies the Court identified in its prior order finding that the
12 doctrine of fraudulent concealment does not apply. Mot. 5-11, Reply 5-8. Specifically, Facebook
13 argues that Plaintiffs have not pled affirmative acts Facebook took to mislead them Mot. 5-11.
14 Facebook argues that Plaintiffs knew of their injuries by April 2015, and the fact that they were
15 allegedly unaware of Facebook's motives for the removal of the APIs does not impact the
16 fraudulent concealment analysis. Mot. 6, 8-9. Facebook also argues that Plaintiffs have not
17 adequately alleged that they were diligent after learning of their injuries. Mot. 11.

18 "A statute of limitations may be tolled if the defendant fraudulently concealed the
19 existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did
20 not know of its existence." *Hexcel*, 681 F.3d at 1060. "The plaintiff carries the burden of pleading
21 and proving fraudulent concealment." *Id.* (brackets and internal quotation marks omitted). "To
22 plead fraudulent concealment, the plaintiff must allege that: (1) the defendant took affirmative acts
23 to mislead the plaintiff; (2) the plaintiff did not have 'actual or constructive knowledge of the facts
24 giving rise to its claim'; and (3) the plaintiff acted diligently in trying to uncover the facts giving
25 rise to its claim." *In re Animation Workers Antitrust Litig.* ("*Animation Workers II*"), 123 F. Supp.
26 3d 1175, 1194 (N.D. Cal. 2015) (quoting *Hexcel*, 681 F.3d at 1060)). Thus, "[a] fraudulent
27 concealment defense requires a showing both that the defendant used fraudulent means to keep the
28 plaintiff unaware of his cause of action, and also that the plaintiff was, in fact, ignorant of the

1 existence of his cause of action.” *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d
2 1515, 1521 (9th Cir. 1983). “The plaintiff is deemed to have had constructive knowledge if it had
3 enough information to warrant an investigation which, if reasonably diligent, would have led to
4 discovery of the fraud.” *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th
5 Cir. 1988). “It is enough that the plaintiff should have been alerted to facts that, following duly
6 diligent inquiry, could have advised it of its claim.” *Hexcel*, 681 F.3d at 1060 (internal quotation
7 marks omitted).

8 “Moreover, allegations of fraudulent concealment must be pled with particularity.” *Ryan*
9 *II*, 147 F. Supp. 3d at 885. “Although it is generally inappropriate to resolve the fact-intensive
10 allegations of fraudulent concealment at the motion to dismiss stage, Plaintiffs nevertheless must
11 allege specific factual allegations of fraudulent concealment to survive a motion to dismiss,”
12 *Garrison v. Oracle Corp. (“Garrison II”)*, 159 F. Supp. 3d 1044, 1073 (N.D. Cal. 2016) (granting
13 a motion to dismiss with prejudice and finding that plaintiffs had failed to adequately plead
14 fraudulent concealment). “Conclusory statements are not enough.” *Conmar Corp.*, 858 F.2d at
15 502.

16 In *Hexcel*, the Ninth Circuit emphasized that if a plaintiff has actual or constructive
17 knowledge of the facts giving rise to his claim, then fraudulent concealment does not apply.
18 *Hexcel*, 681 F.3d at 1060. Plaintiffs do not attempt to contest that they knew of their alleged
19 exclusion by Facebook by April 30, 2015, when Facebook removed access to the Core APIs.
20 Rather, Plaintiffs argue that without the knowledge of Facebook’s true motives for removing the
21 APIs, they could not know they were injured. However, the “failure to own up to illegal conduct”
22 is not sufficient for fraudulent concealment, “and to find otherwise ‘would effectively nullify the
23 statute of limitations in these cases.’” *Garrison II*, 159 F. Supp. 3d at 1077 (quoting *Pocahontas*
24 *Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 218–19 (4th Cir. 1987)); see
25 also *Conmar*, 858 F.2d at 505 (citing favorably *Pocahontas*, 828 F.2d at 218); *In re Animation*
26 *Workers Antitrust Litig. (“Animation Workers I”)*, 87 F. Supp. 3d 1195, 1216 (N.D. Cal. 2015)
27 (“That Defendants did not affirmatively disclose the details of their allegedly unlawful conspiracy
28

1 to Plaintiffs is neither surprising nor sufficient to constitute ‘affirmative steps to mislead.’”³
 2 (citing *Conmar*, 858 F.2d at 505)). Under *Hexcel*, what is important is the facts that give rise to
 3 Plaintiffs’ claims. The critical fact was losing access to the Core APIs in April 2015.

4 The Court finds the primary cases Plaintiffs rely on, *Animation Workers II* and *In re*
 5 *Glumetza Antitrust Lit.*, 2020 WL 1066934, at *6 (N.D. Cal. Mar 5, 2020), distinguishable from
 6 this case. As Facebook notes, these cases involve allegations of illegal price-fixing, a different
 7 antitrust violation than what Plaintiffs have alleged here. Both cases allege a conspiracy, which is
 8 also absent in this case. These different factual scenarios are meaningful in terms of evaluating
 9 whether Plaintiffs have sufficiently pled fraudulent concealment. The Court agrees with Facebook
 10 that “In a price-fixing case, concealing the reasons a price is set at a given level obscures not only
 11 the defendant’s intent but also the fact that a potential plaintiff has been injured at all—i.e., that
 12 prices are the result of collusion rather than market forces.” Mot. 8. Here, by contrast, the injury of
 13 lost API access was clear to Plaintiffs when it occurred. *See* Phillip E. Areeda & Herbert
 14 Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 320a (4th
 15 ed., last updated Sept. 2020) (“[I]n the typical refusal to deal, tying, or exclusive dealing case, the
 16 injured party and likely plaintiff has virtually immediate knowledge of the unlawful act.”).

17 The Court also finds that Plaintiffs have failed to plead affirmative conduct on the part of
 18 Facebook with the requisite particularity that Rule 9(b) requires. “[T]o plead fraudulent
 19 concealment in accordance with Rule 9(b), Plaintiffs must allege an account of the time, place, and
 20 specific content of the false representations as well as the identities of the parties to the
 21 misrepresentations.” *Garrison II*, 159 F. Supp 3d at 1075 (internal quotation and citation omitted).
 22 Many of the statements cited by Plaintiffs were not made to these particular Plaintiffs. *See, e.g.*,
 23 Am. Compl. ¶¶ 464-65 (statements to developers at Microsoft and Airbiquity); Am. Compl. ¶ 466
 24 (statements to unspecified, unnamed developers). Statements made before Plaintiffs were

25
 26
 27 ³ The Court acknowledges that the *Animation Workers* plaintiffs were ultimately able to plead
 28 sufficient facts to establish fraudulent concealment at the motion to dismiss stage after Judge Koh
 gave them one opportunity to amend their complaint. *See Animation Workers II*, 124 F. Supp 3d at
 1193-1205. Even under *Animation Workers II*, the facts pled by Plaintiffs after their opportunity to
 amend are not sufficient to plausibly plead fraudulent concealment.

1 allegedly injured in April 2015 necessarily cannot toll the statute of limitations, *see* Am. Compl.
2 ¶¶ 459-60. Plaintiffs also allege a “code of silence” internally at Facebook, Am. Compl. ¶¶ 454-
3 58, but this Court has already rejected Plaintiffs’ attempts to rely on Facebook’s private actions as
4 affirmative misconduct that specifically misled them. Prior MTD Order 9-10.

5 Plaintiffs allege that Facebook misrepresented the real goal of the API withdrawal in an
6 April 30, 2015 blog post, Am. Compl. ¶ 467, but Plaintiffs do not allege that any of them read or
7 relied on this statement. The March 26, 2018 statement of senior executive Ime Archibong, Am.
8 Compl. ¶ 472, suffers from the same deficiency. Plaintiffs also refer to unspecified Facebook
9 “documentation and FAQ,” publicized by Facebook employee Simon Cross on an unspecified
10 message board on an unspecified date, that was false and misleading, Am. Compl. ¶ 468, but this
11 type of allegation is wholly insufficient under Rule 9(b). *See Animation Workers I*, 87 F. Supp. 3d
12 at 1217 (“Plaintiffs offer no specific facts showing the ‘who, what, where, when’ of these alleged
13 incomplete or materially false statements.”) (citing *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th
14 Cir. 2007) (per curiam)). Plaintiffs’ allegations that Reveal Chat and Beehive “frequented those
15 sources of information as a matter of course” and read the posts and accepted the pretextual reason
16 for the API removal, Am. Compl. ¶ 471, is not the type of allegation of fraud “specific enough to
17 give defendants notice of the particular misconduct which is alleged to constitute the fraud
18 charged so that they can defend against the charge.” *Garrison II*, 159 F. Supp 3d at 1075 (citing
19 *Swartz*, 476 F.3d at 764). Defendants also allege that December 5, 2018 blog post by Facebook
20 misrepresented the reasons for the API withdrawal and Data Sharing Agreements, and this post
21 was read by one of the founders of Reveal Chat. Am. Compl. ¶¶ 30, 474. However, the Complaint
22 does not specifically identify this founder, or how many founders Reveal Chat and its predecessor
23 company claim. These allegations are significantly less particular than those held sufficient in
24 *Animation Workers II*, where those plaintiffs alleged facts such as “Lucasfilm made ‘affirmative
25 efforts to eliminate a paper trail regarding its code-named ‘DNR’ agreements,’ including a
26 requirement that “all discussions of ‘DNR’ needed to be conducted over the phone ... [i]f you see
27 an email forward to Steve and one of our lawyers.” 123 F. Supp. 3d at 1201. Despite a previous
28 warning from the Court that the alleged affirmative acts need to be specifically pled, *see* Prior

1 MTD Order 9-10, Plaintiffs have still not cured this deficiency.

2 Finally, Plaintiffs have failed to plead their diligence in trying to uncover the facts giving
 3 rise to its claim with particularity. “Diligent inquiry is required where facts exist that would excite
 4 the inquiry of a reasonable person,” and diligence must be pled with particularity. *Glumetza*, 2020
 5 WL 1066934, at *6 (citing *Conmar*, 858 F.2d at 502, 504). Allegations such as “[Reveal Chat]
 6 then contacted *acquaintances that worked at Facebook* to get more clarity as to the APIs and to
 7 determine whether [Reveal Chat] could obtain an exemption from the decision,” Am. Compl. ¶ 26
 8 (emphasis added) fall woefully short of the particularity required to plead diligence. Beehive
 9 likewise “contacted an *acquaintance that worked at Facebook*, who advised them that they would
 10 never receive an exemption.” Am. Compl. ¶ 61 (emphasis added). Lenddo alleges that it spoke
 11 with Facebook’s Simon Cross and Neil Hiltz about an exemption to the policy withdrawing access
 12 to the Core APIs, and Cross told them they would not be receiving an exemption. Am. Compl. ¶¶
 13 44-46, 476. Plaintiff has not pled how seeking an exemption to a policy constitutes diligence in
 14 attempting to determine if the API withdrawal was unlawful. Plaintiffs also claim they read two
 15 Facebook blog posts from 2015 and 2018 and unspecified message board posts, but “[o]nce
 16 [parties] had clear knowledge of their claims, it was not reasonable for them to rely on reassuring
 17 comments from [Defendant].” *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987)
 18 (citation omitted). Accordingly, the Court finds that Plaintiffs have failed to plead sufficient facts
 19 alleging they acted diligently in trying to uncover the facts giving rise to their claim.

20 **iii. Conclusion**

21 The Court is mindful that resolution of statute of limitations challenges are generally
 22 deferred until a presentation of a more developed record, but this is one of the rare cases where
 23 Plaintiffs’ entire theory of liability is based on completed acts by Facebook beyond the limitations
 24 period. By their own pleading, Plaintiffs have exposed the tardiness of their claims, their
 25 knowledge of their injury, and the absence of diligence. Thus, the Court finds that the four-year
 26 statute of limitations applies to this case, and Plaintiffs have not adequately pled a tolling theory
 27 under the continuing violation or fraudulent concealment doctrines. The Court put Plaintiffs on
 28 notice in its first order granting Facebook’s motion to dismiss that “allegations of fraudulent

1 concealment must be pled with particularity.” Prior Order 8 (citing *Ryan II*, 147 F. Supp. 3d at
2 885). Despite this notice, Plaintiffs’ allegations are wholly inadequate to meet the pleading
3 standard for fraud claims under Rule 9(b). Given Plaintiffs’ adequate notice of the need to plead
4 with particularity and their continued failure to do so, the Court finds that further amendment
5 would be futile and will GRANT Facebook’s motion to dismiss WITH PREJUDICE.

6 **C. Facebook’s Remaining Arguments**

7 Facebook argues several other grounds for dismissal, including that Plaintiffs have not
8 plausibly alleged an antitrust injury and have failed to state a claim establishing a violation of
9 Section 2 of the Sherman Act. Mot. 11-25. However, because this case is being dismissed under
10 the statute of limitations, the Court need not reach these arguments.

11 **IV. ORDER**

12 For the foregoing reasons, IT IS HEREBY ORDERED that Facebook’s motion to dismiss
13 is GRANTED WITH PREJUDICE.

14
15 Dated: April 26, 2021



16
17 **BETH LABSON FREEMAN**
United States District Judge

United States District Court
Northern District of California

18
19
20
21
22
23
24
25
26
27
28