

1 BRIAN M. BOYNTON
 Acting Assistant Attorney General
 2 LESLEY R. FARBY
 Assistant Branch Director
 3 LISA ZEIDNER MARCUS (N.Y. Bar 4461679)
 Senior Counsel
 4 UNITED STATES DEPARTMENT OF JUSTICE
 Civil Division, Federal Programs Branch
 5 1100 L St., NW, Twelfth Floor
 Washington, DC 20530
 6 Tel: (202) 514-3336
 Facsimile: (202) 616-8470
 7 lisa.marcus@usdoj.gov

8 *Counsel for Federal Defendant*

9
 10 UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 11 SAN FRANCISCO DIVISION

12	CORONAVIRUS REPORTER, CALID INC.,)	Case No. 3:21-cv-05567-EMC
13	on behalf of themselves and all others similarly)	
13	situated,)	Federal Defendant's Notice of Motion
14	Plaintiff,)	and Motion to Dismiss
15	v.)	<u>Noticed Hearing</u>
16	APPLE INC., FEDERAL TRADE)	Date: January 20, 2022
17	COMMISSION,)	Time: 1:30pm
18	Defendants.)	Judge: Hon. Edward M. Chen

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- Exhibit A: Declaration of Lisa Zeidner Marcus, Senior Counsel, U.S. Department of Justice, Civil Division, Federal Programs Branch
- Exhibit A-1: Email chain containing plaintiffs’ counsel’s March 12, 2021, email to the Federal Trade Commission
- Exhibit A-2: Attachment to plaintiffs’ counsel’s March 12, 2021, email: amended complaint for damages and injunctive relief in *Coronavirus Reporter v. Apple Inc.*, No. 21-cv-47 (D.N.H.)
- Exhibit A-3: Attachment to plaintiffs’ counsel’s March 12, 2021, email: “CNBC interview corporate min.pdf”
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- Exhibit A-6: Copy of webpage, “Report an Antitrust Violation,” Federal Trade Commission, <https://www.ftc.gov/faq/competition/report-antitrust-violation>.
- Exhibit A-7: Copy of blog post / webpage, “Inside the antitrust mailbox,” Federal Trade Commission, <https://www.ftc.gov/news-events/blogs/competition-matters/2014/02/inside-antitrust-mailbox>.

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1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on January 20, 2022, at 1:30pm, or as soon thereafter as
3 the matter may be heard, federal defendant the Federal Trade Commission, will appear before the
4 Honorable Edward M. Chen and move: (1) pursuant to Federal Rule of Civil Procedure 12(b)(1)
5 to dismiss the amended complaint, ECF No. 41, for lack of subject matter jurisdiction; (2)
6 pursuant to Federal Rule of Civil Procedure 12(b)(3) to dismiss the amended complaint for
7 improper venue; and (3) pursuant to Federal Rule of Civil Procedure 41(b) to dismiss the
8 amended complaint for failure to comply with Federal Rule of Civil Procedure 8(a)(3).

9 Defendant’s motion is based on this notice, the points and authorities in support of this motion,
10 the Declaration of Lisa Zeidner Marcus and exhibits thereto, and other good cause.

11 **RELIEF SOUGHT BY FEDERAL DEFENDANT**

12 Federal defendant the Federal Trade Commission seeks dismissal of the purported claims
13 against it for lack of subject matter jurisdiction, improper venue, and failure to specify the relief
14 demanded. Given the jurisdictional deficiencies in plaintiffs’ amended complaint, the Federal
15 Trade Commission respectfully submits that dismissal without leave to amend would be
16 appropriate.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I. INTRODUCTION**

19 In March of 2021, plaintiffs’ counsel sent an email to the general email address for the
20 Federal Trade Commission’s Bureau of Competition. The email asked for assistance with a
21 federal district court matter that had been recently filed by plaintiffs against Apple, Inc. Plaintiffs
22 allege that the Federal Trade Commission (“FTC”) never substantively responded to that email.

23 On that basis, and that basis alone, plaintiffs attempt to sue the FTC. According to
24 plaintiffs, the FTC’s lack of response to plaintiffs’ counsel’s email “constitutes agency action
25 unlawfully withheld” or “agency action unreasonably delayed,” in violation of the
26 Administrative Procedure Act (“APA”), 5 U.S.C. § 706(1). It does not.

27 Plaintiffs’ purported claim against the FTC is a quintessential example of trying to make
28 a “federal case” where none exists. The Court should dismiss plaintiffs’ purported claim against

1 the FTC set forth in their amended complaint (ECF No. 41) for lack of subject matter jurisdiction
2 because plaintiffs ask the Court to compel the FTC to take action that is not legally required, and
3 thus fail to establish jurisdiction under APA § 706(1) of the APA. The Court further lacks
4 jurisdiction because, as a matter of law, the plaintiffs lack standing to sue the FTC. Additionally,
5 plaintiffs fail to establish venue in this district with respect to their purported claim against the
6 FTC. Plaintiffs' amended complaint is also deficient because plaintiffs fail to specify the relief
7 they seek against the FTC. Any one of these grounds on its own would provide a sufficient basis
8 for the Court to dismiss plaintiffs' purported claim against the FTC. The existence of all of them
9 here show that further amendment would be futile. Accordingly, the Court should grant the
10 FTC's motion, and should dismiss the amended complaint's allegations against the FTC with
11 prejudice.

12 **II. STATEMENT OF ISSUES TO BE DECIDED**

13 Whether the Court has jurisdiction under the APA § 706(1); whether plaintiffs have
14 standing to sue the FTC; whether venue properly lies in this district with respect to plaintiffs'
15 purported claim against the FTC; whether plaintiffs have complied with Federal Rule of Civil
16 Procedure 8(a)(3).

17 **III. STATUTORY AND REGULATORY BACKGROUND**

18 **A. The Federal Trade Commission**

19 The FTC is an independent federal agency established in 1914 under the Federal Trade
20 Commission Act ("FTC Act"), Pub. L. No. 63-203, 38 Stat. 717 (1914), codified as amended at
21 15 U.S.C. §§ 41–58.¹ The Commission itself is composed of five commissioners who are
22 appointed to staggered terms by the President with the advice and consent of the Senate. 15
23 U.S.C. § 41.

24 The FTC Act prohibits "unfair methods of competition" and "unfair or deceptive acts or
25 practices" in or affecting commerce. *Id.* § 45(a)(1). To that end, the FTC investigates and brings

26 ¹ For more information regarding the "independent" status of the FTC, *see, e.g., Bowsher v.*
27 *Synar*, 478 U.S. 714, 725 n.4 (1986); *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1176 (9th Cir.
28 2021).

1 enforcement actions concerning possible unfair methods of competition, which include (but are
2 not limited to²) “those restraints of trade which also [are] outlawed by” the antitrust laws.³ *See*
3 *FTC v. Cement Inst.*, 333 U.S. 683, 691–92 (1948). Congress empowered the FTC to enforce
4 these provisions in its discretion either through FTC administrative adjudication or civil
5 enforcement actions in the U.S. district courts. 15 U.S.C. §§ 45(a) & (b), 53(b). The FTC “*may*
6 ... prosecute any inquiry necessary to its duties in any part of the United States,” *id.* § 43
7 (emphasis added), and is authorized “to gather and compile information concerning, and to
8 investigate from time to time the organization, business, conduct, practices, and management of
9 any person, partnership, or corporation engaged in or whose business affects commerce,
10 excepting banks, savings and loan institutions ... Federal credit unions ... and common carriers
11 ...,” *id.* § 46(a).

12 The FTC may issue an administrative complaint whenever it determines that such action
13 is in the public interest, and it has “reason to believe” that a person, partnership, or corporation
14 has been or is violating the Act’s prohibitions. *Id.* § 45(b). Administrative complaints are tried
15 before an administrative law judge and are subject to *de novo* review by the Commission. *Id.*; 16
16 C.F.R. §§ 3.51–3.54. If the FTC determines that the FTC Act was violated, it may issue a cease
17 and desist order. 15 U.S.C. § 45(b). FTC cease and desist orders are subject to judicial review
18 exclusively in the courts of appeals. *Id.* § 45(c).

19 Alternatively, the FTC may file a federal district court action under section 13(b) of the
20 FTC Act. 15 U.S.C. § 53(b). That provision authorizes a lawsuit when the FTC has “reason to
21 believe” that a person, partnership, or corporation is violating or is about to violate any provision
22 of law enforced by the FTC. *Id.* Section 13(b) empowers the district court to grant injunctive
23 relief as the Court may deem appropriate to halt the law violations. *Id.*; *see also AMG Cap.*
24 *Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1346–47, 1352 (2021).

25 ² *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (recognizing that the “unfair
26 competitive practices” that the FTC is authorized to pursue are “not limited to those likely to
have anticompetitive consequences after the manner of the antitrust laws”).

27 ³ The Supreme Court has explained that “[i]t is ... clear that the Federal Trade Commission
28 Act was designed to supplement and bolster the Sherman Act and the Clayton Act ...—to stop in
their incipiency acts and practices which, when full blown, would violate those Acts.” *FTC v.*
Motion Picture Advertising Service Co., 344 U.S. 392, 394–95 (1953).

1 Whichever procedural route the Commission follows, the FTC commissioners are alone
2 charged with deciding whether and where (*i.e.*, administrative or federal court forum) to file a
3 law enforcement action. That decision must be approved by a majority vote. 16 C.F.R. § 4.14.

4 **B. The Administrative Procedure Act**

5 Under the APA § 706(1), a district court may “compel agency action unlawfully withheld
6 or unreasonably delayed.” 5 U.S.C. § 706(1). In making this determination, the court “shall
7 review the whole [administrative] record or those parts of it cited by a party.” *Id.* However,
8 judicial review under the APA is not available where “statutes preclude judicial review” or
9 “agency action is committed to agency discretion by law. *Id.* § 701(a).

10 **IV. STATEMENT OF RELEVANT FACTS**

11 Most of the allegations in the amended complaint pertain to plaintiffs’ claims against
12 non-federal defendant Apple Inc. (“Apple”). With respect to federal defendant the FTC,
13 plaintiffs allege the following facts:

14 On March 12, 2021, counsel for plaintiff Coronavirus Reporter sent an email to the
15 Federal Trade Commission at antitrust@ftc.gov. Am. Compl. ¶ 326. The subject line of the email
16 referenced “Coronavirus Reporter v. Apple, Inc.” Ex. A-1 at 1.⁴ The email stated:

17 To whom it may concern,

18 My client has recently filed this action against Apple, Inc. in the District Court
19 for the District of New Hampshire. It raises concerns about the compan[y’s]
20 policies which violate the Sherman Act. I am writing to you to implore your
21 office to aid in this pursuit in any way you can.

22 Please see attached for your review.

23 Please feel welcome to contact me with any further questions.

24 *Id.* Plaintiffs characterize this email as “submit[ing] an antitrust complaint to the FTC, requesting
25 assistance in prosecuting civil and criminal violations of the Sherman Act.” Am. Compl. ¶ 326.

26 Attached to this email were four documents: (a) an amended complaint for damages and

27 ⁴ Plaintiffs’ counsels’ email to the FTC, and the FTC’s response thereto, are incorporated by
28 reference into the Complaint, *see* Am. Compl. ¶¶ 326–27, and the Court may thus consider them
without converting this motion into a motion for summary judgment. *See* § V, *infra*.

1 injunctive relief in *Coronavirus Reporter v. Apple Inc.*, No. 21-cv-47 (D.N.H.);⁵ (b) a document
2 entitled “CNBC interview corporate min.pdf,” containing Coronavirus Reporter “Officer
3 Minutes”; (c) a document entitled “Robert Roberts short bio 2019.pdf,” containing biographical
4 information for Dr. Robert Roberts; and (d) a document entitled “Roberts CV.pdf,” a fifty-five
5 page curriculum vitae for Dr. Roberts. *See* Ex. A. at ¶¶ 3–7; Ex. A-2, Ex. A-3; Ex. A-4; Ex. A-5.

6 On March 16, 2021, an employee of the Federal Trade Commission sent an email
7 response to plaintiffs’ counsel, indicating that counsel’s March 12, 2021, email “has been
8 forwarded to the appropriate office for review.” Ex. A-1. The Federal Trade Commission has not
9 substantively responded to plaintiffs’ counsel’s email. *See* Am. Compl. ¶ 327. According to
10 plaintiffs, this constitutes “agency action unlawfully withheld,” in violation of the APA § 706(1).
11 *Id.* ¶ 328.

12 Plaintiffs allege that “it is mystifying that the US Government has actively pursued
13 Sherman Act claims against the Google Play Store, but won’t even answer ... complaints to the
14 FTC concerning Apple’s far more egregious behavior.” Am. Compl. ¶ 238. Plaintiffs assert that
15 “[t]o pursue antitrust actions against Android, when it permits application loading, does not
16 require notary stamps, and charges one-quarter Apple’s developer fees is a double-standard.” *Id.*

17 Plaintiffs point to the Federal Trade Commission’s mission: “Protecting consumers and
18 competition by preventing anticompetitive, deceptive, and unfair business practices through law
19 enforcement, advocacy, and education without unduly burdening legitimate business activity.”
20 *Id.* ¶ 32. Plaintiffs assert that “[t]he FTC mission ... requires the FTC to investigate such
21 egregious actions by a monopoly” as that described in plaintiffs’ counsel’s email regarding
22 plaintiffs’ allegations against Apple. *Id.* ¶ 332. Plaintiffs “seek [that the] FTC charge Apple with
23 appropriate Sherman civil and criminal penalties.”⁶ *Id.* ¶ 333.

24 Additionally, plaintiffs cite President Biden’s July 9, 2021, Executive Order 14,036,

25 ⁵ On May 14, 2021, the district court in that case ordered that the case be transferred to the
26 Northern District of California, No. 21-cv-47 (D.N.H.), ECF No. 30, and on July 1, 2021, the
27 court denied the plaintiffs’ motion for reconsideration, *id.*, ECF No. 39. Thereafter, on July, 2,
2021, plaintiffs filed a notice of voluntary dismissal without prejudice, pursuant to Federal Rule
of Civil Procedure 41(a)(1)(A)(i). *Id.*, ECF No. 40.

28 ⁶ The FTC does not have criminal enforcement authority. *See* 15 U.S.C. § 45(m) (authorizing
the Commission to commence a civil action in district court).

1 entitled *Promoting Competition in the American Economy*, which was printed in the Federal
2 Register on July 14, 2021. *See id.* ¶¶ 36, 334; *see also* 86 Fed. Reg. 36,987, 36,987–99 (July 14,
3 2021). Plaintiffs assert that the Executive Order “specifically task[s]” the FTC “to use its
4 statutory rulemaking authority to address ‘unfair competition in Major internet marketplaces.’”
5 Am. Compl. ¶ 36. Plaintiffs “hope[] that any claims against FTC for non-action, arbitrary, and/or
6 capricious enforcement of Sherman will be rendered moot by compliance with the President’s
7 directive.” *Id.* ¶ 335. Plaintiffs seek FTC “assistance and guidelines,” and request[] [that] the
8 agency investigate Plaintiffs’ complaint, take decisive action, and notify the Court of said
9 action.” *Id.*

10 Plaintiffs allege that they have been injured because, in the absence of a response by the
11 FTC to the complaint that they submitted, “Apple has subjected Plaintiff to now eight months of
12 abusive litigation tactics, including filing false federal court pleadings (picked up by the press)
13 that Plaintiffs claims verge on ‘disregard for the law.’” *Id.* ¶ 329. Plaintiff contend that the “FTC
14 can conclude Apple engages in harassing tactics to subvert Sherman litigation.” *Id.* ¶ 330.

15 Plaintiffs’ prayer for relief does not specify any relief sought against the FTC. Am.
16 Compl. at 106–107.

17 **V. LEGAL STANDARDS**

18 Plaintiffs bear the burden of establishing that the Court has the requisite subject matter
19 jurisdiction. Fed. R. Civ. P. 12(b)(1); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,
20 377 (1994). A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may either
21 attack either the allegations of the complaint or the existence of subject matter jurisdiction in
22 fact. *Thornhill Publ’g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). A Rule
23 12(b)(1) motion will be granted when, looking at the entirety of the complaint, its allegations fail
24 to establish jurisdiction either facially or factually. *Safe Air for Everyone v. Meyer*, 373 F.3d
25 1035, 1039 (9th Cir. 2004).

26 Where, as here, a motion to dismiss under Rule 12(b)(1) makes a facial attack on the
27 complaint, asserting that the complaint’s allegations fail to establish subject-matter jurisdiction
28

1 as a matter of law,⁷ the Court “take[s] the allegations in the plaintiff’s complaint as true.”
2 *Whisnant v. United States*, 400 F.3d 1177, 1179 (9th Cir. 2005) (citing *Wolfe v. Strankman*, 392
3 F.3d 358, 362 (9th Cir. 2004)).⁸ The Court may consider well-pled allegations in the complaint
4 as well as documents that are “incorporated by reference” and information subject to judicial
5 notice. *Poorsina v. Xiaosong Zhang*, No. 20cv9119, 2021 WL 1222520, at *5 (N.D. Cal. Mar.
6 31, 2021); *see also Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). A document “may be
7 incorporated by reference into a complaint if the plaintiff refers extensively to the document or
8 the document forms the basis of the plaintiff’s claim.” *United States v. Ritchie*, 342 F.3d 903,
9 908 (9th Cir. 2003). The Court may treat such a document as “part of the complaint, and thus
10 may assume that its contents are true for purposes of a motion to dismiss” *Id.* The Court
11 “need not accept as true allegations contradicting documents that are referenced in the complaint
12 or that are properly subject to judicial notice.” *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588
13 (9th Cir. 2008). Likewise, the Court need not accept “‘naked assertion[s]’ devoid of ‘further
14 factual enhancement,’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
15 *Twombly*, 550 U.S. 544, 557 (2007)), and “the tenet that a court must accept as true all of the
16 allegations contained in a complaint is inapplicable to legal conclusions,” *id.*

17 As with subject matter jurisdiction, plaintiffs bear the burden of showing that venue is
18 proper. *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979). A
19 Rule 12(b)(3) motion challenges the complaint for improper venue. In considering such a
20 motion, “[the] pleadings need not be accepted as true, and facts outside the pleadings may be
21 considered.” *Doe I v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009). Should plaintiffs fail to

22 ⁷ Where a defendant brings a factual challenge, on the other hand, the defendant “disputes the
23 truth of allegations that otherwise would give rise to federal jurisdiction.” *Safe Air for Everyone*,
24 373 F.3d at 1039. “In such circumstances, ‘[n]o presumptive truthfulness attaches to plaintiff’s
25 allegations, and the existence of disputed material facts will not preclude the trial court from
evaluating for itself the merits of jurisdictional claims.” *Augustine v. United States*, 704 F.2d
1074, 1077 (9th Cir. 1983) (quoting *Thornhill Publ’g Co.*, 594 F.2d at 733).

26 ⁸ “‘If the defendant brings a facial attack, arguing that the allegations in the complaint are
27 insufficient to demonstrate the existence of jurisdiction, the court’s inquiry is much the same as
28 when ruling on a motion to dismiss brought under Rule 12(b)(6).” *Herrera v. Cathay Pac.*
Airways Ltd., No. 20cv3019, 2021 WL 673448, at *3 (N.D. Cal. Feb. 21, 2021) (quoting *Org. for*
Advancement of Minorities with Disabilities v. Brick Oven Rest., 406 F. Supp. 2d 1120, 1124
(S.D. Cal. 2005)).

1 satisfy their burden to show proper venue in this district, the court “shall dismiss” the action, 28
2 U.S.C. § 1406(a), but retains discretion to transfer the case “in the interest of justice” to any
3 district where the case could initially have been brought, *id.*; *see also King v. Russell*, 963 F.2d
4 1301, 1304–05 (9th Cir. 1992).

5 A defendant may move to dismiss under Rule 41(b) where plaintiffs fail to comply with
6 the Federal Rules of Civil Procedure. Fed. R. Civ. P. 41(b). In the Ninth Circuit, seeking
7 dismissal under Rule 41(b) is the appropriate procedure where a complaint fails to comply with
8 Rule 8(a), including Rule 8(a)(3)’s requirement to specify relief demanded. *See Nevijel v. N.*
9 *Coast Life Ins. Co.*, 651 F.2d 671, 673 (9th Cir. 1981).

10 VI. ARGUMENT

11 A. The Court Lacks Jurisdiction under § 706(1) of the APA

12 In order for a claim to proceed under § 706(1), plaintiffs must “assert[] that an agency
13 failed to take a discrete agency action that it is required to take.” *Norton v. S. Utah Wilderness*
14 *All.*, 542 U.S. 55, 64 (2004) (“*SUWA*”); *see also, e.g., Hells Canyon Pres. Council v. U.S. Forest*
15 *Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). “Absent such an assertion, a Section 706(1) claim may
16 be dismissed for lack of jurisdiction.” *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008,
17 1019–20 (9th Cir. 2007); *accord Flathead Irrigation Dist. v. Zinke*, 725 F. App’x 507, 510 (9th
18 Cir. 2018); *see also, e.g., N. Cty. Cmty. All., Inc. v. Salazar*, 573 F.3d 738, 744 (9th Cir. 2009)
19 (treating 5 U.S.C. § 706(1) as jurisdictional); *Gros Ventre Tribe v. United States*, 469 F.3d 801,
20 814 (9th Cir. 2006) (same). A court also lacks jurisdiction over a § 706(1) claim where “agency
21 action is committed to agency discretion by law.” 5 U.S.C. § 701(a). Here, plaintiffs lack a valid
22 basis to argue that the FTC failed to take discrete nondiscretionary actions, and therefore the
23 Court should dismiss their “failure to act claim” for lack of jurisdiction. *See, e.g., Gros Ventre*
24 *Tribe*, 469 F.3d at 814.

25 1. There Is No Statutory Provision Requiring the Federal Trade 26 Commission to Respond to Emails or Complaints

27 According to plaintiffs, a lack of response to their counsel’s March 12, 2021, email to the
28 FTC constitutes agency action that has been “unlawfully withheld or unreasonably delayed”

1 under 5 U.S.C. § 706(1). *See* Am. Compl. ¶¶ 327–28. Not so.

2 As noted above, to pursue a claim under the APA § 706(1), plaintiffs must demonstrate
3 that the FTC has “failed to take a discrete agency action that it is required to take.” *SUWA*, 542
4 U.S. at 64. The requirement of action must be unambiguous: In order to state a claim under
5 section 706(1), the Ninth Circuit has held, a party “must at least show ‘agency recalcitrance ... in
6 the face of clear statutory duty or ... of such magnitude that it amounts to an abdication of
7 statutory responsibility.’” *N. Cty. Cmty. All.*, 573 F.3d at 744 (quoting *Confederated Tribes of*
8 *Umatilla Indian Rsrv. v. Bonneville Power Admin.*, 342 F.3d 924, 930 (9th Cir. 2003)); *accord*
9 *Dmitriev v. Chertoff*, No. 06cv7677, 2007 WL 1319533 at *2 (N.D. Cal. May 4, 2007) (holding
10 that “[u]nder the APA, a plaintiff must show that (1) an agency had a nondiscretionary duty to
11 act and (2) the agency unreasonably delayed in acting”). This plaintiffs cannot do, as the FTC
12 does not have a statutory duty to respond to emails, and any FTC response to complaints
13 submitted by the public is discretionary.

14 While the FTC Act authorizes the FTC to gather information and to investigate potential
15 antitrust violations, 15 U.S.C. § 43, the statute does not specify what the FTC must do with the
16 information it gathers, or mandate that the FTC act on this information. *See id.* Thus, plaintiffs
17 cannot show that there is a “discrete” agency action that the FTC is “required to take” with
18 respect to the plaintiffs’ counsel’s email of March 12, 2021. This is especially true given the
19 vague and general nature of the email at issue, which brought to the FTC’s attention recent
20 litigation that the plaintiffs had filed in the District of New Hampshire, and which they later
21 voluntarily dismissed. Ex. A-1; No. 21-cv-47 (D.N.H.), ECF No. 40.

22 The FTC’s Bureau of Competition has published on the FTC’s website a blog post
23 entitled “Inside the antitrust mailbox.”⁹ Ex. A-7 (copy of webpage, [https://www.ftc.gov/news-](https://www.ftc.gov/news-events/blogs/competition-matters/2014/02/inside-antitrust-mailbox)
24 [events/blogs/competition-matters/2014/02/inside-antitrust-mailbox](https://www.ftc.gov/news-events/blogs/competition-matters/2014/02/inside-antitrust-mailbox)). The post provides “tips” for
25 presenting an antitrust complaint to the FTC, and “some insight” into what happens after a
26

27 ⁹ The Court may take judicial notice of publicly available information on federal government
28 websites, including that cited herein and attached. *See Kater v. Churchill Downs Inc.*, 886 F.3d
784, 788 n.3 (9th Cir. 2018); *People With Disabilities Found. v. Colvin*, No. 15cv2570, 2016 WL
2984898, at *3 (N.D. Cal. May 24, 2016).

1 complaint is sent to antitrust@ftc.gov. *Id.* The post advises:

2 Sometimes we hear back from folks who wonder if their complaint led to an
3 investigation. With few exceptions, FTC investigations are not public, so we
4 can't disclose whether an investigation is underway. Information about FTC
5 law enforcement actions is placed on our website only after the agency
6 reaches a settlement or files a lawsuit. But not every complaint will lead to an
7 investigation, and only a few result in an FTC case. The FTC does not choose
8 winners or losers—consumers do that. Nor do we act on behalf of individual
9 consumers or businesses. Rather, our job is to make sure that businesses are
10 competing fairly within a set of rules—the antitrust laws—and to prevent
11 consumer harm in the form of higher prices, fewer choices, poorer service, or
12 less innovation.

13 *Id.* As the post explains, an individual who writes to antitrust@ftc.gov should not expect to
14 receive a substantive response because not every complaint will lead to an FTC investigation,
15 and those complaints that do lead to an investigation will likely still not receive a response
16 because FTC investigations are not public. *See id.* Plaintiffs lack a legal basis to demand a
17 substantive response to their counsel's email.

18 Plaintiffs' amended complaint points to the FTC's mission statement, in an attempt to
19 show that the FTC is required to investigate plaintiffs' allegations against Apple. Am. Compl.
20 ¶¶ 32, 332. But plaintiffs' legal conclusion does not follow. The FTC's mission to "[p]rotect[]
21 consumers and competition by preventing anticompetitive, deceptive, and unfair business
22 practices through law enforcement, advocacy, and education without unduly burdening
23 legitimate business activity," Am. Compl. ¶ 32, does not impose a nondiscretionary burden on
24 the Commission to investigate or act on every complaint about potential antitrust violations
25 submitted by the public. To the contrary, as discussed further below, the FTC's enforcement
26 decisions are committed to agency discretion by law.

27 The Court lacks jurisdiction over plaintiffs' purported APA § 706(1) claim related to the
28 FTC's non-response to plaintiffs' counsel's March 12, 2021, email because the FTC did not have
a nondiscretionary duty to respond to that email or to investigate the allegations attached to it.
See, e.g., Confederated Tribes of Umatilla, 342 F.3d at 930 (where the agency "has no
mandatory duty to act ... judicial review of its alleged delay is unavailable").

1 **2. Plaintiffs Cannot Pursue an APA § 706(1) Claim Based on Any**
2 **Alleged Failure of the Federal Trade Commission to Engage in**
3 **Rulemaking Because the Commission Does Not Have a**
4 **Nondiscretionary Duty to Conduct Rulemaking**

5 Plaintiffs' purported APA § 706(1) claim appears to be focused on the "FTC's failure to
6 issue a decision on Coronavirus Reporter's complaint." Am. Compl. ¶ 328. But even if the
7 amended complaint could be construed as asserting an APA § 706(1) claim with respect to the
8 FTC's failure or delay to engage in rulemaking in response to Executive Order 14,036, *see* Am.
9 Compl. ¶¶ 334, 335, the claim would still fail.

10 “To address persistent and recurrent practices that inhibit competition,” Executive Order
11 14,036 “encourage[s]” the Chair of the FTC “*in the Chair’s discretion*, ... to consider working
12 with the rest of the Commission to exercise the FTC’s statutory rulemaking authority, as
13 appropriate and consistent with applicable law, in areas such as ... unfair competition in major
14 Internet marketplaces.” Exec. Order 14,036 § 5(h), 86 Fed. Reg. at 36,992 (emphasis added).
15 Executive Order 14,036 does not impose a nondiscretionary duty on the FTC Chair. To the
16 contrary, the Executive Order makes clear that it shall be within “the Chair’s discretion” whether
17 to exercise the FTC’s statutory rulemaking authority in this area. *Id.* Further, the Executive Order
18 explicitly states that it “not intended to, and does not, create any right or benefit, substantive or
19 procedural, enforceable at law or in equity by any party against the United States, its
20 departments, agencies, or entities, its officers, employees, or agents, or any other person.” *Id.*
21 § 6(d), 86 Fed. Reg. at 36,999.

22 Because the FTC Chair has “full discretion ... to pursue rulemaking if [she] so chooses,”
23 a claim for failure to engage in rulemaking is “not cognizable under the APA.” *See Moden v.*
24 *U.S. Fish & Wildlife*, No. 08cv214, 2008 WL 4763025, at *5 (D. Or. Oct. 27, 2008). *See also*
25 *SUWA*, 542 U.S. at 63 (“[T]he only agency action that can be compelled under the APA is action
26 legally required.”); *In re Barr Lab’ys., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) (“[W]e have no
27 basis for reordering [the agency’s] priorities. The agency is in a unique—and authoritative—
28 position to review its projects as a whole, estimate the prospects for each, and allocate its
29 resources in the optimal way.”).

1 **3. The Federal Trade Commission’s Enforcement Decisions Are**
2 **Committed to Agency Discretion by Law, and Are Therefore**
3 **Unreviewable under the APA**

4 The APA provides no authority for this Court to enjoin the FTC to take specific
5 enforcement actions against Apple. Enforcement decisions are “committed to agency discretion
6 by law” and not reviewable under the APA. *See* 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470
7 U.S. 821, 828–35 (1985); *see also Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (“[A]n agency’s
8 decision not to institute enforcement proceedings [is] presumptively unreviewable under
9 § 701(a)(2).”).

10 In *Heckler v. Chaney*, the plaintiffs challenged a Department of Health and Human
11 Services decision to refuse to enforce alleged violations within the agency’s jurisdiction and
12 brought suit seeking “various investigatory and enforcement actions to prevent these perceived
13 violations.” *Heckler*, 470 U.S. at 832–34. The Supreme Court rejected plaintiffs’ attempt to force
14 the agency’s hand, ruling that the decision whether to bring an enforcement action is the
15 paradigmatic example of presumptively unreviewable action committed to agency discretion by
16 law, 5 U.S.C. § 701(a)(2). *Heckler*, 470 U.S. at 828–33. Indeed, the Supreme Court “has
17 recognized on several occasions over many years that an agency’s decision not to prosecute or
18 enforce, whether through civil or criminal process, is a decision generally committed to an
19 agency’s absolute discretion,” “attributable in no small part to the general unsuitability for
20 judicial review of agency decisions to refuse enforcement.” *Id.* at 831. In deciding when to
21 enforce a law, “[a]n agency must not only assess whether a violation has occurred, but whether
22 agency resources are best spent on this violation or another ... whether the particular enforcement
23 action requested best fits the agency’s overall policies, and, indeed, whether the agency has
24 enough resources to undertake the action at all.” *Id.* Absent a command from Congress
25 “indicat[ing] an intent to circumscribe agency enforcement discretion” and “provid[ing]
26 meaningful standards for defining the limits of that discretion, “an agency refusal to institute
27 proceedings is a decision ‘committed to agency discretion by law’ within the meaning of [the
28 APA].” *Id.* at 835.

Heckler thus obligates courts to decline review of an agency’s enforcement efforts.

1 Indeed, the Court of Appeals has explained that an agency’s “decision not to take enforcement
2 measures, like a prosecutor’s decision not to indict, is one that is ‘typically committed to the
3 agency’s absolute discretion,’” even where a statute instructs that it “shall” take certain actions in
4 response to a violation. *Sierra Club v. Whitman*, 268 F.3d 898, 903–04 (9th Cir. 2001)
5 (explaining that Clean Water Act’s use of “shall” “does not create mandatory enforcement
6 duties”); *see also Better Mkts., Inc. v. U.S. Dep’t of Justice*, 83 F. Supp. 3d 250, 256 (D.D.C.
7 2015) (citation omitted) (“Choosing whether and how to enforce a statute is the quintessential
8 type of action ‘committed to an agency’s absolute discretion’”; an agency thus “could have
9 declined to pursue any enforcement action against [a regulated entity], and such a decision would
10 have been wholly unreviewable.”).

11 With respect to the FTC in particular, the Supreme Court has emphasized that “the
12 Commission alone is empowered to develop th[e] enforcement policy best calculated to achieve
13 the ends contemplated by Congress and to allocate its available funds and personnel in such a
14 way as to execute its policy efficiency and economically.” *Moog Indus., Inc. v. FTC*, 355 U.S.
15 411, 413 (1958); *see also Pendleton v. Trans Union Sys. Corp.*, 430 F. Supp. 95, 97–98 (E.D. Pa.
16 1977) (noting that “the FTC has exercised its discretion by establishing its enforcement program
17 and deciding what matters should be investigated,” that “[a] court has no authority for interfering
18 with this discretion,” and holding that “[s]ince the action the plaintiffs are attempting to compel
19 ... is not plainly prescribed by statute or regulation, but is within the discretion of the FTC,
20 mandamus relief cannot be granted”). FTC investigations and any decision to bring an
21 enforcement action, whether administratively or in court, are statutorily committed to the FTC’s
22 discretion. *See* 15 U.S.C. §§ 45(b), 53(b) (authorizing enforcement actions when the agency
23 determines that they would be in the public interest). Accordingly, those decisions are not subject
24 to judicial review.

25 The Eleventh Circuit’s decision in *Rush v. Macy’s New York, Inc.*, 775 F.2d 1554 (11th
26 Cir. 1985), is on point. The appellants in that case had sought mandamus to require the FTC to
27 take enforcement actions under one of the statutes that the FTC is authorized to enforce;
28 appellants also sought to compel the FTC to intervene in appellants’ private dispute with Macy’s.

1 *Id.* at 1556, 1558. But, as here, appellants could not show “any such duty to act on the part of the
2 FTC,” and therefore the Eleventh Circuit affirmed the district court’s decision to dismiss the
3 claim against the FTC. Quoting *Heckler*, the Eleventh Circuit observed that “[a]n agency
4 generally cannot act against each technical violation of the statute it is charged with enforcing.”
5 *Id.* at 1558 (quoting *Heckler*, 470 U.S. at 831) (emphasis supplied by Eleventh Circuit opinion).
6 The Eleventh Circuit concluded, “The FTC exercises its enforcement powers at its own
7 discretion.” *Id.*

8 Simply put, “the FTC’s decision whether to take action with respect to a potential
9 violation ... is a quintessential enforcement decision that is committed to the agency’s discretion
10 and is not subject to judicial review.” *Elec. Priv. Info. Ctr. v. FTC*, 844 F. Supp. 2d 98, 101
11 (D.D.C. 2012), *aff’d*, No. 12-5054, 2012 WL 1155661 (D.C. Cir. Mar. 5, 2012). Plaintiffs cannot
12 maintain an APA claim against the FTC because the FTC’s decision whether to investigate or
13 initiate an enforcement action is committed to agency discretion and that discretion is not subject
14 to judicial review. *Id.*

15 **B. Plaintiffs Lack Standing to Sue the Federal Trade Commission**

16 This Court lacks subject matter jurisdiction over plaintiffs’ purported claim against the
17 FTC for another reason: plaintiffs cannot establish standing to sue. Their allegations fail to
18 establish the “irreducible constitutional minimum” of standing under Article III. *See Lujan v.*
19 *Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

20 In order to invoke Article III jurisdiction, plaintiffs must satisfy three requirements: *First*,
21 plaintiffs must show an “injury-in-fact,” which is defined as “an invasion of a legally protected
22 interest that is (a) concrete and particularized [meaning that the injury must affect the plaintiff in
23 a personal and individual way], and (b) actual or imminent, not conjectural or hypothetical.”
24 *Lujan*, 504 U.S. at 560 & n.1 (1992) (citations and quotation marks omitted); *see also Warth v.*
25 *Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740–41 n.16 (1972).
26 *Second*, plaintiffs must demonstrate a “causal connection between the injury and the conduct
27 complained of.” *Lujan*, 504 U.S. at 560. This means that the injury has to be “fairly ...
28 trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent

1 action of some third party.” *Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976).
2 *Third*, the injury in question must be redressable by the relief sought by the complaint. This
3 means that it “must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be
4 ‘redressed by a favorable decision.” *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38); *see*
5 *also Allen v. Wright*, 468 U.S. 737, 750–51 (1984).

6 It is black-letter law that a private plaintiff “lacks standing to compel the investigation or
7 prosecution of another person.” *Graves-Bey v. City & Cty. of San Francisco*, 669 Fed. App’x
8 373, 374 (9th Cir. 2016) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)); *Linda R.S.*,
9 410 U.S. at 619 (“The [Supreme] Court’s ... decisions consistently hold that a citizen lacks
10 standing to contest the policies of the prosecuting authority when he himself is neither
11 prosecuted nor threatened with prosecution[;]... a private citizen lacks a judicially cognizable
12 interest in the prosecution or nonprosecution of another.”). Accordingly, courts consistently
13 conclude that plaintiffs seeking to compel an investigation, as here, fail to establish standing.
14 *See, e.g., id.*; *Robinson v. Cunan*, 489 F. App’x 187 (9th Cir. 2012); *Tia v. Crim. Investigation*
15 *Demanded as Set Forth*, 441 F. App’x 457, 458 (9th Cir. 2011); *Thornton v. Daly City*, No.
16 19cv7638, 2021 WL 4466164, at *3 (N.D. Cal. Aug. 24, 2021) (Chen, J.).

17 Here, the only injuries alleged by plaintiffs’ amended complaint relate to alleged actions
18 by Apple. *See, e.g.*, Am. Compl. ¶ 329 (alleging that Apple “has subjected” plaintiffs to “abusive
19 litigation tactics”). Plaintiffs cannot trace their alleged injuries to the FTC’s alleged failure to
20 take action on the email from their counsel to the FTC. Accepting plaintiffs’ allegations as true
21 (*i.e.*, that they have been subjected to abusive litigation tactics by Apple), the causal connection
22 between plaintiffs’ injuries and the FTC’s alleged conduct are “highly indirect” and “results from
23 the independent action of some third party.” *Allen*, 468 U.S. at 757; *Simon*, 426 U.S. at 42. And,
24 as *Allen* concluded, “[t]he links in the chain of causation between the challenged Government
25 conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents’
26 standing.” *Allen*, 468 U.S. at 759. Further, any causal connection between plaintiffs’ injuries and
27 the FTC’s alleged conduct is purely speculative; even if the FTC had investigated the complaint
28 by plaintiffs or any alleged wrongdoing by Apple, there is no assurance that the Commission

1 would have taken any enforcement action, what the outcome of that action would have been, or
2 whether any resulting remedy would have helped the plaintiffs. Plaintiffs cannot show that the
3 FTC’s alleged failures caused their alleged injuries. *See In re Application for Appointment of*
4 *Indep. Counsel*, 766 F.2d 70, 75–76 (2d Cir. 1985) (finding that plaintiffs lacked standing to seek
5 the appointment of an independent counsel to investigate whether a government informant had
6 given false testimony before a grand jury, even though the allegedly false testimony caused
7 injury to the plaintiffs, because the injury was not traceable to the government’s failure to
8 prosecute).

9 Plaintiffs also fail to establish redressability. It is “speculative at best” whether a court
10 order compelling the FTC to investigate Apple, or to promulgate regulations, would redress the
11 harms plaintiffs claim. *See Levine v. Vilsack*, 587 F.3d 986, 993, 996 (9th Cir. 2009). In *Freedom*
12 *Watch, Inc. v. Sessions*, the plaintiff sought a court order directing the Department of Justice to
13 undertake an investigation of leaks alleged to be emanating from Special Counsel Robert Muller
14 and his staff. The court held that plaintiff failed to establish redressability needed for Article III
15 standing because “while plaintiff has detailed the source of defendants’ authority to undertake
16 investigations, and the reasons why, in plaintiff’s view, they should act, it points to no legal
17 source of a mandatory duty owed to plaintiff to act, and therefore supplies no basis for the
18 Court’s power to order defendants to do so.” *Freedom Watch, Inc. v. Sessions*, 281 F. Supp. 3d
19 159, 163 (D.D.C. 2017), *aff’d*, 729 F. App’x 7 (D.C. Cir. 2018). The plaintiff in that case, as
20 here, failed to show that the court was “capable of granting the relief sought,” and thus could not
21 satisfy the standing element of “redressability.” *Id.* And even if the Court could order the FTC to
22 investigate Apple (which it cannot), it remains completely speculative that any such investigation
23 would lead to the outcome that plaintiffs desire. Plaintiffs can only speculate that such
24 investigation could help them. This is insufficient to establish redressability. *See Lujan*, 504 U.S.
25 at 561.

26 **C. The Court Should Dismiss the Amended Complaint for Improper Venue**
27 **with Respect to the Federal Trade Commission**

28 The amended complaint’s venue allegations only pertain to plaintiffs’ claims against non-

1 federal defendant Apple. *See* Am. Compl. ¶ 24 (asserting that venue in this district “is proper
2 under 15 U.S.C. § 22, which states that any suit proceeding under antitrust laws against a
3 corporation may be brought in any district where it transacts business”). Plaintiffs’ failure to
4 specifically plead venue relating to their purported claim against the FTC is not fatal in and of
5 itself. *See Dudash v. Varnell Struck & Assocs., Inc.*, No. 04cv2478, 2004 WL 2623903, at *4
6 (N.D. Cal. Nov. 16, 2004). Nonetheless, plaintiffs are unable to show that venue properly lies in
7 this district with respect to the FTC.

8 28 U.S.C. § 1391(e) sets forth the general venue requirements for suits against the United
9 States and its agencies. It provides that such actions “may, except as otherwise provided by law,
10 be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial
11 part of the events or omissions giving rise to the claim occurred, ... or (C) the plaintiff resides if
12 no real property is involved in the action.” 28 U.S.C. § 1391(e). The venue requirement “is
13 specific and unambiguous; it is not one of those vague principles which, in the interests of some
14 overriding policy, is to be given a ‘liberal’ construction.” *Olberding v. Ill. Cent. R. Co.*, 346 U.S.
15 338, 340 (1953). “The purpose of statutorily specified venue is to protect the *defendant* against
16 the risk that a plaintiff will select an unfair or inconvenient place of trial.” *Leroy v. Great W.*
17 *United Corp.*, 443 U.S. 173, 183–84 (1979) (emphasis in original). Under 28 U.S.C. § 1406(a), a
18 court “shall dismiss” a case that has been filed in the wrong district unless “the interest of
19 justice” warrants transfer to a district where the case could have been brought.

20 The most direct path to establishing venue under § 1391(e)—the place of residence of
21 plaintiffs or defendant—does not exist here. The plaintiffs reside not in this district, but in
22 Wyoming and New Jersey. Am. Compl. ¶¶ 27–29.¹⁰ Nor does the FTC reside in this district; it
23 resides in Washington, D.C., where it maintains its headquarters. *See Kings Cty. Econ. Cmty.*
24 *Dev. Ass’n v. Hardin*, 333 F. Supp. 1302, 1304 (N.D. Cal. 1971) (“A public official is deemed to
25 ‘reside’ for the purposes of § 1391(e) in the judicial district where he performs his official
26 duties.”); *see also id.* (rejecting argument that venue against a federal agency will lie wherever a

27
28 ¹⁰ Plaintiffs’ amended complaint lists locations for plaintiff Coronavirus Reporter, plaintiff CALID, and plaintiff Primary Productions LLC, Am. Compl. ¶¶ 27–29, but does not indicate where plaintiff Dr. Jeffrey D. Isaacs resides, *see* Am. Compl. ¶ 30.

1 subordinate departmental official resides); *Williams v. United States*, No. 01cv0024, 2001 WL
2 1352885, at *1 (N.D. Cal. Oct. 23, 2001) (“Venue does not lie in every judicial district where a
3 federal agency has a regional office.”).

4 Thus, the only potential basis for venue is 28 U.S.C. § 1391(e)(1)(B), under which
5 plaintiffs must show that “a substantial part of the events giving rise to the claim occurred” in
6 this district. 28 U.S.C. § 1391(e)(1)(B). ““To determine whether a substantial part of the events
7 giving rise to the claim occurred in the forum, the court first considers what acts or omissions by
8 the defendants give rise to the plaintiffs’ claims.” *Saravia v. Sessions*, 280 F. Supp. 3d 1168,
9 1189 (N.D. Cal. 2017) (quoting in *United Tactical Sys. LLC v. Real Action Paintball, Inc.*, 108 F.
10 Supp. 3d 733, 752 (N.D. Cal. 2015)). “After ‘identifying the alleged wrongful acts, the court
11 must determine whether a substantial part of those acts took place in the forum.’” *Id.* (quoting
12 *All. for Multilingual Multicultural Educ. v. Garcia*, No. 11cv0215, 2011 WL 2532478, at *7
13 (N.D. Cal. June 24, 2011)); accord *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1372 (11th Cir.
14 2003). “What constitutes a ‘substantial part’ is likely to be determined in light of the purpose of
15 the venue statute: *i.e.*, to protect the defendant from having to defend in an unreasonably
16 burdensome forum.” *Remley v. Lockheed Martin Corp.*, No. 00cv2495, 2001 WL 681257, at *3
17 (N.D. Cal. June 4, 2001) (quoting Federal Civil Procedure Before Trial ¶ 4:123 (2000)).

18 Here, plaintiffs allege that their attorney (who is located in New Hampshire, *see* Am.
19 Compl. at 107) sent an email to the FTC at antitrust@ftc.gov, and the FTC failed to respond.
20 Am. Compl. ¶¶ 325, 326. The Court can take judicial notice of the fact that the email address
21 “antitrust@ftc.gov” belongs to the FTC’s Bureau of Competition. *See* n.9, *supra*; Ex. A-6 (FTC
22 webpage entitled “Report An Antitrust Violation,” [https://www.ftc.gov/faq/competition/report-
23 antitrust-violation](https://www.ftc.gov/faq/competition/report-antitrust-violation), showing that emails may be submitted to the Bureau of Competition via this
24 email address). The Bureau of Competition’s office is located at FTC headquarters, 600
25 Pennsylvania Avenue, NW, Washington, DC. *See id.* All “acts or omissions” by the FTC took
26 place in Washington, DC, not in this district.

27 Because plaintiff has not established that venue properly lies in this district, the Court
28 should dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(3). Given the

1 jurisdictional defects with plaintiffs' amended complaint, it would not serve the interests of
2 justice to transfer this matter to another district, and dismissal is appropriate. *See* 28 U.S.C.
3 § 1406(a).

4 **D. Plaintiffs Fail to Comply with Federal Rule of Civil Procedure 8(a) Because**
5 **They Do Not Specify the Relief They Seek Against the Federal Trade**
6 **Commission**

7 In addition to the bases for dismissal addressed above, dismissal would be also
8 appropriate on the ground that plaintiffs have not complied with Federal Rule of Civil Procedure
9 8(a) because they have not specified the relief they seek against the FTC. *See, e.g., Moore v.*
10 *United States*, 193 F.R.D. 647, 652 (N.D. Cal. 2000). As noted in section V above, "a complaint
11 which fails to comply with rule 8(a) ... may be dismissed with prejudice pursuant to rule
12 41(b)."¹¹ *Nevijel*, 651 F.2d at 673; *see also Schmidt v. Herrmann*, 614 F.2d 1221, 1223–24 (9th
13 Cir. 1980); *Agnew v. Moody*, 330 F.2d 868, 870 (9th Cir. 1964). Rule 41(b) provides in pertinent
14 part: "For failure of the plaintiff ... to comply with these rules ..., a defendant may move for
15 dismissal of an action or of any claim against him.... Unless the court in its order for dismissal
16 otherwise specifies, a dismissal under this subdivision ... operates as an adjudication upon the
17 merits." Fed. R. Civ. P. 41(b).

18 Rule 8(a) provides that a complaint must include: (1) "a short and plain statement of the
19 grounds for the court's jurisdiction;" (2) "a short and plain statement of the claim showing that
20 the pleader is entitled to relief;" and (3) "a demand for the relief sought." Fed. R. Civ. P. 8(a).
21 Plaintiffs fail to satisfy these pleading requirements because they do not specify the relief they
22 seek against the FTC. *See* 5 Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.*
23 § 1255 (4th ed.) (explaining that Rule 8(a)(3) requires that "a pleading asserting a claim for relief
24 shall contain a demand for judgment for the relief to which the pleader believes himself or

25 ¹¹ Alternatively, some courts have held that have held that a plaintiff's failure to demand relief
26 and thus comport with Rule 8(a) justifies dismissal of the complaint under Federal Rule of Civil
27 Procedure 12(b)(6). *See, e.g., Andrianumearisata v. Gem State Staffing*, No. 20cv547, 2021 WL
28 2692334, at *4 (D. Idaho June 30, 2021); *Adams v. A E Door & Windows*, No. 17cv602, 2018
WL 1322240, at *2 (S.D. Ohio Mar. 13, 2018) (listing cases), *report and recommendation*
adopted, No. 17cv602, 2018 WL 2735527 (S.D. Ohio June 7, 2018); *Kilpatrick v. Michelle*, No.
12cv1554, 2012 WL 2428440, at *2 (E.D. Cal. June 26, 2012).

1 herself entitled”). The amended complaint’s demand for relief outlines only the relief plaintiffs
 2 seek against non-federal defendant Apple, and does not list any specific relief that they seek
 3 against the FTC. *See* Am. Compl. at 106–07; *cf.* Fed. R. Civ. P. 8(a)(3). The closest plaintiffs get
 4 to demanding judicial relief against the FTC is to request that the Court “[g]rant any further relief
 5 as may be fair and just.”¹² Am. Compl. at 107. Such a demand is far too generalized to meet the
 6 pleading standard of Rule 8(a)(3). *See, e.g., Applegate v. Arizona*, No. 10cv47, 2010 WL
 7 4574460, at *3 (D. Ariz. Nov. 5, 2010) (prayer for relief seeking “compliance” was “too
 8 generalized to inform either the Court, or Defendants, of exactly what relief” the plaintiff hoped
 9 to obtain from the action). Because plaintiffs have failed to include in their amended complaint “a
 10 demand for the relief sought” from this Court against the FTC, *see* Fed. R. Civ. P. 8(a)(3), the
 11 Court should dismiss their purported claim against the FTC. *See Ignacio v. Judges of U.S. Ct. of*
 12 *Appeals for Ninth Cir.*, 453 F.3d 1160, 1165 (9th Cir. 2006) (holding that district court properly
 13 dismissed complaint that contained no prayer for relief); *McHenry v. Renne*, 84 F.3d 1172, 1177
 14 (9th Cir. 1996) (affirming dismissal with prejudice of amended complaint that did not comply
 15 with Rule 8(a)).

16 **E. The Court Should Dismiss the Amended Complaint’s Purported Claim**
 17 **Against the Federal Trade Commission Without Leave to Amend**

18 Dismissal without leave to amend is appropriate where “it is clear that ... [the] complaint
 19 cannot be cured by amendment.” *Cato v. United States*, 70 F.3d 1103, 1105 (9th Cir. 1995);
 20 *accord Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (“[A]
 21 district court may dismiss without leave [to amend] where ... amendment would be futile.”). That
 22 is the case here. Plaintiffs’ theory of liability “fall[s] outside the limited waiver of sovereign
 23 immunity by the United States” in the APA. *See Cato*, 70 F.3d at 1105. Because the APA itself

24 _____
 25 ¹² Plaintiffs’ statements in paragraphs 333 and 335 of their amended complaint, in the section
 26 describing plaintiffs’ “FTC Cause of Action,” do not qualify as a “demand for the relief sought”
 27 under Rule 8(a)(3) because they do not articulate the relief that plaintiffs seek from this Court
 28 against the FTC. Those statements describe action requested from the FTC, not a demand for
 relief to be granted by this Court. *See* Am. Compl. ¶ 333 (“Plaintiffs seek FTC charge Apple with
 appropriate Sherman civil and criminal penalties.”); *id.* ¶ 335 (“FTC assistance and guidelines
 for enforcing these relatively new app marketplace claims would substantially reduce burden on
 small startups, and moreover, the Court. It is therefore requested the agency investigate
 Plaintiffs’ complaint, take decisive action, and notify the Court of said action.”).

1 precludes plaintiffs’ claim, “any attempt to amend the complaint would be futile.” *DCR*
2 *Workforce, Inc. v. Coupa Software Inc.*, No. 21cv6066, 2021 WL 4776700, at *12 (N.D. Cal.
3 Oct. 13, 2021) (Chen, J.).

4 **VII. CONCLUSION**

5 For the foregoing reasons, the Court should grant the FTC’s motion to dismiss the
6 amended complaint’s purported claim against the FTC, and should do so without leave to amend.

7 Dated: November 8, 2021

8 Respectfully submitted,

9 BRIAN M. BOYNTON
Acting Assistant Attorney General

10 LESLEY R. FARBY
Assistant Branch Director

11 /s/ Lisa Zeidner Marcus
12 LISA ZEIDNER MARCUS (N.Y. Bar 4461679)
13 Senior Counsel
14 United States Department of Justice
15 Civil Division, Federal Programs Branch
16 1100 L St., NW, Twelfth Floor
17 Washington, DC 20530
18 Telephone: (202) 514-3336
19 Facsimile: (202) 616-8470
20 lisa.marcus@usdoj.gov

21 *Counsel for Federal Defendant*