APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSEMARIE VARGAS; et al., Plaintiffs-Appellants, and NEUHTAH OPIOTENNIONE; JESSICA TSAI, Plaintiffs, v. FACEBOOK, INC., Defendant-Appellee.	No. 21-16499 D.C. No. 3:19-cv-05081-WHO Northern District of California, San Francisco ORDER Oct. 13, 2023

Before: M. MURPHY,* GRABER, and OWENS, Circuit Judges.

The memorandum disposition filed on June 23, 2023, is hereby amended. The amended disposition and Judge Owens' dissent will be filed concurrently with this order.

With the memorandum disposition so amended, Judge Murphy and Judge Graber have voted to deny the petition for panel rehearing. Judge Owens has voted to grant the petition for panel rehearing. Judge Murphy and Judge Graber have recommended denial of the petition for rehearing en banc. Judge Owens has voted to grant the petition for rehearing en banc.

* The Honorable Michael R. Murphy, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

The full court has been advised of Appellee's petition for rehearing en banc, and no judge of the court has requested a vote on it.

The petition for panel rehearing and rehearing en banc, Docket No. 80, is DENIED. No further petitions for rehearing or rehearing en banc will be entertained.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSEMARIE VARGAS; et al., Plaintiffs-Appellants, and NEUHTAH OPIOTENNIONE; JESSICA TSAI, Plaintiffs, v. FACEBOOK, INC., Defendant-Appellee.	No. 21-16499 D.C. No. 3:19-cv-05081-WHO AMENDED MEMORANDUM* Oct. 13, 2023

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Argued and Submitted July 28, 2022
Withdrawn January 9, 2023
Resubmitted June 20, 2023
San Francisco, California

Before: M. MURPHY,** GRABER, and OWENS, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Michael R. Murphy, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

Plaintiffs Rosemarie Vargas, Jazmine Spencer, Kisha Skipper, Deillo Richards, and Jenny Lin appeal from the dismissal of their Third Amended Class Action complaint against Defendant Facebook, Inc. We review the dismissal de novo, Meland v. Weber, 2 F.4th 838, 843 (9th Cir. 2021), and reverse and remand for further proceedings.

1. The district court erred by dismissing the operative complaint for failure to allege a concrete injury sufficient to confer Article III standing. "[A]t the pleading stage, the plaintiff must allege sufficient facts that, taken as true, 'demonstrate each element' of Article III standing." Jones v. L.A. Cent. Plaza LLC, 74 F.4th 1053, 1057 (9th Cir. 2023) (alteration adopted) (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016)). Plaintiffs have done so here.

The operative complaint alleges that Facebook's "targeting methods provide tools to exclude women of color, single parents, persons with disabilities and other protected attributes," so that Plaintiffs were "prevented from having the same opportunity to view ads for housing" that Facebook users who are not in a protected class received.

Plaintiff Vargas provides an example. She alleges that she is a disabled female of Hispanic descent and a single parent living in New York City with her two minor children and that she is a frequent Facebook user who has posted photos of herself and her children. Because of her use of Facebook, the platform knew that she was "a single parent, disabled female of Hispanic descent." She sought housing from August 2018 through April 2019 and was ready, willing, and able to move. In an effort to find housing, she accessed the Facebook Marketplace. Although she sought housing in Manhattan, her Facebook searches yielded

no ads for housing in Manhattan. After receiving unsatisfactory search results, in early 2019, Plaintiff Vargas sat side by side with a Caucasian friend "and conducted a search for housing through Facebook's Marketplace, both using the same search criteria . . . . [The Caucasian friend] received more ads for housing in locations that were preferable to Plaintiff Vargas. Plaintiff Vargas did not receive the ads that [the friend] received." Third Am. Compl. at 24 (emphases added). In other words, her Caucasian friend saw more, and more responsive, ads than Plaintiff Vargas received even though they used identical search criteria. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–74 (1982) (holding that racially diverse "testers" attempting to obtain truthful information about available housing had standing to sue under the Fair Housing Act of 1968).

The district court faulted the complaint for not identifying specific ads that Plaintiff Vargas did not see. But Plaintiffs' very claim is that Facebook's practices concealed information from housing-seekers in protected classes. And nothing in the case law requires that a plaintiff identify specific ads that she could not see when she alleges that an ad-delivery algorithm restricted her access to housing ads in the first place.

The district court also relied on the fact that only paid ads used Facebook's targeting methods, and Plaintiffs do not specify whether the ads that Plaintiff Vargas's Caucasian friend saw (and that Plaintiff Vargas did not) were paid ads. The operative complaint alleges that Facebook hosts a vast amount of paid advertising but does not allege that all ads on the Marketplace are paid ads. Nonetheless, given the allegations concerning the magnitude of paid

advertising, it is plausible to infer that one or more of the ads that Plaintiff Vargas could not access because of Facebook's methods was paid. If Plaintiff Vargas cannot prove that she was denied access to one or more paid ads, then her claims will fail on the merits—but they do not fail for lack of standing. See Cath. League for Religious & Civil Rts. v. City & County of San Francisco, 624 F.3d 1043, 1049 (9th Cir. 2010) (en banc) ("Nor can standing analysis, which prevents a claim from being adjudicated for lack of jurisdiction, be used to disguise merits analysis, which determines whether a claim is one for which relief can be granted if factually true."). Plaintiff Vargas alleges a concrete and particularized injury—deprivation of truthful information and housing opportunities—whether or not she can establish all the elements of her claims later in the litigation.

2. The district court also erred by holding that Facebook is immune from liability pursuant to 47 U.S.C. § 230(c)(1). "Immunity from liability exists for '(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a [federal or] state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.'" Dyroff v. Ultimate Software Grp., 934 F.3d 1093, 1097 (9th Cir. 2019) (quoting Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100 (9th Cir. 2009)). We agree with Plaintiffs that, taking the allegations in the complaint as true, Plaintiffs' claims challenge Facebook's conduct as a co-developer of content and not merely as a publisher of information provided by another information content provider.

Facebook created an Ad Platform that advertisers could use to target advertisements to categories of users. Facebook selected the categories, such as sex,

number of children, and location. Facebook then determined which categories applied to each user. For example, Facebook knew that Plaintiff Vargas fell within the categories of single parent, disabled, female, and of Hispanic descent. For some attributes, such as age and gender, Facebook requires users to supply the information. For other attributes, Facebook applies its own algorithms to its vast store of data to determine which categories apply to a particular user.

The Ad Platform allowed advertisers to target specific audiences, both by including categories of persons and by excluding categories of persons, through the use of drop-down menus and toggle buttons. For example, an advertiser could choose to exclude women or persons with children, and an advertiser could draw a boundary around a geographic location and exclude persons falling within that location. Facebook permitted all paid advertisers, including housing advertisers, to use those tools. Housing advertisers allegedly used the tools to exclude protected categories of persons from seeing some advertisements.

As the website's actions did in Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008) (en banc), Facebook's own actions "contribute[d] materially to the alleged illegality of the conduct." Id. at 1168. Facebook created the categories, used its own methodologies to assign users to the categories, and provided simple drop-down menus and toggle buttons to allow housing advertisers to exclude protected categories of persons. Facebook points to three primary aspects of this case that arguably differ from the facts in Roommates.com, but none affects our conclusion that Plaintiffs' claims challenge Facebook's own actions.

First, in Roommates.com, the website required users who created profiles to self-identify in several protected categories, such as sex and sexual orientation. Id. at 1161. The facts here are identical with respect to two protected categories because Facebook requires users to specify their gender and age. With respect to other categories, it is true that Facebook does not require users to select directly from a list of options, such as whether they have children. But Facebook uses its own algorithms to categorize the user. Whether by the user's direct selection or by sophisticated inference, Facebook determines the user's membership in a wide range of categories, and Facebook permits housing advertisers to exclude persons in those categories. We see little meaningful difference between this case and Roommates.com in this regard. Facebook was "much more than a passive transmitter of information provided by others; it [was] the developer, at least in part, of that information." Id. at 1166. Indeed, Facebook is more of a developer than the website in Roommates.com in one respect because, even if a user did not intend to reveal a particular characteristic, Facebook's algorithms nevertheless ascertained that information from the user's online activities and allowed advertisers to target ads depending on the characteristic.

Second, Facebook emphasizes that its tools do not require an advertiser to discriminate with respect to a protected ground. An advertiser may opt to exclude only unprotected categories of persons or may opt not to exclude any categories of persons. This distinction is, at most, a weak one. The website in Roommates.com likewise did not require advertisers to discriminate, because users could select the option that corresponded to all persons of a particular category, such as "straight or gay." See, e.g., id. at 1165

("Subscribers who are seeking housing must make a selection from a drop-down menu, again provided by Roommate[s.com], to indicate whether they are willing to live with 'Straight or gay' males, only with 'Straight' males, only with 'Gay' males or with 'No males.'"). The manner of discrimination offered by Facebook may be less direct in some respects, but as in Roommates.com, Facebook identified persons in protected categories and offered tools that directly and easily allowed advertisers to exclude all persons of a protected category (or several protected categories).

Finally, Facebook urges us to conclude that the tools at issue here are "neutral" because they are offered to all advertisers, not just housing advertisers, and the use of the tools in some contexts is legal. We agree that the broad availability of the tools distinguishes this case to some extent from the website in Roommates.com, which pertained solely to housing. But we are unpersuaded that the distinction leads to a different ultimate result here. According to the complaint, Facebook promotes the effectiveness of its advertising tools specifically to housing advertisers. "For example, Facebook promotes its Ad Platform with 'success stories,' including stories from a housing developer, a real estate agency, a mortgage lender, a real estate-focused marketing agency, and a search tool for rental housing." A patently discriminatory tool offered specifically and knowingly to housing advertisers does not become "neutral" within the meaning of this doctrine simply because the tool is also offered to others.

REVERSED and REMANDED.

OWENS, Circuit Judge, dissenting:

I respectfully dissent. Each of Plaintiffs' theories of injury—denial of truthful information, denial of the opportunity to obtain a benefit, denial of the social benefit of living in an integrated community, and stigmatic injury—depends on Plaintiffs having been personally discriminated against by at least one housing advertiser that used Facebook's Ad Platform. Thus, to survive a motion to dismiss, Plaintiffs would need to plausibly allege that a housing ad that would otherwise have appeared in their News Feeds or in their search results on Facebook Marketplace did not appear because the advertiser used Facebook's Ad Platform to exclude their protected class. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555- 57 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

As to each named plaintiff, the Third Amended Complaint ("TAC") does not identify any such ad or advertiser. Nor does it allege facts supporting an inference that housing discrimination (even if the identities of the ads and advertisers are unknown) is plausibly the reason Plaintiffs failed to find housing ads meeting their respective search criteria. Plaintiffs have alleged nothing to exclude the possibility that suitable housing was not available or not advertised on Facebook. *See Iqbal*, 556 U.S. at 682 (finding that an allegation of discrimination was not plausible in view of one "obvious alternative explanation").

Although Vargas alleges in Paragraph 95 of the TAC that her Caucasian friend, while using the same search criteria, received ads on Facebook Marketplace that she did not, she does not specify whether the ads her Caucasian friend saw were user-generated or paid (i.e., created using the Ad Platform and its audience selection tools). Users can distinguish paid ads from

user-generated ads by the label "Sponsored." *See* Andrew Hutchinson, *Facebook Provides New Option to Boost Marketplace Posts, and Marketplace Ads for Businesses*, SocialMediaToday (June 7, 2018), https://www.socialmediatoday.com/news/facebook-provides-new-option-to-boost-marketplace-posts-and-marketplace-ad/525158/. Only paid ads are relevant to Vargas's housing discrimination claims.

Accordingly, I would affirm the district court's dismissal for failure to allege a concrete injury sufficient to confer standing.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSEMARIE VARGAS; et al., Plaintiffs-Appellants, and NEUHTAH OPIOTENNIONE; JESSICA TSAI, Plaintiffs, v. FACEBOOK, INC., Defendant-Appellee.	No. 21-16499 D.C. No. 3:19-cv-05081-WHO MEMORANDUM[*] June 23, 2023

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for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Argued and Submitted July 28, 2022
Withdrawn January 9, 2023
Resubmitted June 20, 2023
San Francisco, California

Before: M. MURPHY,[**] GRABER, and OWENS, Circuit Judges. Dissent by Judge OWENS.

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Michael R. Murphy, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

Plaintiffs Rosemarie Vargas, Jazmine Spencer, Kisha Skipper, Deillo Richards, and Jenny Lin appeal from the dismissal of their Third Amended Class Action complaint against Defendant Facebook, Inc. We review the dismissal de novo, Meland v. Weber, 2 F.4th 838, 843 (9th Cir. 2021), and reverse and remand for further proceedings.

1. The district court erred by dismissing the operative complaint for failure to allege a concrete injury sufficient to confer Article III standing. Under Federal Rule of Civil Procedure 12, the bar to allege standing is not high. See Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011) (holding that "Twombly and Iqbal are ill-suited to application in the constitutional standing context"); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." (brackets omitted) (citation and internal quotation marks omitted)). And we must accept all factual allegations as true. See Warth v. Seldin, 422 U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.").

The operative complaint alleges that Facebook's "targeting methods provide tools to exclude women of color, single parents, persons with disabilities and other protected attributes," so that Plaintiffs were "prevented from having the same opportunity to view

ads for housing" that Facebook users who are not in a protected class received.

Plaintiff Vargas provides an example. She alleges that she is a disabled female of Hispanic descent and a single parent living in New York City with her two minor children and that she is a frequent Facebook user who has posted photos of herself and her children. Because of her use of Facebook, the platform knew that she was "a single parent, disabled female of Hispanic descent." She sought housing from August 2018 through April 2019 and was ready, willing, and able to move. In an effort to find housing, she accessed the Facebook Marketplace. Although she sought housing in Manhattan, her Facebook searches yielded no ads for housing in Manhattan. After receiving unsatisfactory search results, in early 2019, Plaintiff Vargas sat side by side with a Caucasian friend "and conducted a search for housing through Facebook's Marketplace, both using the same search criteria . . . . [The Caucasian friend] received more ads for housing in locations that were preferable to Plaintiff Vargas. Plaintiff Vargas did not receive the ads that [the friend] received." Third Am. Compl. at 24 (emphases added). In other words, her Caucasian friend saw more, and more responsive, ads than Plaintiff Vargas received even though they used identical search criteria. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–74 (1982) (holding that racially diverse "testers" attempting to obtain truthful information about available housing had standing to sue under the Fair Housing Act of 1968).

The district court faulted the complaint for not identifying specific ads that Plaintiff Vargas did not see. But Plaintiffs' very claim is that Facebook's practices concealed information from housing-seekers in

protected classes. And nothing in the case law requires that a plaintiff identify specific ads that she could not see when she alleges that an ad-delivery algorithm restricted her access to housing ads in the first place.

The district court also relied on the fact that only paid ads used Facebook's targeting methods, and Plaintiffs do not specify whether the ads that Plaintiff Vargas's Caucasian friend saw (and that Plaintiff Vargas did not) were paid ads. The operative complaint alleges that Facebook hosts a vast amount of paid advertising but does not allege that all ads on the Marketplace are paid ads. Nonetheless, given the allegations concerning the magnitude of paid advertising, it is plausible to infer that one or more of the ads that Plaintiff Vargas could not access because of Facebook's methods was paid. If Plaintiff Vargas cannot prove that she was denied access to one or more paid ads, then her claims will fail on the merits—but they do not fail for lack of standing. See Cath. League for Religious & Civil Rts. v. City & County of San Francisco, 624 F.3d 1043, 1049 (9th Cir. 2010) (en banc) ("Nor can standing analysis, which prevents a claim from being adjudicated for lack of jurisdiction, be used to disguise merits analysis, which determines whether a claim is one for which relief can be granted if factually true."). Plaintiff Vargas alleges a concrete and particularized injury—deprivation of truthful information and housing opportunities—whether or not she can establish all the elements of her claims later in the litigation.

2. The district court also erred by holding that Facebook is immune from liability pursuant to 47 U.S.C. § 230(c)(1). "Immunity from liability exists for '(1) a provider or user of an interactive computer

service (2) whom a plaintiff seeks to treat, under a [federal or] state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.'" Dyroff v. Ultimate Software Grp., 934 F.3d 1093, 1097 (9th Cir. 2019) (quoting Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100 (9th Cir. 2009)). We agree with Plaintiffs that, taking the allegations in the complaint as true, Plaintiffs' claims challenge Facebook's conduct as a co-developer of content and not merely as a publisher of information provided by another information content provider.

Facebook created an Ad Platform that advertisers could use to target advertisements to categories of users. Facebook selected the categories, such as sex, number of children, and location. Facebook then determined which categories applied to each user. For example, Facebook knew that Plaintiff Vargas fell within the categories of single parent, disabled, female, and of Hispanic descent. For some attributes, such as age and gender, Facebook requires users to supply the information. For other attributes, Facebook applies its own algorithms to its vast store of data to determine which categories apply to a particular user.

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allegedly used the tools to exclude protected categories of persons from seeing some advertisements.

As the website's actions did in Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008) (en banc), Facebook's own actions "contribute[d] materially to the alleged illegality of the conduct." Id. at 1168. Facebook created the categories, used its own methodologies to assign users to the categories, and provided simple drop-down menus and toggle buttons to allow housing advertisers to exclude protected categories of persons. Facebook points to three primary aspects of this case that arguably differ from the facts in Roommates.com, but none affects our conclusion that Plaintiffs' claims challenge Facebook's own actions.

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website in Roommates.com in one respect because, even if a user did not intend to reveal a particular characteristic, Facebook's algorithms nevertheless ascertained that information from the user's online activities and allowed advertisers to target ads depending on the characteristic.

Second, Facebook emphasizes that its tools do not require an advertiser to discriminate with respect to a protected ground. An advertiser may opt to exclude only unprotected categories of persons or may opt not to exclude any categories of persons. This distinction is, at most, a weak one. The website in Roommates.com likewise did not require advertisers to discriminate, because users could select the option that corresponded to all persons of a particular category, such as "straight or gay." See, e.g., id. at 1165 ("Subscribers who are seeking housing must make a selection from a drop-down menu, again provided by Roommate[s.com], to indicate whether they are willing to live with 'Straight or gay' males, only with 'Straight' males, only with 'Gay' males or with 'No males.'"). The manner of discrimination offered by Facebook may be less direct in some respects, but as in Roommates.com, Facebook identified persons in protected categories and offered tools that directly and easily allowed advertisers to exclude all persons of a protected category (or several protected categories).

Finally, Facebook urges us to conclude that the tools at issue here are "neutral" because they are offered to all advertisers, not just housing advertisers, and the use of the tools in some contexts is legal. We agree that the broad availability of the tools distinguishes this case to some extent from the website in Roommates.com, which pertained solely to housing. But we are unpersuaded that the distinction leads to

a different ultimate result here. According to the complaint, Facebook promotes the effectiveness of its advertising tools specifically to housing advertisers. "For example, Facebook promotes its Ad Platform with 'success stories,' including stories from a housing developer, a real estate agency, a mortgage lender, a real estate-focused marketing agency, and a search tool for rental housing." A patently discriminatory tool offered specifically and knowingly to housing advertisers does not become "neutral" within the meaning of this doctrine simply because the tool is also offered to others.

REVERSED and REMANDED.

OWENS, Circuit Judge, dissenting:

I respectfully dissent. Each of Plaintiffs' theories of injury—denial of truthful information, denial of the opportunity to obtain a benefit, denial of the social benefit of living in an integrated community, and stigmatic injury—depends on Plaintiffs having been personally discriminated against by at least one housing advertiser that used Facebook's Ad Platform. Thus, to survive a motion to dismiss, Plaintiffs would need to plausibly allege that a housing ad that would otherwise have appeared in their News Feeds or in their search results on Facebook Marketplace did not appear because the advertiser used Facebook's Ad Platform to exclude their protected class. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555- 57 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

As to each named plaintiff, the Third Amended Complaint ("TAC") does not identify any such ad or advertiser. Nor does it allege facts supporting an inference that housing discrimination (even if the identities of the ads and advertisers are unknown) is plausibly the reason Plaintiffs failed to find housing ads meeting their respective search criteria. Plaintiffs have alleged nothing to exclude the possibility that suitable housing was not available or not advertised on Facebook. *See Iqbal*, 556 U.S. at 682 (finding that an allegation of discrimination was not plausible in view of one "obvious alternative explanation").

Although Vargas alleges in Paragraph 95 of the TAC that her Caucasian friend, while using the same search criteria, received ads on Facebook Marketplace that she did not, she does not specify whether the ads her Caucasian friend saw were user-generated or paid (i.e., created using the Ad Platform and its audience selection tools). Users can distinguish paid ads from

user-generated ads by the label "Sponsored." *See* Andrew Hutchinson, *Facebook Provides New Option to Boost Marketplace Posts, and Marketplace Ads for Businesses*, SocialMediaToday (June 7, 2018), https://www.socialmediatoday.com/news/facebook-provides-new-option-to-boost-marketplace-posts-and-marketplace-ad/525158/. Only paid ads are relevant to Vargas's housing discrimination claims.

Accordingly, I would affirm the district court's dismissal for failure to allege a concrete injury sufficient to confer standing.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROSEMARIE VARGAS, et al., Plaintiffs, v. FACEBOOK, INC., Defendant.	Case No. 19-cv-05081-WHO **ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE** Re: Dkt. No. 92 Aug. 20, 2021

In an Order dated January 21, 2021, I dismissed plaintiffs' Second Amended Complaint with leave to amend, requiring plaintiffs to add specific facts regarding the searches they performed looking for housing on defendant Facebook, Inc.'s platform in order to attempt to plead a plausible injury in support of their standing. January 2021 Order, Dkt. No. 86. I directed them to state facts regarding matters within their knowledge about their use of Facebook to search for housing, specifically what type of housing they searched for, during what time frames, and what results were returned. *Id*. at 10-11.

On March 3, 2021, plaintiffs filed the Third Amended Complaint ("TAC"). Dkt. No. 89. While plaintiffs have added additional details regarding the searches they performed, those additional details do not plausibly demonstrate that they were injured by any housing advertiser's possible use of Facebook's now-discontinued targeting criteria that could be used

to direct paid ads at specific categories of persons.[1] And even if plaintiffs had been able to allege facts plausibly supporting a harm to any of them sufficient to confer standing, the claims plaintiffs' assert are barred by the Communications Decency Act. The TAC is DISMISSED WITH PREJUDICE.

BACKGROUND

The TAC reasserts claims under the federal Fair Housing Act[2] and analogous California[3] and New York[4] laws challenging Facebook, Inc.'s former practice of allowing advertisers to self- select target audiences for their paid housing advertisements ("Targeted Ads" or "Ads"), theoretically excluding protected classes of consumers from seeing those advertisers' particular housing ads.

I dismissed plaintiffs' Second Amended Complaint ("SAC"), following the analyses of two other Northern District of California cases that dismissed challenges to Facebook's Targeted Ad tools under other anti-

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[1] Plaintiffs note that Facebook was sued over the use of the targeting criteria tools by "the National Fair Housing Alliance and others, which resulted in a settlement in which Facebook purportedly vowed to revise its housing advertising practices to comply with the FHA by the end of 2019." TAC ¶ 3; *see also id.* ¶ 52 n.5 ("Based on settlement agreements Facebook has entered into with various fair housing organizations, Facebook has publicly claimed it no longer illegally targets housing ads and it no longer allows housing advertisers to use its Ad Platform to target ads based on protected classes.").

[2] FHA, 42 U.S.C. § 3604 *et seq*.

[3] California Fair Employment and Housing Act (FEHA), Cal. Govt. Code § 12940 *et seq*. and California Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq*.

[4] New York State Human Rights Law, N.Y. Exec. Law § 296.

discrimination laws for lack of standing. I held that plaintiffs' standing allegations were deficient because:

> There are, in short, no facts showing that any of the plaintiffs were plausibly injured personally by the ad-targeting tools that advertisers purportedly used to possibly target housing ads in areas that plaintiffs possibly searched that plausibly resulted in plaintiffs not receiving ads for housing based on the aspects of their protected classifications that they otherwise would have been in a position to pursue

January 2021 Order at 9. I directed that plaintiffs plead:

> [T]he facts within their exclusive knowledge, explaining what they actually did with respect to their use of Facebook to look for housing, how they know their white compatriot saw different ads, and facts regarding their then-current intent and ability to secure housing had they been shown a full range of ads through Facebook. Those facts—which are wholly absent from the SAC—are necessary to raise a plausible inference that Vargas or the other plaintiffs were injured in fact by the potential use of [] Facebook's discriminatory tools by housing advertisers.

Id. at 10-11. I did not reach Facebook's other arguments that the SAC should be dismissed with prejudice and granted leave to amend.

The TAC adds some facts regarding each plaintiff's use of Facebook during identified times to search for housing based on identified criteria. *See* TAC ¶¶ 79-152. Their allegations regarding Facebook's Ad Platform's design and tools allowing advertisers to

target specific groups for their paid Ads remained largely the same as in the SAC. *See also* January 2021 Order at 2-3.

Facebook's motion to dismiss argues that (i) plaintiffs lack standing because they fail to allege facts about their use of Facebook to search for housing ads sufficient to plausibly allege injury in fact, (ii) Facebook's publishing conduct is protected and immune under Section 230 of the Communications Decency Act (CDA, 47 U.S.C. § 230), and (iii) plaintiffs fail to state their claims under the FHA, California, and New York laws.

LEGAL STANDARD

A motion pursuant to Federal Rule of Civil Procedure 12(b)(1) tests whether the court has subject matter jurisdiction to hear the claims alleged in the complaint. A Rule 12(b)(1) motion may be either facial, where the inquiry is limited to the allegations in the complaint, or factual, where the court may look beyond the complaint to consider extrinsic evidence. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Here, Facebook brings a facial attack on the sufficiency of the allegations in the SAC. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (in a facial attack under Rule 12(b)(1), "the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction."). A district court, "resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). As with a Rule 12(b)(6) motion, however, a

court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

DISCUSSION

I. STANDING

In the TAC, each plaintiff adds details about the types (costs, size, location and other "criteria") of housing searches they conducted using Facebook, the timeframes when they used Facebook to conduct those searches, and states that they did not receive any housing ads that matched their criteria.[5] They generally allege that if they had received Ads for housing that matched their criteria, they would have pursued those housing opportunities. TAC ¶¶ 79-152.

Facebook contends that these more detailed allegations are still not sufficient to confer standing because they do not plausibly allege that any plaintiff was in fact injured by Facebook's advertisers' use of the now-defunct Ad targeting tools. I agree. As Facebook notes, plaintiffs do not attempt to allege that housing *was generally available* in their desired markets—much less that housing Ads satisfying those criteria *were being placed in Facebook*—under the criteria that any of the plaintiffs were using during the

[5] The legal standard and discussion of standing cases from my January 2021 Order is incorporated herein.

times they were using Facebook to search for housing.[6] That is fatal to plaintiffs' standing.[7]

Only one plaintiff even attempts to make a showing that she received different results from the Facebook searches she (a disabled female of Hispanic descent who is a single parent with minor children) than her friend (a Caucasian) received. Specifically, Vargas alleges that:

> On or about February or March 2019, Plaintiff Vargas was with a Caucasian friend, Chet Marcello. Plaintiff Vargas and [] Marcello sat side-by-side and conducted a search for housing through Facebook's Marketplace, both using the same search criteria Plaintiff Vargas had been using. [] Marcello received more ads for housing in locations that were preferable to Plaintiff Vargas. Plaintiff Vargas did not receive the ads that [] Marcello received.

TAC ¶ 95.

Unlike in other places in the TAC, this paragraph about Vargas and her friend's searches does not distinguish between consumer-placed ads (that plaintiffs

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[6] *See, e.g.*, TAC ¶ 85 (Vargas searched for "a three-bedroom apartment located in lower Manhattan in the rental price range of $1,7000.00 per month"); ¶ 107 (plaintiff Skipper searched for "a two-to-three bedroom single family home or apartment unit in Yonkers or Westchester County in the monthly rental range of $1,000 to $2,000.").

[7] As I noted in the January 2021 Order, the facts of this case are wholly unlike the "testing" cases plaintiffs rely on under the FHA where the facts demonstrated the housing sought by the plaintiffs was available and that the tester received false information. *See* January 2021 Order at 7-8 (discussing *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)).

admit did not utilize the "targeted criteria" plaintiffs claim are discriminatory) and paid Ads covered by the claims in this case. Nor does plaintiff identify *any specific ads* that Marcello received that met plaintiff's criteria and that plaintiff would have pursued. She simply declares that Marcello received unspecific ads in "preferable" locations. She does not indicate those ads, even if paid ads, met her other criteria (cost, size, etc.) to plausibly allege that she was harmed by being denied access to those other, unidentified ads. That is insufficient.

Plaintiffs contend, as they did on the prior round to dismiss, that I should not follow the standing analyses of the Hon. Beth L. Freeman in *Bradley v. T-Mobile US, Inc.*, 17-CV-07232- BLF, 2020 WL 1233924 (N.D. Cal. Mar. 13, 2020) and the Hon. Jacqueline Scott Corley in *Opiotennione v. Facebook, Inc.*, 19-CV-07185-JSC, 2020 WL 5877667, at *1 (N.D. Cal. Oct. 2, 2020. Both of those cases challenged Facebook's Targeting Ads program, and both were dismissed for lack of standing given plaintiffs' failure to plead plausible facts to support that they were harmed under other anti-discriminatory laws by advertiser's use of the Targeted Ad tools. Plaintiffs repeat their unsupported argument that I should not follow the analyses in those cases because standing under the FHA is broader than under Title VII and the statutory schemes considered by Judges Freeman and Corley. Oppo. at 10-11. I addressed and rejected this argument in the January 2021 Order at 7-9 (discussing and distinguishing *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1304 (2017), *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982),*Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 110-111 (1979), and *Trafficante v. Metro. Life*

Ins. Co., 409 U.S. 205, 209-212 (1972)) and will not revisit it again.[8]

In sum, what the plaintiffs have alleged is that they each used Facebook to search for housing based on identified criteria and that no results were returned that met their criteria. They *assume* (but plead no facts to support) that no results were returned because unidentified advertisers theoretically used Facebook's Targeting Ad tools to exclude them based on their protected class statuses from seeing paid Ads for housing that they assume (again, with no facts alleged in support) were available and would have otherwise met their criteria. Plaintiffs' claim that Facebook denied them access to unidentified Ads is the sort of generalized grievance that is insufficient to support standing. *See, e.g., Carroll v. Nakatani*, 342 F.3d 934, 940 (9th Cir. 2003) ("The Supreme Court has repeatedly refused to recognize a generalized grievance against allegedly illegal government conduct as sufficient to confer standing" and when "a government actor discriminates on the basis of race, the resulting injury 'accords a basis for standing only to those persons who are personally denied equal

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[8] A recent decision from the District of Maryland further supports my conclusion. In *Opiotennione v. Bozzuto Mgt. Co*., CV 20-1956 PJM, 2021 WL 3055614 (D. Md. July 20, 2021), the plaintiffs sued the underlying advertisers who allegedly used Facebook to place Targeted Ads in a discriminatory fashion in violation of local antidiscrimination and consumer protection laws. Despite plaintiffs alleging they were denied access to ads placed for specifically identified housing complexes in their area—something plaintiffs here do not even attempt to allege—the court dismissed for lack of standing. *Id*. at *3-4 (distinguishing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982)).

treatment.'" (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)).[9]

Having failed to plead facts supporting a plausible injury in fact sufficient to confer standing on any plaintiff, the TAC is DISMISSED with prejudice.

II. CDA

If plaintiffs had alleged sufficient facts to plausibly state an injury from Facebook's discontinued provision of Targeting Ad tools for paid advertisers, their claims would still be barred by Section 230 of the Communications Decency Act.

Section 230 of the CDA "immunizes providers of interactive computer services against liability arising from content created by third parties." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC* ("*Roommates*"), 521 F.3d 1157, 1162 (9th Cir. 2008) (*en banc*). Section 230(c)(1) explains that, "providers or user of an interactive computer service shall not be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Under the CDA, "[i]mmunity from liability exists for '(1) a provider or user of an interactive computer service (2) whom a

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[9] For similar reasons, plaintiffs have failed to plausibly plead injury and thus standing to pursue their claims under the California and New York laws alleged. *See Oppo*. at 11-12 (admitting that under the California laws "Plaintiffs must establish standing by alleging facts showing that they 'actually suffer[ed] the discriminatory conduct' being challenged and possess a 'concrete and actual interest that is not merely hypothetical or conjectural' []" and under "the NYSHRL, Plaintiffs must establish that they have been 'aggrieved by an unlawful discriminatory practice,' N.Y. Exec. Law § 297, which 'requires a threshold showing that a person has been adversely affected by the activities of defendants.'" (citations omitted)).

plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider,'" and when "a plaintiff cannot allege enough facts to overcome Section 230 immunity, a plaintiff's claims should be dismissed." *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020) (*quoting Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268-71 (9th Cir. 2016)).

Relying on *Roommates*, plaintiffs contend that Facebook's conduct here—creating, promoting use of, and profiting from paid advertisers' use of the Targeting Ad tools—removes any immunity that Facebook would otherwise have under the CDA. In *Roommates*, the Ninth Circuit explained that "the CDA does not grant immunity for inducing third parties to express illegal preferences," and found that "Roommate's own acts—posting the questionnaire and requiring answers to it—are entirely its doing and thus section 230 of the CDA does not apply to them. Roommate is entitled to no immunity." *Roommates*, 521 F.3d at 1165.

Roommates is materially distinguishable from this case based on plaintiffs' allegations in the TAC that the now-defunct Ad Targeting process was made available by Facebook for optional use by advertisers placing a host of different types of paid-advertisements.[10] Unlike in *Roommates* where use of the

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[10] *See, e.g.*, TAC ¶¶ 45, 46, 50, 52, 55, incorporating by reference multiple descriptions of how Facebook's Ad Platform and the tools at issue work, including:

https://www.facebook.com/about/ads

https://www.facebook.com/business/success/categories/real-estate

discriminatory criteria was mandated, here use of the tools was neither mandated nor inherently discriminatory given the design of the tools for use by a wide variety of advertisers.

In *Dyroff*, the Ninth Circuit concluded that tools created by the website creator—there, "recommendations and notifications" the website sent to users based on the user's inquiries that ultimately connected a drug dealer and a drug purchaser—did not turn the defendant who controlled the website into a content creator unshielded by CDA immunity. The panel confirmed that the tools were "meant to facilitate the communication and content of others. They are not content in and of themselves." *Dyroff*, 934 F.3d 1093, 1098 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020); *see also Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (where website "questionnaire facilitated the expression of information by individual users" including proposing sexually suggestive phrases that could facilitate the development of libelous profiles, but left "selection of the content [] exclusively to the user," and defendant was not "responsible, even in part, for associating certain

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https://www.facebook.com/business/ads

Facebook also requests, and plaintiffs' object, to my taking notice of the following: (i) Facebook's "Discriminatory Practices" subpage of its "Advertising Policies" webpage; (ii) Facebook's "Advertising Policies" webpage; (iii) screenshots of the Facebook Marketplace; (iv) screenshots of Facebook's user sign-up screens that existed at the time the New York Plaintiffs registered for Facebook; (v) Facebook's past terms of service that existed at the time the New York Plaintiffs registered for Facebook; (vi) Facebook's terms of service effective as of February 4, 2009; and (vii) Facebook's present terms of service. Dkt. Nos. 95, 97, 99. The request for judicial notice is DENIED. I do not rely on these documents or the information in this Order.

multiple choice responses with a set of physical characteristics, a group of essay answers, and a photograph," website operator was not information content provider falling outside Section 230's immunity); *Goddard v. Google, Inc*., 640 F. Supp. 2d 1193, 1197 (N.D. Cal. 2009) (no liability based on Google's use of "Keyword Tool," that employs "an algorithm to suggest specific keywords to advertisers").

Here, the Ad Tools are neutral. It is the users "that ultimately determine what content to post, such that the tool merely provides 'a framework that could be utilized for proper or improper purposes, ...'" *Roommates*, 521 F.3d at 1172 (analyzing *Carafano*). Therefore, even if the plaintiffs could allege facts supporting a plausible injury, their claims are barred by Section 230.[11]

CONCLUSION

Accordingly, plaintiffs' TAC is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: August 20, 2021

/s/ William H. Orrick
William H. Orrick
United States District Judge

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[11] Having found two bases for dismissal with prejudice of plaintiffs' TAC, I need not reach defendant's other arguments for dismissal for failure to plead required elements of the claims under the FHA and state laws.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROSEMARIE VARGAS, et al., Plaintiffs, v. FACEBOOK, INC., Defendant.	Case No. 19-cv-05081-WHO **ORDER GRANTING MOTION TO DISMISS** Re: Dkt. No. 64 Jan. 21, 2021

Plaintiffs' Second Amended Complaint (SAC) asserts claims under the federal Fair Housing Act (FHA) and analogous California and New York laws challenging defendant Facebook, Inc.'s former practice of allowing advertisers to self-select target audiences for their housing advertisements (ads), theoretically excluding protected classes of consumers from seeing those advertisers' particular housing ads. Facebook moves to dismiss, arguing that (i) plaintiffs lack standing because they fail to identify any facts about their use of Facebook to search for housing ads sufficient to plausibly allege injury in fact, (ii) Facebook's publishing conduct is protected and immune under Section 230 of the Communications Decency Act (CDA), and (iii) plaintiffs fail to state their claims under the FHA, California, and New York law.

I conclude that plaintiffs' failure to allege any specific facts regarding their use of Facebook to search for housing means, given the context of this case, that they have not adequately alleged plausible injury in

fact and lack Article III standing. Plaintiffs are given leave to amend to attempt to allege the facts that are within their exclusive knowledge.

BACKGROUND

In the SAC, plaintiffs allege that when Facebook "created, implemented and/or maintained a pre-populated list of demographics, behaviors and interests that allowed real estate brokers, real estate agents and landlords to exclude certain buyers or renters from ever seeing their ads for housing," its conduct resulted in discriminatory "redlining" in violation of the FHA[1] and New York[2] and California[3] state statutes. SAC ¶ 3. Facebook was sued for this exact conduct by

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[1] 42 U.S.C. § 3601 *et seq*., in particular § 3604, making it unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> . . .
>
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.
>
> (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

[2] New York Rights Law, N.Y. Exec. L. § 290 *et seq*.

[3] California Unruh Act, Cal. Civil Code § § 51, 51.5, 52(a) and California Business and Professions Code § 17200 *et seq*.

non- profits and charged with discrimination by the United States Department of Housing and Urban Development, and plaintiffs admit that Facebook asserts that it stopped using the challenged tools by December 2019. *Id.* ¶¶ 3, 24. Plaintiffs sue, however, to recover damages for plaintiffs who were allegedly injured by the practice and to enjoin Facebook from restarting use of the challenged tools in the future. *Id.*

Plaintiffs assert that Facebook created an advertising platform (the "Ad Platform") that published and disseminated targeted advertisements for housing. This Ad Platform "allowed and/or facilitated the omission of certain Facebook users based on their real or perceived personal characteristics (which included several protected classes), by purposefully and intentionally creating, developing, and/or offering the 'Exclude People' feature. The Ad Platform also permitted advertisers to include only certain users with certain demographic characteristics (which included several protected classes), excluding users who lacked those characteristics (the 'Include People' feature)." *Id.* ¶ 5. Plaintiffs allege that Facebook also created "Multicultural Affinity groups for use on its Ad Platform," where Multicultural Affinity groups were "made up of people whose activities on Facebook suggest they may be interested in ads related to African American, Hispanic American, or Asian American communities." *Id.* ¶ 7. Facebook then "allowed advertisers to promote or market a community or home for sale or rent to select 'ethic affinity' groups as part of their advertising campaigns" and through the Multicultural Affinity tool used with the other feature of the Ad Platform allowed housing advertisers to "steer advertisements, information and content away from users in protected classes," resulting in a segregated marketplace for housing. *Id.* ¶¶ 8, 15.

Plaintiff Rosemarie Vargas is a resident of New York City, New York. She is a disabled female of Hispanic descent, and a single parent with minor children. *Id*. ¶ 29. She alleges that "during the relevant time" she "searched for housing periodically on Facebook" and "would filter her search for housing on the Facebook marketplace by location and cost," but because "Facebook created a platform which provided tools to exclude women of color, single parents and other protected attributes, Ms. Vargas and others similarly situated were prevented by Facebook from having the same opportunity to view ads for housing that other Facebook users who did not share the same characteristics were shown." *Id*. ¶¶ 30-31. She also claims that she "filtered her search for housing on the Facebook marketplace using the same parameters that her white male friend used but she obtained fewer results than her white male friend," and when she "included her use of a Section 8 voucher and her status as a veteran in her search, she obtained no results." *Id*. ¶¶ 32- 33.[4]

The plaintiffs did not identify: (i) when and how often they used Facebook to search for housing ads; (ii) the parameters or selection criteria used for those searches; (iii) what specific ads they saw during those times as the result of their searches; or (iv) the numbers of ads that were returned by their searches, or any other details regarding their "use" of Facebook to "seek housing." They did not allege that they were denied access to housing ads that, had they had seen

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[4] The five other named plaintiffs identify only their ethnicities and gender and that they "used Facebook during the relevant time period to seek housing." *Id*. ¶¶ 34-38. None of these other plaintiffs alleges any further details about their use of Facebook to seek or review housing ads.

them, they were otherwise ready, able, and willing to accept during the specific time periods they were using Facebook to search for housing. As an example, neither Vargas nor any plaintiff provides facts explaining: (i) why she was actively looking for housing, (ii) what specific markets at specific price ranges she was looking for during any specific time, and (iii) if she had found housing in her preferred market, within those ranges and during those times, she would have applied for that housing.

LEGAL STANDARD

A motion pursuant to Federal Rule of Civil Procedure 12(b)(1) tests whether the court has subject matter jurisdiction to hear the claims alleged in the complaint. A Rule 12(b)(1) motion may be either facial, where the inquiry is limited to the allegations in the complaint, or factual, where the court may look beyond the complaint to consider extrinsic evidence. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Here, Facebook brings a facial attack on the sufficiency of the allegations in the SAC. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (in a facial attack under Rule 12(b)(1), "the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction."). A district court, "resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). As with a Rule 12(b)(6) motion, however, a court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of

fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

DISCUSSION

Facebook argues, first, that plaintiffs lack Article III standing and statutory standing. For Article III standing, plaintiffs must allege facts supporting (1) "an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). Under the Unruh Act and Section 51.5, plaintiffs must allege facts showing that they "actually suffer[ed] the discriminatory conduct" being challenged and possess a "concrete and actual interest that is not merely hypothetical or conjectural." *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 165 (2007); *White v. Square, Inc.*, 7 Cal. 5th 1019, 1032 (2019). Similarly, under the NYSHRL, they must allege plausible facts that they have been "aggrieved by an unlawful discriminatory practice," N.Y. Exec. Law § 297, which "requires a threshold showing that a person has been adversely affected by the activities of defendants . . . , or—put another way—that [he or she] has sustained special damage, different in kind and degree from the community generally." *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 433 (N.Y. 1990). Under California's UCL, plaintiffs must allege facts to "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that economic injury was the result of, *i.e.*, caused by, the unfair business practice." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 321–22 (2011) (citing Cal. Bus. Prof. Code § 17204).

Facebook points out that none of the plaintiffs in this case has identified any specific advertisement or series of advertisements (*i.e.*, advertisements from a particular source) that she or he was deprived of receiving. Nor do any of the plaintiffs allege that if they had seen particular advertisements, they would have been ready, willing, and able to pursue the housing advertised. Instead, plaintiffs broadly allege that they believe they were discriminated against because some unidentified housing advertisers may have used the Facebook tools that were available to target housing advertisements away from them and, accordingly, plaintiffs may not have been shown the same housings ads as others of presumably different races, ethnicities, genders, and/or family- types were shown in violation of the housing laws they invoke.

Two judges in this District have dismissed materially similar cases for lack of Article III standing. In *Bradley v. T-Mobile US, Inc.*, 17-CV-07232-BLF, 2020 WL 1233924 (N.D. Cal. Mar. 13, 2020), plaintiffs alleged that defendants T-Mobile US, Inc. ("T-Mobile") and Amazon.com, Inc. ("Amazon") used the discriminatory tools provided by Facebook to routinely exclude older individuals from viewing the employment ads they post on Facebook in violation of the Age Discrimination in Employment Act ("ADEA," 29 U.S.C. § 623(e)) and similar state laws, including the California Unruh Act and UCL. The Hon. Beth Labson Freeman recognized that being "denied an opportunity to apply for certain jobs" due to the defendants' alleged use of Facebook's tools to target-ads away from older Facebook users might establish Article III standing. But in order to plausibly plead injury in fact, Judge Freeman concluded that the plaintiffs must "show that they were deprived of the opportunity to apply for jobs" and to do so must "plausibly allege that they

were 'able and ready' to apply for one or more of the jobs advertised using age-restricted ads" and where "'able' means qualified and to be 'ready' means seeking employment and genuinely interested in the position." *Id*., at *10. Because plaintiffs had not alleged those types of facts—and instead simply asserted (similar to plaintiffs here) that they were "denied" access to job advertisements—the complaint was dismissed with leave to amend.

In *Opiotennione v. Facebook, Inc*., 19-CV-07185-JSC, 2020 WL 5877667, at *1 (N.D. Cal. Oct. 2, 2020, Magistrate Judge Jacqueline Scott Corley dismissed a materially similar case that likewise included federal and California Unruh Act discrimination claims. There, plaintiff challenged Facebook's practice of allowing businesses to direct their advertising to consumers based on a potential customer's age or gender. Unlike here, the plaintiff identified examples of ads "where Facebook and financial services companies selected and executed upon age- or gender-restricted audience selections that denied older persons and/or women, including Plaintiff, the full and equal accommodations, advantages, facilities, and services of Facebook and those companies." *Id*. at 1. And, unlike here, the plaintiff further identified "three specific ads that allegedly were not displayed in her News Feed because of her age and/or gender" that including she alleged she would have been interested in receiving in order to consider pursuing the opportunity. *Id*.

Despite plaintiff's identification of advertisements that she claimed were discriminatorily denied to her, Judge Corley still determined that plaintiff "has not met her burden of alleging facts sufficient to support an inference of injury in fact. She contends that because she identified advertisements that could not

appear in her News Feed because of her age or gender she has suffered an injury in fact, namely, being subject to discrimination. These allegations, however, are merely a generalized claim of "unequal treatment" that does not rise to the level of an Article III injury in fact." *Id*. at *3. While plaintiff generally alleged that she "would have been interested in receiving in order to consider pursuing the opportunity," she still failed to allege injury in fact because she failed to "allege that she was qualified for and interested in actually applying for the product offered." *Id*. at *4. Judge Corley explained, "Plaintiff's general grievance about being denied 'full and equal access' without alleging facts that support an inference that she was personally injured by that denial fails to demonstrate an injury in fact sufficient to confer Article III standing." *Id*. at 5. Considering plaintiff's separate allegation of injury (that she suffered "stigmatic harm" when "she was denied a primary benefit or service of Facebook—financial services advertising and information—based on age and gender"), Judge Corley determined that was also deficient because "it still requires a personal denial of equal treatment, which as discussed *supra*, Plaintiff has not alleged." *Id*.

Plaintiffs here attempt to distinguish these two decisions by arguing that standing under the FHA is broader than that under the ADEA at issue in *Bradley* and the discrimination laws at issue in *Opiotennione*. They cite no support for that proposition. Instead, plaintiffs cite Supreme Court decisions finding standing in situations markedly different from the allegations here.

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982), the Court found standing under the FHA for a "tester" who received false information from

an apartment complex. There, the rental agents "told her on four different occasions that apartments were not available in the Henrico County complexes while informing white testers that apartments were available." *Id*. at 374. The Court explained that Section 804(d) of the FHA "establishes an enforceable right to truthful information concerning the availability of housing, is such an enactment. A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions. That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d)." *Id*. at 373-74. Having *received* false information, the tester had standing even though the tester did not have the actual intent to secure housing from the rental agents. *See also Bradley*, 2020 WL 1233924 at *8 (distinguishing *Havens* and other "tester" cases as inapposite "because they involve litigants who *sought* and were then denied truthful information." (emphasis in original)). *Havens* also addressed the standing of a non-profit that had *spent* money to combat housing discrimination. It found that those expenditures constituted concrete harms sufficient to confer standing. *Id*. at 379.

In both of those situations, the plaintiffs had alleged sufficient injuries in fact to confer standing under the FHA. *See also Bank of Am. Corp. v. City of Miami, Fla*., 137 S. Ct. 1296, 1304 (2017) (standing for city based on allegation that banks "intentionally targeted predatory practices at African–American and Latino neighborhoods and residents," which led to a

"concentration" of "foreclosures and vacancies" in those neighborhoods, that caused "stagnation and decline in African–American and Latino neighborhoods," and "reduced property values, diminishing the City's property-tax revenue and increasing demand for municipal services."); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209-212 (1972) (FHA allowed suits by white tenants claiming that they were deprived benefits from interracial associations when discriminatory rental practices kept minorities out of their apartment complex); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 110-111 (1979) (municipality had standing based on allegations of lost tax revenue and had the racial balance of its community undermined by racial-steering practices).

The allegations in those cases readily established the plaintiffs' injuries in fact stemming directly from the defendants' conduct: in *Havens*, the tester's receipt of false information and the association's expenditures; in *Bank of Am. Corp.*, the City's reduced taxes and increased expenditures; in *Trafficante,* the denial of plaintiffs' ability to live in integrated housing; and in *Gladstone Realtors,* the loss of tax revenue and racially balanced neighborhoods. Here, however, we have only allegations that plaintiffs could *theoretically* have been injured *if* housing advertisers in fact used the targeted-ad tools to exclude users with *plaintiffs'* characteristics from ads that *might* have been within plaintiffs' spheres of interest and ability. For these facially speculative allegations of injury to be potentially plausible, plaintiffs must at a minimum allege more facts regarding their own use of Facebook to search for housing that they would have been ready to pursue.

Plaintiffs argue they have identified "concrete injuries that they have personally experienced," namely (1) "discrimination" based on protected classes, SAC at ¶¶ 88-89; (2) "perpetuat[ion] [of] segregation" and denial of "the benefits of living in a[n] . . . integrated society," SAC at ¶ 92; and (3) denial of information that laws require to be given on an equal basis. SAC at ¶¶ 87, 93; Oppo. at 6. Not so. There are *no facts* regarding the nature of the searches performed by Vargas or the other plaintiffs, *no facts* regarding specific entities who allegedly used Facebook's ad-targeting tools to place discriminatory ads that possibly could have been seen by Vargas or any other plaintiff, and *no facts* establishing that Vargas or the other plaintiffs were actively looking for housing during a specific period and were ready, able, and otherwise qualified to secure such new housing had they been able to see the ads to which they were speculatively denied access. There are, in short, no facts showing that any of the plaintiffs were plausibly injured personally by the ad-targeting tools that advertisers purportedly used to possibly target housing ads in areas that plaintiffs possibly searched that plausibly resulted in plaintiffs not receiving ads for housing based on the aspects of their protected classifications that they otherwise would have been in a position to pursue.

The most specific allegation made by Vargas is that at some unspecified time, using some unspecified search criteria, a search in Facebook's "marketplace" for housing resulted in "fewer" results than her white male friend received at some unspecified time, using some unspecified search criteria. *Id*. ¶ 32. That is insufficient to establish Article III standing and statutory standing under the FHA under plaintiffs' own authority.

I recognize plaintiffs' concern that because they were allegedly denied access to housing ads, they cannot (absent evidence from a comparable "tester") identify ads that they were not shown as evidence of their actual injury in fact. I am not reaching the question of whether plaintiffs in this sort of case need to plead facts showing that a specific, comparable testor received different specifically identified ads. What I am requiring plaintiffs to plead are the facts within their exclusive knowledge, explaining what they actually *did* with respect to their use of Facebook to look for housing, how they know their white compatriot saw different ads, and facts regarding their then-current intent and ability to secure housing had they been shown a full range of ads through Facebook. Those facts—which are wholly absent from the SAC—are necessary to raise a *plausible inference* that Vargas or the other plaintiffs were injured in fact by the potential use of the Facebook's discriminatory tools by housing advertisers.[5]

The result is no different for statutory standing under California's Unruh Act and Unfair Competition Law or New York law. There are no plausible facts alleged that *any* of the plaintiffs have *personally* suffered discrimination as a result of potential use of Facebook's ad-targeting tools at any particular time or in any particular manner, much less that they suffered any other non-conjectural injury or economic loss.

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[5] These facts are within the exclusive control of plaintiffs. Plaintiffs' request—made during the hearing on this motion—that they be provided "jurisdictional discovery" by Facebook puts the cart before the horse. Plaintiffs must make a plausible showing of *their* injury in fact based on facts within their exclusive control before Facebook may be subject to discovery.

CONCLUSION

The Motion to Dismiss the Second Amended Complaint is GRANTED with leave to amend.[6] If plaintiffs can amend to cure the deficiencies identified, they shall file their Third Amended Complaint within 20 days of the date of this Order.

IT IS SO ORDERED.

Dated: January 21, 2021

/s/ William H. Orrick
William H. Orrick
United States District Judge

[6] As such, I need not reach Facebook's other arguments in support of its motion to dismiss.