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9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION
13

14 SUZANNE-JULIETTE MOBLEY, DANIEL
ADRIAN MANRIQUEZ, VICTOR
15 ONUOHA, on behalf of themselves and all
others similarly situated,

16 Plaintiffs,

17 vs.

18 FACEBOOK, INC., and DOES 1-9999,

19 Defendants.
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Case No. 5:16-cv-06440-EJD

**DEFENDANT'S NOTICE OF MOTION
AND MOTION TO DISMISS FIRST
AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Judge: Hon. Edward J. Davila
Date: June 1, 2017
Time: 9:00 a.m.
Crtrm.: 4

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1 **NOTICE OF MOTION TO DISMISS**

2 PLEASE TAKE NOTICE that on June 1, 2017, at 9:00 a.m., before the Honorable Edward J.
3 Davila in Courtroom 4 on the 5th floor of the above-entitled court located in San Jose, California,
4 Defendant Facebook, Inc. (“Facebook”) will and hereby does move to dismiss Plaintiffs’ First
5 Amended Complaint (“FAC”). This motion is made pursuant to Fed. R. Civ. P. 12(b)(6) and is
6 based on the Notice of Motion and Motion, the Memorandum of Points and Authorities, all
7 pleadings and papers on file, and such other matters as may be presented to this Court.

8 **STATEMENT OF RELIEF SOUGHT**

9 Facebook seeks an order pursuant to Rule 12(b)(6) dismissing with prejudice the First
10 Amended Complaint and each of its causes of action for failure to state a claim for relief.

11 **STATEMENT OF ISSUES TO BE DECIDED**

12 Whether the First Amended Complaint states a claim upon which relief can be granted.

13 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

14 **I. INTRODUCTION**

15 Defendant Facebook, Inc. operates an online platform that allows users to connect and share
16 through Facebook’s website and mobile app. Facebook is free of charge to users, and is supported
17 in part through ads placed on Facebook by third-party advertisers. The primary goal in advertising
18 is to reach people who are most likely to be interested in the product or service offered. Advertisers
19 using traditional media, such as print and television, have long accomplished that goal through
20 targeted advertising—*e.g.*, placing ads for women’s clothing in Vogue or running commercials for
21 men’s athletic shoes on ESPN. On Facebook, advertisers may choose to do the same by using self-
22 serve tools on Facebook’s ad platform (“Ad Platform”) that allow (but do not require) them to target
23 ads based on hundreds of categories that correspond to user interests as expressed through their
24 activities on Facebook, such as an interest in seeing content related to women, parents, Christians,
25 and/or the African American, Asian American and/or US Hispanic communities.

26 According to Plaintiffs, by allowing advertisers to engage in the commonplace practice of
27 targeted advertising, Facebook unlawfully allows advertisers to use the Ad Platform to *not* show
28 some unspecified ads to them. Plaintiffs’ claims fail, above all, because what they ultimately allege

1 is that third-party advertisers, not Facebook, control both the content of the advertisements and what
 2 targeting criteria to use, if any. Plaintiffs do not allege that Facebook plays any role in the targeting
 3 decisions at issue here. Nor could they, as Facebook’s policies prohibit all unlawful discrimination
 4 on its Ad Platform (including discriminatory targeting) and require advertisers to certify that their
 5 ads comply with antidiscrimination laws. Plaintiffs’ claims fail for multiple independent reasons.

6 *First*, the Communications Decency Act (“CDA”) preempts Plaintiffs’ claims because they
 7 seek to hold Facebook liable “as the publisher or speaker” of third-party ads. 47 U.S.C. § 230(c)(1).
 8 In Plaintiffs’ own words, Facebook has provided “tools to businesses” to “allow them to target” ads
 9 to “particular individuals and groups of individuals.” FAC ¶ 3. Advertisers, not Facebook, are
 10 responsible for both the content of their ads and what targeting criteria to use, if any. Facebook’s
 11 provision of these neutral tools to advertisers falls squarely within the scope of CDA immunity.

12 *Second*, Plaintiffs fail to plead Article III standing. Plaintiffs do not allege that they suffered
 13 any actual discrimination or harm as a result of not seeing certain ads, nor that any such harm would
 14 be traceable to Facebook, as opposed to the targeting decisions of third-party advertisers.

15 *Third*, Plaintiffs’ veritable kitchen sink of claims, many of which do not even remotely apply
 16 to online platforms like Facebook, do not actually allege any unlawful or discriminatory conduct *by*
 17 *Facebook*. Accordingly, Plaintiffs fail to state a claim under Title VII of the Civil Rights Act (“Title
 18 VII”), the Fair Housing Act (“FHA”), the Equal Credit Opportunity Act (“ECOA”), the Civil Rights
 19 Act of 1866 (“Section 1981” and “Section 1982”), as well as the Fair Employment and Housing Act
 20 (“FEHA”), the Unruh Civil Rights Act (“Unruh Act”), and the Unfair Competition Law (“UCL”).

21 **II. BACKGROUND AND SUMMARY OF ALLEGATIONS**

22 Third-party advertisers use Facebook’s Ad Platform to place ads on Facebook. FAC ¶¶ 3,
 23 55. The Ad Platform provides self-serve tools that advertisers can (but are not required to) use to
 24 target ads based on hundreds of categories that correspond to users’ interests as expressed through
 25 their activities on Facebook—including *Behaviors*, such as likely to move, fine jewelry, and/or
 26 music on iPhones; *Interests*, such as celebrity figures, baseball, action games, and/or buying a
 27 house; and *Demographics*, such as education level, away from family, baby boomers, and/or Fit
 28 Moms; and *Location*. *Id.* ¶¶ 32-34, 41. Using these categories, Spanish-language TV stations can

1 target ads to users who have expressed an interest in content related to the US Hispanic category,
 2 yoga studios can target ads to users who have expressed an interest in content related to the Fit
 3 Moms category, and a neighborhood cafe can target ads to users in the same zip code. *Id.*

4 Advertisers also have the ability to target ads by excluding categories, which benefits both
 5 advertisers and users. For example, advertisers who wish to reach users through customized
 6 messaging often create more than one ad for the same product—(1) a general ad designed for all
 7 Facebook users, and (2) an ad designed to appeal to users who have expressed an interest in content
 8 related to the US Hispanic community by using a Hispanic model and/or by presenting the ad in
 9 Spanish. Users in the US Hispanic category will be eligible to see both ads because they are
 10 Facebook users (Ad 1) and they have expressed an interest in content related to the US Hispanic
 11 community (Ad 2). But the advertiser might choose to *exclude* the US Hispanic category for Ad 1
 12 and *include* that category for Ad 2 to avoid duplication and to provide a better user experience.

13 Facebook requires all advertisers to comply with its Advertising Policies, which have always
 14 prohibited advertisers from using the Ad Platform to engage in unlawful discrimination.
 15 Advertising Policy 7.1 mandates that advertisers “must not use targeting options to discriminate
 16 against ... users[.]” Request for Judicial Notice (“RJN”),¹ Ex. B; *see also* Ex. A “[A]dvertisers
 17 may not (1) use our audience selection tools to (a) wrongfully target specific groups of people for
 18 advertising ..., or (b) wrongfully exclude specific groups of people from seeing their ads; or (2)
 19 include discriminatory content in their ads.”²

20 According to Plaintiffs, certain targeting categories—e.g., the “ethnic affinity” categories
 21 and location categories—may be used by advertisers seeking to target or exclude based on race or
 22 national origin. FAC ¶¶ 36-38, 43-44. The ethnic affinity categories include users who have
 23 expressed an interest in content related to the African American (US), Asian American (US) and
 24 _____

25 ¹ Facebook’s motion to dismiss can and should be granted regardless of whether the Court takes
 26 judicial notice of the documents attached to the RJN, which simply provide additional “background
 for understanding [this] dispute.” *United States ex rel. Modglin v. DJO Global, Inc.*, 114
 F. Supp. 3d 993, 998 n.23 (C.D. Cal. 2015).

27 ² Since December 2016, targeting based on ethnic affinity categories for ads offering housing,
 28 employment or credit opportunities has been disallowed. *See*
<http://newsroom.fb.com/news/2016/11/updates-to-ethnic-affinity-marketing/>.

1 various Hispanic (US) communities. *Id.* ¶ 37.³ Plaintiffs also allege that “metropolitan areas” are
 2 “highly segregated based on race,” and location-based targeting may result in “disproportionate[]
 3 reach” to certain users, while not reaching other users of “a particular racial or ethnic background or
 4 national origin.” *Id.* ¶¶ 44-46. In addition to the targeting categories, Plaintiffs challenge the Ad
 5 Platform’s self-serve “Audience” tools, which allow advertisers to target or exclude their existing
 6 customers by creating “Custom” or “Lookalike” audiences. *Id.* ¶¶ 48-49.

7 Plaintiffs allege that they “have not received (or have not regularly received)” ads related to
 8 employment, housing, and/or credit from advertisers who use the targeting tools. *Id.* ¶ 58. Plaintiffs
 9 assert that they have therefore been “denied employment, housing, and credit opportunities by
 10 Facebook and” third-party advertisers. *Id.* Plaintiffs offer no allegations of harm beyond these
 11 vague assertions concerning unidentified advertisers and ads. Nor do they allege that Facebook had
 12 any role whatsoever in creating the content of these ads or in the decisions made by these
 13 unidentified advertisers regarding whether or how to target their ads.

14 **III. LEGAL STANDARDS**

15 A Rule 12(b)(6) motion “tests the legal sufficiency of a claim.” *Navarro v. Block*, 250 F.3d
 16 729, 732 (9th Cir. 2001). A complaint “must contain sufficient factual matter ... to ‘state a claim to
 17 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
 18 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).⁴ Though the court accepts all allegations of material
 19 fact as true, the Court should not accept mere “labels and conclusions,” nor a “formulaic recitation
 20 of the elements of a cause of action.” *Id.*

21 **IV. ARGUMENT**

22 **A. Section 230 of the CDA Bars Plaintiffs’ Claims in Their Entirety**

23 Plaintiffs’ claims seek to hold Facebook liable for the ad content and ad-targeting decisions
 24 made by third-party advertisers on Facebook’s platform. *See* FAC ¶ 3 (“Facebook *provides tools* to
 25 _____

26 ³ Facebook does not collect information on the race or ethnicity of its users. Instead, users become
 27 part of an ethnic affinity category because, through their activities on Facebook, they have expressed
 28 an interest in content related to the African-American (US), Asian-American (US) and/or Hispanic
 (US) communities. As a result, users can be members of more than one ethnic affinity category.

⁴ Internal citations and internal quotation marks are omitted throughout unless otherwise noted.

1 businesses ... to allow them to target particular individuals and groups of individuals” to receive
 2 their ads) (emphasis added). The CDA, which prohibits claims seeking to impose liability on
 3 websites based on the publication of third-party content, stands as an insurmountable obstacle to that
 4 effort. This alone requires dismissal of the FAC in its entirety, without leave to amend.

5 Under § 230, “No provider or user of an interactive computer service shall be treated as the
 6 publisher or speaker of any information provided by another information content provider.” 47
 7 U.S.C. § 230(c)(1). The law bars liability “under any State or local law that is inconsistent with this
 8 section.” *Id.* § 230(e)(3). Section 230 “establish[es] broad ‘federal immunity to any cause of action
 9 that would make service providers liable for information originating with a third-party user of the
 10 service.’” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007). It also extends to
 11 federal claims. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d
 12 1157, 1169 n.24 (9th Cir. 2008) (en banc) (§ 230 extends to claims “under state or federal law”).

13 Through § 230, Congress sought to “encourage the unfettered and unregulated development
 14 of free speech on the Internet, and to promote the development of e-commerce.” *Batzel v. Smith*,
 15 333 F.3d 1018, 1027 (9th Cir. 2003); *see* 47 U.S.C. § 230(b)(1)-(2). “Congress recognized the
 16 threat that tort-based lawsuits pose” to websites that publish third-party content, *Optinrealbig.com*,
 17 *LLC v. Ironport Sys., Inc.*, 323 F. Supp. 2d 1037, 1044 (N.D. Cal. 2004), and sought to prevent such
 18 lawsuits “from shutting down websites and other services on the Internet.” *Batzel*, 333 F.3d at 1028.
 19 “None of this means, of course, that the original culpable party who posts [unlawful content] would
 20 escape accountability,” but “Congress made a policy choice” to preempt “tort liability on companies
 21 that serve as intermediaries for other parties’ potentially injurious messages.” *Zeran v. Am. Online*,
 22 *Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997). Accordingly, the “CDA has been interpreted to provide
 23 a ‘robust’ immunity” for “websites.” *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196 (N.D.
 24 Cal. 2009) (quoting *Carafano v. Metrosplash.com Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003)).

25 Courts “aim to resolve the question of § 230 immunity at the earliest possible stage of the
 26 case because that immunity protects websites not only from ‘ultimate liability,’ but also from
 27 ‘having to fight costly and protracted legal battles.’” *Nemet Chevrolet, Ltd. v. Consumeraffairs.com*
 28 *Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (quoting *Roommates*, 521 F.3d at 1175). Thus, courts

1 routinely apply the CDA on the pleadings in dismissing complaints. *See, e.g., Kimzey v. Yelp! Inc.*,
 2 836 F.3d 1263, 1266 (9th Cir. 2016); *Goddard*, 640 F. Supp. 2d at 1202.

3 CDA immunity attaches when (1) the defendant is “a provider or user of an interactive
 4 computer service,” (2) “whom a plaintiff seeks to treat, under a state law cause of action, as a
 5 publisher or speaker,” (3) “of information provided by another information content provider.”
 6 *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009). Applying this standard, courts have
 7 repeatedly held that Facebook is protected by CDA immunity for claims related to third-party
 8 content. *See, e.g., Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014); *Caraccioli v.*
 9 *Facebook, Inc.*, 167 F. Supp. 3d 1056, 1065-66 (N.D. Cal. 2016); *Sikhs for Justice, Inc. v.*
 10 *Facebook, Inc.*, 144 F. Supp. 3d 1088, 1096 (N.D. Cal. 2015). The same is true here.

11 **1. Facebook Is an Interactive Computer Service Provider**

12 It is beyond dispute that Facebook, a social networking platform and website, is a provider
 13 of an interactive computer service. *See, e.g., Klayman*, 753 F.3d at 1357 (“Facebook qualifies as an
 14 interactive computer service because it is a service that provides information to ‘multiple users’ by
 15 giving them ‘computer access ... to a computer server,’ 47 U.S.C. § 230(f)(2)”); *Caraccioli*, 167
 16 F. Supp. 3d at 1065 (same). Plaintiffs have not alleged otherwise.

17 **2. Plaintiffs’ Causes of Action Treat Facebook As a Publisher or Speaker**

18 The second element of CDA immunity is also satisfied: The FAC and each of its causes of
 19 action make clear that Plaintiffs seek to hold Facebook liable as a publisher of ads displayed on its
 20 platform. Plaintiffs allege that Facebook “has printed or published or caused to be published”
 21 discriminatory ads. FAC ¶ 91; *see also id.* ¶¶ 116, 155, 186. They allege that Facebook “sell[s]
 22 advertising placements to marketers,” who “purchase ads that can appear in multiple places” on
 23 Facebook’s platform. FAC ¶¶ 30; 91. And they seek to hold Facebook liable for “provid[ing] tools
 24 to businesses (‘Businesses’) to allow them to target” their ads to “particular individuals and groups
 25 of individuals based on information about Facebook users that Facebook collects, analyzes, and
 26 categorizes.” *Id.* ¶ 3; *see also id.* ¶ 47 (Facebook “enabl[es]” third-party “[b]usinesses to determine
 27 who will and who will not receive their advertisements”). Selling ad space to third parties and
 28 providing them tools to display their ads to particular users is publishing activity under the CDA.

1 The case law confirms this commonsense conclusion. Courts have recognized that a lawsuit
 2 treats a defendant as a publisher or speaker when it seeks to “hold a service provider liable for its
 3 exercise of a publisher’s traditional editorial functions—such as deciding whether to publish,
 4 withdraw, postpone or alter content.” *Optinrealbig.com*, 323 F. Supp. 2d at 1044. “A provider of
 5 information services might get sued for violating anti-discrimination laws ... or even for negligent
 6 publication of advertisements that cause harm to third parties. ... [W]hat matters is not the name of
 7 the cause of action,” but “whether the duty that the plaintiff alleges the defendant violated derives
 8 from the defendant’s status or conduct as a ‘publisher or speaker.’” *Barnes*, 570 F.3d at 1101-02.
 9 Moreover, “[t]he broad construction accorded to section 230 as a whole has resulted in a capacious
 10 conception of what it means to treat a website operator as [a] publisher or speaker.” *Jane Doe No. 1*
 11 *v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017).

12 Applying these principles, numerous cases recognize that the publication of third-party ads
 13 falls squarely within the realm of traditional publisher functions protected by the CDA, even if the
 14 ads themselves are discriminatory or otherwise unlawful under federal or state law. *See, e.g.,*
 15 *Chicago Lawyers Cmte. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-72
 16 (7th Cir. 2008) (CDA barred claim against Craigslist for publishing allegedly discriminatory
 17 housing ads in violation of federal FHA); *Goddard*, 640 F. Supp. 2d at 1195-96 (CDA barred claim
 18 premised on “allegedly fraudulent web-based advertisements” published by Google); *Zeran*, 129
 19 F.3d at 329 (CDA barred claim premised on allegedly fraudulent third-party ads).

20 Likewise, Facebook’s provision of “tools to businesses” to “allow them to target” ads to
 21 “particular individuals and groups of individuals” (FAC ¶ 3) squarely constitutes traditional
 22 publisher activity protected by the CDA. Indeed, publishers routinely allow advertisers to target ads
 23 and assist them in doing so. For instance, newspapers might sell sporting-goods stores advertising
 24 space in the sports section. Viacom might sell some advertisers airtime on Black Entertainment
 25 Television while selling other advertisers airtime on Comedy Central. That is the same type of
 26 service Facebook and other online publishers protected by the CDA offer to their advertisers in
 27 providing them tools to help them target and refine delivery of their ads. *See, e.g., Jane Doe*, 817
 28 F.3d at 16 (CDA-protected website allowed ad buyers to “target their advertisements” based on

1 geography); *Rosetta Stone Ltd. v. Google Inc.*, 732 F. Supp. 2d 628, 633 (E.D. Va. 2010) (Google’s
 2 “providing advertisers the ability to refine their keyword term selection” protected by CDA). The
 3 publication of online ads entails more than blindly displaying them; it also entails providing
 4 advertisers with tools to help them reach their target audience.

5 Courts also have held that the steering of third-party content constitutes a protected publisher
 6 function. In *Roommates*, for example, the Ninth Circuit stated that a website giving users tools “to
 7 specify whether they will or will not receive emails” from others “by means of *user-defined* criteria”
 8 would be protected, even though it “might help some users exclude email from other users of a
 9 particular race or sex.” 521 F.3d at 1169. A recent opinion in this District held that providing
 10 messaging services to users allowing them “to contact and communicate with” particular individuals
 11 “treat[s]” the service as a “publisher of information” provided by third parties. *Fields v. Twitter,*
 12 *Inc.*, 200 F. Supp. 3d 964, 976 (N.D. Cal. 2016). Here, Plaintiffs challenge the provision of tools to
 13 third parties to determine who receives their ads, which equally is a protected publisher function.

14 Separately, Plaintiffs’ claims also treat Facebook as a publisher or speaker because they
 15 “address the structure and operation” of its website and its “decisions about how to treat” third-party
 16 ads. *Jane Doe*, 817 F.3d at 21. In *Jane Doe*, the First Circuit rejected the plaintiffs’ argument that
 17 their efforts to force a website to change certain policies—such as its lack of phone number and
 18 email address verification, and allowing anonymous postings, *see id.* at 16—did not implicate the
 19 CDA. The court held that the plaintiffs’ claims “challenge features that are part and parcel of the
 20 overall design and operation of the website” reflecting “decisions about how to treat” third-party
 21 content, which “fall within the purview of traditional publisher functions.” *Id.* at 21. The court in
 22 *Fields* recently applied that reasoning in concluding that the CDA barred a lawsuit seeking to hold
 23 Twitter liable for allegedly allowing ISIS operatives to sign up for and use Twitter accounts. 200 F.
 24 Supp. 3d at 966. Citing *Jane Doe*, the court held that Twitter’s policy “reflect[ed] choices about
 25 what [third-party] content can appear on [Twitter] and in what form.” *Id.* at 973.

26 The same is true here. Plaintiffs are candid that their goal is to stop Facebook from “giving
 27 [advertisers] the tools and services” that allow them to target their ads based on ethnic affinity
 28 groups or other grounds that may bear some relationship to it, such as zip code. FAC ¶ 44; *see also*

1 *id.* ¶¶ 36-37, 45-48. But such policies—about whether and how third parties can control which
 2 readers or viewers are more likely to see their content—are “precisely the sort of website policies
 3 and practices” to which “section 230(c)(1) extends.” *Jane Doe*, 817 F.3d at 20.

4 **3. The Ads and Targeting Decisions at Issue Are Provided by Other** 5 **Information Content Providers**

6 It is also clear that all of the “information” at issue here—ads and who they target—is
 7 “provided by another information content provider.” 47 U.S.C. § 230(c)(1). Plaintiffs allege
 8 numerous facts about Facebook’s role in creating the Ad Platform’s targeting tools, evidently
 9 hoping to avoid CDA immunity on that basis. But for purposes of the CDA, it is irrelevant that
 10 Facebook created the Ad Platform or the targeting tools. All that matters is whether Facebook has
 11 “contribute[d] materially to the alleged illegality of the conduct.” *Roommates*, 521 F.3d at 1168
 12 (emphasis added). Facebook has done no such thing. Plaintiffs’ voluminous allegations cannot hide
 13 the basic reality that the FAC is devoid of any allegation that Facebook, rather than third-party
 14 advertisers, makes decisions about the content of ads or decides what targeting criteria to select on
 15 the Ad Platform. Because Facebook plays no role in the targeting decisions at issue here,
 16 advertisers are the only “information content provider[s]” of the content.

17 **(a) Neutral Ad-Targeting Tools Are Protected by the CDA**

18 In attempting to evade the CDA, plaintiffs often argue that the defendant played some role in
 19 the creation or development of the content at issue. Courts regularly reject such efforts, and have
 20 adopted “a relatively restrictive definition of ‘information content provider,’” under which a website
 21 retains immunity so long as it does not create or develop “the particular information at issue” in the
 22 case. *Carafano*, 339 F.3d at 1123-25. “A material contribution to the alleged illegality of the
 23 content does not mean merely taking action ... necessary to the display of allegedly illegal content.
 24 Rather, it means being responsible *for what makes the displayed content allegedly unlawful.*” *Jones*
 25 *v. Dirty World Ent’m’t Recordings LLC*, 755 F.3d 398, 410 (6th Cir. 2014) (emphasis added).

26 Here, what “makes the displayed content allegedly unlawful,” *id.*, are the advertisers’
 27 decisions about how to target particular types of ads to certain groups of users. As the FAC alleges,
 28 Facebook “provides tools to businesses ... to *allow them to target* particular individuals and groups

1 of individuals” their ads on the basis of (among other traits) ethnic affinity groups. FAC ¶ 3
 2 (emphasis added); *see also, e.g., id.* ¶ 55 (advertisers “use Facebook’s targeting tools to exclude
 3 which Facebook customers will receive” their ads); ¶ 38 (ethnic affinity groups “can be used by
 4 Businesses to exclude Facebook users in these demographic groups from receiving Facebook
 5 advertisements”); ¶ 42 (“advertisers ... exclude or include Facebook users from receiving
 6 advertisements based on their racial demographic backgrounds”); ¶ 44 (“Businesses ... exclude and
 7 include people who live in particular locations” from receiving ads). There is no allegation, nor can
 8 there be, that *Facebook* decides whether and how to use the ethnic affinity targeting at issue.

9 To be sure, the FAC contains extensive factual allegations about Facebook’s own conduct,
 10 but these allegations merely confirm that Facebook’s role is limited to “provid[ing] tools” that
 11 “allow” advertisers to target their ads. FAC ¶ 3. For instance, Plaintiffs allege that Facebook “gives
 12 advertisers step-by-step instructions on how to click on the various drop-down menus” to include or
 13 exclude certain audiences for their ads (*id.* ¶ 33); that it provides “suggested drop-down forms to
 14 select which Facebook users will receive their advertisements” (*id.* ¶ 34); that it “creates profiles of
 15 its users—based on their Internet activity” to “assist advertisers who want to target their
 16 advertisements to Facebook users who may be interested in employment, housing, or credit
 17 opportunities” (*id.* ¶ 41); and that it encourages advertisers to ““choose the right audience”” for their
 18 ads and to ““target specific groups”” and ““key locations”” (*id.* ¶ 32). These allegations share a
 19 consistent theme: Facebook created the Ad Platform, and the tools it provides, to help advertisers
 20 target their ads to groups of users most likely to be interested in the goods or services being offered.

21 These allegations describe the classic sort of “neutral tool” protected by the CDA.
 22 *Roommates*, 521 F.3d at 1171. Courts uniformly have held that such neutral tools, which facilitate
 23 the publication of third-party content and which third parties may use for either “proper or improper
 24 purposes,” do not “contribute[] materially to the alleged illegality” of the third-party content. *Id.* at
 25 1168, 1172. They thus are subject to CDA immunity “even if the users committed their misconduct
 26 using” such “tools.” *Id.* at 1169 n.24; *see Kimzey*, 836 F.3d at 1270 (a “‘neutral tool’ operating on
 27 ‘voluntary inputs’ [does] not amount to content development or creation”). Importantly, such
 28 neutral tools are protected *even if* they may be deemed in some sense to “encourage[],” “enable[],”

1 or “assist[.]” (FAC ¶ 37) third parties in engaging in unlawful conduct.

2 For example, in *Carafano*, a dating website provided its users with a “detailed questionnaire”
 3 that included multiple-choice questions where “members select[ed] answers ... from menus
 4 providing between four and nineteen options” in creating their profiles. 339 F.3d at 1121. The
 5 plaintiff argued that these menus included “sexually suggestive” phrases that facilitated the creation
 6 of a defamatory impersonated profile. *Id.* The Ninth Circuit held that “[d]oubtless, the
 7 questionnaire facilitated the expression of information by individual users” but the “selection of the
 8 content was left exclusively to the user”; thus, the defendant “cannot be considered an ‘information
 9 content provider’” because “no profile has any content until a user actively creates it.” *Id.* at 1124.

10 Similarly, in *Goddard*, the plaintiff challenged Google’s “Keyword Tool” that “suggest[ed]
 11 the phrase ‘free ringtone’ to advertisers, claiming that “the suggestion of the word ‘free,’ when
 12 combined with Google’s knowledge ‘of the mobile content industry’s unauthorized charge
 13 problems,’ makes the Keyword Tool ‘neither innocuous nor neutral.’” 640 F. Supp. 2d at 1197. The
 14 court rejected this argument, holding that “[l]ike the menus in *Carafano*, Google’s Keyword Tool is
 15 a neutral tool. It does nothing more than provide options that advertisers may adopt or reject at their
 16 discretion.” *Id.* at 1198; *see also, e.g., Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal.
 17 2010) (same); *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 562 (N.C. App. 2012) (pricing tool for tickets
 18 that suggested prices above that allowed by law was “a prototypically ‘neutral tool’”).

19 Most recently, in *Herrick v. Grindr, LLC*, 2017 WL 744605 (S.D.N.Y. Feb. 24, 2017), the
 20 plaintiff argued that the defendant, a social networking app, was “not merely a publisher of third-
 21 party content but is also a creator of content by virtue of the sorting and matching functions and geo-
 22 locational services that it integrated” into the app, which a third party used for unlawful harassment.
 23 *Id.* at *3. The court rejected this argument. It held that the plaintiff had not “identified any acts by
 24 Grindr—other than ‘neutral assistance’—that might make Grindr the ‘provider’ of the false profiles”
 25 the user had created. *Id.* at *4. “The fact that these offerings have been weaponized by a particular
 26 Grindr user” to create fake profiles “does not make Grindr the creator of the allegedly tortious
 27 conduct.” *Id.* “Moreover, to the extent Grindr has ‘contributed’ to the harassment by providing
 28 functionality such as geo-location assistance, that is not what makes the false profiles tortious.” *Id.*

1 Just so here. Although Plaintiffs make numerous allegations about ways in which Facebook
 2 designed the Ad Platform and provided a variety of functionality to advertisers, that functionality is
 3 not “what makes the displayed [ads] allegedly unlawful.” *Jones*, 755 F.3d at 410. Rather, what
 4 makes the ads allegedly unlawful are the discriminatory targeting decisions that might have been
 5 made by some unidentified advertisers—not the neutral tools provided on Facebook’s Ad Platform.
 6 The provision of these neutral tools does not transform Facebook into a content provider.

7 **(b) Plaintiffs’ Conclusory Assertions Do Not Defeat CDA Immunity**

8 Apart from Plaintiffs’ allegations regarding the tools Facebook provides to advertisers using
 9 the Ad Platform, the FAC makes a number of assertions regarding Facebook’s supposed role in
 10 “encouraging” or “assisting” advertisers’ targeting decisions. *See, e.g.*, FAC ¶ 37 (“Facebook
 11 encourages, enables, and assists advertisers to include or exclude who will view the advertisements
 12 based on the race or perceived race of the Facebook user”); ¶¶ 42, 44, 46, 48. The only factual
 13 allegations supporting such alleged encouragement or assistance, however, concern the provision of
 14 the tools themselves. *See id.* ¶ 3 (the “tools that Facebook provides Businesses enable and
 15 encourage” advertiser conduct); *id.* ¶ 44 (“by giving them the tools and services to do so with
 16 precision, Facebook encourages, enables and assists Businesses to place advertisements that often
 17 will disproportionately reach people of a particular” background). Nowhere does the FAC allege,
 18 nor could it, that Facebook actually instructs or otherwise actively encourages advertisers to engage
 19 in discriminatory targeting; indeed, Facebook expressly prohibits such conduct, *see supra* at 3.

20 Beyond the allegations concerning the tools themselves, Plaintiffs’ “encouragement” and
 21 “assistance” assertions are wholly conclusory and should not be credited. They are not properly
 22 pleaded allegations regarding Facebook’s actual conduct, but mere conclusory labels Plaintiffs have
 23 attached to describe that conduct. *See Iqbal*, 556 U.S. at 686; *Moss v. U.S. Secret Service*, 572 F.3d
 24 962, 970 (9th Cir. 2009) (“[t]he allegation of systematic ... discrimination, ... without any factual
 25 content to bolster it, is just the sort of conclusory allegation that the *Iqbal* Court deemed
 26 inadequate”). Multiple courts have applied this principle in precisely the circumstance at issue here.
 27 For instance, in *Goddard*, the plaintiff “allege[d] in conclusory fashion that Google *assisted its*
 28 *AdWords customers in drafting their advertisements*,” but “offered no allegations to support this

claim” and “fail[ed] to explain how Google ‘controlled’ or ‘collaborated’ with” advertisers “in the creation of any allegedly fraudulent advertisement.” 640 F. Supp. 2d at 1202 (emphasis added). As the Ninth Circuit has emphasized, “threadbare allegations” of a website’s authorship of content “are implausible on their face and are insufficient to avoid immunity under the CDA.” *Kimzey*, 836 F.3d at 1268. “Were it otherwise, CDA immunity could be avoided simply by reciting a common line that user-generated statements are not what they say they are.” *Id.* at 1268-69. Plaintiffs cannot circumvent the CDA merely by asserting that Facebook “encourag[es], enabl[es], and assist[s] advertisers” (FAC ¶ 37) in engaging in allegedly unlawful targeting.⁵

(c) ***Roommates* Makes Clear that the CDA Bars Plaintiffs’ Claims**

The operation of Facebook’s Ad Platform stands in stark contrast to the kind of website functionality for which courts have denied CDA immunity—and, in particular, to the situation at issue in *Roommates*. There, the Ninth Circuit held that where a roommate-search website “require[d] each subscriber to disclose his sex, sexual orientation, and whether he would bring children to a household,” and to “describe his preferences in roommates with respect to the same three criteria,” the site lost its CDA immunity because it “bec[a]me[] the developer, at least in part, of that information.” 521 F.3d at 1161, 1166 (emphasis added). Numerous other courts have correctly interpreted *Roommates* in this way, recognizing that the case “turned entirely on the website’s decision to *force* subscribers to divulge the protected characteristics and discriminatory preferences ‘as a condition of using its services’” and “carved out only a narrow exception” to CDA immunity. *Goddard*, 640 F. Supp. 2d at 1198 (emphasis in original).⁶

⁵ Even if Plaintiffs *had* alleged facts suggesting that Facebook actually “encouraged” advertisers to target their ads in certain ways—which, again, the FAC does not allege—that still would not displace CDA immunity. *See, e.g., Jones*, 755 F.3d at 414 (citing *Roommates* and expressly declining to adopt “encouragement test of immunity under the CDA”); *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 986-87 (N.D. Cal. 2015) (recognizing that *Jones* “adopted the Ninth Circuit’s reasoning in *Roommates.com*” that in order to forfeit CDA immunity, a website “must have done more than merely ‘encourage’ the creation of the challenged conduct,” but “must have *required* another to create that content” (emphasis added)).

⁶ *See also, e.g., Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 701 (S.D.N.Y. 2009) (*Roommates* “was based solely on the fact that” the website “*required* potential subscribers” to input unlawful content (emphasis in original)); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663, 665 (E.D. Tex. 2009) (“[t]he Ninth Circuit repeatedly stated throughout its en banc opinion that the

Here, advertisers are not required to use the audience options at all, let alone in a way that would direct their ads to, or away from, any users on the basis of race, national origin, or any other protected classification. As the FAC alleges (§ 3), the Ad Platform merely “allows” advertisers to use the targeting options if they so choose. That core principle settles the matter: because Facebook does not *require* (or, indeed, even encourage) advertisers to target their ads in a discriminatory manner, Facebook retains its CDA immunity and Plaintiffs’ claims are barred in their entirety.

B. Plaintiffs Have Failed to Allege Facts Demonstrating Article III Standing

The FAC must be dismissed on the separate ground that Plaintiffs have not alleged facts demonstrating Article III standing. The “‘irreducible constitutional minimum’ of standing consists of three elements”: (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)). Here, Plaintiffs do not allege that they suffered any actual discrimination or harm as a result of not seeing certain ads on Facebook, nor that any harm is traceable to Facebook, as opposed to the purported targeting decisions of unidentified third-party advertisers.

First, Plaintiffs have failed to allege injury in fact. To do so, they must show that they have “suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo*, 136 S. Ct. at 1548. As the Supreme Court recently emphasized, “[a] ‘concrete’ injury must be ‘*de facto*’; that is, it must actually exist” and must be “‘real’” rather than “‘abstract.’” *Id.* Where, as here, a plaintiff alleges a violation of a statute, “Article III standing requires a concrete injury even in the context of a statutory violation,” and a “bare” allegation that the defendant violated the law will not suffice. *Id.* at 1549.

Courts addressing similar claims have held that it is not enough for a plaintiff merely to allege that he or she received a discriminatory advertisement. The Tenth Circuit has held that a plaintiff must allege that the ad either deterred her from seeking to enter into a transaction or deprived her of the opportunity to do so. *Wilson v. Glenwood Intermtn. Props., Inc.*, 98 F.3d 590,

Roommates.com website *required* its users to provide certain information as a condition of its use” (emphasis in original); *Opperman*, 84 F. Supp. 3d at 987 (*Roommates* applies only where a website “required another to create [the] content”); *Jones*, 755 F.3d at 414 (same).

1 595-96 (10th Cir. 1996) (“mere receipt of a discriminatory advertisement” is insufficient absent
 2 allegation that plaintiff was seeking to “liv[e] in the advertised housing”); *see also Spann v.*
 3 *Colonial Village, Inc.*, 899 F.2d 24, 29 n.2 (D.C. Cir. 1990). Other courts likewise have held that
 4 receipt of a discriminatory ad alone does not confer Article III standing, while suggesting that an
 5 allegation of “psychic injury or substantial insult or distress” would suffice. *McDermott v. N.Y.*
 6 *Metro LLC*, 664 F. Supp. 2d 294, 305-06 (S.D.N.Y. 2009); *see also Fair Hous. Council of Suburban*
 7 *Phila. v. Main Line Times*, 141 F.3d 439, 434-44 (3d Cir. 1998) (“that a particular advertisement
 8 violates the [FHA] is not sufficient to satisfy the requirements of Article III”).

9 Here, under either approach, Plaintiffs’ factual allegations are deficient. Plaintiffs do not
 10 allege that they have received any discriminatory ads. If *actually seeing* a discriminatory ad alone is
 11 insufficient to confer Article III standing, there is no basis for concluding that *not* seeing an ad is
 12 sufficient. Plaintiffs allege only that they have “been interested in obtaining housing, employment,
 13 and credit opportunities” and “in doing so” have “reviewed advertisements” on Facebook. FAC
 14 ¶¶ 25-27. On that basis alone, Plaintiffs have sued Facebook. Plaintiffs have not alleged that they
 15 were actually looking for housing, employment, or credit ads on Facebook, nor (more importantly)
 16 have they alleged that the ads they *did* see were less desirable than the ads they believe advertisers
 17 allegedly chose to exclude them from seeing. Instead, Plaintiffs allege only that they were shown
 18 some ads but not others—which, given the volume of ads on Facebook, is inevitable—and that
 19 unspecified advertisers may have excluded them from seeing certain ads. Under the case law cited
 20 above, Plaintiffs have failed to allege facts showing any concrete harm, even psychic injury or
 21 distress.⁷ At best, they have alleged only a “bare” statutory violation, *Spokeo*, 136 S. Ct. at 1549,
 22 which is not sufficient (and indeed, they have not alleged even that, *see infra* at 16-25).

23 *Second*, Plaintiffs have failed to allege any injury that is “fairly traceable” to Facebook.

25 ⁷ Even if Plaintiffs *had* sought to allege psychic injury or distress, which they have not, it is doubtful
 26 whether that sort of theory applies here in the first place. Courts have held that these theories of
 27 injury may come into play where a reader sees an ad that is *overtly discriminatory on its face*, but no
 28 court has extended these theories to cases where a plaintiff alleges unlawful targeting of facially
 neutral ads. It is difficult to see how a plaintiff plausibly could allege that she suffered any “loss of
 dignity,” “emotional distress,” or “humiliation,” *Saunders v. Gen. Servs. Corp.*, 659 F. Supp. 1042,
 1060-61 (E.D. Va. 1987), merely as a result of allegedly *not* seeing certain ads.

1 *Spokeo*, 136 S. Ct. at 1547. To establish fair traceability, a plaintiff must show that her injury
 2 results from “the challenged action of the defendant,” and not from “the independent action of some
 3 third party not before the court.” *Lujan*, 504 U.S. at 560. Only if the defendant’s actions had a
 4 “determinative or coercive effect” on the third party’s actions can a plaintiff establish standing.
 5 *Bennett v. Spear*, 520 U.S. 154, 169 (1997); *Levine v. Vilsack*, 587 F.3d 986, 995 (9th Cir. 2009).

6 For reasons similar to those discussed above (*supra* at 9-14), the facts alleged by Plaintiffs
 7 do not show fair traceability. Facebook’s provision of neutral targeting tools to advertisers does not
 8 have a “determinative or coercive effect,” *Bennett*, 520 U.S. at 169, upon advertisers in making their
 9 targeting decisions, and Plaintiffs allege no facts suggesting otherwise. Nor have Plaintiffs
 10 adequately linked any asserted injury to any particular ad—much less any specific conduct of
 11 Facebook. *See Ark. ACORN Fair Housing, Inc. v. Greystone Dev., Ltd.*, 160 F.3d 433, 434-35 (8th
 12 Cir. 1998) (no fair traceability where plaintiff failed to show that any “discriminatory effects” were
 13 “specifically attributable” to defendant’s allegedly discriminatory advertising (emphasis added)).

14 **C. Plaintiffs Do Not Allege that Facebook Engaged in Any Unlawful Conduct**

15 Apart from the CDA and Article III, Plaintiffs have failed to allege any facts plausibly
 16 suggesting that *Facebook*, as opposed to certain unnamed third-party advertisers, engaged in any
 17 unlawful or discriminatory conduct. The FAC includes more than a dozen theories of liability
 18 (¶¶ 69-189), but quantity is no substitute for quality. Plaintiffs’ causes of action share a common
 19 and insurmountable defect: even if some advertisers violated Facebook’s policies and engaged in
 20 unlawful discrimination, Plaintiffs cannot show that Facebook may be held liable for their actions.

21 **1. Plaintiffs Fail to State a Claim Under 42 U.S.C. § 1981**

22 Plaintiffs’ section 1981 claim (FAC ¶¶ 122-27) fails because (1) Plaintiffs fail to allege
 23 intentional discrimination, and (2) Facebook has not refused to contract with Plaintiffs.

24 *First*, section 1981 prohibits only *intentional*, race-based discrimination in the “making,
 25 enforcement, performance, modification, and termination of contracts.” 42 U.S.C. § 1981(b); *see*
 26 *Gen. Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982); *Peters v. Lieuallen*,
 27 746 F.2d 1390, 1393 (9th Cir. 1984). Plaintiffs allege no facts suggesting that Facebook
 28 intentionally discriminates against users based on race. On the contrary, Facebook expressly

1 prohibits such conduct. *Supra* at 3. Plaintiffs allege only that Facebook “encourages, enables, and
 2 assists *advertisers* to include or exclude who will view the advertisements,” and that some
 3 unspecified advertisers may have done so in a discriminatory manner “us[ing] Facebook’s targeting
 4 tools.” FAC ¶¶ 37, 55, 63, 67, 75, 79, 84, 87, 91, 95, 106, 107, 109, 112, 124 (emphasis added).
 5 These allegations give rise to no inference of intentional discrimination on *Facebook’s* part. Nor
 6 does the provision of facially neutral tools suggest the requisite intent. *Gen. Bldg. Contractors*, 458
 7 U.S. at 388 (holding that § 1981 encompasses only intentional discrimination, not disparate impact).

8 *Second*, Plaintiffs do not and cannot plead any facts showing that Facebook discriminated in
 9 the making, enforcing, or performing of any contracts (for employment or otherwise). The “right to
 10 ‘make and enforce contracts’ is violated if a private offeror refuses to extend ... the same
 11 opportunity to enter into contracts” based on race. *Runyon v. McCrary*, 427 U.S. 160, 170-71
 12 (1976). Plaintiffs’ claims are based on hypothetical future contracts for employment or housing
 13 offered by third-party advertisers, not Facebook. Nor could Plaintiffs rely on an aiding-and-abetting
 14 theory of liability, as section 1981 does not encompass such a theory. *Gen. Bldg. Contractors*, 458
 15 U.S. at 391-92; *Long v. Marubeni Am. Corp.*, 2006 WL 547555, at *4 n.4 (S.D.N.Y. Mar. 6, 2006).

16 **2. Plaintiffs Fail to State a Claim Under 42 U.S.C. § 1982**

17 For similar reasons, Plaintiffs’ section 1982 claim (FAC ¶¶ 128-34) also fails.

18 *First*, like section 1981, section 1982 requires a showing of discriminatory intent. *Ghosh v.*
 19 *Uniti Bank*, 566 F. App’x 596, 597 (9th Cir. 2014); *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816,
 20 822 (10th Cir. 1981). Plaintiffs fail to allege any such intent on Facebook’s part. *Supra* at 16-17.

21 *Second*, section 1982 does not apply to advertising platforms like Facebook. Section 1982
 22 prohibits “racial discrimination in the sale of property.” *Scott v. Eversole Mortuary*, 522 F.2d 1110,
 23 1113 (9th Cir. 1975); 42 U.S.C. § 1982 (prohibiting interference with person’s right to “inherit,
 24 purchase, lease, sell, hold [or] convey” property on basis of race). Plaintiffs do not and cannot allege
 25 that Facebook sells, leases, or conveys real property to users. Moreover, the Supreme Court has held
 26 that section 1982, unlike the FHA, “does not prohibit advertising or other representations that
 27 indicate discriminatory preferences.” *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968).
 28 Thus, Plaintiffs have not alleged any actionable conduct under section 1982 even with respect to

1 advertisers, much less Facebook. And Plaintiffs cannot proceed on aiding-and-abetting liability here
 2 either, because Congress has not provided for it. *See Cent. Bank of Denver, N.A. v. First Interstate*
 3 *Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994) (“If ... Congress intended to impose aiding and
 4 abetting liability, we presume it would have used the words ‘aid’ and ‘abet’ in the statutory text.”).

5 **3. Plaintiffs Fail to State a Claim Under the ECOA**

6 Plaintiffs fail to state a claim under the Equal Credit Opportunity Act (ECOA) (FAC ¶¶ 135-
 7 144) for the simple reason that the statute does not apply to Facebook. The ECOA prohibits “any
 8 creditor” from discriminating against “any applicant, with respect to any aspect of a credit
 9 transaction.” 15 U.S.C. § 1691(a). Plaintiffs do not and cannot allege that Facebook is a “creditor.”
 10 The ECOA defines a “creditor” as “any person who regularly extends, renews or continues credit.”
 11 *Id.* § 1691a(e). Plaintiffs fail to allege any facts remotely suggesting that Facebook “regularly
 12 extends, renews, or continues credit,” and cannot because Facebook is not a bank or credit agency.

13 Plaintiffs argue that Facebook is a “creditor” under 12 C.F.R. § 1002.2(1) because Facebook
 14 “regularly refers applicants or prospective applicants to creditors.” FAC ¶ 137. But the FAC is
 15 bereft of facts to support this conclusory assertion. Moreover, the Consumer Financial Protection
 16 Bureau has explained that section 1002.2(1) is intended to cover persons “who accept applications
 17 and refer applicants to creditors” or “select creditors to whom credit requests can be made.” 12
 18 C.F.R. pt. 202, Supp. I (e.g., “automobile dealers” and “home builders”). Facebook does not
 19 “accept applications and refer applicants to creditors” nor does Facebook “select creditors to whom”
 20 requests can be made. Facebook provides a platform for advertisers to publish ads, some of which
 21 may be credit-related. Nor can Plaintiffs rely on an aiding-and-abetting theory. The text of the
 22 ECOA does not contemplate such liability, *cf. Cent. Bank of Denver*, 511 U.S. at 176, and courts
 23 have so held. *See Grady v. FDIC*, 2014 WL 1364932, at *7 (D. Ariz. Mar. 26, 2014); *S & G*
 24 *Petroleum Co. v. Brice Capital Corp.*, 1993 WL 497859, at *2 (E.D. Pa. Dec. 2, 1993).

25 **4. Plaintiffs Fail to State a Claim Under Title VII**

26 Plaintiffs’ Title VII claim (FAC ¶¶ 176-189) fails because that statute does not apply to
 27 Facebook in this context either. Title VII applies only to covered entities, including “employer[s]”
 28 and “employment agenc[ies].” 42 U.S.C. § 2000e-3(b). Plaintiffs’ sole theory appears to be that

Facebook acts as an “employment agency” because it publishes employment ads “on behalf of Businesses.” FAC ¶ 179. But the Ninth Circuit rejected this theory decades ago. In *Brush v. San Francisco Newspaper Printing Co.*, the plaintiff brought a Title VII claim against newspapers that published third-party employment ads. 315 F. Supp. 577, 578 (N.D. Cal. 1970), *aff’d* 469 F.2d 89 (9th Cir. 1972) (per curiam). The court rejected the plaintiff’s argument that newspapers should be treated as “employment agencies” because they published such ads and categorized the ads by sex. 469 F.2d at 90; 315 F. Supp. at 578, 583 (citing text and legislative history); *see Greenfield v. Field Enters., Inc.*, 1972 WL 155, at *4 (N.D. Ill. Feb. 1, 1972) (same). Plaintiffs’ argument here is no different. Providing a platform for third parties to publish their ads does not transform Facebook into an employment agency. And aiding-and-abetting liability is not available under Title VII either. *See Smith v. Riccelli Brokerage Servs., LLC*, 2011 WL 2007209, at *5 (W.D.N.Y. May 23, 2011) (“[I]t is clear that Title VII does not provide for aider and abettor liability.”).⁸

5. Plaintiffs Fail to State a Claim Under the FHA

Plaintiffs’ FHA claims (FAC ¶¶ 145-175) fare no better. *First*, Plaintiffs fail to state a claim under 42 U.S.C. § 3604(a) and its related regulations, 24 C.F.R. § 100.70(c)(1) and (d)(2). Section 3604(a) makes it unlawful to “refuse to sell or rent after the making of a bona fide offer” or “refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny” a dwelling because of a protected trait. As noted, Plaintiffs do not and cannot allege that Facebook sells, leases, or conveys real property to users. Rather, as Plaintiffs allege, third-party advertisers, not Facebook, “seek applicants for the sale or rental or [sic] dwellings.” FAC ¶ 147. At most, Plaintiffs allege that certain advertisers may use Facebook to target their ads for the sale or rental of property. But even that allegation (which still would fail to state a claim *against Facebook*) falls short. Targeted advertising is not a refusal to sell or rent, nor does it make a dwelling unavailable.

Second, Plaintiffs’ claim under 42 U.S.C. § 3604(d) fails for similar reasons. Section

⁸ Moreover, courts interpreting analogous statutes have held that there is no such aider-and-abettor liability. *See Wynn v. Nat’l Broad. Co.*, 234 F. Supp. 2d 1067, 1113-14 (C.D. Cal. 2002) (no aiding-and-abetting liability under the Age Discrimination in Employment Act (ADEA)); *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 n.16 (1985) (interpretation of ADEA and Title VII apply with “equal force” to each other because relevant provisions are “identical”).

1 3604(d) prohibits “represent[ing] to any person ... that a dwelling is not available for inspection,
 2 sale, or rental” based on a protected trait. Again, Plaintiffs fail to allege any such misrepresentation,
 3 much less that *Facebook* (as opposed to certain unnamed advertisers) has made one.

4 *Third*, 42 U.S.C. § 3605(a) does not apply to Facebook either. It prohibits an entity “whose
 5 business includes engaging in residential real estate-related transactions,” defined as including the
 6 “making or purchasing” of real estate loans, or the “selling, brokering, or appraising of residential
 7 real property.” *Id.* § 3605(a)-(b). Plaintiffs do not and cannot allege that Facebook makes or
 8 purchases real estate loans, or sells, brokers, or appraises residential real property.

9 *Fourth*, Plaintiffs’ theory of liability under 42 U.S.C. § 3604(c) also fails. Although section
 10 3604(c) pertains to advertising, there is no indication that it imposes liability on online platforms for
 11 providing ad-targeting tools to third-party advertisers. Section 3604(c) makes it unlawful to publish
 12 any advertisement that “indicates any preference, limitation, or discrimination based on” a protected
 13 trait. Applying this language, the test is whether a challenged advertisement “would discourage an
 14 ordinary reader” of a protected class from applying to rent or purchase the dwelling, or would
 15 “suggest” to the ordinary reader that certain protected classes are “preferred or dis-preferred.”
 16 *Llanos v. Estate of Coehlo*, 24 F. Supp. 2d 1052, 1057 (E.D. Cal. 1998). This test assumes that the
 17 plaintiff actually sees an advertisement whose content is either facially or implicitly discriminatory.
 18 *See id.*; *Ragin v. New York Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991) (section 3604(c) requires
 19 evaluating content of advertisement). Here, Plaintiffs fail to plead that the content of any
 20 advertisement is discriminatory, and thus fail to state a claim under section 3604(c).

21 Plaintiffs cite 24 C.F.R. § 100.75(c)(3), which prohibits “[s]electing media or locations for
 22 advertising” housing that “deny particular segments of the housing market information about
 23 housing opportunities” on a protected ground. FAC ¶ 157.⁹ But the plain language of the regulation
 24

25 ⁹ It is doubtful whether this regulation is compatible with the statute, which prohibits “statement[s]”
 26 or “advertisement[s]” that “*indicate[]* any preference, limitation, or discrimination based on” a
 27 protected trait. 42 U.S.C. § 3604(c) (emphasis added); *see Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct.
 28 1326, 1334 (2013) (“[R]egulations, in order to be valid, must be consistent with the statute under
 which they are promulgated.”). This statutory language encompasses only ads that, on their face,
 are either explicitly or implicitly discriminatory. But this Court need not reach that issue, because—
 however the statute is read—the regulation does not apply to Facebook.

1 does not apply to advertising platforms like Facebook; it applies to the advertisers themselves.
 2 Facebook does not engage in “[s]electing media or locations for advertising”; Facebook and other
 3 platforms *are* the “media or locations” that third-party advertisers may select, and third-party
 4 advertisers also control their ad-targeting decisions on Facebook (*supra* at 2-4, 9-14). Thus, even
 5 assuming the regulation applies to online advertising, it only prohibits certain conduct by
 6 advertisers, e.g., the parties wholly responsible for deciding where, how, and when to publish their
 7 ads. As Plaintiffs allege throughout the FAC, it is advertisers, not Facebook, who choose whether
 8 and how to use the targeting tools at issue. *See, e.g.*, FAC ¶¶ 3, 38, 41, 147, 148, 158.

9 *Fifth*, Plaintiffs cannot rely on an aiding-or-abetting theory of liability to skirt these
 10 fundamental problems with their FHA claims. The text of the FHA does not provide for such
 11 liability, so it is not available. *See Cent. Bank of Denver*, 511 U.S. at 176; *Rivera v. Incorporated*
 12 *Village of Farmingdale*, 2011 WL 1260195, at *3 (E.D.N.Y. Mar. 30, 2011) (noting that such a
 13 theory of liability under the FHA has not been recognized).

14 *Sixth*, Plaintiffs fail to state a disparate-impact claim under the FHA (FAC ¶ 148). An FHA
 15 disparate-impact claim requires allegations of “facts at the pleading stage” consisting of “statistical
 16 evidence demonstrating a causal connection” between the defendant’s policy and a racial disparity.
 17 *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Proj., Inc.*, 135 S. Ct. 2507, 2523 (2015);
 18 *see also id.* at 2524 (cautioning that courts must “examine with care ... at the pleading stage”
 19 whether a plaintiff has stated a disparate-impact claim, lest defendants face “abusive disparate-
 20 impact claims” that “displace valid governmental and private priorities”). Plaintiffs fail to allege
 21 any statistical disparity, which is the first step in a disparate-impact claim. Nor do they allege the
 22 requisite “causal connection.” *Id.* at 2523. Any discriminatory targeting would be caused by the
 23 intentional choices of advertisers alone. These “intentional” decisions “break the causal chain”
 24 between any harm and Facebook’s conduct, because they are a “superseding cause” of the alleged
 25 discrimination. *United States v. Speakman*, 594 F.3d 1165, 1174 (10th Cir. 2010).

26 **6. Plaintiffs Fail to State a Claim Under the FEHA**

27 Plaintiffs’ FEHA housing and employment claims (FAC ¶¶ 83-121) fail for reasons similar
 28 to those requiring dismissal of their comparable federal FHA and Title VII claims.

1 *First*, Plaintiffs fail to state a claim under Cal. Gov’t Code sections 12940(d) or (k).
 2 Plaintiffs allege that Facebook is an “employment agency” and therefore a “covered entity.” FAC
 3 ¶¶ 84, 86. Facebook is no more an “employment agency” under FEHA than it is under Title VII.
 4 *See Mendoza v. Town of Ross*, 128 Cal. App. 4th 625, 635 (2005) (courts “look to federal decisions
 5 interpreting [Title VII] for assistance in interpreting the FEHA” “[b]ecause the antidiscrimination
 6 objectives and relevant wording ... are similar”); 55 Ops. Cal. Atty. Gen. 53 (1972) (citing *Brush*
 7 and concluding that a newspaper is not an employment agency under FEHA’s predecessor statute).

8 *Second*, Plaintiffs fail to allege the elements of an aiding-and-abetting claim. Section
 9 12940(i) incorporates common law aiding and abetting standards, including the intent and
 10 substantial assistance requirements. *Fiol v. Doellstedt*, 50 Cal. App. 4th 1318, 1325 (1996).
 11 Plaintiffs fail to allege that Facebook provides substantial assistance to advertisers, with the intent to
 12 discriminate. *See Casey v. U.S. Bank Nat’l Ass’n*, 127 Cal. App. 4th 1138, 1144, 1146 (2005) Any
 13 alleged failure to prevent advertisers from acting unlawfully does not constitute “substantial
 14 assistance.” Such a theory would “conflate[] an ‘aiding and abetting’ claim with a claim brought
 15 under Cal. Gov. Code § 12940(k), which makes it unlawful for a [covered entity] to fail to take all
 16 reasonable steps necessary to prevent discrimination.” *Ortiz v. Ga. Pac.*, 973 F. Supp. 2d 1162,
 17 1184 (E.D. Cal. 2013). And for the reasons discussed above, Facebook is not a covered entity. Nor
 18 have Plaintiffs identified any advertiser’s violation of the law they believe Facebook abetted.

19 *Third*, Plaintiffs fail to state a claim for housing discrimination under California Gov’t Code
 20 section 12955(a). Plaintiffs fail to allege any facts showing that Facebook is an “owner.” *See* Cal.
 21 Gov’t Code § 12927(e) (defining “owner”). Plaintiffs assert that Facebook is an “agent or
 22 salesperson of housing accommodations.” (FAC ¶ 102.) But Plaintiffs fail to plead any facts
 23 showing an agency relationship between Facebook and advertisers or that Facebook is a “real estate
 24 ... salesperson.” Plaintiffs cannot plead such facts, because Facebook is not a “real estate broker or
 25 salesperson” under California law. *See* Cal. Fair Housing & Pub. Accommodations § 1:4 (“Real
 26 estate brokers and salespersons are professionals licensed and regulated by the State of California
 27 Bureau of Real Estate.”); Cal. Bus. & Prof. Code § 10132 (definition of real estate salesperson).
 28 Courts routinely disregard “conclusory” assertions of agency like Plaintiffs’ and should do so here.

1 *See, e.g., Kennedy v. Wells Fargo Bank N.A.*, 2011 WL 3359785, at *3 (N.D. Cal. Aug. 2, 2011).

2 *Fourth*, Plaintiffs cannot state a housing-discrimination claim under Cal. Gov’t Code
3 § 12955(k), which makes it unlawful to “make unavailable or deny a dwelling based on
4 discrimination.” Facebook cannot make unavailable or deny a dwelling, because Facebook does not
5 sell, lease, or otherwise offer any dwellings to its users. Plaintiffs allege that Facebook “provid[es]
6 information” and targeting tools to third-party advertisers, but Plaintiffs do not and cannot allege
7 that Facebook decides whether to sell or rent accommodations to users. *Supra* at 2-4, 9-14.

8 *Fifth*, Plaintiffs cannot state a claim under Cal. Gov’t Code section 12955(i), which applies
9 only to entities “whose business involves real estate-related transactions.” Like the FHA, the FEHA
10 defines “real estate-related transactions” as the “making or purchasing of loans,” the “selling,
11 brokering, or appraising” of property, or the “use of territorial underwriting requirements.” *Id.*
12 § 12927(h). Plaintiffs do not and cannot allege that Facebook does any of these things.

13 *Sixth*, Plaintiffs’ discriminatory advertising claim under Cal. Gov’t Code section 12955(c)
14 suffers from the same fatal flaws as Plaintiffs’ section 3604(c) claim under the FHA. The “language
15 of sections 12955(c) and 3604(c) are substantially similar and subject to the same analysis.” *Pack v.*
16 *Fort Washington II*, 689 F. Supp. 2d 1237, 1248 (E.D. Cal. 2009). Plaintiffs’ section 12955(c)
17 claim should be dismissed for the reasons discussed above. *Supra* at 20-21.

18 *Seventh*, Plaintiffs cannot state a claim under Cal. Gov’t Code section 12955(j), which makes
19 unlawful the discriminatory denial of “access to, or membership or participation in, a multiple
20 listing service, real estate brokerage organization, or other service.” Section 12955(j) protects
21 brokers and salespersons, not applicants for housing. *Cf. Derish v. San Mateo–Burlingame Bd. of*
22 *Realtors*, 136 Cal. App. 3d 534, 539-40 (1982) (multiple listing service could exclude public from
23 access and membership). Plaintiffs fail to allege that Facebook has denied any broker or salesperson
24 access or membership to a multiple listing service, brokerage organization, or other service.

25 *Eighth*, Plaintiffs’ aiding-and-abetting claim under Cal. Gov’t Code section 12955(g) (FAC
26 ¶ 114), like their claim under section 12940(i), fails because Plaintiffs do not allege that Facebook
27 had the requisite intent to discriminate or provided “substantial assistance or encouragement” to
28 advertisers violating FEHA. *See Fiol*, 50 Cal. App. 4th at 1325; *Casey*, 127 Cal. App. 4th at 1144.

1 Nor do they identify any advertiser's violation of the law they believe Facebook abetted.

2 **7. Plaintiffs Fail to State a Claim Under the Unruh Act**

3 Plaintiffs' Unruh Act claim (FAC ¶¶ 77-82) fails at the outset because "a plaintiff seeking to
4 establish a case under the Unruh Act must plead and prove intentional discrimination." *Koebke v.*
5 *Bernardo Heights Country Club*, 36 Cal.4th 824, 854 (2005). Plaintiffs make no such allegation.
6 *See supra* at 16-17. As the California Supreme Court has held, the statutory text, and in particular
7 its reference to "'aiding'" and "'inciting'" discrimination (Cal. Civ. Code § 52(a)), "imply willful,
8 affirmative misconduct on the part of those who violate the Act." *Koebke*, 36 Cal.4th at 853.
9 Plaintiffs allege no facts demonstrating that Facebook willfully or affirmatively discriminated
10 against users based on a protected trait. Plaintiffs' allegations speak only to whether unspecified
11 *advertisers* may have engaged in discriminatory conduct. Nor can any discriminatory intent be
12 inferred from Facebook's provision of a neutral tool used by advertisers, in their sole discretion, to
13 engage in a practice that is commonplace in advertising. *Id.* at 854; *see also Earll v. eBay Inc.*, 2012
14 WL 3255605, at *5 (N.D. Cal. Aug. 8, 2012) (dismissing Unruh Act claim where "allegations
15 describe a facially neutral" policy and so did not "demonstrate intentional discrimination").

16 Plaintiffs also fail to allege facts indicating that any conduct violated the Unruh Act. The
17 Act "prohibits only unreasonable, arbitrary, or invidious discrimination, not differential treatment
18 based on actual characteristic differences or differences in needs of users." *Sunrise Country Club*
19 *Ass'n v. Proud*, 190 Cal. App. 3d 377, 380-81 (1987). "Invidious discrimination is the treatment of
20 individuals in a manner that is malicious, hostile, or damaging." *Javorsky v. W. Athletic Clubs, Inc.*,
21 242 Cal. App. 4th 1386, 1404 (2015). The Act does not prohibit discriminatory policies that "do[]
22 not perpetuate any invidious stereotypes," *id.* at 1401, or policies based on "actual characteristic
23 differences or differences in needs of users." *Sunrise Country Club*, 190 Cal. App. 3d at 380-81.

24 Plaintiffs do not, and cannot, allege that Facebook has engaged in any unreasonable,
25 arbitrary, or invidious discrimination. Rather, Plaintiffs allege that Facebook has developed a tool
26 that "enabl[es]" third-party "[b]usinesses to determine who will and who will not receive their
27 advertisements." (FAC ¶ 47.) But developing a tool that allows third parties to target ads does not
28 amount to "unreasonable, arbitrary, or invidious discrimination." As discussed above (*supra* at 2-4),

1 the Ad Platform allows advertisers to engage in a broad range of targeted advertising, including
 2 based on users' expressed interest in content related to certain ethnic affinity groups, that do not rest
 3 on unfair or harmful stereotypes or the "undesirable propensities" of a class. *See Javorsky*, 242 Cal.
 4 App. 4th at 1395 (differential treatment "may be reasonable, and not arbitrary, in light of the nature
 5 of the enterprise or its facilities, legitimate business interests ... and public policy").

6 Nor can Plaintiffs claim that Facebook's conduct in developing the Ad Platform constitutes
 7 "aid[ing] or incit[ing]" any discrimination. Cal. Civ. Code, § 52(a). No aiding-and-abetting liability
 8 is available for the same reasons such a theory of liability fails under the FEHA. Facebook has
 9 "do[ne] no more than provid[e its] usual, legitimate service" to advertisers; that some may abuse the
 10 service does not amount to intentional substantial assistance or encouragement warranting aiding-
 11 and-abetting liability. *Schulz v. Neovi Data Corp.*, 152 Cal. App. 4th 86, 94 (2007).

12 **8. Plaintiffs Fail to State a Claim Under the UCL**

13 Plaintiffs' UCL claim (FAC ¶¶ 69-76) fails both because Plaintiffs have not alleged any
 14 unlawful, unfair, or fraudulent conduct, and because they are entitled to no relief under the UCL. A
 15 plaintiff may "borrow" violations of other laws to state a claim under the "unlawful" prong of the
 16 UCL. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999). But, for the
 17 reasons discussed, Plaintiffs fail to allege that Facebook has violated any laws. Nor do Plaintiffs
 18 allege any "unfair" or "fraudulent" conduct by Facebook. And even if they had, they would not be
 19 entitled to relief. A private UCL plaintiff must show that she has "lost money or property as a result
 20 of the unfair competition," Cal. Bus. & Prof. Code § 17204, but Plaintiffs allege no facts suggesting
 21 that they have. Moreover, to obtain restitution—the only form of monetary relief available under
 22 the UCL—the plaintiff must have lost money or property "to the defendant." *Korea Supply Co. v.*
 23 *Lockheed Martin Corp.*, 29 Cal.4th 1134, 1147-48 (2003) (emphasis added). Plaintiffs allege no
 24 such thing, so their UCL claim must be dismissed. *See, e.g., L.A. Taxi Coop., Inc. v. Uber Techs.,*
 25 *Inc.*, 114 F. Supp. 3d 852, 867-68 (N.D. Cal. 2015). Plaintiffs also request punitive damages, but
 26 such damages cannot be recovered in a UCL action. *Korea Supply*, 29 Cal.4th at 1148.

27 **V. CONCLUSION**

28 For these reasons, the Court should dismiss Plaintiffs' FAC without leave to amend.

1 DATED: April 3, 2017

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