

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

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.

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

United States District Court
Northern District of California

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1 **BACKGROUND**

2 The TAC reasserts claims under the federal Fair Housing Act² and analogous California³
3 and New York⁴ laws challenging Facebook, Inc.'s former practice of allowing advertisers to self-
4 select target audiences for their paid housing advertisements ("Targeted Ads" or "Ads"),
5 theoretically excluding protected classes of consumers from seeing those advertisers' particular
6 housing ads.

7 I dismissed plaintiffs' Second Amended Complaint ("SAC"), following the analyses of
8 two other Northern District of California cases that dismissed challenges to Facebook's Targeted
9 Ad tools under other anti-discrimination laws for lack of standing. I held that plaintiffs' standing
10 allegations were deficient because:

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

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

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

27 *Id.* at 10-11. I did not reach Facebook's other arguments that the SAC should be dismissed with
28 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

29 _____
30 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.*

1 regarding Facebook’s Ad Platform’s design and tools allowing advertisers to target specific
 2 groups for their paid Ads remained largely the same as in the SAC. *See also* January 2021 Order
 3 at 2-3.

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

9 LEGAL STANDARD

10 A motion pursuant to Federal Rule of Civil Procedure 12(b)(1) tests whether the court has
 11 subject matter jurisdiction to hear the claims alleged in the complaint. A Rule 12(b)(1) motion
 12 may be either facial, where the inquiry is limited to the allegations in the complaint, or factual,
 13 where the court may look beyond the complaint to consider extrinsic evidence. *Wolfe v.*
 14 *Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Here, Facebook brings a facial attack on the
 15 sufficiency of the allegations in the SAC. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035,
 16 1039 (9th Cir. 2004) (in a facial attack under Rule 12(b)(1), “the challenger asserts that the
 17 allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction.”).
 18 A district court, “resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6):
 19 Accepting the plaintiff’s allegations as true and drawing all reasonable inferences in the plaintiff’s
 20 favor, the court determines whether the allegations are sufficient as a legal matter to invoke the
 21 court’s jurisdiction.” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). As with a Rule
 22 12(b)(6) motion, however, a court is not required “to accept as true allegations that are merely
 23 conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec.*
 24 *Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

25 DISCUSSION

26 I. STANDING

27 In the TAC, each plaintiff adds details about the types (costs, size, location and other
 28 “criteria”) of housing searches they conducted using Facebook, the time frames when they used

1 Facebook to conduct those searches, and states that they did not receive any housing ads that
 2 matched their criteria.⁵ They generally allege that if they had received Ads for housing that
 3 matched their criteria, they would have pursued those housing opportunities. TAC ¶¶ 79-152.

4 Facebook contends that these more detailed allegations are still not sufficient to confer
 5 standing because they do not plausibly allege that any plaintiff was in fact injured by Facebook’s
 6 advertisers’ use of the now-defunct Ad targeting tools. I agree. As Facebook notes, plaintiffs do
 7 not attempt to allege that housing *was generally available* in their desired markets – much less that
 8 housing Ads satisfying those criteria *were being placed in Facebook* – under the criteria that any
 9 of the plaintiffs were using during the times they were using Facebook to search for housing.⁶
 10 That is fatal to plaintiffs’ standing.⁷

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

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

21 TAC ¶ 95.

22 Unlike in other places in the TAC, this paragraph about Vargas and her friend’s searches
 23 does not distinguish between consumer-placed ads (that plaintiffs admit did not utilize the
 24 “targeted criteria” plaintiffs claim are discriminatory) and paid Ads covered by the claims in this

25 _____
 26 ⁵ The legal standard and discussion of standing cases from my January 2021 Order is incorporated
 27 herein.

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

32 ⁷ As I noted in the January 2021 Order, the facts of this case are wholly unlike the “testing” cases
 33 plaintiffs rely on under the FHA where the facts demonstrated the housing sought by the plaintiffs
 34 was available and that the tester received false information. See January 2021 Order at 7-8

1 case. Nor does plaintiff identify *any specific ads* that Marcello received that met plaintiff’s criteria
 2 and that plaintiff would have pursued. She simply declares that Marcello received unspecific ads
 3 in “preferable” locations. She does not indicate those ads, even if paid ads, met her other criteria
 4 (cost, size, etc.) to plausibly allege that she was harmed by being denied access to those other,
 5 unidentified ads. That is insufficient.

6 Plaintiffs contend, as they did on the prior round to dismiss, that I should not follow the
 7 standing analyses of the Hon. Beth L. Freeman in *Bradley v. T-Mobile US, Inc.*, 17-CV-07232-
 8 BLF, 2020 WL 1233924 (N.D. Cal. Mar. 13, 2020) and the Hon. Jacqueline Scott Corley in
 9 *Opiotennione v. Facebook, Inc.*, 19-CV-07185-JSC, 2020 WL 5877667, at *1 (N.D. Cal. Oct. 2,
 10 2020. Both of those cases challenged Facebook’s Targeting Ads program, and both were
 11 dismissed for lack of standing given plaintiffs’ failure to plead plausible facts to support that they
 12 were harmed under other anti-discriminatory laws by advertiser’s use of the Targeted Ad tools.
 13 Plaintiffs repeat their unsupported argument that I should not follow the analyses in those cases
 14 because standing under the FHA is broader than under Title VII and the statutory schemes
 15 considered by Judges Freeman and Corley. *Oppo.* at 10-11. I addressed and rejected this
 16 argument in the January 2021 Order at 7-9 (discussing and distinguishing *Bank of Am. Corp. v.*
 17 *City of Miami, Fla.*, 137 S. Ct. 1296, 1304 (2017), *Havens Realty Corp. v. Coleman*, 455 U.S. 363,
 18 373–74 (1982), *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 110-111 (1979), and
 19 *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209-212 (1972)) and will not revisit it again.⁸

20 In sum, what the plaintiffs have alleged is that they each used Facebook to search for
 21 housing based on identified criteria and that no results were returned that met their criteria. They
 22 *assume* (but plead no facts to support) that no results were returned because unidentified
 23 advertisers theoretically used Facebook’s Targeting Ad tools to exclude them based on their
 24

25 ⁸ A recent decision from the District of Maryland further supports my conclusion. In
 26 *Opiotennione v. Bozzuto Mgt. Co.*, CV 20-1956 PJM, 2021 WL 3055614 (D. Md. July 20, 2021),
 27 the plaintiffs sued the underlying advertisers who allegedly used Facebook to place Targeted Ads
 28 in a discriminatory fashion in violation of local antidiscrimination and consumer protection laws.
 29 Despite plaintiffs alleging they were denied access to ads placed for specifically identified housing
 30 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

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