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3   **UNITED STATES DISTRICT COURT**

4   **NORTHERN DISTRICT OF CALIFORNIA**

5   **SAN JOSE DIVISION**

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7   LINDA BRADLEY, et al.,   Case No. 17-cv-07232-BLF

8   Plaintiffs,

9   v.   **ORDER GRANTING MOTION TO
                                                 DISMISS FOURTH AMENDED CLASS
10   T-MOBILE US, INC., et al.,   AND COLLECTIVE ACTION
                                                 COMPLAINT**
11   Defendants.   [Re: ECF 143, 165]

12

13   This is a case about employment discrimination in "the Cyber Age," *S. Dakota v. Wayfair,*

Inc., 138 S. Ct. 2080, 2097 (2018). It has often been said that the Internet has wrought "far-

reaching systemic and structural changes in the economy." *Id.* One of these changes is the ability

for companies like Facebook to collect enormous amounts of data about people through their

social media activity and online behavior more generally. These companies have harnessed that

information in many ways, including crafting so-called "targeted ads." Targeted ads are

personalized to the user, featuring the products, services, and opportunities of greatest interest to

that user. In theory, both advertisers and users benefit: Advertisers can spend their marketing

dollars more efficiently, and users see more interesting content. In Plaintiffs' view, however, this

kind of targeting can also be used in insidious ways—namely, to deny access to information to

certain groups of people and thereby advance discriminatory aims. Specifically, the plaintiffs in

this case believe that Defendants T-Mobile US, Inc. ("T-Mobile") and Amazon.com, Inc.

("Amazon") routinely exclude older individuals from viewing the employment ads they post on

Facebook. In an effort to stop that practice, Plaintiffs have brought this putative class action

alleging violations of various federal and state laws.

        Defendants move to dismiss the Fourth Amended Complaint ("4AC") on multiple grounds,

1 including lack of Article III standing, lack of personal jurisdiction, and failure to state a claim

2 upon which relief may be granted. As set forth below, the Court holds that the 4AC does not

3 currently contain the allegations necessary to establish standing or personal jurisdiction, but that

4 Plaintiffs have adequately justified their narrow request for jurisdictional discovery. Accordingly,

5 the Court GRANTS the motion to dismiss with LEAVE TO AMEND and GRANTS the request

6 for jurisdictional discovery.

7 **I.   BACKGROUND**

8 The following facts are drawn from the 4AC, which the Court must treat as true at the

9 pleading stage, *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011).

10 **A.   Defendants' Alleged Conduct**

11 The defendants in this case are T-Mobile US, Inc. ("T-Mobile") and Amazon.com, Inc.

12 ("Amazon"). These two major U.S. companies need little introduction. T-Mobile is one of the

13 largest wireless companies in the United States"; it provides "wireless communications services

14 including voice, messaging and data, to more than 71 million customers" and, as of December

15 2016, employs "approximately 50,000 full-time and part-time employees." 4AC ¶ 39. Amazon is

16 "one of the largest online retailers in the world." *Id.* ¶ 40. Headquartered in Seattle, Washington,

17 it "employed 341,400 full-time and part-time employees as of December 31, 2016." *Id.*

18 This suit concerns Defendants' methods of recruiting prospective employees, which

19 Plaintiffs believe discriminate against older workers. In particular, both Defendants allegedly use

20 Facebook's ad platform to advertise employment opportunities at their various stores and

21 operations. 4AC ¶¶ 39-40. According to Plaintiffs, "Facebook has emerged as one of the largest

22 venues for employers to seek applicants for employment and for workers to find job

23 opportunities." *Id.* ¶ 46. As "the most popular social media platform in the world," *id.* ¶ 41,

24 Facebook collects a vast amount of information about its users, *id.* ¶ 44. Facebook then gives its

25 advertisers "the power to use that information to determine which Facebook users will be included

26 or excluded in the population that will receive their ads." *Id.* Facebook promotes such targeted

27 advertising to employers as helping them to "minimize the cost of reaching people who are

¶ 45. Factors that advertisers can use to target ads include "age, gender, location, interests, and behaviours." *Id.*

Defendants are alleged to have used Facebook's ad targeting functionality to recruit younger workers and not older workers. They did this by imposing a "ceiling on the age of people who will receive their job advertisements." 4AC ¶ 82. Plaintiffs summarize the basic practice at issue as follows:

> When an employer or an employment agency creates, purchases, and sends a Facebook ad to make workers aware of job opportunities and encourage them to apply for various jobs, Facebook requires the employers or employment agencies to select the population of Facebook users who will be eligible to receive the ad, including the age range of the users who will receive the ad. Following Facebook's encouragement to narrowly focus ad campaigns on the "right people," including by targeting younger people, upon information and belief, Defendants have routinely focused their Facebook employment ads on users who are under 40-years-old (and sometimes on users who are under higher age thresholds). This prevents workers who are above the selected age threshold from receiving employment ads and pursuing relevant job opportunities.

Id. ¶ 17. Plaintiffs further allege that "[t]he default age setting for ads is 18 to 65+, which means that anyone who is 18-years-old or older would receive the ad." *Id.* ¶ 63. As a result, Plaintiffs say, "any employer or employment agency that selects a narrower and younger age range (such as ages 18 to 40) is consciously and purposefully choosing to target younger prospective applicants and thereby excluding older applicants who will not receive the ad." *Id.*

Defendants' employment ads—and Facebook employment ads in general—are not typically for individual job opportunities; rather, they "direct the Facebook user to [the advertiser's] 'Careers' or company Facebook pages, in addition to a page on the company's website page that has information about a range of job opportunities throughout the company." 4AC ¶ 49. Thus, the prospective applicant can view "all available positions for which she or he could apply and encourages prospective employees to apply for such positions." *Id.*

Also relevant to this case is a function called "Why am I seeing this." When a Facebook user sees an ad, he or she can click on the "Why am I seeing this" function to view why he or she has been selected to see that particular ad. 4AC ¶¶ 84-85. For instance, a user might see that "T-Mobile wants to reach people ages 18 to 38 who live or were recently in the United States." *Id.* ¶

85. Thus, the user can view the age range that the advertiser selected.

The 4AC included the below exemplars of two age-restricted ads and the associated "Why am I seeing this" pages:
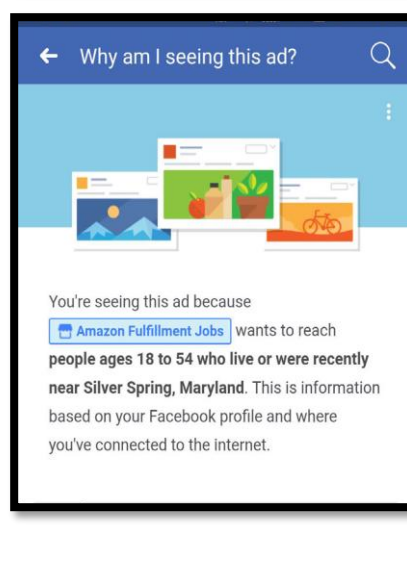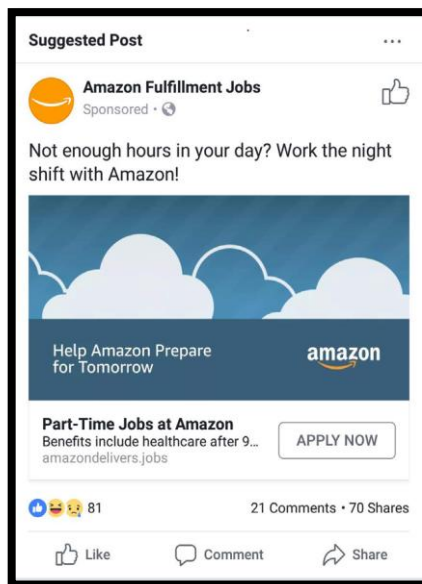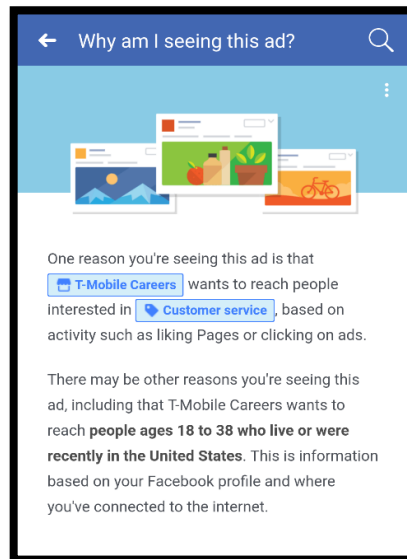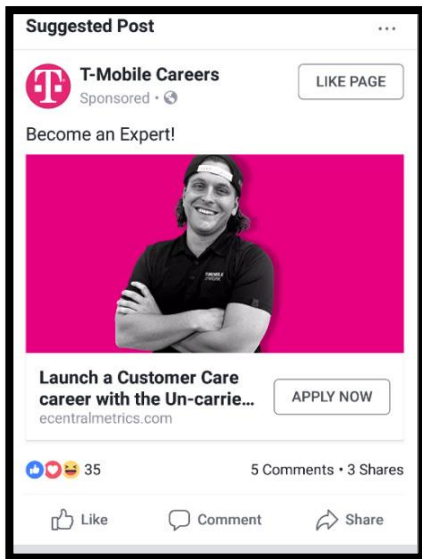
4AC ¶¶ 2, 92. Other exemplars are attached the 4AC as Exhibit A. ECF 140-1.

Plaintiffs allege that Defendants have employed age-restricted ads on Facebook to advertise "jobs that were located throughout the states where these employers employ workers, including jobs in this District and elsewhere in California, the District of Columbia, and Ohio." 4AC ¶ 97. Specifically, as to T-Mobile, the 4AC alleges that "T-Mobile advertised jobs in 42 states and the District of Columbia," *id.* ¶ 39; as to Amazon, the 4AC alleges that Amazon

1   advertised "for a range of positions . . . throughout the United States," *id.* ¶ 40.

2   **B.   The Instant Suit**

3   Plaintiffs contend that Defendants' use of age-restricted employment ads is part of a

4   "pattern or practice of age discrimination in employment advertising, recruitment, and hiring."

5   4AC ¶¶ 89, 150. Accordingly, Plaintiffs filed this putative class action, alleging two basic legal

6   theories. First, the Age Discrimination in Employment Act ("ADEA") makes it unlawful for an

7   employer "to print or public, or cause to be printed or published, any notice or advertisement

8   relating to employment by such employer . . . indicating any preference, limitation, specification,

9   or discrimination, based on age." 29 U.S.C. § 623(e). Plaintiffs believe that Defendants'

10   advertisements "indicate a preference" for younger workers and against older workers by (1) being

11   targeted to younger workers and excluded from older workers, and (2) informing users of the

12   targeting through the "Why am I seeing this" function. 4AC ¶¶ 12, 151; *see* Opp. at 18-19, 22.

13   Second, the ADEA makes it unlawful for an employer "to fail or refuse to hire or . . .

14   otherwise discriminate against any individual with respect to his compensation, terms, conditions,

15   or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Plaintiffs

16   contend that Defendants' age-restricted advertising constitutes disparate treatment in hiring

17   because it is disparate treatment in recruiting. *See* Opp. at 23. That is, employers only hire the

18   people who apply, who are the people they recruit; by favoring younger workers in recruitment,

19   Defendants necessarily favor them in hiring. *Id.*; *see* 4AC ¶¶ 166, 168.

20   Plaintiffs allege these theories under the ADEA and similar state laws. The operative 4AC

21   contains eleven counts: (1) discriminatory publication or advertising by an employer, in violation

22   of the ADEA, 29 U.S.C. § 623(e); (2) disparate treatment in recruiting and hiring, in violation of

23   the ADEA, 29 U.S.C. § 623(a); (3) discriminatory publication or advertising by an employer, in

24   violation of the California Fair Employment and Housing Act ("California FEHA"), Cal. Gov.

25   Code § 12940(d); (4) discriminatory publication or advertising, in violation of the District of

26   Columbia Human Rights Act ("DCHRA"), D.C. Code § 2-1402.11(a); (5) discriminatory

27   publication or advertising, in violation of the Ohio Fair Employment Practices Law ("OFEPL"),

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