

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TYLER BARNETT PR, LLC, et al.,

Plaintiffs,

v.

FACEBOOK INC.,

Defendant.

Case No. 16-cv-06232-JSW

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS**

Re: Dkt. No. 110

Now pending before the Court for consideration is the motion to dismiss filed by Defendant Facebook, Inc. The Court has considered the parties' papers, relevant legal authority, and the record in this case, and the Court finds the motion suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). For the reasons set forth below, the Court **HEREBY DENIES** Facebook's motion to dismiss.

BACKGROUND

The factual allegations underlying this action are explained in detail in this Court's December 18, 2017 order granting Facebook's motion to dismiss the second amended complaint with leave to amend. (*See* Dkt. No. 94, SAC Dismissal Order at 1-3.) In general, Plaintiffs are companies or individuals who purchased video advertisements on Facebook's platform between May 2014 and September 2016. Plaintiffs allege that Facebook touted to advertisers the availability of certain video metrics that would permit advertisers to assess the effectiveness of their video ads. (*See* Dkt. No. 8, Third Amended Complaint ("TAC") ¶¶ 18.) In September 2016, Facebook announced that its calculations for certain of these video metrics were erroneous. (*See id.* ¶¶ 25-28.) Plaintiffs contend that this error led Plaintiffs to believe their advertisements were more effective than they were, thus (1) inducing Plaintiffs to continue to purchase video

advertising on the Facebook platform, and (2) distorting the market price for those ads. (*See id.* ¶¶ 34-37.) It appears undisputed that Facebook has fixed the erroneously-calculated video metrics.

In the TAC, as in the second amended complaint, Plaintiffs seek injunctive relief. Specifically, Plaintiffs seek:

(i) an order prohibiting Facebook from engaging in the wrongful acts described herein; (ii) requiring Facebook to engage third-party auditors to conduct audits and evaluations of Facebook’s advertising metrics on a periodic basis and ordering them to promptly correct any problems or issues detected by these auditors, and (iii) requiring Facebook to disclose any further inaccurate advertising metrics in a timely and accurate manner.

(TAC at Prayer for Relief ¶ B.)

In its prior order, the Court found that Plaintiff lacked standing to pursue this injunctive relief. The Court noted that “Plaintiffs do not appear to contest that in 2016 Facebook identified, and corrected, the two allegedly inflated analytics.” (SAC Dismissal Order at 6.) The Court also addressed Plaintiffs’ reliance on *Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103 (9th Cir. 2017), *amended and superseded by* — F.3d —, 2018 WL 2169784 (9th Cir. May 9, 2018). The Court acknowledged the potential for such a theory to give rise to standing, but found that Plaintiffs had failed to support the theory with sufficient factual allegations:

Plaintiffs argue that unless Facebook’s verification and auditing practices are changed, they will suffer the same injury as the consumer in *Davidson* because they will be unable to determine the accuracy of Facebook’s analytics in the future. (See Opposition at 8.) The Court has no qualms with this theory of standing, and recognizes its potential applicability to this case. The problem, however, is Plaintiffs do not allege sufficient facts to support this theory. Plaintiffs’ theory relies on the premise that Facebook’s verification and auditing practices are deficient, leading to errors and uncertainty regarding the video analytics. The SAC, however, contains no factual allegations describing Facebook’s auditing practices, let alone explaining why these practices are deficient.

(*Id.* at 7-8.) The Court, however, afforded Plaintiffs leave to amend, stating that if “Plaintiffs are able to plead *facts* demonstrating that Facebook has a track record of providing inaccurate analytics as a result of deficient auditing practices, this could, in theory, give rise to a plausible inference that Plaintiffs face a ‘real and immediate’ risk of either (1) being subjected to inaccurate analytics in the future, or (2) being unable to rely on the accuracy of Facebook’s analytics in the

future.” (*Id.* at 8.)

In the TAC, Plaintiffs have sought to provide the factual support requested by the Court. They allege that Facebook has made “systemic and continuous” errors in their audit and verification process. (TAC ¶ 42.) Plaintiffs rely on an article from a marketing publication which noted that in a one year period (September 2016 through November 2017) Facebook reported 12 errors relating to its analytics. (*Id.* ¶ 43.)¹ The cited article indicates that Facebook had corrected each of the discovered mistakes. Plaintiffs also cite numerous trade and news articles publicly calling for the need for Facebook to permit third-party verification of its audits. (*See id.* ¶¶ 45-42.)

Facebook has again moved to dismiss Plaintiffs’ claim for injunctive relief on the ground that Plaintiffs lack standing to assert such relief.²

DISCUSSION

The applicable legal standard remains unchanged from the Court’s prior order. A party seeking to invoke the Court’s jurisdiction bears the burden of demonstrating that it has standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In the context of requests for injunctive relief, the standing inquiry requires a plaintiff to “demonstrate that [it] has suffered or is threatened with a ‘concrete and particularized’ legal harm, coupled with a ‘sufficient likelihood that he will again be wronged in a similar way.’” *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (quoting first *Lujan*, 504 U.S. at 560, and then *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). This latter inquiry turns on whether the plaintiff has a “real and immediate threat of repeated injury.” *Id.* The threat of future injury cannot be “conjectural or hypothetical” but must be “certainly impending” to constitute an injury in fact for injunctive relief purposes. *Davidson v. Kimberly-Clark Corp.*, — F.3d —, 2018 WL 2169784, at *7 (9th Cir. May 9, 2018).

Under the Ninth Circuit’s decision in *Davidson*, the Court finds that Plaintiffs have, for

¹ The video metric errors that gave rise to this lawsuit are one of the 12 identified errors.

² After briefing was complete on Facebook’s motion, Plaintiff Tyler Barnett PR, LLC voluntarily dismissed its claims. (*See* Dkt. No. 133.) The remaining Plaintiffs continue to assert a claim for injunctive relief.

1 purposes of the pleading stage, adequately alleged standing to pursue their desired injunctive
2 relief. As the Court previously noted, the Ninth Circuit has recognized that a consumer's
3 "inability to rely on the validity of the information advertised," combined with the consumer's
4 desire to purchase the product in question, constituted a concrete harm. *See Davidson*, 2018 WL
5 2169784, at *10. Such a consumer would also face the risk of repeated injury because he or she
6 would "face[] the similar injury of being unable to rely on [the defendant's] representations of its
7 product in deciding whether or not she should purchase the product in the future." *Id.*

8 The Plaintiffs here allege that they were subjected to inaccurate advertising (namely, the
9 erroneous video metrics). The Plaintiffs appear to agree that Facebook has identified and
10 corrected these specific erroneous video metrics. The Plaintiffs have, however, now made specific
11 factual allegations suggesting that these erroneous video metrics were only one of several
12 advertising-analytic errors made by Facebook. In light of these new factual allegations, Plaintiffs
13 have, for purposes of the pleading stage, plausibly alleged that they have standing to pursue their
14 claims for injunctive relief. *See, e.g., Barnum Timber Co. v. Envtl. Prot. Agency*, 633 F.3d 894,
15 899 (9th Cir. 2011) (at the motion to dismiss stage, Article III standing is adequately demonstrated
16 through allegations of "specific facts plausibly explaining" why the standing requirements are
17 met).

18 First, the Plaintiffs plausibly allege a concrete and particularized legal harm. Like the
19 consumers in *Davidson*, Plaintiffs have been harmed in that they are unable to rely on the validity
20 and accuracy of Facebook's representations regarding its advertising metrics. *See Davidson*, 2018
21 WL 2169784, at *10; *see also Martin v. Tradewinds Beverage Co.*, No. 16-cv-9249-PSG, 2018
22 WL 313123 (C.D. Cal. Jan. 4, 2018) ("Under *Davidson*, Plaintiffs here could allege that they
23 suffer the same continuing injury: the inability to rely on packaging alleged to be 'once marred by
24 false advertising.'"). Further, Plaintiffs plausibly allege that this harm—this uncertainty—is
25 sufficiently likely to recur. *Id.* ("In other words, Davidson faces the similar injury of being unable
26 to rely on Kimberly-Clark's representations of its product in deciding whether or not she should
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purchase the product in the future.”).³ As the Supreme Court and Ninth Circuit have recognized, “[p]ast wrongs, though insufficient by themselves to grant standing, are ‘evidence bearing on whether there is a real and immediate threat of repeated injury.’” *Id.* at *7 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). Finally, the Court finds that Plaintiffs adequately allege that injunctive relief would redress this uncertainty harm by requiring a third-party to verify Facebook’s advertising metrics.

Here, Plaintiffs allege that they intend to purchase advertising on Facebook’s platform going forward. (TAC ¶¶ 64, 71.) They have also alleged that Facebook’s errors regarding the video-metrics were one in a series of similar errors and that these errors persisted for a not insignificant amount of time being identified and corrected. Finally, Plaintiffs have alleged that these various errors were the result of deficient auditing and verification procedures and the inference in the TAC is that these underlying procedures have not been corrected. These allegations, which must be taken as true for purposes of the pleading stage, give rise to a sufficient inference that Plaintiffs will be unable to rely on Facebook’s representations regarding its analytics in the future.⁴ Under *Davidson*, this is a sufficiently concrete, and likely to recur, injury sufficient to establish standing to pursue injunctive relief.

In arguing that Plaintiffs cannot establish standing (and, implicitly, that this Court’s analysis of *Davidson* in the prior order was erroneous) Facebook relies on *Bruton v. Gerber Products Company*, No. 12-cv-02412-LHK, 2018 WL 1009257 (N.D. Cal. Feb. 13, 2018). The Court finds this case distinguishable. In *Gerber*, the plaintiff sought to certify a Rule 23(b)(2)

³ In this regard, Facebook misapprehends the nature of the injury giving rise to injunctive relief. Facebook contends that Plaintiffs have “not alleged sufficient facts to establish that another error will arise.” (Reply Br. at 2.) *Davidson*, however, spoke of consumers being injured as a result of the *uncertainty* created by the defendant’s conduct. Here, Plaintiffs have adequately alleged facts supporting the theory that they are unable to rely on Facebook’s representations regarding its advertising metrics.

⁴ The Court recognizes that Facebook, in its motion, cites the articles quoted in the TAC for the proposition that it has taken steps to strengthen its auditing practices. Even assuming the Court is permitted to take as true assertions in articles which have been cited in the TAC, the Court finds the sufficiency of these purported steps, and their impact on Plaintiffs’ standing to pursue injunctive relief, is one better resolved at either the summary judgment stage or, if necessary, at trial. For example, the Court notes the articles themselves reveal disagreement as to the efficacy of Facebook’s changes.

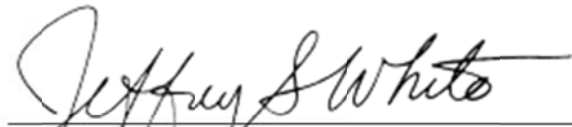
injunctive class to prevent defendant from continuing to mislabel the nutrient and sugar content of its baby food. The court, however, found that the plaintiff lacked standing to pursue injunctive relief because the defendant had stopped making the misleading statements at issue. *See id.* at *7. The court noted that “nothing in *Davidson* suggests the Ninth Circuit created a freestanding right to seek injunctive relief based on conduct that has ended.” *Id.* Unlike that case, however, here Plaintiffs are not seeking injunctive relief based entirely on conduct that has ended. Rather, they seek injunctive relief targeted on allegedly deficient auditing and verification practices—practices that allegedly permitted not only the erroneous video metrics at issue in this case to persist for over two years but also allowed similar errors to be made.⁵ According to the plausible allegations in Plaintiffs’ TAC, Facebook still follows these purportedly deficient auditing and verification practices.

CONCLUSION

For the foregoing reasons, Facebook’s motion to dismiss Plaintiffs’ Third Amended Complaint is DENIED.

IT IS SO ORDERED.

Dated: June 1, 2018



 JEFFREY S. WHITE
 United States District Judge

⁵Facebook contends that Plaintiffs have not alleged sufficient facts establishing that “Facebook’s errors resulted from deficient auditing practices.” (Reply Br. at 3.) The Court finds this argument is better tailored for after discovery has taken place. For purposes of the pleading stage, and after taking Plaintiff’s allegations as true, the Court finds it plausible that Facebook’s verification and auditing practices at least contributed to Facebook’s metric related errors.