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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SADEK RAOUF EBEID,
Plaintiff,
v.
FACEBOOK, INC,
Defendant.

Case No. 18-cv-07030-PJH

**ORDER GRANTING MOTION TO
DISMISS**

Re: Dkt. No. 11

Defendant Facebook, Inc's ("Facebook") motion to dismiss came on for hearing before this court on May 1, 2019. Plaintiff Sadek Raouf Ebeid appeared through his counsel, Behzad Vahidi. Facebook appeared through its counsel, Paven Malhotra and Victor Yu. Having read the papers filed by the parties and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS defendant's motion, for the following reasons.

BACKGROUND

Plaintiff was born and raised in Cairo, Egypt, but is now a resident of Arizona. Dkt. 1, Compl. ¶ 10. Ebeid alleges he has long been involved in the political and national issues of Egypt. Id. ¶ 11. As part of that involvement, in August 2010, Ebeid created a public Facebook page, titled "Egypt-Cradle of Love" (the "ECL page"). Id. ¶ 13. The purpose of that page "was to promote religious tolerance and the mutual acceptance of people of all faiths in Egypt and the Middle east." Id. Many of Ebeid's posts on the ECL public page were in Arabic. Id. ¶ 14.

The parties do not dispute that Facebook gives users the ability to "boost" their posts. Id. The boost feature allows users to turn posts that are otherwise free to publish

United States District Court
Northern District of California

1 into advertisements that target specific demographics. Id. If a user decides to boost his
2 posts, Facebook charges the user for each time the boosted post is actually displayed to
3 other users. Before the events that form the basis of this action, plaintiff regularly used
4 Facebook’s boost feature to promote posts on the ECL page. Id.

5 In early 2017, Ebeid started an advertisement campaign on the ECL page calling
6 for the recall of John Casson, the then-British Ambassador to Egypt. Compl. ¶ 16. As
7 that campaign gained popularity, Ebeid allegedly experienced repeated restrictions and
8 interference by Facebook related to his ability to promote his campaign. Id. ¶ 17.

9 According to plaintiff, all of Facebook’s conduct “shared a common goal and outcome,
10 which was prohibiting Dr. Ebeid from utilizing Facebook’s public forum to exercise his
11 right to free speech in supporting the Campaign[.]” Id. ¶ 17.

12 Between March 2017 and August 2017, plaintiff and other administrators of the
13 ECL page published and boosted numerous posts in support of ECL’s campaign
14 advocating for the recall of Casson. Id. ¶¶ 18-21. Facebook allegedly responded to that
15 campaign by removing some of those posts and restricting or suspending plaintiff’s and
16 the other administrators’ access to the Facebook platform or certain of its features. Id. In
17 August 2017, Facebook suspended Ebeid’s personal Facebook page for 30 days. Id.

18 In response to the restrictions imposed by Facebook, in September 2017, two
19 people created a Facebook group called “Friends of Dr. Sadek Raouf Ebeid” (the
20 “Friends of Ebeid page”). Id. ¶ 22. Over the next several months, Ebeid and others
21 shared posts from the ECL page on their own personal Facebook pages and on the
22 Friends of Ebeid page. Id. ¶ 23. In December 2017, Facebook notified Ebeid that
23 sharing posts from the ECL page would result in Facebook restricting Ebeid’s use of the
24 Facebook platform. Id. ¶ 24. Between September 2017 and February 2018, Facebook
25 restricted Ebeid from posting or joining any Facebook group—including the Friends of
26 Ebeid group—approximately 16 times. Id. ¶ 28. Though Facebook removed the
27 restriction each time Ebeid appealed the decision to restrict his access, Facebook
28 nevertheless restricted plaintiff’s access again, sometimes as early as the next day. Id.

1 During the same time period, Facebook allegedly removed numerous posts made
2 by plaintiff on the Friends of Ebeid page and the ECL page. Compl. ¶¶ 29-33. On at
3 least five occasions, Facebook removed the posts after labeling them as “spam.” Id.
4 Though Facebook reversed its decision after Ebeid challenged Facebook’s removal of
5 the posts, Facebook subsequently continued to remove similar posts as “spam.” Id. ¶ 33.
6 According to the complaint, Facebook removed Ebeid’s posts and restricted “his access
7 solely to interfere with his ability to campaign for the recall of the British Ambassador.” Id.
8 ¶ 34.

9 Lastly, plaintiff alleges that throughout the months of April and May 2018,
10 Facebook told plaintiff that his posts were being boosted as requested, when in fact that
11 was not the case. Id. ¶¶ 35-38. Plaintiff’s sole support for this allegation is that plaintiff’s
12 past boosted posts had reached about 100,000 Facebook users, while Ebeid’s April and
13 May posts, which were similar in content and targeted demographic to the past posts,
14 reached only a nominal number of users. Id. ¶¶ 35-37. Plaintiff complains that those
15 disparate results can only be attributed Facebook’s failure to boost the posts, despite its
16 representations to the contrary. Id. ¶ 38. Importantly, plaintiff does not contend that he
17 was charged for posts that were not actually boosted or seen by other Facebook users.
18 Instead, plaintiff alleges that he was somehow harmed by Facebook’s interference with
19 his ability to use the page to promote his “ideas and message.” Id. ¶ 39.

20 Based on those allegations, plaintiff alleges seven causes of action for: (i) violation
21 of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, et seq. (“Title II”); (ii) violation of the
22 First Amendment of the U.S. Constitution; (iii) violation of California’s Unruh Civil Rights
23 Act, Cal. Civ. Code §§ 51 et seq. (the “UCRA” or “Unruh Act”); (iv) fraud and/or
24 intentional misrepresentation; (v) breach of contract; (vi) breach of the implied covenant
25 of good faith and fair dealing; and (vii) violation of California’s Unlawful Business
26 Practices Act, Cal. Bus. & Prof. Code § 17200 et seq. (the “UCL”).

27 Defendant now moves to dismiss.

28 DISCUSSION

1 **A. Legal Standard**

2 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims
3 alleged in the complaint. Ileto v. Glock, 349 F.3d 1191, 1199–1200 (9th Cir. 2003).

4 Under Federal Rule of Civil Procedure 8, which requires that a complaint include a “short
5 and plain statement of the claim showing that the pleader is entitled to relief,” Fed. R. Civ.
6 P. 8(a)(2), a complaint may be dismissed under Rule 12(b)(6) if the plaintiff fails to state a
7 cognizable legal theory, or has not alleged sufficient facts to support a cognizable legal
8 theory. Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013).

9 While the court is to accept as true all the factual allegations in the complaint,
10 legally conclusory statements, not supported by actual factual allegations, need not be
11 accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009). The complaint must proffer
12 sufficient facts to state a claim for relief that is plausible on its face. Bell Atlantic Corp. v.
13 Twombly, 550 U.S. 544, 555, 558–59 (2007).

14 “A claim has facial plausibility when the plaintiff pleads factual content that allows
15 the court to draw the reasonable inference that the defendant is liable for the misconduct
16 alleged.” Iqbal, 556 U.S. at 678. “[W]here the well-pleaded facts do not permit the court
17 to infer more than the mere possibility of misconduct, the complaint has alleged—but it
18 has not ‘shown’—‘that the pleader is entitled to relief.’ ” Id. at 679 (quoting Fed. R. Civ.
19 P. 8(a)(2)). Where dismissal is warranted, it is generally without prejudice, unless it is
20 clear the complaint cannot be saved by any amendment. Sparling v. Daou, 411 F.3d
21 1006, 1013 (9th Cir. 2005).

22 The court’s review is generally limited to the contents of the complaint, although
23 the court can also consider documents “whose contents are alleged in a complaint and
24 whose authenticity no party questions, but which are not physically attached to the
25 plaintiff’s pleading.” Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005); see also
26 Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007). The court may also consider
27 matters that are properly the subject of judicial notice, Lee v. City of L.A., 250 F.3d 668,
28 688–89 (9th Cir. 2001), exhibits attached to the complaint, Hal Roach Studios, Inc. v.

1 Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989), and documents
 2 referenced extensively in the complaint and documents that form the basis of the
 3 plaintiff's claims, No. 84 Emp'r-Teamster Jt. Counsel Pension Tr. Fund v. Am. W. Holding
 4 Corp., 320 F.3d 920, 925 n.2 (9th Cir. 2003).

5 For plaintiff's claims that sound in fraud, the complaint must also meet the
 6 heightened pleading standard of Federal Rule of Civil Procedure 9(b). See Kearns v.
 7 Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009). Rule 9(b) requires a party alleging
 8 fraud or mistake to state with particularity the circumstances constituting fraud or mistake.
 9 "To satisfy Rule 9(b)'s particularity requirement, the complaint must include an account of
 10 the time, place, and specific content of the false representations as well as the identities
 11 of the parties to the misrepresentations." Depot, Inc. v. Caring for Montanans, Inc., 915
 12 F.3d 643, 668 (9th Cir. 2019) (internal quotation marks omitted).

13 **B. Analysis**

14 **1. The Communications Decency Act Immunizes Facebook From** 15 **Liability For Counts I-III and In Part For Count VII**

16 Defendant first argues that § 230 of the Communications Decency Act (the "CDA")
 17 immunizes it from plaintiff's Title II claim, First Amendment claim, UCRA claim, and part
 18 of the UCL claim (together, the "content-based-restriction claims"). According to
 19 defendant, it is immune from those claims because they essentially seek to hold
 20 Facebook liable for restricting what plaintiff can post on the Facebook platform. The
 21 court agrees.

22 "Section 230 immunizes providers of interactive computer services against liability
 23 arising from content created by third parties." Fair Hous. Council of San Fernando Valley
 24 v. Roommates.Com, LLC ("Roommates"), 521 F.3d 1157, 1162 (9th Cir. 2008) (en
 25 banc)). Under § 230(c)(1), "[n]o provider or user of an interactive computer service shall
 26 be treated as the publisher or speaker of any information provided by another information
 27 content provider." 47 U.S.C. § 230(c)(1). Accordingly, the CDA bars plaintiff's content-
 28 based-restriction claims if "(1) [the] Defendant is a 'provider or user of an interactive

1 computer service;’ (2) the information for which Plaintiff seeks to hold defendant liable is
 2 ‘information provided by another information content provider;’ and (3) Plaintiff’s claim
 3 seeks to hold Defendant liable as the ‘publisher or speaker’ of that information.” Sikhs for
 4 Justice "SFJ", Inc. v. Facebook, Inc., 144 F. Supp. 3d 1088, 1092-93 (N.D. Cal. 2015)
 5 (quoting § 230), aff’d sub nom. Sikhs for Justice, Inc. v. Facebook, Inc., 697 F. App’x 526
 6 (9th Cir. 2017).

7 **a. Interactive Computer Service**

8 Consistent with numerous prior decisions, plaintiff does not dispute that defendant
 9 qualifies as an “interactive computer service.” See e.g., Id.; Fraley v. Facebook, Inc., 830
 10 F. Supp. 2d 785, 801–02 (N.D. Cal. 2011). This court agrees.

11 **b. Information Provided by Another Information Content Provider**

12 Plaintiff argues that the information at issue was not provided by another
 13 information content provider because plaintiff himself—not some other third-party—
 14 provided the information. That argument has been repeatedly rejected.

15 [T]he CDA precludes publisher liability against an interactive
 16 computer service for content created by “another information
 17 content provider.” 47 U.S.C. § 230(c)(1). An “information
 18 content provider” is defined as “any person or entity that is
 19 responsible, in whole or in part, for the creation or development
 20 of information provided through the Internet or any other
 21 interactive computer service.” Id. § 230(f)(3). “The reference
 22 to ‘another information content provider’ . . . distinguishes the
 23 circumstance in which the interactive computer service itself
 24 meets the definition of ‘information content provider’ with
 25 respect to the information in question.” Batzel v. Smith, 333
 26 F.3d 1018, 1031 (9th Cir. 2003); see also Perkins, 53 F. Supp.
 27 3d at 1246 (noting that § 230’s “grant of immunity only applies
 28 if the interactive computer service provider is not also an
 ‘information content provider’ ” (quoting Roommates, 521 F.3d
 at 1162)). In other words, the CDA immunizes an interactive
 computer service provider that “passively displays content that
 is created entirely by third parties,” but not an interactive
 computer service provider that acts as an information content
 provider by creating or developing the content at issue.
Roommates, 521 F.3d at 1162. Put another way, “third-party
 content” is used to refer to content created entirely by
 individuals or entities other than the interactive computer
 service provider. See id.

SFJ, 144 F. Supp. 3d at 1093–94.

1 Essentially, plaintiff reads “third-party” into a statute that only requires “another”
2 party, which plaintiff certainly qualifies as. See also Lancaster v. Alphabet Inc., No. 15-
3 CV-05299-HSG, 2016 WL 3648608, at *3 (N.D. Cal. July 8, 2016) (holding that plaintiff’s
4 own content satisfied second prong of the CDA immunity test).

5 **c. Treatment As A Publisher**

6 Defendant contends that plaintiff’s content-based-restriction claims stem from
7 defendant’s decision to remove plaintiff’s posts or restrict plaintiff’s ability to publish new
8 posts. According to defendant, such acts are traditional publisher functions protected by
9 the CDA. Plaintiff argues that the content-based-restriction claims allege discrimination
10 and, therefore, do not seek to hold defendant liable as the publisher or speaker of the
11 information at issue. The court again agrees with defendant.

12 In determining whether the CDA immunizes a defendant from liability, the court
13 must look to “whether the cause of action inherently requires the court to treat the
14 defendant as the ‘publisher or speaker’ of content provided by another,” “not the name of
15 the cause of action.” Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101-02 (9th Cir. 2009), as
16 amended (Sept. 28, 2009). “[C]ourts must ask whether the duty that the plaintiff alleges
17 the defendant violated derives from the defendant’s status or conduct as a ‘publisher or
18 speaker.’ If it does, section 230(c)(1) precludes liability.” Id. at 1102.

19 “[P]ublication involves reviewing, editing, and deciding whether to publish or to
20 withdraw from publication third-party content.” Id. Thus, “a publisher . . . decides
21 whether to publish” “material submitted for publication.” Id. It is “immaterial whether this
22 decision comes in the form of deciding what to publish in the first place or what to remove
23 among the published material.” Id. at 1102 n. 8. “[A]ny activity that can be boiled down
24 to deciding whether to exclude material that third parties seek to post online is perforce
25 immune under section 230.” Roommates, 521 F.3d at 1170–71.

26 Here, defendant’s decision to remove plaintiff’s posts undoubtedly falls under
27 “publisher” conduct. See SFJ, 144 F. Supp. 3d at 1095; Lancaster, 2016 WL 3648608, at
28 *3 (“CDA precludes as a matter of law any claim arising from defendants’ removal of

1 plaintiff's videos"). The same is true for Facebook's on-and-off again restriction of
 2 plaintiff's use of and ability to post on the Facebook platform. That conduct can be
 3 "boiled down to deciding whether to exclude material that third parties seek to post
 4 online." Roommates, 521 F.3d at 1170–71; Riggs v. MySpace, Inc., 444 F. App'x 986,
 5 987 (9th Cir. 2011) ("Section 230(c)(1) immunizes "decisions to delete [plaintiff's] user
 6 profiles."); Fields v. Twitter, Inc., 200 F. Supp. 3d 964, 972 (N.D. Cal. 2016) (finding that
 7 Twitter's decision to allow ISIS to have accounts qualified as publisher activity under §
 8 230); Gonzalez v. Google, Inc., 282 F. Supp. 3d 1150, 1166 (N.D. Cal. 2017) (similar).

9 Lastly, the Ninth Circuit has rejected plaintiff's argument that CDA immunity does
 10 not apply to Title II claims. Sikhs for Justice, Inc., 697 F. App'x at 526 ("[W]e have found
 11 no authority, and SFJ fails to cite any authority, holding that Title II of the Civil Rights Act
 12 of 1964 provides an exception to the immunity afforded to Facebook under the CDA.");
 13 see also SFJ, 144 F. Supp. 3d at 1095 (holding CDA immunized defendant from Title II
 14 liability despite allegation that defendant engaged in "blatant discriminatory conduct";
 15 affirmed by Sikhs for Justice, 697 F. App'x at 526). This court sees no reason why
 16 plaintiff's UCRA claim and plaintiff's UCL claim, to the extent it is based on discrimination,
 17 should be treated differently. See Riggs, 444 F. App'x at 987 (CDA immunizes defendant
 18 from state causes of action); see Nat'l Ass'n of the Deaf v. Harvard Univ., No. 3:15-CV-
 19 30023-KAR, 2019 WL 1409302, at *10 (D. Mass. Mar. 28, 2019) ("Federal and state
 20 antidiscrimination statutes are not exempted" from the CDA. (citing § 230(e)).).

21 **d. CDA Conclusion**

22 Accordingly, because CDA immunity applies, the court DISMISSES causes of
 23 action I-III WITH PREJUDICE. In addition, plaintiff's UCL claim is DISMISSED WITH
 24 PREJUDICE to the extent it relies on allegations that defendant removed plaintiff's posts
 25 or restricted his ability to use the Facebook platform.

26 **2. Plaintiff's Complaint Does Not State A Claim**

27 **a. Plaintiff Has Failed To State A Title II Claim**

28 Section 2000a(a) of Title II states: "All persons shall be entitled to the full and

1 equal enjoyment of the goods, services, facilities, privileges, advantages, and
2 accommodations of any place of public accommodation, as defined in this section,
3 without discrimination or segregation on the ground of race, color, religion, or national
4 origin.” 42 U.S.C. § 2000a(a).

5 Plaintiff has failed to state a Title II claim for multiple reasons. First, plaintiff has
6 not adequately alleged that Facebook’s conduct was based on plaintiff’s “race, color,
7 religion, or national origin.” While the complaint alleges plaintiff’s national origin, Compl.
8 ¶ 10, other than a conclusory allegation that mirrors the language of § 2000a(a), the FAC
9 does nothing to connect that national origin to Facebook’s alleged conduct. The same
10 goes for allegations about plaintiff’s use of Arabic on the Facebook platform. Indeed, the
11 complaint’s allegations suggest that, if anything, Facebook denied plaintiff access to its
12 services based on plaintiff’s views about the then-British Ambassador to Egypt. See
13 Compl. ¶ 34 (“Facebook was removing [Ebeid’s] posts and restricting his access solely to
14 interfere with his ability to campaign for the recall of the British Ambassador.”); see also
15 id. ¶ 17.

16 Second, Facebook is not a public accommodation covered by Title II. The Ninth
17 Circuit has held that Title II “covers only places, lodgings, facilities and establishments.”
18 Clegg v. Cult Awareness Network, 18 F.3d 752, 756 (9th Cir. 1994) (holding that a
19 national organization was not sufficiently connected to a “place” open to the public).
20 Section 2000a(b)’s catchall provision, subsection (b)(4), “emphasizes the importance of
21 physical presence by referring to any ‘establishment . . . which is physically located
22 within’ an establishment otherwise covered, or ‘within . . . which’ an otherwise covered
23 establishment ‘is physically located.’” Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d
24 532, 541 (E.D. Va. 2003) (quoting § 2000a(b)(4); emphasis and ellipses in original), aff’d
25 sub nom. Noah v. AOL-Time Warner, Inc., No. 03-1770, 2004 WL 602711 (4th Cir. Mar.
26 24, 2004) (finding chat rooms are not “public accommodations”). Though plaintiff points
27 to the physical location of Facebook’s servers, plaintiff’s use of and the service provided
28 by Facebook’s online platform “is unconnected to entry into a public place or facility” and

1 therefore “the plain language of Title II makes the statute inapplicable.” Clegg, 18 F.3d at
2 756 (offering goods or services is insufficient without evidence that the “goods or services
3 are sold, purchased, performed or engaged in from any public facility or establishment”).

4 For each of those reasons, plaintiff has failed to state a Title II claim.

5 **b. Plaintiff Has Failed To State A First Amendment Claim**

6 Plaintiff argues that Facebook has violated his First Amendment rights by
7 regulating his speech in a public forum. Though plaintiff concedes that Facebook is a
8 private entity, he nevertheless argues that Facebook can be held liable under the public
9 function test, which, when satisfied, treats private entities as state actors.

10 Under the public function test, “[p]rivate activity becomes a ‘public function’ only if
11 that action has been ‘traditionally the exclusive prerogative of the State.’ ” Brunette v.
12 Humane Soc’y of Ventura Cty., 294 F.3d 1205, 1214 (9th Cir. 2002) (quoting Rendell-
13 Baker v. Kohn, 457 U.S. 830, 842 (1982)). The Supreme Court has stated that “[w]hile
14 many functions have been traditionally performed by governments, very few have been
15 exclusively reserved to the State.” Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158 (1978)
16 (internal quotation marks omitted). Examples of functions that have been deemed to be
17 “traditionally the exclusive prerogative of the State” include “hold[ing] [public] elections,”
18 “govern[ing] a town,” and “serv[ing] as an international peacekeeping force.” Brunette,
19 294 F.3d at 1214. It is this “exclusivity” that plaintiff fails to show applies to Facebook’s
20 regulation of speech on its platform. See Prager Univ. v. Google LLC, No. 17-CV-06064-
21 LHK, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018) (collecting cases that have
22 declined to treat private social media corporations as state actors for regulating content
23 on their websites).

24 Because Facebook is a private entity and because plaintiff has failed to show that
25 Facebook should be treated as a state actor, plaintiff has failed to state a First
26 Amendment claim. Hudgens v. N.L.R.B., 424 U.S. 507, 513 (1976) (“[T]he constitutional
27 guarantee of free speech is a guarantee only against abridgment by government, federal
28 or state.”).

1 **c. Plaintiff Has Failed To State A UCRA Claim**

2 The UCRA provides that “[a]ll persons within the jurisdiction of this state are free
3 and equal, and no matter what their sex, race, color, religion, ancestry, national origin, . .
4 . [or] primary language . . . are entitled to the full and equal accommodations,
5 advantages, facilities, privileges, or services in all business establishments of every kind
6 whatsoever.” Cal. Civ. Code § 51(b). “The California Supreme Court has clarified that
7 the Unruh Act contemplates willful, affirmative misconduct on the part of those who
8 violate the Act[.]” Greater Los Angeles Agency on Deafness, Inc. v. Cable News
9 Network, Inc., 742 F.3d 414, 425 (9th Cir. 2014) (internal quotation marks omitted).
10 Plaintiff must prove “intentional discrimination” in violation of the terms of the Act. Id.

11 Plaintiff has failed to state a UCRA claim for at least two reasons. First, as
12 discussed above, plaintiff has not adequately alleged that Facebook’s conduct was
13 animated by discriminatory intent. And plaintiff’s contention that Facebook’s actions were
14 “arbitrary” undermines, rather than supports, his UCRA claim—no inference of
15 discrimination arises from assertions of arbitrariness. Second, application of the Unruh
16 Act is limited to “persons within the jurisdiction of” California who have suffered harm
17 therein. Tat Tohumculuk, A.S. v. H.J. Heinz Co., No. CIV 13-0773 WBS KJN, 2013 WL
18 6070483, at *7 (E.D. Cal. Nov. 14, 2013) (rejecting argument that the UCRA applied
19 because discrimination was approved by defendants’ officers within California); Warner v.
20 Tinder Inc., 105 F. Supp. 3d 1083, 1099 (C.D. Cal. 2015) (same; collecting cases).
21 Plaintiff is a resident of Arizona, Compl. ¶ 8, but has not even asserted that the alleged
22 discrimination took place while he was in California.

23 For each of those reasons, plaintiff has failed to state a UCRA claim.

24 **d. Plaintiff Has Failed to State A Claim for Breach of Contract Or**
25 **Fraud/Intentional Misrepresentation**

26 Plaintiff’s breach of contract and fraud claims are premised on Facebook’s alleged
27 “fail[ure] to boost Dr. Ebeid’s posts despite [Facebook] notifying Dr. Ebeid that the posts
28

1 have in fact been boosted.” Compl. ¶¶ 67; id. ¶¶ 58-62.¹

2 To plead a claim for breach of contract under California law, a plaintiff must allege:
 3 “(1) existence of the contract; (2) plaintiff’s performance or excuse for nonperformance;
 4 (3) defendant’s breach; and (4) damages to plaintiff as a result of the breach.” Appling v.
 5 Wachovia Mortg., FSB, 745 F. Supp. 2d 961, 974 (N.D. Cal. 2010) (quoting CDF
 6 Firefighters v. Maldonado, 158 Cal. App. 4th 1226, 1239 (2008)). To plead a fraud claim
 7 under California law, a plaintiff must allege “(a) misrepresentation (false representation,
 8 concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to
 9 defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.”
 10 Engalla v. Permanente Med. Grp., Inc., 15 Cal. 4th 951, 974 (1997), as modified (July 30,
 11 1997) (internal quotation marks omitted); see also Manderville v. PCG&S Grp., Inc., 146
 12 Cal. App. 4th 1486, 1498 (2007) (enumerating similar elements for the tort of intentional
 13 misrepresentation).

14 Plaintiff has failed to state a claim under either theory. First, plaintiff’s contract
 15 claim fails because “[i]n an action for breach of a written contract, a plaintiff must allege
 16 the specific provisions in the contract creating the obligation the defendant is said to have
 17 breached.” Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1117 (N.D. Cal. 2011). The
 18 complaint does not allege which contract Facebook allegedly breached, much less the
 19 breach of a specific provision therein.

20 Second, plaintiff does not allege that Facebook failed to perform its obligations
 21 under the contract. Assuming the complaint attempts to allege a breach of Facebook’s
 22 Self-Serve Ad Terms (the “SSAT”), the SSAT specifically reserved Facebook’s right to
 23 “reject or remove any ad for any reason” and states that Facebook does “not guarantee
 24
 25

26 ¹ Plaintiff’s opposition asserts two new theories of liability that were not alleged in the
 27 complaint. Those allegations, even if assumed sufficient, cannot provide a basis for
 28 defeating defendant’s Rule 12(b)(6) motion. Broam v. Bogan, 320 F.3d 1023, 1026 n.2
 (9th Cir. 2003) (“In determining the propriety of a Rule 12(b)(6) dismissal, a court may not
 look beyond the complaint to a plaintiff’s moving papers[.]” (emphasis in original)).

1 the activity that [] ads will receive[.]” Dkt. 11-5, Ex. D ¶¶ 7, 13; Dkt. 11-6, Ex. E ¶¶ 3, 8.²
 2 For similar reasons, plaintiff has not adequately alleged a misrepresentation supporting
 3 his fraud claim. Depot, 915 F.3d at 668 (Rule 9(b) requires the complaint to “include an
 4 account of the time, place, and specific content of the false representations[.]” (internal
 5 quotation marks omitted)).

6 Third, plaintiff’s breach of contract and fraud claims fail because plaintiff has not
 7 alleged damages that occurred as a result of the breach or alleged misrepresentation.
 8 As noted above, plaintiff does not allege that he was charged for ads that were not
 9 boosted. Further, at the hearing on this motion, plaintiff’s counsel was unable to
 10 articulate an alternative basis for harm tied to Facebook’s alleged failure to adequately
 11 boost plaintiff’s posts. As to the fraud claim, plaintiff’s allegations of harm fall far short of
 12 the particularity required by Rule 9(b). See Compl. ¶¶ 39, 62 (conclusorily alleging
 13 harm); Shahangian v. Bank of Am. Nat’l Ass’n, No. CV15-1919 DMG (MRWX), 2015 WL
 14 12696038, at *4 (C.D. Cal. Dec. 1, 2015) (“[A] plaintiff must plead facts suggesting that
 15 the damages in question were the direct result of the misrepresentation in question.”).

16 For each of the above reasons, the court DISMISSES plaintiff’s fraud and breach
 17 of contract claims.

18 **e. Plaintiff Has Failed To State a Claim for Breach of Implied**
 19 **Covenant of Good Faith and Fair Dealing Claim**

20 Under California law, “[t]here is implied in every contract a covenant by each party
 21 not to do anything which will deprive the other parties thereto of the benefits of the
 22 contract.” Harm v. Frasher, 181 Cal. App. 2d 405, 417 (Cal. Ct. App. 1960). To state a
 23 claim for breach of the implied covenant of good faith, a plaintiff must show “that the
 24 conduct of the defendant, whether or not it also constitutes a breach of a consensual
 25 contract term, demonstrates a failure or refusal to discharge contractual responsibilities,
 26

27 _____
 28 ² Plaintiff does not dispute the authenticity of or Facebook’s reliance upon the SSAT documents.

1 prompted . . . by a conscious and deliberate act.” Careau & Co. v. Security Pacific
 2 Business Credit, Inc., 222 Cal. App. 3d 1371, 1395 (Cal. Ct. App. 1990). Further, “a party
 3 cannot be held liable on a bad faith claim for doing what is expressly permitted in the
 4 agreement.” Solomon v. N. Am. Life & Cas. Ins. Co., 151 F.3d 1132, 1137 (9th Cir.
 5 1998).

6 Here, plaintiff’s claim fails because it is premised on the allegation that Facebook
 7 “did not boost [plaintiff’s] posts,” Compl. ¶ 72—conduct that the contract expressly
 8 permits.

9 Plaintiff’s papers alternatively contend that “Facebook’s discriminatory actions”—
 10 removing posts and restricting plaintiff’s use of the Facebook platform—“have interfered
 11 with [plaintiff’s] ability to grow and promote the ECL page and his campaign, and thus
 12 [Facebook] has failed to exercise” its contractual right to remove or disapprove any post
 13 in good faith. That theory fails to support plaintiff’s breach of implied covenant claim for
 14 two reasons. First, as discussed above, plaintiff has not adequately alleged that
 15 Facebook’s actions were discriminatory. Second, as with the theory actually alleged in
 16 the complaint, plaintiff has conceded that Facebook had the contractual right to remove
 17 or disapprove any post or ad at Facebook’s sole discretion.

18 For those reasons, plaintiff has failed to state a breach of implied covenant of good
 19 faith claim.

20 **f. Plaintiff Has Not Stated a UCL Claim**

21 Plaintiff’s UCL claim relies solely upon the UCL’s “unlawful” prong. Compl. ¶ 77.
 22 Because plaintiff has failed to state a predicate violation, plaintiff’s UCL claim also must
 23 be dismissed. See Krantz v. BT Visual Images, LLC, 89 Cal. App. 4th 164, 178 (2001).

24 **CONCLUSION**

25 For the foregoing reasons, the court GRANTS defendant’s motion. Plaintiff’s first,
 26 second, and third causes of action are DISMISSED for failure to state a claim and,
 27 additionally, because the CDA immunizes defendant from liability, those causes of action
 28 are DISMISSED WITH PREJUDICE. Plaintiff’s fourth, fifth, and sixth causes of action

1 are DISMISSED WITHOUT PREJUDICE for failure to state a claim. However, if plaintiff
 2 chooses to amend any of those three claims, plaintiff's amended complaint shall include
 3 specific allegations about the relevant contractual provision and the alleged
 4 misrepresentations. In addition, any amended complaint shall allege a specific harm not
 5 dependent on defendant's alleged failure to adequately boost plaintiff's posts. Plaintiff's
 6 seventh cause of action for unfair competition under § 17200 is DISMISSED WITH
 7 PREJUDICE to the extent it relies on causes of action one through three and to the
 8 extent it relies on defendant's alleged failure to adequately boost plaintiff's posts. In all
 9 other respects, it is DISMISSED WITHOUT PREJUDICE.

10 Plaintiff's amended complaint, if any, shall be filed no later than May 31, 2019. No
 11 new parties or claims may be added without defendant's consent or leave of court.

12 Because this is plaintiff's first complaint and because the court is giving plaintiff
 13 leave to amend in part, defendant's anti-SLAPP motion is DENIED without prejudice.
 14 Verizon Delaware Inc. v. Covad Communications. Co., 377 F.3d 1081, 1091 (9th Cir.
 15 2004) ("[G]ranted a defendant's anti-SLAPP motion to strike a plaintiff's initial complaint
 16 without granting the plaintiff leave to amend would directly collide with Fed. R. Civ. P.
 17 15(a)'s policy favoring liberal amendment.").

18 **IT IS SO ORDERED.**

19 Dated: May 9, 2019



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PHYLLIS J. HAMILTON
United States District Judge