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4   UNITED STATES DISTRICT COURT

5   NORTHERN DISTRICT OF CALIFORNIA

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7   ETHAN ZUCKERMAN,   Case No. 24-cv-02596-JSC

            Plaintiff,
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                                                      ORDER RE: DEFENDANT META
9   v.   **PLATFORMS' MOTION TO DISMISS**
                                                      THE AMENDED COMPLAINT
10   META PLATFORMS, INC.,
                                                      Re: Dkt. No. 30
            Defendant.
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13   This lawsuit involves a proposed web browser extension called Unfollow Everything 2.0,

14   which would automate the process of unfollowing friends, groups, and pages on a user's Facebook

15   social media profile. Ethan Zuckerman, a professor at UMass Amherst, seeks a declaratory

16   judgment against Meta Platforms, Inc. that 47 U.S.C. § 230(c)(2)(B) provides him immunity for

17   all breach of contract, Computer Fraud and Abuse Act ("CFAA"), and Computer Data Access and

18   Fraud Act ("CDAFA") claims related to Unfollow Everything 2.0. In the alternative, Professor

19   Zuckerman requests a declaratory judgment that Unfollow Everything 2.0: 1) does not violate

20   Meta's Terms of Service, or as applied, the Terms of Service are void for public policy; 2)

21   Unfollow Everything 2.0 does not violate the CFAA; and 3) Unfollow Everything 2.0 does not

22   violate the CDAFA. Defendant moves to dismiss all claims.

23   After considering the parties' submissions, and with the benefit of oral argument on

24   November 7, 2024, the Court GRANTS the motion to dismiss for lack of subject-matter

25   jurisdiction. Professor Zuckerman's request for declaratory relief is not ripe for adjudication and

26   seeks an unconstitutional advisory opinion.

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DISCUSSION

Professor Zuckerman's request for relief is governed by the Declaratory Judgment Act, 28 U.S.C. § 2201, which provides: "[i]n a case of actual controversy," a court "may declare the rights and other legal relations of any interested party . . . whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). Analysis under the Act proceeds in two parts: first, a court must determine whether an "actual controversy exists," and second, whether to exercise its discretion to permit the declaratory judgment action. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143-44 (9th Cir. 1994).

A complaint must be dismissed when the district court lacks subject-matter jurisdiction to hear the dispute. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010). Article III of the Constitution limits federal courts "to deciding cases and controversies" where the plaintiff has standing to bring suit and the dispute is ripe for judicial review. *Bova v. City of Medford*, 564 F.3d 1093, 1095 (9th Cir. 2009) (cleaned up). The ripeness inquiry, in particular, "addresses *when* litigation may occur" and often "coincides squarely with standing's injury in fact prong." *Id.* (citations omitted). The interplay between standing and ripeness instructs that "a possible future injury is not sufficient to establish standing . . . [b]ut future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *3taps, Inc. v. LinkedIn Corp.*, No. 18-cv-00855, 2022 WL 16953623, at *3 (N.D. Cal. Nov. 15, 2022) (citation omitted) (cleaned up).

Ultimately, it is "[t]he party asserting federal subject-matter jurisdiction [who] bears the burden of proving its existence." *Chandler*, 598 F.3d at 1122. A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) may assert a factual or facial challenge to jurisdiction. *3taps, Inc.*, 2022 WL 16953623 at *4 (citing *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)). A factual challenge "disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction," while a facial challenge argues "the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone*, 373 F.3d at 1039. To resolve a factual challenge, the court "may review evidence beyond the complaint" and "need not presume the truthfulness of the plaintiff's allegations." *Id.* at 1038. The

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1 court "resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the

2 plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor . . . ."

3 *3taps, Inc.*, 2022 WL 16953623 at *4 (citing *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir.

4 2014)).

5   Meta maintains the instant case presents no actual controversy for two main reasons. As

6 alleged, Professor Zuckerman has not built the Unfollow Everything 2.0 browser extension—he

7 has prepared "pseudocode" describing the product's functionality and architecture, but his team of

8 software engineers have not developed the actual code that would allow the extension to operate.

9 (Amended Complaint "AC" ¶ 85.) Additionally, Meta has not contacted Professor Zuckerman

10 regarding Unfollow Everything 2.0 to assert a position on whether it would violate Facebook's

11 Terms of Service. Meta argues these facts make this case unripe for adjudication. Even if the case

12 were ripe, Meta further asserts the Court should not exercise its discretion based on the factors

13 outlined in *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942).

14   The Court considers the instant motion a facial attack on subject-matter jurisdiction and

15 addresses these arguments assuming the truth of the Amended Complaint allegations.

16 **I.   RIPENESS**

17   The "actual controversy" required by the Declaratory Judgment Act "is the same as the

18 'case or controversy' requirement of Article III," and "requires no more stringent showing of

19 justiciability than the Constitution does." *Societe de Conditionnement en Aluminium v. Hunter*

20 *Eng'g Co.*, 655 F.2d 938, 942 (9th Cir. 1981) (citation omitted). "The disagreement must not be

21 nebulous or contingent but must have taken on a fixed and final shape so that a court can see what

22 legal issues it is deciding, what effect its decision will have on the adversaries, and some useful

23 purpose to be achieved in deciding them." *Pub. Serv. Comm'n v. Wycoff, Co.*, 344 U.S. 237, 244

24 (1952). Absent such a controversy, the court cannot adjudicate the matter as it would "become an

25 unconstitutional advisory opinion." *Rhoades v. Avon Prod., Inc.*, 504 F.3d 1151, 1157 (9th Cir.

26 2007).

27   The constitutional ripeness inquiry looks to "whether the facts alleged, under all the

28 circumstances, show that there is a substantial controversy, between parties having adverse legal

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1   interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment."

2   *Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1092 (9th Cir. 1992). "If the defendant's

3   actions cause the plaintiff to have a 'real and reasonable apprehension that he will be subject to

4   liability,' the plaintiff has presented a justiciable case or controversy." *Id*. (citation omitted). So,

5   the plaintiff's alleged injury must not be "dependent on 'contingent future events that may not

6   occur as anticipated, or indeed may not occur at all.'" *Trump v. New York*, 592 U.S. 125, 131

7   (2020) (citation omitted). Here, Plaintiff's alleged injury is too contingent upon uncertain events

8   to satisfy the constitutional ripeness requirement.

9   Professor Zuckerman has not yet created Unfollow Everything 2.0. The "pseudocode"

10   prepared by him and reviewed by an "academic cybersecurity expert" provides a sense of the

11   tool's architecture and its proposed function. (AC ¶ 85.) Indeed, the Amended Complaint states

12   often what the browser extension "will" do or how it "would" function. (*Id*. ¶¶ 71-77.) But as

13   alleged, Professor Zuckerman has not yet built the tool. (*Id*. ¶ 85 ("an academic cybersecurity

14   expert has reviewed the design and confirmed that the tool, *if built to the specifications in the*

15   *design*, will perform as expected" (emphasis added).) Additionally, he alleges:

16   Before actually launching Unfollow Everything 2.0, Professor
17   Zuckerman must build the tool as designed and obtain approval for
         the research study from his university's institutional review board.
18   Professor Zuckerman has assembled a team of engineers to code the
         tool. He has also applied for institutional review board review, and
19   fully expects to receive approval. He anticipates being able to
         complete the tool within six weeks of a determination from this Court
20   that it would be lawful for him to launch the tool.

21   (*Id.*) So, although he "anticipates" the coding could be completed within six weeks by his "team

22   of engineers," his anticipation demonstrates the uncertainty in how the tool will ultimately be

23   coded, by what technical means it will interact with Facebook, and how long the venture will take.

24   (*Id*.) "[U]nless and until contingent events occur," his request for declaratory relief remains too

25   speculative to support jurisdiction. *Bova*, 564 F.3d at 1097.

26   Professor Zuckerman cites various cases across federal courts to suggest his preparations

27   to date are sufficiently concrete. But those cases do not support his contention that a tool which

28   remains only conceptual suffices to meet the "actual controversy" requirement. Indeed, in nearly

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1   all of those cases[1] meaningful steps in manufacturing had been completed by the time declaratory

2   relief was sought. *See, e.g., Interdynamics, Inc. v. Firma Wolf*, 698 F.2d 157, 160 (3d Cir. 1982)

3   (noting an "experimental sample" had been created); *Cat Tech LLC v. TubeMaster, Inc.*, 528 F.3d

4   871, 877 (Fed. Cir. 2008) (The product at issue was "customized based upon the dimensions of

5   each customer's reactor," so manufacture had to wait until dimensions were received from

6   customers.); *Paramount Pictures Corp. Axanar Prods., Inc*., No. 15-cv-09938, 2016 WL 2967959,

7   at *6 (C.D. Cal. May 9, 2016) (Though film had not been completed, the script was "fully revised

8   and locked," and the infringement was "based on Defendants' utilization of similar character,

9   theme, setting, and mood."); *Gelmart Indus., Inc. v. Eveready Battery Co*., 120 F. Supp. 3d 327,

10   332 (S.D.N.Y. 2014) (noting the existence of "marketing prototypes" and that plaintiff had

11   "designed and offered product for sale bearing [the allegedly offending mark]"). The absence of a

12   meaningful prototype or functional code distinguishes Unfollow Everything 2.0 from the above-

13   cited cases.

14   Professor Zuckerman's insistence that the absence of actual code does not impact the

15   ripeness analysis because the dispute turns on the core functionality—not technical details—of

16   Unfollow Everything 2.0, is unpersuasive. To satisfy ripeness, a court must be able to issue "a

17   decree of a conclusive character, as distinguished from an opinion advising what the law would be

18   upon a hypothetical state of facts." *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 127

19   (2007). If all that mattered were the core function or outcome the tool enabled, then this dispute

20   could be about *any* extension that automated an interaction with Facebook, real or hypothetical.

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22   _____

[1] In *Rengo Co. v. Molins Mach. Co*., 657 F.2d 535, 539 (3d Cir. 1981), the plaintiff asserted a
23   patent infringement claim against a defendant who had advertised, but not manufactured, a
     potentially infringing device. The defendant argued the court lacked jurisdiction because there
24   was no infringing device, but also asserted a counterclaim against the plaintiff for violation of
     antitrust laws and sought declaratory judgment on patent invalidity. *Id*. at 538-39. Ultimately, the
25   court of appeals upheld jurisdiction to determine patent validity and infringement, noting that
     "[r]egardless of deficiencies in the complaint," the defendant's assertion of a counterclaim
26   conferred jurisdiction. *Id*. at 539. Though the court of appeals went on to hold the defendant's
     "apparent ability" to produce a possibly infringing device was sufficient, it maintained its separate
27   ground for jurisdiction based on the defendant's counterclaims. *Id*. These facts differ from the
     instant case, where Meta has not asserted a claim against Professor Zuckerman while
28   simultaneously contesting the Court's jurisdiction. Given the *Rengo* court's alternate grounds for
     jurisdiction, the Court does not consider its "apparent ability" analysis to be dispositive.

1   But the dispute must be about *this* tool, not *a* tool. Professor Zuckerman, or his investors, want an

2   opinion on legality *before* they invest further resources into Unfollow Everything 2.0. Federal

3   courts do not, and cannot, exist to give advisory opinions to assist investment decisions.

4   Professor Zuckerman's allegations also do not permit a plausible inference of a "real and

5   reasonable apprehension that he will be subject to liability." *Spokane*, 972 F.2d at 1092. In

6   assessing apprehension of liability, the Ninth Circuit has declined to "identify specific acts or

7   intentions of the defendant that would automatically constitute a threat of litigation," instead

8   considering a spectrum of factual circumstances. *Chesebrough-Pond's, Inc. v. Faberge, Inc*., 666

9   F.2d 393, 396 (9th Cir. 1982). Here, Professor Zuckerman has not alleged any contact with Meta

10   prior to this suit regarding Unfollow Everything 2.0. This lack of contact signals that adverse

11   positions on the dispute have not sufficiently crystallized into a ripe case. *See, e.g., Adobe Sys.*

12   *Inc. v. Kelora Sys. LLC*, No. 11-cv-3938 CW, 2011 WL 6101545, at *4 (N.D. Cal. Dec. 7, 2011)

13   (holding there was no apprehension of suit where the defendant had not "communicated with [the

14   plaintiff] at all before [plaintiff] instituted [the] suit").

15   Instead, Professor Zuckerman argues Meta's history of litigation against third parties who

16   have created browser extensions suggests a reasonable apprehension of suit. He also alleges a

17   cease-and-desist letter from Meta threatened litigation against an individual who created a browser

18   extension that functioned identically to Unfollow Everything 2.0. (AC ¶¶ 86-89.) Ultimately,

19   Meta's litigation history against other entities—who have no alleged connection to Professor

20   Zuckerman—does not establish a plausible apprehension of suit related to this proposed

21   technology. *See Xerox Corp. v. Apple Computer, Inc.*, 734 F. Supp. 1542, 1547 (N.D. Cal. 1990)

22   ("[S]uit against [third parties] alone cannot reasonably be viewed as giving rise to an

23   'apprehension of liability' on [plaintiff's] part."). Professor Zuckerman cites to *3taps, Inc. v.*

24   *LinkedIn Corp*., No. 18-cv-00855, 2022 WL 16953623, at *4 (N.D. Cal. Nov. 15, 2022), to

25   support his assertion that litigation brought against similarly situated entities can give rise to an

26   actual controversy. However, *3taps* is distinguishable. There, the plaintiff had communicated

27   with the defendant about the basis of the dispute prior to seeking declaratory relief. *Id*.

28   Additionally, the defendant in *3taps* had sued a third party related to the matter, but that third party

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1   shared a common partial owner with the plaintiff, and the court had granted a motion to relate the

2   plaintiff's case to the third party's suit because of common facts. *Id*. at *2. These circumstances

3   differ from the instant case where Professor Zuckerman has not alleged any such connection to the

4   third parties sued by Meta.

5   　　　Professor Zuckerman's other cited authority fares no better. In both *E. & J. Gallo Winery*

6   *v. Proximo Spirits, Inc*., 583 F. App'x 632 (9th Cir. 2014), and *Societe de Conditionnement en*

7   *Aluminium v. Hunter Eng'g Co*., 655 F.2d 938 (9th Cir. 1981), the plaintiff had a relationship to

8   the third parties threatened with suit by the defendant—for *Gallo*, the third party was their sole

9   supplier, and in *Societe*, it was a purchaser of their product. Moreover, Professor Zuckerman

10   overlooks an important distinction between the patent cases upon which he relies and the instant

11   case. An action for patent infringement may derive from unauthorized use or sale of a patented

12   invention, but also the making of the invention. 35 U.S.C. § 271. The manufacture of a product

13   may expose a declaratory relief plaintiff to patent infringement liability, thereby creating an

14   apprehension of suit without sale or distribution. Here, he has not alleged a theory of liability that

15   prevents him from even coding Unfollow Everything 2.0. As such, Professor Zuckerman—who

16   has not created the tool at issue—falls short of the reasonable apprehension of suit articulated in

17   the cited authority.

18   　　　Accordingly, Professor Zuckerman has not pled an "actual controversy" to provide this

19   Court with subject-matter jurisdiction.

20   **II.   THE COURT'S DISCRETIONARY EXERCISE OF JURISDICTION**

21   　　　To the extent ripeness is a close question here, the Court touches lightly on the

22   discretionary factors that counsel in favor of dismissal.

23   　　　The Declaratory Judgment Act provides courts with discretion to assert jurisdiction when

24   an actual controversy exists. To guide courts in this exercise, the Supreme Court laid out factors

25   that bear on the utility and propriety of adjudicating a request for declaratory relief in *Brillhart v.*

26   *Excess Ins. Co. of Am*., 316 U.S. 491, 495 (1942). These *Brillhart* factors caution that "[t]he

27   district court should avoid needless determination of state law issues; it should discourage litigants

28   from filing declaratory actions as a means of forum shopping; and it should avoid duplicative

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1 litigation." *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998). This list is not

2 exhaustive, and the Ninth Circuit has also considered:

> "whether the declaratory action will settle all aspects of the
> controversy; whether the declaratory action will serve a useful
> purpose in clarifying the legal relations at issue; whether the
> declaratory action is being sought merely for the purposes of
> procedural fencing or to obtain a 'res judicata' advantage; or whether
> the use of a declaratory action will result in entanglement between the
> federal and state court systems. In addition, the district court might
> also consider the convenience of the parties, and the availability and
> relative convenience of other remedies."

8 *Id*. at n.5.

9 Of these factors, the Court considers "settlement of all aspects of the controversy" and

10 "clarifying the legal relations at issue" to be the most relevant here. These factors echo the

11 underlying concerns of the ripeness doctrine, where a premature suit may not fully develop the

12 topography of a dispute to achieve a conclusive resolution. Since Unfollow Everything 2.0 is not

13 built, and the parties have not solidified their positions on its use with Facebook, much remains

14 uncertain. Ruling on the hypothetical causes of action Meta might bring had Unfollow Everything

15 2.0 been released could fail to resolve the dispute, leaving the parties embroiled in further

16 litigation on claims unconsidered here. Indeed, were Professor Zuckerman to prevail, the Court

17 would have to cabin a declaratory relief order based on contingent facts—such as, whether

18 Unfollow Everything 2.0 would be built to x specification or function in y capacity, or whether z

19 provision of the Meta Terms of Service would be implicated. Such guesswork runs counter to the

20 benefit of finality offered by the judiciary. Therefore, even if the Court had subject-matter

21 jurisdiction, it would nonetheless exercise its discretion to decline to hear the dispute until it

22 becomes concrete.

CONCLUSION

24 For the reasons stated above, the Defendant's motion to dismiss under Federal Rule of

25 Civil Procedure 12(b)(1) is GRANTED without prejudice.

26 **IT IS SO ORDERED.**

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Dated: November 22, 2024

JACQUELINE SCOTT CORLEY
United States District Judge