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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 JONATHAN CORRELL, on behalf of  
12 himself and all others similarly situated,  
13 Plaintiffs,  
14 v.  
15 AMAZON.COM, INC., and DOES 1-10,  
16 Defendants.

Case No.: 3:21-cv-01833-BTM-MDD

**ORDER DENYING IN PART AND  
GRANTING IN PART DEFENDANT  
AMAZON.COM, INC.'S MOTION TO  
DISMISS**

**[ECF NO. 25]**

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19 Defendant Amazon.com, Inc (“Amazon”) has filed a Motion to Dismiss Plaintiff’s  
20 Amended Complaint. (ECF No. 25 (“Def.’s MTD”).) In response, Plaintiff Jonathan  
21 Correll (“Correll”) filed an opposition. (ECF No. 26 (“Pls.’ Opp’n”).) Defendant  
22 Amazon then filed a reply. (ECF No. 28 (“Def.’s Reply”).) For the reasons discussed  
23 below, the Court **grants in part and denies in part** Defendant’s Motion to Dismiss.  
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1 **I. BACKGROUND**

2 Correll, on behalf of himself and a potential class, filed suit against Amazon  
3 alleging unequal treatment and discrimination in Amazon’s Seller Certification program,  
4 Guided Buying policy, and other orientation-based incentive programs for retailers.  
5 (ECF No. 1 (“Complaint”).) Amazon filed a Motion to Dismiss (ECF No. 13), which the  
6 Court granted under Federal Rule of Civil Procedure 12(b)(1) with leave to amend. (ECF  
7 No. 17 (“Order”).) Correll filed an Amended Complaint alleging an additional claim for  
8 a Violation of the Civil Rights Act of 1866 (42 U.S.C. § 1981) and additional facts.  
9 (ECF No. 20 (“FAC”).)

10 Correll’s Amended Complaint asks for declaratory and injunctive relief and  
11 damages under 42 U.S.C. § 1981 and California Civil Code Sections 51 and 51.5 (“Unruh  
12 Civil Rights Act”). (ECF No. 20.) The parties agree that Amazon has programs and  
13 policies in place to promote, encourage, and incentivize minority certified sellers  
14 (“Amazon’s programs”). (ECF No. 20, 3–7, 13–15; ECF No. 25, 4–5.) The Amended  
15 Complaint alleges that through these programs, Amazon “direct[s] consumers away from  
16 Amazon’s disfavored sellers...and towards Amazon’s preferred and privileged sellers”  
17 based on the sellers’ identity. (ECF No. 20, 2–3.) Correll pleads that he visited  
18 Amazon’s website in the summer and fall of 2021 with the intent to use Amazon’s sales  
19 services. (Id. at 17.) There, Correll encountered Amazon’s programs which he asserts  
20 “denied and deprived heterosexual White males,” among other groups, “the full and equal  
21 accommodations, advantages, facilities, privileges, or services based on their sexual  
22 orientation, race, and sex.” (Id. at 18.) After viewing Amazon’s programs, Correll did  
23 not open an Amazon Sellers account and did not sell any products on Amazon.com. (Id.  
24 at 21.)

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1 **II. STANDARD**

2 Amazon moves to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack  
3 of subject-matter jurisdiction and 12(b)(6) for failure to state a claim. (ECF No. 25.)  
4 For the reasons discussed below, the Court holds that it will not decide this factual  
5 challenge to standing on a motion to dismiss. The Court then analyzes Correll’s claims to  
6 determine whether they should be dismissed under Rule 12(b)(6).

7 **A. Motion to Dismiss for lack of subject-matter jurisdiction under 12(b)(1)**

8 Amazon challenges the Amended Complaint, in part, on the ground that Correll  
9 lacks Article III standing. (Id.) Standing is an element of subject matter jurisdiction.  
10 Accordingly, Amazon moves to dismiss Correll’s Amended Complaint for lack of subject  
11 matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

12 A Rule 12(b)(1) jurisdictional attack may be facial or factual. Fed. R. Civ. P.  
13 12(b)(1). In a facial attack, the challenger asserts that the allegations contained in a  
14 complaint are insufficient on their face to invoke federal jurisdiction. *Safe Air for*  
15 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Generally, on a 12(b)(1)  
16 motion regarding subject matter jurisdiction, unlike a 12(b)(6) motion, a court need not  
17 defer to a plaintiff’s factual allegations. *Id.* But the Supreme Court has held that where a  
18 12(b)(1) motion to dismiss is based on lack of standing, the court must defer to the  
19 plaintiff’s factual allegations and must “presume that general allegations embrace those  
20 specific facts that are necessary to support the claim.” *Lujan v. Defenders of Wildlife*,  
21 504 U.S. 555, 561 (1992). “At the pleading stage, general factual allegations of injury  
22 resulting from the defendant’s conduct may suffice.” *Id.* at 560. In short, a 12(b)(1)  
23 motion to dismiss for lack of standing can only succeed if the plaintiff has failed to make  
24 “general factual allegations of injury resulting from the defendant's conduct.” *Id.*

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1 defendant's causal connection to the injury; and (3) demonstrate that the injury would be  
2 redressed by a favorable decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016).  
3 That is, a plaintiff must allege "such a personal stake in the outcome of the controversy as  
4 to warrant his invocation of federal court jurisdiction and to justify exercise of the court's  
5 remedial powers on his behalf." *Warth*, 422 U.S. at 498–99. A plaintiff must have  
6 suffered an 'injury in fact'— "an invasion of a legally protected interest' that is  
7 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*,  
8 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560). A "particularized" injury is  
9 one that "affect[s] the plaintiff in a personal and individual way." *Id.*

10 Correll contends that because he viewed identity-based incentive programs on the  
11 Amazon Seller site that he could not qualify for, he was subject to discrimination, and  
12 accordingly suffered an injury in fact. (ECF No. 20 at 17–18.) Correll further contends  
13 that he "had and continues to have the direct and specific intent to establish an Amazon  
14 Professional Seller account and sell his products on Amazon.com," and he "was and  
15 continues to be able and ready to sell his collectibles on Amazon.com" since the summer  
16 and fall of 2021. (*Id.* at 17, 21.) However, upon noticing Amazon's programs, Correll  
17 "knew his business would be at a competitive disadvantage" as a result of his identity.  
18 (*Id.* at 21.)

19 The products Correll contends he intended to sell on Amazon.com are collectible  
20 coins and comic books. (*Id.* at 21.) In response, Amazon argues Correll was never  
21 "'able' to sell collectible coins and comics in Amazon's store, because both categories  
22 have been closed to new sellers since well before the summer of 2021." (ECF No. 25,  
23 11.) As Correll did not apply to become a seller for either category while it was  
24 accepting new sellers, Amazon argues, Correll cannot and could not have sold these  
25 products regardless of Amazon's diversity programs. (*Id.* at 11–12.) Finally, Correll

1 responds by alleging Amazon.com currently has listings for numerous collectible coin  
2 products which appear to be in violation of Amazon’s policies regarding sale of such  
3 products. (ECF No. 26, 11–13.) Correll therefore argues that “[t]here is at least some  
4 evidence that the rules and requirements Amazon declares to be in effect are either not in  
5 effect, or are not being enforced,” and so “Plaintiff may very well have been able to sell  
6 his coins too.” (Id.)

7 In order to allege a particularized injury here, Correll must plead facts showing that  
8 he was “able and ready” to sell products on Amazon.com. *Compare Carroll*, 342 F.3d at  
9 947 (affirming dismissal on summary judgment for lack of standing where plaintiff  
10 “offers no evidence that he is ‘able and ready’ to compete for, or receive” the challenged  
11 benefit), *with White v. Square*, 891 F.3d 1174, 1175–77 (9th Cir. 2018) (holding plaintiff  
12 who “sought to use Square’s services, but was unable to do so because of its  
13 discriminatory policy against bankruptcy attorneys” met constitutional standing  
14 requirements). Correll has added such allegations into his Amended Complaint. (ECF  
15 20, 20–21.) However, the additional facts presented by Amazon in its Motion to Dismiss  
16 the Amended Complaint put standing into question. If Amazon’s allegations that it has  
17 banned all new sellers in the only categories Correll intended to sell products in since  
18 before Correll’s intent to sell on Amazon.com began, Correll could not possibly have  
19 been able to sell products on Amazon.com.

20 Because the Court cannot resolve these factual issues on a Motion to Dismiss,  
21 discovery is necessary to verify these allegations and determine whether Correll has  
22 standing. *See Safe Air for Everyone*, 373 F.3d at 1039–40. Accordingly, the Court  
23 **DENIES** Amazon’s Fed. R. Civ. P. 12(b)(1) Motion to Dismiss without prejudice. The  
24 parties are to conduct discovery only into the issue of standing by November 22, 2023.  
25 Amazon may raise this issue again on summary judgment after discovery is complete.

1 The Court will set aside a date for oral argument on a Motion for Summary Judgment on  
2 December 21, 2023, at 1 pm.

3 **B. Motion to Dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6)**

4 **I. Sufficiency of 42 U.S.C. § 1981 Claim**

5 Section 1981 provides that that “[a]ll persons within the jurisdiction of the United  
6 States shall have the same right in every State and Territory to make and enforce  
7 contracts . . . as is enjoyed by white citizens.” 42 U.S.C. § 1981(a). Accordingly,  
8 Section 1981 “offers relief” when “racial discrimination” either: (1) “impairs an existing  
9 contractual relationship” or (2) “blocks the creation of a contractual relationship.”  
10 *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). A plaintiff asserting a  
11 Section 1981 claim must plead that “but for the defendant’s unlawful conduct,” such an  
12 injury “would not have occurred.” *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned*  
13 *Media*, 140 S. Ct. 1009, 1014 (2020). A plaintiff asserting a Section 1981 claim must  
14 generally either “identify an impaired contractual relationship under which the plaintiff  
15 has rights,” *Astre v. McQuaid*, 804 F. App’x 665, 666 (9th Cir. 2020) (citing *Domino’s*  
16 *Pizza*, 546 U.S. at 476), or allege that they were “block[ed]” from entering into a new  
17 contractual relationship on account of race. *Domino’s Pizza*, 546 U.S. at 476.

18 To survive the motion to dismiss, Correll would need to plead either an existing or  
19 future contract which Amazon impaired or blocked. First, Correll does not have an  
20 existing contract with Amazon or any Amazon customers as he never set up an Amazon  
21 Sellers account. Second, Correll could not have a future contract with Amazon or any  
22 Amazon customers because he voluntarily stopped engaging Amazon to enter into a  
23 contract when he stopped before making a seller account. Additionally, depending on the  
24 outcome of the discovery into the standing issue, there remains the question of whether  
25 Correll would have been able to contract with Amazon or its customers depending on  
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1 whether he could sell any of his products on Amazon.com.

2 Next, the question of whether deterrence from contracting is sufficient under  
3 Section 1981 is an issue of first impression for the Ninth Circuit. Several other circuits  
4 have held that a defendant must preclude the plaintiff from entering into a contract to  
5 establish a Section 1981 claim, whereas mere deterrence is insufficient. *See Arguello v.*  
6 *Conoco, Inc.*, 330 F.3d 355, 358–59 (5th Cir. 2003) (“a § 1981 claim must allege that the  
7 plaintiff was ‘*actually prevented, and not merely deterred,*’” from entering into a  
8 contractual relationship on account of race) (emphasis in original) (quoting *Morris v.*  
9 *Dillard Dep’t Stores, Inc.*, 277 F.3d 743, 752 (5th Cir. 2001)); *Alston v. Spiegel*, 988 F.3d  
10 564, 572 (1st Cir. 2021) (“section 1981 affords relief when racial discrimination  
11 *precludes* a plaintiff from entering a contractual relationship”) (emphasis added); *Green*  
12 *v. Dillard’s, Inc.*, 483 F.3d 533, 539 (8th Cir. 2007) (“In order to prevail in their § 1981  
13 case the Greens must also show actionable interference with their contractual interest. . .  
14 [such as by] a series of actions which a trier of fact could find as a whole *thwarted* their  
15 attempt to make and close a contract”) (emphasis added). This interpretation corresponds  
16 with the language used by the Supreme Court in describing Section 1981 liability: in  
17 *Runyon v. McCrary*, 427 U.S. 160, 172 (1976), where the Court “subjected defendants to  
18 liability under §1981 when, for racially motivated reasons, they *prevented* individuals  
19 who ‘sought to enter into contractual relationships’ from doing so.” *Domino’s Pizza.*,  
20 546 U.S. at 476 (emphasis added and omitted).

21 According to Correll’s pleadings, Amazon’s programs did not preclude him from  
22 contracting with Amazon as a seller. Rather, Correll did not desire to participate in a  
23 marketplace which provided some benefit programs only to minorities. (ECF No. 20,  
24 21.) Correll argues this deterrence can be sufficient to support a claim under Section  
25 1981, but the only caselaw he cites is not a Section 1981 case, but rather a case about



1 employment discrimination where the existence or formation of a contract is not at issue.  
2 (ECF No. 26, 15 (citing *Teamsters v. United States*, 431 U.S. 324, 365–366 (1977).)  
3 Here, assuming Correll was able to contract with Amazon, Amazon’s programs did not  
4 preclude his entering into that contract—Correll’s own actions did.

5 Correll has failed to plead an existing or future contract which Amazon impaired or  
6 blocked through racial discrimination. Accordingly, the Court **GRANTS** Amazon’s Fed.  
7 R. Civ. P. 12(b)(6) Motion to Dismiss the Section 1981 claim with leave to amend.

8 **II. Sufficiency of Claims under California Civil Code Sections 51 and 51.5**  
9 **(“Unruh Civil Rights Act”)**

10 The Court should not decide questions of state law while standing is questionable.  
11 Accordingly, the Court **DENIES** Amazon’s Fed. R. Civ. P. 12(b)(6) Motion to Dismiss  
12 the claims under California Civil Code Sections 51 and 51.5 without prejudice.

13 **IV. CONCLUSION**

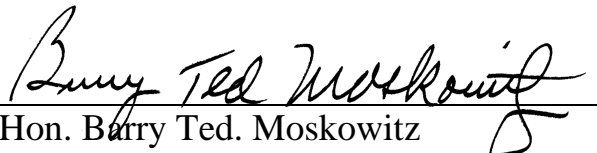
14 For the reasons discussed above, Defendant’s Motion to Dismiss Plaintiff’s 42  
15 U.S.C. § 1981 claim under Fed. R. Civ. P. 12(b)(6) is **GRANTED**. Defendant’s motions  
16 under Fed. R. Civ. P. 12(b)(1) and under Fed. R. Civ. P. 12(b)(6) regarding the claims  
17 under the Unruh Civil Rights Act are **DENIED** without prejudice. The parties will  
18 conduct discovery into the issue of standing until November 22, 2023, and Amazon may  
19 raise its challenge to standing again on a motion for summary judgment, for which the  
20 Court has set aside time for oral argument on December 21, 2023, at 1 pm. The Plaintiff

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1 has leave to file an amended complaint as to the Section 1981 claim by November 1,  
2 2023. The parties shall cooperate in discovery. Failure to cooperate will be sanctioned.

3 **IT IS SO ORDERED.**

4 Dated: September 18, 2023

5   
6 Hon. Barry Ted. Moskowitz  
7 United States District Judge