

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN MATEO

Law and Motion Calendar  
Judge: HONORABLE V. RAYMOND SWOPE  
Department 23  
400 County Center, Redwood City  
Courtroom 8A

Monday, October 18, 2021

IF YOU **INTEND TO APPEAR** ON ANY CASE ON THIS CALENDAR YOU MUST DO ONE OF THE FOLLOWING:

1. EMAIL [Dept23@Sanmateocourt.org](mailto:Dept23@Sanmateocourt.org) BEFORE 4:00 P.M. CONTEMPORANEOUSLY COPIED TO ALL PARTIES OR THEIR COUNSEL OF RECORD. IF BY EMAIL, IT MUST INCLUDE THE NAME OF THE CASE, THE CASE NUMBER, AND THE NAME OF THE PARTY CONTESTING THE TENTATIVE RULING
2. YOU MUST CALL (650) 261-5123 BEFORE 4:00 P.M. AND FOLLOW THE INSTRUCTIONS ON THE MESSAGE.
3. You must give notice before 4:00 P.M. to all parties of your intent to appear pursuant to California Rules of Court 3.1308 (a) (1) .

Failure to do both items 1 or 2 and 3 will result in no oral presentation.

**At this time, all appearances will be by Zoom. No personal appearances will be allowed.**

**Zoom Video/Computer Audio Information:**

<https://sanmateocourt.zoomgov.com/>

Meeting ID: 161 435 0369

Password: 188130

**Zoom Phone-Only Information Please note: You must join by dialing in from a telephone; credentials will not work from a tablet or PC**

Dial in: +1 (669)-254-5252

***(Meeting ID and passwords are the same as above)***

**TO ASSIST THE COURT REPORTER, the parties are ORDERED** to: (1) state their name each time they speak and only speak when directed by the Court; (2) not to interrupt the Court or anyone else; (3) speak slowly and clearly; (4) use a dedicated land line if at all possible, rather than a cell phone; (5) if a cell phone is absolutely necessary, the parties must be stationary and not driving or moving; (6) no speaker phones under any circumstances; (7) provide the name and citation of any case cites; and (8) spell all names, even common names.

Case

Title / Nature of Case

2:00

LINE:1

18-CIV-02283 ROBERTA JURASH, ET AL. VS. CARYN MCDOWELL, ET AL.

ROBERTA JURASH  
CARYN MCDOWELL

SIMON A. MAZZOLA  
JEFFREY A. LEON

---

MOTION FOR GOOD FAITH SETTLEMENT BY CROSS-DEFENDANT EXCELSIOR ROOFING CO.'S

**TENTATIVE RULING:**

Cross-Defendant Excelsior Roofing Co.'s ("Excelsior") Motion to Determine Good Faith Settlement is GRANTED.

Notwithstanding the procedural issue with the Notice of Motion (Cal. Rules of Court, rule 3.1382), the Court has considered the argument and evidence posited in support of this motion on the merits and finds, in its discretion, that Excelsior has met its initial burden to demonstrate the good faith issue on the basis of the Tech-Bilt factors where it was named a cross-defendant in the Cross-Complaint of Stephen Richard Johnson dba Johnson Construction, filed on September 17, 2018 by Roe amendment on May 17, 2019. (Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal.3d 488, 494-497.) Excelsior is a not party named in the Owners' Second Amended Complaint or any other cross-complaint, including the Cross-Complaint of Defendants Caryn and James McDowell ("Defendants"), filed June 25, 2018. (Contra Opp., p. 4:11-17; 6:23 - 7:3. See Owners SAC, filed Dec. 2, 2021, ¶¶ 138 - 143.) E

Defendants are the only parties to oppose this motion. The Court finds that Defendants have not met their shifting burden where they posit no evidence in support of their opposition arguments. (Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (Rutter, Jun. 2021 Update) ¶¶ 12:818.) Rather, their opposition is primarily predicated on Excelsior's failure to meet its initial burden.

The Court admonishes Excelsior for its failure to timely file its reply, filed on October 13, 2021 (Code Civ. Proc. § 1005, subd. (b)) and both Excelsior and Defendants for their failure to comply with the Court's procedural requirements for courtesy copies pursuant to Case Management Order no. 1, issued May 11, 2021, ¶ 5.

---

2:00

LINE:2

20-CIV-01712 SAMANTHA LIAPES VS FACEBOOK, INC.

SAMANTHA LIAPES  
FACEBOOK, INC.

JAHAN C. SAGAFI  
ROSEMARIE T. RING

---

HEARING ON DEMURRER BY DEFENDANT FACEBOOK, INC.

**TENTATIVE RULING:**

Defendant Facebook, Inc.'s ("Defendant" or "Facebook") Demurrer to the First Amended Complaint is SUSTAINED, WITH LEAVE TO AMEND. (Code Civ. Proc. § 430.10, subd. (e).)

Defendant's Request for Judicial Notice is DENIED as to:

1) Facebook's current "Discriminatory Practices" subpage of its "Advertising Policies" webpage, attached as Exhibit A to the Ring Declaration; [¶] 2) Facebook's current "Advertising Policies" webpage, attached as Exhibit B to the Ring Declaration; [¶] 3) Facebook's Blueprint "How to Find Your Customers On Facebook" webpages, attached as Exhibit C to the Ring Declaration; [¶] 4) Facebook's "Ad Targeting - Help your ads find the people who will love your business" webpage, attached as Exhibit D to the Ring Declaration; [¶] 5) Facebook's "Ad Library" webpage, attached as Exhibit E to the Ring Declaration

(Facebook RJN, p. 2:6-14.) Plaintiff Samantha Liapes' ("Plaintiff") Request for Judicial Notice is GRANTED, BUT NOT FOR THE TRUTH OF THE MATTERS ASSERTED THEREIN, as to: "1. Statement of Interest of the United States, National Fair Housing Alliance v. Facebook, Inc. (S.D.N.Y. Aug. 17, 2018, No. 18 Civ. 2689) ECF No. 48. [¶] 2. Statement of Interest of the United States, Onuoha v. Facebook, Inc. (N.D. Cal. Nov. 16, 2018, No. 16 Civ. 06440) ECF No. 77." (Pl. RJN, p. 1:6-9.)

Plaintiff has not pled sufficient facts to allege the two causes of action for age and gender discrimination in violation of the Unruh Civil Rights Act.

No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is

---

associated with a person who has, or is perceived to have, any of those characteristics.

(Civ. Code, § 51.5, subd. (a).)

The Unruh Civil Rights Act was enacted to "create and preserve a nondiscriminatory environment in California business establishments by 'banishing' or 'eradicating' arbitrary, invidious discrimination by such establishments." (Angelucci v. Century Supper Club (2007) 41 Cal.4th 160, 167.) The substantive protections against discrimination established by the Unruh Civil Rights Act are set forth in Civil Code section 51. Subdivision (b) of that provision states: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (§ 51, subd. (b).)

(Flowers v. Prasad (2015) 238 Cal.App.4th 930, 937.)

Despite its broad application, the Unruh Act does not extend to practices and policies that apply equally to all persons: "This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation." (Civ. Code, § 51, subd. (c); Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1172 (Harris ).) A policy that is neutral on its face is not actionable under the Unruh Act, even when it has a disproportionate impact on a protected class. (Harris, at pp. 1172-1173; Belton v. Comcast Cable Holdings, LLC (2007) 151 Cal.App.4th 1224, 1238 (Belton ).)

(Turner v. Association of American Medical Colleges (2008) 167 Cal.App.4th 1401, 1408.) "[A] plaintiff seeking to establish a case under the Unruh Act must plead and prove intentional discrimination in public accommodations in violation of the terms of the Act." (Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1175 (superseded by statute on other grounds as stated in Munson v. Del Taco, Inc. (2009) 46 C4th 661, 667-668). See Opp., p. 7:9-10.)

At issue are three tools used in Facebook advertising: (1) Audience Selection Tool (First Am. Complaint, filed Oct. 9, 2020, ¶¶ 41 - 63 ("FAC")): (2) Lookalike Audiences (¶¶ 64 - 70); and (3) Ad Delivery Algorithm (¶¶ 71 - 81).

Plaintiff has not pled sufficient facts to allege the Audience Selection Tool is facially discriminatory where she alleges the

---

default setting for Facebook advertisements is to ages 18 to 65+ (all adults) and all genders. (FAC, ¶¶ 46, 47.) The Court finds Facebook's encouragement of the use of its Audience Selection Tool is distinguishable from the requirements imposed by Roommates.com for access to the site. (Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC ("Roommates"), 521 F.3d 1157, 1166.)

Similarly, Lookalike Audiences are created from the advertiser's initial selection, which as pled, the default setting is age and gender neutral. (FAC, p. 19:19-24. See also id. at ¶ 65.)

For the Ad Delivery Algorithm, the Court finds the allegations in the First Amended Complaint are inconsistent with those of the Complaint and Plaintiff has failed to plead around the earlier allegations. Specifically, in the Complaint, Plaintiff alleged that the Ad Delivery Algorithm's purpose was to optimize both the advertisement's audience and the advertiser's goals.

The purpose of this algorithm is to optimize an advertisement's audience and the advertiser's goals by showing the advertisement preferentially to the users Facebook believes will maximize Awareness, Consideration, or Conversion scores for the advertisement. (Awareness is the maximum advertisement Views; Consideration is clicks and engagement with the advertisement; and Conversion is the sales generated by clicks on the advertisement.)

(Complaint, filed Apr. 20, 2020, p.19:5-13 (emphasis added).)

Now, Plaintiff alleges that the Ad Delivery Algorithm's purpose is for earn Facebook more money, deleting any mention of the advertiser's goals. "The purpose of this algorithm is to increase the likelihood that Facebook users will click on each advertisement, because Facebook earns more money when its users click on ads more frequently." (FAC, p. 21:20-22 (emphasis added).)

Plaintiff further alleges without explanation that Facebook, "uses both the age and gender of its users to determine who will actually receive advertisements regardless of whether the advertiser directs Facebook to limit the age or gender of its audience selection" and "even when advertisers do not want to discriminate based on age or gender in their ad delivery of insurance advertisements, Facebook itself decides to discriminate and does discriminate based on age and gender, and Facebook does so on behalf of the advertisers, who directly rely on Facebook's ad delivery algorithm for their advertisement distribution on Facebook." (FAC, ¶ 75 (original emphasis).) The Court finds these new allegations contradict Plaintiff's prior allegation that the "purpose of this algorithm is to optimize an advertisement's audience and the advertiser's goals"

---

(Complaint, p. 19:8-9) and fails to plead around this earlier allegations.

The Court takes judicial notice of the complaint and in its discretion disregards the conflicting factual allegations in the First Amended Complaint. (Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal.App.3d 593, 604. Accord Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (Rutter, Jun. 2021 Update) ¶ 7:47.)

Plaintiff has not pled sufficient facts to allege a cause of action for aiding and abetting where Defendant "knew the other's conduct constitutes a breach of duty and gives substantial assistance to the other to so act." (Casey v. U.S. Bank Nat. Assn. (2005) 127 Cal.App.4th 1138, 1144. See also CACI no. 3610.)

The Court is persuaded by the District Court's findings in Vargas v. Facebook, Inc. (N.D. Cal., Aug. 20, 2021, No. 19-CV-05081-WHO) 2021 WL 3709083, at \*1, 4-5 ((9th Cir. appeal filed September 10, 2021) and finds Plaintiff's claims are barred pursuant to the Communications Decency Act where the Audience Selection Tool and Lookalike Audience "are neutral. It is the

users 'that ultimately determine what content to post, such that the tool merely provides 'a framework that could be utilized for proper or improper purposes,...." ' Roommates, 521 F.3d at 1172 (analyzing Carafano)." (Vargas v. Facebook, Inc. (N.D. Cal., Aug. 20, 2021, No. 19-CV-05081-WHO) 2021 WL 3709083, at \*5.)

In response to Defendant's Notice of Supplemental Authority, Plaintiff argues that "Facebook's ad platform does require advertisers to select among age- and gender-based categories in drop-down menus to decide which users will receive their ads." (Pl. Resp., filed Oct. 13, 2021, p. 3:24 - 4:7.) However, this directly contradicts her allegations in the First Amended Complaint. (FAC, ¶¶ 46, 47).

The Court declines to rule whether her claims are similarly barred as to the Ad Delivery Algorithm, given the aforementioned inconsistent pleading.

---



POSTED: 3:00 PM