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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Cordova Plaintiff/Petitioner(s) VS. Greyhound Lines, Inc. Defendant/Respondent(s) (Abbreviated Title)	No. RG18928028 Order Demurrer to Complaint Sustained

The Demurrer to Complaint filed for Greyhound Lines, Inc. was set for hearing on 05/28/2019 at 09:00 AM in Department 16 before the Honorable Michael M. Markman. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

Defendant Greyhound Lines, Inc.'s ("Defendant") Demurrer to Plaintiff Rocio Cordova's ("Plaintiff") First Amended Complaint ("FAC") is SUSTAINED IN PART WITH LEAVE TO AMEND and OVERRULED IN PART.

At the outset, the Court notes that Plaintiff filed a redacted FAC, but did not concurrently lodge a courtesy copy of the unredacted FAC in Department 16 or file a motion to seal. (Cal. Rules of Court, rule 2.551; see Overstock.com, Inc. v. Goldman Sachs Group, Inc. (2014) 231 Cal.App.4th 471, 487, fn. 8 [explaining difference between lodging and filing].) The only operative version of the FAC properly before the Court is the redacted version that was actually filed. (See A & B Metal Products v. MacArthur Properties, Inc. (1970) 11 Cal.App.3d 642, 647 [act of filing is exhibition of papers to the court].)

Defendant's Demurrers to the First, Second, and Third Causes of Action for failure to state facts sufficient to constitute a cause of action are OVERRULED to the extent that they are based on federal preemption. (Code Civ. Proc. § 430.10(e).)

Defendant did not bear its burden of proving that Congress intended to preempt state law in this instance. (Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc. (2007) 41 Cal.4th 929, 935.) California recognizes "four species of federal preemption: express, conflict, obstacle, and field." (Id. at 936.) Each has its own distinct test. (Id.) Defendant incorrectly tried to conflate the latter three types of preemption into a single test. (Def.'s Mem. at 5:17-20.)

Read as a whole, the Demurrer appears to be primarily making a conflict preemption argument based upon 8 U.S.C. § 1357. But that argument rests upon the factual premise that Defendant merely acceded to CBP demands -- in other words, that Defendant was acting only under government compulsion and not of its own independent volition. (Def.'s Mem. at 5:17.) Defendant cannot demur on the basis of a purported fact which is not found in the FAC and contradicts the FAC's express allegations: "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with

which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (Committee On Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 213.)

At this stage, the Court must assume the truth of Plaintiff's repeated allegations that Defendant voluntarily cooperated with the requests of Customs and Border Protection ("CBP") and went out of its way to assist CBP personnel. (Id.) The word "voluntarily" connotes both freedom of choice and an absence of coercion or compulsion. (In re Marriage of Bonds (2000) 24 Cal.4th 1, 16.) Whether Defendant's apparent cooperation was actually compelled by a federal statute not mentioned in the FAC is an issue for summary judgment or trial. (Id.) The foregoing analysis is also dispositive of Defendant's argument that Plaintiff did not identify a discriminatory policy attributable to itself as distinguished from CBP.

Defendant's Demurrers to the First, Second, and Third Causes of Action for failure to state facts sufficient to constitute a cause of action are OVERRULED to the extent that they are based on nonjoinder of CBP as a defendant. (Code Civ. Proc. § 430.10(e).) Procedurally, Defendant never pleaded a special demurrer for nonjoinder. (Code Civ. Proc. § 430.60; Cal. Rules of Court, rule 3.1320(a); Kreling v. Kreling (1897) 118 Cal. 413, 420 [special demurrer for nonjoinder must be pleaded with particularity].) Substantively, the federal government enjoys sovereign immunity. (Collins v. Plant Insulation Co. (2010) 185 Cal.App.4th 260, 269.) The same is true of federal officials. (Civiletti v. Municipal Court (1981) 116 Cal.App.3d 105, 109.)

Contrary to Defendant's position at the hearing, the federal government did not waive its sovereign immunity in state courts by enacting 5 U.S.C. § 702. (Quantification Settlement Agreement Cases (2011) 201 Cal.App.4th 758, 832.) Even if CBP is a necessary party, this action can be dismissed for nonjoinder only if they are also an indispensable party. (Id. at 848.) Defendant did not bear its burden of establishing that CBP is an indispensable party. (Id. at 855-856.) Defendant's moving and reply papers were silent on the statutory factors essential to the indispensable party analysis. (Id. at 856-859 [citing Code Civ. Proc. § 389(b)].) It was Defendant's burden to argue those specific factors in light of the facts alleged in the FAC and judicially noticeable facts. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850 ["a party who seeks a court's action in his favor bears the burden of persuasion thereon"].)

Instead, Defendant relied upon distinguishable federal authority. The issue before the court in Carlson v. Tulalip Tribes of Washington (9th Cir. 1975) 510 F.2d 1337, 1339 was whether the government was a necessary party; whether it was also indispensable does not appear to have been challenged on appeal. Barnes v. Raytheon Technical Services Co., LLC (D. Ariz., May 28, 2013, No. CV-12-00839-TUC-CKJ) 2013 WL 2317727, at *3 expressly relied on the defendant's extrinsic evidence to hold that the federal government was an indispensable party. Federal courts operating under notice pleading are much more open to receiving extrinsic evidence on pre-answer motions. This is a California court hearing a demurrer. (See Fremont Indem. Co. v. Fremont General Corp. (2007) 148 Cal.App.4th 97, 115.)

Defendant's Demurrers to the First and Second Causes of Action for failure to state facts sufficient to constitute a cause of action are OVERRULED to the extent that they are based on a purported failure to plead reliance. (Code Civ. Proc. § 430.10(e).) It was sufficient for Plaintiff to plead that if she had known up front about Defendant's policy or practice, she would not have bought her Greyhound bus ticket or she would have paid less for it. The essential element of reliance does not require Plaintiff to expressly plead the magic word "reliance." (Hale v. Sharp Healthcare (2010) 183 Cal.App.4th 1373, 1386.) Nor was Plaintiff required to plead facts showing that the nondisclosure was the "sole or even the predominant or decisive factor in influencing" her conduct. (Id. at 1384-1385.)

The fact that CBP has long operated stationary checkpoints whose constitutionality has been upheld by the U.S. Supreme Court is irrelevant to Plaintiff's actual theory of reliance. Plaintiff expressly alleged that the bus stopped in a rural area not near any checkpoint. (FAC, ¶ 54 at 16.) Again, at this stage, the Court must assume the truth of that allegation and accept it at face value. (Committee On Children's Television, 35 Cal.3d at 213.)

Defendant's Demurrers to the First, Second, and Third Causes of Action for failure to state facts sufficient to constitute a cause of action are SUSTAINED WITH LEAVE TO AMEND to the extent that they are directed to the invalidity of Plaintiff's class allegations. (Code Civ. Proc. § 430.10(e); see Canon U.S.A., Inc. v. Superior Court (1998) 68 Cal.App.4th 1, 5.)

It is proper to sustain a demurrer to class allegations when they fail to adequately allege the existence of an ascertainable class. (Bartlett v. Hawaiian Village, Inc. (1978) 87 Cal.App.3d 435, 437-439 [citing Weaver v. Pasadena Tournament of Roses Ass'n (1948) 32 Cal.2d 833, 838-840].) In particular, "class certification can be denied for lack of ascertainability when the proposed definition is overbroad and the plaintiff offers no means by which only those class members who have claims can be identified from those who should not be included in the class." (Sevidal v. Target Corp. (2010) 189 Cal.App.4th 905, 921; accord, Thompson v. Automobile Club of Southern California (2013) 217 Cal.App.4th 719, 728; see also Akkerman v. Mecta Corp., Inc. (2007) 152 Cal.App.4th 1094, 1100-1101.)

Plaintiff's theory of her case is that in buying her ticket, she saw and relied on Defendant's advertising that no discrimination was tolerated on its buses and she would not have bought her ticket or would have paid less if she knew that Defendant "had a corporate policy or practice of granting requests by immigration agents to conduct discriminatory immigration raids in the restricted-access passenger cabins of its buses." (FAC, ¶ 53 at 16.) Yet she seeks to represent a class of "all California consumers who, since January 20, 2017, have purchased a Greyhound bus ticket for travel to, from, or within California." (FAC, ¶ 79 at 23-24.)

The Court agrees with Defendant that Plaintiff's proposed class definition is unduly overbroad relative to her actual theory of her case. It is overinclusive in that it necessarily includes those passengers whose buses were never boarded by CBP and thus could not have suffered any harm under Plaintiff's theory; passengers who never saw Defendant's allegedly misleading advertising; passengers who were not actually subjected to allegedly discriminatory conduct by CBP officers; and passengers who were properly subjected to immigration inspection by CBP officers on the basis of a warrant or probable cause.

In opposition, Plaintiff's response was that dismissal of her class allegations is premature. (Pl.'s Opp. at 21:1-14.) A promise that an adequate class definition will follow in due course after discovery is not an adequate substitute for pleading one. Because the class definition is so overbroad, it cannot advise potential class members as to which of them have viable claims, so that in turn common issues will predominate. (See Hefczyc v. Rady Children's Hospital-San Diego (2017) 17 Cal.App.5th 518, 537-540 [refusing to allow "self-defined" class where potential class members could not readily ascertain and identify themselves as class members from proposed class definition].)

Plaintiff's proposed subclass of Latino and nonwhite consumers would exclude Caucasian consumers but otherwise is still as overinclusive as her proposed general class definition. Further, Plaintiff has not explained how membership in such a subclass is to be ascertained without invading potential class members' privacy in a way that could facilitate the very discriminatory misconduct Plaintiff purportedly seeks to prevent. (See Starbucks Corp. v. Superior Court (2011) 194 Cal.App.4th 820, 825-828 [denying precertification class discovery amounting to violation of privacy statute on which plaintiff's claims were based].)

In turn, lack of ascertainability is also fatal to the other elements of class certification. Since the Court is granting leave to amend, however, the Court will not separately address those elements. If Plaintiff is able to plead a reasonably ascertainable class, then the resulting narrower class definition may also avoid or minimize some of the other issues raised by Defendant.

Defendant's Demurrers to the First and Second Causes of Action for failure to state facts sufficient to constitute a cause of action are OVERRULED as to all other remaining arguments raised. (Code Civ. Proc. § 430.10(e).)

Since Plaintiff has adequately alleged at least one good theory in support of her first and second causes of action, the Court cannot sustain general demurrers on the basis of Defendant's other objections to the FAC because a demurrer cannot attack a portion of a cause of action. (PH II, Inc. v. Superior Court (1995) 33 Cal.App.4th 1680, 1682-1683.) The correct remedy for Plaintiff's apparently improper theories under her first and second causes of action was a motion to strike. (Id.)

Defendant's Demurrer to the Third Cause of Action for Violation of the Unruh Civil Rights Act for failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH LEAVE TO AMEND. (Code Civ. Proc. § 430.10(e).)

Plaintiff did not adequately allege standing by alleging that she herself was the victim of a discriminatory act committed by Defendant. (Surrey v. TrueBeginnings, LLC (2008) 168 Cal.App.4th 414, 419-420.) Discrimination means to treat one person differently than other persons because of one or more protected characteristics. (Wallace v. County of Stanislaus (2016) 245 Cal.App.4th 109, 126.) At the time Defendant's bus allegedly pulled over to the side of the freeway, all passengers on the bus were equally inconvenienced. Plaintiff alleged that she observed discriminatory treatment of at least one other passenger, but did not unequivocally allege that she herself was subjected to discriminatory treatment.

Defendant's Demurrers to the First, Second, and Third Causes of Action for uncertainty are OVERRULED. (Code Civ. Proc. § 430.10(f).) Procedurally, these demurrers were not pleaded with the requisite specificity. (Taliaferro v. Salyer (1958) 162 Cal.App.2d 685, 688.) Substantively, while "inconvenient, annoying and inconsiderate," the flaws in Plaintiff's FAC "do[] not substantially impair [Defendant's] ability to understand the [FAC]." (Williams v. Beechnut Nutrition Corp. (1986) 185 Cal.App.3d 135, 139.)

Since Plaintiff has not yet "had an opportunity to amend the complaint in response to [the court's ruling on a] demurrer, leave to amend is liberally allowed as a matter of fairness." (City of Stockton v. Superior Court (2007) 42 Cal.4th 730, 747.)

Plaintiff must file and serve a Second Amended Complaint no later than July 8, 2019. (Code Civ. Proc. § 472a(c).) If Plaintiff would like to ensure that the contents of any redacted portions of the Second Amended Complaint are properly before the Court, Plaintiff must concurrently file and serve a motion to seal pursuant to rule 2.551 of the California Rules of Court. (See Savaglio v. Wal-Mart Stores, Inc. (2007) 149 Cal.App.4th 588, 596-597 [citing NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal.4th 1178, 1208-1209].) The public has a federal and state constitutional right of access to court filings used as the basis for adjudication of civil actions. (Id.)

Dated: 06/20/2019

Facsimile

Judge Michael M. Markman

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Case Number: RG18928028
Order After Hearing Re: of 06/20/2019

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 06/20/2019.

Chad Finke Executive Officer / Clerk of the Superior Court

By Digital

Deputy Clerk