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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Manuel Gray, 10 Plaintiff, 11 v. 12 Saks Fifth Avenue, 13 Defendant.	No. CV-20-01987-PHX-JJT **ORDER**

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15 At issue is Defendant Saks Fifth Avenue's Motion for Summary Judgment (Doc.
16 69, "MSJ"), to which Plaintiff Manuel Gray filed a Response (Doc. 78, "Resp.") and
17 Defendant filed a Reply (Doc. 85, "Reply"). Also at issue is Plaintiff's Motion to Strike,
18 which he raised in his Response. (Resp. at 4–6.) The Court finds this matter appropriate for
19 decision without oral argument. *See* LRCiv 7.2(f). For the following reasons, the Court will
20 grant Defendant's Motion for Summary Judgment under Federal Rule of Civil Procedure
21 56(c) and deny Plaintiff's Motion to Strike.

22 **I. BACKGROUND**

23 In July 2020, Plaintiff, who is African-American, visited a Saks Fifth Avenue store
24 with his girlfriend. Plaintiff states that he and his girlfriend sampled candles in the
25 fragrance department until he "had an idea" of which candle he wanted to purchase. (Doc.
26 77, Pl.'s Separate Statement of Facts ("PSSOF"), Ex. A ¶ 4.) While his girlfriend continued
27 exploring the fragrance department, Plaintiff left to browse the men's department. When
28 Plaintiff returned, his girlfriend was speaking with a sales associate. Although Plaintiff was

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"prepared" to buy a candle, he decided to wait while his girlfriend finished her purchase. (PSSOF, Ex. A ¶ 6.)

As Plaintiff sat nearby, a store security guard approached him and asked him to leave the store, explaining that a sales associate had accused Plaintiff of harassment. (Doc. 70, Def.'s Separate Statement of Facts ("DSSOF") ¶¶ 5–7.) Plaintiff denied the allegation and asked to speak with a manager. (DSSOF ¶ 8.) The manager arrived, conversed with the security guard, and eventually determined that there had been a mistake. (DSSOF ¶¶ 9–12.) The manager stepped away momentarily, and Plaintiff joined his girlfriend at the checkout counter. (DSSOF ¶ 13.)

When the manager returned, he offered Plaintiff a gift. But according to Plaintiff, the manager did not apologize or adequately explain the mishap. (PSSOF, Ex. A ¶ 9.) Plaintiff's girlfriend then completed her transaction without issue, and the couple left the store. (DSSOF ¶¶ 15–16.) Plaintiff did not purchase anything, but he claims he "felt compelled to leave the store," and the manager and security guard "demanded that [he] leave . . . so that he could not purchase a candle . . . as he intended." (PSSOF ¶¶ 17–19.) Plaintiff adds that, at one point, the manager pushed him "as if to herd [him] . . . out of the store." (PSSOF, Ex. A ¶ 10.)

Plaintiff initially asserted six different claims, five of which the Court dismissed. (Doc. 33.) Plaintiff's only remaining claim, for which Defendant seeks summary judgment, is that Defendant violated 42 U.S.C. § 1981 by denying Plaintiff the right to make a contract on the basis of his race. (Doc. 9 ¶ 36.)

II. LEGAL STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is granted summary judgment when: (1) the movant shows that there is no genuine dispute as to any material fact; and (2) after viewing the evidence most favorably to the non-moving party, the movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288–89 (9th Cir. 1987). Under this standard, "[o]nly disputes over facts that might affect

1 the outcome of the suit under governing [substantive] law will properly preclude the entry
2 of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A
3 "genuine issue" of material fact arises only when the "evidence is such that a reasonable
4 jury could return a verdict for the nonmoving party." *Id.*

5 In considering a motion for summary judgment, the court must regard as true the
6 non-moving party's evidence, if it is supported by affidavits or other evidentiary material.
7 *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party
8 may not merely rest on its pleadings; it must produce some significant probative evidence
9 tending to contradict the moving party's allegations, thereby creating a material question
10 of fact. *Anderson*, 477 U.S. at 256–57 (holding that the plaintiff must present affirmative
11 evidence in order to defeat a properly supported motion for summary judgment); *First Nat'l*
12 *Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

13 "A summary judgment motion cannot be defeated by relying solely on conclusory
14 allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
15 1989). "Summary judgment must be entered 'against a party who fails to make a showing
16 sufficient to establish the existence of an element essential to that party's case, and on
17 which that party will bear the burden of proof at trial.'" *United States v. Carter*, 906 F.2d
18 1375, 1376 (9th Cir. 1990) (quoting *Celotex*, 477 U.S. at 322).

19 **III. ANALYSIS**

20 **A. Defendant's Motion for Summary Judgment**

21 Section 1981 prohibits racial discrimination in the making and enforcement of
22 contracts. 42 U.S.C. § 1981. When reviewing § 1981 claims, courts apply the *McDonnell*
23 *Douglas* burden-shifting analysis. *Lindsey v. SLT L.A., LLC*, 447 F.3d 1138, 1144 (9th Cir.
24 2006). Under this analysis, if Plaintiff establishes a *prima facie* case of discrimination, the
25 burden shifts to Defendant to offer a legitimate, non-discriminatory reason for its actions.
26 *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973)). If Defendant
27 does so, the burden shifts back to Plaintiff to demonstrate that Defendant's reason was
28 mere pretext for intentional discrimination. *Id.* (citing *Tex. Dep't of Cmty. Affairs v.*

Burdine, 450 U.S. 248, 253 (1981)).

In the context of a non-employment contract, Plaintiff establishes a *prima facie* case of discrimination if he shows that "(1) [he] is a member of a protected class, (2) [he] attempted to contract for certain services, and (3) [he] was denied the right to contract for those services." *Id.* at 1145 (citing *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir. 2001); *Bratton v. Roadway Package Sys., Inc.*, 77 F.3d 168, 176 (7th Cir. 1996)). The parties agree that Plaintiff is a member of a protected class, but Defendant challenges the remaining two elements.

1. Attempt to Contract

To survive summary judgment, Plaintiff must demonstrate a genuine factual issue as to whether he attempted to contract with Defendant. *See Lindsey*, 447 F.3d at 1145. Because "[t]he Ninth Circuit has not yet established the parameters of the minimum showing necessary to demonstrate an attempt to make a contract in a non-employment context," courts within the Ninth Circuit have turned to other circuits for guidance. *See Clark v. Safeway, Inc.*, 478 F. Supp. 3d 1080, 1088 (D. Or. 2020).

The First Circuit, for example, has explained that "a retail customer must allege that he was actually denied the ability either to make, perform, enforce, modify, or terminate a contract, or to enjoy the fruits of a contractual relationship, by reason of race-based animus." *Garrett v. Tandy Corp.*, 295 F.3d 94, 100–01 (1st Cir. 2002). The Tenth Circuit requires plaintiffs to demonstrate "interference with a contract beyond the mere expectation of being treated without discrimination while shopping." *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1118 (10th Cir. 2001). The Fifth Circuit has held that plaintiffs must offer "evidence of some tangible attempt to contract." *Morris v. Dillard Dep't Stores, Inc.*, 277 F.3d 743, 752 (5th Cir. 2001). And the Seventh Circuit has clarified that interference with "prospective contractual relations" is too speculative to state a claim under § 1981, and plaintiffs must instead "allege the actual loss of a contract interest, not merely the possible loss of future contract opportunities." *Morris v. Office Max, Inc.*, 89 F.3d 411, 414–15 (7th Cir. 1996).

Defendant contends that the record is devoid of evidence that Plaintiff attempted to contract with the store, emphasizing that Plaintiff never gathered any items for purchase and "was, at best, browsing." (MSJ at 4–6.) Plaintiff responds by pointing out that he sampled some candles and knew exactly what he wanted to purchase, which he argues is "ample evidence that he was shopping at Saks[,] not merely browsing." (Resp. at 13.)

Plaintiff's argument is inapposite. Even if Plaintiff has shown he was "shopping," he fails to demonstrate "interference with a contract beyond the mere expectation of being treated without discrimination while shopping." *See Hampton*, 247 F.3d at 1118. And although Plaintiff may have established that he wished to purchase a certain candle, he offers no evidence of a "tangible attempt to contract" with Defendant for that candle. *See Morris*, 277 F.3d at 752. For example, Plaintiff does not allege that he tried to purchase any items at the checkout counter, nor that he physically selected any items while shopping. In fact, Plaintiff does not even allege that he informed anyone at the store that he planned on purchasing an item. In contrast, Plaintiff's girlfriend selected the items she wanted to purchase and completed her purchase at the checkout counter. But Plaintiff offered no evidence that he independently took any steps to purchase anything at the store. Thus, Plaintiff's evidence that he knew what he wanted to purchase is evidence only of a "prospective contractual relation[]," which is insufficient to state a claim under the statute. *See Morris*, 89 F.3d at 414–15. Plaintiff has not presented evidence from which a reasonable jury could find he "attempted to contract" with Defendant. *See Lindsey*, 447 F.3d at 1145. Accordingly, Plaintiff cannot establish a *prima facie* case of discrimination under § 1981. On this ground, the Court will grant Defendant's Motion for Summary Judgment.

2. Denial of the Right to Contract

Defendant also argues that it is entitled to summary judgment because there is no genuine dispute as to whether Defendant denied Plaintiff's right to contract. The Court disagrees.

Assuming that Plaintiff could show he attempted to contract with Defendant, he

must then show that Defendant thwarted that attempt. *See Lindsey*, 447 F.3d at 1145. Here, it is undisputed that at one point, the security guard asked Plaintiff to leave the store. (DSSOF ¶ 7). Nevertheless, Defendant argues that Plaintiff cannot demonstrate he was denied the right to contract because "the request that he leave the store was retracted once Saks personnel realized the mistake." (MSJ at 6.) But it offers no evidence that the manager or security guard explicitly retracted the demand. *Cf. Touray v. Burlington Coat Factory Warehouse Corp.*, No. 3:21-cv-5407-BJR, 2021 WL 6051146, at *1 (W.D. Wash. Dec. 21, 2021) (describing that when store employee realized she had misidentified plaintiff, she "informed him that 'he was free to continue shopping.'"). Moreover, although it is undisputed that the manager offered Plaintiff a gift, Plaintiff denies that the manager apologized. And Plaintiff also claims that the manager pushed him as if to hurry him out of the store. Therefore, had the Court concluded there was a genuine dispute as to whether Plaintiff attempted to contract with Defendant, it also would conclude that Plaintiff presented sufficient evidence such that a reasonable jury could find Defendant interfered with Plaintiff's right to contract.

B. Plaintiff's Motion to Strike

In support of its Motion for Summary Judgment, Defendant offered two exhibits of surveillance video evidence depicting the incident described above. (DSSOF, Exs. 1, 2.) In his response, Plaintiff moved to have that evidence stricken, alleging that Defendant never disclosed either video. (Resp. at 4.) However, Plaintiff also supported his response with two surveillance videos of the same incident. (PSSOF, Exs. C, D.) And Defendant claims that "the Court itself can verify[Defendant's] Exhibits 1 and 2 are no different from Plaintiff's Exhibits C and D," which demonstrates that Defendant disclosed the videos to Plaintiff. (Reply at 2.)

The Court has reviewed the exhibits and finds that they are not identical. Although similar, each of Defendant's exhibits depicts several more minutes of the incident than Plaintiff's exhibits. Regardless, none of these exhibits played a material role in the Court's conclusion that Defendant is entitled to summary judgment. The Court, therefore, will deny

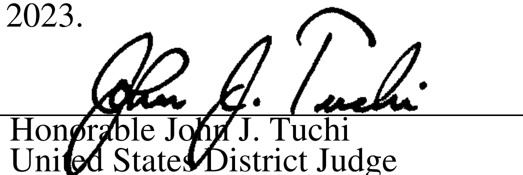
Plaintiff's Motion to Strike as moot.

IT IS THEREFORE ORDERED granting Defendant's Motion for Summary Judgment (Doc. 69).

IT IS FURTHER ORDERED denying as moot Plaintiff's Motion to Strike (Resp. at 4).

IT IS FURTHER ORDERED directing the Clerk to enter judgment in favor of Defendant and to close this case.

Dated this 6th day of October, 2023.



Honorable John J. Tuchi
United States District Judge