

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

**Civil Division**

Central District, Stanley Mosk Courthouse, Department 78

**22STCV08295**

December 20, 2022

**LUIS LICEA, AN INDIVIDUAL vs PTC THERAPEUTICS,  
INC., A DELAWARE CORPORATION**

8:30 AM

Judge: Honorable Robert S. Draper  
Judicial Assistant: Patricia Salcido  
Courtroom Assistant: Patricia Aranda

CSR: None  
ERM: None  
Deputy Sheriff: None

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**APPEARANCES:**

For Plaintiff(s): Scott Ferrell by David W. Reid via Teams

For Defendant(s): GREGORY F. HURLEY by Michael Chilleen via Teams

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**NATURE OF PROCEEDINGS:** Case Management Conference; Hearing on Demurrer - without Motion to Strike

The Court's tentative ruling is electronically posted on the Court's website before the hearing is held.

The matter is called for hearing and argued.

After argument, the Court's tentative ruling becomes the final ruling of the Court as indicated below and as more fully reflected in the written ruling, which is signed and filed this date and incorporated herein by reference to the Court file.

The Demurrer - without Motion to Strike filed by PTC Therapeutics, Inc., a Delaware corporation on 05/04/2022 is Sustained without Leave to Amend.

**LATER, OUTSIDE THE PRESENCE OF COUNSEL:**

The Court issues a Final Ruling Re Defendant PTC Therapeutics, Inc.'s Demurrer to the Complaint which is signed and filed today's date and incorporated herein.

Defendant PTC Therapeutics, Inc.'s Demurrer is SUSTAINED. Since the California Supreme Court has declined the petition for review filed in *Martinez v. Cot'n Wash, Inc.* (2022) 81 Cal.App.5th 1026, the Demurrer is sustained without leave to amend.

**FACTUAL BACKGROUND**

This is an action under the Unruh Civil Rights Act. The Complaint alleges as follows.

Plaintiff Luis Licea ("Plaintiff") is a blind individual who requires screen reading software to

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read website content and to access the internet. (Compl. ¶ 5.) Defendant PTC Therapeutics, Inc.'s ("Defendant") website contains several access barriers that prevent Plaintiff, and other visually-impaired consumers, from equal access to the website. (Ibid.) Plaintiff accessed the website with the intention to gain information about Defendant and its products, and to test the site for ADA compliance. (Compl. ¶ 9.)

**PROCEDURAL HISTORY**

On March 8, 2022, Plaintiff filed the Complaint asserting a single cause of action for Violations of the Unruh Civil Rights Act.

On May 4, 2022, Defendant filed the instant Demurrer.

On June 22, 2022, Plaintiff filed an Opposition.

On June 28, 2022, Defendant filed a Reply.

On July 6, 2022, the Court took the matter under submission.

On July 28, 2022, Defendant filed a Request for Judicial Notice of Post Briefing Authority.

On October 3, 2022, the Court vacated its July 6 order submitting the matter due to the newly cited authority.

On October 25, 2022, Defendant filed a second Request for Judicial Notice of Post Briefing Authority.

On November 1, 2022 the Court issued a Tentative Decision sustaining the demurrer but staying the final decision pending a decision by the California Supreme Court on whether to grant a petition for review in *Martinez v. Cot'n Wash, Inc.* (2022) 81 Cal.App.5th 1026.

On November 9, 2002 the California Supreme Court declined review of *Martinez v. Cot'n Wash, Inc.* (2022) 81 Cal.App.5th 1026,

**DISCUSSION**

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**I. EVIDENTIARY OBJECTIONS**

Plaintiff makes several evidentiary objections to the declarations of Abraham Adler and Gregory F. Hurley.

Objection Number One is Overruled.

Objection Number Two is Sustained.

**II. DEMURRER**

Defendant demurs to the sole cause of action for Violation of the Unruh Civil Rights Act (“Unruh”).

A demurrer should be sustained only where the defects appear on the face of the pleading or are judicially noticed. (Code Civ. Pro., §§ 430.30, et seq.) As is relevant here, a court should sustain a demurrer if a complaint does not allege facts that are legally sufficient to constitute a cause of action. (See id. § 430.10, subd. (e).) As the Supreme Court held in *Blank v. Kirwan* (1985) Cal.3d 311: “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. . . . Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.” (Id. at p. 318; see also *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747 [“A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed. [Citation.]”])

“In determining whether the complaint is sufficient as against the demurrer . . . if on consideration of all the facts stated it appears the plaintiff is entitled to any relief at the hands of the court against the defendants the complaint will be held good although the facts may not be clearly stated.” (*Gressley v. Williams* (1961) 193 Cal.App.2d 636, 639.)

A demurrer should not be sustained without leave to amend if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment. (*Schifando v. City of Los Angeles*, supra, 31 Cal.4th at p. 1081.) The demurrer also may be sustained without leave to amend where the nature of the defects and previous unsuccessful attempts to plead render it probable plaintiff cannot state a cause of action. (*Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 967.)

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A. The Unruh Civil Rights Act

Defendant demurs to the single cause of action for violation of the Unruh Civil Rights Act.

Under the Unruh Act, “[a]ll persons within the jurisdiction of this state are free and equal . . . and no matter what their . . . disability [or other protected characteristic] . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” (Civ. Code, § 51; see also CACI No. 3066.) A violation of the Americans with Disabilities Act (ADA) also qualifies as a violation of Unruh. (Civ. Code, § 51, subd. (f).) Moreover, “[w]hoever denies, aids, or incites a denial, or makes any discrimination or distinction” contrary to the Unruh Act is liable for damages. (Civ. Code, § 52, subd. (a).)

A cause of action under Unruh consists of the following elements: (1) the defendant denied the plaintiff access to full and equal accommodations, advantages, facilities, privileges, or services in a business establishment; (2) the plaintiff’s membership in a protected class was a motivating factor for this denial; and (3) defendants’ wrongful conduct caused plaintiff to suffer injury, damage, loss or harm. (See *Wilkins-Jones v. County of Alameda* (2012) 859 F.Supp.2d 1039, 1048.) Importantly, “[a] plaintiff who establishes a violation of the ADA . . . need not prove intentional discrimination in order to obtain damages under section 52.” (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665.) On the other hand, a plaintiff establishing an Unruh violation that is not also an ADA violation must nevertheless establish that the discrimination was intentional. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1172; see *Long v. Playboy Enterprises Intern., Inc.* (2014) 565 Fed.Appx. 646, 647-648 [observing that the Munson Court’s holding did not disturb the requirement that a non-ADA Unruh claim be based on intentional discrimination].)

1. Business Establishment

First, Plaintiff argues that Defendant cannot state a claim under Unruh because his interaction with Defendant’s business was solely through their website, and therefore Plaintiff cannot show he was discriminated in a “business establishment.”

In the tentative for the initial hearing, the Court found that, as there was a circuit split as to whether a website constitutes a business establishment and no binding authority expressly stated that a website was not a business establishment, the Court could not sustain Defendant’s Demurrer on this basis at the pleading stage. However, at hearing, Defendant indicated that new

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authority was pending that would shed light onto this issue. The Court took the Demurrer under submission so that the authority could be considered.

On October 25, 2022, Defendant filed a Request for Judicial Notice as to Post-Briefing Authority. Defendant stated that the California Court of Appeal's recent decision in *Martinez v. Cot'n Wash, Inc.* (2022) 81 Cal.App.5th 1026, was controlling on the question of whether a website is a business establishment for the purposes of Title III of the Americans with Disabilities Act.

In *Martinez*, plaintiff alleged defendant violated the Unruh Act by maintaining a retail website that was inaccessible to the visually impaired because it was not fully compatible with screen reading software. Defendant did not offer any products or services at any physical location.

The trial court dismissed the Complaint on demurrer, finding that a website was not a business establishment under the ADA, and that the Complaint did not state facts sufficient to demonstrate intentional discrimination.

The Court of Appeal affirmed. After considering many of the same arguments before this Court today, the *Martinez* Court found that "the language of the statute, when considered in the context of Congress's failure to act and the DOJ's silence in terms of formal guidance, does not permit us to adopt an interpretation of the statute that is not dictated by its language, especially in the face of the legislative and agency inaction described above." (*Martinez* at p. 1052.)

The Court finds that the decision in *Martinez* is both on-point and binding on this Court. Accordingly, Plaintiff fails to allege a violation of the ADA.

## 2. Discriminatory Intent

Absent a violation of the ADA, Plaintiff must demonstrate intentional discrimination on the part of Defendant to successfully plead a cause of action under Unruh. (See *Harris*, supra, at 1172.) To show such intent, a plaintiff must allege "willful, affirmative misconduct [citation] with the specific intent to accomplish discrimination on the basis of a protected trait. [Citation]." (*Martinez*, supra, at 1036.) Although evidence of disparate impact may be probative of intentional discrimination in some cases under the Unruh Act, it cannot alone establish such intent." (*Ibid.*)

Here, Defendant argues that the Complaint fails to allege facts showing intentional

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discrimination against Plaintiff. Plaintiff responds that the Complaint alleges Defendant had actual knowledge of its website's deficiencies but did not remedy the issues. Plaintiff contends that this is sufficient to allege discriminatory intent.

Plaintiff argues, first, that Ruiz v. Musclewood Investment Properties, LLC (2018) 28 Cal.App.5th 15, supports this contention. However, as the Martinez Court stated in addressing this exact argument:

Ruiz involved a claim under the Disabled Persons Act, Civil Code section 54 et seq. (the DPA), not the Unruh Act . . . The court in Ruiz concluded that the “[d]efendants’ guard dog’s repeated attacks on plaintiff’s guide dog and defendants’ alleged knowledge of those attacks” over the course of almost six months “permit[ted] a reasonable inference of intent” to discriminate against the plaintiff, who was blind. (Ruiz, supra, at p. 22, 238 Cal.Rptr.3d 835.) Because the DPA does not require intent, however (see Civ. Code, § 54.3, subd. (a)), the court’s conclusion regarding intent is dictum, even as it applies to the DPA. (Ruiz, supra, at p. 21, 238 Cal.Rptr.3d 835.) In any case, applying Ruiz’s DPA-related dictum to an Unruh Act claim would be inconsistent with Koebke. Ruiz does not conclude otherwise. Indeed, Ruiz does not even mention Koebke or the Unruh Act. We thus disagree that Ruiz allows Martinez to prove intentional discrimination under the Unruh Act based on CW’s failure to change a facially neutral policy or action—here, the structure of the CW website—in response to Martinez’s complaints.

Accordingly, Plaintiff’s reliance on Ruiz is unavailing.

Next, Plaintiff argues his position is supported by Hankins v. El Torito Restaurants, Inc. (1998) 63 Cal.App.4th 510. In Hankins, plaintiff, a physically handicapped man, visited defendant restaurant. While dining, plaintiff needed to use the restroom. Defendant’s restrooms were located on the second floor. There were eighteen steps separating the two floors.

When plaintiff asked if he could use defendant’s ADA accessible employee restroom, defendant’s employee refused and told plaintiff to use the restroom in the restaurant next door. Plaintiff attempted to use that restroom, only to find out that it, too, was not ADA accessible. On his way back to defendant restaurant, plaintiff could no longer hold his bladder, and was forced to relieve himself behind a bush in the parking lot. He was angered and humiliated by the experience.

The trial court ruled that plaintiff had successfully pled discriminatory intent. On appeal, the Hankins Court affirmed, noting that plaintiff alleged that defendant “wrongfully and unlawfully

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denied accessible restroom facilities to physically handicapped persons, that it acted with knowledge of the effect [its conduct] was having on physically disabled persons, and that Hankins was discriminated against on the sole basis that he was physically disabled and on crutches.”

Plaintiff’s contention that Hankins stands for the proposition that mere knowledge of structural deficiencies constitutes intentional discrimination is unavailing. In Hankins, defendant took the affirmative step of intentionally denying plaintiff access to an accessible restroom and directing him to a restroom in a neighboring restaurant. That is an entirely different scenario than the one alleged here, where defendant merely failed to correct deficiencies in its website after being informed of same.

Therefore, the Court finds that Plaintiff fails to state a cause of action under Unruh, as he has successfully alleged neither a violation of the ADA nor intentional discrimination on Defendant’s part.

Accordingly, Defendant’s Demurrer to the Complaint is SUSTAINED.

Counsel for defendant is directed to prepare and submit an Order of Dismissal.

Order to Show Cause Re: Entry of Order of Dismissal is scheduled for 01/24/23 at 08:30 AM in Department 78 at Stanley Mosk Courthouse.

Defendant is to give notice.

Certificate of Mailing is attached.