UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ENTERTAINMENT STUDIOS NETWORK, INC., et al. Plaintiffs, v. MCDONALD'S USA, LLC, Defendant.	Case No. CV 21-4972 FMO (MAAx) **ORDER RE: PENDING MOTION**

Plaintiffs Entertainment Studios Networks, Inc. ("ESN" or "Entertainment Studios") and Weather Group, LLC ("Weather Group") (collectively, "plaintiffs") filed their Third Amended Complaint ("TAC") against defendant, asserting violations of: (1) 42 U.S.C. § 1981; and (2) California's Unruh Civil Rights Act ("Unruh Act"), Cal. Civ. Code §§ 51, et seq. Pending before the court is the Motion to Dismiss the Third Amended Complaint (Dkt. 55, "Motion") filed by McDonald's USA, LLC's ("defendant" or "McDonald's"). Having reviewed and considered all the briefing with respect to the Motion, the court finds that oral argument is not necessary to resolve the Motion, see Fed. R. Civ. P. 78(b); Local Rule 7-15; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and concludes as follows.

ALLEGATIONS IN THIRD AMENDED COMPLAINT

Plaintiffs are solely owned by Byron Allen ("Allen"), an African American media entrepreneur. (See Dkt. 45, TAC at ¶¶ 10, 36, 46). ESN initially produced non-fiction television programs that were distributed via broadcast syndication. (Id. at ¶ 39). These programs "had general audience appeal, in that they did not specifically target any particular demographic group

as the core audience." (Id at ¶ 40). Between 2009 and 2012, ESN launched seven television networks featuring lifestyle programming ("Lifestyle Networks") that also had general audience appeal. (See id. at ¶¶ 42-43). The Lifestyle Networks "are widely distributed and have high viewer demand[,]" reaching more than 180 million subscribers through ESN's contracts with over 60 multi-channel video programming distributors. (Id. at ¶ 45). ESN continues to produce television programming that runs on its Lifestyle Networks and in broadcast syndication. (See id. at ¶ 10). In 2018, Allen acquired Weather Group, the parent company of The Weather Channel, which plaintiffs allege is "the most trusted brand in cable news for the past decade[.]" (Id. at ¶ 47).

McDonald's is the world's leading global food service retailer, generating over $100 billion in revenue annually. (See Dkt. 45, TAC at ¶ 48). According to plaintiffs, defendant "employs a 'tiered' structure for advertising spending that explicitly differentiates on the basis of race." (Id. at ¶ 54). For "white-owned media companies[,]" McDonald's "contracts with a general market advertising agency[,OMD Worldwide ("OMD"),] . . . to allocate McDonald's annual advertising budget." (Id.). But for "African American media[,]" defendant contracts with Burrell Communications ("Burrell") to spend an advertising budget that "is *de minimis* compared to the general market budget[.]" (Id. at ¶ 55). For example, in 2019, McDonald's spent approximately $1.6 billion in television advertising in the United States; less than $5 million of that amount was allocated to African American-owned media companies. (See id. at ¶ 49).

Plaintiffs allege that if they were a "white-owned" company, they "would have received tens of millions of dollars in advertising revenue from McDonald's on an annual basis[,]" (Dkt. 45, TAC at ¶ 117), and "avoided the costs and burdens they were forced to incur through the racially discriminatory contracting process that McDonald's created" through its "two-tiered system that gave Entertainment Studios no chance of success." (Id. at ¶ 118). According to plaintiffs, "[t]he African American tier is less favorable than the general market tier[,]" in part because defendant "pays lower prices for African American advertising." (Id. at ¶ 56). In addition, plaintiffs allege that ESN "was shut out of the general market tier and forced to bid for advertising in the less favorable African American tier[,]" because McDonald's "stereotyped the entire company as an African American media company." (Id. at ¶ 58).

Plaintiffs allege that ESN "repeatedly sought to contract with McDonald's through its general tier advertising agency," but defendant "blocked these efforts[.]" (Dkt. 45, TAC at ¶ 68); (see id. at ¶¶ 70-87) (describing attempts to contract). At the same time, McDonald's has advertised on "similarly situated, white-owned networks[,]" (id. at ¶ 90), while offering plaintiffs "pretextual excuse[s]" for its refusal to contract for advertising on ESN's Lifestyle Networks and syndicated programs. (Id. at ¶ 65). According to plaintiffs, even though ESN's Lifestyle Networks and syndicated programming "have general audience appeal[,]" McDonald's "viewed Entertainment Studios as an African American media company because Entertainment Studios is owned by an African American." (Id. at ¶ 59). Plaintiffs claim this discriminatory treatment reflects defendant's "long and troubled history with racial discrimination directed towards African Americans," (id. at ¶ 2), including racial discrimination lawsuits brought by African American former senior executives and franchisees, protests by civil rights groups, and a text message sent by McDonald's CEO to Chicago's mayor that appears to blame the parents of a young African American girl who was shot in a McDonald's parking lot. (See id. at ¶¶ 2-8).

LEGAL STANDARD

A motion to dismiss for failure to state a claim should be granted if the plaintiff fails to proffer "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly (Twombly), 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007); Ashcroft v. Iqbal (Iqbal), 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009); Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678, 129 S.Ct. at 1949; Cook, 637 F.3d at 1004; Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010). Although the plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," Twombly, 550 U.S. at 555, 127 S.Ct. at 1965; Iqbal, 556 U.S. at 678, 129 S.Ct. at 1949; see also Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004) ("[T]he court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. Nor is the court required to accept as true allegations

that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.") (citations and internal quotation marks omitted), "[s]pecific facts are not necessary; the [complaint] need only give the defendant[s] fair notice of what the . . . claim is and the grounds upon which it rests." Erickson v. Pardus, 551 U.S. 89, 93, 127 S.Ct. 2197, 2200 (2007) (per curiam) (internal quotation marks omitted); Twombly, 550 U.S. at 555, 127 S.Ct. at 1964.

In considering whether to dismiss a complaint, the court must accept the allegations of the complaint as true, Erickson, 551 U.S. at 94, 127 S.Ct. at 2200; Albright v. Oliver, 510 U.S. 266, 268, 114 S.Ct. 807, 810 (1994), construe the pleading in the light most favorable to the pleading party, and resolve all doubts in the pleader's favor. Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct. 1843, 1849 (1969); Berg v. Popham, 412 F.3d 1122, 1125 (9th Cir. 2005). Dismissal for failure to state a claim can be warranted based on either a lack of a cognizable legal theory or the absence of factual support for a cognizable legal theory. See Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). A complaint may also be dismissed for failure to state a claim if it discloses some fact or complete defense that will necessarily defeat the claim. Franklin v. Murphy, 745 F.2d 1221, 1228-29 (9th Cir. 1984), abrogated on other grounds by Neitzke v. Williams, 490 U.S. 319, 324 n. 3, 109 S.Ct. 1827, 1831 & n. 3 (1989).

DISCUSSION

I. SECTION 1981 CLAIM.

Title 42 U.S.C. § 1981[1] provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens[.]" 42 U.S.C. § 1981(a). The statute defines "make and enforce contracts" as including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Id. at § 1981(b).

[1] All statutory references are to Title 42 of the United States Code.

"[S]ection 1981 offers relief when racial discrimination blocks the creation of a contractual relationship[.]"[2] Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 476, 126 S.Ct. 1246, 1250 (2006); Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 609, 107 S.Ct. 2022, 2026 (1987) ("Although § 1981 does not itself use the word 'race,' the [Supreme] Court has construed the section to forbid all 'racial' discrimination in the making of private as well as public contracts."). To state a § 1981 claim, a plaintiff must plausibly allege that it "attempted to contract for certain services[,]" Lindsey v. SLT Los Angeles, LLC, 447 F.3d 1138, 1145 (9th Cir. 2006), and that, but for racial animus, the defendant would have contracted with plaintiff.[3] See Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media ("Comcast"), 140 S.Ct. 1009, 1013 (2020) (holding that a § 1981 plaintiff must "plausibly show[] that, but for racial animus, [defendant] would have contracted with [plaintiff]"); Yoshikawa v. Seguirant, 41 F.4th 1109, 1117 (9th Cir. 2022) (same); Knight v. Wells Fargo Bank NA, 459 F.Supp.3d 1288, 1291 (N.D. Cal. 2019) ("To state a claim under Section 1981, a plaintiff must identify an impaired contractual relation by showing that intentional racial discrimination prevented the creation of a contractual relationship or impaired an existing contractual relationship.") (internal quotation marks omitted).

A. Intentional Discrimination.

Defendant contends that plaintiffs have failed to plead sufficient facts to support a plausible inference of intentional discrimination. (See Dkt. 55-1, Memo. at 13-21). In particular, McDonald's challenges the sufficiency of plaintiffs' alleged comparator television networks, which McDonald's

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[2] In 1991, Congress amended § 1981 to make clear "that § 1981's prohibition against racial discrimination in the making and enforcement of contracts applies to all phases and incidents of the contractual relationship[.]" Rivers v. Roadway Exp., Inc., 511 U.S. 298, 302, 114 S.Ct. 1510, 1514 (1994); see id. at 302 n. 2, 114 S.Ct. at 1514 n. 2 (language amending § 1981); Garrett v. Tandy Corp., 295 F.3d 94, 100 (1st Cir. 2002) ("The 1991 expansion of the definition of 'make and enforce contracts' in section 1981 . . . extends the reach of the statute to situations beyond the four corners of a particular contract[.]").

[3] Defendant does not dispute that the African American-owned companies are "member[s] of a protected class" for purposes of their § 1981 claim. (See, generally, Dkt. 55-1, Memorandum of Points and Authorities in Support of Motion to Dismiss [] ("Memo.")); see Lindsey, 447 F.3d at 1145.

contends are not similar in material respects to plaintiffs' Lifestyle Networks or syndicated programming. (See id. at 14-18). Defendant's contentions are unpersuasive.

The Supreme Court has "often acknowledged the utility of circumstantial evidence in discrimination cases." Desert Palace, Inc. v. Costa, 539 U.S. 90, 99-100, 123 S.Ct. 2148, 2154 (2003). For example, a "plaintiff [may] raise an inference of discrimination by identifying a similarly situated entity who was treated more favorably." Pac. Shores Properties, LLC v. City of Newport Beach, 730 F.3d 1142, 1159 (9th Cir. 2013); see Snoqualmie Indian Tribe v. City of Snoqualmie, 186 F.Supp.3d 1155, 1162 (W.D. Wash. 2016) ("Plaintiffs in discrimination cases may plausibly plead discriminatory intent . . . . [by] alleg[ing] that a similarly situated individual or entity outside of the plaintiff's protected group received more favorable treatment from the defendant."). The alleged comparator "need not be identical, but must be similar in material respects. Materiality depends on the context and is a question of fact that cannot be mechanically resolved." Earl v. Nielsen Media Rsch., Inc., 658 F.3d 1108, 1114 (9th Cir. 2011) (cleaned up).

Plaintiffs allege that McDonald's "refused to advertise on Entertainment Studios' lifestyle networks since they were launched in 2009[,]" even though defendant "purchased significant advertising on similarly situated, white-owned networks." (Dkt. 45, TAC at ¶ 13). According to plaintiffs, the comparator networks identified in the operative complaint are similarly situated to ESN's Lifestyle Networks and The Weather Channel from an advertiser's perspective because they "are carried by the same [distributors] and therefore reach the same subscribers, [] feature similar content and [] target and reach the same demographic age groups." (Id. at ¶ 91). Further, plaintiffs allege that even if their programs and networks "have different ratings (i.e., viewership)[,]" (id. at ¶ 94), their networks and syndicated programming "have higher viewership than networks that McDonald's paid to advertise on." (Id. at ¶ 95). For example, according to MRI-Simmons data, which is "the most well-known and trusted survey data provider in the television industry[,]" ESN's Lifestyle Networks and The Weather Channel "are more popular with McDonald's and fast-food customers in general as compared to white-owned networks that [defendant] advertises on[.]" (Id. at ¶¶ 99-100).

Despite plaintiffs' allegations that ESN's syndicated programming and The Weather Channel have higher ratings than the alleged comparators, (see Dkt. 45, TAC at ¶¶ 95-96), McDonald's asserts that the "[t]wo television channels are not similarly situated in all material respects, from an advertiser's perspective, if one attracts many times more viewers than the other." (Dkt. 55-1, Memo. at 16). Defendant cites cases in which courts found that ratings are relevant to "the amount advertisers will pay[.]" (See id. at 15). However, defendant cites no case in which a court has found, at the pleading stage or otherwise, that ratings determined whether an advertiser decided to enter into a contract, much less that any ratings difference rendered a comparator fatally deficient. (See, generally, id. at 14-15). As plaintiffs note, "[w]hile ratings are relevant as to the *terms* of a potential contract, such as revenue and price, ratings disparities do not justify flat out refusals to contract." (See Dkt. 56, Opposition to Defendant's Motion to Dismiss [] ("Opp.") at 18-19) (emphasis in original).

As for ESN's syndicated programming, defendant similarly contends that plaintiffs failed to identify appropriate comparators because syndicated programming "is an entirely different product from cable television networks, which are distributed via multi-channel video programming distributors[.]" (Dkt. 55-1, Memo. at 18). However, the Ninth Circuit rejected a similar argument in Nat'l Ass'n of Afr. Am.-Owned Media v. Charter Commc'ns, Inc. ("Charter"), 915 F.3d 617 (9th Cir. 2019), judgment vacated on other grounds by Comcast, 140 S.Ct. 1009. In Charter, the defendant argued that "the complaint fail[ed] to allege any facts whatsoever showing that Entertainment Studios' channels are 'similarly situated' to the channels [the defendant] added (or expanded) in respects such as content, quality, popularity, viewer demand, or any objective metric relevant to a carriage decision." Id. at 626 n. 8 (cleaned up). The Charter court agreed that "in order for us to infer discriminatory intent from these allegations of disparate treatment, we would need to conclude that the white-owned channels were similarly situated to Entertainment Studios'." Id. But because "television networks can vary widely" with respect to those metrics, the court concluded that "such a thorough comparison of channels would require a factual inquiry that is inappropriate in reviewing a 12(b)(6) motion[,]" and "accept[ed] as true Plaintiffs' assertions that

other, lesser-known, white-owned networks were selected for carriage at the same time that Charter refused to carry Entertainment Studios' offerings." Id.

Here, plaintiffs allege that ESN's syndicated programs are similarly situated to the comparator networks, including, among other things, in their general audience appeal and ratings. (See Dkt. 45, TAC at ¶¶ 91, 97-98). Construing the allegations in the light most favorable to plaintiffs, the court, at this stage, cannot conclude that plaintiffs have failed to allege or identify similarly situated products. In other words, to the extent the parties dispute whether the alleged comparators are similarly situated in all material respects, that "is a question of fact that cannot be mechanically resolved" at this stage. See Earl, 658 F.3d at 1114 (internal quotation marks omitted). In short, the court is persuaded that plaintiffs have sufficiently alleged that similarly situated products received more favorable treatment from defendant. See Snoqualmie Indian Tribe, 186 F.Supp.3d at 1162 (in pleading discriminatory intent, "plaintiffs commonly allege that a similarly situated individual or entity outside of the plaintiff's protected group received more favorable treatment from the defendant").

McDonald's also asserts that plaintiffs undermined their allegations that it "stereotyped" plaintiffs' products based on Allen's race by "admit[ting] that, since at least November 2019, they have consistently pitched their cable television networks" to OMD, defendant's general advertising representative. (Dkt. 55-1, Memo. at 26). As an initial matter, plaintiffs allege that McDonald's blocked ESN, not Weather Group's, access to OMD. (See, e.g., Dkt. 45, TAC at ¶¶ 14-19, 58, 67-69, 72, 79, 87). Plaintiffs allege that while Weather Group made "presentations [to] showcase the significant advertising opportunities that are available for McDonald's on The Weather Channel[,]" (id. ¶ 65); (see id. at ¶¶ 64-65, 77-82), defendant blocked ESN's efforts to pitch advertising opportunities to OMD. (See, e.g., id. at ¶¶ 68, 87).

As a result, plaintiffs joined Weather Group for two advertising presentations to OMD, (see Dkt. 45, TAC at ¶¶ 79, 82), in an effort "to circumvent McDonald's racial stereotyping so that OMD could finally consider Entertainment Studios' networks and other media properties." (Id. at ¶ 79). According to plaintiffs, ESN "wanted to pitch its syndicated programming to OMD so that it could potentially access McDonald's much larger general market advertising budget, but McDonald's

continued to force Entertainment Studios to pitch its syndicated programming to Burrell as a result of the same racial profiling and stereotyping that McDonald's engaged in for over a decade." (Id. at ¶ 87). Contrary to defendant's assertions, plaintiffs' allegations that they pitched their networks to OMD do not contradict plaintiffs' allegations that McDonald's stereotyped ESN's network and programming based on Allen's race. Indeed, plaintiffs allege that, because of defendant's racial stereotyping, ESN had to find a way to "circumvent" the two-tiered system – a system, the necessity of which, McDonald's makes no attempt to rationalize or explain in its papers. (See, generally, Dkt. 55-1, Memo.); (Dkt. 57, Reply Memorandum [] ("Reply")).

With respect to Weather Group, defendant contends that plaintiffs cannot show intentional discrimination because "there is no allegation that McDonald's advertising decisions changed after Allen acquired Weather Group in 2018." (Dkt. 55-1, Memo. at 19). According to McDonald's, "the obvious alternative explanation" for its decision not to contract with The Weather Channel is that it "continued to evaluate [the network] the same way it did before" Allen purchased the company. (Id.). Again, defendant's contentions are unpersuasive.

"If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6). A plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is implausible." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011). Here, plaintiffs allege that Weather Group diligently pursued an advertising contract for The Weather Channel after Allen acquired the company, and that defendant did not offer, and otherwise refused, to buy advertising on The Weather Channel, even though McDonald's advertised on similarly situated white-owned networks. (See Dkt. 45, TAC at ¶¶ 77-82, 90-91). But whether defendant continued to evaluate the network the same way after Allen purchased Weather Group is a factual question that cannot be resolved at this stage. Further, McDonald's apparent refusal to even offer terms for advertising on the Weather Channel makes little business sense given that the Weather Channel has higher ratings and wider distribution than the two comparator networks. (See id. at ¶¶ 95-96). In short, the court declines to rule at this stage that "defendant's plausible alternative explanation is so convincing that

plaintiff's explanation is implausible." Starr, 652 F.3d at 1216; see, e.g., Charter, 915 F.3d at 628 ("Charter's race-neutral explanations for its conduct are not so convincing as to render Plaintiffs' theory implausible.").

Defendant also challenges plaintiffs' assertion that McDonald's "gave pretextual excuses for its refusal to contract." (Dkt. 56, Opp. at 13); (see Dkt. 55-1, Memo. at 20); (Dkt. 57, Reply at 18-20). Plaintiffs allege that OMD, McDonald's general market advertising agency, told Weather Group that defendant would not advertise on The Weather Channel because it "skews towards an older audience." (Dkt. 45, TAC at ¶ 110). In addition, McDonald's "African American ad agency" Burrell allegedly told plaintiffs that defendant "did not contract to advertise on the ESN Lifestyle Networks because they were not widely distributed." (Id. ¶ 112). McDonald's contends that the statements identified by plaintiffs cannot be pretextual because "the TAC admits that both statements were true when made." (Dkt. 57, Reply at 18).

However, plaintiffs allege that defendant's explanations are questionable because McDonald's "contracts with older-skewing networks" that "have lower ratings than The Weather Channel and have less distribution[.]" (Dkt. 45, TAC at ¶ 110). Also, ESN presented Burrell with data showing its distribution had grown, but McDonald's "still refuse[d] to contract, while at the same time contracting with white-owned networks that have smaller distribution." (Id. at ¶ 112). Finally, regardless of whether the statements were accurate with respect to The Weather Channel's demographics or ESN's distribution, plaintiffs' contention is that the "nondiscriminatory explanation[s] for [defendant's] decision . . . were not its true reasons, but were a pretext for discrimination." Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 143, 120 S.Ct. 2097, 2106 (2000) (internal quotation marks omitted); see B&S Glass, Inc. v. Del Metro, 2021 WL 3268360, *8 (D.D.C. 2021) ("Race is not barred from being a 'but-for cause' of the contract's cancellation simply because Plaintiffs allege that Defendants provided them with illegitimate, pretextual explanations for the termination."). Drawing all reasonable inferences in favor of plaintiff, the court is persuaded that plaintiffs' allegations of pretext bolster an inference of racial discrimination. See, e.g. Armstrong v. Reynolds, 22 F.4th 1058, 1069 (9th Cir. 2022) ("On a motion to dismiss, taking Armstrong's factual allegations in her complaint as true, the presence

of allegedly pretextual reasons for firing do not defeat the plausibility of Armstrong's allegation that her termination was retaliatory."); Dickerson v. D.C., 315 F.Supp.3d 446, 455-56 (D.D.C. 2018) (noting that "[w]hile the ultimate fact-finder may determine" that the stated reasons for employment decision were "benign or unsupported by the evidence," the allegations of pretext supported an inference of racial discrimination for § 1981 claim at the motion-to-dismiss stage).

Finally, defendant contends that plaintiffs' allegations regarding its "corporate culture[,]" including an allegedly racist text message sent by McDonald's CEO to Chicago's mayor, are "irrelevant" to this action. (See Dkt. 55-1, Memo. at 20). However, the Ninth Circuit has held that remarks by a corporation's "senior management" that "suggest[] the existence of racial bias" can support a § 1981 claim, even when not directed at the plaintiff specifically. Metoyer v. Chassman, 504 F.3d 919, 937 (9th Cir. 2007), abrogated on other grounds by Charter, 915 F.3d 617; see id. ("We have held that bigoted remarks by a member of senior management may tend to show discrimination, even if directed at someone other than the plaintiff."); id. at 627 n. 9 (noting that "racially charged comments" made by senior decision-makers for the corporate defendant could serve as "circumstantial evidence of discriminatory animus" even though the statements did not occur in the context of the plaintiffs' specific claims).

Taken together, and construed in the light most favorable to plaintiffs, plaintiffs have alleged sufficient facts to support an inference of intentional discrimination. See, e.g., Charter, 915 F.3d at 626-27 (finding that plaintiffs had plausibly alleged intentional discrimination in refusing to contract based in part on allegations "that white-owned companies were not treated similarly"); Brown v. Sessoms, 774 F.3d 1016, 1023 (D.C. Cir. 2014) (concluding that plaintiff stated a § 1981 claim by alleging differential treatment of a similarly-situated employee in university tenure process).

B. But-For Causation.

To prevail on a § 1981 claim, "a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right." Comcast, 140 S.Ct. at 1019. The "'traditional' standard of but-for causation . . . is established whenever a particular outcome would not have happened 'but for' the purported cause." Bostock v. Clayton Cnty.,

Georgia, 140 S.Ct. 1731, 1739 (2020) (citation omitted). The Supreme Court has noted that but-for causation "can be a sweeping standard" because "[o]ften, events have multiple but-for causes." Id. In the context of a § 1981 claim, "if the defendant would have responded differently but for the plaintiff's race, it follows that the plaintiff has not received the same right as a white person." Comcast, 140 S.Ct. at 1015.

Here, defendant asserts that plaintiffs "provide[d] no well-pleaded facts to support an inference that, but for Allen's race, McDonald's would have contracted with either Plaintiff." (Dkt. 55-1, Memo. at 21). Specifically, McDonald's contends that, with respect to ESN's Lifestyle Networks, "the allegations in the TAC only demonstrate that McDonald's has chosen to do business with its larger, better-known, and more popular competitors." (Id.). But that is not what the TAC alleges, and the court cannot accept defendant's version of the facts at this stage.[4] Rather, the TAC alleges that "[i]f Plaintiffs were white-owned, McDonald's would not have (1) forced Entertainment Studios to deal exclusively with McDonald's African American advertising agency, (2) deprived Entertainment Studios access to McDonald's general market advertising budget and general market advertising agency, or (3) refused to contract to advertise on The Weather Channel, the ESN Lifestyle Networks and other non-print media owned by Allen." (Dkt. 45, TAC at ¶ 116). As a result, plaintiffs allege that they were denied "tens of millions of dollars

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[4] Defendant's reliance on Astre v. McQuaid, 804 F.Appx. 665 (9th Cir. 2020), (see Dkt. 55-1, Memo. at 21), is unavailing. In Astre, a short unpublished decision, the plaintiff admitted that a race-neutral reason caused her employer to lose its contract with the county, which in turn "impaired" the plaintiff's contract with her employer. See id. at 667 ("Astre expressly alleged that Judge Wood, at or with the request of Cal CASA, decided to decertify MAC due to a lack of community support. These allegations do not give rise to a plausible inference that McQuaid's alleged racially discriminatory actions caused the alleged impairment to Astre's contractual relationship with MAC."). Here, plaintiffs allege that McDonald's provided them with race-neutral explanations for its refusal to contract, but they do not allege or suggest that those were the actual reasons for defendant's decision. See, e.g., B&S Glass, Inc., 2021 WL 3268360, at *8 (distinguishing Astre on the ground that "the *plaintiff*[] provided non-discriminatory reasons for the defendants' cancellation of a contract" in that case, whereas in B&S Glass, "Plaintiffs pleaded that *Defendants* gave them multiple non-discriminatory explanations for the cancellation" of a contract) (emphasis in original). The court in Astre also identified other problems with the plaintiff's § 1981 claim that are not present here, including her "fail[ure] to plausibly allege that any conduct motivated by intentional discrimination impaired her contractual relationship with [her employer]." 804 F.Appx at 666 n. 2.

in advertising revenue from McDonald's on an annual basis[,]" (id. at ¶ 117), and that ESN incurred costs "trying to get a contract through [defendant's] two-tiered process." (Id. at ¶ 119). Plaintiffs also allege that but-for McDonald's stereotyping of ESN based on its owner's race, ESN would have been able to compete in defendant's larger "general market" advertising tier, which has significantly greater resources available than the separate "tier reserved for media companies that produce content 'targeted' to an African American audience." (Id. at ¶ 14-15).

Defendant also contends that plaintiffs failed to adequately plead causation because, "even if McDonald's had offered an advertising contract for these networks, nothing suggests that Entertainment Studios would have accepted its terms." (Dkt. 55-1, Memo. at 22). But McDonald's contention begs the question as to whether it engaged in discriminatory conduct in the formation and/or negotiation of an advertising contract. In other words, based on a reasonable interpretation of plaintiffs' allegations, it was because of McDonald's discriminatory conduct that plaintiffs were never provided with an opportunity to consider McDonald's terms, let alone given an opportunity to decide whether or not to "accept" defendant's terms. In any event, plaintiffs' TAC sets forth allegations detailing plaintiffs' decade-long efforts to obtain an advertising contract, which included "multiple offers each year to enter into a contract with McDonald's[.]"[5] (Dkt. 45, TAC at ¶ 67); (see id. at ¶¶ 67-87) (alleging efforts to obtain an advertising contract with defendant).

Finally, defendant repeats its argument that plaintiffs cannot show that race was the but-for cause of its decision not to advertise on The Weather Channel because there is no allegation McDonald's advertised there before Allen bought Weather Group in 2018. (See Dkt. 50-1, Memo.

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[5] The court is not persuaded by defendant's contention – for which no authority was provided, (see, generally, Dkt. 55-1, Memo. at 22) – that because it advertised on ESN's syndicated programming years ago, plaintiffs cannot satisfy the causation standard. (See id.) ("[W]ith respect to Entertainment Studios' syndicated programming, Plaintiffs concede that McDonald's has advertised on that programming in the past."). Defendant's argument that plaintiffs cannot establish causation because they do not allege that McDonald's "generally refuses to advertise with African-American-targeted media companies[,]" (Dkt. 55-1, Memo. at 22), is similarly unavailing. Defendant cites no case law holding that a § 1981 plaintiff must show that the defendant discriminated against all members of a protected class. (See, generally, id.). In any event, defendant's argument misses the mark. Plaintiffs contend that defendant refused to contract with them because "they are owned by an African American[,]" (see Dkt. 45, TAC at ¶ 21), not because they may have certain "African-American-targeted" media content.

at 22). However, it is unclear to what extent, if any, Weather Group pursued advertising with McDonald's prior to Allen's acquisition in 2018. (See, generally, id.); (Dkt. 57, Reply at 22). In any event, plaintiffs allege that defendant has refused to contract with Weather Group since Allen's acquisition because of his race. (See Dkt. 45, TAC at ¶¶ 46-66). And, as noted earlier, see supra at § I.A., despite Weather Group's diligent efforts to pursue an advertising contract for The Weather Channel, McDonald's has refused to do so while advertising on similarly situated white-owned networks with inferior ratings and distribution. (See Dkt. 45, TAC at ¶¶ 63-64, 77-82, 90-91, 95-96).

In short, the court is persuaded that plaintiffs have adequately alleged but-for causation in support of their § 1981 claim. See, e.g., Circle City Broad. I, LLC v. AT&T Servs., Inc., 2021 WL 6134587, *4 (S.D. Ind. 2021) (concluding that plaintiff, "minority-owned, local television broadcasting company[,]" plausibly alleged but-for causation in support of § 1981 claim against television distributor who "refus[ed] to negotiate a fair deal").

C. Contractual Right.

Defendant also contends that plaintiffs failed to state a § 1981 claim because "the TAC does not adequately identify a contractual right that was infringed" and the TAC "concedes that neither party ever offered any particular contract." (Dkt. 55-1, Memo. at 23). According to defendant, aside from an ESN proposal during a meeting in July 2019, plaintiffs failed to allege that they presented "any contractual terms" to McDonald's during meetings regarding potential advertising, "including price, quantity, or duration." (Id. at 24).

"Any claim brought under § 1981 . . . must initially identify an impaired 'contractual relationship,' under which the plaintiff has rights." Domino's Pizza, Inc., 546 U.S. at 476, 126 S.Ct. at 1249 (2006) (quoting 42 U.S.C. § 1981(b)). However, "[s]uch a contractual relationship need not already exist, because § 1981 protects the would-be contractor along with those who already have made contracts." Id. at 476, 126 S.Ct. at 1249-50. Thus, "Section 1981 offers relief when racial discrimination blocks the creation of a contractual relationship . . . so long as the plaintiff has or would have rights under the . . . proposed contractual relationship." Id. at 476, 126 S.Ct. at 1250.

Here, plaintiffs allege that they have "made multiple offers each year to enter into a contract with McDonald's whereby McDonald's purchases advertising time on the networks[,]" (Dkt. 45, TAC at ¶ 67), and identified several specific meetings between 2012 and 2021, where defendant refused to contract with them. (See, e.g., id. at ¶¶ 70, 72, 77-80); (see id. at ¶ 53) ("Plaintiffs repeatedly presented their advertising opportunities to McDonald's ad agencies, but McDonald's refused to offer advertising contracts on any terms for Plaintiffs' networks or broadcast syndicated programming."). Plaintiffs also allege that "media companies do not offer contracts" or "deal terms" to defendant or its advertising agencies. (Id. at ¶ 52). Rather, "[m]edia companies present opportunities and McDonald's will make an offer to spend a certain amount of money at certain prices on certain media properties." (Id.). Under the circumstances here, the court is persuaded that plaintiffs' allegations "create the plausible inference that [plaintiffs] attempted to enter a contractual relationship with [defendant]" to advertise on plaintiffs' networks. See Body by Cook, Inc. v. State Farm Mut. Auto. Ins., 869 F.3d 381, 388 (5th Cir. 2017). In other words, plaintiffs have sufficiently alleged that they are "would-be contractor[s]" within the meaning of § 1981.[6] See Domino's Pizza, Inc., 546 U.S. at 476, 126 S.Ct. at 1250.

Defendant also contends that the Second Amended Complaint ("SAC") "added a new claim that McDonald's discriminated against Entertainment Studios by failing to advertise on its syndicated programming after a meeting held in July 2019." (Dkt. 55-1, Memo. at 28) (citing Dkt. 40, SAC ¶ 83; Dkt. 45, TAC ¶ 84). Because the SAC was filed in December 2021, defendant argues that a "claim related to the July 2019 meeting is timely only if it relates back to the [First Amended Complaint ("FAC")] or original complaint filed in July and May 2021, respectively." (Id.).

As an initial matter, the court is skeptical that this is a new claim. For example, the FAC alleged that ESN "was shut out of the general market tier and forced to bid for advertising in the less favorable African American tier" because at one time ESN had some "African American

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[6] The court is unpersuaded by McDonald's contentions that because plaintiffs' claims are based in part on statements or decisions that occurred before May 20, 2019, plaintiffs' claims are barred by the two-year statute of limitations. (See Dkt. 55-1, Memo. at 27). As plaintiffs point out, (see Dkt. 56, Opp. at 29-30), they allege that defendant continued refusing to contract with them based on unlawful discrimination within the limitations period. (See Dkt. 45, TAC at ¶¶ 76-87).

shows that ran in broadcast syndication." (Dkt. 20, FAC at ¶ 49). Rather than attempting to add a new claim, it appears that plaintiffs included additional allegations in their SAC regarding ESN's efforts to obtain an advertising contract for its syndicated programming in response to the court's order dismissing their earlier complaint. (See Dkt. 38, Court's Order of November 30, 2021, at 2) (stating that plaintiffs' general allegations regarding their attempts to contract appeared to be insufficient).

In any event, even if plaintiffs' additional allegations regarding ESN's syndicated programming constitute a new claim, the court finds that it relates back to the FAC and the original complaint. Rule 15 of the Federal Rules of Civil Procedure provides that "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading[.]" Fed. R. Civ. P. 15(c)(1)(B). "An amended claim arises out of the same conduct, transaction, or occurrence if it will likely be proved by the same kind of evidence offered in support of the original pleading." ASARCO, LLC v. Union Pac. R. Co., 765 F.3d 999, 1004 (9th Cir. 2014) (internal quotation marks omitted). Rule 15(c)'s relation back doctrine is "liberally applied." Id. (internal quotation marks omitted).

Assuming plaintiffs assert a new claim regarding McDonald's refusal to contract for advertising on ESN's syndicated programming, that claim would be "proved by the same kind of evidence" offered in support of plaintiffs' original claims regarding ESN's Lifestyle Networks. For example, the FAC alleged that defendant "stereotyped" ESN "as an African American media company because Entertainment Studios is owned by an African American[,]" which has impacted both ESN's syndicated programming and its Lifestyle Networks. (See Dkt. 20, FAC at ¶¶ 49-50). Thus, whether McDonald's stereotyped plaintiffs "as an African American media company" with respect to ESN's syndicated programming is likely to be proved with the same kind of evidence offered in support of plaintiffs' claim with respect to ESN's Lifestyle Networks.

II. UNRUH ACT CLAIM.

Defendant generally argues that plaintiffs' Unruh Act claim, which is based on the same allegations regarding defendant's refusal to contract on the basis of race, (see Dkt. 45, TAC at ¶¶

128-134), fails for the same reasons as their § 1981 claim. (See Dkt. 55-1, Memo. at 6-8).

The Unruh Act provides that "[a]ll persons within the jurisdiction of [California] are free and equal, and no matter what their . . . race . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51(b). The purpose of the Unruh "Act is to create and preserve a nondiscriminatory environment in California business establishments by banishing or eradicating arbitrary, invidious discrimination by such establishments." White v. Square, Inc., 7 Cal.5th 1019, 1025 (2019) (internal quotation marks omitted). "In enforcing the [Unruh] Act, courts must consider its broad remedial purpose and overarching goal of deterring discriminatory practices by businesses" and construe it "liberally in order to carry out its purpose." Id. (citations and internal quotation marks omitted).

As with a § 1981 claim, a plaintiff must plead intentional discrimination to state an Unruh Act claim. See Harris v. Capital Growth Investors XIV, 52 Cal.3d 1142, 1175 (1991) (plaintiff must "plead and prove intentional discrimination" under the Unruh Act), superseded by statute on other grounds as noted in Munson v. Del Taco, Inc., 46 Cal.4th 661, 624 (2009); Mackey v. Bd. of Trustees of California State Univ., 31 Cal.App.5th 640, 660 (2019) ("The Unruh Act requires proof of intentional acts of race discrimination and does not cover disparate impact.") (emphasis omitted). However, the but-for causation standard does not apply to plaintiffs' Unruh Act claim. As defendant acknowledges, (see Dkt. 55-1, Memo. at 21), plaintiffs need only show "that a substantial reason for [defendant's conduct] was because of Plaintiff's race[.]" Grant v. Starbucks Corp., 2019 WL 8112465, *6 (C.D. Cal. 2019) (citing Judicial Council Of California Civil Jury Instruction 3060) (emphasis added); see also Harris v. City of Santa Monica, 56 Cal.4th 203, 226 (2013) (distinguishing between the "substantial motivating factor" and more stringent "but-for" standards in discrimination cases).

For the reasons stated above, see supra at § I., the court finds that plaintiffs plausibly allege that defendant intentionally discriminated against them in refusing to contract, and that race was a but-for cause – a more demanding requirement than the Unruh Act's "substantial reason" standard, see Harris, 56 Cal.4th at 226 – of defendant's refusal to contract.

With respect to defendant's argument that plaintiffs' Unruh Act claim fails because they "have not alleged that their 'relationship with [McDonald's] was similar to that of the customer in the customer-proprietor relationship,'" (Dkt. 55-1, Memo. at 29) (quoting Bongiovanni v. State Farm Mut. Auto. Ins. Co., 2020 WL 7861973, *2 (C.D. Cal. 2020), the court is unpersuaded. The court cannot conclude at this stage that plaintiffs were not "in a relationship with the offending business establishment [i.e., defendant] 'similar to that of the customer in the customer-proprietor relationship which the [Unruh] Act and its predecessors have most commonly covered.'" Johnson v. Riverside Healthcare Sys., LP, 534 F.3d 1116, 1124 (9th Cir. 2008) (quoting Strother v. S. California Permanente Med. Grp., 79 F.3d 859, 874 (9th Cir. 1996)). The Ninth Circuit has "acknowledged that California courts have allowed parties who were 'not clients, patrons, or customers, in the traditional sense' to bring claims under" the Unruh Act, including, for example, condominium owners against their condominium owners' association and female children excluded from membership in the Boys' Club. Id. at 1124 n. 5 (quoting Strother, 79 F.3d at 873).

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT:

1. Defendant's Motion to Dismiss the Third Amended Complaint (**Document No. 55**) is **denied**.

2. Defendant shall file its Answer no later than **September 26, 2022**.

Dated this 16th day of September, 2022.

/s/
Fernando M. Olguin
United States District Judge