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FILED
San Francisco County Superior Court

JUL 28 2020

CLERK OF THE COURT
BY: [Signature] Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ROBERT WHITE, an individual,
Plaintiff,
vs.
SQUARE, INC., a Delaware corporation,
Defendant.

Case No. CGC-19-580267

**ORDER SUSTAINING
DEFENDANT SQUARE, INC.'S
DEMURRER TO PLAINTIFF'S
FIRST AMENDED COMPLAINT
WITHOUT LEAVE TO AMEND AND
TAKING OFF CALENDAR AS MOOT
MOTION TO STRIKE PLAINTIFF'S
REQUEST FOR DAILY MINIMUM
DAMAGES**

1 Defendant Square Inc.’s demurrer to the First Amended Complaint is sustained without
2 leave to amend. Plaintiff fails to state a cause of action under the Unruh Act. Defendant’s motion
3 to strike plaintiff’s request for daily statutory minimum damages under the Unruh Act is off
4 calendar as moot.

5 Plaintiff contends that defendant is engaging in occupational discrimination against
6 “bankruptcy attorneys” because defendant’s service agreement requires users to certify that they
7 would not accept payments in connection with “bankruptcy attorneys or collection agencies
8 engaged in the collection of debt.” (Compl., ¶ 10; FAC, ¶25.) The agreement also requires
9 accountholders to certify that they would not accept payments in connection with various other
10 types of businesses or business activities including, among other things, “any illegal activity or
11 goods,” “credit counseling or credit repair agencies,” “infomercial sales,” “bill payment services,”
12 “adult entertainment oriented products or services,” sales of firearms and other weapons,
13 “internet/mail order/telephone order cigarette, tobacco or vaporizer sales,” “drug paraphernalia,”
14 and “escort services.” (Compl. ¶ 10.) None of these other categories is placed at issue by
15 plaintiff’s first amended complaint.

16 At the threshold, the court notes that neither the Ninth Circuit nor the California Supreme
17 Court has ruled that plaintiff’s claim is viable and therefore, contrary to plaintiff’s contention, the
18 doctrines of collateral estoppel and law of the case do not apply. (See *White v. Square, Inc.* (9th
19 Cir. 2018) 891 F.3d 1174 [certifying question of statutory standing to the California Supreme
20 Court]; *White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1023 [“We express no view on White’s
21 occupational discrimination claims.”]; *id.* at 1032 [“Nor do we express any view on whether a
22 defendant violates the Act by discriminating on the basis of occupation”].)

23 In determining whether plaintiff states an Unruh Act claim, the court analyzes each of the
24 following: [1] “[whether the claim is] based on a personal characteristic similar to those listed in
25 the statute,” [2] “whether the alleged discrimination was justified by a legitimate business reason”
26 and [3] “the consequences of allowing the claim to proceed.” (*Semler v. General Electric Capital*
27 *Corp.* (2011) 196 Cal.App.4th 1380, 1392, citing *Harris v. Capital Growth Investors XIV* (1991)
28 52 Cal.3d 1142, 1160, 1162, 1167 (superseded by statute on other grounds); see also *Koebke v.*

1 *Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 840 [explaining that *Harris* “created a
2 three-part analytic framework for determining whether a future claim of discrimination, involving
3 a category not enumerated in the statute or added by prior judicial construction, should be
4 cognizable under the Act”].)) Plaintiff’s claim fails each of the prongs of this three-part test.

5 *First*, Plaintiff fails to plead intentional discrimination based on his purported personal
6 characteristic of being a “bankruptcy attorney.” Plaintiff acknowledges in the First Amended
7 Complaint that there is no standard definition of a bankruptcy attorney and that defendant’s policy
8 applies to numerous general legal practitioners as well. (FAC, ¶¶ 27, 30-31.) According to
9 plaintiff’s allegations in the original complaint, it also applies to non-attorney collection agencies.
10 Thus, plaintiff’s claim of discrimination is not based on a classification that “involve[s] personal as
11 opposed to economic characteristics—a person’s geographical origin, physical attributes, and
12 personal beliefs.” (*Harris*, 52 Cal.3d at 1160.)

13 To be sure, plaintiff is correct that the Unruh Act has been held to prohibit arbitrary
14 discrimination on the basis of occupational status, and at least one court has concluded that such a
15 claim may obviate the need to “engage in the three-part *Harris* test that would require a qualitative
16 analysis of whether a person’s occupation is a ‘personal’ characteristic, or a purely ‘economic
17 one.’” (*Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1407 [holding that
18 plaintiff stated cognizable claim against lender for refusing to make mortgage loan to her because
19 of her choice of occupation as a family day care operator]; see also, e.g., *Long v. Valentino* (1989)
20 216 Cal.App.3d 1287, 1297 [plaintiff police officer who was ejected from public meeting stated
21 claim based upon arbitrary occupational-status discrimination].) However, in that case, the
22 plaintiff “contend[ed] that she was discriminated against because of her choice of occupations, *not*
23 that she was denied a mortgage loan because that choice resulted in her earning insufficient income
24 to meet the lender’s underwriting criteria.” (*Sisemore*, 151 Cal.App.4th at 1407.) As *Harris*
25 recognized, “[e]conomic and financial distinctions are not among the impermissible classifications
26 listed in the statute,” and the Court found “no support in the language or history of the Act for
27 extending our past holdings to encompass economic criteria, which by their nature seek to further
28 the legitimate interest of business establishments in controlling financial risk while providing

1 goods and services on a nondiscriminatory basis.” (*Harris*, 52 Cal.3d at 1148.) The policy
2 involved here, which is based on the nature of the transactions engaged in by bankruptcy attorneys
3 and debt collectors and the economic risks they pose rather than on their personal characteristics or
4 those of their occupations, is far closer to *Harris* than to *Sisemore*.

5 *Second*, even if plaintiff could meet prong one, defendant’s challenged restriction is
6 justified by legitimate business reasons. “[T]he California appellate cases have . . . recognized that
7 legitimate business interests may justify limitations on consumer access to public
8 accommodations. . . . In [several] case[s], the particular business interests . . . in maintaining
9 order, *complying with legal requirements*, and protecting a business reputation or investment were
10 recognized as sufficient to justify distinctions among its customers.” (*Harris*, 52 Cal.3d at 1162
11 (emphasis added).) The court can make this determination on demurrer to avoid “expense and
12 uncertainty on a massive scale.” (*Harris*, 52 Cal.3d at 1167; see also *Howe v. Bank of Am. N.A.*
13 (2009) 179 Cal.App.4th 1443, 1453 [noting, quoting *Harris*, that Unruh Act issues are often
14 decided as questions of law on demurrer].)

15 Defendant’s policy, which applies to bankruptcy attorneys as well as collection agencies,
16 serve defendant’s legitimate commercial objectives. “[B]ankruptcy cases are highly-regulated, and
17 significant controls regarding professionals have been imposed by Congress in such cases.” (*In re*
18 *Walker Land & Cattle, LLC* (Bankr.D.Idaho 2015) 535 B.R. 348, 351.) In particular, the fees
19 charged by debtors’ attorneys are subject to judicial review and approval. (See, e.g., 11 U.S.C. §
20 329 [debtors’ attorneys must disclose fees they receive from a debtor in the year prior to its
21 bankruptcy filing and courts may order excessive payments returned to the estate]; *id.* § 330(a)(1)
22 [court may award reasonable compensation from the estate for services rendered by debtor’s
23 counsel and other professionals appointed to administer a bankruptcy].) And, as defendant points
24 out, “an attorney violates [11 U.S.C.] Section 526(a)(4) if he instructs a client to pay his
25 bankruptcy-related legal fees using a credit card.” (*Cadwell v. Kaufman Englett & Lynd* (11th Cir.
26 2018) 886 F.3d 1153, 1155.) Defendant properly seeks to avoid the financial risks of facilitating
27 bankruptcy and debt-related transactions. Those risks include the disallowance or reduction of
28 fees sought by counsel, potentially unethical or voidable transactions such as those prohibited by

1 section 526(a)(4), and chargebacks (payment disputes) for which defendant could face liability.
2 Just as landlords “have a legitimate interest in screening out tenants who are unable to pay rent
3 regularly and on time throughout the tenancy,” (*Harris*, 52 Cal.3d at 1165), defendant has a
4 legitimate interest in screening out customers who may enmesh it in legal and fee disputes relating
5 to the complexities of bankruptcy and debt collection law.

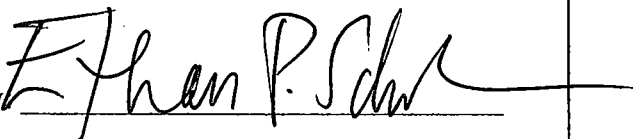
6 “Businesses retain the right under the Unruh Act to establish reasonable regulations that are
7 rationally related to the services performed and facilities provided.” (*Lazar v. Hertz Corp.* (1999)
8 69 Cal.App.4th 1494, 1502 [rental car lessors’ refusal to rent automobiles to persons under age 25
9 or assessment of surcharges on such drivers not prohibited by Unruh Act]; see also *Scripps Clinic*
10 *v. Superior Court* (2003) 108 Cal.App.4th 917, 933-934 [medical clinic’s alleged retaliatory
11 discrimination against patient litigants by terminating care for filing medical malpractice action
12 against clinic physicians did not violate Act where the clinic’s policy relied on patient’s conduct,
13 not personal characteristics, and its concerns were reasonably related to the medical services it
14 provided].) “[R]isk-oriented distinctions based on economic as opposed to personal characteristics
15 do not violate the Unruh Civil Rights Act.” (*Spanish Speaking Citizens’ Foundation, Inc. v. Low*
16 (2000) 85 Cal.App.4th 1179, 1240 [insurers had legitimate business reason for use of claims
17 frequency and severity as factors in auto insurance rate setting, since such factors are “substantially
18 related to the risk of loss”].)¹

19 *Third*, “the consequences of allowing the claim to proceed must be taken into account.”
20 (*Semler*, 196 Cal.App.4th at 1393.) “Many . . . businesses, including lending institutions and retail
21 and wholesale sellers, are in the position of extending money, goods, or services in exchange for
22 promises to pay or repay in the future. They use minimum income policies as well as other

23
24 ¹ Square likewise declines to make its service available for a variety of other types of
25 businesses and business activities that are either of dubious legality (“any illegal activity or
26 goods,” “adult entertainment oriented products or services,” “escort services,” “drug
27 paraphernalia”), highly regulated (sales of firearms and other weapons, “internet/mail
28 order/telephone order cigarette, tobacco or vaporizer sales”), or likely to pose substantial
financial risk (“credit counseling or credit repair agencies,” “infomercial sales,” “bill payment
services”). If plaintiff’s position were to be accepted, owners of businesses in each of those
categories—gun dealers, online tobacco dealers, infomercial product sellers—could assert a
claim for occupational discrimination under the Unruh Act. However, the Act does not prohibit
all discrimination on the basis of a customer’s occupation, but only “*arbitrary* occupational
discrimination.” (*Sisemore*, 151 Cal.App.4th at 1406 (emphasis added).)

1 financial criteria to make risk-oriented decisions regarding what customers to deal with and on
2 what terms. These businesses, as well as others, could be subjected to legal challenges to their
3 policies based on summary allegations that they had acted ‘arbitrarily.’ Plaintiffs’ approach would
4 require that each business defend its policies as ‘reasonable’ in a trial on the merits.” (*Harris*, 52
5 Cal.3d at 1167.) As our Supreme Court explained in *Harris*, however, “[t]he economics of credit
6 practices, whether those of landlords or other businesses, have traditionally been left to the
7 guidance of market forces or to specific legislative and administrative action designed to address
8 particular grievances. . . . In the absence of clear legislative direction, which the general
9 antidiscrimination provisions of the Unruh Act do not provide, we are unwilling to engage in
10 complex economic regulation under the guise of judicial decisionmaking.” (*Harris*, 52 Cal.3d at
11 1167-1168.) “[T]he Act does not entirely prohibit businesses from drawing distinctions on the
12 basis of the protected classifications or personal characteristics; rather, ‘[t]he objective of the Act
13 is to prohibit businesses from engaging in *unreasonable, arbitrary or invidious discrimination.*’”
14 (*Howe*, 179 Cal.App.4th at 1450, 1453-1454 [holding that bank’s policy of allowing foreign
15 nationals, but not United States citizens, to obtain credit card accounts without providing a Social
16 Security number bore a reasonable relationship to bank’s commercial objectives and was
17 consequently valid on its its face].) Here, likewise, plaintiff has not shown that defendant’s policy
18 is unreasonable or arbitrary, and this court is “unwilling to engage in complex economic regulation
19 under the guise of judicial decisionmaking.” (*Harris*, 52 Cal.3d at 1168.)

20
21 DATED: July 28, 2020

By 

The Honorable Ethan P. Schulman
Judge of the Superior Court

CGC-19-580267
CORPORATION

ROBERT WHITE VS. SQUARE, INC. A DELAWARE

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on July 28, 2020 I served the foregoing ORDER SUSTAINING DEFENDANT SQUARE, INC.'S DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND AND TAKING OFF CALENDAR AS MOOT MOTION TO STRIKE PLAINTIFF'S REQUEST FOR DAILY MINIMUM DAMAGES on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: July 28, 2020

By: 
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