UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PATRICIA HARRINGTON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

AIRBNB, INC.,

Defendant.

Case No. 3:17-cv-00558-YY

FINDINGS AND RECOMMENDATIONS

YOU, Magistrate Judge:

Patricia Harrington ("Harrington") has brought a class action complaint against Airbnb, Inc. ("Airbnb) alleging a violation of Oregon's public accommodations law, specifically ORS 659A.403 and 659A.885(7). Compl. 9 (ECF #1). Airbnb has filed a Motion to Dismiss (ECF #30) asserting that Harrington has failed to state a claim for relief pursuant to FRCP 12(b)(6). Because neither Harrington nor the individual members of the class she seeks to represent are within the class of persons authorized to bring suit under ORS 659A.885(7), Airbnb's motion to dismiss should be granted and this action should be dismissed with prejudice.

**STANDARDS**

A motion to dismiss for failure to state a claim under FRCP 12(b)(6) may be granted only when there is no cognizable legal theory to support the claim or when the complaint lacks

sufficient factual allegations to state a facially plausible claim for relief. *Mollett v. Netflix, Inc.*, 795 F.3d 1062, 1065 (9th Cir. 2015); *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). When evaluating the sufficiency of a complaint's factual allegations, the court must accept as true all well-pleaded material facts alleged in the complaint and construe them in the light most favorable to the plaintiff. *Davidson v. Kimberly-Clark Corp*., 873 F.3d 1103, 1107 n.1 (9th Cir. 2017) (citing *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010)); *see also Dowers v. Nationstar Mortg., LLC*, 852 F.3d 964, 969 (9th Cir. 2017) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). However, the court need not accept as true conclusory allegations that contradict documents referred to in the complaint or subject to judicial notice, nor must the court accept as true legal conclusions couched as factual allegations. *Saldana v. Occidental Petroleum Corp*., 774 F.3d 544, 551 (9th Cir. 2014) (citations omitted); *Rosales-Martinez v. Palmer*, 753 F.3d 890, 892 (9th Cir. 2014) (citation omitted).

## FINDINGS

### I. Allegations in Complaint

Harrington makes the following allegations in her complaint:

Airbnb operates an online platform that allows "hosts," consisting of Airbnb users who wish to offer accommodations, to connect with and rent to prospective "guests," who are Airbnb users seeking to book those accommodations on a short-term basis. Compl. ¶ 5. Hosts post listings on the Airbnb website, offering guests the opportunity to stay in a variety of accommodations (such as a spare room, basement, or guest house) around the world. *Id.* ¶¶ 5, 7.

Airbnb members who wish to rent accommodations through Airbnb's platform, and hosts who wish to offer accommodations for rent, must first become Airbnb members by registering and creating an account with Airbnb. *Id.* ¶ 9. Prospective guests must maintain a member

profile that includes, among other things, a photo of the member's face and the member's full name. *Id*. ¶ 10.

Hosts may opt to receive booking requests only from prospective guests whose profiles include certain information, such as a photograph, by choosing a particular setting on the Airbnb platform. *Id*. ¶ 12. Thus, Airbnb's booking policies allow hosts to deny a booking request from a prospective guest whose profile does not include a photograph, as well as deny a booking request from a prospective guest whose profile includes a photograph. *Id*. ¶ 12-13.

Airbnb guests cannot immediately book an accommodation, unless the host has opted in to the "instant booking" feature. *Id*. ¶ 14. If the host has not opted in to the "instant booking" feature, a prospective guest must "request a booking" and be approved by the host. *Id*. The booking request is forwarded to the host, along with the prospective guest's profile information (including full name and profile photo), and the host may either pre-approve, confirm, or reject the request within a specified time. *Id*. If the host does not respond to the request, the request expires and the prospective guest is not allowed to book the accommodation. *Id.*

Harrington is not, and never has been, a member of Airbnb. *Id*. ¶ 22. She wishes to become a member of Airbnb and take advantage of Airbnb's offerings without any distinction, discrimination, or restriction on account of her race. *Id*. ¶ 23. Through counsel, Harrington requested that Airbnb allow her to become a member so that she and others similarly situated can access the public accommodations offered. *Id.* ¶ 25. However, as part of her request, Harrington demanded that Airbnb cease implementation of its policies that discriminate against African-Americans and that allow hosts to discriminate against African-Americans. *Id.*

Harrington alleges a single claim for violation of ORS 659A.403 and 659A.885(7) on behalf of "[a]ll African-American residents of Oregon who are not currently, and have never

been, members of Airbnb." *Id*. ¶¶ 30, 40. She alleges that discriminatory hosts use Airbnb's booking policies to deny African-Americans access to accommodations. *Id*. ¶ 16. She claims that Airbnb hosts are able to discriminate due to the combination of: (1) their access to guests' names and photographs, which in turn give clues as to those guests' immutable characteristics; (2) their ability to receive booking requests only from prospective guests whose profile includes a photograph; and (3) their ability to deny booking requests from guests whose profile includes a photograph and full name. *Id*. ¶¶ 10, 12–13. She asserts that Airbnb is directly liable for discrimination because its policies "directly act to deny" African-Americans full and equal accommodations, advantages, facilities, and privileges of a place of public accommodation. *Id*. ¶ 20. Further, she alleges that Airbnb is liable for aiding and abetting its hosts in unlawful discrimination by establishing policies that allow its member hosts to discriminate based on protected characteristics and by continuing to maintain such policies. *Id*. ¶ 21.

## II. Analysis

In its motion to dismiss, Airbnb argues that Harrington and the putative class members have no claim under ORS 659A.403 and 659A.885(7) because they allege only the possibility of future discrimination. Airbnb also contends that its online platform does not constitute a "place of public accommodation" under ORS 659A.400(1). Before examining these issues, however, the court must consider the issue of "standing" that Harrington has raised in response to Airbnb's motion.

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**A. "Standing" and "Statutory Standing"**

Harrington argues that Airbnb's motion is really an attack on her Article III standing and that, if this court accepts Airbnb's argument that she has not suffered an injury, it lacks subject matter jurisdiction and must remand the case to state court.[1] This argument lacks merit.

At the heart of Airbnb's motion is the claim that Harrington and the putative class members are not within the class of persons authorized to bring suit under ORS 659A.885(7). The question of whether a statute allows a plaintiff or class of plaintiffs the right to bring suit is not a jurisdictional question. The Ninth Circuit recently noted the confusion caused when the terms "standing" or "statutory standing" are used to describe this inquiry:

> [O]ur cases discussing whether a plaintiff is authorized to sue under ERISA's civil enforcement provisions often refer to the question as whether the plaintiff has "standing" or "statutory standing" to sue under ERISA. This common shorthand suggests that subject matter jurisdiction may also be at stake. It is not. The question whether Congress has granted a private right of action to a particular plaintiff is *not* a jurisdictional requirement.

*DB Healthcare, LLC v. Blue Cross Blue Shield of Ariz., Inc.*, 852 F.3d 868, 873 (9th Cir. 2017) (emphasis in original) (citations omitted). Accordingly, a "dismissal for lack of statutory standing is properly viewed as a dismissal for failure to state a claim rather than dismissal for lack of subject matter jurisdiction." *Vaughn v. Bay Envtl. Mgmt., Inc.*, 567 F.3d 1021, 1024 (9th Cir. 2009).

[1] Harrington originally filed this case in Multnomah County Circuit Court on March 6, 2017. On April 7, 2017, Airbnb filed a Notice of Removal to this court (ECF #1), alleging jurisdiction under 28 U.S.C. §§ 1332(a) and (d). Harrington then filed a Motion to Remand (ECF #12), contending that Airbnb failed to establish jurisdiction and that this court should abstain, whether or not the jurisdictional requirements were satisfied. This court denied the motion to remand after concluding that Airbnb satisfied its burden of establishing jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d), and that abstention was inappropriate. Findings and Recommendation (ECF #23), adopted by Opinion and Order (ECF #25).

Courts in other circuits have also recognized that the question of whether a plaintiff is authorized to sue under a particular statute is separate and apart from the "standing" inquiry of Article III. The Fourth Circuit has explained that the "concept of statutory standing . . . is perhaps best understood as not even standing at all. Statutory standing 'applies only to legislatively-created causes of action' and concerns 'whether a statute creating a private right of action authorizes a particular plaintiff to avail herself of that right of action.'" *CGM, LLC. v. BellSouth Telecomm., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011) (quoting Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89, 91 (2009)). The "statutory standing inquiry" is framed as "whether the plaintiff 'is a member of the class given authority by a statute to bring suit. . . .'" *Id*. (quoting *In re Mutual Funds Inv. Litig*., 529 F.3d 207, 216 (4th Cir. 2008)).

The Third Circuit makes the same distinction:

> Though all are termed "standing," the differences between statutory, constitutional, and prudential standing are important. Constitutional and prudential standing are about, respectively, the constitutional power of a federal court to resolve a dispute and the wisdom of so doing. . . . Statutory standing is simply statutory interpretation: the question it asks is whether Congress has accorded *this* injured plaintiff the right to sue the defendant to redress his injury.

*Graden v. Conexant Sys., Inc.*, 496 F.3d 291, 295 (3d Cir. 2007) (emphasis in original) (citations omitted); *see also Roberts v. Hamer*, 655 F.3d 578, 581 (6th Cir. 2011) (noting that the question of statutory standing "asks whether *this* plaintiff has a cause of action under the statute. The question is closely related to the merits inquiry (oftentimes overlapping it) and is analytically distinct from the question whether a federal court has subject-matter jurisdiction to decide the merits of a case.") (emphasis in original) (citations omitted) (quotation marks omitted).

The Supreme Court affirms that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.* the court's statutory or constitutional

*power* to adjudicate the case." *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014) (emphasis in original) (quoting *Verizon Md. Inc. v. Pub. Util. Serv. Comm'n of Md.*, 535 U.S. 635, 642-43 (2002)); *see also Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) (distinguishing concept of Article III standing from concept of a cause of action; noting that "[w]hether petitioner has asserted a cause of action . . . depends not on the quality or extent of her injury," as does the inquiry under Article III standing, "but on whether the class of litigants of which petitioner is a member may use the courts to enforce the right at issue").

In the present motion, Airbnb asserts that ORS 659A.885(7) does not authorize Harrington or putative class members to sue because the statute only authorizes suit by individuals who have already been the victims of discriminatory treatment, not by those who anticipate future discrimination. Thus, this case "presents a straightforward question of statutory interpretation: Does the cause of action in [ORS 659A.885(7)] extend to plaintiffs like [Harrington and the class defined in the complaint]?" *Lexmark*, 134 S. Ct. at 1388. In answering that question, this court is to "apply traditional principles of statutory interpretation." *Id*. Like the Ninth Circuit, to avoid confusion on this point, this court avoids further references to "standing," and instead turns to the question of whether ORS 659A.885(7) extends a cause of action to Harrington and the class she seeks to represent. *See DB Healthcare*, 852 F.3d at 873-74. As discussed below, ORS 659A.885(7) does not authorize such a cause of action.

**B. Causes of Action Authorized by ORS 659A.885(7)**

Airbnb argues that, under ORS 659A.885(7), a suit may be brought only by a plaintiff who has already suffered discriminatory treatment. As Airbnb correctly contends, the plain text and context of ORS 659A.885(7) do not support a claim for anticipated discrimination, such as the one Harrington has alleged in this case.

When interpreting a state statute, this court's role is to "determine what meaning the state's highest court would give to the law. Thus, [this court] must follow the state's rules of statutory interpretation." *Brunozzi v. Cable Commc'ns, Inc.*, 851 F.3d 990, 998 (9th Cir. 2017) (citations omitted), *cert. denied*, 138 S. Ct. 167 (2017). In Oregon, the "first step [involves] an examination of text and context." *State v. Gaines*, 346 Or. 160, 171 (2009) (*en banc*) (citation omitted). After examining text and context, the court will consult legislative history, "even if the court does not perceive an ambiguity in the statute's text, where the legislative history appears useful to the court's analysis." *Id.* at 172 (footnote omitted). Finally, "[i]f the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.*

ORS 659A.403(1), the statute that Harrington claims Airbnb violated, provides:

> [A]ll persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is of age, as described in this section, or older.

ORS 659A.885(7) limits who may bring suit:

> Any individual against whom any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age, if the individual is 18 years of age or older, has been made by any place of public accommodation, as defined in ORS 659A.400, by any employee or person acting on behalf of the place or by any person aiding or abetting the place or person in violation of ORS 659A.406 may bring an action against the operator or manager of the place, the employee or person acting on behalf of the place or the aider or abettor of the place or person.

The plain language of ORS 659A.885(7) makes clear that it pertains only to past discrimination. The statute unambiguously allows an individual "against whom any distinction, discrimination, or restriction on account of race . . . *has been made* by any place of public accommodation" to bring an action against the operator or manager of the public

accommodation. ORS 659A.885(7) (emphasis added). Oregon courts "assume that the legislature's choice of verb tense is purposeful, and verb tense may be a significant indicator of legislative intent. When the legislature uses different verb tenses within one statute, it is indicative of a legislative intent to refer to different relative points in time." *State v. Stewart*, 282 Or. App. 845, 858-59 (2016) (citations omitted) (quotation marks omitted), *rev. allowed*, 361 Or. 311 (March 31, 2017). Oregon cases discussing other statutes establish that verb tense is a critical consideration in interpreting statutory language. *See, e.g.*, *Lohr v. State Acc. Ins. Fund*, 48 Or. App. 979, 984 (1980) (noting Oregon Supreme Court's interpretation of statute "which speaks in the present tense [to] preclude[] cancellation of a permanent total disability award based upon a speculative future change in employment status") (quoting *Gettman v. SAIF*, 289 Or. 609, 614 (1980)). In particular, "the use of the past tense 'denotes an act, state, or condition that occurred or existed at some point in the past.'" *Stewart*, 282 Or. App. at 859. Thus, the plain text of ORS 659A.885(7) unambiguously refers to a claim made by an individual who suffered discrimination at a point in the past, not in the future.

Additionally, the statutory context of ORS 659A.885(7) supports what the plain text clearly demands. Another provision in the same section expressly allows claims based on *future* discriminatory conduct. Specifically, ORS 659A.885(10)(A)(a) authorizes a claim by an aggrieved person who believes he or she "*[w]ill be injured by an unlawful practice . . . that is about to occur*" under ORS 659A.145 (discrimination in residential real property transactions), ORS 659A.421 (discrimination in selling, renting, or leasing residential real property), and federal housing laws. However, ORS 659A.403 is not among those statutes listed. Had the Oregon legislature intended to include ORS 659A.403 in this list, it could have done so. *See Fisher Broad., Inc. v. Dep't of Revenue*, 321 Or. 341, 353 (1995) (applying the rule of statutory

construction that by including one provision, the legislature intended to exclude the other). The Oregon legislature's failure to include ORS 659A.403 buttresses the conclusion that, consistent with its plain text allowing claims only by individuals "against whom . . . discrimination . . . *has been made*," ORS 659A.885(7) provides relief only for discriminatory conduct that has already taken place.

Although Oregon law allows for consideration of legislative history even where the court perceives no ambiguity, *Gaines*, 345 Or. at 172, neither party has proffered such history to aid the court's analysis. ORS 659A.885(7) was enacted in 2001, some seven years before the founding of Airbnb and had the same "has been made by any place of public accommodation" verbiage it has today. When enacting that provision, the Oregon legislature unlikely would have contemplated the meteoric rise of the "shared economy" or had Airbnb's construct for offering accommodations in mind. ORS 659A.885(7) was—perhaps unsurprisingly—unambiguously written in the past tense. Thus, while Oregon's public accommodations laws were in no doubt intended to eliminate discrimination in public accommodations, ORS 659A.885(7), the statute authorizing suit, currently provides recourse only to those individuals who can point to discriminatory treatment they have already endured.

Here, it is undisputed that Harrington, and the members of the class she seeks to represent, have never joined Airbnb or attempted to book rooms through Airbnb's platform. Indeed, the class is defined as "[a]ll African-American residents of Oregon who *are not currently, and never have been, members of Airbnb*." Compl. ¶ 30 (emphasis added). Airbnb's publicly-released self-investigation concedes "it is clear that discrimination is a problem" and "that minorities struggle more than others to book a listing." Laura W. Murphy, "Airbnb's Work to Fight Discrimination and Build Inclusion," September 8, 2016, at 16, http://blog.airbnb.com

/wpcontent/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf. While including future-looking discrimination claims under the umbrella of ORS 659A.885(7) could arguably provide a remedial tool, this court lacks authority to expand the statutory language: "We do not ask whether in our judgment [the legislature] *should* have authorized [Harrington's] suit, but whether [the legislature] in fact did so." *Lexmark*, 134 S. Ct. at 1388 (emphasis in original); *see also Bennett v. Farmers Ins. Co. of Oregon*, 332 Or. 138, 149 (2001) (holding "the creation of law for reasons of public policy . . . is a task assigned to the legislature, not to the courts"). As currently written, ORS 659A.885(7) provides no recourse for forward-looking discrimination claims. Accordingly, neither Harrington nor the individuals in the class she seeks to represent may bring suit thereunder.

**C. Place of Public Accommodation**

Airbnb also argues that its online platform is not a "place of public accommodation" under ORS 659A.400(1). Instead, it contends that it maintains an online "home-sharing marketplace for third parties to list, browse, and book accommodations." Mot. to Dismiss 4 (ECF #30).

This court need not and does not reach that issue because the pleadings do not state a claim under ORS 659A.885(7), regardless of whether or not Airbnb is a place of public accommodation.

## RECOMMENDATIONS

For the reasons stated above, Harrington's Motion to Dismiss (ECF #30) should be GRANTED, and this court should issue a judgment dismissing this case with prejudice.

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**SCHEDULING ORDER**

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Thursday, February 08, 2018. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

**NOTICE**

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED January 25, 2018.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge