

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DAWN DANGAARD, KELLY GILBERT,
JENNIFER ALLBAUGH, and all other
similarly situated,

No. C 22-01101 WHA

Plaintiffs,

v.

**ORDER REGARDING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND
MOTION TO STRIKE**

INSTAGRAM, LLC, FACEBOOK
OPERATIONS, LLC, META
PLATFORMS, INC., and JOHN DOES 1-
10,

Defendants.

INTRODUCTION

In this putative class action, plaintiffs allege that defendants are engaged in unfair competition, and intentional interference with contracts and business relationships. Defendants have filed a motion for summary judgment and motion to strike expert testimony. A period of supplemental discovery and briefings was then permitted (Dkt. No. 273). Now that the supplemental filings are complete, the motion for summary judgment is hereby **GRANTED**, and the motion to strike is **GRANTED IN PART**.

STATEMENT

1. FACTUAL HISTORY

Plaintiffs Dawn Dangaard, Kelly Gilbert, and Jennifer Allbaugh are adult entertainment performers who use social media to disseminate their content and promote themselves.

1 Plaintiffs post links on social media to adult entertainment websites, which allow users to
2 watch plaintiffs' content for a price. Currently, one of the most heavily used online platforms
3 for adult entertainment is a website called "OnlyFans." While some of the plaintiffs may have
4 used this adult entertainment website, plaintiffs have also contracted with competitors of
5 OnlyFans. Defendant Meta Platforms, Inc., owns and operates defendants Instagram, LLC,
6 and Facebook, LLC (collectively, "Meta defendants"). John Does One through Ten were
7 employees of Meta defendants when the claims arose. This action included three additional
8 defendants when it was first filed in 2022: Fenix International, Ltd., Fenix Internet, LLC, and
9 Leonid Radvinsky who were associated with OnlyFans.

10 In 2022, the BBC published an interview with an anonymous adult performer and an
11 anonymous adult entertainment platform. The performer stated that their social media account
12 had been flagged by an employee of a social media platform which led to reduced visibility of
13 the account. Plaintiffs' counsel subsequently received anonymous tips regarding alleged wire
14 transfers affiliated with the Fenix defendants. With this whistleblowing article and anonymous
15 tips, plaintiffs filed the instant action in February 2022 with the following allegations: plaintiffs
16 experienced a precipitous drop in web traffic from 2018 to 2019 which could only be attributed
17 to a blacklisting scheme that was directed towards plaintiffs because they were utilizing adult
18 entertainment platforms that compete with OnlyFans.

19 Plaintiffs allege that defendants conspired in an anticompetitive scheme to boost the
20 popularity of OnlyFans to the detriment of plaintiffs through two tactics: bribery and
21 blacklisting (Second Amd. Compl. ¶¶ 63, 84). Fenix defendants allegedly paid Meta
22 defendants to delete or decrease the visibility of plaintiffs' accounts and posts on Instagram. In
23 return for accepting bribes from Fenix defendants, Meta defendants allegedly reduced the web
24 traffic of competitors of OnlyFans, in part by suppressing their online visibility.

25 More specifically, plaintiffs allege a blacklisting scheme whereby Meta defendants
26 caused such demotion or removal by manipulating Facebook and Instagram databases to
27 include plaintiffs in lists of dangerous individuals or organizations ("DIO List"). Such lists
28 identify terrorists, and Facebook and Instagram's algorithms use those lists to demote or

1 remove terrorist content. Plaintiffs also allege that Meta defendants share their lists of
2 terrorists with other social media platforms via the “Global Internet Forum to Counter
3 Terrorism” (“GIFCT”) shared hash database.

4 Taken together, plaintiffs allege that both tools “would have served as the ideal training
5 data for a classifier/filtering tool to create this blacklisting effect, particularly in 2018 and
6 2019. No other tool then in existence could have produced this effect” (Second Amd. Compl.
7 ¶ 61). Plaintiffs argue that this conduct constitutes unfair competition and tortious interference
8 with plaintiffs’ contracts and business relationships (with competitors of OnlyFans). Plaintiffs
9 seek to hold Meta defendants vicariously liable for the actions of Doe defendants.

10 The allegations and claims of relief have shifted throughout the course of this action.
11 This order will therefore briefly review this action’s procedural history.

12 **2. PROCEDURAL HISTORY**

13 Plaintiffs filed the original complaint as a putative class action in February 2022 and filed
14 their first amended complaint in September in 2022 (Dkt. No. 4). Meta defendants moved to
15 dismiss all claims under Rule 12(b)(6) and California’s anti-SLAPP statute (Dkt. No. 41).
16 During the hearing for defendant’s motion, plaintiffs informed the Court that they had
17 information outside of the pleadings that may support their claims for bribery and blacklisting.
18 The Court granted plaintiffs leave to file a second amended complaint and ordered defendants
19 to re-brief their motions based on the new complaint. Again, all defendants moved to dismiss
20 the second amended complaint under Rule 12(b)(6).

21 Defendants’ motion to dismiss was denied and an order permitted the case to go forward
22 on the grounds that, at that time, plaintiffs had sufficiently alleged that web-traffic had
23 precipitously dropped off during the relevant period and plaintiffs sufficiently alleged claims of
24 bribery and blacklisting (Dkt. No. 101). Specifically, that order found that the whistleblower
25 article referenced in the second amended complaint supported plaintiffs’ claims (*ibid.*). For
26 this reason, that same order permitted broad discovery for plaintiffs to take discovery and to
27 further investigate the existence of the alleged bribes.
28

1 In March 2023, all parties appeared for a case management conference. During that
2 hearing, plaintiffs were ordered to serve subpoenas on several banks and third parties in order
3 to prove up their bribe allegations. Likewise, Meta defendants were permitted to serve
4 plaintiffs with reasonable sets of document requests relating to the bribe allegations. By July
5 2023, however, plaintiffs withdrew the allegations of bribery because they could “no longer
6 certify that the particular factual contentions . . . will likely have evidentiary support after a
7 reasonable opportunity for further investigation” (Dkt. No. 172).

8 Shortly thereafter, an order dismissed defendants Fenix International Limited, Fenix
9 Internet LLC, and Leonid Radvinsky for lack of specific personal jurisdiction (Dkt. No. 178).
10 In another hearing in August 2023, the undersigned judge, being concerned that plaintiffs’
11 counsel had sweeping allegations but slow to seek proof, urged the parties to invest in this
12 action and again authorized broad discovery into the merits. And again, in September 2023, an
13 order was issued reiterating that discovery was open (Dkt. No. 193).

14 In March 2024, plaintiffs filed a motion to dismiss their own case for lack of subject-
15 matter jurisdiction. Mere hours later, Meta defendants filed a motion for summary judgment
16 on all claims. Meta defendants also filed a motion to exclude and strike plaintiffs’ proffered
17 experts who are in fact two of the named plaintiffs: Dawn Dangaard and Kelly Gilbert. Also of
18 note, plaintiffs never moved for class certification.

19 Counsel fully briefed all three motions. In preparation for oral argument, the
20 undersigned judge also asked several questions, which will be discussed in due course. This
21 order will now briefly summarize the main issues and concerns raised during oral argument in
22 May 2024 and the subsequent period of supplemental discovery.

23 **A. MAY 2024 HEARING**

24 Each side presented their respective dispositive motions during the May 2024 hearing.
25 Again, the central claims in this action involve the alleged misuse of databases for “terrorist
26 content” and “dangerous individuals and organizations” (Br. at 9). Specifically, plaintiffs have
27 alleged that one or more DOI Lists combined with the GIFCT shared hash database has created
28

1 a blacklisting effect that has impacted adult artists who have promoted or affiliated with
2 OnlyFans’ competitors (Second Amd. Compl. ¶ 58).

3 (i) *Meta’s Use of a DOI List*

4 Meta’s use and maintenance of their DOI List was a major topic of discussion during the
5 May 2024 hearing. Most importantly, Meta defendants stated in their summary judgment
6 motion that because the DOI List was a “living document,” Mr. Patrick James’s reviews were
7 “necessarily done as of the dates on which he conducted the searches” (Br. at 10).

8 In plaintiffs’ motion to dismiss for lack of subject-matter jurisdiction, plaintiffs had taken
9 this to mean that “there is no archived version of the DOI list . . . [t]herefore, the only way to
10 search that database is as of a particular date, which provides a contemporaneous snapshot as
11 of that date” (Dkt. No. 236 at 10; Azar Decl. ¶ 18). Additionally, in plaintiffs’ opposition to
12 the motion for summary judgment, they acknowledged that defendants “do[] not have the data
13 to know, one way or another, whether or not its terror list . . . was manipulated . . . to benefit
14 the OnlyFans adult entertainment platform” (Reply Br. at 1). This concession revealed a major
15 pitfall in plaintiffs’ case: due to the manner in which Meta defendants maintained the DOI List,
16 neither side can confirm or deny whether an individual was on the List during the relevant
17 period between 2018 and 2019.

18 The undersigned judge expressed both concern towards Meta’s recordkeeping practices
19 and a degree of skepticism that neither side was able to ascertain whether any of the plaintiffs
20 appeared on Meta’s DOI List during the relevant period. Among other questions, the
21 undersigned judge asked Meta defendants: (1) where in the summary judgment record there is
22 anything under oath explaining that the DOI List is a “living document” and (2) if there was or
23 is now any way to retrieve an archived version of the DOI List. Counsel for Meta defendants
24 repeated that the DOI List is a “living document” but they did not provide a declaration or a
25 sworn statement stating such in the record. Moreover, counsel for Meta defendants confirmed
26 that because they do not have a practice of archiving copies of the DOI List, they are unable to
27 determine who was included in the List during the relevant period. They were, however, able
28 to review versions of the list in August 2022, November 2023, and January 2024 and

1 confirmed that none of the plaintiffs or their platforms appeared on the List as of those
2 searches.

3 Likewise, the undersigned judge asked plaintiffs what evidence they have to prove that
4 they experienced a precipitous drop off in web traffic. Counsel for plaintiffs responded that
5 they could not provide a clear answer because Meta does not keep referral traffic for more than
6 forty days, nor does it retain engagement metrics data for more than ninety days.

7 On both of these issues—the DOI List and plaintiffs’ referral traffic data—plaintiffs’
8 counsel had taken zero depositions. Characterizing it as a deliberate and strategic decision,
9 plaintiffs’ counsel maintained that they did not wish to give Meta defendants an opportunity to
10 change their responses to interrogatories or document requests through depositions.

11 **(ii) Order to File Declarations**

12 At the end of the May 2024 hearing, counsel for both sides were required to file a
13 declaration under oath that statements made during oral argument were accurate. Counsel
14 were also ordered to provide clarifications to any of the undersigned judge’s questions if
15 necessary.

16 Meta defendants provided the following information on the issue of whether there was
17 any blacklisting through the DOI List or the GIFCT shared hash database. In their declaration,
18 Meta’s counsel stated that in 2018 and 2019, designations were approved by a member of what
19 is now called Meta’s content policy team. Since 2019, Mr. James joined Meta as a DOI Policy
20 Manager, and the designation process evolved.

21 Currently, there is a multistage nomination process to be placed on the DOI List, which is
22 primarily done by a team of experts within Meta who work under Mr. James. This team then
23 compiles a package of evidence which is reviewed by a cross-functional team at Meta which
24 includes the DOI Policy Team, DOI Process Team, Core Policy Team, Strategic Response
25 Policy, Legal, Communications, and several other departments (Allen Decl. at 3). The
26 designations are ultimately approved by the DOI director, the strategic response director, and a
27 core policy director. If the designation decision is not unanimous, it is escalated to a more
28 senior member of content policy leadership, who ultimately makes the final decision (*ibid.*).

1 When asked whether it is possible to bypass the nomination process, counsel for defendants
2 stated that while it is theoretically possible, it “also technically difficult” to do so, and that after
3 a reasonable investigation, “Meta found no evidence that such a bypass occurred here” (*id.* at
4 5).

5 Most importantly, however, Meta’s counsel revealed a discovery oversight. Although
6 Meta defendants had previously produced what they considered as constituting records of
7 enforcements of the plaintiffs’ accounts, they did not include other records of any of the
8 plaintiffs’ posts that “were subject to other actions that were not clearly identified as
9 constituting enforcements” (*ibid.*). Here, there were three instances in which plaintiff
10 Allbaugh posted images that were similar or possibly similar to content in two counter-
11 terrorism banks. The images consisted of text against a background.

12 Meta’s counsel for defendants clarified that Meta had determined that the images were
13 likely “false positives” and “after reasonable investigation,” defendants found “no evidence”
14 that these three images resulted in or were caused by plaintiffs being blacklisted, their names
15 being added to the DOI List, or being hashed into the GIFCT. Lastly, the declaration offered
16 an additional thirty days of discovery on the issue.

17 Regarding counsel for plaintiffs’ declaration, two points are of note. *First*, plaintiffs’
18 counsel protested against permitting supplemental discovery because they did not wish to give
19 defendants an opportunity to correct their discovery missteps. *Second*, plaintiffs’ counsel
20 clarified that referral traffic (as opposed to internet search traffic) was at issue (Azar Decl. at 6-
21 7).

22 **(iii) Order to Conduct Supplemental Depositions and Briefings**

23 Defendants were ordered to file a supplemental declaration as to why and how the
24 documents were not previously produced. To that end, plaintiffs were also ordered (Dkt. No.
25 273) to conduct depositions as to why and how Meta’s supplemental productions were not
26 previously produced, and the merits issues raised by the documents in Meta’s June and July
27 productions. Further, plaintiffs were permitted to file a supplemental brief to address whether
28 and to what extent their findings impacted their opposition to the motion for summary

1 judgment. Meta defendants were then permitted to file an opposition brief. This order will
2 now provide a brief overview of this supplemental briefing period.

3 **B. SUPPLEMENTAL DISCOVERY PERIOD FROM JULY 2024 TO SEPTEMBER**
4 **2024**

5 In their supplemental brief, plaintiffs raise three main points. *First*, plaintiffs allege that
6 even after completing supplemental depositions, Meta does not know the full impact of the
7 “matches” between plaintiff Allbaugh’s posts and content in two counter-terrorism banks.
8 Plaintiffs argue that Meta cannot confirm whether or not plaintiff Allbaugh’s content was sent
9 to the GIFCT shared hash database or if the “matches” created any negative signals that might
10 connect her to terrorism for moderation purposes.

11 *Second*, plaintiffs request that the Court instruct a jury, should this proceed to trial, on an
12 adverse inference that the above-mentioned effects are possible. Alternatively, plaintiffs
13 request that the Court preclude Meta defendants’ from denying that those effects are possible.
14 This order finds that a jury instruction permitting an adverse inference is unwarranted.
15 Plaintiffs made a deliberate decision to not take any depositions prior to this Court’s order
16 (Dkt. No. 273) and missed out on ample opportunities to develop this record further. Instead
17 of raising concerns much earlier regarding Meta defendant’s compliance with discovery
18 requests and requirements, plaintiffs chose to proceed—in their own words—like “ships
19 passing in the night” (May 29, 2024, Tr. at 37).

20 *Third*, plaintiffs request that the Court compel Meta defendants to produce additional
21 documents and information (including privileged information) related to an internal
22 investigation completed by Meta defendants in the fall of 2021 and spring of 2022. Plaintiffs
23 argue that it is “not clear” whether all documents responsive to plaintiffs’ previous document
24 requests “were actually produced, or collected but then withheld” (Dkt. No. 301-3 at 31).
25 Plaintiffs concede that some of the documents in this investigation would be protected by
26 attorney work-product. They attempt to argue, however, that those materials should still be
27 disclosed because the underlying facts are discoverable and they have “substantial need.”
28 FRCP 26(b)(3)(A). According to plaintiffs, they have been “stymied in presenting direct

1 evidence” of their claims due to Meta’s “inability or unwillingness” to provide records (Dkt.
2 No. 301-3 at 29). This order is not convinced. Plaintiffs have not raised any discovery
3 disputes prior to the instant motions and therefore have not demonstrated substantial need.

4 It is concerning that Meta had overlooked producing records. Nevertheless, as this order
5 will explain in more detail, it does not move the needle; there is insufficient evidence to
6 proceed past summary judgment.

7 With the benefit of the initial briefing, oral argument, and supplemental briefing, this
8 order now turns to the instant two motions. This entire case proceeded first, on the withdrawn
9 bribe allegations, and thereafter, on a now-failed allegation of blacklisting. Plaintiffs have
10 developed no proof sufficient to go to a jury on any of these claims.

11 ANALYSIS

12 1. MOTION FOR SUMMARY JUDGMENT

13 A. Legal Standard.

14 “One of the principal purposes of the summary judgment rule is to isolate and dispose of
15 factually unsupported claims or defenses.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24
16 (1986). Summary judgment is proper when “there is no genuine dispute as to any material fact
17 and the movant is entitled to judgment as a matter of law.” FRCP 56(a). A dispute is
18 “genuine” only if there is sufficient evidence for a reasonable fact finder to find for the non-
19 moving party, and “material” only if the fact may affect the outcome of the case. *Anderson v.*
20 *Liberty Lobby, Inc.*, 477 U.S. 242, 248–249 (1986). In this analysis, all reasonable inferences
21 must be drawn in the light most favorable to the non-moving party. *Johnson v. Racnho*
22 *Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1018 (9th Cir.2010). Unsupported conjecture or
23 conclusory statements, however, cannot defeat summary judgment. *Surrell v. Cal. Water Serv.*
24 *Co.*, 518 F.3d 1097, 1103 (9th Cir. 2008).

25 Where the party moving for summary judgment would not bear the burden of proof at
26 trial, that party bears the initial burden of either producing evidence that negates an essential
27 element of the non-moving party's claims, or showing that the non-moving party does not have
28 enough evidence of an essential element to carry its ultimate burden of persuasion at trial.

1 *See Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir.2000). If the
2 moving party does not satisfy its initial burden, then the non-moving party has no obligation to
3 produce anything and summary judgment must be denied. If, however, the moving party
4 satisfies its initial burden of production, then the non-moving party must produce admissible
5 evidence to show there exists a genuine issue of material fact. *Id.* at 1102–1103.

6 Meta defendants argue that they should be granted summary judgment because: (1)
7 plaintiffs have not shown any factual basis to their allegations showing entitlement to relief, (2)
8 plaintiffs have failed to show that the elements of their causes of action are met, and (3)
9 plaintiffs’ claims are barred by Section 230 of the Communications Decency Act and the First
10 Amendment.

11 This action began with spectacular allegations that OnlyFans had bribed Meta to blacklist
12 adult entertainers who also used other competing sites. This was, in a way, to “monopolize”
13 the adult entertainment market. After hearing this allegation at least twice, the Court instructed
14 plaintiffs’ counsel to go present proof of such a bribe and to specifically subpoena the banks
15 that were allegedly involved in laundering the bribe. Plaintiffs’ counsel were given the
16 opportunity and eventually reported that they could find no proof of the bribe and withdrew the
17 allegation. The complaint then shifted to claiming that Meta, for its own reasons, had
18 discriminated against plaintiffs by blacklisting them. Again, the judge gave ample
19 opportunities to plaintiffs’ counsel to prove up this claim. Again, plaintiffs’ counsel failed to
20 find any poof. This is the basic reason that summary judgment, at long last, must be **GRANTED**
21 to Meta defendants.

22 **B. Plaintiffs Have Not Shown Evidence of the Elements of the Claims of**
23 **Relief**

24 Plaintiffs assert three claims: tort of intentional interference with a contract, intentional
25 interference with business relationships, and unfair competition. Meta defendants argue that
26 plaintiffs have failed to establish the elements for each of their claims of relief. As stated
27 above, the crux of plaintiffs’ claims for relief depends on identifying who was or was not on
28 Meta’s DOI List during the relevant period. It is disturbing that Meta failed to archive a daily

1 copy of the DOI List so that in future litigation (or consultations with federal or state law
2 enforcement) it could identify when someone was on the list. It would have been easy to save
3 the list at the end of each day.

4 Nevertheless, this order has no choice but to grant Meta defendants' motion for
5 summary judgment; it does so in spite of and not because of the questionable recordkeeping.
6 Plaintiffs have failed to demonstrate a genuine issue of material fact with respect to their three
7 claims for relief.

8 (i) ***Intentional Interference with Contract***

9 The elements for the tort of intentional interference with a contract are (1) a valid
10 contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3)
11 defendant's intentional acts designed to induce a breach or disruption of the contractual
12 relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting
13 damage. *United Nat. Maint., Inc. v. San Diego Convention Ctr., Inc.*, 766 F.3d 1002, 1006 (9th
14 Cir. 2014).

15 Meta defendants assert that plaintiffs have not produced a valid contract during the
16 relevant time. Although plaintiff Gilbert produced two contracts dating back to 2011-2012,
17 this is prior to the relevant period between 2018 and 2019. Plaintiff Allbaugh produced one
18 contract which was signed in 2020, after the relevant period. Dangaard has produced no
19 contracts at all (Br. at 22). Plaintiffs have not rebutted this point, provided any additional
20 contracts, or cited to any other documents in the record which would purport to serve as a
21 contract during the relevant period.

22 Moreover, Meta defendants argue that plaintiffs have no evidence as to whether Meta had
23 any knowledge of the contracts. Plaintiff Allbaugh was asked in a deposition whether "Meta
24 ha[d] any way of knowing you had a contract with any of those companies," to which she
25 responded, "I don't think so" (Allbaugh Dep. at 259:20-23). According to defendants, Gilbert
26 and Dangaard have offered no evidence that Meta had any knowledge of these alleged
27 contracts. Nor has plaintiffs stated otherwise in their opposing brief.
28

1 As such, this order finds that plaintiffs have not met the elements for their first claim for
2 relief. Therefore, summary judgment is **GRANTED** for plaintiffs' first claim for relief.

3 (ii) ***Intentional Interference with Business Relationships***

4 The elements of an intentional inference with business relationships claim are: (1) an
5 economic relationship between the plaintiff and some third party, with the probability of future
6 economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3)
7 intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual
8 disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the
9 acts of the defendant." *TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676,
10 689 (9th Cir. 1990) (quoting *Youst v. Longo*, 43 Cal. 3d 64, 71 n.6 (1987)).

11 Defendants argue that this claim fails because plaintiffs have provided no evidence of an
12 economic relationship; plaintiffs have failed to identify a "paying customer who would have
13 continued paying for plaintiffs' services" in the absence of Meta's alleged conduct (Br. at 23).
14 This order agrees. Plaintiffs provide nothing more than speculation in their depositions
15 regarding potential customers they may have gained. Nor have plaintiffs rebutted this point in
16 their opposition brief.

17 With respect to the second element, defendants assert that plaintiffs have not established
18 that Meta had any knowledge of these alleged business relationships.

19 Regarding the third element, the 'intentional act' alleged by plaintiffs is the "participation
20 in the scheme" i.e. blacklisting plaintiffs by improperly adding them to Meta's DOI List during
21 the relevant period (Second Amd Compl. 132). As explained above, both sides concede this
22 cannot be determined given the nature of the DOI List.

23 Regarding the fourth element, defendants argue that plaintiffs would need to establish
24 that Meta engaged in an "independently wrongful act" that caused a disruption in the business
25 relationship. *Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal.5th 1130, 1139 (2020). Defendants
26 assert that plaintiffs have not identified an independently wrongful act or proved that one
27 occurred at all. Plaintiffs do not rebut or respond to this argument at all in their opposition.
28

1 With respect to the last element, defendants maintain that plaintiffs have established no
2 cognizable damages. This order agrees. Although Dangaard vaguely asserts a connection
3 between the alleged actions of Meta and an alleged economic harm, neither she nor have the
4 other plaintiffs provided actual evidence of damages.

5 Therefore, plaintiffs have not met the elements for this cause of action. As such,
6 summary judgment of the second claim for relief is **GRANTED**.

7 **(iii) Unfair Competition**

8 A claim of unfair competition can be brought under unfair, unlawful, or fraudulent
9 business practices. Cal. Bus. & Prof. Code § 17200. Plaintiffs' complaint does not specify
10 which of type of unfair competition claim they are asserting. Given that plaintiffs refer to
11 defendants' actions as "unfair practices," this order will proceed under the unfair business
12 practice theory.

13 Plaintiffs assert that defendants have caused the classifying of adult entertainer provider
14 content as "originating from terrorists . . . or a DIO," and "falsely representing [adult
15 entertainer provider content] as originating from terrorists . . . or otherwise DIO to other social
16 media platforms" (Second Amd. Compl. ¶ 136). Plaintiff have presented no admissible proof
17 of this allegation.

18 As such, defendant's motion for summary judgment for plaintiffs' third claim for relief is
19 **GRANTED**.

20 Given that this order grants summary judgment as to all three claims for relief, this order
21 need not decide on defendants' additional arguments related to the Communications Decency
22 Act or the First Amendment.

23 This order will now turn to Meta defendants' motion to strike.

24 **2. MOTION TO EXCLUDE PLAINTIFFS' PROFFERED EXPERTS DAWN DANGAARD**
25 **AND KELLY GILBERT AND STRIKE THEIR EXPERT DECLARATIONS**

26 Plaintiffs have used two of their named plaintiffs, Dawn Dangaard and Kelly Gilbert, as
27 experts in this action. Dangaard and Gilbert have each provided a declaration. Defendants
28

1 move to exclude these two named plaintiffs as experts and move to strike their expert
2 testimony.

3 **A. Legal Standard**

4 District courts have a “gatekeeping role” to ensure that expert testimony admitted into
5 evidence is both reliable and relevant, and to exclude “junk science.” *Messick v. Novartis*
6 *Pharms. Corp.*, 747 F.3d 1193, 1197 (9th Cir. 2014). “A witness who is qualified as an expert
7 by knowledge, skill, experience, training, or education may testify in the form of an opinion or
8 otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the
9 trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is
10 based on sufficient facts or data; (c) the testimony is the product of reliable principles and
11 methods; and (d) the expert has reliably applied the principles and methods to the facts of the
12 case.” Fed. R. Evid. 702; see *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–94
13 (1993).

14 However, an expert is not bound by the *Daubert* factors in cases involving non-scientific
15 testimony. In that case, “a trial court may consider one or more” of the *Daubert* factors in
16 determining the reliability of nonscientific expert testimony. *Kumho Tire Co. v. Carmichael*,
17 526 U.S. 137, 141. The proponent of the testimony must establish admissibility by a
18 preponderance of the evidence. *Bourjaily v. United States*, 483 U.S. 171, 175–176, (1987).

19 Defendants argue that four areas of Dangaard’s and Gilbert’s testimony should be
20 stricken. *First*, defendants seek to strike opinion about disproportionate enforcement between
21 how Instagram moderates content posted by a competitor to OnlyFans as opposed to content
22 relating to OnlyFans. *Second*, expert opinion which involves interpreting of Meta’s terms of
23 service. *Third*, expert opinion regarding various websites are similar to OnlyFans in that they
24 have a paywall and non-adult content is viewable unless a purchase is made. *Fourth*, plaintiffs
25 testify as to what percentage of the content on OnlyFans is pornographic.

26 To support their motion, defendants primarily argue that plaintiffs lack the relevant
27 expertise; although this action involves adult entertainers, “the scheme alleged by plaintiffs is
28 one of . . . misuse of counter-terrorism databases at Meta” (Dkt. No. 238 at 4). For this reason,

1 defendants argue that relevant expertise would include fields such as statistics, data analysis, or
2 web-traffic analysis (*ibid.*).

3 Plaintiffs Dangaard and Gilbert, argue that their expertise as adult content creators should
4 be held to the admissibility requirements for non-scientific expert testimony based on their
5 personal knowledge (Opp. at 9). Interestingly, however, both plaintiffs concede that “the
6 claims in this case implicate both scientific and non-scientific aspects” (*ibid.*). The following
7 is a brief overview of each declaration.

8 Gilbert’s declaration boils down to three conclusions. *First*, “[b]ased on [her] experience
9 in the industry,” content posted to Instagram relating to non-OnlyFans competitor platforms
10 “was more likely to be actioned by Meta whereas content relating to OnlyFans was not
11 actioned in the same way” (Gilbert Decl. ¶ 21). *Second*, that this “preferential treatment” of
12 OnlyFans, “negatively affected the ability of performers on other competing platforms to . . .
13 earn income they would have otherwise been able to earn” (¶ 22). *Third*, that “at least 90% in
14 [Gilbert’s] opinion” of OnlyFans is pornographic” (¶ 38).

15 Likewise, Dangaard’s declaration provides four conclusions. The first three conclusions
16 are almost identical to those of Gilbert. *First*, based on Dangaard’s “experience in the
17 industry,” content posted to Instagram relating to non-OnlyFans competitor platforms “was
18 more likely to be actioned by Meta whereas content relating to OnlyFans was not actioned in
19 the same way” (Dangaard Decl. ¶ 22). *Second*, Dangaard concludes that the supposed
20 “preferential treatment” of OnlyFans, “negatively affected the ability of performers on other
21 competing platforms to . . . earn income they would have otherwise been able to earn” (¶ 23,
22 35). *Third*, that “at least 90% in [Dangaard’s] opinion” of OnlyFans is pornographic” (¶ 34).
23 *Fourth*, Dangaard provided insight surrounding “the economics of the industry” (¶ 44). Here,
24 she explained that subscription-based adult websites “rely entirely on traffic from social media
25 platforms to survive and grow” because social media is free and social media promotions
26 “target” users that are already following a specific performer “and therefore have a higher
27 conversion rate to paying users [versus] buying traffic” (¶¶ 45-47).

1 This order agrees with plaintiffs that they should not be strictly bound by *Daubert* factors
2 insofar as the fourth conclusion provided by Dangaard is based on personal knowledge as
3 opposed to a scientific methodology. As noted by defendants, however, the first, second, and
4 third conclusions espoused by both Gilbert and Dangaard are based on some form of data or
5 statistical analysis. In their respective declarations, neither Gilbert nor Dangaard provide the
6 basis upon which they arrived at the conclusion that Meta was actioning content made by non-
7 OnlyFans adult entertainers more frequently than OnlyFans adult entertainers. Therefore, the
8 first, second, and third conclusions from both Gilbert's and Dangaard's declarations are
9 **STRICKEN.**

10 This order finds, however, that the fourth conclusion espoused by Dangaard is based on
11 her specialized knowledge and shall therefore **NOT** be stricken.

12
13 **CONCLUSION**

14 Defendant's motion for summary judgment is **GRANTED**. Defendant's motion to strike is
15 **GRANTED IN PART AND DENIED IN PART**. There is no claim left to try. Given that plaintiffs
16 have been unable to produce the predicate data to move past the summary-judgment stage,
17 judgment shall be entered accordingly. All hearing dates are hereby **VACATED**.

18
19 **IT IS SO ORDERED.**

20
21 Dated: September 23, 2024.

22 

23 WILLIAM ALSUP
24 UNITED STATES DISTRICT JUDGE