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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FREDERICK WILLIAM GULLEN,
Plaintiff,
v.
FACEBOOK, INC.,
Defendant.

Case No. [3:16-cv-00937-JD](#)

ORDER RE SUMMARY JUDGMENT

Re: Dkt. No. 106

In this putative class action, plaintiff Gullen alleges that defendant Facebook, Inc. violated the Illinois Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/1 *et seq.* (“BIPA”), by collecting his biometric identifiers without notice or consent. Dkt. No. 1-1 at 6-7; *see generally Patel v. Facebook Inc.*, ___ F. Supp. 3d ___, No. 3:15-cv-03747-JD, 2018 WL 1050154, at *1 (N.D. Cal. Feb. 26, 2018) (factual background). Facebook has moved for summary judgment on a number of grounds here and in the companion case *In re Facebook Biometric Privacy Litigation*, Case No. 15-3747. Dkt. No. 105. In a “supplemental brief” directed entirely to Gullen’s case, Facebook says that his claims are based on a single photograph uploaded to an organizational, as opposed to personal, page, and that Facebook did not use its facial recognition technology for that page. Dkt. No. 106. Since Gullen has not raised any genuine dispute about this fact, the motion is granted on this ground. The Court does not reach any of Facebook’s other arguments in the supplemental brief or other summary judgment papers.

“A party may move for summary judgment, identifying each claim or defense -- or the part of each claim or defense -- on which summary judgment is sought. The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Smith v. State of California Dep’t of Highway Patrol*, 75 F. Supp. 3d 1173, 1179 (N.D. Cal. 2014).

1 A dispute is genuine “if the evidence is such that a reasonable jury could return a verdict”
2 for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it
3 could affect the outcome of the suit under the governing law. *Id.* at 248-49. In determining
4 whether a genuine dispute of material fact exists, the Court will view the evidence in the light
5 most favorable to the non-moving party and draw “all justifiable inferences” in that party’s favor.
6 *Id.* at 255. A principal purpose of summary judgment “is to isolate and dispose of factually
7 unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

8 The moving party must initially establish the absence of a genuine issue of material fact,
9 which it can do by “pointing out to the district court . . . that there is an absence of evidence to
10 support the nonmoving party's case.” *Id.* at 325. It is then the nonmoving party’s burden to go
11 beyond the pleadings and identify specific facts that show a genuine issue for trial. *Id.* at 323-34.
12 “A scintilla of evidence or evidence that is merely colorable or not significantly probative does not
13 present a genuine issue of material fact.” *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th
14 Cir. 2000). In addition, it is not the Court’s task “to scour the record in search of a genuine issue
15 of triable fact.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quotations omitted).

16 The dispositive material facts here are straightforward, and Gullen has not shown that they
17 are in dispute. He concedes that he has identified only two photos of himself on Facebook. One
18 was taken in Pennsylvania and uploaded in Michigan. The other was uploaded to an
19 organizational account -- a Facebook page run by an organization, rather than an individual. Dkt.
20 No. 104-6 at 4. At the summary judgment hearing, Gullen confirmed that his claims are based
21 solely on the organizational page photograph.

22 The record shows that Facebook does not use facial recognition technology on photos
23 uploaded to organizational accounts. Facebook submitted a declaration from software engineer
24 Omry Yadan stating that “facial recognition is not performed on photos that are posted on business
25 or other organization Facebook Pages.” Dkt. No. 256-8 at 5.¹ While Gullen criticizes the

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27 _____
28 ¹ Briefing on Facebook’s motion for summary judgment against Gullen took place largely on the
docket for the companion action, *In re Facebook Biometric Privacy Litigation*, Case No. 15-3747.
This citation and citations going forward are to the *In re Facebook* docket unless otherwise noted.

1 declaration as self-serving, Dkt. No. 271-4 at 10-11, he offers no facts or evidence to call that
2 statement into question. Gullen says that “much of Mr. Yadan’s declaration directly contradicts
3 his earlier testimony,” *id.* at 11, but that is a purely conclusory assertion, and Gullen never
4 explains which part of Yadan’s declaration may be subject to genuine dispute.

5 This state of the record is enough to terminate Gullen’s claims, and his suggestion that
6 summary judgment should be deferred to allow for more discovery is unavailing. *See* Dkt. No.
7 271-34. Gullen professes surprise at Yadan’s declaration, and says he would like to “re-open
8 Yadan’s deposition” to ask him about the organizational page practices and require him to identify
9 the specific source code supporting his testimony. *Id.* at 5-6. The problem with this request is that
10 by December 2016, Facebook had already produced documents stating that Facebook does not
11 apply facial recognition to photographs uploaded to the Facebook organizational pages. *See, e.g.,*
12 Dkt. No. 125-1 at 1-2 (*Gullen* action) (“recognition wasn’t necessary for page photos and so it was
13 left out of the upload flow”). Gullen had this information in hand before his expert finished
14 reviewing Facebook’s facial recognition source code and before Gullen deposed Yadan in October
15 2017. His lawyer acknowledged this at the hearing. *Tr.* at 9-11. Gullen was free during discovery
16 to pursue these leads by interrogating Facebook and its witnesses about the exclusion of “page
17 photos” from the facial recognition technology, and about the portions of the source code that
18 might implement that. He did not do so, and instead waited until after summary judgment
19 proceedings were initiated in December 2017 to raise the issue.

20 This is not at all the situation Rule 56(d) is intended to address. Rule 56(d) “requires
21 discovery only where the non-moving party has not had the opportunity to discover information
22 that is essential to its opposition.” *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1169 (9th Cir. 2011)
23 (internal quotation and citation omitted). Gullen had ample opportunity to conduct discovery on
24 organizational pages, and he has not shown that the discovery he now seeks was in any way
25 unavailable to him in the normal course of litigation.

26 Even so, the record does not indicate that Yadan said anything inconsistent or untruthful
27 about Facebook’s practices for organizational pages. Yadan testified during his deposition that
28 not all photos uploaded to Facebook undergo facial recognition. Dkt. No. 271-8 at 106-108

1 (discussing photos uploaded to Facebook comments and stating that “there are others [other
2 examples]. It’s just that there are so many ways for photos to get into Facebook, and not all of
3 them -- it doesn’t always make sense for them to go through this [face recognition]”). Gullen
4 contends that the testimony of another Facebook witness, Yaniv Taigman, contradicts Yadan, but
5 that stretches the evidence too far. Gullen highlights Taigman’s answer to the question:
6 “Facebook has to collect face signatures from everybody who appears on a photo upload to
7 Facebook in order to determine whether there’s a match; isn’t that right?” Dkt. No. 271-7 at 240.
8 Taigman did not respond with yes or no, but attempted to re-explain the steps in Facebook’s facial
9 recognition software: “So, like we said, photos uploaded to Facebook, we extract. Like, face
10 detection process, then create face signature, and then, yes, you try to match that into whatever
11 your -- you have, right?” *Id.* This snippet of testimony does not bear the weight Gullen puts on it
12 because the question does not contemplate the possibility that some photos uploaded to Facebook
13 are not analyzed for user matches, and because neither the question nor the answer expressly
14 addressed organizational pages.

15 In a final effort to avoid summary judgment, Gullen’s counsel read at the hearing another
16 portion of Taigman’s deposition with the comment “transcript’s on file.” Tr. at 5. The quoted
17 transcript portion might be buried somewhere in the voluminous record for this litigation, but the
18 Court has determined that it was not filed for the pending summary judgment motion, nor
19 discussed at all in the opposition brief, and consequently is of no moment. Even giving Gullen
20 every benefit of the doubt, the excerpt again does not inherently contradict the Yadan declaration
21 or other evidence in the record with respect to Facebook’s organizational page practices.

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On the record before the Court, Gullen has failed to show that a genuine dispute exists as to whether Facebook runs facial recognition on photos uploaded to organizational pages. Facebook’s motion for summary judgment is **GRANTED** as to Gullen.

IT IS SO ORDERED.

Dated: April 3, 2018



JAMES DONATO
United States District Judge