

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 22 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

GEORGE JARVIS AUSTIN,

Plaintiff-Appellant,

v.

LINDA ZHANG; AIRBNB; AVINASH K.
JHA; GREEN DOT CORPORATION;
BANK OF AMERICA,

Defendants-Appellees.

No. 22-15955

D.C. No. 3:20-cv-05445-RS

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, District Judge, Presiding

Submitted May 16, 2023**

Before: GRABER, MILLER, and VANDYKE, Circuit Judges.

George Jarvis Austin appeals pro se from the district court's partial judgment in his action alleging discrimination and defamation in violation of federal and state laws. Because the district court certified its interlocutory orders

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

under Federal Rule of Civil Procedure 54(b), we have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Brunette v. Humane Soc. of Ventura County*, 294 F.3d 1205, 1209 (9th Cir. 2002). We affirm.

The district court properly dismissed Austin's claims against Bank of America and Green Dot because Austin failed to allege facts sufficient to show that defendants denied his refund requests because of race, made defamatory statements, or acted under color of state law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (to avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" (citation and internal quotation marks omitted)); *see also West v. Atkins*, 487 U.S. 42, 48 (1988) ("To state a claim under § 1983, a plaintiff . . . must show that the alleged deprivation was committed by a person acting under color of state law."); *Evans v. McKay*, 869 F.2d 1341, 1344 (9th Cir. 1989) (in a 42 U.S.C. § 1981 action, "plaintiffs must show intentional discrimination on account of race"); *Munson v. Del Taco, Inc.*, 208 P.3d 623, 629-30 (Cal. 2009) (to state a claim under the Unruh Act premised on racial discrimination, a plaintiff must plead intentional discrimination); *Taus v. Loftus*, 151 P.3d 1185, 1209 (Cal. 2007) (setting forth elements of a defamation claim under California law); *Kahn v. Bower*, 284 Cal. Rptr. 244, 252 n.5 (Ct. App. 1991) ("The general rule is that the

words constituting an alleged [defamatory statement] must be specifically identified, if not pleaded verbatim, in the complaint.”).

We lack jurisdiction to consider Austin’s claims against Airbnb because they are beyond the scope of the Rule 54(b) judgment. *See Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 179 n.1, 190 n.17 (9th Cir. 1989) (on appeal from a Rule 54(b) order, there is no jurisdiction over claims that are not within the scope of that order); *see also Dees v. Billy*, 394 F.3d 1290, 1294 (9th Cir. 2005) (district court order staying judicial proceedings and compelling arbitration is not appealable).

In his opening brief, Austin fails to address the district court’s dismissal of Zhang and Jha due to untimely service under Federal Rule of Civil Procedure 4(m) and has therefore waived any challenge to this issue. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (“[W]e will not consider any claims that were not actually argued in appellant’s opening brief.”); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1993) (issues not supported by argument on a pro se appellant’s opening brief are waived).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.