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United States District Court, W.D. Washington, at Tacoma.

Kyla YI, individually and on behalf of all others similarly situated, Plaintiff,
v.
SK BAKERIES, LLC, a Washington Limited Liability Company, CInnabon Franchisor SPV, LLC, a Delaware Limited Liability Company, and Does 1 through 10, inclusive, Defendants.

CASE NO. 18-5627 RJB
|
Signed 11/13/2018

Attorneys and Law Firms

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ORDER DENYING DEFENDANTS' MOTION TO DISMISS

ROBERT J. BRYAN, United States District Judge

***1** This matter comes before the Court on Defendant Cinnabon Franchisor SPV LLC's ("Cinnabon" or "franchisor") Motion to Dismiss Pursuant to Rule 12 (b) (6) (Dkt. 25) and Defendant SK Bakeries, LLC's ("SK" or "franchisee") Notice of Joinder in Cinnabon's Motion to Dismiss (Dkt. 26). The Court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

The Plaintiff, a former SK employee, brings this putative class action, alleging that the Defendants violated the Sherman Act, 15 U.S.C. § 1, *et. seq.*, and the Washington state law analog, The Unfair Business Practices Act, RCW 19.86, *et. seq.*, by entering into an "unlawful agreement, combination and conspiracy" in an unreasonable restraint of trade by agreeing "to restrict competition for [Plaintiff's] services through a non-solicitation ... and no-hire agreement." Dkt. 1.

The Defendants now move to dismiss the complaint, alleging that Plaintiff has failed to plead sufficient facts which would entitle her to the relief she seeks. Dkts. 25 and 26. For the reasons provided below, Defendants' motion to dismiss (Dkts. 25 and 26) should be denied.

I. BACKGROUND FACTS

The Complaint alleges that Defendant Cinnabon uses franchise agreements to sell franchise licenses to other companies which allow those other companies to own and operate Cinnabon bakeries. Dkt. 1, at 4. Cinnabon bakeries sell cinnamon rolls and pastries which are handmade by employees at the individual stores. *Id.*, at 7. The franchise agreements permit the use of Cinnabon trademarks, signage, and proprietary ingredients and products. There are around 24 Cinnabon bakeries in Washington state. *Id.*

The Complaint asserts that until 12 July 2018, Defendant Cinnabon's franchise agreement included a provision that the franchisee agreed that it would "not employ or seek to employ an employee of [Cinnabon], of another franchisee, or attempt to induce such employee to cease his/her employment without prior written consent of such employee's employer." Dkt. 1, at 4-5. (After 12 July 2018, Cinnabon no longer included this provision in its franchise agreements. The damages in this case arise from the time this provision was in place.) This no-hire and non-solicitation provision is alleged to be in Defendant Cinnabon's agreement with Defendant SK and in Cinnabon's agreements with the Doe Defendants. *Id.*

The Complaint maintains that all of the Defendants entered into these franchise agreements with the no-hire and non-solicitation provisions with "intention to keep their

employees' wage costs down, so that profits continued to rise or at least not be undercut by rising salaries across the industry." *Id.*, at 6. The Complaint alleges that "[n]o-hire and non-solicitation agreements create[d] downward pressure on fast food worker wages. No-hire and non-solicitation agreements restrict[ed] worker mobility, which prevent[ed] low-wage workers from seeking and obtaining higher pay." *Id.*, at 7. The Complaint maintains that "[t]his artificially suppresse[d] fast food worker wages," including those of the Plaintiff and other similarly situated employees and "restrict[ed] competition in the labor markets in which Plaintiff and the other members of the [putative] class sold their services." *Id.,* at 7-8.

***2** The Complaint asserts that active solicitation by rival franchisees "often include enticing offers that exceed an employee's wages, salary, and/or benefits, thereby incentivizing the employee to leave his or her employment in order to receive greater compensation, or alternatively, allowing the employee to negotiate increased compensation." Dkt. 1, at 8. The Complaint also maintains that Defendants' "efforts to maintain internal equity coupled with their non-solicitation agreements ensured that their conspiracy caused the compensation of all their employees to be suppressed." *Id.,* at 9.

The Complaint seeks certification of a nationwide class. Dkt. 1, at 9-12. It asserts that Defendants' agreements are per se violations of the Sherman Act and violate the Washington Unfair Business Practices Act. *Id.,* at 13-14. The Complaint seeks damages (including trebled damages), attorneys' fees, and costs. *Id.*, at 15-16.

II. DISCUSSION

A. STANDARD FOR MOTION TO DISMISS

Fed. R. Civ. P. 12 (b) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). "While a complaint attacked by a Rule 12 (b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007) (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555. The complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 547.

B. SHERMAN ACT

The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Section 1 outlaws "only unreasonable restraints." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018)(*internal quotation marks and citations omitted*).

"In order to prevail on a cause of action for violation of 15 U.S.C. § 1, a plaintiff must show (1) there was an agreement, conspiracy, or combination between two or more entities; (2) the agreement was an unreasonable restraint of trade under either a per se or rule of reason analysis; and (3) the restraint affected interstate commerce." *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 784 (9th Cir. 1996).

The Defendants argue that the Complaint should be dismissed because Plaintiff has failed to sufficiently plead facts in support of the first two elements: (1) agreement, conspiracy or combination between more than one entity and (2) that the agreement was an unreasonable restraint of trade. Each of the first two elements will be examined below. No further analysis of the third element is necessary for purposes of this motion.

1. Agreement, Conspiracy or Combination between Two or More Entities

In determining whether there is an agreement, conspiracy or combination between two or more entities capable of violating the Sherman Act, the key inquiry is whether the alleged "contract, combination ... or conspiracy is concerted action – that is whether it joins together separate decision makers." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010)(*internal quotation marks and citations omitted*). "[S]ubstance, not form, should determine whether an ... entity is capable of conspiring under § 1." *Id.* "The question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved seem like one firm or multiple firms

in any metaphysical sense." *Id.* "The relevant inquiry, therefore, is whether there is a contract, combination [ ], or conspiracy amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition." *Id.* (*internal quotation marks and citations omitted*).

***3** The allegations in the Complaint sufficiently allege an agreement, conspiracy or combination between two or more entities capable of violating the Sherman Act. The allegations indicate that the franchisor and franchisees' agreement joins separate decision makers in direct competition for employees such that "the agreement deprives the marketplace of independent centers of decisionmaking." *Am. Needle,* at 195. Even if Cinnabon and all its franchisees could be considered a single firm, and actions of a single firm are generally considered independent actions and do not violate of the Sherman Act, "[a]greements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself" - here competing for labor with Cinnabon and the other franchisees. *Am. Needle,* at 200. These "intrafirm agreements may simply be a formalistic shell for ongoing concerted action." *Am. Needle,* at 200. "Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged § 1 violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture." *Am. Needle,* at 195. At this stage in the litigation, there are sufficient facts that the agreement "joins together independent centers of decisionmaking" in competition for in the market for employees. *Am. Needle,* at 196.

The Defendants point to a Ninth Circuit case and one unpublished district court case which held that agreements between a franchisor and franchisee were not capable of conspiring in violation of the Sherman Act because they were a single entity that was not in competition with itself and was not pursuing separate economic interests. Dkt. 25 (*citing Williams v. I.B. Fischer Nevada,* 999 F.2d 445, 447-48 (1993); and *Danforth & Assoc., Inc. v. Coldwell Banker Real Estate, LLC,* 2011 WL 338798 (W.D. Wash. Feb. 3, 2011)). In *Williams,* the Ninth Circuit relied on the district court's findings and held that, based on the specific agreement at issue and the undisputed facts in that case, the franchisor and franchisee were a single entity that could not violate the Sherman Act. 999 F.2d, at 447. The Ninth Circuit cautioned in that case that, "[w]hether corporate entities are sufficiently independent requires an examination of the particular facts of each case." *Id.* The Plaintiff properly points out that discovery has not yet begun. It is premature to dismiss the Complaint here based on *Williams. Danforth,* with no analysis, cites *Williams* for the proposition that a franchisor and franchisee cannot conspire to violate the Sherman Act. That case is not binding and is of questionable application at this stage in the proceedings.

The Defendants "are capable of conspiring under § 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one." *Am. Needle,* at 196.

2. Unreasonable Restraint of Trade

"Restraints can be unreasonable in one of two ways. A small group of restraints are unreasonable per se because they always or almost always tend to restrict competition and decrease output." *Am. Express,* at 2283 (*internal quotation marks and citations omitted*).

"Restraints that are not unreasonable per se are judged under the 'rule of reason.' The rule of reason requires courts to conduct a fact-specific assessment of market power and market structure ... to assess the restraint's actual effect on competition." *Id.,* at 2284 (*internal quotation marks and citations omitted*). "The rule of reason is the presumptive or default standard, and it requires the antitrust plaintiff to demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive." *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011).

"A certain class of restraints, while not unambiguously in the per se category, may require no more than cursory examination to establish that their principal or only effect is anticompetitive." *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1134 (9th Cir. 2011) (*internal quotation marks and citations omitted*). A "truncated rule of reason or 'quick look' antitrust analysis may be appropriately used where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Id.* "Full rule of reason treatment is unnecessary where the anticompetitive effects are clear even in the absence of a detailed market analysis." *Id.* The object of the quick look analysis "is to see whether the experience of the market

has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *Harris,* at 1134. "[I]f an arrangement might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition, then a quick look form of analysis is inappropriate." *Harris,* at 1134.

***4** The Defendants maintain that the restraint at issue is a vertical restraint (between the franchisor and the franchisee) and the Ninth Circuit requires a full rule of reasons analysis. Dkt. 25 and 31 (*citing In re Musical Instruments & Equip. Antitrust Litigation,* 798 F.3d 1186 (9th Cir. 2015)). They maintain, in any event, the Plaintiff has failed to properly plead an unreasonable restraint under any of the standards. *Id.*

The Plaintiff argues that the restraint at issue is a horizontal one – it also an agreement between each of the franchisees, through Cinnabon, that they will not compete in the labor market with one another – they will not solicit or hire, without permission, one another's employees. Dkt. 29. The Plaintiff asserts that she has adequately alleged restraints of trade that are either per se violations of the Sherman Act or are sufficient under the "quick look" rule of reason analysis. *Id.* If the Court determines that the full "rule of reason" standard applies, the Plaintiff seeks leave to amend her complaint. Dkt. 29.

While a part of the restraint at issue in the agreements is a vertical one (the franchisee agrees not to solicit or hire a Cinnabon employee), a part of the restraint is also a horizontal one (the franchisee agrees not to solicit or hire another franchisee's employee without permission).

a. Per Se Violation of Sherman Act

"Some types of restraints ... have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se." *Harris,* at 1133. Accordingly, "[s]uch restraints are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* "To justify per se condemnation, a challenged practice must have manifestly anticompetitive effects and lack any redeeming virtue." *Id.* (*internal quotation marks and citation omitted*). *Id.* "Typically only horizontal restraints—restraints imposed by agreement between competitors—qualify as unreasonable per se." *Am. Express Co.*, at 2283–84 (*internal quotation marks and citations omitted*).

To the extent that Plaintiff attempts to assert a "per se" violation of the Sherman Act, she fails to allege sufficient facts in support of this theory. While it may be easily ascertained that the agreement not to compete for employees has "manifestly anticompetitive effects," it is not clear that the Defendants' agreements "lack any redeeming virtue." "[N]ot all horizontal agreements between competitors are per se invalid." *Paladin Associates, Inc. v. Montana Power Co.*, 328 F.3d 1145, 1155 (9th Cir. 2003). "When a defendant advances plausible arguments that a practice enhances overall efficiency and makes markets more competitive," as Defendants do here, "per se treatment is inappropriate, and the rule of reason applies." *Id.*

b. *Rule of Reason – Quick Look Version*

"To use the "quick look" approach, [courts] must first determine whether an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Harris,* at 1138. "Once it is established that the restraint is inherently suspect and the anticompetitive effects are easily ascertained, then the burden shifts to the [defendants] to produce evidence of procompetitive justification or effects and thus demonstrate the need for more extensive market inquiry." *Id.*

***5** The Plaintiff has plausibly alleged an arrangement that has an anticompetitive effect from the perspective of an observer "with even a rudimentary understanding of economics." *Harris,* at 1138. Plaintiff has alleged an arrangement between competing firms to not compete with each other in the market for employees, such that someone with a basic understanding of economics would understand would have an anticompetitive effect on the prevailing wage. This case is similar to *Deslandes v. McDonald's USA, LLC,* 2018 WL 3105955 (N.D. Ill. June 25, 2018). In *Deslandes*, the plaintiff asserted a Sherman Act claim based on a provision in the franchise agreement under which franchisees agreed not to hire employees of other McDonald's stores. The court there concluded that the franchisees' agreement not to hire other each other's employees was a horizontal agreement in the form of a market division. *Id.,* at 6. While the court noted that the per se analysis was inappropriate, it concluded that

the Plaintiff plausibly stated a claim for relief under the quick look analysis, noting:

> Even a person with a rudimentary understanding of economics would understand that if competitors agree not to hire each other's employees, wages for employees will stagnate ... [A]n employee working for a below-market wage would be extremely valuable to her employer.
>
> This case ... is not about competition for the sale of hamburgers to consumers. It is about competition for employees, and, in the market for employees, the McDonald's franchisees and McOpCos within a locale are direct, horizontal, competitors ... Here, [the Defendants] are alleged to have divided the market for employees by prohibiting restaurants from hiring each other's current or former (for the prior six months, anyway) employees. In the employment market, the various McDonald's stores are competing brands. Dividing the market does not promote intrabrand competition for employees, it stifles interbrand competition.

Id., at 7–8. While Defendants' justification for the provision may carry weight at other stages in the litigation, on a motion to dismiss under Rule 12 (b)(6), the Court is bound to examine the allegations in the Complaint. The Plaintiff has met her initial burden.

C. WASHINGTON'S UNFAIR BUSINESS PRACTICES ACT, RCW 19.86.030

"RCW 19.86.030 is essentially identical to section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. In construing RCW 19.86.030, courts are to be guided by federal decisions interpreting comparable federal provisions." *Murray Pub. Co., Inc. v. Malmquist*, 66 Wn. App. 318, 324 (1992).

As above, the Sherman Act claim should not be dismissed. On those same grounds, the claim under the state law analogue should also not be dismissed.

D. CONCLUSION

The Defendants' motion to dismiss the Plaintiff's Complaint (Dkts. 25 and 26) should be denied. At this stage in the litigation, the Plaintiff has alleged sufficient facts in support of her claims. The Plaintiff acknowledges that she has failed to allege sufficient facts to support a full rule of reason analysis. She does so at her own risk (and perhaps those she seeks to represent) if she is unable to prevail under a "quick look" rule of reason analysis. If Plaintiff wishes to reconsider, she may move to amend her complaint to plead a full rule of reason claim.

III. ORDER

Therefore, it is hereby **ORDERED** that:

- Defendant Cinnabon's Motion to Dismiss Pursuant to Rule 12 (b)(6) (Dkt. 25) and Defendant SK's joinder in Cinnabon's Motion to Dismiss (Dkt. 26) **ARE DENIED**.

All Citations

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