UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 19-3537-GW(JCx)	Date	June 24, 2019
Title	*FashionPass, Inc. v. Rent the Runway, Inc., et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Katie E. Thibodeaux	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
George C. Rudolph David E. Outwater	Eric S. Hochstadt David R. Singh

PROCEEDINGS: **DEFENDANT RENT THE RUNWAY, INC.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM [13];**

SCHEDULING CONFERENCE

Court and counsel confer. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. The Court would GRANT Defendant's Motion to Dismiss on all counts without prejudice. Counsel will confer and attempt to resolve discovery issues prior to the amendment. The Court continues the scheduling conference to July 1, 2019 at 8:30 a.m., with a joint report to be filed by noon on June 27, 2019.

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Initials of Preparer JG

FashionPass, Inc. v. Rent the Runway, Inc., Case No. 2:19-cv-03537-GW-(JCx)
Tentative Ruling on Defendant's Motion to Dismiss for Failure to State a Claim

I. Background

A. Factual Background

FashionPass, Inc. ("FashionPass" or "Plaintiff") sues Rent the Runway, Inc. ("RTR" or "Defendant") for: (1) violations of the Cartwright Act; (2) unfair competition; (3) intentional interference with contract; and (4) intentional interference with prospective economic advantage. *See generally* Notice of Removal, Ex. A, Complaint ("Complaint"), Docket No. 1-1. Plaintiff alleges the following relevant facts:

Plaintiff and Defendant are businesses that provide women's clothing and accessory rentals. *See id.* ¶ 8. Both are involved in extensive e-commerce, providing the majority of their clothing and accessory rentals through online internet sites. *See id.* "Fashion rental companies" ("FRCs"), such as Plaintiff and Defendant, allow customers to rent clothing and accessories for special events, work and casual, through subscriptions that permit the customer to rent designer and sought-after brand clothing, and to then return the items to the FRCs who professionally clean the items and make them available for others to rent. *See id.* ¶ 9. FRCs are generally distinguished amongst one another by the kinds of fashion offered, the brands they carry, the terms of rental, exchange and return of items, and cost. *See id.* ¶ 12. Plaintiff and Defendant are direct competitors with regard to the clothing and accessories that appeal to women in their 20s and 30s. *See id.* ¶ 15.

Plaintiff was founded in 2016 and conducts its business exclusively through its online site. *See id.* ¶¶ 13, 17. Defendant began its business in 2009 and conducts its business through its online site and through physical stores in five locations, two of which are located in California. *See id.* ¶¶ 14, 19. FRCs purchase merchandise at wholesale from clothing and accessory manufacturers three to four months ahead of each season, publicize the availability of merchandise on their websites, hold those items in inventory for rental, and supply the items to customers in accordance with the customers' selection of items from the website. *See id.* ¶¶ 16, 21. At the appropriate time prior to each season, FRCs review the season's offerings from manufacturers in person, with the assistance of the manufacturer's employees or representatives. *See id.* ¶ 22. The manufacturer's employees or representatives take notes, reflecting the FRCs tentative purchasing intentions, and

these notes are turned in a purchase order, which is provided to the FRCs for revision and final submission. *See id.*

Prior to 2019, Plaintiff had been regularly buying from Yumi Kim, since no later than August 2016; from The Jetset Diaries, since no later than September 2016; from ASTR the Label, since no later than October 2016; from LIKELY, since no later than May 2017; from Show Me Your Mumu and Saylor, since no later than June 2017; from Amanda Uprichard, since no later than August 2017; from Dress the Population, since no later than October 2017; from Flynn Skye, since no later than February 2018; from Sanctuary Clothing, since no later than April 2018; from Blank NYC and Finders Keepers, since no later than August 2018; and from Elliatt, since no later than September 2018. *See id.* ¶ 29. Beginning in October and November 2018, Plaintiff sought to purchase merchandise in Los Angeles, California, from each of the following businesses: The Jetset Diaries, Show Me Your Mumu, Saylor, Blank NYC, Flynn Skye, ASTR the Label, Dress the Population, Elliatt, Finders Keepers, Yumi Kim, AGOLDE, Citizens of Humanity, Keepsake, CIMEO, Fifth Label, Cleobella, Sanctuary Clothing, LIKELY, Amanda Uprichard, and Fame and Partners. *See id.* ¶ 30. In each instance, Plaintiff's request to purchase merchandise was rejected upon the stated ground that the manufacturer had granted Defendant an exclusive right to purchase merchandise in the Fashion Rental Business. *See id.*

Between August and October of 2018, FashionPass entered into contracts to purchase merchandise from Blank NYC, Elliatt, Flynn Skye, ASTR the Label, and Yumi Kim. *See id.* ¶¶ 40-44. Plaintiff is informed and believes that RTR had knowledge of, and intended to cause the manufacturers to breach and cancel each of their contracts by and through their insistence that each of the above listed labels refuse to sell merchandise to FashionPass. *See id.* ¶¶ 45-46. As a result of RTR's demands, Blank NYC, Elliatt, Flynn Skye, ASTR the Label, and Yumi Kim breached and cancelled each of their contracts with FashionPass. *See id.* ¶ 47. FashionPass suffered injury and damages and will continue to suffer injury and damages based upon the cancellation of said contracts. *See id.* ¶ 48.

Furthermore, FashionPass and each of The Jetset Diaries, Show Me Your Mumu, Saylor, Blank NYC, Flynn Skye, ASTR the Label, Dress the Population, Elliatt, Finders Keepers, Yumi Kim, Sanctuary Clothing, LIKELY, Amanda Uprichard, and Fame and Partners were in an economic relationship that would have resulted in a significant economic benefit to FashionPass. *See id.* ¶ 51. RTR had full knowledge of FashionPass's economic relationship with each of the

brands and intentionally interfered with those relationships. *See id.* ¶ 52-53. FashionPass has suffered and will continue to suffer economic damages as a result of RTR's interference. *See id.* ¶ 55.

B. Procedural Background

Now before the Court is Defendant's motion to dismiss. *See* Defendant Rent the Runway, Inc.'s Notice of Motion to Dismiss for Failure to State a Claim ("MTD"), Docket No. 13. Plaintiff filed an opposition. *See* Plaintiff FashionPass, Inc.'s Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss ("Pl. Opp."), Docket No. 20. Defendant filed a reply. *See* Defendant Rent the Runways, Inc.'s Reply in Support of its Motion to Dismiss for Failure to State a Claim ("Reply"), Docket No. 26.

II. Legal Standard

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A complaint may be dismissed for failure to state a claim for one of two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) ("Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.").

In deciding a 12(b)(6) motion, a court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007); *see also Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (indicating that a court may consider a document "on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion"). The court must construe the complaint in the light most favorable to the plaintiff; accept all allegations of material fact as true; and draw all reasonable inferences from well-pleaded factual allegations. *Gompper v. VISX, Inc.*, 298 F.3d 893, 896 (9th Cir. 2002); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001); *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court is not required to accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where a plaintiff facing a 12(b)(6) motion has pled "factual content that

allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," the motion should be denied. *Id.*; *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1191 (9th Cir. 2013). But if "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] . . . the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (citations omitted).

III. Analysis

A. Cartwright Act Claim

Defendant moves to dismiss Plaintiff's Cartwright Act claim on two grounds: (1) that FashionPass failed to allege harm to competition; and (2) that FashionPass failed to allege foreclosure of the relevant market. *See* MTD at 7-14. Defendant also asserts that FashionPass failed to allege that RTR devised a boycott, or any other *per se* antitrust violation and therefore, the complaint must be analyzed under the rule of reason. *See id.* at 14.

The Cartwright Act makes unlawful a "trust," defined as "a combination of capital, skill, or acts by two or more persons" for the purposes of restraining commerce and preventing market competition in the variety of ways listed in the statute. Cal. Bus. & Prof. Code § 16720. *See also Lowell v. Mother's Cake & Cookie Co.*, 79 Cal.App.3d 13, 22 (1978) (citing *Bondi v. Jewels by Edwar, Ltd.*, 267 Cal.App.2d 672, 678 (1968)). The Cartwright Act generally codifies the common law prohibition against the restraint of trade. *Kolling v. Dow Jones & Co.*, 137 Cal.App.3d 709, 717 (1982). The Cartwright Act is patterned after the Sherman Act and consequently, "federal cases interpreting the Sherman Act are applicable problems arising under the Cartwright Act." *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 908 F.2d 477, 482 n.3 (9th Cir. 1990) (citing *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 200 Cal.App.3d 687, 694 (1988)).

Plaintiffs allege that RTR pressured manufacturers to grant RTR "an exclusive right to buy" and to refuse to sell merchandise to FashionPass. *See* Complaint ¶ 25. As an initial matter, the Court would agree with Defendant that Plaintiff's allegations do not rise to the level of a boycott, and therefore Plaintiff has not alleged a *per se* violation of the Cartwright Act. California courts have found that "vertical restraints of trade, such as exclusive dealing arrangements, can violate the Cartwright Act, though they are not illegal per se." *Pecover v. Electronics Arts Inc.*, 633 F.Supp.2d 976, 983 (N.D. Cal. 2009) (citing *Fisherman's Wharf Bay Cruise Corp. v. Superior Court*, 114 Cal.App.4th 309, 334–35 (2004). "The law conclusively presumes manifestly

anticompetitive restraints of trade to be unreasonable and unlawful, and evaluates other restraints under the rule of reason." *Id*. Vertical restraints, including exclusive dealing arrangements, are proscribed when it is probable that performance of the arrangements will foreclose competition in a substantial share of the affected line of commerce. *Id.*

The rule of reason analysis requires a factual analysis of the line of commerce, the market area, and the affected share of the relevant market. *See Id.* Typically, such a factual inquiry is improper at the motion to dismiss stage. *See Pecover*, 633 F.Supp.2d at 984. However, here, Defendant argues that Plaintiff has failed to allege *any* harm to competition. *See* MTD at 7. The Court would agree. Although Plaintiff alleges economic harm to itself, the Court finds no allegations of harm to the *market*, or competition generally, in the complaint. Therefore, the Court would find that Plaintiff has failed to state a claim for antitrust injury under the Cartwright Act. *See NorthBay HealthCare Group, Inc. v. Kaiser Foundation Health Plan, Inc.*, 305 F.Supp.3d 1065, 1073 (N.D. Cal. 2018) (finding that plaintiff's antitrust claims failed where plaintiff did "not allege any antitrust injury or harm to competition generally. It alleges injury only to itself.") (internal quotations and citations omitted).

The Court would not, however, find that Plaintiff has failed to "plausibly define the relevant market" as alleged by Defendant in the MTD. *See* MTD at 9. Plaintiff defines the relevant market as the "fashion rental business" in which companies such as FashionPass and RTR "allow customers to rent clothing and accessories for special events, work, and casual, through subscriptions that allow the customer to rent designer and sought-after brand clothing, and to then return the items to the Fashion Rental Company, which professionally cleans the items and makes them available for others to rent." *See* Complaint ¶ 9. Defendant argues that this market definition is "facially unsustainable." Defendants seem to focus on the assertion that traditional retail sellers should be included in the market definition, because they are "reasonably interchangeable." *See* MTD at 10 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)).

At this stage of the proceedings, without any evidence before the Court, it is impossible for the Court to determine the appropriate market definition. All Plaintiff must allege to state a valid claim is that a relevant market exists and that defendant has market power in said area. *See Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1044 (9th Cir. 2008). "There is no requirement that these elements be pled with specificity." *See id.* at 1045. Plaintiff has alleged a *plausible* market definition, and has alleged that RTR is "the dominant player" in that market. *See*

Complaint at 1. Therefore, failure to plausibly define the market is not a basis upon which the Court would dismiss the claim.

However, given that Plaintiff has failed to sufficiently allege harm to competition, the Court would dismiss Plaintiff's first claim for relief. To the extent Plaintiff can amend the complaint to allege harm to the competition in general, the Court would allow Plaintiff leave to amend its Cartwright Act claim.

B. Unfair Competition Claim

Plaintiff alleges a violation of California's Unfair Competition Law ("UCL"), Cal Bus. & Prof. Code § 17200. Defendant argues that because Plaintiff does not sufficiently allege a claim for a violation of antitrust law, it cannot properly allege a claim under the UCL. *See* MTD at 15. Plaintiff admits in its Opp. that its UCL claim is derivative of its claim under the Cartwright Act. *See* Opp. at 8. Given that the Court granted Defendant's motion to dismiss Plaintiff's first claim for relief, its second claim for relief also fails. To the extent Plaintiff is able to amend its complaint to plead a Cartwright Act claim, it may also reallege a claim under the UCL.

C. Intentional Interference with Contract Claim

Plaintiff asserts its claim for intentional interference with contract, based on five alleged contracts FashionPass entered into with five different clothing manufacturers, prior to the alleged anticompetitive conduct of RTR. *See* Complaint ¶¶ 40-47. Defendant argues that Plaintiff fails to "allege existing contractual relationships" with the manufacturers named, and therefore RTR "could not possibly have known of any order requests." *See* MTD at 17.

To state a claim for intentional interference with contractual relations, Plaintiff must allege: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *United National Maintenance, Inc. v. San Diego Convention Center, Inc.*, 766 F.3d 1002, 1006 (9th Cir. 2014) (quoting *Pacific Gas &Elec. Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1126 (1990)).

Defendant claims that Plaintiff's allegations that it submitted purchase orders which were accepted is insufficient, as Plaintiff does not allege "facts to support that the order requests were actually accepted." At this stage, Plaintiff's allegations that it submitted purchase orders, (with specific dates and order numbers) which were accepted by the specific named manufacturers is

sufficient. *See* Complaint ¶¶ 40-44. If Defendant wishes to dispute this fact, it may do so at later stages of the proceeding, but it may not depend on factual disputes to support its MTD.

However, Defendant also claims that aside from a single conclusory allegation, Plaintiff fails to allege "any facts establishing that RTR knew of any contract between FashionPass and the Purchase Order Manufacturers." *See* MTD at 20. The Court would tentatively agree with Defendant. Plaintiff's only allegation as to Defendant's knowledge of the contracts states: "FashionPass is informed and believes, and upon such information and belief alleges, that RTR and Does 1 through 100, and each of them, had actual knowledge of each of the contracts." *See* Complaint ¶ 45. Although Plaintiff need not plead facts with specificity at the motion to dismiss stage, mere conclusory allegations will not suffice. *See Swipe & Bite, Inc. v. Chow*, 147 F.Supp. 3d 924, 935 (N.D. Cal. 2015) (finding dismissal appropriate where Plaintiff merely alleged knowledge of agreements without any facts showing knowledge). Therefore, the Court would dismiss Plaintiff's claim for intentional interference with contract. The Court would grant Plaintiff leave to amend to the extent it can allege facts showing RTR's knowledge of the contracts at issue.

D. Intentional Interference with Prospective Economic Advantage

Plaintiff's claim for intentional interference with prospective economic advantage is deficient for similar reasons as its first three claims. To state a claim for intentional interference with economic advantage the Plaintiff must plead: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (4) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *See CRST Van Expedited, Inc. v. Werner Enterprises, Inc.*, 479 F.3d 1099, 1108 (9th Cir. 2007). Additionally, interference with prospective economic advantage "requires a plaintiff to allege an act that is wrongful independent of the interference itself." *Id.*

Plaintiff has not sufficiently pled its antitrust claim and has not alleged a separate basis upon which Defendant's actions would be legally wrongful. *See* Complaint ¶¶ 50-56. Therefore, Plaintiff cannot allege that the act constituting interference was independently wrongful.

However, unlike Plaintiff's claim for intentional interference with contract, the intentional interference with prospective economic advantage does not require knowledge of any specific contract that would be adversely impacted by Defendant's conduct. Rather, it only necessitates

that Defendant be aware of an existing business relationship between the Plaintiff and the third-party vendor. As to this element, the Court would find that Plaintiff has sufficiently plead knowledge on the part of RTR. In paragraph 25 of the complaint, Plaintiff avers that "in or around October and November 2018, and continuing thereafter to the present date, RTR . . . communicated RTR's demand to various manufacturers that unless the manufacturers grant 'an exclusive right to buy' to RTR, and refuse to sell merchandise to FashionPass, RTR would not purchase any merchandise from those manufacturers." *See* Complaint ¶ 25.

The Court would grant Plaintiff leave to amend to the extent Plaintiff is able to successfully amend its Cartwright Act claims to establish a legally wrongful act, as well as allege facts showing Defendant's knowledge of the alleged contracts.

IV. Conclusion

The Court would **GRANT** Defendant's MTD on all counts without prejudice.