UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LAS VEGAS SKYDIVING ADVENTURES LLC,

Plaintiff

v.

GROUPON, INC.,

Defendant

Case No.: 2:18-cv-02342-APG-VCF

Order (1) Granting Defendant's Motion to Dismiss in Part and (2) Overruling Plaintiff's Objection

[ECF Nos. 9, 28]

Las Vegas Skydiving Adventures LLC (LV Skydiving) sued Groupon, Inc. (Groupon), alleging antitrust violations, trademark infringement, and Nevada common law claims for misappropriation of commercial properties and unjust enrichment. Groupon moves to dismiss, arguing that LV Skydiving lacks antitrust standing, Groupon and LV Skydiving are not competitors, and LV Skydiving has not demonstrated that Groupon engages in predatory pricing. It also argues that LV Skydiving's infringement claim fails because Groupon does not use the mark "FYROSITY" in its metadata and a reasonably prudent consumer is not likely to be confused by who the service provider is when searching on its website for skydiving services in southern Nevada. Finally, Groupon argues that the state law claims should be dismissed as insufficiently pleaded and repetitive of the trademark infringement claim.

LV Skydiving responds that it has sufficiently demonstrated that Groupon has gained control of the southern Nevada tandem skydiving services market and that Groupon affiliates' low prices for skydiving services has resulted in harm to LV Skydiving's profits. It argues that Groupon's predatory and exclusionary conduct includes the misuse of its registered mark. LV Skydiving further contends that it has properly alleged that Groupon uses the mark

"FYROSITY" to mislead potential customers to Groupon affiliates and that the state law claims are sufficiently pleaded.

After Magistrate Judge Ferenbach granted limited discovery pending resolution of the motion to dismiss, LV Skydiving filed a motion for sanctions. Magistrate Judge Ferenbach denied that motion. LV Skydiving objects to that decision. I grant Groupon's motion to dismiss in part and I overrule LV Skydiving's objection to Magistrate Judge Ferenbach's order.

I. BACKGROUND[1]

LV Skydiving "offers services to individuals who wish to have the experience of jumping out of an airplane while tethered to an experienced parachutist." ECF No. 1 at 3. It offers such services in southern Nevada using the registered mark "FYROSITY." *Id.* Groupon provides "discount certificates that Groupon's customers may use with businesses that maintain a relationship with Groupon to help enable Groupon to provide" skydiving services. *Id.* LV Skydiving alleges that Groupon controls the southern Nevada skydiving services market by aggressively recruiting businesses to become affiliates and then setting skydiving services at "deeply discounted" prices, which harms LV Skydiving's business. *Id.* at 3-4.

LV Skydiving also alleges that Groupon uses LV Skydiving's name and registered mark in its website metadata without permission and engages in such infringement to divert customers looking for skydiving services to Groupon's site. *Id.* at 4. It alleges that consumers using LV Skydiving's mark as a search term in a general internet search are diverted to Groupon. *Id.* And it alleges that Groupon's website is constructed in a way so that consumers can search specifically for LV Skydiving's mark and be misled into finding information on Groupon affiliates. *Id.* For example, LV Skydiving points to a Facebook post by Groupon that provides a

[1] These facts are a summary of LV Skydiving's allegations in its complaint. *See* ECF No. 1.

link to search results on Groupon's website for "skydive Fyrosity." *Id.* at 5. LV Skydiving alleges that the link to the search results is intended to obfuscate the fact that the advertised services are by Groupon affiliates and not LV Skydiving. *Id.* It also alleges that as a result of Groupon's behavior, it has lost potential clients and suffered economic harm. *Id.* at 5-6.

LV Skydiving asserts five causes of action: 1) monopolization under 15 U.S.C. § 2 (Pricing); 2) monopolization under 15 U.S.C. § 2 (intellectual property misuse); 3) registered trademark infringement under 15 U.S.C. § 1114(a)(1); 4) misappropriation of commercial properties under Nevada common law; and 5) unjust enrichment under Nevada common law. *Id.* at 6-9.

II. ANALYSIS

In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). However, I do not assume the truth of legal conclusions merely because they are cast in the form of factual allegations. *See Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). A plaintiff must make sufficient factual allegations to establish a plausible entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Such allegations must amount to "more than labels and conclusions, [or] a formulaic recitation of the elements of a cause of action." *Id.* at 555.

A. Monopolization Under 15 U.S.C. § 2

Section 2 of the Sherman Act prohibits persons from monopolizing, or attempting to monopolize, "any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. "There are three essential elements to a successful claim of Section 2 monopolization: (a) the possession of monopoly power in the relevant market; (b) the willful

acquisition or maintenance of that power; and (c) causal antitrust injury." *Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124, 1131 (9th Cir. 2015) (citation omitted).

Only those who meet the requirements for antitrust standing may pursue an antitrust claim. *Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 371 (9th Cir. 2003). Antitrust standing requires the plaintiff to adequately allege antitrust injury. *Id.* Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). "A plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer antitrust injury." *Vinci v. Waste Mgmt., Inc.*, 80 F.3d 1372, 1376 (9th Cir. 1996) (quotation and citation omitted). It is not enough that two firms compete; rather they must compete in the market in which trade was restrained. *Exhibitors' Serv., Inc. v. Am. Multi-Cinema, Inc.*, 788 F.2d 574, 579 (9th Cir. 1986).

In analyzing whether the plaintiff and defendant participate in the same market, I look to the "reasonable interchangeability of use or the cross-elasticity of demand between the services provided by [Groupon] and by [LV Skydiving]." *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1471 (9th Cir. 1985); *see also Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1271 (9th Cir. 1975) ("[W]here there is a high degree of substitutability in the use of two commodities, it may be said that the cross-elasticity of demand between them is relatively high, and therefore the two should be considered in the same market."). In *Bhan*, the Ninth Circuit found that nurse anesthetists and M.D. anesthesiologists competed in the same market because the services provided were reasonably interchangeable in that nurse anesthetists "still duplicate

many of the services provided by an M.D. anesthesiologist" despite requiring the supervision of a physician to conduct such services. 772 F.2d at 1471.

LV Skydiving states that it offers tandem skydiving services to customers in southern Nevada. It alleges that Groupon provides discount certificates to customers to use at businesses affiliated with Groupon that provide skydiving services in southern Nevada. The relevant market consists of "businesses that sell[] the Relevant Services to residents of and visitors to southern Nevada who wish to have the experience of jumping out of an airplane while tethered to an experienced parachutist." *See* ECF No. 1 at 3.

However, LV Skydiving has not plausibly alleged that Groupon provides services that are interchangeable with other tandem skydiving service providers as required to be part of the same market. This is unlike the situation in *Bhan* where the services provided were interchangeable. Providing discount certificates to customers seeking tandem skydiving services is different (and a separate market) from providing tandem skydiving services. Tandem skydiving businesses in southern Nevada that allow Groupon to advertise their discounts compete in the same market as LV Skydiving. Because LV Skydiving and Groupon are not competitors in the allegedly restrained market, Groupon has not caused LV Skydiving antitrust injury under the Sherman Act. Consequently, I dismiss LV Skydiving's first and second causes of action with prejudice.

B. Registered Mark Infringement Under 15 U.S.C. § 1114(a)(1)

"To prevail on a claim of trademark infringement under the Lanham Act, 15 U.S.C. § 1114, a party must prove: (1) that it has a protectible ownership interest in the mark; and (2) that the defendant's use of the mark is likely to cause consumer confusion." *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011) (quotation and citation omitted). This may include an initial interest confusion theory of

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