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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FEDERICO VILCHIZ VASQUEZ, JESUS
VILCHEZ VASQUEZ, FRANCISCO DOMINGO
CLAUDIO, for themselves and all others similarly
situated,

Plaintiffs,

v.

USM, INC. dba USM SERVICES, INC., a
Pennsylvania Corporation; Ross Stores, Inc. dba
Ross Dress for Less, a Delaware Corporation; Ross
Stores, Inc. dba dd's DISCOUNTS, a Delaware
Corporation; and DOES 1 through 20, inclusive,

Defendants.

No. C 13-05449 WHA

**ORDER DENYING
DEFENDANT ROSS
STORES, INC.'S
MOTION TO DISMISS**

INTRODUCTION

In this putative state-law labor class action, defendant retailer moves to dismiss the complaint for failure to state a claim. To the extent stated below, defendant's motion is **DENIED**.

STATEMENT

Ross Stores, Inc. entered into a contract with USM, Inc. for janitorial services. USM, in turn, subcontracted with local businesses for these services. USM required its subcontractors to assume all costs associated with overhead, equipment, workers' compensation and liability insurance (Compl. ¶¶ 49–50). The subcontracting businesses are run mainly by immigrants and low-wage workers. They rarely operate for more than a year or two and hire predominantly

1 **1. CALIFORNIA LABOR CODE SECTION 2810.**

2 Ross argues that the complaint fails to state a claim under Section 2810(a) because it
3 fails to allege facts regarding the terms of the contractual relationship between USM and Ross
4 causing there to be insufficient funds. In particular, Ross points to the complaint's failure to
5 allege the number of contracts, dates they were entered into, duration, amount of money to be
6 paid, etc. Ross further argues that there are no factual allegations in the complaint that
7 demonstrate Ross' contract with USM was insufficient. Finally, defendant alleges the complaint
8 is based on conclusory allegations and generalities that do nothing more than establish that a
9 contractual relationship existed between Ross and USM.

10 Section 2810(a) makes it unlawful to enter a janitorial services contract where the party
11 "knows or should know that the contract or agreement does not include funds sufficient to allow
12 the contractor to comply with all applicable local, state, and federal laws or regulations
13 governing the labor or services to be provided." The term "knows" is defined in the statute as
14 including knowledge "arising from familiarity with the normal facts and circumstances of the
15 business activity engaged in." The phrase "should know" includes the knowledge "of any
16 additional facts or information that would make a reasonably prudent person undertake to
17 inquire" whether the funds are sufficient. Cal. Lab. Code 2810(i)(1), (2).

18 Although our court of appeals has not construed Section 2810(a) (codified in 2004),
19 *Castillo v. Toll Bros., Inc.*, 197 Cal. App. 4th 1172 (2011), provides persuasive guidance for
20 analyzing complex contracts under Section 2810(a). A complex contract is one in which
21 insufficiency cannot be confirmed at the time of contracting. When complex contracts are
22 involved, as here, Section 2810(a) requires two inquiries. *First*, the contracting party's
23 knowledge at the time the contract was executed. That is, if the contracting party knew or
24 should have known the contract price was reasonably likely to be insufficient at the time the
25 contract was executed. The contracting party is charged with "knowledge typical in the industry,
26 as well as knowledge of any 'additional facts or information' reasonably suggesting
27 insufficiency." *Second*, the contract price is actually insufficient in practice. This second
28 question, of course, is retrospective, whereas the first question is prospective. *Id.* at 1196–1197.

1 Ross cannot insulate itself against alleged labor code violations by its subcontractors
2 if they “know or should know” the contract with USM is insufficient for USM to comply with
3 applicable laws. Given Ross’ “familiarity with the normal facts and circumstances,” as well as
4 “additional facts or information” suggesting insufficiency, Ross knew or should have known
5 its contracts with USM were under-funded on the basis of (1) work orders; (2) schedules; and
6 (3) subcontractor agreements.

7 Here, the complaint alleges that Ross knew or should have known the funds provided
8 to USM under the agreements were not sufficient to allow USM to comply with applicable
9 laws and regulations governing janitorial services (Compl. ¶ 6). USM, in turn, entered into
10 thinly-funded agreements with subcontractors that did not allow the subcontractors to comply
11 with applicable laws, or so the complaint alleges (Compl. ¶ 29). For example, USM and
12 subcontractor Cleanmex entered into an agreement wherein Cleanmex was to “assign two people
13 to each store for (1) three hours of routine cleaning seven days a week and (2) approximately
14 12.5 hours of overnight floor buffering once a month.” These schedules required approximately
15 205 hours of labor per store per month and specified a monthly payment of \$1,200.
16 This translated to an hourly wage of \$5.85 — a wage below the minimum wage at the time
17 (Compl. ¶¶ 58, 59, Exh. D). USM’s agreements with subcontractors required the subcontractors
18 to assume all costs associated with overhead, equipment, workers’ compensation, and liability
19 insurance (Compl. ¶¶ 49, 50, Exhs. A at 1, B at 1, C at 3). USM was not obligated to pay the
20 subcontractor if USM was not paid by Ross (Compl. Exhs. A at 1, B at 1, C at 3).

21 The complaint alleges that insufficiently-funded contracts between Ross and USM and
22 between USM and janitorial subcontractors resulted in a routine failure by the subcontractors
23 to pay plaintiffs and other similarly-situated janitorial employees the minimum wage, their
24 contracted rate, and/or overtime premiums (Compl. ¶ 10). As evidence of minimum wage
25 violations, plaintiffs attach schedules that USM provided to Cleanmex. These schedules clearly
26 show a wage gap since they require approximately 205 hours of labor but only allocate a
27 monthly payment of \$1,200 (Compl. Exh. D). Furthermore, the \$1,200 payment had to cover not
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1 just wages, but also insurance, equipment and supplies, payroll, overhead and other costs
2 (Compl. ¶ 60).

3 The pleading alleges (1) that USM and Ross design work orders which articulated the
4 specific tasks to be completed and how often they had to be done and (2) that through the
5 creation and review of these work orders and its daily supervision of the workers, Ross knew
6 or should have known how many hours of labor and what equipment were necessary to
7 enable fulfillment of the services it requested (Compl. ¶¶ 66, 70). As evidence of Ross' daily
8 supervision, plaintiffs attach janitorial sign-off sheets that Ross' store managers signed off on
9 each day (Compl. Exh. E at 1). In addition, plaintiffs include as Exhibits A through C, USM
10 subcontractor agreements that contained the following services provision: "we will provide you
11 with a work order that must be signed by our customer following completion of Service . . .
12 You must perform all the Services per the specifications and to our customer's satisfaction . . .
13 on the days and during the hours specified by our customer(s)" (Compl. Exhs. A at 1; B at 1;
14 C at 3).

15 The pleading alleges that, given the compensation Ross was providing to USM, Ross
16 knew or should have known that USM entered into agreements with subcontractors that did not
17 comply with applicable labor laws. Ross would have knowledge regarding insufficiency of the
18 master contract on the basis of its role in outlining and monitoring the janitorial services in its
19 stores (Compl. ¶¶ 111, 4).

20 The complaint's factual allegations are sufficient because they are not the sort
21 of conclusory or formulaic recitations that fall short of the *Twombly* pleading standard.
22 Specifically, the complaint's factual allegations put Ross on notice that plaintiffs allege Ross'
23 contract with USM did not include sufficient funds. Accordingly, defendant's motion to dismiss
24 for failure to state a claim under Section 2810 is **DENIED**.

25 **2. UNFAIR COMPETITION LAW AND**
26 **PRIVATE ATTORNEYS GENERAL ACT OF 2004.**

27 Plaintiffs' UCL (Cal. Bus. & Prof. Code 17200, *et seq.*) and PAGA claims depend on
28 alleged Section 2810 violations (Opp. 11, n. 4). Ross argues that plaintiffs' failure to state a
claim under Section 2810 means plaintiffs' derivative UCL and PAGA claims must fail.

1 This order does not dismiss plaintiffs' Section 2810 claim so the derivative claims do not fail
2 at this stage.

3 **A. Unfair Competition Law.**

4 Defendant argues that, to the extent the UCL claim is predicated on the "fraudulent"
5 prong, the allegations fail to conform with Rule 9(b)'s heightened pleading requirements.
6 "Rule 9(b) demands that the circumstances constituting the alleged fraud be specific enough to
7 give defendants notice of the particular misconduct . . . so that they can defend against the charge
8 and not just deny that they have done anything wrong." *Kearns v. Ford Motor Co.*, 567 F.3d
9 1120, 1124 (9th Cir. 2009). Pleading with particularity includes the "who, what, when, where,
10 and how of the misconduct charged." *Ibid.*

11 The complaint alleges that Ross engaged in unlawful, unfair and/or fraudulent business
12 acts and practices by entering into contracts for janitorial services with USM that were not
13 sufficiently funded for the cleaning of Ross' California stores (Compl. ¶ 115). "A pleading is
14 sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that a defendant
15 can prepare an adequate answer from the allegations." *Moore v. Kayport Package Express, Inc.*,
16 885 F.2d 531, 540 (9th Cir. 1989). Pleading information and belief alone may be insufficient;
17 however, to the extent the UCL claim is predicated on the "fraudulent" prong, the factual
18 allegations in the complaint and the attached exhibits are specific enough to give Ross notice of
19 the particular alleged misconduct they must defend. For example, Ross has notice of the
20 subcontract dates, terms, party names, and the monthly payment amount for the janitorial
21 services in Ross' California stores. Accordingly, defendant's motion to dismiss plaintiffs' UCL
22 claim is **DENIED**.

23 **B. Private Attorneys General Act of 2004.**

24 Defendant argues that plaintiffs fail to state a PAGA claim because Ross is not their
25 "employer." California Labor Code Section 2699.5, however, specifically identifies
26 Section 2810 as one of the predicate labor code provisions upon which a PAGA claim may be
27 brought. Accordingly, defendant's motion to dismiss plaintiffs' PAGA claim is **DENIED**.

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1 Plaintiffs argue that if Ross' motion is granted, leave to amend be granted but only after
2 Ross is ordered to produce "all of the Master Service Agreements" (Opp. 14). Plaintiffs based
3 this request on a theory that they stand in the shoes of the Labor Commissioner and, under
4 Section 2810(f), are thus entitled to discovery. Section 2810(f) states that upon request of the
5 Labor Commissioner "any person or entity who enters into the contract . . . shall provide to the
6 Labor Commissioner a copy of the provisions of the contract." Plaintiffs further indicate that
7 they served "discovery on Defendants" in November 2013 (Opp. 14, n. 6). This order will not
8 compel Ross to produce the master agreements at this time; however, Ross is advised to comply
9 with its discovery obligations, including producing the master agreements if requested. This
10 order is without prejudice to any discovery letters or motion to compel plaintiffs may bring when
11 appropriate.

12 CONCLUSION

13 For the reasons stated above, the motion to dismiss the Section 2810, UCL, and PAGA
14 claims is **DENIED**. The answer is due in seven days.

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16 **IT IS SO ORDERED.**

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18 Dated: January 21, 2014.

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20 WILLIAM ALSUP
21 UNITED STATES DISTRICT JUDGE
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