United States District Court
Southern District of Texas
ENTERED
August 16, 2016
David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VIVA CINEMAS THEATERS AND ENTERTAINMENT LLC; dba VIVA CINEMA,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 4:15-CV-1015
AMC ENTERTAINMENT HOLDINGS, INC., *et al*,	§	
Defendants.	§	

ORDER

Before the Court is Defendants AMC Entertainment Holdings, Inc. *et al*'s Motion to Dismiss First Amended Complaint (Doc. #23), Plaintiff Viva Cinemas's Response to Defendants' Motion to Dismiss (Doc. #27), and Defendants' Reply in Support of Motion to Dismiss First Amended Complaint (Doc. #29). After considering counsels' arguments and the applicable legal authority, the Court denies Defendants' Motion to Dismiss First Amended Complaint.

I. Background

In 2013, Plaintiff Viva Cinemas Theaters and Entertainment LLC ("Viva") opened an eight screen movie/dinner theater with a Latin flair. Doc. #31 at 6[1]. The cinema was located at PlazAmericas Mall, 535 Sharpstown Center, Houston, Texas 77036. Viva sought to establish a presence for the Spanish speaking market in Houston, Texas that it felt was not being served. Doc. #31 at 8. In order to do this, Viva began running what it calls First Run Spanish Language Films. Doc. #31 at 8. It is the First Run Spanish Language Film market/submarket that is the

[1] CM/ECF page numbers used throughout when referring to filings on the record.

focus of AMC Entertainment Holding, Inc.'s ("AMC") Motion to Dismiss. *See* Doc. #23.

First Run Spanish Language Films were movies that were subtitled in Spanish, dubbed over in Spanish, or native Spanish language films. Doc. #31 at 5. Viva alleges that there was no other theater in the Houston area catering to movie-goers who spoke only Spanish, or at least those movie-goers who preferred Spanish. Doc. #31 at 1.

Viva contends that upon its opening, Defendant AMC threatened several Hollywood studios including Warner Brothers, Fox, Paramount, Disney, Universal, Sony, and Lions Gate by telling these studios that should they allow Viva to show any film within the first three weeks of its opening–the most financially impactful three weeks of a newly released movie–AMC would not show that movie. Doc. #31 at 9. Only once did the studios test AMC on its threat, during the release of Disney's "Planes." Doc. #31 at 10. True to its word, AMC did not show the movie at its AMC Dunvale location after Disney allowed Viva to show the movie. Doc. #31 at 10.

Viva contends AMC successfully employed its market power to block Viva Cinema, over a six-month period, from licensing any First Run Spanish Language film during any given film's initial three week run, with the exception of "Planes." Doc. #1 at 2. During Viva's existence, it is alleged that AMC infrequently showed some first run films in Spanish or with Spanish subtitles. Doc. #1 at 2. Viva believes this was actionable, anti-competitive behavior.

As a result, Viva filed this suit in 2015. *Id.* AMC has moved to dismiss Viva's complaint as being legally insufficient. Doc. #23. Specifically, AMC argues that the sub-market of First Run Spanish Language Films is improper because its fails to take into account reasonably interchangeable films and because Viva concedes that a large portion of their consumer base was not Spanish speaking only. *See* Doc. #23. AMC argues that this concession precludes "substantial overlap in targeted customers" for the relevant market designation. *Id.*

II. Motion to Dismiss

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' . . . it demands more than . . . 'labels and conclusions.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "'[A] formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, "[t]he 'court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breeches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). To survive the motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "Conversely, 'when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court [and such an action should be dismissed].'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 558).

III. Sherman Act

Section 1 of the Sherman Act provides "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1 (1997). In order to demonstrate a

claim of unreasonable restraint of trade under Section 1,Viva must establish that: (1) AMC and the studios engaged in a conspiracy, (2) the conspiracy had the effect of restraining trade, and (3) trade was restrained in the relevant market. *Spectators' Comm. Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 220 (5th Cir. 2001); *Johnson v. Hosp. Corp. of Am.*, 95 F.3d 383, 392 (5th Cir. 1996).

In order to allege a complaint under the Sherman Act, the "relevant market" must be defined. The relevant market is broken both into two parts, the product market and the geographic market. *See Apani Sw., Inc. v. Coca-Cola Enter., Inc.*, 300 F.3d 620, 626-27 (5th Cir. 2002).

A. Product Market

In ascertaining the relvant product market, courts consider the extent to which the seller's product is "interchangeable in use" and the degree of "cross-elasticity of demand between the product itself and substitutes for it." *C.E. Servs., Inc. v. Control Data Corp.*, 759 F.2d 1241, 1245 (5th Cir. 1985) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Within the product market though, there may exist submarkets which, in themselves, represent product markets for antitrust purposes. *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 980 (5th Cir. 1977) (citing *United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586, 593-95 (1957)). "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Apani.*, 300 F.3d at 626 (citing *Heatransfer Corp.*, 553 F.2d at 980).

B. Geographic Market

For purposes of the geographic market inquiry, the focus is on the area of "effective competition." *Jim Walter Corp. v. F.T.C.*, 625 F.2d 676, 682 (5th Cir. 1980). The area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates and to which buyers can practicably turn for supplies. *Tampa Elec. Co.v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The geographic market must "'correspond to the commercial realities' of the industry and be 'economically significant.'" *Brown Shoe Co.*, 370 U.S. at 336-37. "Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it maybe as small as a single metropolitan area." *Id.* (citation omitted).

"When determining whether a geographic market corresponds to commercial realities, courts have taken into account practical considerations such as the size, cumbersomeness, and other characteristics of the relevant product. In addition, determinants that affect the behavior of market participants may also be considered such as regulatory constraints impending the free flow of competing goods into the area, perishability of products and transportation barriers." *Apani*, 300 F.3d at 626.

However, in order for an area to qualify as being economically significant, it must contain an "appreciable segment of the product market." Earl W. Kintner, *Federal Antritrust Law: Volume IV The Clayton Act Section 3, Section 7; Mergers And Markets § 38.2* (1984). Whether a segment is 'appreciable' depends upon whether it includes either an appreciable proportion of the product market as a whole, or a proportion of the product market which is "largely segregated from, independent of, or not affected by competition elsewhere." *Id.* Therefore, it is not required that an area encompass a large percentage of all business activity in

the relevant product market to be considered economically significant. "An area containing only a small percentage of business activity may qualify as being economically significant if the relevant competition in that specific area is insulated from equivalent competition elsewhere." *Apani*, 370 F.3d at 627.

IV. Analysis

In its Motion to Dismiss AMC challenges whether Viva has established a sufficient relevant market. As seen above, a relevant market is defined in two parts: (1) a product market; and (2) a geographic market.

A. Product Market

Viva has put forward two proposed product markets in its pleadings: (i) First Run Films; and (ii) First Run Spanish Language Films. AMC has challenged whether First Run Spanish Language Films is an appropriate submarket. AMC argues that Viva has not alleged sufficient factual allegations to establish that First Run Spanish Language Films are a proper submarket.

AMC argues that because there is a substantial overlap of persons who can see both Spanish language films as well as films in English, First Run Spanish Language film is not a proper submarket. AMC anchors its argument in two points. First, AMC points out that in the statistics used by Plaintiff, only 7% of the Houston population speaks only Spanish. For the other 93% of persons, even those who prefer to speak Spanish, seeing a movie without Spanish subtitles or dubbing over is a legitimate market substitute.

To support its case, AMC cites a number of cases concerning proper submarkets, most powerful the *Spanish Broad. Sys., Inc. v. Clear Channel Commc'ns., Inc.*, 242 F.Supp. 2d 1350, 1363-64 (S.D. Fla. 2003) which concerned Spanish radio and which dismissed Plaintiff's case. In

that case, like here, the defendants argued that Spanish radio was not a proper submarket as most persons could just as easily listen to English radio, that the two were interchangeable. To strengthen this interchangeability argument, AMC points out that movies are even less of a problem than radio, because movies are observed through more than just the language. Viewers also observe story lines, body language, sound effects, etc. Doc. #23 at 19. However, in *Spanish Broadcasting*, the allegations did not properly allege that the defendant competed in the proposed submarket. The Court in *Spanish Broadcasting* found the defendant in that case to be a non-competitor. 242 F. Supp. 2d at 1361, 1364. This fact alone precluded competition and short-circuited the plaintiff's case.

Conversely, in the present case, Viva alleges, "During the period of Viva Cinema's operations, AMC infrequently showed some films in Spanish or with Spanish subtitles." Doc. #20 at 2. For purposes of a Motion to Dismiss this factual allegation must be accepted by the Court.

Further, AMC does not explain why 7% of Houston's population is not a sufficient submarket.[2] Viva does concede that there were people capable of seeing movies in both English and Spanish, however, this does nothing to address the 7% (assuming that is the correct number) that cannot observe a movie without dubbing or subtitles. For purposes of a Motion to Dismiss, these allegations of a portion of the population that is concerned solely with First Run Spanish Language films are sufficient.

B. Geographic Market

Lastly, AMC attacks Viva for its lack of a proper geographic market. AMC argues that

[2] This is especially true in light of the fact that one of the proposed geographic markets is the entire City of Houston, 7% of which is still a significant number of persons.

Viva has failed to "carry its burden of defining the relevant geographic market 'by careful selection of the market in area in which the seller operates and to which the purchaser can practicably turn for supplies." Doc. #23 at 21 (quoting *Apani*, 300 F.3d at 625). However, contrary to AMC's assertions, Viva went to great lengths to set out two proposed geographic markets in their amended complaint.

Viva's first proposed geographic market is Houston, Texas. Doc. #20 at 18. Coupled with its alleged 7% of the Houston population speaking only Spanish, the amended complaint contains proposed estimates of persons that such a geographic market would include. *Id.* at 19.

The second proposed geographic market is defined in the pleadings as a combination of two zones. The first zone is the "Viva Cinema Zone." *Id.* Viva defined this zone as a triangle bordered by Beltway 8 on the West, Westpark Drive on the North, and the Southwest Freeway on the Southeast, "and is equivalent to zip code 77036." *Id.* Viva alleged that drivers are unlikely to drive very far outside of this zone to see a movie. *Id.* at 20. Additionally, Viva alleged that the percentage of Spanish only speaking residents is higher in this zone than it is throughout the City of Houston.

The second zone is the AMC Zone. The AMC Zone is alleged to be roughly the square area bordered by Beltway 8 on the West, I-610 on the East, Westpark Drive on the South and an East-West line touching the northernmost part of Memorial Drive.

Viva alleged an "Overlap Zone" defined as the Viva Cinema Zone plus the AMC Zone. This zone has been alleged with sufficient detail as to meet Viva's initial burden of alleging a geographic market. Accordingly, AMC's motion fails on this point.

V. Conclusion

After reviewing the Amended complaint, it is this Court's determination that there are

sufficient factual allegations to support Viva's Complaint. Accordingly, AMC's Motion to Dismiss must be DENIED.

It is so ORDERED.

AUG 16 2016

Date

The Honorable Alfred H. Bennett
United States District Judge