UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KATHERINE SEARS and VIRGINIA SEGANOS,

Plaintiffs

v.

MID VALLEY ENTERPRISES, LLC and PAHRUMP ICS LLC, doing business as Sheri's Ranch,

Defendants

Case No.: 2:19-cv-00532-APG-DJA

Order Granting in Part Defendants' Motion to Dismiss

[ECF No. 30]

Plaintiffs Katherine Sears and Virginia Seganos were courtesans at the defendants' legal brothel, Sheri's Ranch, in Pahrump, Nevada. The plaintiffs contend that although the defendants have attempted to define them as independent contractors, they are actually the defendants' employees and, as such, have not been paid minimum wage, overtime, or all tips as required under the Federal Labor Standards Act (FLSA) and Nevada law. They assert individual and collective action claims under the FLSA, as well as individual and class action claims under Nevada law.

The defendants move to dismiss, arguing that the FLSA does not apply because, by law, courtesans like the plaintiffs can engage in legal prostitution only at Sheri's Ranch in Nye County. They thus contend that only purely instrastate commerce is at issue, so the FLSA does not apply. The defendants also argue that under Nevada law, the plaintiffs are conclusively presumed to be independent contractors, not employees, so their state law claims must be dismissed.

The plaintiffs respond that they have adequately alleged the defendants are an enterprise engaged in interstate commerce because the defendants operate a bar and restaurant attached to the brothel, at which food and beverages that have moved in interstate commerce are served and where the courtesans go to attract patrons and offer them tours of the brothel. The plaintiffs also argue the courtesans use other products, such as massage oil and condoms, that have moved in interstate commerce. Alternatively, they contend they are individuals engaged in interstate commerce because they communicate with out-of-state patrons via the defendants' website and email system, and book appointments with out-of-state patrons through these channels of interstate commerce. The plaintiffs concede to dismiss their state law claims without prejudice so that those claims may be resolved in Nevada state court.

I deny the defendants' motion as to the FLSA claims because the plaintiffs have adequately alleged enterprise coverage under the FLSA. I grant the defendants' motion to dismiss the state law claims because I decline to exercise supplemental jurisdiction over those claims.

I. BACKGROUND[1]

A. General Allegations

The defendants jointly operate Sheri's Ranch, which is a legal brothel in Pahrump, Nevada. ECF No. 25 at 2. Sheri's Ranch has a hotel and a restaurant, as well as amenities such as tennis courts and a swimming pool. *Id.* The plaintiffs worked as legal prostitutes, or courtesans, at Sheri's Ranch. *Id.*

[1] This is a recitation of the allegations in the amended complaint, which I accept as true at this stage of the proceedings.

The defendants require courtesans to sign an "Independent Contractor Agreement," which provides that the defendants will pay the courtesan "[t]he sum equal to 50% of all gross revenue collected by [the defendants] in connection to legal brothel services performed by Independent Contractor [i.e. prices and tips] less any expenses relating to such revenue, including but not limited to daily rent, cost of meals, commissions of revenue to third parties or Owner should owner provide such third party services, medical expenses, bar drinks, or any other miscellaneous expense relating to Independent Contractor's work performed at the Property." *Id.* at 3.

The plaintiffs contend that they are employees, not independent contractors, who are entitled to the minimum wage, overtime, and anti-tip confiscation protections provided in the FLSA and Nevada law. *Id.* at 6. They contend the defendants violated these provisions because "in many weeks, Courtesans' total non-tip compensation, net the amounts they are unlawfully required to 'kick back' to Defendants, divided over the number of hours for which they are entitled to compensation, averages to below the applicable federal and Nevada minimum wage." *Id.* at 4. They also allege that they did not receive overtime for hours worked in excess of 40 hours per week, and that the defendants keep half of all tips in violation of 29 U.S.C. § 203(m)(2)(B). *Id.*

According to the plaintiffs, the defendants maintain a "lockdown" policy at the Ranch that requires the courtesans to stay on the premises for one to three weeks at a time, during which they work daily shifts of either twelve or twenty-four hours. *Id.* While on shift, the courtesans are listed as "currently available" on the defendants' website and "must remain available to greet and/or line up for Defendants' patrons upon request." *Id.* Throughout their shifts, the courtesans are required to "greet and interact with their patrons in a variety of ways for the purpose of

'booking' a session, including 'casually mingl[ing]' with Patrons at the sports bar, appearing for mandatory 'LineUps' in which '[a]ll the available courtesans in the house . . . lineup just for [any patron who requests] and introduce[s] themselves one by one,' and communicating with patrons through the messenger service Defendants' operate as part of their website." *Id.* at 10. The plaintiffs allege they regularly worked over 40 hours in a single workweek, were not paid overtime, had to kickback money to the defendants to pay for certain expenses related to their employment, and had portions of their tips confiscated. *Id.* at 6.

Based on these allegations, the plaintiffs assert claims under the FLSA on behalf of themselves and others similarly situated for minimum wage, overtime, and tip confiscation violations. They also assert similar claims under Nevada law.

B. Allegations Related to Interstate Commerce

The plaintiffs allege that the defendants' annual sales exceed $500,000 and that "they have more than two employees handling, selling, or otherwise working on goods or materials that had been moved in or produced for commerce." *Id.* at 6. In support of this general allegation, the amended complaint states that the defendants operate a sports bar and restaurant that "serves Pepsi and Coca-cola [sic] products and a variety of branded liquors and spirits, such as Jack Daniels, Bud, Grey Goose, Titos, Captain Morgan, and Patron, among other food and drink products that are processed and manufactured out of state." *Id.* at 6-7. The restaurant is located in the same building as the brothel and offers customers free tours of the brothel. *Id.* at 7. The restaurant and bar, including its association with the brothel, is advertised on the Sheri's Ranch website. *Id.*

The plaintiffs allege that in the course of their work for the defendants, the courtesans also use goods that have traveled in interstate commerce, such as massage oils and condoms. *Id.*

at 7. They also use the defendants' website and email system to communicate with and book appointments for out-of-state customers. *Id.* at 8. Sears alleges she "booked approximately ten or more reservations with out of state patrons per month through Defendants' website" and she "responded to approximately 20-60 e-mails from out of state patrons per week." *Id.* Seganos alleges she "responded to approximately 20 e-mails from out of state patrons per week." *Id.*

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. FLSA

If an employee is covered by the FLSA, that employee must be paid the minimum wage and overtime. 29 U.S.C. §§ 206(a), 207(a). The FLSA's minimum wage and overtime provisions apply to any "employee[] who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce." *Id.* Although the defendants dispute the plaintiffs were employees, they assume the plaintiffs were employees for purposes of this portion of their motion. They contest, however, whether they are employees covered by the FLSA.

The FLSA provides two independent types of coverage: enterprise and individual. *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 914 (9th Cir. 2003). The FLSA covers an employee if either type applies. *Id.* Individual coverage exists where "the employee is engaged in commerce." *Id.* Enterprise coverage exists where "the employer is an enterprise engaged in commerce." *Id.* The statute defines an "[e]nterprise engaged in commerce or in the production of goods for commerce" to mean an enterprise that:

> (A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and
>
> (ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated);

29 U.S.C. § 203(s)(1).

The plaintiffs have adequately alleged the defendants are an enterprise engaged in commerce. They allege the defendants' operation of Sheri's Ranch resulted in annual sales exceeding $500,000. They also allege the defendants' bar and restaurant sell food and beverages that were produced outside of Nevada. Taking these allegations as true, the plaintiffs have plausibly alleged enterprise coverage under the FLSA. *See Donovan v. Scoles*, 652 F.2d 16, 17-18 (9th Cir. 1981) (holding FLSA applied to Arizona gas station where the employees handled and sold gas that had been moved in commerce, stating that "even a business engaged in purely intrastate activities can no longer claim exemption from FLSA coverage if the goods its employees handle have moved in interstate commerce").

Courts have found similar facts to support enterprise coverage under the FLSA. *See Landeros v. Fu King, Inc.*, 12 F. Supp. 3d 1020, 1024-25 (S.D. Tex. 2014); *Lemus v. Nathan & Morgan, Inc.*, No. 2:12-CV-00681-MMD-GWF, 2012 WL 4490962, at *3 n.6 (D. Nev. Sept. 27,

2012); *Diaz v. Jaguar Rest. Grp., LLC*, 649 F. Supp. 2d 1343,1355 (S.D. Fla. 2009). And the Department of Labor has issued an interpretive opinion that supports this conclusion. *Opinion Letter Fair Labor Standards Act (FLSA)*, 1997 WL 958726, at *1 (Jan. 22, 1997). When asked whether a fast food retailer would be an enterprise engaged in commerce "even if 100% of the products purchased are bought within the State," the Department stated that it would be. *Id.* It reasoned that "[u]nder the enterprise provisions of the FLSA . . . any products, supplies or equipment used by employees of the enterprise that were produced or shipped from outside the State (even though purchased by the enterprise from suppliers within that State) would cause the employees to be covered. For example, the coffee served, cleaning supplies utilized, cooking equipment (ranges fryers, grills) operated, etc., that have been produced outside of *** or shipped by any person from outside the State, would trigger this provision." *Id.* (emphasis in original).

The plaintiffs thus have alleged facts that plausibly support an enterprise theory of FLSA coverage. Consequently, I deny the defendants' motion to dismiss the FLSA claims.

B. State Law Claims

The plaintiffs agree to voluntarily dismiss their state law claims without prejudice, consistent with my reasoning in another wage and hour case, *Reno v. Western Cab Company*, 2:18-cv-00840-APG-NJK, 2019 WL 189004 (D. Nev. Jan. 14, 2019). *See* ECF No. 34 at 13:3-6. The defendants contend the plaintiffs' state law claims should be dismissed with prejudice because under Nevada law, they are conclusively presumed to be independent contractors.

I have supplemental jurisdiction over state-law "claims that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or

controversy . . . .” 28 U.S.C. § 1367(a). Nevertheless, I may decline to exercise supplemental jurisdiction if:

> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c)(1)-(4). If I determine that one or more of these conditions exists, I must then consider whether exercising jurisdiction would ultimately serve “the principles of judicial economy, procedural convenience, fairness to litigants, and comity . . . .” *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). If these considerations do not favor exercising supplemental jurisdiction, then “[I] should hesitate to exercise jurisdiction over [the] state claims . . . .” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966).

The principles of judicial economy and procedural convenience arguably favor resolving all claims in one lawsuit. The plaintiffs’ FLSA and state law claims form part of the same case or controversy because they involve the nature of the economic relationship between the defendants and the courtesans, and whether that relationship subjects the defendants to minimum wage, overtime, and tip confiscation protections in federal and state law.[2] Some facts will overlap as well, including how many hours the plaintiffs worked, the work requirements and restrictions they were subject to, and how they were compensated.

However, the plaintiffs’ claims raise novel and complex questions of state law that should be addressed by Nevada courts in the first instance. The defendants’ motion to dismiss points

[2] Although it is not inconsistent to pursue both collective and class action claims in the same case, it may raise procedural inconveniences in this federal case that would not exist if the state law claims are dismissed.

out a Nevada statute that potentially would classify the plaintiffs as independent contractors rather than employees. That statute, Nevada Revised Statutes § 608.0155, was first enacted in 2015 and amended in 2019. It has not been interpreted or applied by the Supreme Court of Nevada. *See Barber v. D. 2801 Westwood, Inc.*, No. 74183, 437 P.3d 1053, 2019 WL 1422916, at *1 n.1 (Nev. Mar. 28, 2019) (declining to address the statute). The Supreme Court of Nevada is best suited to address Nevada law on the differences between employees and independent contractors, particularly where the 2015 statute came shortly after a decision from that court adopting the FLSA standard for determining whether a person is an employee or an independent contractor. *See Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951 (Nev. 2014) (en banc); 2015 Nev. Laws Ch. 325 (S.B. 224). This is especially true given that this case involves the uniquely Nevada industry of legal prostitution. Thus, comity favors that I decline jurisdiction over the state law claims.

Because neither party opposes dismissal of the state law claims, fairness to the litigants favors my declining to exercise supplemental jurisdiction. The defendants ask that I dismiss the claims with prejudice, but that would require me to resolve the novel issues of state law that are best addressed by the Nevada courts. The defendants do not identify any prejudice they would suffer from dismissal without prejudice.

Finally, this case is relatively new and has not moved beyond the pleadings. I have made no rulings with respect to the state law claims. So declining jurisdiction would not result in a significant loss of time and resources of the parties or the court. Exercising supplemental jurisdiction over the state law claims would not be economic, convenient, or fair to the parties and would not serve the interests of comity. I decline to exercise supplemental jurisdiction over the state law claims, so I dismiss them without prejudice.

III. CONCLUSION

I THEREFORE ORDER that the defendants' motion to dismiss **(ECF No. 30) is GRANTED in part**. I deny the motion with respect to the FLSA claims. I dismiss the plaintiffs' state law claims without prejudice because I decline to exercise supplemental jurisdiction over them.

DATED this 16th day of April, 2020.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE