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ELECTRONIC ARTS INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE NCAA STUDENT-ATHLETE NAME & LIKENESS LICENSING LITIGATION,

Case No. CV-09-1967-CW (NC)

ELECTRONIC ARTS INC.'S NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE MOTION TO DISMISS THE THIRD AMENDED CONSOLIDATED COMPLAINT

Date: September 5, 2013
Time: 2:00 p.m.
Dept.: Courtroom 2, 4th Floor
Judge: Hon. Claudia Wilken

Date Comp. Filed: May 5, 2009

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT, on Thursday, September 5, 2013 at 2:00 pm, or at such earlier time that the Court shall order, before the Honorable Claudia Wilken, United States District Court, 1301 Clay Street, Suite 400 S, Oakland, CA 94612-5212, Courtroom 2, 4th Floor, Defendant Electronic Arts Inc. ("EA") will and hereby does respectfully move the Court for an order granting leave to file a motion to dismiss Plaintiffs' Third Amended Consolidated Class Action Complaint before the Court rules on Plaintiffs' motion for class certification.

I. INTRODUCTION

On July 5, 2013, the Court granted Antitrust Plaintiffs' leave to file an amended complaint to conform their complaint to the new legal and factual allegations made in their class certification papers and "to respond to the potential deficiencies identified by Defendants in the briefing and hearing thereon." Dkt. 830. The Court also ordered that "Defendants shall not file an additional motion to dismiss or for judgment on the pleadings and shall instead include any arguments they would have made therein in their future motions for summary judgment." *Id.*

Plaintiffs filed their Third Consolidated Amended Class Action Complaint ("Third Amended Complaint") on July 18, 2013. Dkt. 832. As the Court invited, Plaintiffs' Third Amended Complaint includes a legal theory and factual allegations with respect to EA that had not been alleged in any prior complaint. The Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, (2013), entitles Defendant EA to test the legal sufficiency of Plaintiffs' operative Complaint *before* the Court certifies a class. *Id.* at 1435. EA therefore respectfully requests leave to file a motion to dismiss with respect to the Third Amended Complaint *before* the Court rules on Plaintiffs' motion for class certification. [1]

II. BACKGROUND

The first pleading in this case asserting antitrust claims against EA was Plaintiffs' March 10, 2010 Consolidated Amended Class Action Complaint ("CAC"). Dkt. 175. The antitrust allegations against EA in the CAC were limited to allegations that EA entered into license

[1] A copy of EA's motion to dismiss is attached as Exhibit A.

agreements with CLC that did not compensate Plaintiffs for use of their likenesses. But Plaintiffs admitted that the license agreements "are obviously not the agreements among Defendants to participate in this unlawful and anticompetitive scheme," Dkt. 325 at 10 (Order granting EA's motion to dismiss, quoting Plaintiffs' opposition to EA's first motion to dismiss), and failed to "identify any other agreement to which EA was a party that relates to the alleged price-fixing scheme," *id.* at 10. The Court granted EA's motion to dismiss the CAC because it found the CAC "d[id] not plead facts suggesting that EA joined [an antitrust] *conspiracy*." *Id*. at 9 (emphasis added); *see also* Dkt. 345 at 2.

In their May 16, 2011 Second Consolidated Amended Complaint ("SAC"), Dkt. 327, Plaintiffs attempted to address this issue by, what the court characterized as, "chang[ing] course" and asserting "that EA's license agreements, in which it agreed not to offer compensation to former student-athletes, do represent its agreements to engage in the antitrust conspiracy with NCAA and CLC." Dkt. 345 at 6. EA moved to dismiss the SAC because, in EA's view, the SAC merely added allegations regarding efforts by EA to obtain greater rights from CLC and the NCAA, and therefore was insufficient under the Ninth Circuit's ruling in *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008). Dkt. 331. The Court agreed that, under *Kendall*, "[a]n 'account of a defendant's commercial efforts' is not, on its own, sufficient to support a § 1 claim," Dkt. 345 at 5 (quoting *Kendall*, 518 F.3d at 1048)). And it further agreed that "many of Plaintiffs' new allegations do not suggest anything more than EA's commercial efforts to obtain new rights and use its existing rights" within the context of the NCAA's rules. Dkt. 345 at 6. However, it found that a claim was sufficiently pled against EA based on Plaintiffs' "significant additional allegation[] that in addition to agreeing to abide by the NCAA's rules . . . , EA also agreed not to offer compensation to *former* student-athletes." *Id.* at 6 (emphasis added).

Because Plaintiffs had relied on the EA-CLC agreement for their allegation that EA agreed to not compensate *former* student-athletes, EA moved for judgment on the pleadings, arguing that the agreements themselves show that EA never made any such agreement. Dkt. 366. The Court denied EA's motion because it found that the licenses, when viewed in the light most favorable to Plaintiffs (as the non-moving party), "can fairly be read to evidence a 'meeting

of the minds' between EA and the other Defendants not to compensate former student-athletes." Dkt. 455 at 8.

These were the allegations as they stood at the time Plaintiffs filed their motion for class certification. But Plaintiffs' class certification papers abandoned the theory that EA is liable because it agreed through its licenses with CLC not to offer compensation to former student-athletes. Rather, Plaintiffs alleged for the first time in their briefing in support of certification that their theory of antitrust conspiracy against EA is that "the conspiracy was accomplished" through the NCAA's rules, which "were accepted and implemented by EA and CLC." Dkt. 748 at 1-2; *see also* Dkt. 651 at 6 (seeking to hold EA and CLC liable for the alleged conspiracy on the grounds that "NCAA requires its business partners to follow its rules and regulations and both EA and CLC have done so"). Similarly, Plaintiffs economics expert, Roger Noll, opined that the NCAA's rules were the lynchpin of the alleged conspiracy: "[t]he alleged anticompetitive conduct in this case is the NCAA's imposition of rules that restrict both use of and payments for the images, likenesses and/or names of student-athletes after they cease being student-athletes." Noll Opening Rep. 6. Noll also conceded that "there is no exclusion from the market" for collegiate licensing for former student-athletes, thus expressly disavowing the theory of liability that Plaintiffs had alleged in the SAC and the Court had allowed Plaintiffs to pursue. Dkt. 680 Ex. 69 (Noll Dep.) at 420:4-11.

In response to this change in theory, EA argued in its opposition papers and at the class certification hearing that class certification must be denied because, among other reasons, Plaintiffs' class certification theory did not articulate a viable antitrust claim as to EA. *E.g.*, Dkt. 794 at 3-5. At the hearing, the Court suggested that EA's argument might be better suited for summary judgment rather than being decided as part of class certification. June 20, 2013 Hearing Tr. at 49:14-18. Following the hearing, the Court issued its July 5 Order permitting Plaintiffs to file the Third Amended Complaint and stating that no Defendant may move to dismiss that amended complaint. Dkt. 830.

Plaintiffs filed the Third Amended Complaint on July 18, 2013. Dkt. 832. The new allegations in the Third Amended Complaint largely track the arguments Plaintiffs made in their

class certification papers and hearing (and which were absent from the SAC). The Third Amended Complaint alleges that "[t]he conspiracy to deny compensation to current and former student-athletes for the use of their names, images, and likeness *emanates from a commercial bylaws, regulations, rules, and policies, both written and unwritten developed and interpreted by the NCAA*." Third Amended Complaint ¶ 12 (emphasis added). In other words, the alleged restraint is the NCAA rules. Plaintiffs allege that EA only participates in "vertical aspects" of the conspiracy which "emanate from the fact that the NCAA and its member schools and conferences, in order not to undermine their horizontal agreement, further have agreed to impose, and EA, CLC and other unnamed vertical business partner co-conspirators have agreed to abide by, the same compensation restrictions." *Id.* ¶ 15; *see also id* ¶ 358 ("The alleged restraints are effectuated through the NCAA's constitution, bylaws, regulations, rules, interpretations, and policies, . . . and by the agreements of non-NCAA members like EA . . . to be bound by those bylaws and rules."). Thus, according to the Third Amended Complaint, EA is liable because it follows the NCAA rules. The Plaintiffs also allege that EA "did not merely follow the NCAA's rules" because it "actively lobbied for, and obtained, administrative interpretations of those rules that permitted greater uncompensated exploitation of student-athletes' names, images, and likenesses," and, "[w]here their formal efforts were unsuccessful, EA . . . obtained agreement from the NCAA to permit great uncompensated exploitation of student-athletes' names, images, and likenesses notwithstanding the rules." *Id.* at ¶ 418. In other words, all Plaintiffs allege as to EA beyond merely following the NCAA's rules is activity of the sort that the Court has previously characterized as "commercial efforts by EA to obtain new rights and use its existing rights" under the NCAA's rules. Dkt. 345 at 6.[2]

[2] The Third Amended Complaint does not contain any allegations that EA participated in the alleged broadcast conspiracy, which now is the centerpiece of Plaintiffs' case. Third Amended Complaint ¶¶ 417-425 (conspiracy allegations against EA and CLC focusing exclusively on videogames). Plaintiffs admitted during the class certification hearing that broadcast is not "part of [the] antitrust complaint" against EA, and that the "complaint against [EA] is the fact that they deliberately do not pay the athletes for their name, image, and likeness . . . [f]or their use in video games." June 20, 2013 Hearing Tr. at 46:9-21.

III. ARGUMENT

A. EA is Entitled to Challenge, and the Court Must Consider, the Legal Sufficiency of the Complaint Before Deciding Class Certification as to EA.

EA is entitled to challenge the legal sufficiency of the Third Amended Complaint *before* the Court issues any order certifying a class against it because the Court cannot certify a class based on a claim that fails as a matter of law. The Supreme Court held in *Comcast Corp. v. Behrend* that a district court cannot certify a class that is not based on an "accepted theory of antitrust harm." 133 S. Ct. at 1435; *see also McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 228 (2d Cir. 2008) ("[W]hen a claim cannot succeed as a matter of law, the Court should not certify a class on that issue"); *The Authors Guild v. Google, Inc.* --- F.3d ----, 2013 WL 3286232 (2d Cir. July 1, 2013) (reversing grant of class certification as premature and remanding for determination of viability of defense). What these cases recognize is that class certification is only available if the plaintiffs have a viable legal theory for which liability and damages can be proven in a common way—and that requires first deciding whether the plaintiffs have a viable legal theory before class certification.

Furthermore, EA should have the right to challenge the legal sufficiency of Plaintiffs' amended pleading under Rules 15 and 12 of the Federal Rules of Civil Procedure. The Supreme Court has held that the opportunity to respond to an amended pleading, under Rule 15, "is the echo of the opportunity to respond to original pleadings secured by Rule 12" and is "fundamental to due process" *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466 (2000). *See also Moore's Fed. Practice (Civil)* § 15.17[5] ("While courts do not always require a response to an amended pleading, *a court may not deprive an affected party of the right to file a response to an amended pleading if the party so desires*.") (emphasis added); *accord Lucente v. IBM Corp.*, 310 F.3d 243, 260 (2d Cir. 2002) (holding that it is a "cardinal rule of civil procedure" that "an amended complaint ordinarily renders the original complaint of no legal effect," and, "[c]onsequently 'a court may not deprive an affected party of the right to file a response to an amended pleading if the party so desires.'" (quoting *Moore's Fed. Practice (Civil)* § 15.17[5])).

Even without *Comcast* and the Federal Rules of Civil Procedure, it would be unfair and

inefficient to wait until the dispositive motions stage, after class certification, to consider the legal insufficiencies in the Third Amended Complaint. EA should not be forced to continue to litigate this case for another six months (or more), until dispositive motions on liability are briefed and decided, all based on a complaint that fails as a matter of law. Moreover, addressing the legal insufficiency of Plaintiffs' claims against EA now, prior to class certification, will significantly simplify the case for the Court and the remaining parties. The main thrust of Plaintiffs' case is the NCAA's rules and the alleged effects those rules have on revenues from broadcast licensing. Plaintiffs' claims against EA—the only NCAA-licensee named a defendant—are a distraction that can be resolved now on the law alone. Finally, Plaintiffs will not be prejudiced by the Court's consideration of EA's motion to dismiss prior to its ruling on Plaintiffs' class certification motion.

B. EA's Motion to Dismiss Establishes That Plaintiffs' New Theory is Legally Insufficient.

EA's motion to dismiss establishes that Plaintiffs' newly pleaded theory against EA fails as a matter of law. Plaintiffs allege that EA is liable for a vast antitrust conspiracy because it followed the NCAA's rules. Third Amended Complaint ¶ 15, 358. But the Ninth Circuit has held repeatedly that such allegations cannot support an antitrust claim. *Kendall*, 518 F.3d at 1048; *49er Chevrolet, Inc. v. General Motors Corp*., 803 F.2d 1463, 1465, 1467 (9th Cir. 1986); *Toscano v. Professional Golfers' Assoc*., 258 F.3d 978, 983 (9th Cir. 2001). Recognizing that they must allege something that goes "beyond the requirements of the NCAA rules and policies," Dkt. 345 at 7, Plaintiffs allege that EA "did not merely follow the NCAA's rules" because EA "lobbied" the NCAA to interpret those rules to permit the use of names and likenesses without compensation, Third Amended Complaint ¶ 418. But these allegations also fail under binding Ninth Circuit law: as the Court recognized earlier in the proceedings, an "'account of a defendant's commercial efforts'" to "obtain new rights" is not, on its own, sufficient to support a § 1 claim." Dkt. 345 at 5-6 (quoting *Kendall*).

Thus, under the applicable law and this Court's prior orders, the Third Amended Complaint fails to plead an "accepted theory of antitrust harm" against EA, as required by

Comcast. 133 S. Ct. at 1435.

IV. CONCLUSION

For the foregoing reasons, EA respectfully requests that the Court grant it leave to file the attached motion to test the legal sufficiency of Plaintiffs' Third Amended Complaint, and, furthermore, that the Court consider and rule on this motion prior to issuing any order certifying a class against EA.

Respectfully submitted,

Dated: July 29, 2013

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/s/ R. James Slaughter

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