EXHIBIT A

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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 MOTION TO DISMISS THE THIRD CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

Judge: Hon. Claudia Wilken

Date Comp. Filed: May 5, 2009

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I. INTRODUCTION

Plaintiffs' Third Consolidated Amended Class Action Complaint ("Third Amended Complaint") pleads no facts to support their theory that Electronic Arts Inc. ("EA") participated in an antitrust conspiracy with the NCAA and Collegiate Licensing Company ("CLC"). All it alleges is that EA agreed to follow the NCAA's rules regarding using student-athletes' names and likenesses. That is not a viable antitrust claim. EA does not belong in this antitrust action that centers on the NCAA's adoption and enforcement of its rules.

Under settled Ninth Circuit law, merely following the rules adopted and enforced by a business partner does not state an antitrust claim.[1] Plaintiffs must allege that EA did something that goes "beyond the requirements of the NCAA rules and policies." Dkt. 345 (Order re EA's Second Mot. to Dismiss) at 7. They do not do so, except to re-state what they presented in their Reply in support of class certification that EA "lobbied" the NCAA to interpret those rules to permit the use of names and likenesses without compensation. This theory, however, claims nothing more than that EA made independent efforts to obtain as many rights and commercial benefits as it could *within the confines of the NCAA's requirements for its licensees*. That allegation is insufficient as a matter of Ninth Circuit law to support a section 1 Sherman Act claim.

There is an additional reason to dismiss Plaintiffs' latest complaint. The only conspiracy they allege is not an antitrust conspiracy at all—it is a conspiracy to use a publicity right without paying for it. That theory presents a royalties issue, not an antitrust issue—and it is the subject of the *Keller* case. To prove an antitrust conspiracy, Plaintiffs must show that the alleged conspiracy was intended to produce, and did in fact produce, significant anticompetitive effects within a relevant market. The Third Amended Complaint fails to allege any anticompetitive effects in the alleged licensing market—the only proposed relevant market in which EA could possibly participate.

[1] *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008); *Toscano v. Professional Golfer's Association*, 258 F. 3d 978 (9th Cir. 2001); *49er Chevrolet, Inc. v. General Motors Corporation*, 803 F.2d 1463 (9th Cir. 1986).

EA does not belong in this antitrust action. Plaintiffs' case against EA should end now.

II. RELEVANT ALLEGATIONS[2]

Plaintiffs are current and former student-athletes who compete or competed in NCAA Division I men's football and basketball. Third Amend. Compl. ¶ 16. Defendant NCAA "is an unincorporated association that acts as the governing body of college sports." *Id.* ¶ 238. Plaintiffs allege that NCAA has "total control of intercollegiate athletics" (*id.* ¶ 390) and "the licensing rights to current and former" student-athletes' names and likenesses. *Id.* ¶ 392. Defendant CLC "is the nation's leading collegiate trademark, licensing and marketing company" and "represents nearly 200 colleges, universities, bowl games, and athletic conferences, including the NCAA." *Id.* ¶ 239. Defendant EA develops and publishes videogames (*id.* ¶ 242), including *NCAA Football* and *NCAA Basketball*. *Id.* ¶ 482. EA and CLC have entered into trademark license agreements (*id.* ¶ 417) whereby EA obtained the rights to the NCAA's and certain colleges' and universities' trademarks and tradedress, which it uses in its NCAA-theme videogames. Dkt. 274, Exs. B, D, ¶ 1(b). The EA-CLC licenses do not license the right to use student-athletes' names and likenesses. *Id.* ¶ 2(f)(7). In its agreements with CLC, "EA agreed to be bound by the NCAA's rules and subjected its games to the approval of the NCAA and/or certain of its member institutions." Third Amend. Compl. ¶ 417. Plaintiffs allege that the NCAA "totally controls" the licensing rights of its members and "is able to dictate the supply and the terms upon which licensed products and licenses are bought and sold." *Id.* ¶ 395.

Plaintiffs claim that the NCAA, CLC and EA, along with numerous unnamed co-conspirators, "conspired to use the names, images, and likenesses, of current and former student athletes without compensation for the use." *Id.* ¶ 354. The alleged goals of the conspiracy are to (1) fix the amount student-athletes are paid for the use of their name and likeness at "zero" and (2) "foreclose" student-athletes from the market for the licensing, use, and sale of their names and likenesses. *Id.* ¶ 355.

[2] Except where noted, all facts in this section are drawn from the Third Amended Complaint. Dkt. 832. EA accepts them as true for the purposes of this motion only.

Plaintiffs allege that "[t]he conspiracy to deny compensation to current and former student-athletes for the use of their names, images, and likeness *emanates from [the] commercial bylaws, regulations, rules, and policies, both written and unwritten developed and interpreted by the NCAA*." *Id*. ¶ 12 (emphasis added). The alleged conspiracy has both horizontal and vertical aspects. The horizontal aspect involves only the NCAA and its member schools, who set the rules and have agreed not to compete with one another in compensating student-athletes. *Id*. ¶ 356. The two goals of the conspiracy are achieved through this horizontal agreement: the NCAA and its member institutions have (1) "capped" compensation to student-athletes at "zero" (*id*. ¶ 398); and (2) "foreclose[d] student-athletes from exercising" their name and likeness rights. *Id*. ¶ 400. Plaintiffs do not allege that EA participated in this horizontal agreement. *Id*. ¶ 356.

The vertical aspects of the conspiracy are an effect of the horizontal conspiracy. "In order to avoid undermining the horizontal conspiracy," the NCAA and its members "impose and EA, CLC and other unnamed co-conspirators ***agree to abide by*** the" NCAA's rules regarding compensation. *Id*. ¶ 357 (emphasis added).

The conspiracy is "effectuated through the NCAA's constitution, bylaws, regulations, rules, interpretations, and policies"[3] and "*by the NCAA's administrative interpretations of its bylaws and rules*." *Id*. ¶ 358 (emphasis added). The NCAA's rules "regulate all aspects of collegiate athletics" and, through an "enforcement program", the NCAA ensures "that institutions and student-athletes comply with NCAA rules." *Id*. ¶¶ 352, 353; *see also* ¶ 388. The rules regulate the use of student-athletes' names and likeness and "preclude[] student-athletes from accepting remuneration for use of his name, image, and likeness." *Id*. ¶ 387; ¶¶ 385-86. The NCAA adopted and enforces its rules. *Id*. ¶ 358. Plaintiffs do not allege that EA played any role in adopting or enforcing the NCAA rules. EA merely agreed to follow and "be bound by those" rules. *Id*. ¶ 358.

[3] EA refers to the "NCAA's constitution, bylaws, regulations, interpretations, and policies" as the "NCAA's rules".

Plaintiffs allege that EA lobbied the NCAA to amend its rules to permit the use of student-athletes' names and likeness. *Id.* ¶ 419. While those efforts "were unsuccessful," Plaintiffs allege that EA "obtained agreement from the NCAA" to interpret its rules to permit greater use of names and likenesses. *Id.* ¶ 418. As a result, Plaintiffs allege that the NCAA permitted EA to "use former and current student-athletes names, images, and likenesses in their videogames without compensation." *Id.* ¶ 421.

Plaintiffs claim that the conspiracy restrained two relevant markets, but do not mention EA once in describing them. The first market is "the student-athlete Division I college education market" (the "education market"). *Id.* ¶ 391. The NCAA "imposes a wide variety of conditions on student-athletes" in the education market: among other things, they may not be compensated beyond educational expenses approved by the NCAA; may not retain an agent; must meet minimum educational requirements; and are limited in receiving compensation for services that may reflect on their athletic ability. *Id.* ¶ 397. Plaintiffs claim the NCAA's rules cause anticompetitive effects in the education market because absent those rules, colleges and universities would compete for student-athletes by offering "higher amounts of licensing revenues to student athletes." *Id.* ¶ 398. Plaintiffs do not allege that EA participates in the education market.

The second market is the "market for the acquisition of group licensing rights for the use of student-athletes names, images, and likenesses" (the "group licensing market"). *Id.* ¶ 391. Plaintiffs alleged that the group licensing market is a submarket of the larger collegiate licensing market. *Id.* Plaintiffs allege that the NCAA has total control and market power in the group licensing market. *Id.* ¶¶ 392, 394, 395, 396. Plaintiffs allege that the NCAA and its members have a "100% share in" and the power to control price, output, and competition in this market. *Id.* ¶ 394. Yet, Plaintiffs do not identify any anticompetitive effects in the licensing market.

Plaintiffs do not allege that EA has any role in this licensing market, except to say that EA has a license agreement with CLC. *See, e.g., id.* ¶¶ 391-403, 417. In other words, EA participates only as one of many buyers in the group licensing market.

III. ARGUMENT

To state a claim under Section 1 of the Sherman Act, Plaintiffs must plead "evidentiary facts" which, if true, will prove: (1) a conspiracy among two or more distinct business entities; (2) which is intended to harm or restrain trade or commerce; and (3) actually injures competition. *Kendall v. Visa U.S.A., Inc*., 518 F.3d 1042, 1047 (9th Cir. 2008); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-556 (2007). The Third Amended Complaint must be dismissed because it fails to allege facts to prove these necessary elements of Plaintiffs' antitrust claim.

A. That EA Followed NCAA Rules Does Not State an Antitrust Claim.

This Court previously has stated that "[a]n 'account of a defendant's commercial efforts' is not, on its own, sufficient to state a § 1 [Sherman Act] claim." Dkt. 345 (Order re EA's Second Mot. to Dismiss) at 5 (quoting *Kendall*); Dkt. 325 (Order re EA's First Mot. to Dismiss) at 9 (same). Plaintiffs must plead facts showing "'a meeting of the minds' with regard to concerted, anticompetitive conduct." Dkt. 345 at 5 (quoting *Kendall*).

The Third Amended Complaint does not do so. It alleges that EA "conspired to use the names images, and likenesses of current and former student-athletes without compensation for the use." Third Amend. Compl. ¶ 354 (internal footnote inserted). It alleges that the conspiracy is "effectuated through the NCAA's constitution, bylaws, regulations, rules, and policies" and "by the NCAA's administrative interpretations of its bylaws and rules." *Id*. ¶ 358; *id*. ¶¶ 15, 357. Plaintiffs allege EA is a co-conspirator because "EA agreed to be bound by the NCAA rules and subjected its games to the approval of the NCAA and /or certain of its member institutions." *Id*. ¶ 417; ¶¶ 15, 357. Plaintiffs do not allege that EA played any role in adopting, amending or enforcing those rules.

Under Ninth Circuit law following rules adopted and enforced by a business partner does not support an antitrust claim. *Kendall*, 518 F.3d 1042; *Toscano v. Professional Golfer's Association*, 258 F. 3d 978 (9th Cir. 2001); *49er Chevrolet, Inc. v. General Motors Corporation*, 803 F.2d 1463 (9th Cir. 1986). These decisions rejected claims based on the same theory alleged in the Third Amended Complaint.

In *Kendall*, plaintiffs claimed that two credit-card companies (the "Consortiums") conspired with three banks (the "Banks") to set the amount of certain fees charged in standard credit-card transactions. 518 F.3d at 1042. The plaintiffs alleged that the Banks participate in the management and have a proprietary interest in the Consortiums, and "adopt" and "charge" fees, *which are set by the Consortium*s. *Id*. at 1048. The Ninth Circuit soundly rejected that theory, holding that an allegation that the "Banks conspired to fix the interchange fee" does not state an antitrust claim because "merely charging, adopting or following the fees set by a Consortium is insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act." *Id*. at 1048.

Toscano v. Professional Golfer's Association involved claims against the PGA and Senior Tour event sponsors. Plaintiff alleged that the sponsors conspired with the PGA to unreasonably restrain trade in professional golf "by agreeing to sponsor golf tournaments in accordance with the PGA Tour rules and regulations." 258 F. 3d 978, 980 (9th Cir. 2001). The sponsors contracted with the PGA to host tournaments. The contracts "define player eligibility by PGA Tour rules and regulations" and require the sponsors to "agree to organize and conduct the tournament in accordance with PGA Rules and Regulations." *Id*. at 981-82. The Ninth Circuit affirmed, adopting the district court's holding that there was no "evidence of an agreement in restraint of trade because the defendants merely accepted the PGA Tour's rules and regulations and played no role in creating or enforcing them." *Id*. at 983.

In *49er Chevrolet, Inc. v. General Motors Corporation*, plaintiff car dealers claimed "a horizontal price-fixing conspiracy" between GM and three transport companies regarding GM's payments to its dealers for repairing vehicles damaged in transit. 803 F.2d 1463, 1467 (9th Cir. 1986). The Ninth Circuit concluded that where "GM determines the amounts it pays dealers," no antitrust conspiracy claim existed against the dealers because they "[did] not participate in any way or have any role whatsoever in establishing or determining General Motors agreements and

arrangements with its dealers." *Id*. at 1465, 1467.[4]

Thus, as this Court already acknowledged in its prior Orders, Plaintiffs' allegation that EA agreed to follow the NCAA's rules does not support a a section 1 claim.[5] At most, this allegation shows that EA "accepted" the NCAA's "rules and regulations and played no role in creating or enforcing them." *Toscano*, 258 F. 3d at 983. Because EA did "not participate in any way or have any role whatsoever in establishing or determining" those rules, *49er*, 803 F.2d at 1467, it cannot be held liable for merely "following" them. *Kendall*, 518 F.3d at 1048.

Plaintiffs try to get around this well-settled rule by alleging that EA did more than follow the rules when it "lobbied" the NCAA to permit use of student-athlete likenesses. Third Amend. Compl. ¶ 418. While Plaintiffs acknowledge that EA's "formal efforts" to get the NCAA to change its rules "were unsuccessful", they allege that the NCAA nevertheless decided to interpret its rules to permit use of names and likenesses. *Id*. Rather than support their claims, this allegation underscores the fact that EA had no independent power regarding the NCAA's rules. The NCAA made the rules and decided how to interpret them. *Id*. ¶ 12 (the conspiracy "emanates" from the NCAA's "bylaws, regulations, rules and policies" as "***developed and interpreted by the NCAA***.") (emphasis added); ¶¶ 423, 424 (discussing the NCAA's interpretations of it rules). All Plaintiffs' theory demonstrates is that EA made efforts to obtain as many rights and "commercial benefits" as it could *within the confines of the NCAA's requirements for its licensees*. But, as the Court acknowledged in its order on EA's second motion to dismiss, allegations that suggest nothing more than "EA's commercial efforts to obtain new rights and use its existing rights" are not sufficient to support an antitrust claim. Dkt. 345 at

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[4] The Ninth Circuit's rule finds support both in Supreme Court precedent and in cases outside this Circuit. *See, e.g., Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984) (a "manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination."); *Am. Airlines v. Christensen*, 967 F.2d 410, 413-14 (10th Cir. 1992) ("Defendants have alleged no concerted action by American. No evidence in the record suggests that American did not independently set the terms under which it would offer its travel awards, and the mere fact that its members accepted those terms does not generate the kind of concerted action needed to violate Section 1.").

[5] *See* Dkt. 345 at 7 (denying EA's second motion to dismiss because Plaintiffs alleged conduct that went "beyond the requirements of the NCAA's rules and policies.").

6; *id*. at 5 ("An 'account of a defendant's commercial efforts' is not, on its own, sufficient to support a § 1 claim.") (quoting *Kendall*); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (same). The Court's holding is well-grounded in the bedrock legal principal that "[a]llegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws." *Kendall*, 518 F.3d at 1049 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-57 n.5 (2007)). The essential point is that a licensee like EA does not have to be part of an unlawful conspiracy to desire more or different rights, and the law does not punish efforts to obtain more rights by imputing membership in an antitrust conspiracy.

In *Kendall*, plaintiffs alleged that each of the Bank defendants "participates in the management of and has a proprietary interest in" the Consortiums—the entities which made the rules. *Id*. at 1048. The Ninth Circuit held that was not enough. Here, Plaintiffs do not allege even that much. EA is not a member of, and has no management role or proprietary interest in the NCAA. The most Plaintiffs allegations could show is that EA made independent commercial efforts to obtain rights within the confines of the NCAA's requirements of its business partners. This is not enough under *Twombly*, *Kendall*, or this Court's prior Orders.

Plaintiffs' claims against EA should be dismissed on this ground alone.

B. The Alleged Conspiracy is Not an Antitrust Conspiracy.

Independently, the Third Amended Complaint must be dismissed because (1) the alleged conspiracy was not intended to harm or restrain trade or commerce, *Kendall*, 518 F.3d at 1048; and (2) Plaintiffs do not allege that it caused "'significant anticompetitive effects' within a 'relevant market.'" *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (quoting *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996)); *see also Agnew v. Nat'l Coll. Athletic Assoc*., 683 F.3d 328, 335 (7th Cir. 2012).

First, Plaintiffs allege that EA "conspired to use the names, images, and likenesses of current and former student athletes without compensation for the use." Third Amend. Compl. ¶ 354; ¶¶ 7, 12. Plaintiffs call this an antitrust conspiracy, but it is not one. "[L]abels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."

Twombly, 550 U.S. at 555. Labels aside, Plaintiffs' "antitrust" conspiracy is the same as the *Keller* conspiracy, which is made plain by the unchanged allegations in the Third Amended Complaint asserted by the right-of-publicity plaintiffs. *See* Third Amend. Compl. ¶¶ 248-336.

An antitrust conspiracy requires an agreement to restrain trade or harm commerce. *Kendall*, 518 F.3d at 1047; *Tanaka*, 252 F.3d at 1062 ("plaintiff must demonstrate" that the agreement unreasonably restrained trade"). A conspiracy to commit a tort, however, does not restrain trade and is not subject to the antitrust laws.[6]

Nearly identical claims were dismissed with prejudice in *Washington v. National Football League*, because they were "not claims for antitrust." 880 F. Supp. 2d at 1008. There, a proposed class of former professional football players alleged that the NFL and others violated "the antitrust laws by allegedly constraining the sale of their images and likenesses" and "by not allowing them the rights to game films and images from the games in which they played." *Id*. at 1005. The court granted defendants motion to dismiss. The Court held:

> If the NFL is refusing to pay Plaintiffs for the use of their images in its copyrighted material, then Plaintiffs may have a claim for a violation of their right of publicity (as in the *Dryer* case[7]). But this is a royalties issue, not an antitrust issue. Plaintiffs have utterly failed to make out a claim for violation of the antitrust laws, and no amount of legal tongue-twisting will turn their claims into antitrust claims. What they have are claims for royalties, not claims for antitrust. The Complaint is therefore dismissed with prejudice.

Id. at 1008 (internal footnote added). The same is true here. The allegation that EA conspired to use Plaintiffs' likenesses without paying for them presents "a royalties issue." That theory is alleged in *Keller* and "no amount of legal tongue-twisting will turn" it into an antitrust claim. *Id*.

Second, the Third Amended Complaint does not identify any anticompetitive effects

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[6] *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526-27 (1983) (alleged conduct "might constitute a breach of contract, an unfair labor practice, or perhaps even a common law fraud or deceit" but "such activities are plainly not subject to review under the federal antitrust laws."); *Watkins & Son Pet Supplies v. Iams Co*., 254 F.3d 607, 616 (6th Cir. 2001) ("To the extent Watkins is claiming that it suffered an injury as a result of termination of its distributorship, we find, as did the district court, that while a contract or tort claim might lie, an antitrust claim does not, because the injury to Watkins flows from the termination . . ."); *Washington v. National Football League*, 880 F. Supp. 2d 1004, 1008 (D. Mich. 2012).

[7] *Dryer*, like *Keller*, alleged a misappropriation of plaintiffs' publicity rights. *Id*. at 1005.

caused by the alleged conspiracy in a market in which EA participates. *Agnew*, 683 F.3d 335 ("[P]laintiff carries the burden of showing that an agreement or contract has an anticompetitive effect on a given market within a given geographic area."); *see Tanaka, Hairston supra*. An anticompetitive effect is one that raises the price of goods above their competitive level or diminishes their quality. *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001). To the extent the Third Amended Complaint identifies any anticompetitive effect caused by the conspiracy, the alleged effect arises from restrictions the NCAA imposes on student-athletes *in the education market*—i.e., that the NCAA's rules require student-athletes to release their publicity rights in order to be eligible to play NCAA Division I sports. Third Amend. Compl. ¶ 363. Therefore, Plaintiffs' allegations regarding the licensing market—the only market in which EA could have arguably participated (*id.* ¶ 391)—cannot possibly show that EA participated in an antitrust conspiracy.

C. EA Is Not Involved in Any Conspiracy Involving Broadcast.

The Third Amended Complaint correctly does not allege that EA is part of a conspiracy to use student-athletes' names and likenesses in television broadcasts of college football or basketball games. At the hearing on Plaintiffs' motion for class certification, Plaintiffs' lead counsel told the Court that use of "broadcast footage" is not "part of" Plaintiff's "antitrust claim against [EA]"; rather the "complaint against them is the fact that they deliberately do not pay the athletes for their name, image, and likeness . . . in video games." June 20, 2013 Hearing Tr. at 46:9-21. The Court's order granting Plaintiffs leave to file the Third Amended Complaint limited Plaintiffs to the positions they had taken in seeking class certification. Dkt. 830 (Order Granting Leave to Amend) ("The [amended] pleading may be amended only the minimum amount necessary to conform Antitrust Plaintiffs' portion of the complaint to their class certification motion . . .").

To the extent the Third Amended Complaint is ambiguous on this point,[8] any claim

[8] The only ambiguity arises from the fact that the Third Amended Complaint inartfully groups EA in with "Defendants" in their antitrust claim for relief, which seeks damages "in connection with game footage or videogames." Third Amend. Compl., Antitrust Prayer for Relief, C.

against EA regarding broadcast must be dismissed because there are no factual allegations to support it. Indeed, EA's alleged participation in the "alleged restraints" is limited to videogames. Third Amend. Compl. ¶¶ 417-25. To state an antitrust claim the complaint must "answer the basic questions" about the alleged conspiracy, including "who did what, to whom (or with whom) where and when?" *Kendall*, 518 F.3d at 1048. The Third Amended Complaint fails to answer any of these "basic questions."

IV. CONCLUSION

EA does not belong in this antitrust action. The Court should dismiss with prejudice the Third Amended Complaint.

Respectfully submitted,

Dated: July 29, 2013

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