

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 11-1063-DOC

Date October 11, 2011

Title MGA ENTERTAINMENT INC -V- MATTEL INC., ET AL.

Present: The Honorable DAVID O. CARTER, U.S. District Judge

Julie Barrera

Debbie Gale

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Courtney Palko
Maxwell Blecher

Michael T. Zeller
Stephen Neuwirth

Proceedings: MATTEL'S AND ROBERT A. ECKERT'S MOTION TO DISMISS MGA ENTERTAINMENT'S COMPLAINT [11]

Tentative ruling issued, of which a copy is attached hereto.

The case is called and counsel make their appearances. The Court hears argument and the matter is taken under submission.

Initials of Preparer

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **SOUTHERN DIVISION**

11
12 **MGA ENTERTAINMENT, INC.,**

13 **Plaintiff,**

14 **vs.**

15
16 **MATTEL, INC., and ROBERT A.
ECKERT,**

17 **Defendants.**

Case No.: SACV 11-01063 DOC(RNBx)

[TENTATIVE]
ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS WITHOUT
PREJUDICE

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21
22 Before the Court is a Motion to Dismiss filed by Defendants Mattel, Inc., and Robert A.
23 Eckert against Plaintiffs MGA Entertainment, Inc. For the following reasons, the Court
24 [GRANTS] Defendants' Motion, but dismisses without prejudice.

25 **I. Background**

26 **a. Initial Litigation Between Mattel and MGA**

27 On April 27, 2004, Mattel, Inc., ("Mattel") filed a state court complaint against a former
28 employee Carter Bryant ("Bryant") alleging that Bryant breached his contractual and common

1 law duties to Mattel by failing to disclose his concept sketches and sculpts of the Bratz dolls
2 prior to leaving Mattel for MGA Entertainment, Inc. (“MGA”) on or about October 4, 2000.
3 (04-9049 Dkt. 1).

4 MGA intervened in Mattel’s suit and, on April 13, 2005, filed a stand-alone complaint in
5 federal court against Mattel for unfair competition, trade dress infringement, dilution, and unjust
6 enrichment. (05-2727 Dkt. 1). That complaint alleges that Mattel infringed MGA’s distinctive
7 packaging and interfered with MGA’s business relationships.

8 On June 19, 2006, the Honorable Stephen G. Larson consolidated these cases. (05-2727
9 Dkt. 47).

10 **b. Phase 1 of Litigation in Cases 05-2727 and 04-9049**

11 Mattel entered into a settlement with Bryant on the eve of the “phase 1” trial, leaving the
12 following claims against MGA and other defendants to be tried to the jury: (1) intentional
13 interference with contract; (2) aiding and abetting breach of fiduciary duty; (3) aiding and
14 abetting breach of duty of loyalty; (4) conversion; (5) statutory unfair competition; (6)
15 declaratory relief; and (7) copyright infringement. (04-9049 Dkt. 3917 at 11.) Mattel prevailed
16 on each of its claims. On the basis of the jury’s special and general verdicts and after
17 independently examining the similarity between the concept sketches/sculpts and MGA’s Bratz
18 dolls, the district court placed the Bratz trademarks in a constructive trust and enjoined MGA
19 from continuing to sell dolls that were substantially similar to Bryant’s initial works. MGA
20 appealed.

21 During the pendency of MGA’s appeal of the phase 1 orders, discovery proceeded on the
22 claims not tried in the phase 1 trial. Mattel repeatedly amended its pleadings three times,
23 ultimately filing the operative Fourth Amended Answer and Counterclaims (“4AAC”), which
24 brought claims arising out of MGA’s relationships with Bryant and other former Mattel
25 employees who allegedly stole Mattel’s confidential information before leaving Mattel. The
26 4AAC’s claims also arose out of MGA’s alleged litigation misconduct and unwillingness to
27 comply with the phase 1 jury’s verdicts, though many of these allegations were dismissed on
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1 August 2, 2010. MGA narrowed its trade dress infringement allegation to the two-pronged
2 claim that Mattel copied MGA's trapezoidal and heart-shaped packaging.

3 **c. Ninth Circuit Ruling Affecting Cases 05-2727 and 04-9049**

4 On July 22, 2010, MGA prevailed on its appeal. In vacating the constructive trust and
5 injunction, the Ninth Circuit held that the equitable relief was impermissibly broad and
6 predicated upon jury verdicts tainted by erroneous instruction.

7 **d. Phase 2 of Litigation in Cases 05-2727 and 04-9049**

8 On August 16, 2010, MGA filed counterclaims-in-reply alleging Mattel's violation of the
9 Racketeering Influenced and Corrupt Organizations Act ("RICO"), trade secret
10 misappropriation, and wrongful injunction. (04-9049 Dkt. 8583). This complaint alleged that
11 Mattel and its CEO, Robert Eckert, ("Eckert") engaged in illegal market research and aggressive
12 tactics in preparation for and during the pending litigation, including discovery abuses, disregard
13 for the statute of limitations, and the pursuit of injunctive relief after phase 1.

14 On October 5, 2010, the Court dismissed MGA's wrongful injunction claim but permitted
15 MGA's other counterclaims-in-reply. (Dkt. 8892). The Court held that *all* MGA's
16 counterclaims-in-reply, including the one for wrongful injunction, were compulsory. *Id.* at 14.
17 However, the Court dismissed MGA's wrongful injunction counterclaim-in-reply on the merits,
18 reasoning that MGA sought to "recover two categories of damages that are unavailable as a
19 matter of law." *Id.*

20 On October 22, 2010, in response to the Ninth Circuit ruling, this Court granted MGA's
21 motion for a new trial on all claims and issues tried to the jury in phase 1, finding that the
22 indistinct and inseparable claims were all infected by instructional error. The Court separately
23 discarded with the earlier bifurcation of claims, and ordered that all pending claims between the
24 parties be tried in a single proceeding to commence on January 11, 2011.

25 On January 5, 2011, the Court granted Mattel summary judgment on MGA's claims for
26 trade dress infringement, dilution, common law unfair competition, and unjust enrichment and
27 MGA's counterclaim-in-reply for a RICO violation. (Dkt. 9600). The Court denied summary
28

1 judgment as to MGA’s claim for statutory unfair competition and MGA’s counterclaim-in-reply
2 for trade secret misappropriation.

3 **e. Case 11-1063 Giving Rise to the Current Motion to Dismiss**

4 On February 3, 2011, two weeks into trial, MGA filed a complaint, referred to here as
5 MGA’s “current complaint,” in a stand-alone action against Mattel and Eckert (“Defendants”).
6 (Dkt. 1). MGA’s current complaint pleads three claims. First, MGA alleges that Defendants
7 engaged in anticompetitive conduct “beginning at least . . . in 2001 and continuing through the
8 present time” that constitutes a claim under Section 2 of the Sherman Act. (Compl. ¶¶ 52-53).
9 Second, MGA alleges that Mattel sought a remedy in its prior litigation against MGA that
10 “required the district judge to enter a ruling that was an abuse of discretion,” giving rise to an
11 abuse of process claim. *Id.* ¶¶ 59-60. Finally, MGA alleges that Mattel sold Wee 3 Friends “at
12 prices which are below [Mattel’s] fully allocated cost,” giving rise to a claim under California
13 Business & Professions Section 17043. *Id.* at ¶¶ 61-62.

14 The parties stipulated to extending Defendants’ deadline for an Answer to March 17,
15 2011. (Dkt. 9). On March 17, 2011, in lieu of an answer, Defendants filed the present Motion
16 to Dismiss that is before the Court.¹ (Dkt. 11). Defendants’ Motion raises arguments both on
17 procedural grounds and on the merits. Defendants contend that MGA’s current complaint is
18 procedurally barred under the principles of *res judicata* because: (1) the prior litigation is a
19 product of claim-splitting; or (2) alternatively, because the current claims were compulsory
20 under Federal Rule of Civil Procedure 13. On the merits, Defendants contended that: (1) the
21 *Noerr-Pennington* doctrine protects litigation not brought in bad faith and thus bars MGA’s
22 antitrust and abuse of process claim; (2) California Civil Code Section 47(b) protects litigation
23 that is not a malicious prosecution and thus bars MGA’s abuse of process claim; (3) MGA’s
24 relief for damages is barred to the extent it arises from a claim for a wrongfully obtained
25 injunction; (4) MGA fails to state an antitrust claim because it fails to adequately allege the

26
27 ¹ FRCP 12(b)(6) permits a motion to dismiss for failure to state a claim upon which relief can be
28 granted to be filed before an answer. *See Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir.
1984) (affirming dismissal where defendants raised *res judicata* in FRCP 12(b)(6) motion to
dismiss).

1 geographic market, product market, or Mattel's monopolization power; and (5) MGA fails to
2 state a claim under California Business & Professions Section 17043 because MGA does not
3 allege the sale price or cost of the product allegedly sold below cost.

4 **f. Conclusion of Phase 2 and Affect on Case 11-1063 Motion to Dismiss**

5 On August 4, 2011, this Court rendered judgment on the merits pursuant to a jury verdict
6 in case 04-9049. (Dkt. 10704). The judgment awarded MGA \$85 million in compensatory
7 damages, \$85 million in exemplary damages, and \$2,172,000 in attorneys' fees for MGA's
8 counterclaim-in-reply for trade secret misappropriation. Judgment was entered against MGA
9 regarding its claims for common law unfair competition, statutory unfair competition, trade
10 dress infringement, trade dress dilution, RICO violations, unjust enrichment, and wrongful
11 injunction. Judgment was also entered against Mattel regarding its remaining claims against
12 MGA. MGA was awarded addition attorneys fees and costs of more than \$100 million.

13 On September 12, 2011, Defendants filed a Notice of Finality with the Court indicating
14 that, because a final judgment had been entered in the prior litigation, Defendants' Motion to
15 Dismiss the present case is no longer properly analyzed under the theory of claim-splitting, but
16 rather under *res judicata*. (11-1063 Dkt. 26).

17 **II. Legal Standard**

18 Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a
19 plaintiff's allegations fail to state a claim upon which relief can be granted. Dismissal for failure
20 to state a claim does not require the appearance, beyond a doubt, that the plaintiff can prove "no
21 set of facts" in support of its claim that would entitle it to relief. *Bell Atl. Corp. v. Twombly*, 127
22 S. Ct. 1955, 1968 (2007) (abrogating *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99
23 (1957)). In order for a complaint to survive a 12(b)(6) motion, it must state a claim for relief
24 that is plausible on its face. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). A claim for relief is
25 facially plausible when the plaintiff pleads enough facts, taken as true, to allow a court to draw a
26 reasonable inference that the defendant is liable for the alleged conduct. *Id.* at 1949. If the facts
27 only allow a court to draw a reasonable inference that the defendant is possibly liable, then the
28 complaint must be dismissed. *Id.* Mere legal conclusions are not to be accepted as true and do

1 not establish a plausible claim for relief. *Id.* at 1950. Determining whether a complaint states a
2 plausible claim for relief will be a context-specific task requiring the court to draw on its judicial
3 experience and common sense. *Id.*

4 In evaluating a 12(b)(6) motion, review is “limited to the contents of the complaint.”
5 *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). However, exhibits attached
6 to the complaint, as well as matters of public record, may be considered in determining whether
7 dismissal was proper without converting the motion to one for summary judgment. *See Parks*
8 *School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995); *Mack v. South Bay*
9 *Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Further, a court may consider
10 documents “on which the complaint ‘necessarily relies’ if: (1) the complaint refers to the
11 document; (2) the document is central to the plaintiff’s claim; and (3) no party questions the
12 authenticity of the copy attached to the 12(b)(6) motion.” *Marder v. Lopez*, 450 F.3d 445, 448
13 (9th Cir. 2006). “The Court may treat such a document as ‘part of the complaint, and thus may
14 assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).” *Id.*

15 Dismissal without leave to amend is appropriate only when the Court is satisfied that the
16 deficiencies in the complaint could not possibly be cured by amendment. *Jackson v. Carey*, 353
17 F.3d 750, 758 (9th Cir. 2003) (citing *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996)); *Lopez*
18 *v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

19 **III. Discussion**

20 Because the Court [GRANTS] Defendants’ motion under the doctrine of *res judicata*, the
21 Court does not reach Defendants’ alternative arguments.

22 **a. MGA’s Three Claims Are Dismissed Under the Doctrine of *Res Judicata***

23 The doctrine of *res judicata*, also referred to as claim preclusion, bars litigation in a
24 subsequent suit of any claims that were raised or could have been raised in a prior suit where
25 there has been: (1) a final judgment on the merits in the prior suit; (2) the prior suit involved the
26 same parties or parties in privity; and (3) there is an identity of claims between the two suits.²

27
28 ² MGA misstates this Circuit’s law governing *res judicata*. The Ninth Circuit has not adopted
the rule, urged by MGA, that *res judicata* bars *only* a later claim alleging facts “virtually

1 *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). Because *res*
2 *judicata* is an affirmative defense, the burden is on Mattel, as the party asserting it, to prove all
3 of its elements. See Fed. R. Civ. P. 8(c); *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d
4 621, 627 n.4 (9th Cir. 1988) (abrogated on other grounds).

5 The parties do not dispute that this Court's judgment in the prior case (04-9049 Dkt.
6 10704) was a final judgment by a court of competent jurisdiction.³ See *Tripati v. Henman*, 857
7 F.2d 1366, 1367 (9th Cir. 1988) (“[A] final judgment retains all of its *res judicata* consequences
8 pending decision of the appeal.”). Nor do they dispute that that this is a case involving the
9 same parties in privity, given that Eckert is a senior employee of Mattel—a named party in
10 MGA's prior litigation—and Eckert's conduct was the subject of MGA's prior allegations. See
11 *Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684, 691 (9th Cir. Cal. 2007) (employees were
12 parties in privity with corporation where corporation was prior suit's defendant and liability was
13 premised on employee wrongdoing).

14
15 identical” to those alleged in prior litigation. (Pl. Opp'n at 11). MGA also suggests, without
16 citation, that *res judicata* does not bar a current claim where it was not actually litigated or has
17 elements that differ from claims brought in the prior litigation. *Id.* Contrary to MGA's
18 contention, actual litigation of claims is not a requirement for *res judicata*. See *Costantini v.*
19 *Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982). The difference in elements between
20 the claims in two suits is irrelevant; indeed, *res judicata* prevents “an imaginative lawyer” from
relitigating old facts by “attaching a different legal label.” *Tahoe-Sierra Preservation Council,*
Inc. v. Tahoe Regional Planning Agency, 322 F.3d 1064, 1079 (9th Cir. 2003).

21 ³ The doctrine of *res judicata* rather than claim splitting applies to Mattel's Motion to Dismiss
22 because this Court has rendered a final decision on the merits. The parties' briefs disputed
23 whether the present case could be dismissed as a product of claim-splitting, a doctrine which
24 applies the principles of *res judicata* to multiple actions that lack final judgments. On April 4,
25 2011, after the parties submitted their briefs in the present case 11-1063, this Court rendered a
26 final judgment (Dkt. 10704) on the merits in the prior case 04-9049. Because this prior case
27 now has a final judgment, Mattel's Motion to Dismiss the present case is no longer properly
28 analyzed under the theory of claim-splitting, but rather under *res judicata*. Compare *Adams v.*
Cal. Dept. of Health Servs., 487 F.3d 684, 688-89 (9th Cir. 2007) (applying claim-splitting
doctrine prior to entry of final judgment); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe*
Regional Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003) (applying claim preclusion
doctrine after entry of final judgment). However, because the parties' discussion of claim-
splitting necessarily involved the application of *res judicata* principles, no additional briefing is
necessary.

1 Thus, the only disputed issue is whether the prior suits, cases 05-2727 and 04-9049,
2 shares an identity of claims with the present case 11-1063. Whether there is an identity of
3 claims depends on four factors, the first of which is the most important, namely: (1) the two
4 suits arise out of the same transactional nucleus of facts; (2) the rights or interests established in
5 the prior judgment would be destroyed or impaired by prosecution of the second action; (3)
6 substantially the same evidence is presented in the two actions; and (4) the two suits involve
7 infringement of the same right. *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02
8 (9th Cir. 1982). Because this Court concludes that these four factors show that MGA's current
9 and prior suits share an identity of claims, *res judicata* bars the current claims and dismissal is
10 proper.

11 **i. The same transactional nucleus of facts give rise to MGA's current**
12 **and prior claims**

13 Claims arise from the same transactional nucleus of facts where the same "transaction, or
14 series of transactions" could give rise to both claims, often shown by the similarity of the
15 allegations in the prior and current pleadings. See *Western Sys. v. Ulloa*, 958 F.2d 864, 871 (9th
16 Cir. 1992); *Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684, 691 (9th Cir. Cal. 2007).
17 However, a claim does not arise from the same transactional nucleus of facts where the claim
18 alleges new conduct "subsequent to the last date alleged in the prior adjudication." *Int'l Techs.*
19 *Consultants*, 137 F.3d at 1388.

20 Thus, *res judicata* bars MGA's current complaint if Defendants can show that: (1)
21 MGA's allegations in its prior pleadings could give rise to the current claims; and (2) MGA fails
22 to allege new conduct occurring between August 16, 2010, and February 3, 2011. Those dates
23 reflect MGA's last pleadings in the prior litigation and MGA's filing of its current complaint.
24 *See id.*

25 **1. The same transactional nucleus of facts give rise to MGA's**
26 **abuse of process claim and to its antitrust claim to the extent**
27 **the latter relies on Defendants' litigation conduct before**
28 **August 16, 2010**

1 All of MGA’s abuse of process claim and a substantial portion of MGA’s antitrust claim
2 rely on Defendants’ conduct prior to August 16, 2010, during and in preparation for litigation.
3 Indeed, MGA concedes in its Opposition Brief that MGA’s current claims “came into being on
4 July 22, 2010,” with the Ninth Circuit ruling reversing the district court’s judgment. (Pl. Opp’n
5 at 1, 9-10). The Complaint refers to conduct relied on by MGA in its prior pleadings and which
6 occurred before August 16, 2010, as shown by other documents filed with the Court.
7 Defendants identify these documents, arranged in a useful chart, to show that MGA’s current
8 complaint mirrors MGA’s earlier allegations about Defendants’ litigation conduct prior to
9 August 16, 2010.⁴ See Mot. Dismiss at 9-10; Reply at 3, n.1. For example, the gravamen of
10 MGA’s abuse of process claim is that Mattel sought a remedy against MGA that “required the
11 district judge to enter a ruling that was an abuse of discretion”—conduct which occurred prior to
12 August 16, 2010. (Compl. ¶¶ 16-25, 30, 59-60). Other litigation conduct prior to August 16,
13 2010, including Mattel’s alleged discovery abuses and disregard for the statute of limitations,
14 comprise a substantial amount of MGA’s antitrust claim. *Id.* at ¶¶ 16-25, 30. These allegations
15 appeared in MGA’s pleadings on and prior to August 16, 2010. See (04-9049) Dkt. 2573 ¶¶ 59-
16 69 (MGA’s March 8, 2008 proposed statement of facts); Dkt. 8583 ¶¶ 30-36, 60, 315-18
17 (MGA’s August 16, 2010, counterclaims in reply). Because the entire abuse of process claim is
18 based on Defendants’ conduct in the prior litigation—conduct which must have occurred before
19 August 16, 2010—MGA’s current abuse of process claim arises from the same transactional
20 nucleus of facts as MGA’s prior claims.⁵ Similarly, to the extent MGA’s antitrust claim relies
21 on Defendants’ litigation conduct, this claim also arises from the same transactional nucleus of
22 facts as MGA’s prior claims.⁶

24 ⁴ This court takes judicial notice of these documents as matters of public record. See Fed. R.
25 Evid. 201; *Lee v. City of Los Angeles*, 250 F.3d 668, 688-689 (9th Cir. 2001).

26 ⁵ To the extent that MGA argues that Mattel engaged in litigation conduct after August 16, 2010,
27 by relying on MGA’s allegation that Mattel filed a “baseless and frivolous new lawsuit” in state
28 court, this one-sentence allegation is conclusory. See Compl. 30(c).

⁶ Because this Court previously held that all MGA’s counterclaims-in-reply were compulsory,
including the wrongful injunction claim that the Court dismissed (04-9049 Dkt. 8892 at 14),
MGA cannot now contend this Court procedurally precluded MGA from raising these claims.

1 **2. The same transactional nucleus of facts give rise to MGA’s**
2 **California claim and antitrust claim to the extent the latter**
3 **relies on Mattel’s non-litigation conduct before August 16,**
4 **2010**

5 MGA’s current complaint does not specify whether the remaining non-litigation conduct
6 by Defendants occurred between August 16, 2010, and February 3, 2011. Instead, MGA alleges
7 that Mattel and Eckert engaged in various anticompetitive conduct “beginning at least . . . in
8 2001 and continuing through the present time.” (Compl. ¶¶ 52-53). MGA also alleges, in one
9 sentence and without any reference to dates, that Mattel sold its Wee 3 Friends dolls “below its
10 fully allocated cost.” *Id.* at 53(g), 62.

11 As Defendants note, documents filed with this Court show that MGA’s current complaint
12 mirrors MGA’s earlier allegations about Defendants’ non-litigation conduct prior to August 16,
13 2010. *See* Mot. Dismiss at 9-10; Reply at 3, n.1. These documents show, for example, that
14 MGA alleges in both the current and prior complaints the same anticompetitive conduct, such as
15 Mattel’s manipulation of NPD data and pressure on companies to not distribute Bratz products
16 or supply MGA with raw material. *Compare* Compl. ¶ 53(b-c) with 05-2727 Dkt. 1 at ¶ 9, 76-
17 78, 86, 113 (2005 complaint). In addition, these documents show that, in March and June of
18 2010, MGA was considering alleging “below cost pricing” for Mattel’s Wee 3 Friends as part of
19 an earlier unfair competition claim. *See* 04-9049 Dkt. 8168 at 1-2; Dkt. 8169 at 736:5-7. All
20 these documents existed before MGA’s last pleading on April 16, 2011. Given that MGA’s
21 current complaint makes almost all the same allegations as its prior ones, Defendants contend
22 that MGA’s current and prior suits arise from the same transactional nucleus of facts.⁷
23

24 Because the Court dismissed MGA’s wrongful injunction counterclaim-in-reply on the merits,
25 MGA’s own failure to articulate a cognizable claim arising from the injunction prevented it from
26 further litigating that claim.

27 ⁷ As Defendants observe, MGA’s current complaint also alleges facts which either were in
28 MGA’s possession or were public knowledge by 2003, and thus are not “new facts” for purposes
of *res judicata*. *See* Reply 3-4 n. 1; *Western Sys. v. Ulloa*, 958 F.2d 864, 871-872 (9th Cir.
1992) (“Ignorance of a party does not, however, avoid the bar of *res judicata* unless the
ignorance was caused by the misrepresentation or concealment of the opposing party.”).

1 MGA does not dispute the accuracy of Defendants’ chart nor the contention that
2 allegations in MGA’s current pleadings appeared in its prior pleadings. Instead, MGA’s argues
3 vaguely that the present case is based on “new conduct subsequent to the existing case.” (Pl.
4 Opp’n at 9-10). Read charitably, this statement suggests that MGA alleges conduct after August
5 16, 2010. Given the language of the Complaint, the extensive documentation indicating the
6 similarity of current and prior pleadings, and given that MGA does not dispute the overlap in
7 allegations, any alleged conduct that occurred before August 16, 2010 is barred by *res judicata*.

8 **3. To the extent that MGA’s antitrust claim alleges conduct**
9 **after August 16, 2010, those allegations are too conclusory to**
10 **state a claim**

11 None of the conduct alleged in MGA’s current complaint is attributed to a date after
12 August 16, 2010; instead, the complaint details some conduct that is expressly attributed to
13 earlier dates, describes other conduct with no dates, and states that monopolization is
14 “continuing through the present time.” Compl. ¶ 52. Given the extensive overlap between
15 MGA’s current and prior complaints and the absence of conduct attributed to dates after August
16 16, 2010, the remaining issue is whether MGA’s reference to continuous activity is too
17 conclusory to allege conduct by Defendants between August 16, 2010, and February 3, 2011.
18 *See Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010) (“A court need not
19 credit a complaint’s “allegations that contradict . . . matters properly subject to judicial notice, or
20 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
21 inferences.”). Defendants and MGA dispute whether allegations of continuous antitrust
22 violations are sufficient to save an antitrust claim from *res judicata*.

23 In *Dual-Deck*, the Ninth Circuit applied issue preclusion—a close cousin of *res*
24 *judicata*—to bar an antitrust claim where the complaint asserted “violations of [antitrust] law
25 and other acts taken by the defendant . . . since the filing” of the prior suit and incorporated the
26 factual allegations from the prior suit’s complaint. *In re Dual-Deck Video Cassette Recorder*
27 *Antitrust Litig.*, 11 F.3d 1460, 1463 (9th Cir. 1993). The Ninth Circuit held that this
28 “ambiguous” reference to activity “since the filing” did not show that the plaintiff alleged that

1 defendants had formed a new conspiracy *after* the filing, which was a necessary element of the
2 antitrust claim. *Id.* at 1463-64. Later courts have interpreted *Dual-Deck* as holding that the
3 “plaintiff alleged damages from subsequent consequences of the earlier conduct, and that
4 conduct had already been held not to violate the antitrust laws.” *Int’l Techs. Consultants v.*
5 *Pilkington PLC*, 137 F.3d 1382, 1388 (9th Cir. 1998).

6 In contrast, in *Harkins* the Ninth Circuit held that *res judicata* did not bar an antitrust
7 claim where the later complaint alleged that defendants, “at least as early as September 1, 1976
8 and continuing without interruption[. . .] formulated a plan and have continuously pursued a
9 course of conduct intended to unreasonably restrain trade.” *Harkins Amusement Enterprises,*
10 *Inc. v. Harry Nace Co.*, 890 F.2d 181, 182 (9th Cir. 1989). The court reasoned that it would be
11 “over-technical” to construe the complaint as alleging that a conspiracy formed *only* in
12 September 1, 1976. *Id.* Thus, the court read the complaint as alleging that defendants
13 “conspire[d] continuously since that date,” which meant that defendants’ conspiracy formed
14 *after* the pleadings in the prior litigation. *Id.* The Ninth Circuit also noted that, “by the
15 defendants’ own concession,” the facts alleged in the later and prior complaints were “at least 10
16 percent different,” in addition to being “conduct that occurred in a different time period.” *Id.* at
17 184.

18 The Court finds *Dual-Deck* more persuasive and distinguishes *Harkins*. MGA’s current
19 complaint is more conclusory than that in *Harkins* because MGA does not allege that the
20 conduct giving rise to MGA’s antitrust violations was “without interruption.” Furthermore,
21 unlike in *Harkins*, Defendants here do not concede that MGA’s current complaint contains 10
22 percent new allegations; to the contrary, Defendants have demonstrated that MGA reiterates the
23 same allegations as in its prior pleadings.

24 Finally, like in *Dual-Deck*, MGA’s current complaint fails to provide any dates to
25 indicate that the alleged conduct occurred after the prior pleadings on August 16, 2010. Like in
26 *Dual-Deck*, MGA’s Opposition Brief does not identify *any* allegations of conduct after August
27 16, 2010, in the current complaint—indeed, MGA omits any mention of Mattel or Eckert’s
28 conduct between August 16, 2010, and February 3, 2011, in its summary of the facts of this

1 case.⁸ (Pl. Opp’n at 6-7). And, like in *Dual-Deck*, MGA recreates allegations from prior
2 pleadings.

3 Given that MGA’s current claims mirror its prior allegations and that MGA’s Opposition
4 Brief does not identify a single distinct act in the current complaint by Defendants between
5 August 16, 2010, and February 3, 2011, MGA’s allegations that Defendants’ antitrust violations
6 are “continuing” is too conclusory. At best, like in *Dual-Deck*, MGA is only alleging “damages
7 from subsequent consequences of the earlier conduct,” and not new conduct occurring between
8 August 16, 2010, and February 3, 2011. See *Int’l Techs. Consultants v. Pilkington PLC*, 137
9 F.3d 1382, 1388 (9th Cir. 1998).

10 **4. The remaining factors also indicate that MGA’s current and**
11 **prior claims are the same**

12 As noted earlier, courts consider three additional factors to determine if two suits share
13 the same claim, namely whether: (1) substantially the same evidence is presented in the two
14 actions; (2) the rights or interests established in the prior judgment would be destroyed or
15 impaired by prosecution of the second action; and (3) the two suits involve infringement of the
16 same right. These factors militate strongly in favor of preclusion.

17 First, MGA’s reliance on the same factual allegations in both its present and prior claim
18 demonstrates that the same evidence would be presented to prove both claims. Although MGA
19 argues that its current claims require “new evidence, new expert discovery,” (Pl. Opp’n 1), the
20 availability of *additional* evidence is irrelevant. Instead, the controlling issue is whether
21 substantially the same evidence could be used to satisfy both claims. See *Western Sys. v. Ulloa*,
22 958 F.2d 864, 871-872 (9th Cir. 1992); *Int’l Union of Operating Eng’r-Employers Constr.*

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25 ⁸ MGA’s Opposition Brief cites trial testimony from April 2011—*after* the current complaint
26 was filed—to assert that, in 2004, Mattel formed an agreement with Kohl’s to exclude Bratz
27 dolls and that this exclusion “continues to the present.” See Pl. Opp’n at 12. Even assuming
28 this trial testimony showed antitrust violations conduct between April 16, 2010, and February 3,
2011, MGA cannot defend against a motion to dismiss by relying on new allegations in its
Opposition that are absent from the current complaint. See *Car Carriers, Inc. v. Ford Motor*
Co., 745 F.2d 1101, 1107 (7th Cir.1984).

1 *Indus. Pension v. Karr*, 994 F.2d 1426, 1430 (9th Cir. 1993) (*res judicata* may apply even where
2 there is some difference in the evidence).

3 Second, the rights established in the prior judgment would be destroyed or impaired by
4 prosecution of the current claim. If MGA is successful in its current claims, it could lead to
5 either a double recovery for the same injury or recovery for a claim against which Mattel
6 previously successfully defended.

7 Finally, the two suits involve infringement of the same right, namely, MGA's right to be
8 compete in the market from Mattel's allegedly illegal litigation strategy and out-of-court tactics.

9 In sum, given that these three factors militate in favor of preclusion and that MGA's
10 current and prior pleadings arise from the same transactional nucleus of facts, MGA's current
11 and prior claims are the same. Because there has been a final judgment on the merits of a prior
12 suit between the parties in privity and an identity of claims, *res judicata* bars MGA's three
13 claims. *See Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982).

14 **ii. Although Res Judicata bars MGA's claims, dismissal without**
15 **prejudice is warranted**

16 Contrary to Mattel's contention, dismissal with prejudice would be improper because,
17 although MGA's current complaint is too conclusory, it may be possible for Mattel to allege
18 anticompetitive conduct after August 16, 2010. *See Schreiber Distributing Co. v. Serv-Well*
19 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Because leave to amend, whether
20 requested or not, should be granted unless amendment would be futile, this Court [GRANTS]
21 Defendants' motion to dismiss without prejudice.

22 **IV. Disposition**

23 The Court [GRANTS] Defendants' motion to dismiss MGA's complaint, but dismisses
24 without prejudice.

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26 DATED:

27 _____
28 DAVID O. CARTER

UNITED STATES DISTRICT JUDGE

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