IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KELSEY K., individually and on behalf of all others similarly situated,

Plaintiff,

v.

NFL ENTERPRISES LLC, *et al.*,

Defendants.
/

No. C 17-00496 WHA

ORDER DENYING MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

INTRODUCTION

Following dismissal of her antitrust claims, plaintiff moves for leave to file an amended complaint. The motion is **DENIED**.

STATEMENT

Plaintiff Kelsey K. brought this action against the National Football League and 27 of its member clubs based on allegations that defendants violated the Sherman Act and the Cartwright Act by conspiring to "suppress the compensation" of and "eliminate competition among them for" cheerleaders (*see* Dkt. No. 38-1 ¶ 1). This action comes in the wake of a string of wage-and-hour lawsuits against NFL clubs in recent years to benefit cheerleaders, but it is not itself a wage-and-hour suit. Instead, this action opens a new chapter in litigation concerning NFL cheerleaders based on "more sinister" allegations of antitrust conspiracy between clubs (*see id.* ¶ 102). Five other clubs in the NFL do not even employ cheerleaders and have thus been left out of this lawsuit.

A prior order dated May 25 granted defendants' motion to dismiss, finding that plaintiff had alleged neither "parallel conduct with plus factors" nor antitrust injury (*see* Dkt. No. 36). That order permitted plaintiff to move for leave to amend but cautioned that she "should be sure to plead her best case" (*id.* at 13). Pursuant to the May 25 order, plaintiff now moves for leave to file an amended complaint (Dkt. No. 38). Defendants oppose the proposed amendment as futile (Dkt. No. 39). This order follows full briefing and oral argument.

ANALYSIS

Rule 15(a)(2) advises, "The court should freely give leave when justice so requires." In ruling on motions for leave to amend, courts consider (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the plaintiff has previously amended their complaint. *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2003). Futility alone can justify denying leave to amend. *Ibid.*; *see also Ebner v. Fresh, Inc.*, 838 F.3d 958, 968 (9th Cir. 2016). The parties debate only the futility factor on the instant motion.

For purposes of assessing futility, the legal standard is the same as it would be on a motion to dismiss, *i.e.*, the proposed amendment must plead "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has facial plausibility when its factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While all allegations of material fact are taken as true and construed in the light most favorable to plaintiff, conclusory allegations of law and unwarranted inferences are insufficient to warrant granting leave to amend. *Cf. Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001). For example, "formulaic recitation of the elements" of a claim are not entitled to the presumption of truth. *Iqbal*, 556 U.S. at 681. This order considers allegations in the proposed amendment, attached exhibits, and matters properly subject to judicial notice. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030–31 (9th Cir. 2008).

It bears repeating that plaintiff's proposed amendment, like her initial complaint, asserts *only* claims for violations of antitrust law. In other words, to repeat, "[t]his is *not* a lawsuit for violation of wage-and-hour or labor laws [or] for general maltreatment of cheerleaders. . . .

Plaintiff chose to assert *antitrust* claims, so she must plead factual allegations sufficient to show violations of *antitrust* law" (Dkt. No. 36 at 4). The factual allegations must answer the basic questions of "who, did what, to whom (or with whom), where, and when?" *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047–48 (9th Cir. 2008).

1. SHERMAN ACT CLAIM.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. 1. A Section 1 claim requires (1) a contract, combination, or conspiracy (2) intended to unreasonably restrain or harm trade (3) that actually injures competition and (4) harms the plaintiff via the anticompetitive conduct. *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1129 (9th Cir. 2015); *see also Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1178 (9th Cir. 2016) (citing *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 189–90 (2010)).

Plaintiff's proposed amendment asserts "an overarching conspiracy of two *per se* illegal agreements: a No Poaching Agreement and a Wage Fixing Agreement" (Dkt. No. 38 at 8), but fails to allege facts supporting any plausible inference of such a conspiracy. It would be redundant and unnecessary to catalogue every deficiency in the proposed amendment, many of which overlap with issues already discussed in the May 25 order. Instead, this order primarily focuses on new issues teed up by the proposed amendment that justify denial of leave to amend.

A. Alleged No-Poaching Agreement.

Plaintiff alleges that the "Constitution and Bylaws of the National Football League" — appended in its entirety to the proposed amendment — codifies a "black-and-white" illegal agreement between the NFL clubs to not recruit cheerleaders from each other (Dkt. No. 38-1 ¶¶ 2–5, 83–100). Specifically, Article 9.1(C)(11) provides that "[n]o member, nor any stockholder, director, officer, partner, or employee thereof, or person holding an interest therein, nor any officer or employee of the League shall . . . [t]amper with a player or coaches or other employee under contract to or the property of another member club" (*id.* Exh. A at 37, 39).

Defendants point out, however, that the NFL's anti-tampering policy also expressly provides that, "[i]f a club employee (other than player, coach, or high-level employee) has completed the regular season covered by the final year of his or her contract, any attempt to deny permission for the employee to discuss and accept employment with another club will be considered improper" (*id.* Exh. A at 2001-4–2001-5). Thus, even accepting as true plaintiff's allegation that the anti-tampering policy covers cheerleaders, her own appended documents show that the NFL does not categorically prohibit competition among its member clubs to recruit cheerleaders. On the contrary, the NFL expressly prohibits any attempt to restrict mobility among clubs for cheerleaders who have completed their contracts.

Plaintiff's counsel neglected to bring this mobility provision, which appears within the proposed amendment's own appended documents, to the Court's attention. Plaintiff's counsel does not (and cannot) dispute its plain language, but shifts ground in the reply brief in an attempt to get around the mobility provision, falling back to saying defendants actually "do not enforce the No Poaching Agreement in [the] manner" written (Dkt. No. 40 at 6). In support of this fallback position, the reply brief cites various news articles — none of which appeared in the proposed amendment — for the proposition that the NFL "has repeatedly punished teams for merely contacting employees who are under contract . . . to inquire as to the possibility of the employee signing with that team *once the employee's existing contract expired*" (*id.* at 6–7).

First, the news articles cited in the reply brief concerned players and coaches, not cheerleaders. Those articles hardly contradict the mobility provision cited by defendants, which specifically applies to employees "*other than* player, coach, or high-level employee" (emphasis added). *Second*, the fact remains that the anti-tampering policy cited by plaintiff *expressly permits* — and even prohibits any attempt to restrict — competition among its member clubs to hire cheerleaders (and other employees). It requires only that any such competition occur between contracts. Since contracts for NFL cheerleaders renew on an annual basis (*see* Dkt. No. 38-1 ¶¶ 86, 92), the anti-tampering policy still affords NFL clubs frequent opportunity to poach each others' cheerleaders if they wish to do so. The interim prohibition on poaching while cheerleaders remain under contract would be consistent with any number of legitimate

business reasons that have nothing to do with any anticompetitive conspiracy. In other words, the cited NFL's Constitution and Bylaws actually flatly contradict plaintiff's allegations that defendants agreed to categorically refrain from recruiting each others' cheerleaders.

The reply brief next resorts to saying that cheerleaders "should be permitted to be contacted by NFL teams while under contract" (Dkt. No. 40 at 7). This new assertion is *not* the theory asserted in the proposed amendment, which was supposed to be plaintiff's "best case." Plaintiff brought this action based on allegations that defendants agreed to *categorically* refrain from poaching cheerleaders in order to illegally suppress competition. She has never alleged any fact or advanced any argument indicating that a lesser restraint — *e.g.*, an anti-tampering policy that prohibits only poaching of cheerleaders *under contract* but preserves annual opportunities to poach cheerleaders *in-between contracts* — would somehow constitute an antitrust violation. In short, the proposed pleading has given us *zero* ground to find this fallback theory sufficient to state a plausible claim for relief.

During oral argument, plaintiff's counsel surfaced yet another new tack, saying (for the first time) that yet another provision in the NFL's Constitution and Bylaws undercuts the mobility provision cited by defendants. The provision newly cited by plaintiff's counsel states (Dkt. No. 38-1 Exh. A at 2001-6):

> As a common courtesy and to avoid inter-club disputes, whenever a club wishes to contact a non-player employee of another club about possible employment, such inquiring club must first notify the owner or operating head of the employer club to express its interest. This requirement prevails even if the employee in question does not have an active contract and even if other provisions of this Policy prohibit the employer club from denying permission to discuss employment with the employee.

Counsel insisted that the foregoing provision, combined with the news articles (improperly) cited in the reply brief, shows that the NFL in fact punishes clubs for even contacting other clubs' employees for recruitment purposes. *First*, all but one of those news articles concerned poaching of *players* (the one exception concerned poaching of a coach), while the "common courtesy" provision is expressly limited to poaching of "*non-player* employee[s]" (emphasis added). Counsel's argument offers no basis for inferring that the NFL uses the "common courtesy" provision to punish clubs for attempting to poach cheerleaders. *Second*, the "common

courtesy" provision in no way changes — and indeed reinforces — the simple fact that clubs remain free to poach each other's employees between contracts. At most, the "common courtesy" provision merely regulates any such poaching with a notice requirement.

Plaintiff also cites an "Antitrust Guidance for Human Resource Professionals" from the United States Department of Justice for the proposition that Article 9.1(C)(11) is a *per se* illegal "no poaching" agreement under antitrust laws (Dkt. No. 38-1 ¶ 5). The cited part of the DOJ Guidance states (*id.* Exh. B at 3):

> Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws. That means that if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects. Legitimate joint ventures (including, for example, appropriate shared use of facilities) are not considered per se illegal under the antitrust laws.

To repeat, a policy that permits poaching on an annual basis but bars it during the NFL season is not a "naked" no-poaching agreement. As discussed, plaintiff's proposed amendment fails to allege facts supporting any plausible inference that the anti-tampering policy actually functioned as a "no-poaching agreement . . . separate from or not reasonably necessary to a larger legitimate collaboration" as contemplated by the DOJ Guidance.

Plaintiff's proposed amendment, like her initial complaint, features allegations that no NFL club has ever attempted to recruit a cheerleader from another club (*see* Dkt. No. 38-1 ¶¶ 91–92). As before, however, plaintiff makes no suggestion that any club has ever wanted to do so or that there is a shortage of cheerleading services that would motivate such attempts. The closest the proposed amendment comes is in alleging, in only conclusory phrases, that cheerleaders are "highly valuable" to NFL clubs such that each club has "significant incentive" to hire the best for itself (*e.g., id.* ¶¶ 91–92, 99, 147).

In other words, what is the significance of the fact that no club has ever tried to hire away a cheerleader from another club? Is it proof of a conspiracy? No, it is not, at least in the absence of well-pled facts showing a need for clubs to poach in the first place. The facts alleged in the proposed amendment remain entirely consistent with the plausible possibility that

sufficient local cheerleader talent persists such that NFL clubs have never even contemplated the prospect of luring away a competitor's star. Taken as a whole, the proposed amendment fails to nudge its assertion that NFL clubs would compete for cheerleaders in the absence of a conspiracy from possible to plausible.

This shortfall is all the more starkly illuminated by the reply brief, which remarkably adds assertions fundamentally incompatible with plaintiff's own theories of liability. For example, the reply brief argues that defendants were able to "exploit" cheerleaders because the cheerleaders themselves "longed to perform in front of thousands of fans" (*see* Dkt. No. 40 at 8). This contradicts the notion that defendants have historically been able to "exploit" cheerleaders, *e.g.*, with low pay and poor working conditions, only by participating in some clandestine antitrust conspiracy. Significantly, the proposed amendment itself also repeats the (contrary) allegation from plaintiff's initial complaint that cheerleaders "were told [they] could be quickly replaced," now adding only a modest qualifier that this factual allegation "is not evidence of the fact Female Athletes were, in fact, replaceable" (Dkt. No. 38-1 ¶ 147).

In the same vein, however, the reply brief adds that cheerleaders in the NFL have "short-term" careers in a revolving-door system where, "by the time cheerleaders realized they had been underpaid, they were ready to move on," and "there are certainly women waiting to step into the role" (Dkt. No. 40 at 8). The reply brief further adds that "[c]heerleaders, though important . . . are essential neither to the existence of NFL Member Teams nor to the availability of professional football. In fact, some teams employ no cheerleaders at all" (*id.* at 5). These arguments contradict the theory that NFL clubs would have attempted to poach each others' cheerleaders and paid cheerleaders much higher salaries but for the existence of some unlawful conspiracy. As the prior order dismissing the initial complaint noted, "[t]here is no need to poach for positions where individuals can be 'quickly replaced'" (Dkt. No. 36 at 9).

It also merits mentioning that plaintiff's proposed amendment still fails to allege how she personally suffered any antitrust injury as a result of the purported no-poaching agreement. The closest the proposed amendment comes is its allegation that (Dkt. No. 38-1 ¶ 92):

> Erin Olmstead, the director of the 49ers' cheerleading team, caused to be communicated to Plaintiff Kelsey K. that if she was not hired

> as a 49ers cheerleader in subsequent years she could not go tryout for any other NFL team's cheerleading team. Plaintiff Kelsey K. was not selected for a second year on the 49ers cheerleading team despite trying out, and did not tryout for another team, including Defendant Raiders, despite wanting to do so.

The foregoing allegation artfully stops short of actually stating that Olmstead told plaintiff she could not tryout for another club *because of* any purported no-poaching agreement. In fact, the allegation is conspicuously and suspiciously silent on key facts like *how* Olmstead "caused [this message] to be communicated" to plaintiff, *why* she supposedly could not tryout for another club if the 49ers did not hire her again, and *why* plaintiff didn't tryout for another club "despite wanting to do so." The latter omission, in particular, stands out because the answer would be information exclusively within plaintiff's own control. There is no reason to leave such details to insinuation.

The peculiar phrasing of the allegation makes it impossible to infer any reason why it was not wholly plaintiff's own decision to not tryout for another club after the 49ers declined to re-hire her. Taken as a whole, the proposed amendment simply cannot support any plausible inference that plaintiff missed out on any employment opportunity *as a result of* any purported no-poaching agreement between NFL clubs.

B. Alleged Wage-Fixing Agreement.

Plaintiff's proposed amendment also revives the theory from her initial complaint that parallel conduct between the NFL clubs constitutes circumstantial evidence of a conspiracy to suppress cheerleader earnings by agreeing to (1) pay them "a low, flat wage for each game . . . within a specified range," (2) not pay them "for time spent rehearsing," (3) only pay them "for time spent on various community outreach events if the [club] was reimbursed by a company hosting the event," and (4) file cheerleader contracts with the NFL "to ensure participation in the conspiracy" (*see* Dkt. No. 38-1 ¶¶ 101–39).

As before, to state a claim under Section 1 of the Sherman Act based solely on parallel conduct, plaintiff must allege facts tending to exclude the possibility that defendants acted independently. In our circuit, courts distinguish permissible parallel conduct from impermissible conspiracy by looking for "plus factors," *i.e.*, "economic actions and outcomes

that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." *See In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1193–94 (9th Cir. 2015); *In re Citric Acid Litig.*, 191 F.3d 1090, 1096 (9th Cir. 1999).

The May 25 order rejected plaintiff's wage-fixing theory because the initial complaint failed to allege parallel conduct with plus factors sufficient to support an inference of unlawful conspiracy, and also failed to allege any resulting antitrust injury to plaintiff (Dkt. No. 36 at 4–11). The proposed amendment adds little to cure these defects.

Like the initial complaint, the proposed amendment continues to allege non-parallel cheerleader compensation policies even between the NFL clubs specifically mentioned therein (Dkt. No. 38-1 ¶¶ 110–13). As just one example, the proposed amendment continues to assert a "low, flat wage" theory. According to plaintiff, however, the Buffalo Bills actually paid their cheerleaders *zero* dollars per game, whereas other clubs specifically mentioned in the proposed amendment paid up to $125 per game. In an apparent attempt to write around this self-contradiction, the proposed amendment has reworked its allegations about the Bills to state that the Bills "compensated its Female Athletes $115 per game (*in the form of game tickets and a parking pass for each game worked*)" (*id.* ¶ 113 (emphasis added)). It remains significant, however, that the Bills' compensation system (*i.e.*, not cash but game tickets and parking passes) for cheerleaders differed from other clubs' policies in both the *value* and the *type* of compensation offered. These and other differences between cheerleader compensation with various NFL clubs undercut the plausibility of plaintiff's conspiracy theory.

Plaintiff again attempts to gloss over differences in defendants' alleged pay schemes, arguing that such differences do not preclude a finding of conspiracy (*see* Dkt. Nos. 38 at 21–22, 40 at 12–13). The problem here remains, however, that plaintiff's factual allegations, taken as a whole, "barely show minimal parallel conduct" and fail to "nudge the overall conspiracy across the line from *conceivable* to *plausible*" (*see* Dkt. No. 36 at 9). *See Twombly*, 550 U.S. at 570; *see also In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1022 (N.D. Cal. 2007).

Importantly, even plaintiff acknowledges that the various NFL clubs compensated their cheerleaders in *different* ways, so no one is suggesting that defendants ever conspired to fix an across-the-board pay scale. Instead, plaintiff recedes to the nebulous argument that defendants agreed to suppress compensation for cheerleaders in general, however high or low (or in whatever form). The proposed amendment, however, offers no direct evidence of any agreement on this point and rests solely on a theory of parallel conduct, *i.e.*, that all clubs must have acted in concert because they all paid below what, according to the proposed amendment, cheerleaders' services were worth.

The proposed amendment also alleges five "plus factors," none of which suffice to push plaintiff's overall conspiracy theory over the plausibility bar. *First*, defendants allegedly paid cheerleaders below the minimum wage until wage-and-hour lawsuits caused them to raise cheerleader wages "in order to limit . . . potential legal exposure" (Dkt. No. 38-1 ¶¶ 130–35). This indicates that defendants resisted paying more in wages until the threat of legal liability forced them to — a narrative hardly inconsistent with unilateral and profit-driven (albeit culpable) conduct. *Second*, defendants allegedly required cheerleaders to "*purchase* a minimum number of cheerleader calendars and other promotional items, which [they] were 'allowed' to sell at a small, specified profit per item" (*id.* ¶ 136). This describes a parallel practice but fails to show any suppression of cheerleader wages. *Third*, cheerleader wages have allegedly not "skyrocketed" concurrently with the NFL's revenue and salaries for players, executives, and coaches since 1954 (*id.* ¶ 137). But the proposed amendment alleges nothing to suggest that cheerleaders have made the same contributions as have players, executives, and coaches in causing the NFL to flourish. *Fourth*, defendants allegedly participated in an unlawful no-poaching agreement (*id.* ¶ 138). As explained, this is implausible. *Fifth*, defendants allegedly paid cheerleaders a lump sum for all earnings at the end of the season. As defendants point out, this allegation actually contradicts plaintiff's carefully-crafted allegation that the Bills paid their cheerleaders with game tickets and parking passes (*see* Dkt. No. 39 at 10). But even looking past this contradiction, the proposed amendment offers no explanation for why a lump-sum

arrangement would be more consistent with a wage-suppressing conspiracy than with unilateral, profit-driven conduct.

In summary, plaintiff's proposed amendment fails to state a claim for relief under Section 1 of the Sherman Act because it fails to allege facts supporting a plausible inference that defendants participated in a conspiracy to restrain trade as to NFL cheerleaders by entering into unlawful no-poaching and wage-suppression agreements.

2. CARTWRIGHT ACT CLAIM.

As before, plaintiff's federal and state law antitrust claims are predicated on the same allegations of conspiracy. Her proposed amendment therefore fails to plausibly allege conspiracy under the Cartwright Act for the same reasons that it fails to do so under the Sherman Act. *See Graphics Processing Units*, 527 F. Supp. 2d at 1025. In light of the foregoing, this order does not reach defendants' additional arguments that plaintiff's proposed amendment should also be evaluated and rejected under the "rule of reason standard," rather than *per se* illegality (*see* Dkt. No. 39 at 1, 17–18).

CONCLUSION

As stated, the prior order dismissing the initial complaint for failing to state a claim also allowed plaintiff to move for leave to amend but cautioned that she "should be sure to plead her best case." Her proposed amendment, however, still fails to plead factual allegations supporting any plausible claim for relief. Her motion for leave to file an amended complaint is therefore **DENIED** as futile and this action is hereby **DISMISSED**. Plaintiff may not seek further leave to amend. Judgment will follow.

IT IS SO ORDERED.

Dated: July 21, 2017.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE