

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4
5 IN RE NCAA STUDENT-ATHLETE
6 NAME & LIKENESS LICENSING
7 LITIGATION.

No. C 09-1967 CW

ORDER DENYING
ELECTRONIC ARTS
INC.'S MOTION FOR
JUDGMENT ON THE
PLEADINGS
(Docket No. 366)

8
9 Defendant Electronic Arts Inc. (EA) moves for judgment on the
10 pleadings for the claims asserted against it in the Second
11 Consolidated Amended Complaint (2CAC). Plaintiffs Edward C.
12 O'Bannon, Jr., Harry Flournoy, Alex Gilbert, Sam Jacobson, Thad
13 Jaracz, David Lattin, Patrick Maynor, Tyrone Prothro, Damien
14 Rhodes, Eric Riley, Bob Tallent, and Danny Wimprine (collectively,
15 Antitrust Plaintiffs) oppose the motion. Having considered the
16 parties' papers and their arguments at the hearing on the motion,
17 the Court DENIES EA's motion.

18 BACKGROUND

19 Because the Court's Orders of May 2, 2011 and July 28, 2011
20 describe the factual allegations and procedural history of the
21 case in detail, the Court does not repeat them here in their
22 entirety.

23 Antitrust Plaintiffs in these consolidated cases bring claims
24 based on an alleged conspiracy among EA, Defendants Collegiate
25 Licensing Company (CLC) and National Collegiate Athletic
26 Association (NCAA) to restrain trade in violation of section one
27 of the Sherman Act. Plaintiffs Samuel Keller, Bryan Cummings,
28 Lamarr Watkins, and Bryon Bishop (collectively, Publicity

1 Plaintiffs) bring claims based on Defendants' alleged violations
2 of their statutory and common law rights of publicity. Publicity
3 Plaintiffs' claims are not at issue here, nor are any of the
4 claims against CLC or the NCAA.

5 In its May 2, 2011 Order, the Court granted EA's motion to
6 dismiss Antitrust Plaintiffs' Sherman Act and related common law
7 claims for failure to state a claim for which relief can be
8 granted. The Court found that Plaintiffs' Consolidated Amended
9 Complaint (CAC) had not sufficiently alleged a factual basis for
10 either of two Sherman Act claims asserted against EA. The Court
11 granted Plaintiffs leave to amend to plead facts demonstrating
12 EA's agreement to engage in the alleged conspiracies.

13 On May 16, 2011, Plaintiffs filed the 2CAC, adding
14 allegations regarding EA's involvement in the purported
15 conspiracy, many of which are summarized in the Court's July 28,
16 2011 Order, including that EA is the only NCAA licensee which uses
17 images of current or former players, and that, in its licensing
18 agreements with CLC, EA has expressly agreed to abide by the
19 NCAA's rules prohibiting student-athlete compensation, and has
20 "agreed to extend its agreement with the NCAA, prohibiting
21 compensation to student-athletes, to former student-athletes."
22 2CAC ¶¶ 373, 400.

23 On May 31, 2011, EA filed a motion to dismiss the antitrust
24 claims asserted against it in the 2CAC.

25 On July 28, 2011, the Court denied EA's motion to dismiss.
26 The Court stated that "many of Plaintiffs' new allegations do not
27 suggest anything more than EA's commercial efforts to obtain new
28 rights and use its existing rights," but that "Plaintiffs have

1 added a significant additional allegation: that in addition to
2 agreeing to abide by NCAA's rules prohibiting compensation of
3 current student-athletes, EA also agreed not to offer compensation
4 to former student-athletes." Order Denying EA's Motion to Dismiss
5 at 6. The Court found that this "allegation that EA agreed not to
6 compensate former student-athletes for use of their images,
7 likenesses and names, going beyond the requirements of NCAA's
8 rules and policies, satisfies the requirement that Antitrust
9 Plaintiffs plead the existence of a price-fixing agreement
10 involving EA," because it shows that "EA was not merely doing
11 business in the context of the NCAA's amateurism policies" and
12 instead "suggests that EA was actively participating to ensure
13 that former student-athletes would not receive any compensation
14 for use of their images, likenesses and names." Id. at 7
15 (internal quotations and citations omitted). The Court similarly
16 found, "This allegation sufficiently suggests EA's agreement to
17 participate in the claimed group boycott conspiracy." Id. at 8.
18 As a result, the Court found that Antitrust Plaintiffs had
19 sufficiently alleged that EA agreed to participate in the alleged
20 antitrust conspiracies with NCAA and CLC for both Sherman Act
21 claims.

22 With the instant motion, EA has requested that the Court take
23 judicial notice of its license agreements with CLC. Plaintiffs do
24 not oppose judicial notice. The agreements state in part,

25 Licensee recognizes that any person who has collegiate
26 athletic eligibility cannot have his or her name and/or
27 likeness utilized on any commercial product without the
28 express written permission of the Institution.
Therefore, in conducting licensed activity under this
Agreement, Licensee shall not encourage or participate
in any activity that would cause an athlete or an

1 Institution to violate any rule of the National
2 Collegiate Athletic Association (NCAA) or other
3 governing body. Moreover, Licensee acknowledges and
4 agrees that no license or right is being granted
5 hereunder to utilize the name, face or likeness of any
6 past or current athlete of any Institution.

7 Request for Judicial Notice (RJN), Exs. A at 6-7, B at 7, C at 6,
8 D at 6.

9 LEGAL STANDARD

10 A motion for judgment on the pleadings, like a motion to
11 dismiss for failure to state a claim, addresses the sufficiency of
12 a pleading. Judgment on the pleadings may be granted when the
13 moving party clearly establishes on the face of the pleadings that
14 no material issue of fact remains to be resolved and that the
15 moving party is entitled to judgment as a matter of law. Hal
16 Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550
17 (9th Cir. 1989). The court may consider, in addition to the face
18 of the pleadings, exhibits attached to the pleadings, Durning v.
19 First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987), and facts
20 which may be judicially noticed, Heliotrope Gen., Inc. v. Ford
21 Motor Co., 189 F.3d 971, 981 n.18 (9th Cir. 1999). As with a
22 motion to dismiss, the Court may consider documents "whose
23 contents are alleged in a complaint and whose authenticity no
24 party questions, but which are not physically attached to the
25 pleading." Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994),
26 overruled on other grounds by Galbraith v. County of Santa Clara,
27 307 F.3d 1119 (9th Cir. 2002) (motion to dismiss); Dent v. Cox
28 Commc'n Las Vegas, Inc., 502 F.3d 1141, 1143 (9th Cir. 2007)
(motion for judgment on the pleadings).

In testing the sufficiency of a pleading, the well-plead
allegations of the non-moving party are accepted as true, while

1 any allegations of the moving party which have been denied are
2 assumed to be false. Hal Roach Studios, 896 F.2d at 1550.
3 However, the court need not accept conclusory allegations. W.
4 Mining Counsel v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). The
5 court must view the facts presented in the pleadings in the light
6 most favorable to the non-moving party, drawing all reasonable
7 inferences in that party's favor, General Conference Corp. of
8 Seventh Day Adventists v. Seventh-Day Adventist Congregational
9 Church, 887 F.2d 228, 230 (9th Cir. 1989), but need not accept or
10 make unreasonable inferences or unwarranted deductions of fact,
11 McKinney v. De Bord, 507 F.2d 501, 504 (9th Cir. 1974).

12 DISCUSSION

13 Plaintiffs challenge whether Defendants may properly bring a
14 motion for judgment on the pleadings and argue that the instant
15 motion is in fact for reconsideration of the Court's July 28, 2011
16 Order. Defendants need not provide intervening case law or new
17 facts in order to move for judgment on the pleadings after having
18 brought a motion to dismiss. In the instant motion, EA makes new
19 and distinct arguments that were not before the Court at the time
20 it ruled on EA's earlier motions. While it is true that the Court
21 considered the text of the licensing agreements between EA and CLC
22 in conjunction with CLC's motion to dismiss in the May 2, 2011
23 Order, these contracts were not submitted or discussed by either
24 party in connection with EA's motion addressed in the May 2, 2011
25 Order. Thus, EA's motion is not procedurally improper, and the
26 Court will consider the merits of the motion.

27 Plaintiffs allege two § 1 claims that rest on conspiracies
28 purportedly joined by EA: (1) a price-fixing conspiracy to set at

1 zero dollars the price paid to Antitrust Plaintiffs and putative
2 class members for use of their images, likenesses and names; and
3 (2) a "group boycott/refusal to deal" conspiracy for use of their
4 images, likenesses and names.

5 In this motion, EA contends that the Court found previously
6 that Antitrust Plaintiffs sufficiently alleged that EA had joined
7 in these conspiracies, based solely on their assertion that, in
8 its licensing agreements with CLC, EA expressly agreed not to
9 compensate former student-athletes for the use of their images,
10 likenesses and names. EA argues now that these allegations are
11 conclusively refuted by the actual terms of the licensing
12 agreements.

13 Contrary to EA's characterization, the Court's prior orders
14 did not reduce the antitrust claims against it to "a single
15 allegation." As the Court has previously noted, to state a claim
16 for a violation of § 1 of the Sherman Act, a plaintiff must plead,
17 among other things, facts suggesting the existence of "a contract,
18 combination or conspiracy among two or more persons or distinct
19 business entities" that was intended to impose an unreasonable
20 restraint of trade. Kendall v. Visa U.S.A., Inc., 518 F.3d 1042,
21 1047 (9th Cir. 2008) (citing Les Shockley Racing Inc. v. Nat'l Hot
22 Rod Ass'n, 884 F.2d 504, 507 (9th Cir. 1989)). While a statement
23 of parallel commercial activities "gets the complaint close to
24 stating a claim," the allegations must include some "further
25 circumstance pointing toward a meeting of the minds" with regard
26 to concerted, anticompetitive conduct to be sufficient. Kendall,
27 518 F.3d at 1048 (quoting Bell Atl. Corp. v. Twombly, 550 U.S.
28 544, 557 (2007)); see also Kline v. Coldwell, Banker & Co., 508

1 F.2d 226, 232 (9th Cir. 1974) ("Nor will proof of parallel
2 business behavior alone conclusively establish agreement.").
3 While the Court previously found that Antitrust Plaintiffs'
4 allegations regarding the licensing agreements provided the
5 crucial additional circumstance that demonstrated that Defendants'
6 parallel conduct was the result of a "meeting of the minds," this
7 does not mean that the allegations of parallel business conduct
8 between EA and the other Defendants are not also among the facts
9 suggesting the existence of a conspiracy.

10 Reading Antitrust Plaintiffs' allegations about the
11 agreements in the context of their overall complaint, rather than
12 in isolation, the Court finds, drawing all reasonable inferences
13 in favor of Antitrust Plaintiffs, as the non-movants, that the
14 actual terms of the licensing agreements do not refute Antitrust
15 Plaintiffs' allegations. In their complaint, Antitrust Plaintiffs
16 allege that Defendants required student-athletes to sign NCAA Form
17 08-3a, or a form similar to it, each year prior to participating
18 in intercollegiate athletics events, in accordance with NCAA
19 bylaws, and that in this form, student-athletes were required to
20 give NCAA and third parties acting on its behalf the right to use
21 their name or image. Antitrust Plaintiffs further allege
22 Defendants have interpreted these forms as existing in perpetuity
23 and allowing them to enter licensing agreements to distribute
24 products containing student-athletes' images, likenesses and names
25 without payment to the student-athletes, even after the student-
26 athletes have ended their collegiate athletic careers.

27 In the licensing agreements, EA agrees that it will "not
28 encourage or participate in any activity that would cause an

1 athlete or an Institution to violate" the NCAA's rules. In this
2 term, the agreement does not distinguish between former and
3 current student-athletes, even though, in the next sentence, it
4 acknowledges that both may be encompassed within the word
5 "athlete." In the context of Antitrust Plaintiffs' other
6 allegations, on a motion for judgment on the pleadings, these
7 terms can fairly be read to evidence a "meeting of the minds"
8 between EA and the other Defendants not to compensate former
9 student-athletes, where such a contract would interfere with the
10 student-athletes' existing agreements with the NCAA. Such a
11 meeting of the minds is further supported by the other terms in
12 the licensing agreements. For example, the agreements require
13 written approval from CLC and, through it, the NCAA of all
14 licensed products, which would include the video games that are
15 alleged to contain former student-athletes' likenesses. Further,
16 the agreements give broad authority to the CLC and NCAA to inspect
17 EA's financial records related to the products, allowing them to
18 see that payments were almost never made to former student-
19 athletes.

20 EA argues that Antitrust Plaintiffs' allegations that some
21 former student-athletes have licensed their collegiate likenesses
22 are inconsistent with their theories of anticompetitive conduct.
23 The Court has previously rejected this argument. See, e.g., Order
24 Granting EA's Mot. to Dismiss and Denying CLC's and NCAA's Mots.
25 to Dismiss, Docket No. 325, at 14. EA offers no reason to alter
26 this ruling.

27
28

CONCLUSION

For the reasons set forth above, the Court DENIES EA's motion for judgment on the pleadings (Docket No. 366).

IT IS SO ORDERED.

Dated: 5/16/2012



CLAUDIA WILKEN
United States District Judge

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