

United States District Court
For the Northern District of California

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

GEOFFREY PECOVER and JEFFREY
LAWRENCE, on Behalf of Themselves
and All Others Similarly
Situating,

No C 08-2820 VRW
ORDER

Plaintiffs,

v

ELECTRONICS ARTS INC, a Delaware
Corporation

Defendant.

_____ /

Plaintiff Geoffrey Pecover purchased an interactive video game software product entitled Madden NFL from a Best Buy store in Washington, D C; plaintiff Jeffrey Lawrence purchased a licensed copy of Madden NFL from a store in California. Together plaintiffs now seek to represent a class and prosecute an action on behalf of all Madden NFL purchasers in the United States. Electronic Arts, Inc (EA) produces Madden NFL.

1 Plaintiffs allege that EA foreclosed competition in a
2 market for interactive football software by acquiring, in separate
3 agreements, exclusive rights to publish video games using the
4 trademarks and other intellectual property of "the only viable
5 sports football associations and leagues in the United States." Doc
6 #1 at 4. Plaintiffs allege six causes of action relating to this
7 conduct: (1) violation of section 2 of the Sherman Act, 15 USC § 2;
8 (2) violation of California's Cartwright Act, Cal Bus & Prof Code §
9 16700 et seq; (3) violation of California's Unfair Competition Act,
10 Cal Bus & Prof Code § 17200 et seq; (4) unjust enrichment; and, in
11 the event that the court does not apply California law on a
12 nationwide basis, (5) violation of various other state antitrust and
13 restraint of trade laws; and (6) violation of various state consumer
14 protection and unfair competition laws.

15 EA moves to dismiss the complaint under FRCP 12(b)(6) on a
16 variety of grounds. EA first attacks the section 2 claim as barred
17 by the indirect purchaser doctrine set forth in Illinois Brick Co v
18 Illinois, 431 US 720(1977). Second, EA argues that the conduct
19 alleged in the complaint — obtaining multiple exclusive licenses —
20 cannot violate antitrust laws as a matter of law because such a rule
21 would deny licensors the benefit of bidding competition. Third, EA
22 alleges that plaintiff's Cartwright Act claim fails because the
23 relationships between the NFL, NCAA and the AFL and EA — licensors
24 and their exclusive licensee — renders them incapable of conspiring
25 to violate the antitrust laws. Finally, EA argues that plaintiffs
26 do not have standing to bring state antitrust and unfair competition
27 claims under the law of the eighteen states in which neither named
28 plaintiff resides.

1 For the reasons stated herein, the motion to dismiss is
2 GRANTED IN PART and DENIED IN PART. The court DENIES EA's motion to
3 dismiss plaintiffs' Sherman Act section 2 claim, Cartwright Act
4 claim and other claims under California and District of Columbia
5 law. The court GRANTS EA's motion to dismiss claims five and six as
6 they relate to states other than California and the District of
7 Columbia.

I

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10 A motion to dismiss under FRCP 12(b)(6) for failure to
11 state a claim upon which relief can be granted "tests the legal
12 sufficiency of a claim." Navarro v Block, 250 F3d 729, 732 (9th Cir
13 2001). Because FRCP 12(b)(6) focuses on the sufficiency of a claim
14 — and not the claim's substantive merits — "[o]rdinarily[] a court
15 may look only at the face of the complaint to decide a motion to
16 dismiss." Van Buskirk v Cable News Network, Inc, 284 F3d 977, 980
17 (9th Cir 2002).

18 A motion to dismiss should be granted if plaintiff fails
19 to proffer "enough facts to state a claim to relief that is
20 plausible on its face." Bell Atlantic Corp v Twombly, 550 US 544,
21 127 S Ct 1955, 1966 (2007). Dismissal can be based on the lack of a
22 cognizable legal theory or the absence of sufficient facts alleged
23 under a cognizable legal theory. Balistreri v Pacifica Police
24 Dep't, 901 F2d 696, 699 (9th Cir 1990). Allegations of material
25 fact are taken as true and construed in the light most favorable to
26 the nonmoving party. Cahill v Liberty Mutual Ins Co, 80 F3d 336,
27 337-38 (9th Cir 1996). Moreover, all inferences reasonably drawn
28 from these facts must be construed in favor of the responding party.

1 General Conference Corp of Seventh-Day Adventists v Seventh-Day
2 Adventist Congregational Church, 887 F2d 228, 230 (9th Cir 1989).

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4 A

5 The theories advanced by EA for dismissal of plaintiffs'
6 claim under section 2 of the Sherman Act miss their mark.

7 EA's first attack — that the Illinois Brick indirect
8 purchaser doctrine bars plaintiffs' section 2 claim — fails because
9 the Illinois Brick indirect purchaser bar only bars antitrust claims
10 for damages by indirect purchasers, whereas plaintiffs' section 2
11 claim seeks only injunctive relief. Doc #1 ¶ 40 at 7. In Illinois
12 Brick, the Supreme Court reasoned that such suits would force courts
13 to allocate illegal overcharges between middlemen and the ultimate
14 consumers and thus add "whole new dimensions of complexity to treble
15 damages suits and seriously undermine their effectiveness." 431 US
16 at 737. The Court further reasoned that allowing damages suits by
17 indirect purchasers would open the door to duplicative recovery from
18 both direct and indirect purchasers. Id. Apportionment challenges
19 and duplicative recovery simply do not come into play in suits
20 seeking injunctive relief and thus Illinois Brick does not apply.
21 See United States Gypsum Co v Indiana Gas Co, 350 F3d 623, 625-28
22 (7th Cir 2003) ("[T]he direct purchaser doctrine does not foreclose
23 equitable relief * * * ."); Dickson v Microsoft Corp, 309 F3d 193,
24 213 n 24 (4th Cir 2002) ("Illinois Brick's indirect purchaser rule,
25 when applicable, bars only compensatory damages relief and does not
26 apply to injunctive relief."); In re Warfarin Sodium Antitrust
27 Litig, 214 F3d 395, 399-400 (3d Cir 2000) ("Illinois Brick does not
28 bar indirect purchasers' injunction claim.").

1 Next, EA contends that plaintiffs have not adequately
2 alleged that interactive video football software — the product
3 market in which plaintiffs allege Madden NFL trades — is a
4 recognizable product market for Sherman Act purposes. The court
5 disagrees. Paragraphs 15-16 contain plaintiffs' product market
6 allegations:

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8 15. As Electronic Arts well knew, consumers demand that
9 the teams and players in interactive football software be
10 identified with actual teams and players. This is only
11 achievable through a license with a sports league and
12 associated players associations. There is essentially no
13 demand and therefore no market for interactive football
14 software that is not based on real life teams and/or
15 players. Electronic Arts recognizes this fact in its
16 annual report to investors where it notes that if it were
17 "unable to maintain" licenses with "major sports leagues
18 and players associations" its "revenue and profitability
19 will decline significantly."

20 16. By signing the exclusive agreement with the NFL,
21 Electronic Arts immediately killed off Take Two's NFL 2K5
22 software, the only competing interactive football product
23 of comparable quality to its Madden NFL franchise.
24 Through its agreements with the NCAA and AFL, Electronic
25 Arts prevented Take Two and others from re-entering the
26 market with non-NFL branded interactive football software.
27 Once again without a competitor, Electronic Arts raised
28 its prices dramatically. Specifically, Electronic Arts
raised the price of the Madden 2006 videogame (released in
August of 2005) nearly seventy percent to \$49.95.
Electronic Arts currently sells interactive football
software for up to \$59.95.

Doc #1 at 4-5.

 As the court understands these allegations, interactive
football software will not sell if it does not use the names, logos
and other markers of teams that actually compete in the NFL; there
is, in effect, no market for interactive football software in a
virtual or fictitious setting. If true — as the court must at this
point accept — this adequately alleges that there are no

1 substitutes for interactive football software without the markers of
2 actual teams and players.

3 Plaintiffs do not, however, allege that there are no
4 substitutes for interactive football software. One does not need to
5 be a devotee of video games to recognize that any such claim would
6 be implausible and possibly subject to dismissal under the
7 instructions of the Supreme Court in Bell Atlantic Corp v Twombly to
8 allege antitrust claims with a measure of plausibility. The court
9 qualified this statement because Twombly involved a claim that
10 conduct parallel in nature violated section 2. As parallel conduct
11 is not itself illegal, the Supreme Court held that enough plausible
12 facts must be alleged to take the conduct or issue out of the realm
13 of legality. Twombly, 550 US at 556. Recently, the Supreme Court
14 extended this reasoning to a case involving a somewhat analogous
15 safe harbor from liability: qualified immunity. Ashcroft v Iqbal,
16 ___ US ___, 129 S Ct 1937, 1949-51 (2009). Whether the plausibility
17 requirement will be imposed in cases not involving safe harbors of
18 this kind remains to be seen. In any event, no such safe harbor
19 appears in the facts before the court here and the court presumes
20 that other forms of interactive video game software would substitute
21 for interactive video football software. So the question is whether
22 interactive football software is sufficiently distinct or appealing
23 to consumers to constitute a recognizable product market.

24 In attempting to allege a distinct product market,
25 plaintiffs appear to adopt the market definition approach of the
26 Horizontal Merger Guidelines propounded by the United States
27 Department of Justice and the Federal Trade Commission in 1997. The
28 Guidelines define a market by asking whether a potential monopolist

1 could profitably impose a "small but significant and nontransitory
2 increase" in price. Horizontal Merger Guidelines § 1.11. A
3 positive response suggests very limited functional interchange-
4 ability for the product in question and, for antitrust purposes, a
5 distinct product market.

6 Plaintiffs allege that EA's exclusive agreement with the
7 NFL "killed off" the only other allegedly competitive interactive
8 software and allowed EA to raise its prices "dramatically." Doc #1
9 at 5. For purposes of pleading the claims at bar, these
10 allegations suffice to allege a product market.

11 EA devotes much of its attention to American Needle, Inc
12 v National Football League, 538 F3d 736 (7th Cir 2008), which held
13 that an exclusive licensing contract between the NFL and Reebok,
14 which manufactures football headwear, did not constitute an
15 unreasonable restraint of trade in violation of section 1. The
16 plaintiff had contended that the individual teams in the NFL were
17 separate entities, so that the league's agreement with Reebok was
18 unlawful horizontal or coordinated conduct. *Id* at 741. The
19 district court, granting summary judgment, had found that the NFL
20 was a "single-entity" in that "the teams' individual success is
21 necessarily linked to the success of the league as a whole" and
22 hence rejected plaintiff's contention that the license represented
23 coordinated action. *Id* at 737. Without definitively resolving the
24 single-entity question for all purposes, the court of appeals
25 focused on whether the agreement before it "deprived the market of
26 independent sources of economic power" and, affirming, concluded
27 that the agreement did not do so. *Id* at 743-44. The court reached
28 this conclusion because it viewed the joint licensing of NFL

1 intellectual property as intended to promote NFL football as
2 against other forms of entertainment. Id at 744. The court
3 opined:

4 [T]he failure of American Needle's §1 claim necessarily
5 dooms its §2 monopolization claim. As a single entity
6 for the purpose of licensing, the NFL teams are free
7 under §2 to license their intellectual property on an
8 exclusive basis even if the teams opt to reduce the
9 number of companies to whom they grant licenses.

10 Id (citations omitted).

11 American Needle is inapposite here. The defendants there
12 were the licensors of intellectual property, not, as in the case at
13 bar, the licensees. Furthermore, plaintiff's claim in American
14 Needle foundered on the court's conclusions that at least for
15 purposes of promotional licensing, the NFL was a single entity.
16 The single-entity rationale is, of course, persuasive in the
17 context of NFL's role as a competitor in the entertainment
18 business. An individual team can offer no entertainment value
19 without the other teams in the league. Although this single-entity
20 theory is somewhat less persuasive (to the undersigned, at least)
21 when it comes to licensing NFL team logos on headware (after all,
22 individual teams could make their own license agreements),
23 nonetheless the court of appeals viewed licensing headware as
24 simply an extension of the NFL's competition in promoting the
25 entertainment it provides. This points to the most notable
26 distinction between American Needle and the present case. The
27 exclusive contract in American Needle involved only one provider of
28 football entertainment: the NFL. The present case involves what
are alleged to be a number of such providers, if not all the major
ones, namely the NFL, AFL and NCAA.

1 EA also draws on another line of cases which begins with
2 Paddock Publications, Inc v Chicago Tribune Co, 103 F3d 42 (7th Cir
3 1996) and Fleer Corporation v Topps Chewing Gum, Inc, 658 F2d 139
4 (3d Cir 1981). In Paddock, a suburban daily newspaper in the
5 Chicago metropolitan area, the Daily Herald, asserted claims under
6 section 1 against the two major dailies in Chicago, the Tribune and
7 the Sun-Times, that they had "locked up" the most popular or best
8 supplemental services or features through exclusive agreements with
9 the New York Times and Los Angeles Times/Washington Post news and
10 features syndicates. 103 F3d at 44. The Herald did not contend
11 that the Tribune and Sun-Times had conspired nor that the news and
12 features syndicates had coordinated their conduct. Id. The
13 district court dismissed. Judge Easterbrook recognized that the
14 plaintiff's theory was fundamentally an "essential facilities"
15 claim, but noted that the complaint lacked allegations of "any
16 essential facility." Id. By contrast, the present complaint
17 alleges that the names and logos of actual teams and players are
18 essential to market interactive football software. Doc #1 ¶ 15 at
19 4-5. Whether plaintiffs will be able to back this allegation up
20 with evidence is a matter left for another day.

21 The Fleer case is more factually analogous to the present
22 case. The parties, Fleer Corporation and Topps Chewing Gum,
23 produced bubble gum and similar products. Fleer, 658 F2d at 141.
24 Topps had acquired exclusive licenses to the photographs and
25 statistics of baseball players for use in producing baseball
26 trading cards and, at the time of the case, Topps was the only
27 seller of baseball trading cards sold in connection with bubble
28 gum. Fleer, 658 F2d at 141. The district court found the relevant

1 product market to be “pocket-size pictures of active major league
2 baseball players, sold alone or in combination with a low cost
3 premium, at a price of 15 to 50 cents.” Id at 145. Although the
4 court of appeals assumed without deciding that this market
5 definition was correct, the court noted (and perhaps was influenced
6 by the fact) that baseball trading cards accompany “a variety of
7 other non-confectionary products.” Id at 142. The court also
8 pointed out that Fleer had left the baseball trading card business
9 nine years before the suit was filed by selling its existing
10 baseball player licenses to Topps. Id at 150. The court then
11 opined that because “Fleer or any other trading card manufacturer
12 [] may compete with Topps for minor league players or even persuade
13 the present major league players not to renew their Topps’
14 contracts” the accumulation of exclusive licenses in that case
15 failed to restrict competition sufficiently to violate section 1.
16 Id. In other words, Fleer failed to show the “bottleneck” that an
17 essential facilities claim requires. See Paddock Publications, 103
18 F3d at 44-45.

19 Importantly, the Third Circuit decided Fleer on a motion
20 for summary judgment rather than on a motion to dismiss. The court
21 noted that the determination whether the defendant’s conduct
22 excluded all meaningful competition was a mixed question of law and
23 fact. Fleer, 658 F2d at 154. Here, on EA’s motion to dismiss, the
24 court must take as true plaintiff’s factual allegations that the
25 series of exclusive deals between EA and the NFL, AFL and NCAA
26 “killed off” competition and “prevented [competitors] from re-
27 entering the market.” Doc #1 ¶ 16 at 5. These allegations
28 distinguish this case from Fleer.

1 Accordingly, EA’s motion to dismiss plaintiffs’ claim for
2 violation of section 2 of the Sherman Act is DENIED.

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B

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6 EA next moves to dismiss plaintiffs’ Cartwright Act
7 claim. EA argues, consistent with its argument against the section
8 2 claim, that signing multiple exclusive agreements cannot
9 constitute a restraint of trade. EA continues that if the
10 exclusive agreements are not the “conspiracy” alleged in the
11 complaint, then the complaint lacks the requisite factual details
12 of the alleged Cartwright Act violation. Doc #17 at 18-19.

13

14 The Cartwright Act makes unlawful a “trust,” defined as
15 “a combination of capital, skill, or acts by two or more persons”
16 for the purposes of restraining commerce and preventing market
17 competition in the variety of ways listed in the statute. Cal Bus
18 & Prof Code § 16720. See also Lowell v Mother’s Cake & Cookie Co,
19 79 Cal App 3d 13, 22 (1978), citing Bondi v Jewels by Edwar, Ltd,
20 267 Cal App 2d 672, 678 (1968). The Cartwright Act generally
21 codifies the common law prohibition against the restraint of trade.
22 Kolling v Dow Jones & Co, 137 Cal App 3d 709, 717 (1982).

23

24 California courts have determined that vertical
25 restraints of trade, such as exclusive dealing arrangements, can
26 violate the Cartwright Act, though they are not illegal per se.
27 See Fisherman’s Wharf Bay Cruise Corp v Superior Court, 114 Cal App
28 4th 309, 334-35 (2004). “The law conclusively presumes manifestly
anticompetitive restraints of trade to be unreasonable and
unlawful, and evaluates other restraints under the rule of reason.”
Id. Vertical restraints, including exclusive dealing arrangements,

United States District Court
For the Northern District of California

1 are proscribed when it is probable that performance of the
2 arrangements will foreclose competition in a substantial share of
3 the affected line of commerce. *Id.* The rule of reason analysis
4 requires a factual analysis of the line of commerce, the market
5 area and the affected share of the relevant market. See *Id.* Such
6 a factual inquiry is improper at this stage in the proceedings.

7 As described above relating to plaintiffs' section 2
8 claim, the complaint at bar alleges that EA entered into exclusive
9 agreements with multiple football leagues to "kill[] off"
10 competition and "raise[] prices dramatically." While these
11 exclusive agreements are not per se illegal under the Cartwright
12 Act, they could plausibly be found to restrain trade after applying
13 the rule of reason analysis. Accordingly, the exclusive licenses
14 themselves, described adequately in the complaint, constitute the
15 conduct giving rise to the Cartwright Act claim.

16 EA cites this court's decision in Levi Case Co v ATS
17 Products, 788 F Supp 428 (ND Cal 1992) for the proposition that
18 parties to an exclusive license who are not competitors are legally
19 incapable of conspiring in violation of the antitrust laws. Doc #17
20 at 19. While Levi Case involved the federal Sherman Act, "it is
21 established that the Sherman Act and Cartwright Act are to be
22 interpreted in harmony with one another." Davis v Pacific Bell, 204
23 F Supp 2d 1236, 1243 (ND Cal 2002), citing Redwood Theaters, Inc v
24 Festival Enterprises, Inc, 908 F2d 477, 481 (9th Cir 1990). Levi
25 Case relied on the Supreme Court's ruling in Copperweld Corp v
26 Independence Tube Corp, 467 US 752, 768 (1984) that a corporation
27 and its subsidiaries were incapable of conspiring for the purposes
28 of section 1. Levi Case, 788 F Supp at 430-31. Copperweld reasoned

1 that coordinated activity by parties who lack independent sources of
2 economic power and separate interests does not warrant antitrust
3 scrutiny. Copperweld, 467 US at 771. Levi Case applied that same
4 principle to the relationship between a patent holder and the
5 sublicensee to whom the patent holder had conveyed an exclusive
6 license. Levi Case, 788 F Supp at 431. In that circumstance, the
7 patent holder's only rights relating to the patent after the
8 exclusive license were to receive royalties and approve sublicenses.
9 Id. The patent holder, by virtue of the exclusive license, could
10 not compete in the market covered by the patent and neither could
11 anyone else because a patent is a legally-sanctioned restraint on
12 trade.

13 Levi Case is distinguishable from the instant complaint,
14 which alleges the aggregation of multiple exclusive agreements to
15 choke off competition in a way that is not legally sanctioned,
16 unlike the exclusive agreement involving a single patent. Moreover,
17 the NFL, AFL and NCAA may each have exclusive agreements with EA,
18 but they are competitors with each other. A series of agreements
19 between EA and each of these entities could plausibly deprive the
20 marketplace of independent sources of economic power.

21 Accordingly, EA's motion to dismiss plaintiffs' second
22 cause of action for violation of the Cartwright Act is DENIED.

23
24 II

25 Finally, EA moves to dismiss plaintiff's claims for unfair
26 competition and unjust enrichment under California law, violation of
27 the District of Columbia Consumer Protection Procedures Act and
28 violation of the antitrust and consumer protection laws of eighteen

1 states in which plaintiffs did not purchase the Madden NFL video
2 game. Doc #17 at 25-26.

3 EA argues that plaintiffs' unfair competition and unjust
4 enrichment claims under California law fail because the Cartwright
5 Act claim on which they are based also fails. Because the court
6 finds that the Cartwright Act survives EA's motion to dismiss, the
7 court will not dismiss plaintiffs' other California law claims on
8 that basis. The court also denies the motion to dismiss the claim
9 under the District of Columbia Consumer Protection Procedures Act.

10 As for the remaining state law claims, plaintiffs have
11 effectively conceded, by failing to address the issue in their
12 opposition memorandum (Doc #22), that their claims under the laws of
13 states in which plaintiffs did not purchase the Madden NFL video
14 game should be dismissed. The named plaintiffs in this action
15 purchased the video game at issue in California and the District of
16 Columbia and have alleged no basis for standing to bring claims
17 under the laws of other states. In re Graphics Processing Units
18 Antitrust Litigation, 527 F Supp 2d 1011, 1026-27 (N D Cal 2007).
19 Accordingly, EA's motion to dismiss plaintiff's fifth and sixth
20 claims for violations of the laws of states other than California
21 and the District of Columbia is GRANTED.

22
23 III

24 In summary, EA's motion to dismiss is GRANTED IN PART and
25 DENIED IN PART. While the court GRANTS EA's motion to dismiss
26 claims five and six as they relate to states other than California
27 and the District of Columbia, the court DENIES EA's motion to
28 dismiss plaintiffs' Sherman Act section 2 claim, Cartwright Act

1 claim and other claims under California and District of Columbia
2 law. The court will reserve judgment on choice of law issues until
3 the class certification stage.

4 Additionally, the court approves the following modified
5 schedule for plaintiffs' motion for class certification, as
6 stipulated by the parties (Doc #39): motion filed September 24,
7 2009; opposition filed November 23, 2009; reply filed December 23,
8 2009; hearing January 14, 2010

9
10 IT IS SO ORDERED.

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13 VAUGHN R WALKER
14 United States District Chief Judge