

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

IN RE NCAA STUDENT-ATHLETE
NAME & LIKENESS LICENSING
LITIGATION

No. C 09-1967 CW

ORDER RESOLVING
MISCELLANEOUS
MOTIONS (Docket
Nos. 833, 834,
836, 838, 840)

On July 19, 2013, Antitrust Plaintiffs filed a Third Consolidated Class Action Complaint (3CAC). Defendants filed several motions in response. First, on July 29, 2013, Defendant Electronic Arts Inc. (EA) moved for leave to file a motion to dismiss the 3CAC. The next day, Defendant National Collegiate Athletic Association (NCAA) filed its own motion for leave to file a motion to dismiss, along with a motion for additional briefing and an evidentiary hearing on Plaintiffs' pending motion for class certification. Finally, two days later, on August 1, 2013, Defendant Collegiate Licensing Company (CLC) moved to strike certain allegations from the 3CAC. The Court took these matters under submission without oral argument.

The Court grants Defendants' requests for leave to file motions to dismiss, denies NCAA's motion for additional briefing, and denies CLC's motion to strike. The Court is reluctant to delay this case further, but finds itself compelled to allow an additional round of motions, albeit on prompt and restricted additional briefing, due to Defendants' insistence on pursuing all available procedural steps, and the untimely changes in Plaintiffs' theory of the case.

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BACKGROUND

Antitrust Plaintiffs moved to certify a class in September 2012. Docket No. 554. In October 2012, instead of simply opposing it, Defendants moved to strike Antitrust Plaintiffs' class certification motion. They argued that Plaintiffs' motion raised a new theory of antitrust liability -- one based on an alleged horizontal restraint -- which Plaintiffs had not previously plead. Although the Court denied the motion to strike, it allowed Defendants to file supplemental briefing in response to Plaintiffs' class certification motion so that they could address any new antitrust theories raised in Plaintiffs' motion. Docket No. 673, Order on Defendants' Motion to Strike, at 1-2. The Court also considered the briefing on the motion to strike as part of Defendants' opposition to Plaintiffs' class certification motion. Id. at 1.

At the hearing, the Court acknowledged that Plaintiffs had raised a new theory of antitrust liability in their class certification motion but noted that, because Defendants had been able to attack this new theory in their motion to strike and in supplemental briefs, another round of pleading and briefing on a motion to dismiss would be duplicative, costly and time-consuming. The Court also pointed out that Defendants would have another opportunity to attack the merits of Plaintiffs' claims on a motion for summary judgment, which was then scheduled to be briefed beginning September 26, 2013.

Nonetheless, Defendants insisted that it would be useful for Plaintiffs to file an amended complaint explicitly addressing their new theory of antitrust liability. Accordingly, the Court

1 instructed Antitrust Plaintiffs to amend their complaint "only the
2 minimum amount necessary to conform Antitrust Plaintiffs' portion
3 of the complaint to their class certification motion." Docket No.
4 830. The Court also permitted Antitrust Plaintiffs to "add a new
5 named Plaintiff who is a current student-athlete" to the
6 complaint. Id. The Court's order concluded, "Defendants shall
7 not file an additional motion to dismiss or for judgment on the
8 pleadings and shall instead include any arguments they would have
9 made therein in their future motions for summary judgment." Id.
10 After Plaintiffs filed their amended complaint, Defendants filed
11 the instant motions.

12 DISCUSSION

13 I. Motions for Leave to File Motions to Dismiss

14 EA and NCAA request leave to file further motions to dismiss.
15 They each argue that they must be permitted to test the legal
16 sufficiency of any new theory in the 3CAC before the Court
17 certifies a class. Although these Defendants have already had
18 ample opportunity to respond to Antitrust Plaintiffs' new theory,
19 as discussed above, the Court nevertheless grants their request.
20 Defendants may intend to seek an interlocutory appeal of any class
21 certification order, and the Court does not wish to leave open a
22 claim that they were not allowed to present all of their
23 arguments.

24 Accordingly, NCAA may file a motion to dismiss within seven
25 days of this order. It shall not be noticed for hearing. In
26 support of the motion, NCAA shall first cite, by docket number,
27 page and line, each of the arguments it has previously made, that
28 it would like the Court to reconsider, against any new issues

1 raised by the 3CAC. NCAA may not repeat any of the arguments
2 raised in the joint motion to strike Plaintiffs' class
3 certification motion, Docket No. 639, the several briefs
4 Defendants filed subsequently in opposition to class
5 certification, Docket Nos. 677, 680, 794, 789, or the briefs
6 Defendants filed in support of their motions for leave to file a
7 motion to dismiss, Docket Nos. 834, 838, for leave to file
8 additional briefs, Docket No. 836, or to strike, Docket No. 840.
9 NCAA likewise may cite to but may not repeat facts and law in EA's
10 May 2011 motion to dismiss, Docket No. 331, and EA's October 2011
11 motion for judgment on the pleadings, Docket No. 366. If NCAA
12 wishes to argue facts or law that is not contained in any of these
13 briefs, it may file a memorandum only as long as necessary to do
14 so, but not to exceed ten pages.

15 The Court will accept EA's proposed brief in support of its
16 motion to dismiss and EA shall efile it forthwith. The Court will
17 consider these arguments as they may relate to CLC as well. If
18 CLC now wishes to move to dismiss, it may file a further brief in
19 support, under the conditions set forth above.

20 While Antitrust Plaintiffs note that granting Defendants
21 leave to file further motions to dismiss will likely delay the
22 progress of this case, and the Court is reluctant to do so,
23 Antitrust Plaintiffs contributed to this delay by raising a new
24 theory of their case at this relatively late stage in the
25 litigation.

26 Antitrust Plaintiffs may file a single brief in opposition to
27 the motions to dismiss, not to exceed the number of pages of
28 argument filed by Defendants, within seven days of the filing of

1 NCAA's motion to dismiss. Plaintiffs too must begin by citing all
2 portions of the previous briefing that they would like the Court
3 to consider with regard to Defendants' motions, and may not repeat
4 any facts or law contained therein. NCAA may file a reply of up
5 to five pages, addressing only new matter in Plaintiffs'
6 opposition, within three days thereafter. EA and CLC may file a
7 joint five-page reply by the same date. The Court will decide the
8 motions on the papers.

9 II. NCAA's Motion for Additional Briefing and an Evidentiary
10 Hearing

11 NCAA requests additional briefing and an evidentiary hearing
12 on class certification "to address the new issues introduced by
13 the [3]CAC's allegations." Docket No. 836, Mot. Additional Br.,
14 at 2. Because NCAA is granted leave to file a motion to dismiss
15 the 3CAC, its request for additional briefing and a hearing is not
16 warranted. NCAA has already been granted leave to exceed the page
17 limits for its class certification briefs and received extensive
18 argument time -- more than either of its co-Defendants -- at the
19 class certification hearing. See Docket Nos. 676, 789-90.
20 Additional briefing and argument on class certification is not
21 likely to be useful. There is no justification for the
22 extraordinary step of convening an evidentiary hearing.

23 III. CLC's Motion to Strike

24 CLC's motion to strike contains two parts. First, CLC seeks
25 to strike any allegations in the 3CAC that pertain to "products
26 such as jerseys, bobbleheads, trading cards, action figures, and
27 photographs, which Plaintiffs admitted at the June 20, 2103 Class
28 Certification Hearing and Case Management Conference are no longer

1 part of the litigation." Docket No. 840, CLC Mot. Strike 3-4.
2 Second, CLC seeks to remove four of the recently added current
3 student-athletes from the 3CAC on the grounds that Plaintiffs were
4 only granted permission to add one current student-athlete --
5 rather than five -- to their complaint.¹

6 CLC's first request is denied. None of Plaintiffs'
7 allegations regarding jerseys, bobbleheads, and other merchandise
8 is new to the 3CAC. CLC has also failed to identify with
9 sufficient specificity which of these allegations it seeks to
10 strike. See CLC Mot. Strike 3 (arguing that the complaint
11 "contains pages and pages of immaterial and impertinent
12 allegations" without identifying any specific sentences that
13 should be stricken). Antitrust Plaintiffs' voluntary intention
14 not to pursue certain theories does not necessarily require that
15 particular allegations be ordered stricken from the complaint.

16 CLC's request to remove four of the new named Plaintiffs is
17 also denied. Although CLC is correct that the Court's order
18 stated that Plaintiffs "may add a new named Plaintiff who is a
19 current student-athlete," Docket No. 830, the Court's turn of
20 phrase was not intended as a limitation. Class actions, for
21 logistical reasons, often involve multiple named plaintiffs as
22 proposed class representatives. Courts have broad discretion to
23 permit joinder of new parties. See Fed. R. Civ. P. 21 ("On motion
24 or on its own, the court may at any time, on just terms, add or
25 drop a party."). CLC has not shown that it will be prejudiced by
26

27 ¹ Plaintiffs initially added six current student-athletes to the
28 complaint but one voluntarily dismissed his claims on July 30, 2013.
See Docket No. 835.

1 the inclusion of the four additional student-athletes here.
2 Although CLC asserts that it will need to take discovery of the
3 new Plaintiffs, CLC has not shown that these additional efforts
4 will be burdensome. The Court re-opens fact discovery for thirty-
5 five days for the limited purpose of taking written discovery and
6 depositions of the new named Plaintiffs.²

7 CONCLUSION

8 For the reasons set forth above, EA's motion for leave to
9 file a motion to dismiss (Docket No. 834) is GRANTED; NCAA's
10 motion for leave to file a motion to dismiss (Docket No. 838) is
11 GRANTED; NCAA's motion for additional briefing and an evidentiary
12 hearing (Docket No. 836) is DENIED; and CLC's motion to strike
13 (Docket No. 840) is DENIED. Additionally, Plaintiffs' motion to
14 remove an incorrectly filed document (Docket No. 833) is DENIED
15 because the incorrectly filed document has already been sealed.

16 NCAA and CLC may file their motions to dismiss, as outlined
17 above, within seven days of the date of this order. Plaintiffs
18 may respond within seven days and Defendants may file their
19 replies three days thereafter.

20 Should any Defendant obtain any information to suggest that
21 any of the new named Plaintiffs is not an adequate or typical
22 class representative, it may promptly seek leave to file an
23 appropriate motion with the Court. If by that time, an order
24 certifying a class of current student athletes has issued and been
25

26 ² CLC requests, in the alternative, that the Court order Plaintiffs
27 to cover the costs of any additional discovery that it may need to take
28 regarding the newly added student-athletes. This request -- which would
remove CLC's incentives for seeking tailored and efficient discovery --
is neither justified nor practical.

1 appealed, Defendants may file a request for a suggestion of
2 remand. Fed. R. App. P. 12-1(b).

3 The antitrust case deadline to exchange opening expert
4 reports on the merits is continued to September 25, 2013. The
5 deadline to depose experts on opening reports is continued to
6 October 15, 2013. The deadline to exchange rebuttal expert
7 reports is continued to November 5, 2013. The deadline to depose
8 experts on rebuttal reports is continued to November 12, 2013.

9 The deadline for Antitrust Plaintiffs to file any dispositive
10 motion, including any Daubert motion, is continued to November 7,
11 2013. Defendants shall file their opposition and cross-motion,
12 including any Daubert objections, in a single brief, on or before
13 December 5, 2013. Arguments applicable to only one Defendant may
14 be included in separate sections of the brief. Antitrust
15 Plaintiffs shall file their reply and opposition in a single brief
16 on or before January 6, 2014. Defendants shall file their reply
17 on or before February 3, 2014. The Court shall hear the motions
18 and hold a case management conference on February 20, 2014, at
19 2:00 p.m.

20 If any party seeks to file any other motion addressing any
21 claims or defenses, or class certification, it must first obtain
22 leave of the Court to do so by filing an administrative motion
23 under Local Rule 7-11. Any request for a change to the case
24 management schedule must be preceded by meeting and conferring and
25 must be made in an administrative motion. Any discovery disputes
26 must be presented to the discovery Magistrate Judge in accordance
27 with his procedures.
28

1 A final pretrial conference shall be held on May 28, 2014.
2 Trial shall begin at 8:30 a.m. on June 9, 2014.

3 Fact discovery regarding Right-of-Publicity Plaintiffs'
4 claims shall open when the Ninth Circuit lifts its stay. Within
5 two weeks of the Ninth Circuit's decision to lift the stay, the
6 parties shall file a stipulated case management schedule, or their
7 separate proposals, for the right-of-publicity claims.

8 IT IS SO ORDERED.

9
10 Dated: 9/10/2013


CLAUDIA WILKEN
United States District Judge