UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AGUSTIN CACCURI,

Plaintiff,

v.

SONY INTERACTIVE ENTERTAINMENT LLC,

Defendant.

Case No. 21-cv-03361-RS

ORDER GRANTING MOTION TO DISMISS

Case No. 21-cv-03447-RS

ADRIAN CENDEJAS,

Plaintiff,

v.

SONY INTERACTIVE ENTERTAINMENT LLC, et al.,

Defendant.

ALLEN NEUMARK,

Plaintiff,

v.

SONY INTERACTIVE ENTERTAINMENT LLC, et al.,

Defendant.

Case No. 21-cv-05031-RS

I. Introduction

Defendant Sony Interactive Entertainment LLC ("Sony") moves to dismiss the Consolidated Class Action Complaint for these three related antitrust putative class actions pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs Agustin Caccuri, Adrian Cendejas, and Allen Neumark aver that Sony engaged in monopolistic and anticompetitive conduct in the sale of digital PlayStation games on its PlayStation Store, averring violations of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, and California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200. The motion to dismiss is granted because Plaintiffs have failed to allege adequately anticompetitive conduct under the Sherman Act, and the other claims are derivative of the Sherman Act claims.

II. Factual Background[1]

In May and June 2021, these three putative class actions were filed in the Northern District of California. On June 4, 2021 the *Cendejas* action was related to the *Caccuri* action, and on July 27, 2021, the *Neumark* action was also related to the *Caccuri* action. On December 3, 2021, Michael M. Buchman of Motley Rice LLC was appointed Interim Lead Counsel for all three related actions. Plaintiffs filed a Consolidated Class Action Complaint on December 20, 2021. In the Consolidated Class Action Complaint, Plaintiffs aver five claims for relief: (1) monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2 and Section 4 of the Clayton Act, 15 U.S.C. 4; (2) attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2 and Section 4 of the Clayton Act, 15 U.S.C. 4; (3) declaratory and injunctive relief under Section 2 of the Sherman Act, 15 U.S.C. § 2 and Sections 2 and 16 of the Clayton Act, 15 U.S.C. § 26; (4) damages under the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*; and (5) unjust enrichment.

Sony manufactures, markets, and sells the PlayStation, one of the most popular home video game systems. Sony launched its most recent model, the PlayStation 5, in November 2020,

[1] As facts in a complaint are taken as true when evaluating a Rule 12(b)(6) motion to dismiss, *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005), the facts recited in this background section are from the Complaint unless otherwise noted.

and by September 2021 it had sold over 13 million units. In addition to producing the physical game console, the PlayStation franchise has many other arms: the PlayStation Store (an online digital video game store), the PlayStation Network (an online multiplayer gaming service), PlayStation Now (a subscription-based video game streaming service), and PlayStation Studios (the video game development arm). Most relevant for this litigation is the PlayStation Store, which launched in 2006 and allows users to purchase digital copies of PlayStation games and download them directly onto the console, rather than having to buy physical disks and insert them into the console's disk drive. Sony sells two versions of the PlayStation 5: the $499 Base Model allows users to purchase either physical disks or digital versions of games and the $399 Digital Edition is only compatible with digital games downloaded from the PlayStation Store.

On the PlayStation Store, game developers cannot set prices; instead, the prices are set by Sony. Further, the prices for a digital version of a game on the PlayStation Store may vary from the prices for a physical copy of the game available through any number of retailers. Until April 2019, game developers could sell download codes for digital PlayStation games through the same online and brick-and-mortar retailers of the physical games. When this practice was active, the prices for download codes could vary from the prices in the PlayStation Store. When Sony eliminated the download code option, that meant the price in the PlayStation Store was the only possible price for acquiring a digital copy of a PlayStation-compatible game.

Although Sony's PlayStation is highly popular, it is not the only video game console on the market. Major competitors include the Xbox from Microsoft and the Switch from Nintendo. While some major video games have versions produced for each of the three consoles, a purchased video game is only compatible with one specific console. For example, a consumer who owns both a PlayStation and Xbox and wants to play the "NBA 2K22" game would need to purchase two versions of the game, one compatible with PlayStation and one compatible with Xbox. The different console manufacturers have different practices concerning the production and sale of games for their consoles. While 85% of game sales for the Switch console are for games developed by Nintendo that are exclusive to its console, only 17% of game sales for PlayStation

are games developed by Sony. Microsoft and Nintendo also operate their own virtual stores to download games directly to consoles. The Microsoft and Nintendo online stores, however, allow developers to set the retail price for the game.

III. Legal Background

A. Federal Rule of Civil Procedure 12(b)(6)

Rule 12(b)(6) governs motions to dismiss for failure to state a claim. A complaint must contain a short and plain statement of the claim showing the pleader is entitled to relief. Fed. R. Civ. P. 8(a). While "detailed factual allegations" are not required, a complaint must have sufficient factual allegations to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). A Rule 12(b)(6) motion tests the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). When evaluating such a motion, courts generally "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

B. Federal Antitrust Law

"To establish liability under [section 2 of the Sherman Act], a plaintiff must show: '(a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury.'" *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974, 990 (9th Cir. 2020) (quoting *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013)). "[T]o demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

IV. Discussion

Sony argues that the Complaint should be dismissed because (1) Plaintiffs have failed to

allege monopoly power or a dangerous probability of achieving monopoly power in a properly-defined relevant antitrust market; (2) Plaintiffs have failed to allege anticompetitive conduct; (3) Plaintiffs have failed to allege anticompetitive effects or antitrust injury; and (4) Plaintiffs have failed to allege facts supporting its derivative claims. As explained below, Plaintiffs have failed to plead one of the elements required to establish anticompetitive conduct. Each of Sony's arguments, however, are addressed in turn.

A. Monopoly Power

"A threshold step in any antitrust case is to accurately define the relevant market, which refers to the area of effective competition." *Qualcomm*, 969 F.3d at 992. The relevant market "must encompass the product at issue as well as all economic substitutes for the product." *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018) (quoting *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008)). "Economic substitutes have a 'reasonable interchangeability of use' or sufficient 'cross-elasticity of demand' with the relevant product. Including economic substitutes ensures that the relevant product market encompasses 'the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.'" *Id.* (citations omitted).

Plaintiffs define the relevant product market in this case as "the market for downloadable, digitally-delivered video game content that is compatible with a PlayStation console ("digital PlayStation games")." Complaint ¶ 49. The Complaint also avers that "[d]ue to the high cost of consoles, the differentiation among them, and the lack of cross-compatibility, each console creates a separate aftermarket for games that can be played on it." *Id.* at ¶ 51. Defendant argues that Plaintiff's single-brand market is implausible, because competition occurs at the platform level, such as between Sony and Nintendo, "with manufacturers innovating and pricing their products aggressively to attract users to the platform." Motion to Dismiss, p.9. Defendant also argues Plaintiffs fail to satisfy the requirements for pleading an aftermarket.

Addressing first the single-brand market issue, limiting a market definition to a single brand is disfavored. *See Reilly v. Apple Inc.*, No. 21-CV-04601-EMC, 2022 WL 74162, at *5 (N.D. Cal. Jan. 7, 2022) ("It is an understatement to say that single-brand markets are disfavored.

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