BLIZZARD ENTERTAINMENT INC. v. CEILING FAN SOFTWARE LLC, et al., 41 F.Supp.2d 1227 (C.D. Cal. 2013)

Order re: Plaintiff's Motion to Dismiss Counterclaims

JAMES V. SELNA, District Judge.

This action arises out of Defendants' marketing of a software program designed to run in conjunction with Plaintiff's online computer role-playing game. Plaintiff Blizzard Entertainment, Inc. ("Blizzard") moves to dismiss the First Amended Counterclaims ("FACC") asserted by Defendants Ceiling Fan Software, LLC ("CF") [...] For the ∗1229 following reasons, the Court GRANTS the motion.

I. Background

A. Procedural History

Blizzard filed this action against Defendants based on Defendants' development and sale of software bots that simulate participation in Blizzard's online computer role-playing game "World of Warcraft" ("WoW"). (First Amended Compl., Docket No. 30.) Its claims against Defendants are for intentional interference with contractual relations, breach of contract, unjust enrichment, and unfair competition. (Id.) Defendants counterclaimed for antitrust violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, unfair competition in violation of California Business & Professions Code §§ 17200 et seq. ("UCL"), and declaratory relief. (See Answer and Counterclaims, Docket No. 40.)

[...]

B. Factual Background

[...] Blizzard developed and sells WoW. (FACC ¶ 7.) By playing WoW online, players assume a character that advances and upgrades through various levels, which enable them to access new content. (Id. ¶¶ 8–10.) Defendants allege that to reach the ultimate goal of level 85, a player must spend a substantial amount of time playing WoW. (Id. ¶ 10.) Therefore, Blizzard has created a significant demand for WoW players who wish to reach level 85 but cannot devote the time necessary to do so. (Id. ¶ 11.) In response, a substantial market has been established by third-party software developers to create "bot" programs ("bots" or "bot programs"), which work to simulate participation in WoW, thereby advancing players through levels without as much active game-time playing as would be otherwise required. (Id. ¶¶ 12–14.) Responding to this significant demand for WoW bot programs, CF developed and

sells two such software bots known as "Pocket Gnome" and "Shadow Bot." (Id. ¶ 17.)

When it developed its bots, CF was aware that Blizzard's End User License Agreement ("EULA") and Terms of Use ("TOU") prohibit its users from using third-party bot software programs to decrease the time it takes to advance through levels. (Id. ¶¶ 15-19.) The EULA and TOU expressly prohibit licensees from using any unapproved third-party add-on software and hardware, including "bot" software. (Id. ¶¶ 28-29.) Blizzard does not normally authorize any efforts by players who level up their avatars by using third-party add-on bot software programs. (Id. ¶ 15.) Defendants 1230*1230 claim that Blizzard's use of its copyright, EULA, and TOU are anticompetitive actions in violation of antitrust laws. (Id. ¶¶ 22-32.)

1. The Relevant Market

The FACC now defines the affected "relevant market" as "the aftermarket for add-on hardware and software specific to the WoW that enables WoW players to advance their character levels at a faster-than-normal rate." (Id. ¶ 34.) It alleges that any software product that enables a person to advance its WoW character can be interchangeable with a bot. (Id. ¶ 36.) Blizzard offers such products for leveling characters faster in WoW either directly or through licensing agreements with third parties. (Id. ¶ 37.) Blizzard develops, markets, and sells its own software that are "market substitutes for the `bot' software in the market." (Id. ¶ 32.) These products include keyboards and mice that are pre-programmed to automate keystrokes within WoW, and Blizzard-promoted services such as "Recruit a Friend" or "Scroll of Resurrection" that enable WoW players to advance up to three times the normal rate or advance a character immediately to the top level in the game. (Id. ¶ 38.) Defendants allege that any WoW player who wishes to advance its character at a faster-than-normal rate could choose from those options or purchase CF's bot software. (Id. ¶ 40.)

2. Anticompetitive Behavior

Defendants allege antitrust violations, including monopolization or attempted monopolization in violation of Section 2 of the Sherman Act. Defendants allege that Blizzard and its licensees completely control the relevant market. (Id. ¶ 35.) They allege that Blizzard maintains control by quashing any attempt by third-party developers to enter the WoW add-on aftermarket through a number of specific anticompetitive acts. (Id. ¶¶ 22-32, 55.) These acts include: (1) requiring through its EULA and TOU that any individual who wishes to play WoW use only hardware or software

add-ons sold or licensed by Blizzard; (2) restricting the interoperability of third-party add-on hardware or software through technology barriers; (3) disabling such third-party add-ons through software updates; (4) promoting its own products to advance WoW play while precluding any third parties from selling competing products; (5) threatening to sue entities that sell unauthorized add-ons that interoperate with WoW despite having no contractual or business relationship with the entities; and (6) selectively suing such entities. (Id. ¶¶ 44, 55.) They allege that these acts reduce the choices available to consumers and bar access to high-quality add-ons. (Id. ¶ 57.) Moreover, Blizzard intentionally places these barriers to entry to allow them to supply its own aftermarket products. (Id. ¶ 58.)

Moreover, Defendants allege that Blizzard violates the Sherman Act and Clayton Act by "tying" the sale of its WoW software on the condition that users of WoW will not purchase any unauthorized third-party hardware or software. (Id. ¶ 66.) They allege that Blizzard controls at least 62 percent of the entire massive multiplayer online role-playing game market. (Id. ¶ 65.) Through this tying arrangement, Blizzard attempts to monopolize the relevant aftermarket for WoW add-ons. (Id. ¶ 74.)

II. Legal Standard

[...]

III. Discussion

Defendants assert counterclaims for monopolization in violation of Section 2 of the Sherman Act, and for "tying" under the Sherman and Clayton Acts. (See FACC ¶¶ 47-77.) The Court considers whether the threshold market allegations are sufficient.

As the Court summarized in its previous order, "[i]n order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a `relevant market.' That is, the plaintiff must allege both that a `relevant market' exists and that the defendant has power within that market." Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1044 (9th Cir.2008). The relevant-market inquiry does not differ for Section 1 and Section 2 of the Sherman Act, or Section 3 of the Clayton Act. See id. at 1044 n. 3; Apple Inc. v. Psystar Corp., 586 F.Supp.2d 1190, 1196 (N.D.Cal. 2008). The relevant market must be a product market. Newcal, 513 F.3d at 1045. A properly defined product market "includes a pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir.1988). An antitrust complaint can be dismissed if its relevant

market definition is "facially unsustainable." Newcal, 513 F.3d at 1045. The Court thus discusses whether Defendants have sufficiently alleged that Blizzard has power within a relevant market.

A. Relevant Product Market

The alleged relevant market is defined as "the aftermarket for add-on hardware and software specific to the WoW that enables WoW players to advance their character levels at a faster-than-normal rate." (FACC ¶ 34.) [...]

The Court agrees with Defendants and finds that the newly alleged relevant market definition is not implausible on its face, unlike the overbroad allegations in Defendants' original counterclaims. The inquiry into whether the special keyboards, mice, and promotional service programs that "advance play" are "reasonably interchangeable" with the bots is a factual issue that cannot be determined at the pleading stage. See Todd v. Exxon Corp., 275 F. 3d 191, 200-02 (2d Cir.2001) [...]

B. Blizzard's Market Power in the Relevant "Aftermarket"

However, the Court finds that, despite pleading a sufficiently defined product market with interchangeable products, the market allegations still fail. Although the law recognizes that an antitrust claimant can allege a single-brand aftermarket, see Newcal, 513 F.3d at 1048, such as an aftermarket for WoW only, any market power Blizzard has over the WoW aftermarket is the result of restrictive contractual provisions in its EULA and TOU. These contractual obligations are not a cognizable source of market power.[3] See id. at 1047.

Blizzard raises this argument in its motion, contending that Defendants cannot *1233 establish antitrust claims based on its users' voluntary consent to the EULA and TOU.[4] (Mot. Br. 22-23.) Although Blizzard does not argue this point in the market power analysis, the Court finds that this discussion is applicable to whether the market power requirement is established.[5] Blizzard cites Newcal, Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 441 (3d Cir.1997), and Apple Inc. v. Psystar Corp., 586 F.Supp.2d 1190, 1201 (N.D.Cal.2008), to show that Defendants cannot base its claims on the aftermarket restrictions. (See Opp'n Br. 17.) These cases explain that the law prohibits an antitrust claimant from asserting an antitrust claim "resting on market power that arises solely from contractual rights that customers knowingly and voluntarily gave to the defendant" when they purchased the initial tying product. Newcal, 513 F.3d at 1048 (referring to the Queen City Pizza line of cases).

For example, in Queen City Pizza, the Third Circuit rejected a single brand aftermarket relating to pizza-making ingredients for Domino's franchisees. This was because the franchise agreement explicitly required franchisees to purchase pizza ingredients from Domino's or authorized vendors. Id. at 1046-47. There, the

contractual provision did not change the fundamental nature of the inputs, which remained economically substitutable with other brands of the same inputs, the provision merely changed the plaintiffs' legal freedom to choose substitutes. The Third Circuit held that the contractually created difference among otherwise-substitutable products was insufficient to create an economically distinct antitrust submarket.
Id. at 1046.

[...] [In] Psystar, the court held that the defendant had failed to plead a plausible aftermarket for hardware that could be used with the Mac OS operating system because through "its End User License Agreement and other means, Apple specifically restricts the use of Mac OS to Apple-labeled computer hardware systems," and "customers, therefore, knowingly agree to the challenged restraint." See Psystar, 586 F.Supp.2d at 1201.

Newcal distinguished those cases from that in Eastman Kodak v. Image Technical ∗1234 Services, Inc., 504 U.S. 451, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992), in which consumers did not know that, in purchasing the Kodak-brand equipment, they were agreeing to the equivalent of a contractual commitment giving Kodak an agreed-upon right to monopolize its consumers in the aftermarket for Kodak parts and services. 513 F.3d at 1048. The antitrust plaintiffs alleged that Kodak had market power in the submarket consisting of customers that had already purchased Kodak-brand equipment and needed replacement parts and services for that already-bought equipment. 504 U.S. at 456-59, 112 S.Ct. 2072. Kodak allegedly engaged in illegal practices to prevent third-party companies from competing with Kodak in the aftermarket for service of the Kodak-brand equipment. Id. Such an arrangement can be the basis for antitrust claim. Unlike in Psystar, the customers in Eastman Kodak did not knowingly bind themselves to a single brand of the aftermarket. See Psystar, 586 F.Supp.2d at 1201. "Only after were they `locked in' to Kodak equipment were they forced to evaluate costs in the parts and services markets." Id.

[...]

The fourth and last relevant aspect of the complaint is whether it alleges market imperfections such as those found in Eastman Kodak, i.e. allegations to rebut the economic presumption that consumers

made a knowing choice to restrict their *1236 aftermarket options when they decide to sign the initial contract. Id. In Eastman Kodak, consumers purchased Kodak-brand products without the knowledge that Kodak would then later make it more difficult for third-party companies to provide services for Kodak machines, essentially forcing customers to use Kodak for aftermarket services. 504 U.S. at 458, 112 S.Ct. 2072. The high information costs and switching costs prevented customers from considering their choices at the time of original purchase. Id. at 475-78. Here, nothing in the FACC alleges that market imperfections prevented users from discovering the restrictions at the outset. Again, the situation is more like the aftermarket found in Psystar. There, customers purchasing Apple's Mac OS operating system were restricted to using it only on Apple computers. See Psystar, 586 F.Supp.2d at 1201. Apple was entitled to do have their customers agree to this condition, and so is Blizzard. See id. Moreover, the language in WoW's terms is as clear as the language in Psystar. Here, when users purchased WoW, they agreed, [7] by signing both the EULA and TOU, not to "use cheats, automation software (bots), hacks, mods or any other unauthorized third-party software designed to modify the World of Warcraft experience." (Supplemental Request for Judicial Notice, Ex. 5, at 1; Ex. 6, at 1.) This is similar to the unequivocal language in Apple's agreement. See Psystar, 586 F.Supp.2d at 1194 ("You agree not to install, use or run the Apple Software on any non-Apple-Labeled computer or enable another to do so."); cf. Datel Holdings Ltd. v. Microsoft Corp., 712 F.Supp.2d 974, 989 (N.D.Cal.2010) (because ambiguous warranty language made it "highly unlikely that a customer purchasing a Xbox 360 console would understand the contract as prohibiting unauthorized accessories," the alleged monopoly on the aftermarket was not based on a contractual commitment). These explicit agreements refute the possibility that market imperfections confused WoW users' knowledge of the aftermarket restrictions.

In sum, the principles in Queen City Pizza, Psystar, and Forsyth apply because the FACC does not allege a situation in which Blizzard "is leveraging a special relationship with its contracting partners to restrain trade in a wholly derivative aftermarket," Newcal, 513 F.3d at 1050, but one in which "alleged market power flows from contractual exclusivity," id. Based on the allegations in the FACC, users agreed to the terms of the EULA and TOU during the initial contract they sign with Blizzard regarding the use of WoW. Blizzard is entitled to condition the use of WoW on such restrictions, and any resulting market power in the aftermarket cannot be the basis for antitrust claims. The only reason why Blizzard or its licensees allegedly hold market power in the aftermarket is because Blizzard users agree not to use any unauthorized WoW add-ons. It can be inferred that users therefore

agree to only use authorized WoW add-ons that advance play, and agreeing to this inherently gives Blizzard power over any market for such products. Based on the case law discussed, it is clear that such a contractually 1237*1237 mandated monopoly over an aftermarket is not a legally cognizable market.

Because the market power allegations fail, Defendants have not adequately plead antitrust counterclaims under the Sherman and Clayton Acts.[8] Moreover, since Defendants' UCL counterclaim is based those antitrust claims, that counterclaim also fails.

IV. Conclusion

For the foregoing reasons, the motion to dismiss is GRANTED with prejudice.

IT IS SO ORDERED.

[8] The "tying" claims under the Sherman Act and Clayton Act fail because tying "generally requires that the defendant's economic power be derived from the market, and not from a contractual relationship that the plaintiff has entered into voluntarily." See Rick-Mik Enters., Inc. v. Equilon, Enters. LLC, 532 F.3d 963, 973 (9th Cir.2008). This is clearly not the case, as discussed.

As for Defendants' monopolization claim under Section 2 of the Sherman Act, the claim fails because of the threshold requirement of alleging market power. Even if that requirement were met, the Court notes that none the alleged "anticompetitive acts" that comprise of the monopolization claim are sufficient. First, the use of the EULA and TOU to prohibit third-party programs has already been discussed at length. Such contractual restrictions cannot be anticompetitive under the circumstances here. Moreover, Defendants' allegations based on Blizzard's threats to sue or its lawsuits are barred under the Noerr-Pennington doctrine because Defendants do not allege that the lawsuits are a "sham," objectively baseless, or brought in bad faith. See Prof'l Real Estate Investors v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993). Furthermore, the authority for Blizzard to use "technological barriers" and software updates used to restrict or disable third-party software is derived from its EULA and TOU, and amounts to no more than policing the restrictions to which the purchasers agreed to upfront. Blizzard is also allowed to promote products that it does authorize because that is not barred by the agreements. In sum, none of the alleged conduct is sufficient to meet a Section 2 monopolization claim.