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Is It Game Over for PlayStation Store Antitrust Suit?

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The recent dismissal of an antitrust case against Sony relating to the sale of digital video games on the company's PlayStation Store could shed light on the viability of refusal-to-deal claims against platform technology companies.

Overview of the Allegations

Sony Interactive Entertainment LLC ("Sony") manufactures, markets, and sells the popular video game system PlayStation. In addition to the gaming console, the company also operates the PlayStation Store, an online store where users can purchase PlayStation games for digital download.

In 2021, a group of plaintiffs who purchased digital PlayStation games sued Sony in the Northern District of California. The proposed class asserted federal monopolization (Sherman Act, Section 2) and related state-law claims based on Sony's decision to change its distribution practices for digital games on the PlayStation Store.

The plaintiffs allege that, prior to 2019, PlayStation users could buy digital PlayStation games directly from Sony (through the PlayStation Store) or from game developers (through other online and brick-and-mortar retailers). Unlike Sony's sales of digital games on the PlayStation Store, game developers sold "download codes" for their games that users could then redeem on the PlayStation Store for digital copies of the game. The prices of games bought using these download codes could vary from the prices for games sold on the PlayStation Store.

In April 2019, Sony allegedly stopped allowing retailers to sell PlayStation games through these digital download codes. In doing so, plaintiffs claim, Sony established the PlayStation Store as the only source from which consumers could purchase digital PlayStation games. Further, under Sony's new distribution practice, Sony itself priced all digital games for PlayStation, allegedly "establish[ing] a monopoly over the sale of digital PlayStation games" and allowing Sony to charge allegedly supracompetitive prices. Notably, plaintiffs did not (and could not) claim that Sony had a monopoly in gaming platforms, as it clearly faces competition from several well-known platforms. Plaintiffs instead based their claim on a "platform" monopolization theory, under which Sony allegedly has a monopoly over users "locked into" the Sony platform.

Refusal-to-Deal Allegations Dismissed

Sony moved to dismiss the complaints, challenging the plaintiffs' "platform" monopolization theory and efforts to impose upon Sony an antitrust duty to deal with its competitors (in this case, rival game developers). Sony argued that the decision to alter its distribution practices and stop offering digital download codes did not amount to exclusionary conduct under Section 2.

On July 15, Judge Richard Seeborg dismissed plaintiffs' claims without prejudice.[1] Citing the Supreme Court's decisions in Trinko and Aspen Skiing, he noted that courts generally do not impose upon companies like Sony a duty to deal with other entities.[2] Such refusals to deal, Judge Seeborg explained, can give rise to potential liability under Section 2 only in narrow circumstances, (1) where there is a unilateral termination of **a voluntary and profitable course of dealing**; (2) where there is a willingness to **sacrifice short-term benefits** in order to obtain higher profits in the long run from the exclusion of competition; and (3) the refusal to deal includes products that were **already sold in a retail market to other customers**.[3]

The court found that plaintiffs failed at the first step of the three-part test. According to the court, "Plaintiffs provide conclusory statements that Sony voluntarily terminated a profitable practice," but "do not provide sufficient factual detail."

The plaintiffs had tried to skirt the first requirement under Aspen Skiing, arguing that the Supreme Court's Trinko decision entitled plaintiffs to a presumption that Sony's business practice was profitable. Judge Seeborg rejected plaintiffs' attempt at a shortcut. "Although it seems almost certain that Sony gained some revenue through download codes, and Plaintiffs need not at this stage prove that the practice was profitable," the court explained, "Plaintiffs must at a minimum describe the process through which Sony earned money from the practice."[4]

The court concluded that plaintiffs also fell short of the next two steps of the test because those allegations hinged on the same unsupported assumption that Sony terminated a profitable course of dealing with the digital download codes.

Game Over or One More Life Left?

As antitrust plaintiffs continue to challenge the business conduct of alleged "platform" technology companies, the PlayStation Store case is worth keeping an eye on.

The decision is a victory for defendants and platforms—an example of how difficult it can be to allege a refusal-to-deal case under Aspen Skiing. Nevertheless, plaintiffs and critics of technology platform companies may argue that the ruling merely requires plaintiffs to plead additional facts on the likely profitability of prior courses of dealing to support their theory.

In light of the court's statement that "[i]f Sony was selling download codes to third-party retailers, which those retailers then sold to consumers, it appears that practice could be analogous to the situation in Aspen Skiing," plaintiffs' lawyers may seek to bolster their allegations on the first part of the Aspen Skiing test in an amended complaint.

Assuming they do so, it will be interesting to see how the court analyzes the three-part test from Aspen Skiing on a subsequent motion to dismiss. How robust will the District Judge require the facts to be on the profitability issue at the pleading stage, before plaintiffs have been able to take any discovery? If the court finds that the plaintiffs adequately have pled a profitable course of dealing, then what about the next two steps under Aspen Skiing? Plaintiffs cannot just allege profitability—they plausibly have to allege a sacrifice of short-term benefits and the likelihood of later recoupment through higher prices.

Were these hypothetical amended complaints to be dismissed again, such a dismissal could solidify the narrow circumstances under which a platform company's refusal to deal can be viewed as potentially anticompetitive, once again highlighting the unique circumstances that were at issue in Aspen Skiing and the limitations of that precedent. On the other hand, if these hypothetical amended complaints were to survive a subsequent motion to dismiss, then such a development could embolden plaintiffs to challenge similar behavior by other technology platforms, especially those featuring popular applications and game stores.

1 Caccuri v. Sony Interactive Ent. LLC, No. 21-cv-03361-RS, 2022 U.S. Dist. LEXIS 125848, at *16 (N.D. Cal. July 15, 2022).

2 Id. ("[A]s a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'") (quoting Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)).

3 Id. (citing Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1132-33 (9th Cir. 2004)).

4 Id. at 15.