No. 17-56119

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re National Football League's "Sunday Ticket" Antitrust Litigation

Ninth Inning, Inc., *et al.*,

Plaintiffs-Appellants,

v.

DIRECTV, LLC, *et al.*,

Defendants-Appellees.

On Appeal from an Order of the
United States District Court for the Central District of California
Case No. 15-ml-2668
The Honorable Beverly Reid O'Connell

BRIEF OF NFL DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, defendants-appellees National Football League, NFL Enterprises LLC, and the Individual NFL Clubs (collectively "defendants-appellees") state that:

1. The National Football League is an unincorporated association of 32 member clubs organized under the laws of New York.

2. NFL Enterprises LLC is wholly owned by NFL Ventures, L.P.

3. The 32 member clubs of the National Football League (collectively "Individual NFL Clubs") are as follows:

   a. Arizona Cardinals Football Club LLC, d/b/a Arizona Cardinals;

   b. Atlanta Falcons Football Club, LLC, d/b/a Atlanta Falcons;

   c. Baltimore Ravens Limited Partnership, d/b/a Baltimore Ravens (Baltimore Football Company LLC is the general partner);

   d. Buffalo Bills, LLC, d/b/a Buffalo Bills;

   e. Panthers Football, LLC, d/b/a Carolina Panthers;

f. The Chicago Bears Football Club, Inc., d/b/a Chicago Bears;

g. Cincinnati Bengals, Inc., d/b/a Cincinnati Bengals;

h. Cleveland Browns Football Company LLC, d/b/a Cleveland Browns;

i. Dallas Cowboys Football Club, Ltd., d/b/a Dallas Cowboys (JWJ Corporation is the general partner);

j. PDB Sports, Ltd. d/b/a Denver Broncos Football Club (Bowlen Sports, Inc. is the general partner);

k. The Detroit Lions, Inc., d/b/a Detroit Lions;

l. Green Bay Packers, Inc., d/b/a Green Bay Packers;

m. Houston NFL Holdings, L.P., d/b/a Houston Texans (RCM Sports and Leisure, L.P. is the general partner; Houston NFL Holdings G.P., L.L.C. is the general partner of RCM Sports);

n. Indianapolis Colts, Inc., d/b/a Indianapolis Colts;

o. Jacksonville Jaguars, LLC, d/b/a Jacksonville Jaguars;

p. Kansas City Chiefs Football Club, Inc., d/b/a Kansas City Chiefs;

q. The Los Angeles Rams, LLC, d/b/a Los Angeles Rams;

r. Chargers Football Company, LLC, d/b/a Los Angeles Chargers;

s. Miami Dolphins, Ltd., d/b/a Miami Dolphins (South Florida Football Associates LLC is the general partner);

t. Minnesota Vikings Football, LLC, d/b/a Minnesota Vikings;

u. New England Patriots LLC, d/b/a New England Patriots;

v. New Orleans Louisiana Saints, LLC, d/b/a New Orleans Saints;

w. New York Football Giants, Inc., d/b/a New York Giants;

x. New York Jets LLC, d/b/a New York Jets;

y. Raiders Football Club, LLC, d/b/a Oakland Raiders;

z. Philadelphia Eagles, LLC, d/b/a Philadelphia Eagles;

aa. Pittsburgh Steelers LLC, d/b/a Pittsburgh Steelers;

bb. Forty Niners Football Company LLC, d/b/a San Francisco 49ers;

cc. Football Northwest LLC, d/b/a Seattle Seahawks;

dd. Buccaneers Team LLC, d/b/a Tampa Bay Buccaneers;

ee. Tennessee Football, Inc., d/b/a Tennessee Titans (a subsidiary of KSA Industries, Inc.); and

ff. Pro-Football, Inc., d/b/a Washington Redskins (a subsidiary of WFI Group, Inc., which is a subsidiary of Washington Football, Inc.).

Other than what is listed above, no defendant-appellee has a parent corporation. No publicly-held corporation owns more than 10 percent of any defendant-appellee's stock.

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INTRODUCTION

Plaintiffs challenge long-standing and procompetitive broadcast arrangements of the National Football League. Those broadcast arrangements ensure that fans across the country can view NFL football games in multiple ways, including through free, over-the-air television broadcasts every Sunday afternoon during the NFL season.

Plaintiffs focus their challenge on a television package known as "NFL Sunday Ticket," which provides additional access to NFL game broadcasts during the regular season. To create NFL Sunday Ticket, the NFL licensed to DIRECTV the rights to distribute Sunday afternoon NFL game broadcasts produced by television networks CBS and FOX. Under that license, after receiving and packaging the CBS and FOX broadcast feeds, DIRECTV distributes them via satellite to its residential and commercial subscribers. With NFL Sunday Ticket, fans can watch any Sunday afternoon game, including games not otherwise broadcast in their home markets.

The creation and distribution of NFL Sunday Ticket has greatly expanded the number of televised NFL football games available to every fan across the country; enhanced competition among rival

entertainment products as well as among broadcast, satellite, and cable distributors; strengthened fan interest and loyalty; and helped to create what the complaint admits is "tremendous viewership" of NFL football.

Plaintiffs recognize that their claims, brought under Sections 1 and 2 of the Sherman Act, must be judged under the rule of reason, which requires plaintiffs to plausibly allege—among other elements—anticompetitive effects, a properly defined relevant market, and antitrust standing. The District Court correctly determined that plaintiffs had failed to satisfy any of these requirements, and thus dismissed the complaint on multiple, independent grounds.

First, all of plaintiffs' claims should be dismissed for failure to allege harm to competition. Plaintiffs challenge two agreements: (i) an exclusive "vertical" agreement between the NFL and DIRECTV to distribute the NFL Sunday Ticket product; and (ii) a "horizontal" agreement among the NFL and its member clubs to jointly license the rights to NFL Sunday Ticket. These challenges fail to account for both the protections provided by the Sports Broadcasting Act—which exempts from antitrust scrutiny the NFL's joint licensing of its member clubs' broadcast rights—and the well-established lines of precedent

relating to agreements among the member clubs of a professional sports league to create their product. Plaintiffs' "vertical" challenge further fails to account for well-established precedent holding that exclusive distributorships are presumptively legal. The District Court properly determined that plaintiffs had failed to allege any harm to competition, a conclusion compelled by precedent regardless of whether the vertical and horizontal agreements are analyzed separately or together.

Second, plaintiffs failed to identify a relevant market in which the NFL allegedly exercises market power. Plaintiffs premise their argument on the theory that the broadcasts in the NFL Sunday Ticket package constitute a relevant market. But as the District Court held, there is no reason why NFL broadcasts *within* the NFL Sunday Ticket package, but not the free, over-the-air NFL broadcasts *outside* that package, would be viable substitutes for one another. And as the District Court further held, the substitutability of *free* NFL game broadcasts would preclude any exercise of market power.

Third, as to the horizontal agreement among the NFL and its member clubs, plaintiffs concede that they are not direct purchasers. Under the indirect purchaser rule announced in *Illinois Brick Co. v.*

Illinois, 431 U.S. 720 (1977), they therefore lack standing to assert damages claims as to that agreement.

Finally, because plaintiffs have not plausibly alleged either (i) that any of the challenged agreements has anticompetitive effects or (ii) that defendants acted with the requisite specific intent, their complaint fails to state a Section 2 monopolization claim.

For all these reasons, as more fully discussed below, the District Court's judgment should be affirmed.

STATEMENT OF THE ISSUES

1. Have plaintiffs plausibly alleged that the NFL's presumptively legal exclusive distribution agreement for certain game broadcasts unreasonably restrains competition?

2. Have plaintiffs plausibly alleged that the NFL and its member clubs violated Section 1 of the Sherman Act by jointly licensing a product that can be produced and licensed only jointly?

3. Have plaintiffs identified a relevant market, in which the NFL exercises market power, for some or all NFL game broadcasts, given that multiple NFL games are broadcast on free, over-the-air television every Sunday afternoon in every region of the country?

4. Do plaintiffs, who are not direct purchasers of any product or service from the NFL or its member clubs, have standing to assert Sherman Act damages claims based on an alleged agreement among the NFL and its member clubs?

5. Can plaintiffs state a monopolization claim absent plausible allegations of anticompetitive effects, a relevant market, or a specific intent to monopolize?

STATEMENT OF THE CASE

A. Factual Background

1. Broadcasting of NFL Football

Each year, the NFL and its 32 member clubs jointly produce a structured series of over 250 professional football games culminating in the Super Bowl. Most regular-season NFL games are played on Sunday afternoons beginning about 1 p.m. and 4 p.m. ET (10 a.m. and 1 p.m. PT). R178; R76 (¶ 84). Those games are broadcast across the country through separate agreements between the NFL, on the one hand, and broadcast networks CBS and FOX, on the other. *Id.*

Pursuant to those agreements, every Sunday afternoon NFL game is broadcast on free, over-the-air television, in at least the two competing teams' local markets. R76 (¶ 84). On a typical Sunday

afternoon, consumers throughout the country can choose among three NFL game broadcasts on free, over-the-air television, and every fan can watch the game(s) of his or her local team(s) for free. R177-78; R76 (¶ 84). Additional NFL games are broadcast nationwide on Sunday, Monday, and Thursday nights. R76 (¶ 84).

Each NFL game broadcast is a copyrighted work jointly authored by the NFL, the two competing teams, and the broadcast network.[1] The copyright for each NFL broadcast is vested in the NFL (through NFL Productions LLC). *See id.*

Far from restricting viewership of NFL games, the NFL's distribution arrangements have allowed hundreds of millions of viewers to watch NFL games. For example, during the 2014 season, "202.3 million unique viewers, representing 80 percent of all television homes" in the United States, watched an NFL football game and "every one of the 20 most-watched programs in America was an NFL game." R90 (¶ 120).

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[1] *See, e.g.*, U.S. Copyright Office, *NFL 2016 Season: Cowboys @ Packers, Week #6*, Reg. No. PA0002069024 (Jan. 4, 2017), *available by searching for registration number at* http://cocatalog.loc.gov; *see also Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1114 (9th Cir. 2015) (taking judicial notice of public records from the Copyright Office).

2. The Sports Broadcasting Act

In 1961, a federal district court enjoined the NFL and its member clubs from entering into a pooled-rights agreement that would have licensed CBS to broadcast all regular-season NFL games. *See United States v. Nat'l Football League*, 196 F. Supp. 445 (E.D. Pa. 1961). In response, later that year, with the express goal of permitting such pooled-rights agreements, Congress passed the Sports Broadcasting Act (SBA); it did so "to preserve the availability of NFL games on free broadcast television." *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 301 (3d Cir. 1999).

The SBA provides:

> The antitrust laws . . . shall not apply to any joint agreement by or among persons in or conducting the organized professional team sport of football . . . by which any league of clubs participating in professional football . . . sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football . . . .

15 U.S.C. § 1291. Because the agreements with CBS and FOX are "joint agreement[s] by or among [the NFL clubs] . . . by which [the NFL] . . . sells or otherwise transfers all or any part of the rights of such

league's member clubs in the sponsored telecasting of the games of football," each falls within the protections of the SBA. *See id.*

3. NFL Sunday Ticket

To provide fans with additional access to live NFL football, in 1994 the NFL, as copyright holder of the jointly created game broadcasts, licensed DIRECTV to offer "NFL Sunday Ticket," an innovative product distributed exclusively by DIRECTV. R178; R79 (¶ 89). Neither the broadcasters (CBS and FOX) nor the individual clubs are signatories to the license agreement. R226.

Under the license agreement, DIRECTV receives the copyrighted broadcast "feeds" from the Sunday afternoon games produced by CBS and FOX, packages those feeds, and delivers that package to residential and commercial subscribers of its satellite distribution service. R178; R79 (¶ 90). With NFL Sunday Ticket, fans can watch any Sunday afternoon NFL game, including the "out-of-market" games that are not otherwise available in their home markets. *Id.*

The license agreement provides DIRECTV with substantial autonomy to determine the features of NFL Sunday Ticket. For example, the agreement provides that "DIRECTV has the discretion to

determine . . . the composition of the subscription packages it will sell." R233 (¶ 2(c)); *see also* R195.[2] Similarly, the agreement gives DIRECTV discretion to set "the prices for any and all subscription packages." R233(¶ 2(c)); *see also* R203.[3] Exercising that discretion, DIRECTV has created, priced, and distributed a number of innovative products based on NFL Sunday Ticket, including ""NFL Sunday Ticket Max,' which includes the Red Zone Channel, DirecTV Fantasy Zone Channel, and NFL.com fantasy.'" R195 (quoting R81 (¶ 97)).

NFL Sunday Ticket satisfies demand from avid and casual fans for even more televised NFL football than is available for free on broadcast television: Some fans follow teams in distant locations, while others—including fans who participate in fantasy football leagues—seek access to a broad array of games. *See* R52 (¶ 8).

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[2] The District Court found that the contract between the NFL and DIRECTV was incorporated by reference into plaintiffs' complaint. R182-83.

[3] Under that framework, DIRECTV must provide a weekly package of NFL Sunday Ticket games "at a price not to exceed 17.8% of the highest retail price charged by DIRECTV for the full basic package of [NFL Sunday Ticket] games." *Id.*

NFL Sunday Ticket is also available to commercial establishments that cater to fans who want to watch out-of-market NFL games. *Id.* For such restaurants and bars, NFL Sunday Ticket is highly lucrative; many "generate a substantial share of their overall revenue by having the capability to televise multiple professional football games simultaneously in order to attract a diverse range of fans to their establishments on Sunday afternoons during the fall NFL football season." *Id.* Moreover, as the District Court recognized, "[b]y granting DirecTV the exclusive rights to out-of-market broadcasts, DirecTV can create, package, and promote" various products, including NFL Sunday Ticket Max, which "result in greater fan access and NFL game exposure." R195.

NFL Sunday Ticket also has enabled DIRECTV to compete more effectively with incumbent cable providers and others to distribute video content to consumers. Federal regulators have concluded that such competition from DIRECTV benefits consumers. As the FCC recently determined in its review of the AT&T-DIRECTV merger, a more effective DIRECTV "increase[s] competition for bundles of video and broadband, which, in turn, will stimulate lower prices, not only for

[DIRECTV's] bundles, but also for competitors' bundled products—benefiting consumers and serving the public interest." *In the Matter of Applications of AT&T Inc. & DIRECTV*, 30 F.C.C. Rcd. 9131, 9134 (2015). In the same decision, the FCC *rejected* assertions that "DIRECTV's exclusive contract for NFL Sunday Ticket has harmed competition in the video distribution market or would harm competition post-transaction." *Id.* at 9200.

B. Proceedings Below

Plaintiffs filed actions in the Central District of California and the Southern District of New York challenging the NFL's Sunday Ticket broadcast arrangements. R180. The Judicial Panel on Multidistrict Litigation transferred the actions to the Central District of California, where Judge Beverly Reid O'Connell consolidated the pending actions and ordered plaintiffs to file a consolidated amended complaint. R175, R180.

Plaintiffs' consolidated amended complaint, filed on behalf of putative classes of commercial and consumer NFL Sunday Ticket subscribers, challenged two aspects of the NFL's Sunday Ticket arrangements. First, plaintiffs claimed that the NFL's exclusive

distribution agreement with DIRECTV reduced competition for the distribution of NFL Sunday Ticket (the "vertical" claim). R178. Second, plaintiffs challenged the manner in which the NFL and its member clubs (but not DIRECTV) jointly create and license the NFL Sunday Ticket package of broadcast rights (the "horizontal" claim). R178-79.

The NFL defendants filed a motion to dismiss, and the DIRECTV defendants filed a motion to compel arbitration. R180. After briefing and argument, Judge O'Connell granted the NFL defendants' motion, dismissing all of plaintiffs' claims with prejudice on multiple, independent grounds. R211. The District Court denied as moot the DIRECTV defendants' motion to compel arbitration. R180 n.6.

In granting the motion to dismiss, the District Court first considered whether plaintiffs had alleged a restraint of competition. Because plaintiffs' allegations encompassed both a vertical agreement between the NFL and DIRECTV and a horizontal agreement among the NFL and its member clubs, the District Court, following this Court's precedent, determined that the first step in the analysis should be "to break the conspiracy 'into its constituent parts,' and analyze 'the respective vertical and horizontal agreements'" under the appropriate

antitrust framework. R187-88 (quoting *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1192 (9th Cir. 2015)).

As to the vertical agreement, the District Court rejected plaintiffs' contention that the exclusive distribution license between the NFL and DIRECTV harmed competition. Applying the well-established rule that "'[a]n agreement between a manufacturer and a distributor to establish an exclusive distributorship is not, standing alone, a violation of antitrust laws,'" the District Court held that plaintiffs' exclusive-distributorship allegations failed to state a claim. R190-91 (quoting *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735 (9th Cir. 1987)).

In reaching that conclusion, the District Court found instructive an earlier decision that had dismissed—on the same ground—a challenge to the NBA's analogue of NFL Sunday Ticket (called "NBA League Pass"). *See* R193 (citing *Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177, 1183 (S.D. Cal. 2002)). The District Court rejected plaintiffs' attempts to distinguish *Rutman* and *Kingray*, finding that plaintiffs' challenge to the DIRECTV license relied on the same inadequate theory of vertical harm on which the plaintiffs in those cases had relied. R191-

96. The District Court thus concluded that plaintiffs had "failed to plead facts indicating that the vertical exclusive distributorship agreement between DirecTV and the NFL Defendants has harmed competition." *Id.*

As to the horizontal agreement, the District Court similarly rejected plaintiffs' assertion of harm to competition. It found insufficient plaintiffs' conclusory assertions that competition had been restrained by the agreement among the NFL and its member clubs to jointly license broadcast rights for out-of-market games.

As the District Court explained, the NFL Sunday Ticket product—as well as the individual game broadcasts included in that product—could not be produced or licensed without the cooperation and intellectual property of multiple NFL clubs and the NFL itself. R198-201. Citing analogous precedents involving historical NFL game footage and NFL game photos, the District Court concluded that, because "multiple entities must act collectively to broadcast the games in order for the games to be broadcast at all," this case presents "a situation where the collective issuing of rights is reasonable as a matter of law." *Id.* (citing *Washington v. Nat'l Football League*, 880 F. Supp. 2d

1004, 1005-07 (D. Minn. 2012) (historical NFL game footage) and *Spinelli v. Nat'l Football League*, 96 F. Supp. 3d 81, 95, 114 (S.D.N.Y. 2015) (NFL game photographs)).

The District Court also held that all of plaintiffs' claims should be dismissed on the additional, independent ground that the complaint had failed to allege that the NFL defendants exercise market power in any properly defined relevant market. Plaintiffs' complaint alleged two "markets": a purported market for all "live presentation[s] of professional football games" and a purported market for "out-of-market football broadcasts." R205, R208.

As to the first alleged market—for all NFL game broadcasts—the District Court concluded that, if broadcasts of all NFL games competed with one another as plaintiffs alleged, the NFL could not possess or exercise market power. As the District Court explained, "[b]y offering free game broadcasts on CBS and Fox, the NFL Defendants lack the ability to artificially control out-of-market games pricing because consumers may choose to view these free games as alternatives to paid-for out-of-market games." R206-07.

As to the second alleged market—for out-of-market NFL game broadcasts—the District Court determined that plaintiffs had failed to plausibly allege that such broadcasts constitute a relevant market; that is because plaintiffs had not plausibly alleged that out-of-market game broadcasts do not compete with free, in-market game broadcasts. R208. The District Court concluded that "an out-of-market football broadcasts market is a post-hoc narrowing of the relevant market to cover only those products over which plaintiffs allege that Defendants have control." *Id.*

The District Court also held, as a straightforward application of the indirect purchaser rule of *Illinois Brick*, that plaintiffs lacked standing to assert claims based on an alleged agreement among the NFL and its member clubs. "Plaintiffs do not directly purchase Sunday Ticket from the NFL Defendants," and "[a]ccordingly, Plaintiffs do not have standing to sue the NFL Defendants with respect to the horizontal agreements." R204.

Finally, the District Court dismissed plaintiffs' monopolization claim for failure to satisfy any of the requirements for stating such a claim. R208-10.

Given the multiple, independent bases for dismissal, the District Court determined that "there appears to be no way in which plaintiffs could amend their Complaint to state a claim without contradicting their current allegations." *Id.* Plaintiffs did not assert below—and do not assert on appeal—that further amendments to their consolidated amended complaint could remedy the defects identified by the District Court.

SUMMARY OF THE ARGUMENT

The District Court correctly dismissed plaintiffs' consolidated amended complaint for failure to state a claim.

The complaint challenges the NFL's licensing arrangements for the Sunday Ticket product under Sections 1 and 2 of the Sherman Act. Because there is no dispute that the antitrust rule of reason applies to plaintiffs' claims, the complaint had to plausibly allege that the challenged agreements unreasonably restrained competition in a properly defined relevant market. *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001). The complaint did neither: It did not plausibly allege anticompetitive effects, and it did not plausibly allege a proper relevant market. In addition, plaintiffs' damages claims against

the NFL and its member clubs fail because plaintiffs lack antitrust standing, and plaintiffs' Section 2 monopolization claim fails for the reasons stated above and due to plaintiffs' failure to allege a specific intent to monopolize.

Competitive Effects. There are two parts to plaintiffs' allegations. First, plaintiffs challenge the vertical license agreement between the NFL and DIRECTV. That agreement grants DIRECTV the right to package the NFL game feeds created by CBS and FOX, and thereby create and distribute the NFL Sunday Ticket product. Second, plaintiffs challenge the decision among the NFL member clubs to jointly license the NFL Sunday Ticket rights. The district court properly identified these "constituent parts" of plaintiffs' claims so that "the respective vertical and horizontal agreements can be analyzed" to determine whether the complaint states a plausible claim. *Musical Instruments*, 798 F.3d at 1192. Whether analyzed separately or together, these constituent parts do not plausibly allege anticompetitive effects.

As to the vertical agreement between the NFL and DIRECTV, the gravamen of plaintiffs' complaint is that it grants rights only to

DIRECTV instead of granting rights to multiple multi-channel video programming distributors (MVPDs). Such exclusive distribution licenses are "presumptively legal" under the antitrust laws, *E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 30 (2d Cir. 2006), and nothing in the complaint plausibly rebuts that presumption. On appeal, plaintiffs speculate that the NFL Sunday Ticket license led to a reduction in output, but they make no plausible allegations to that effect; to the contrary, they concede (as they must) that output is higher than it would have been in a "but-for" world without the exclusive DIRECTV license.

As to the horizontal agreement among the NFL member clubs to jointly license the broadcast rights to NFL football games, plaintiffs' challenge fails for multiple reasons. First, plaintiffs fail to account for the protections provided to the NFL and its member clubs by the Sports Broadcasting Act, 15 U.S.C. § 1291. In light of those protections, plaintiffs can potentially challenge only the agreement to jointly license the rights to distribute NFL Sunday Ticket, and plaintiffs do not plausibly allege that that agreement, standing alone, is anticompetitive.

Second, plaintiffs err in assuming that each NFL member club could license game broadcast rights independently, and they fail to explain how NFL Sunday Ticket, or the individual broadcasts that comprise that product, could be created and licensed without horizontal agreements of the kind that plaintiffs challenge. Absent any indication of an alternative means of cooperation to create and distribute the NFL Sunday Ticket package—and how such an alternative would enhance competition—plaintiffs cannot state an antitrust claim. *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012).

Relevant Market. The District Court correctly dismissed the complaint for failure to identify a properly defined relevant market. In order to allege a relevant market, plaintiffs must at a minimum take a position on whether NFL games are, or are not, substitutes for one another. That no-win dilemma dooms plaintiffs' putative markets for "the live video presentations of regular season NFL games" and for "out-of-market" game broadcasts.

The alleged market for all live regular-season NFL games fails because it includes the free, "in-market" NFL game broadcasts offered every week by CBS and FOX. If all of the NFL game broadcasts are in

the same relevant market (as this proposed market necessarily assumes), the substitutability of the free game broadcasts would preclude defendants from exercising market power by increasing prices for the other games in the NFL Sunday Ticket package.

The alleged relevant market for all out-of-market games is equally flawed. That alleged market would treat all out-of-market games as substitutes for one another but not for any in-market games. Plaintiffs do not allege any facts to support that illogical assertion, and their complaint alleges the opposite.

Antitrust Standing. The District Court correctly held that plaintiffs, as indirect purchasers with respect to any agreement among the NFL and its member clubs, lack standing to pursue damages claims. *Illinois Brick*, 431 U.S. 720 (1977); *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 749 (9th Cir. 2012).

Section 2 Monopolization Claim. Finally, the district court correctly dismissed the Section 2 monopolization claim. As plaintiffs conceded below, that claim "rises and falls" with the Section 1 claim. R209. In addition, plaintiffs failed to allege that defendants had a specific intent to monopolize.

ARGUMENT

I. Plaintiffs Fail To Plausibly Allege Anticompetitive Effects From The Creation And Distribution Of NFL Sunday Ticket.

A. Standards for Assessing Anticompetitive Effects.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

1. Analysis of horizontal and vertical agreements.

Plaintiffs challenge (i) a "vertical" agreement—that is, an agreement "up and down a supply chain"—between the NFL and DIRECTV, and (ii) a "horizontal" agreement—that is, an agreement among parties at the same level of a supply chain—among the NFL and its member clubs. *See In re Musical Instruments*, 798 F.3d at 1191. Accordingly, as this Court has held, the first step in the antitrust analysis is to separate the plaintiffs' challenge "into its constituent parts" so that "the respective vertical and horizontal agreements can be analyzed" to determine whether the complaint states a plausible claim. *Id.* at 1192.

Numerous cases recognize that horizontal and vertical restraints, which have "appreciated differences in economic effect," should be

analyzed separately in cases where both are at issue. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007); *see, e.g.*, *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 930 (7th Cir. 2000) ("The antitrust laws, which aim to preserve and protect competition in economically sensible markets, have long drawn a sharp distinction between . . . vertical restraints and . . . horizontal restraints.").

For example, in this case, the alleged horizontal agreement implicates the Sports Broadcasting Act as well as the extensive case law regarding horizontal agreements in the context of professional sports leagues. *See*, *e.g.*, *Chi. Prof'l Sports L.P. v. NBA*, 961 F.2d 667, 672-73 (7th Cir. 1992) ("[sports league] cooperation off the field is essential to produce intense rivalry on it—rivalry that is essential to the sport's attractiveness in a struggle with other sports, and other entertainments in general, for audience"); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101-02 (1984) (describing coordination necessary to maintain a sports league); *see also Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 839 (7th Cir. 2011) ("[*Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)] does not mean . . . that we will

aggregate the effects of conduct immunized from antitrust liability with the effects of conduct not so immunized.").

By contrast, the challenged vertical agreement must be analyzed in light of case law involving exclusive distributor agreements and vertical licensing. *See*, *e.g.*, *E & L Consulting*, 472 F.3d at 30 ("exclusive distributorship arrangements are presumptively legal"); *see also Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-55 (1977) (describing procompetitive benefits of vertical restrictions).

Because of the distinctions between the legal authorities and economic principles applicable to the two different kinds of restraints, considering plaintiffs' horizontal and vertical challenges together would have the potential to obscure and distort the analysis. Plaintiffs do not cite a single case in which the kind of "joint" analysis that they propose has been applied in comparable circumstances, and closely analogous cases confirm that separate analysis is warranted and required. *See, e.g.*, *Spinelli*, 96 F. Supp. 3d at 111-18 (S.D.N.Y. 2015) (separately analyzing (i) horizontal "collective licensing" agreement among NFL clubs and (ii) vertical "exclusive license" agreement); *Kingray*, 188 F. Supp. 2d at 1196-98 (separately analyzing plaintiffs' allegations of a

"Horizontal Conspiracy" among NBA teams and plaintiffs' "Exclusive Distributorship Theory").[4]

The cases on which plaintiffs rely in an effort to avoid separate analysis of the vertical and horizontal aspects of their claims do not support their position. For example, plaintiffs cite the Supreme Court's decision in *Leegin* as purportedly demonstrating that it would be "impossible" to address separately the vertical and horizontal aspects of an antitrust claim. Pls.' Br. 24, 26. But on remand, the Fifth Circuit did exactly that, addressing "[v]ertical price restraint claims" and "horizontal-restraint claims" in separate sections of its opinion. *See PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 417-21 (5th Cir. 2010).

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[4] This case does not fit into either of the two narrow categories of cases in which joint analysis of horizontal and vertical agreements is warranted. *First*, plaintiffs do not allege a "hub and spoke" conspiracy, *see In re Musical Instruments*, 798 F.3d at 1192, and did not raise such a theory either in their briefs below or in their opening brief in this Court. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("arguments not raised by a party in its opening brief are deemed waived"). *Second*, plaintiffs do not allege that this case involves a series of vertical agreements that "organizes" or "facilitates" a horizontal agreement among separate manufacturers. *See, e.g.*, *Leegin*, 551 U.S. at 893 (a collection of vertical agreements can be "useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel"); *United States v. Apple, Inc.*, 791 F.3d 290, 316 (2d Cir. 2015) (similar).

Similarly, the oft-quoted passage from *Continental Ore* on which plaintiffs rely (Pls.' Br. 19) does not even suggest that courts should analyze horizontal agreements and vertical agreements together. "If the warning against 'compartmentalizing' an antitrust conspiracy case were meant to prevent a court from breaking down a plaintiff's allegation of a 'unitary' conspiracy into its component parts for purposes of analysis, the [*Continental*] Court would not have engaged in the 'forbidden' analysis in the very same opinion in which it issued the warning." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 513 F. Supp. 1100, 1168 (E.D. Pa. 1981), *aff'd on this issue and rev'd in part on other grounds*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986).

Finally, plaintiffs assert that *Musical Instruments* should be interpreted to require courts to distinguish between horizontal and vertical agreements only when "deciding *which* analytical framework is to be applied to a challenged restraint," but not when deciding "*how* that framework is applied." Pls.' Br. 25. That argument is contradicted not only by the precedent cited above, but also by the plain language of this Court's opinion: *Musical Instruments* holds that an antitrust

challenge must be "broken into its constituent parts" so that the respective agreements "can be *analyzed*" under the appropriate antitrust doctrines. 798 F.3d at 1192 (emphasis added).

For all of these reasons, to survive a motion to dismiss, plaintiffs were required to allege facts plausibly indicating that each challenged agreement was anticompetitive under the antitrust principles applicable to that alleged restraint.

2. Application of the rule of reason.

Plaintiffs acknowledge that neither of the challenged agreements is subject to the "per se" rule of antitrust analysis, which applies a presumption of illegality to certain "inherently anticompetitive horizontal agreements." *Musical Instruments*, 798 F.3d at 1191; Pls.' Br. 26. Instead, each is appropriately analyzed under the antitrust "rule of reason, whereby courts examine 'the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed,' to determine the effect on competition in the relevant product market." *Musical Instruments*, 798 F.3d at 1191-92 (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

The rule of reason applies to the vertical agreement between the NFL and DIRECTV because "[v]ertical agreements" are "analyzed under the rule of reason." *Id.* at 1191. This rule reflects "the fact that some vertical restraints may have procompetitive justifications that benefit consumers." *Id.* at 1192.

The rule of reason applies to the horizontal agreement among the NFL and its member clubs because cooperation among them is essential for the creation of NFL football. *See NCAA*, 468 U.S. at 101. As the Supreme Court has recognized, the NFL and its member clubs "*must* cooperate in the production and scheduling of games," and this fact "provides a perfectly sensible justification for making a host of collective decisions." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 202 (2010) (emphasis added).

Because the rule of reason applies, plaintiffs were required to plead facts that, if proved, would establish (i) that the challenged agreement unreasonably restrains competition *and* (ii) a properly defined relevant market in which competition was so restrained. *Tanaka*, 252 F.3d at 1063. The complaint does not satisfy either of these basic pleading requirements.

B. Plaintiffs' Allegations Fail to Overcome the Presumption that the Exclusive License to DIRECTV is Legal.

Plaintiffs first allege that the vertical agreement between the NFL and DIRECTV restrains competition among multichannel video programming distributors (MVPDs) for the distribution of out-of-market NFL game broadcasts. R83-84 (¶¶ 105-06). Absent exclusivity, plaintiffs allege, prices for NFL Sunday Ticket would be lower because of "price competition between DIRECTV and one or more [other] MVPDs." R84 (¶ 106). But a producer of a product or service is generally free to determine how best to distribute that product or service, including through an exclusive distribution arrangement. This Court has so confirmed, rejecting such unadorned "exclusive distributorship" theories of competitive harm in *Rutman*, 829 F.2d at 735. Plaintiffs here plead no additional facts suggesting that the agreement between the NFL and DIRECTV harms competition. Accordingly, the District Court correctly dismissed this claim. R190-96.

1. Exclusive distribution agreements are generally procompetitive and presumptively legal.

Because they generally enhance competition, "exclusive distributorship arrangements are presumptively legal." *E & L*

Consulting, 472 F.3d at 30; *accord, e.g.*, *Spinelli*, 96 F. Supp. 3d at 118 (citing, among others, *United States v. Westinghouse Elec. Corp.*, 648 F.2d 642, 647 (9th Cir. 1981)). Thus, "[a]n exclusive license, which merely confers upon the licensee the right to exploit the licensor's exclusive intellectual property rights, does not violate the antitrust laws." *Spinelli*, 96 F. Supp. 3d at 118; *see also Rutman*, 829 F.2d at 735 ("an agreement between a manufacturer and a distributor to establish an exclusive distributorship is not, standing alone, a violation of antitrust laws"); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 153 (3d Cir. 1981) ("[A]s a licensor, the MLBPA is free to grant licenses to any competitor, or none at all.").

The presumption of legality reflects extensive judicial and administrative experience with exclusive licenses, including in the context of content licensing. Courts and administrative agencies have recognized that such exclusivity often enhances competition, including by permitting and incentivizing MVPDs like DIRECTV to differentiate their content offerings. *See, e.g.*, *In the Matter of Revision of the Commission's Program Access Rules*, 27 F.C.C. Rcd. 12605, 12631 (2012) ("the Commission has recognized that exclusive contracts may

result in the procompetitive benefit of allowing MVPDs to differentiate their service offerings"); *see also Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 721 (D.C. Cir. 2011) (similar); *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1325-26 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (noting procompetitive effects of exclusively licensed content; citing the NFL Sunday Ticket agreement as an example).

An enhanced incentive to invest in product development, promotion, and distribution is a frequently recognized procompetitive justification for exclusive distribution agreements. *See, e.g.*, *E & L Consulting*, 472 F.3d at 30 ("product promotion" and improved distribution are legitimate benefits of an exclusive distributorship); *Ralph C. Wilson Indus., Inc. v. Am. Broad. Cos., Inc.*, 598 F. Supp. 694, 700-01 (N.D. Cal. 1984) (exclusive content licenses "may further competition by providing an incentive to the [television] station to invest in promotion and development of the program product"), *aff'd*, 794 F.2d 1359 (9th Cir. 1986). As the District Court recognized, the NFL's exclusive agreement with DIRECTV provides such procompetitive, pro-consumer incentives: "By granting DirecTV the exclusive right to out-of-market broadcasts, DirecTV can create,

package, and promote these various products that result in greater fan access and NFL game exposure." R195; *see also* R52 (¶ 8), R81 (¶ 97).

By contrast, exclusive licenses rarely pose anticompetitive concerns. That is because licensors cannot increase their market power by licensing their intellectual property to only one distributor. *See, e.g.*, *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 124 (2d Cir. 2007) ("[A] monopolist can only extract one monopoly profit on a product; once it enjoys a monopoly at one level of the product's market, there is no further monopoly profit to be had from its expansion vertically."); *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762, 767 (2d Cir. 1995) ("If a monopolist at the distribution level were to restrict output to maximize profit, the restriction would deprive the monopolist at the bottling level of its maximizing output and price.").

Given that economic reality, the decision of an intellectual property holder like the NFL to license its intellectual property exclusively cannot reduce competition. To the contrary, such arrangements are ordinarily made because of their procompetitive effects; as the Second Circuit has explained, a licensor "would prefer multiple competing buyers unless an exclusive distributorship

arrangement provides other benefits in the way of, for example, product promotion or distribution." *E & L Consulting*, 472 F.3d at 30.

2. The District Court correctly followed applicable precedent in dismissing plaintiffs' vertical claim.

The precedents discussed above require dismissal of plaintiffs' vertical claim. That claim relies on plaintiffs' premise that exclusivity—on its own—is inherently anticompetitive: Plaintiffs assert that prices for NFL Sunday Ticket would have been driven down by "price competition between DirecTV and one or more MVPDs." R84 (¶ 106).[5] But that assertion cannot be reconciled with this Court's holding that an "agreement between a manufacturer and a distributor to establish an exclusive distributorship is not, standing alone, a violation of antitrust laws." *Rutman*, 829 F.2d at 735. Indeed, the District Court's decision below is the third case rejecting—at the motion to dismiss stage—antitrust challenges to exclusive distribution agreements for intellectual property related to professional sports.

[5] Plaintiffs' assertion that NFL Sunday Ticket prices are inflated through joint licensing by the NFL and its member clubs is addressed in section I.C, below.

In *Kingray*, the Southern District of California rejected a challenge to NBA licensing practices nearly identical to those challenged in the vertical claim asserted here. 188 F. Supp. 2d 1177. In that case, the plaintiffs alleged that "the NBA Defendants and DIRECTV ha[d] established an exclusive distributorship" for "NBA League Pass"—the NBA's analogue to NFL Sunday Ticket—and asserted that the challenged exclusivity harmed competition. *Id.* at 1196. Applying this Court's holding in *Rutman*, the District Court dismissed the claim. *Id.* *Kingray* also rejected the plaintiffs' assertion that the general "exclusive distributorship" rule articulated by this Court in *Rutman* did not apply because "the NBA as a whole, rather than the 29 individual teams, selected DIRECTV as the satellite distributor of NBA League Pass." *See id.* at 1197. Because the plaintiffs had not pled facts that, if proved, would establish that the exclusive agreement was intended to cause or actually did cause harm to competition, the court held that the *Rutman* rule compelled dismissal. *Id.* at 1196-97.

In *Spinelli*, the Southern District of New York dismissed an exclusive distributorship claim in the context of NFL game

photographs. *See* 96 F. Supp. 3d at 119. The *Spinelli* plaintiffs challenged an NFL licensing agreement that gave the Associated Press "the exclusive right to commercially license NFL and NFL Club photographs." *Id.* at 118. The court granted the NFL's motion to dismiss plaintiffs' Section 1 claim, holding that "the fact that NFLP gave an exclusive license to AP" could not support any allegation of anticompetitive injury because any NFL market power preexisted, and could not be enhanced by, the challenged vertical agreement. *Id.* at 119-20. The court concluded, in language equally applicable here, that the plaintiffs had "not alleged facts plausibly suggesting that they suffered anticompetitive injury from the existence or performance of the exclusive license agreements." *Id.* at 119.

In the decision below, the District Court correctly applied these precedents in dismissing plaintiffs' vertical claims. *See* R190-96; *Rutman*, 829 F.2d at 735; *Spinelli*, 96 F. Supp. 3d at 119; *Kingray*, 188 F. Supp. 2d at 1196-97.

3. Plaintiffs cannot distinguish the precedent that requires dismissal of their vertical claim.

Plaintiffs fail to articulate any credible basis on which to distinguish the consistent line of precedents confirming that allegations

of an exclusive distributorship, without more, do not state a claim. In an attempt to avoid those holdings, plaintiffs offer three principal arguments: (i) that the NFL-DIRECTV license relates only to intellectual property, not physical goods; (ii) that consumers do not have the option to subscribe to NFL Sunday Ticket through MVPDs other than DIRECTV; and (iii) that the vertical license had "horizontal aspects." None of these assertions supports the conclusion that the NFL-DIRECTV license had anticompetitive effects.

First, plaintiffs argue that the precedents and principles involving exclusive distributorships should be limited to cases involving physical goods like lumber, and should not apply to licenses of intellectual property. *See* Pls.' Br. 28-30. Plaintiffs' argument is flatly inconsistent with closely analogous precedent—including *Spinelli* and *Kingray*—that involved the licensing of intellectual property. In any event, as a matter of both law and economics, the "distinction" that plaintiffs assert is illusory. *See Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1170 (9th Cir. 2013) (copyright owner, like a real property owner, may "grant[] an exclusive license of particular rights").

As in *Spinelli*, *Kingray*, *Port Dock*, *G.K.A. Beverage*, and *E & L Consulting*, any market power associated with the NFL Sunday Ticket product is held by the product's "manufacturer" (the NFL), not by its distributor (DIRECTV). *See, e.g.*, *E & L Consulting*, 472 F.3d at 29 (an exclusive distributorship "provides no monopolistic benefit to [a manufacturer] that it does not already enjoy and would not continue to enjoy if the exclusive distributorship were enjoined"). Thus, in the intellectual property context—just as in the physical goods context—an exclusive agreement "cannot harm competition" because it reflects no greater benefit than the manufacturer or licensor "can legally achieve without" the exclusive agreement. *Spinelli*, 96 F. Supp. 3d at 116.[6]

Second, plaintiffs assert that the exclusive license is anticompetitive because individuals and businesses do not have the option to subscribe to NFL Sunday Ticket through other MVPDs such

[6] Plaintiffs note that a motion to dismiss was denied in *Shaw v. Dallas Cowboys Football Club, Ltd.* (Pls.' Br. 7), but that case relied on pre-*Twombly* precedent for the proposition that an antitrust claim could be stated merely by alleging the conclusion that competition was restrained. *See* 1998 WL 419765, at *5 (E.D. Pa. 1998); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047, 1050 (9th Cir. 2008) (after *Twombly*, to survive a motion to dismiss, antitrust plaintiff must plead "evidentiary facts" and not mere "conclusory allegations" (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007))).

as Comcast. Pls.' Br. 36-39. But alleging "reduced choice" does not by itself allege "an injury to competition." *Brantley*, 675 F.3d at 1202. And the fact that a given product can be purchased only through specific distributors "does not mean that competition has been harmed." *See Floors-N-More, Inc. v. Freight Liquidators*, 142 F. Supp. 2d 496, 502 (S.D.N.Y. 2001); *accord, e.g.*, *Habitat, Ltd. v. Art of Muse, Inc.*, 2009 WL 803380, at *8 (E.D.N.Y. 2009) ("Simply put, the fact that consumers can no longer purchase [a particular product] from [the plaintiff, a retailer] or other hypothetical small retailers does not amount to an injury to competition as a whole."). *All* exclusive distributorship agreements limit the purchase of the relevant product to sales by only one distributor, but that limitation is not itself a reduction in competition. *See E & L Consulting*, 472 F.3d at 30 (claim that "end-users of [the exclusively distributed product] have fewer options to purchase their required supplies and are now required to pay artificially inflated prices" was "not a sufficient allegation of harm to competition caused by the exclusive distributorship").

Nor do plaintiffs allege harm to competition when they assert that DIRECTV promotes NFL Sunday Ticket as a way to attract customers

to its "*other* products—including its basic television service." Pls.' Br. 28. Far from reducing competition, MVPDs' use of exclusive content "to differentiate their service offerings" is a commonly recognized "procompetitive benefit" of exclusive licenses. *See In the Matter of Revision of the Commission's Program Access Rules*, 27 F.C.C. Rcd. at 12631; *see also supra* at 30-32. For this reason, in the context of the proposed merger between AT&T and DIRECTV, the FCC squarely rejected claims that "DIRECTV's exclusive contract for NFL Sunday Ticket has harmed competition in the video distribution market." *AT&T Inc. & DIRECTV*, 30 F.C.C. Rcd. at 9200.

Third, plaintiffs' remaining contentions regarding the vertical DIRECTV license agreement rely on an assertion that the District Court's assessment of that agreement "ignored each team's predicate agreement to centralize the sale of rights in the league." Pls.' Br. 19; *see also id.* at 23 & n.5 (asserting that "interbrand" competition between NFL clubs has been "prevent[ed]"). Plaintiffs' challenge to the underlying horizontal agreements by which the rights are pooled is addressed in the paragraphs immediately below. *See infra* § I.C. Nothing in that challenge, however, addresses the precedent confirming

that the grant of exclusive distribution rights to DIRECTV did not harm competition. And, as explained below, plaintiffs fail to allege anticompetitive harm even if the separate challenged horizontal and vertical agreements are assessed together. *See infra* § I.D.

C. Plaintiffs Fail to Allege that Any Horizontal Agreement Among the NFL and its Member Clubs Had an Anticompetitive Effect.

Plaintiffs fail to identify any anticompetitive effect arising from the alleged agreement among the NFL and its member clubs to jointly license the distribution rights for NFL Sunday Ticket. Plaintiffs premise their challenge on the assumption that each NFL team could individually license the broadcast rights to its NFL football games. But as demonstrated below, an individual NFL club can no more license the rights to an NFL game alone than it could play such a game alone. The District Court thus correctly recognized that "the broadcasts of the games here necessarily involve intellectual property rights owned by multiple entities, including the NFL and each of the teams participating in the game." R200. Because "multiple entities must act collectively to broadcast the games" included in NFL Sunday Ticket, the

District Court correctly held that plaintiffs had failed to plausibly allege that any horizontal agreement had an anticompetitive effect. *Id.*

1. The agreement among the NFL and its member clubs to jointly license broadcast rights to CBS and FOX is not subject to antitrust challenge.

Much of the complaint—as well as plaintiffs' brief—critiques the asserted "anticompetitive effects of broadcast centralization." *E.g.*, Pls. Br. 11. But because the NFL's agreements with CBS and FOX are "joint agreement[s] by or among [the NFL clubs] . . . by which [the NFL] . . . sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football," each is fully exempt from the Sherman Act based on a direct application of the Sports Broadcasting Act. 15 U.S.C. § 1291.[7]

[7] The Economists' *Amici Curiae* brief acknowledges the existence of the SBA but ignores the statute's effects on the *legal* issues presented by this appeal. *See Amici* Br. 10. Whether agreements exempt from the antitrust laws do or do not cause "economic harm" has no *legal* significance. For the same reason, there is no legal significance to an economic "analysis" premised on the unfounded assumption that NFL clubs would repudiate their SBA-protected contracts in favor of, for example, "the local-national contracting approach of other pro sports leagues." *Id.* at 14; *see also infra* at 47-48. As the complaint concedes, the NFL's broadcast arrangements have led to *higher* viewership of NFL game broadcasts compared to the broadcasts of any other professional sports league. R81-82 (¶ 100).

That conclusion is not altered by the fact that the NFL's agreements with CBS and FOX provide those networks with only limited rights to broadcast NFL games: The plain language of the SBA exempts from antitrust scrutiny agreements to transfer "all *or any part*" of the NFL clubs' rights. 15 U.S.C. § 1291. Circuit court precedent confirms that "[t]he statute allows the transfer of 'all or any part of' the rights in the games; 'part of' implies fewer than all." *Chi. Prof'l Sports*, 961 F.2d at 670 (Easterbrook, J.); *see also id.* ("We therefore disagree with the district court to the extent it thought that the Sports Broadcasting Act applies only when the league arranges for (or permits) telecasting of every contest.").

The District Court thus correctly concluded that, given the SBA, the *only* horizontal agreement potentially subject to challenge is the agreement among the NFL and its member clubs to jointly license the NFL Sunday Ticket broadcasting rights. *See* R198. As demonstrated below, plaintiffs had to plausibly allege that *this* horizontal agreement harmed competition. That this agreement may arguably be outside the scope of the SBA does not relieve plaintiffs of that pleading obligation, and plaintiffs' complaint fails to meet that burden.

2. The agreement among the NFL and its member clubs to jointly license the NFL Sunday Ticket broadcast rights does not restrain competition.

NFL Sunday Ticket is produced through a joint venture in which the members coordinate "to develop a product" that "none of its members could produce individually." *Nat'l Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592, 602 (11th Cir. 1986).

The complaint fails to offer a plausible allegation that competition was harmed by the agreement among the NFL and its member clubs to jointly license the NFL Sunday Ticket broadcast rights. The antitrust laws "do[] not proscribe all contracts that limit the freedom of the contracting parties," and "a statement that parties have entered into a contract that limits some freedom of action" is not alone "sufficient to allege an injury to competition." *Brantley*, 675 F.3d at 1201-02. Instead, a plaintiff must allege that a challenged agreement harms *competition* in comparison to a factually plausible "'but-for' world." *See In re Online DVD Rental Antitrust Litig.*, 2010 WL 5396064, at *7 (N.D. Cal. 2010). "In order to plead injury to competition" that is "sufficient[] to withstand a motion to dismiss," a plaintiff "must, at a minimum,

sketch the outline of [the injury to competition] with allegations of supporting factual detail." *Brantley*, 675 F.3d at 1198.

It may be straightforward to allege the contours of a plausible but-for world when the products at issue could be created without cooperative agreements. But the analysis is different where, as here, plaintiffs challenge a joint venture that is necessary to offer the product at all. In such circumstances, a complaint must plausibly allege facts indicating how the product could have been created without the challenged cooperation, and it must explain how requiring such an alternative means of cooperation would enhance competition. *See Brantley*, 675 F.3d at 1198, 1202.

Plaintiffs cannot meet that burden because their antitrust theory depends on the express, and incorrect, assertion that "individual professional sports teams own the broadcast rights to their home games." Pls.' Br. 46. That assertion ignores the fact that the production of each NFL game requires the participation of, and features intellectual property owned by, at least two NFL clubs, the broadcast

network, and the NFL itself. *See Washington*, 880 F. Supp. 2d at 1007.[8] In particular, each copyrighted NFL broadcast derives value not only from the active participation of two NFL clubs, but also from the fact that each such game is an official *NFL* game, with the resulting impact on, for example, NFL win-loss records, NFL conference standings, and qualification for the NFL playoffs. *See id.*[9]

Thus, to create even a single NFL game broadcast, at a minimum two clubs and the NFL "must cooperate to produce and sell these images; no one entity can do it alone." *Washington*, 880 F. Supp. 2d

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[8] *See also supra note* 1 (identifying the NFL, both participating clubs, and the broadcast network as "authors" of the copyrighted work of an NFL game). The complaint recognizes that the broadcasts contained in the NFL Sunday Ticket product cannot be created without the participation and consent of the broadcast networks that film the game, provide commentators, and otherwise produce the game broadcasts. *See* R74 (¶ 77) ("[The NFL] could not create Sunday Ticket without the Networks' agreement to provide their feeds of games to DirecTV"); R75 (¶ 80) (similar).

[9] *See also Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 296 (2d Cir. 2008) ("[T]he organization of the Clubs into a nationwide league with geographic diversity and a common championship goal, pursued in a structured manner employing uniform rules of play, has created a vastly different and more marketable product than is created by scrimmages between squads of players from a single Club or even by *ad hoc* 'barnstorming' games between Clubs outside of a large league structure.").

at 1006; *accord Am. Needle,* 560 U.S. at 202 (NFL clubs "must cooperate in the *production* and scheduling of games" (emphasis added)); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978) ("The [NFL] clubs operate basically as a joint venture in producing an entertainment product—football games and telecasts. No NFL club can produce this product without agreements and joint action with every other team."); *Spinelli*, 96 F. Supp. 3d at 114 (game images "necessarily contain the intellectual property of more than one entity"); *see also Salvino*, 542 F.3d at 332 ("The production of [Major League Baseball Entertainment] requires the joint efforts of the 30 Clubs; it cannot be produced by any one Club individually or even by a few Clubs.").

Plaintiffs' assertions to the contrary rely on a 1938 district court opinion that considered whether radio play-by-play descriptions of baseball games could be broadcast without the consent of the competing teams. *See Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490 (W.D. Pa. 1938). By its plain terms, *Pittsburgh Athletic* did not assign sole radio broadcast rights to each home team; instead it held that the "right, title and interest in and to the baseball games played within the parks of members of the National League" is "vested exclusively in *such*

members." *Id.* at 493-94 (emphasis added). The district court accordingly granted an injunction that reflected its conclusion that each club had rights not only with respect to its home games, but also with respect to its "away" games played in other cities. *See id.* at 491 (granting injunction with respect to Pirates games played both at the team's "home baseball park in Pittsburgh" and "at baseball parks in other cities").[10] Moreover, *Pittsburgh Athletic* did not involve television broadcast rights or a transmission that would display the intellectual property of any participating club or of the league itself.

Individual clubs in some other professional sports leagues license certain game broadcast rights, but only after entering into agreements by which those leagues and their member clubs cede to the licensing club their intellectual property rights in the licensed games. Nothing in the antitrust laws could *compel* the NFL and its member clubs to enter into such agreements. *See Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7th Cir. 2006) ("Cooperation is a *problem* in antitrust, not one of its

[10] There is no support for the assertion that the relevant "rights belong to the owner of the home team" (Economists *Amici* Br. 10-11) or that the "NFL brand" can be used without the NFL's consent (*id.* at 12). *See, e.g.*, *Spinelli*, 96 F. Supp. 3d at 114-15.

obligations."); *see also Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 408 (2004) ("[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 *United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919))); *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1216 (9th Cir. 1997) ("We find no reported case in which a court has imposed antitrust liability for a unilateral refusal to sell or license a patent or copyright.").

Furthermore, plaintiffs admit that many NFL Sunday Ticket subscribers seek access not to individual games but rather to the *bundled* NFL Sunday Ticket package of multiple games. *E.g.*, R52 (¶ 8) ("[C]ommercial subscribers—primarily bars and restaurants—generate a substantial share of their overall revenue by having the capability to televise multiple professional football games simultaneously in order to attract a diverse range of fans"). Creation of this bundled product—a product that, as plaintiffs concede, consumers want—would be impossible without the participation and consent of all 32 clubs and the

NFL. *See Washington*, 880 F. Supp. 2d at 1006; *see also Broad. Music, Inc. v. CBS, Inc.* 441 U.S. 1, 22 (1979) ("*BMI*") ("[T]o the extent the blanket license is *a different product*, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material." (emphasis added)). Plaintiffs offer no basis for challenging the cooperation required to create, license, and distribute the NFL Sunday Ticket product that they demand.

The necessarily joint nature of the broadcast rights at issue here distinguishes this case from the Supreme Court's decision in *American Needle*. There, the NFL clubs agreed to jointly license *separately owned* intellectual property that each club was capable of licensing on its own. *See* 560 U.S. at 200 ("marketing of property owned by the separate teams"). By contrast, plaintiffs here offer no allegations regarding how the NFL Sunday Ticket product could be created without the cooperation that they challenge. *See Washington*, 880 F. Supp. 2d at 1006 ("The NFL and its teams can conspire to market each teams' individually owned property, but not property the teams and the NFL can only collectively own."); *Spinelli*, 96 F. Supp. 3d at 115 (same).

The District Court was thus correct in concluding that, "[a]s the *Washington* court explained, and the *Spinelli* court echoed, the multiple entities must act collectively to broadcast the games in order for the games to be broadcast at all." R200. Absent allegations of any plausible means by which the games constituting NFL Sunday Ticket could otherwise be created and licensed, defendants' licensing arrangements are "reasonable as a matter of law because collective licensing is essential if the product is to be available at all." *Spinelli*, 96 F. Supp. 3d at 114 n.14; *accord Washington*, 880 F. Supp. 2d at 1006-07.

This conclusion is confirmed by comparison to the broadcast arrangements that predated the creation of NFL Sunday Ticket. Before NFL Sunday Ticket, the NFL licensed the broadcasts of its Sunday afternoon games only to networks such as CBS and FOX. *See* R72-73 (¶¶ 69-72). The NFL was fully within its rights under the SBA to license the broadcast rights to those networks—and to no one else. 15 U.S.C. § 1291; *Chi. Prof'l Sports*, 961 F.2d at 670; *see also Nat'l Football League v. Play by Play S.B.*, 1995 WL 753840, at *2 (S.D. Tex. 1995) (collecting cases holding that game "broadcasts are the property of the NFL" and affirming the NFL's right to prohibit unauthorized

dissemination of those broadcasts (citing, *inter alia*, *Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726 (8th Cir. 1986))).

The advent of NFL Sunday Ticket added consumer options and viewers to these preexisting distribution arrangements. The complaint therefore admits that, against the backdrop of the NFL's SBA-protected agreements with CBS and FOX, "[t]he argument that NFL Sunday Ticket *increased output* is correct." R93 (¶ 128) (emphasis added); *see also Kingray*, 188 F. Supp. 2d at 1195 (distinguishing *NCAA*, 468 U.S. 85, because "output of out-of-market NBA games increased by virtue of the NBA League Pass"); R93 (¶ 128) (given the existence of the NFL's SBA-protected agreements, "it is obvious that NFL Sunday Ticket is a palliative," *i.e.*, that it increases competition compared to the status quo ante).

For all of these reasons, plaintiffs fail to satisfy their burden to identify any horizontal agreement that (i) is not protected by the SBA yet (ii) restrains competition when compared to a plausible but-for world. The complaint does not allege either that the NFL Sunday Ticket telecasts could be licensed without horizontal arrangements of the kind that plaintiffs challenge, or that any existing horizontal

agreements subject to antitrust scrutiny restrain—as opposed to enhance—competition. These failures required dismissal of the horizontal claims. *See Brantley*, 675 F.3d at 1202.[11]

D. Plaintiffs Fail to Plausibly Allege that the Vertical and Horizontal Agreements "Work Together" to Harm Competition.

Plaintiffs argue that the challenged vertical and horizontal agreements "work together" to harm competition by reducing choice, decreasing output, and increasing prices to view out-of-market games. Pls.' Br. 31-41. But again, "allegations that an agreement has the effect of reducing consumers' choices or increasing prices to consumers do[] not sufficiently allege an injury to competition." *Brantley*, 675 F.3d at 1202. Because "[b]oth effects are fully consistent with a free, competitive market," they do not support an inference that the challenged agreement is anticompetitive. *Id.*

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[11] Plaintiffs also suggest that anticompetitive harm might arise because NFL Sunday Ticket is sold as a package rather than as an offering of individual games a la carte. *E.g.*, R53 (¶ 9). This Court has rejected any claim that a "requirement that channels must be sold to consumers in packages" could harm competition. *Brantley*, 675 F.3d at 1201-04. In any event, there is no agreement with respect to this packaging; DIRECTV has the right to determine "the composition of the subscription packages it will sell" under the NFL Sunday Ticket agreement. R233 (¶ 2(c)).

Plaintiffs do not—and cannot—allege facts that support an inference that the NFL Sunday Ticket agreement reduces output. The District Court treated NFL game broadcasts as the relevant metric for purposes of assessing output, and plaintiffs do not disagree. *See* R191-93; Pls.' Br. 31-33. This is the product that the defendants collectively produce and that plaintiffs ultimately consume. The NFL Sunday Ticket agreement does not reduce the output of NFL game broadcasts regardless of whether output is assessed from the supply side or the demand side of the product market.

From the supply side, as plaintiffs concede, every regular-season NFL game is broadcast; in fact, every regular-season NFL game is broadcast for free. *Supra* at 5-6. Plaintiffs further admit that free broadcasts of NFL regular-season games are available in every Sunday afternoon time slot in every television broadcast market in the country. *Id.* Given that the entire potential supply of NFL game broadcasts is produced and distributed to viewers and that every available time slot contains such broadcasts for free, the District Court correctly concluded that the NFL Sunday Ticket agreement could not have reduced the output of such broadcasts. R192-93 (citing *NCAA*, 468 U.S. at 106-07);

see also Cinema Vill. Cinemart, Inc. v. Regal Entm't Grp., 2016 WL 5719790, at *5 (S.D.N.Y. 2016) (rejecting "bald[] assert[ion]" that an exclusive agreement "resulted in reduced . . . output"), *aff'd*, 708 F. App'x 29 (2d Cir. 2017).

Similarly, from the demand side, plaintiffs cannot plausibly allege that the NFL's broadcast arrangements decreased output. Plaintiffs concede that the number of games on television in any geographic area does not measure output; rather, they argue that "[v]iewership of NFL telecasts" is the correct measure. Pls.' Br. 34. But by that measure, as the complaint itself confirms, the NFL has more output than any of its competitors among the major sports leagues, the NCAA, and other producers in the broad entertainment market. *See* R90 (¶ 120) ("[F]or the past three years, an NFL game was the most-watched program on television for each week of the NFL season."). Moreover, as discussed *supra* at 51, the complaint admits that NFL Sunday Ticket increased output when compared to the output generated by the NFL's SBA-protected broadcast agreements. R93 (¶ 128); *see also Kingray*, 188 F. Supp. 2d at 1195. The District Court was thus correct to conclude that

"Sunday Ticket has also increased the availability—or viewership—of out-of-market games." R194.[12]

Plaintiffs respond that the NFL's broadcast arrangements do not provide viewers unfettered choice about *which* NFL games are broadcast for free in their area. *E.g.*, Pls.' Br. 31. But that is entirely consistent with a properly functioning market. *See Brantley*, 675 F.3d at 1202. Even leaving aside the SBA-protected nature of the NFL's contracts with CBS and FOX, plaintiffs fail to identify how the decisions regarding which games to broadcast reflect any breakdown in the competitive process; nor do they allege that such choices reflect anything more than the consequences of standard contractual limitations. *See id.* (allegations that a contractual arrangement "limits some freedom of action" is "not sufficient to allege an injury to competition.").

The NFL's broadcast arrangements seek to enhance competition and consumer welfare by maximizing fan interest, regional team loyalty, and viewership; that an individual fan may be disappointed by

[12] For this reason, it does not matter whether the Court accepts the invitation from *Amici Curiae* Economists to ignore "the definition of output followed in *NCAA*, [468 U.S. 85, 101-02 (1984)]." *Amici* Br. 4-5.

his or her available free choices does not present an antitrust issue. *See id.* The results of the NFL's broadcast arrangements—measured by plaintiffs' own metric—speak for themselves: During the 2014 season, "202.3 million unique viewers, representing 80 percent of all [U.S.] television homes," watched an NFL football game; "every one of the 20 most-watched programs in America was an NFL game"; and the "2015 Super Bowl was the most-watched program ever." R62 (¶ 37), R90 (¶ 120). In short, plaintiffs' own allegations demonstrate that the NFL has created tremendous consumer surplus; as they concede, "NFL football has the highest ratings of all sports programming." R82 (¶ 100).

Plaintiffs accordingly have failed to plausibly allege that either the vertical or the horizontal agreement restrains competition. The District Court's judgment can be affirmed on this basis alone. *See Tanaka*, 252 F.3d at 1063.

II. Plaintiffs Fail To Allege A Properly Defined Relevant Market In Which Defendants Have Market Power.

Plaintiffs' claims also fail for the independent reason that they have not alleged a properly defined "relevant market" in which defendants assertedly have market power. *See Newcal Indus., Inc. v.*

Ikon Office Sol., 513 F.3d 1038, 1044 (9th Cir. 2008) ("In order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a 'relevant market.'"). "A properly defined product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Colonial Med. Grp., Inc. v. Catholic Health Care W.*, 444 F. App'x 937, 938 (9th Cir. 2011). Failure to include all reasonably interchangeable goods within a purported relevant market renders that market legally deficient and requires dismissal. *Newcal*, 513 F.3d at 1045.

Plaintiffs allege two purported relevant product markets: (i) a market for "the live video presentations of regular season NFL games" and (ii) a "distinct submarket for 'out-of-market' games." R67 (¶ 53). As the District Court correctly held, plaintiffs cannot plausibly allege that either of these purported markets is a properly defined relevant market. R204-08.

A. Plaintiffs Fail to Plausibly Allege that Defendants Have Market Power in a Purported Market for All NFL Game Broadcasts.

Plaintiffs' allegations regarding a purported market for "live video presentations of regular season NFL games" fail because defendants

plainly do not—indeed, cannot—exercise market power in any such market. Putting aside the implausible assertion that NFL football broadcasts face no competition from other sports and entertainment products,[13] plaintiffs cannot plausibly allege a relevant market without alleging either that NFL games are, or are not, substitutes for one another. The District Court correctly held that neither of these alternatives could support the conclusion that defendants exercised market power in a properly defined market. R206-07.

The necessary premise of plaintiffs' alleged market for "live video presentations" of NFL games is that all NFL games are substitutes for one another. *See Colonial Med. Grp.*, 444 F. App'x at 938. But if NFL games *are* substitutes for one another, then the availability of free "in market" NFL broadcasts every Sunday afternoon would prevent anticompetitive pricing for substitutable out-of-market NFL broadcasts.

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[13] *See, e.g.*, *Right Field Rooftops, LLC v. Chi. Baseball Holdings, LLC*, 87 F. Supp. 3d 874, 886-87 (N.D. Ill. 2015) (rejecting alleged relevant market "restricted solely to live Cubs games" because those games "necessarily compete" with non-baseball-related live entertainment); *Glob. Disc. Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 705 (S.D.N.Y. 1997) ("A consumer might prefer . . . Pepsi because she prefers the taste, or NBC because she prefers 'Friends,' 'Seinfeld,' and 'E.R.' . . . but at base, Pepsi is one of many sodas, and NBC is just another television network.").

R77 (¶ 85). In other words, the ubiquitous availability of multiple free NFL games renders absurd any claim that the NFL could restrain a market for "live video presentations of regular season NFL games." The District Court thus correctly recognized that "[b]y offering free game broadcasts on CBS and Fox, the NFL Defendants lack the ability to artificially control out-of-market games pricing because consumers may choose to view these free games as alternatives to paid-for out-of-market games, thereby driving market prices down naturally." R206-07.

On the other hand, if live video presentations of NFL games are *not* substitutes for one another, then (i) by definition there is no market for "live video presentations of regular season NFL games," *see Newcal Indus.*, 513 F.3d at 1044 (scope of relevant market defined by substitutability), and (ii) it would be impossible for the sale of rights to broadcast some NFL games to "naturally force prices down" for rights to broadcast other NFL games, a critical element of plaintiffs' antitrust theory. *See* R82 (¶ 103). In other words, absent a relevant market that includes competition among all live video presentations of NFL games,

plaintiffs' but-for world of clubs competing to broadcast their games could not possibly yield procompetitive effects.

Accordingly, regardless of whether NFL games do or do not compete with one another in a purported market for NFL game broadcasts, the District Court correctly concluded that "Plaintiffs have not adequately alleged the existence of a market in which Defendants have the power to artificially control pricing." R207.

B. Plaintiffs Fail to Plausibly Allege that Defendants Have Market Power in a Purported Market for "Out-of-Market" Game Broadcasts.

In an attempt to identify a market in which defendants might plausibly exercise market power, plaintiffs plead that there is an alternative "submarket" limited to "out-of-market" NFL game broadcasts. R67 (¶ 53). The District Court correctly rejected this purported "submarket" as an improper "post-hoc narrowing of the relevant market to cover only those products over which Plaintiffs allege that Defendants have control." R208.

As an initial matter, plaintiffs' use of the term "submarket" has no effect on their pleading burden because "defining a 'submarket' is the equivalent of defining a relevant product market for antitrust

purposes." *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 995 (11th Cir. 1993). As the leading antitrust treatise explains, "[s]peaking of 'submarkets' is both superfluous and confusing in an antitrust case"; the "typical result" of efforts to define a submarket is "an overly narrow market designation that exaggerates the defendant's power." IIB Areeda & Hovenkamp, *Antitrust Law* ¶¶ 533, 533c (4th ed. 2014) ("Areeda").

Under the general standards for pleading a relevant market, plaintiffs' gerrymandered, made-for-litigation "market" for out-of-market NFL game broadcasts fails. Courts routinely reject such attempts to "define a market so as to cover only the practice complained of" because doing so amounts to inappropriate "circular or at least result-oriented reasoning.'" *Adidas Am., Inc. v. NCAA*, 64 F. Supp. 2d 1097, 1102 (D. Kan. 1999).[14] Here, plaintiffs' asserted submarket fails for multiple reasons.

[14] *See, e.g.*, *Hicks v. PGA Tour, Inc.*, 165 F. Supp. 3d 898, 910 (N.D. Cal. 2016) (rejecting plaintiffs' attempt to define an "artificial" market that was "contorted to meet their litigation needs"); *Spinelli*, 96 F. Supp. 3d at 111 (rejecting attempt "to define the market as that group of products over which a defendant exercises control"); *see also Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir. 1997) (rejecting assertion that "contractual restraints render otherwise

First, for there to be a market for out-of-market broadcasts, (i) all out-of-market game broadcasts *must be* substitutes for one another, but (ii) free in-market NFL games broadcast at the same time *cannot be* substitutes for those out-of-market games. *See Newcal*, 513 F.3d at 1045. There is no plausible explanation for why two out-of-market games could be substitutes for one another but an in-market game could not be a substitute for either. Indeed, far from supporting that assertion, the complaint admits that the free in-market "NFL regular season games broadcast by the Networks" are "competing products" with respect to the out-of-market games included in the NFL Sunday Ticket package. R54 (¶ 12).

Plaintiffs attempt to overcome this core contradiction in their allegations by relying on the concept of "differentiated products." Pls.' Br. 58-60. Antitrust law distinguishes between (i) "[h]omogeneous products" (*e.g.*, corn), which are "indistinguishable from each other"; and (ii) "differentiated products," like Coke and Pepsi, which are "similar enough to compete in a relevant market, but different enough

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identical products non-interchangeable for purposes of relevant market definition").

that some customers prefer one product over another." *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 569 (6th Cir. 2014). Plaintiffs assert that because "NFL telecasts are 'differentiated products,'" such telecasts simultaneously are both substitutes (so the competition among them lowers prices) and not substitutes (so that free, in-market broadcasts do not constrain the prices of out-of-market games). Pls.' Br. 58.

Plaintiffs cite only a single source—the Areeda antitrust treatise—in support of their "differentiated products" argument. *Id.* at 58-59. But that source directly refutes plaintiffs' assertion that "differentiated products" constitute separate relevant markets. As the treatise explains, antitrust practitioners "apply the differentiated label to products that are distinguishable in the minds of buyers *but not so different as to belong in separate markets*." VE Areeda ¶ 563a (emphasis added); *see also ProMedica Health*, 749 F.3d at 569 ("differentiated products are similar enough to compete in a relevant market"); *accord Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc.*, 895 F.2d 1417, 1990 WL 12148 (table) (9th Cir. 1990). The Areeda treatise further cautions that "[t]he legal rules limiting,

say, . . . exclusive dealing become excessively prohibitive when applied to every producer [in] a differentiated market." VE Areeda ¶ 563a.

Second, plaintiffs' claims cannot be supported by the preferences of "fans that are not located within the geographical confines of their favorite teams' home territories." R67 (¶ 53). If specific fans' preferences to watch "their favorite teams" constituted the governing standard, then the games of any specific team would have *no* substitutes. That would undermine plaintiffs' proposed market, not support it.

Under a fan-preferences theory, a Green Bay Packers fan would seek to watch *only* Packers games and would not view any non-Packers game as a substitute. Such a theory might support the assertion that a Packers fan living in San Diego would not regard a free, in-market Chargers-Raiders game as a substitute for a simultaneous, out-of-market Packers game. But that same logic would undermine any assertion that, from the perspective of that same Packers fan, an (out-of-market) Steelers-Browns game would be a substitute for that (out-of-market) Packers game. Fan preferences thus cannot support plaintiffs'

argument that multiple out-of-market games are in the same relevant market. *See Newcal*, 513 F.3d at 1045.

Third, plaintiffs cannot overcome these deficiencies by arguing that NFL Sunday Ticket is a distinct product that does not compete with individual in-market NFL game broadcasts. Even if true, that argument does not support a market for "'out-of-market games, such as those carried in the NFL Sunday Ticket package." R67 (¶ 53). Instead, such allegations would at most support a market that contains only the NFL Sunday Ticket *package* itself.

The complaint does assert in places that NFL Sunday Ticket constitutes a distinct product, and it emphasizes that bars and restaurants specifically seek the bundled NFL Sunday Ticket package.[15] But plaintiffs have no viable antitrust claim in a relevant market limited to only the NFL Sunday Ticket product. If the NFL Sunday

[15] *See, e.g.*, R49 (¶ 1 n.1) ("submarket of 'out-of-market' NFL games" refers to the "distinct product, called the 'NFL Sunday Ticket," which is a "separate product from NFL games broadcast on Fox, CBS, NBC, ESPN, and the NFL Network"); R52 (¶ 8) (bars and restaurants seek "the capability to televise multiple professional football games simultaneously"); R67 (¶ 53) ("NFL games broadcast locally on CBS and Fox on Sunday afternoons are distinct from the multi-game offering provided by Sunday Ticket").

Ticket bundle is the product sought by consumers, then the NFL has a natural monopoly on that product (*see supra* at 48-49), and plaintiffs cannot challenge the agreements necessary to create it. *See BMI*, 441 U.S. at 22-23 (rejecting antitrust challenge to horizontal agreement "necessary to market the product at all"). Moreover, plaintiffs conceded in the District Court that, in the context of such a monopoly, "exclusivity at the distribution level cannot further increase the profitability of the restraint." Pls.' Opp. at 15 (ECF No. 184). As a result, a market for the NFL Sunday Ticket package cannot sustain plaintiffs' antitrust claims. *See BMI*, 441 U.S. at 22-23; *Port Dock*, 507 F.3d at 124.

For all these reasons, the District Court correctly rejected plaintiffs' proffered relevant markets. Plaintiffs' failure to allege a properly defined relevant market is dispositive of all of their claims, and this Court can affirm on this basis alone. *Newcal*, 513 F.3d at 1044-45.

III. Plaintiffs Lack Antitrust Standing To Assert Damages Claims Based On A Horizontal Agreement Among The NFL Member Clubs.

Plaintiffs are indirect purchasers, not direct purchasers, as to any agreement among the NFL defendants. Their damages claims arising

from any agreement among the NFL defendants are thus subject to a third, independent bar: Plaintiffs lack standing under the indirect purchaser rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The District Court correctly dismissed these claims on this additional basis. R201-04.

"'[A] bright line rule emerged from *Illinois Brick*: Only direct purchasers have standing under § 4 of the Clayton Act to seek damages for antitrust violations." *In re ATM Fee*, 686 F.3d at 748 (quoting *Del. Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1120-21 (9th Cir. 2008)). Plaintiffs do not—and cannot—contend that they have ever been direct purchasers as to any agreement among the NFL and its member clubs. Rather, as the complaint admits, plaintiffs each "purchased the Sunday Ticket *from DirecTV*." *E.g.*, R58 (¶¶ 24-25) (emphasis added). Plaintiffs' horizontal damages claims thus fail under *Illinois Brick*'s "bright line" rule. *In re ATM Fee*, 686 F.3d at 748.

There are three "limited exceptions" to *Illinois Brick*'s indirect purchaser rule, and none applies here. *See id.* at 749. Plaintiffs have never asserted that two of the exceptions apply. *See id.* at 750, 756-58 (discussing the "preexisting cost-plus contract" and "ownership and

control" exceptions). And this Court's precedent squarely rejects the applicability of a third potential exception, the "co-conspirator exception," under these facts.

In *In re ATM Fee*, this Court held that, "for the indirect purchaser to merit standing under [the co-conspirator] exception, the conspiracy must fix *the price paid by the plaintiffs*." 686 F.3d at 749 (emphasis added); *accord id.* at 750 (exception applies only where the "direct purchaser conspires horizontally or vertically to fix the price paid by the plaintiffs"). Plaintiffs do not allege any agreement involving the NFL defendants to fix "the price paid by the plaintiffs"; the NFL-DIRECTV license agreement confirms that the discretion to set that price lies solely with DIRECTV. *See supra* at 9. Accordingly, the District Court was correct to conclude that the "co-conspirator exception" does not apply and that plaintiffs' horizontal claims "run squarely into the *Illinois Brick* wall." *Kendall*, 518 F.3d at 1049.

This conclusion is confirmed by *In re ATM Fee*'s reliance on the Fourth Circuit's decision in *Dickson v. Microsoft Corp.,* 309 F.3d 193 (4th Cir. 2002). *Dickson* involved allegedly anticompetitive conduct by Microsoft relating to its operating system and application software. *See*

id. at 198-200. In *Dickson*, as here, plaintiffs were not direct purchasers; instead, they purchased computers with pre-installed Microsoft software from original equipment manufacturers (OEMs). *See id.* There, as here, plaintiffs asserted that they had standing to challenge the defendant's (Microsoft's) conduct because the direct purchasers (the OEMs) were Microsoft's co-conspirators, including because Microsoft and the OEMs had entered into allegedly anticompetitive "exclusive dealing distribution arrangements." *Id.* at 199. The Fourth Circuit held that *Illinois Brick* nonetheless barred plaintiffs' claims against Microsoft because plaintiffs did "not allege any conspiracy between Microsoft and the OEM Defendants *to set the resale price of the software*." *Id.* at 200, 213-16 (emphasis added). This Court adopted this holding in *In re ATM Fee*: "[W]e agree with the Fourth Circuit and decline to extend the co-conspirator exception past the situation when alleged co-conspirators *set the price paid by the plaintiffs*." 686 F.3d at 752 (emphasis added). Thus, because plaintiffs here do not allege a conspiracy involving the NFL defendants to set any price paid by plaintiffs, they lack standing to assert damages claims under *Illinois Brick*.

Plaintiffs cannot escape these holdings by asserting that this case implicates the policy rationales of *Illinois Brick*. *See* Pls.' Br. 66-69. The Supreme Court's "firm rule does not provide [courts] the leeway to make a policy determination on a case-by-case basis as to whether standing should be recognized when there are special business arrangements." *Delaware Valley*, 523 F.3d at 1124. Thus, even though "rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases," the Supreme Court has explicitly rejected calls to "'carve out exceptions to the [indirect purchaser] rule for particular types of markets.'" *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216 (1990) (quoting *Illinois Brick,* 431 U.S. at 744).

Because plaintiffs are indirect purchasers from the NFL and its member clubs, and because they satisfy no exceptions to the indirect purchaser rule, plaintiffs lack standing to assert damages claims as to any alleged agreement among NFL and its member clubs.

IV. Plaintiffs Fail To Allege A Viable Monopolization Claim.

The District Court correctly dismissed plaintiffs' monopolization claim. Plaintiffs conceded below, and do not contest on appeal, that their Section 2 claim "rises and falls along with their [S]ection 1 claim."

R209. Because the Section 1 claim suffers from numerous incurable deficiencies—including failures to allege injury to competition or a properly defined relevant market—the Section 2 claim was appropriately dismissed.

The District Court was also correct in finding that plaintiffs had failed to allege that defendants had the specific intent to monopolize any relevant market. *See* R209-10 (citing, *inter alia*, *Great Escape Inc. v. Union City Body Co.*, 791 F.2d 532, 541 (7th Circ. 1986)). While plaintiffs point to cursory allegations in their complaint that defendants acted "with the purpose, intent, and effect of monopolizing the relevant market and submarket" (R103 (¶ 161)), such "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to avoid dismissal, *Iqbal*, 556 U.S. at 678. That is an independent basis for dismissal of plaintiffs' monopolization claim.

Finally, plaintiffs argue that the NFL has maintained "monopoly power by preventing the individual teams from freely competing" in the marketing of their broadcast rights. Pls.' Br. 62-63 (citing *Bd. of Regents of Univ. of Okla. v. NCAA*, 546 F. Supp. 1276 (W.D. Okla.

1982)). That assertion challenges conduct that is protected by the SBA and required to produce the Sunday Ticket product. *See supra* § I.C. An agreement incapable of supporting a Section 1 claim "cannot form the basis of a [S]ection 2 claim." *Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 448 (9th Cir. 1993).

CONCLUSION

The judgment of the District Court should be affirmed.

April 6, 2018

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, defendants-appellees state that they are not aware of any related cases in this Court.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-56119

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Signature of Attorney or Unrepresented Litigant [/s/ Gregg H. Levy] Date [Apr 6, 2018]

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 6, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Derek Ludwin*
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