No. 17-56119

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 the United States District Court for the Central District of California, Hon. Beverly Reid O'Connell, Case No. 2:15-ml-2668

OPENING BRIEF OF PLAINTIFFS–APPELLANTS

[redacted]

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellants Ninth Inning, Inc., d/b/a "The Mucky Duck," and 1465 Third Avenue Restaurant Corp., d/b/a "Gael Pub," state that they have no parent corporations and that no publicly held corporation owns 10% or more of their stock.

DATED: February 5, 2018

/s/ Marc M. Seltzer
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JURISDICTION

The district court had original subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. *See* II Excerpts of Record ("ER") 102-104.

On June 30, 2017, the district court dismissed Plaintiffs' claims. I-ER-4-41; III-ER-174-211. The court entered judgment on July 13, 2017, I-ER-1-3, and Plaintiffs filed a timely notice of appeal on July 28, 2017. II-ER-42-45. This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal of a final decision of the United States District Court for the Central District of California.

STATEMENT OF THE CASE

Plaintiffs' Consolidated Amended Complaint ("CAC") alleges that the National Football League ("NFL"), its member teams, and DirecTV, along with various television networks, have entered into a set of agreements that, working together, suppress competition for the sale of professional football game telecasts in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. II-ER-48-106.

Plaintiffs are residential and commercial consumers of "NFL Sunday Ticket," a package of NFL telecasts available only through DirecTV.

Without the challenged restraints, the telecasts carried on Sunday Ticket would be available through additional distributors. In addition, each NFL team would be free to contract with competing distribution channels, such as other cable, satellite or Internet carriers, and with competing networks. The resulting competition would increase the accessibility of NFL telecasts, enlarge viewership, and lower prices.

The law has been settled for decades that the challenged telecasting regime is anticompetitive. That is why Congress enacted the Sports Broadcasting Act of 1961 ("SBA"), 15 U.S.C. § 1291, a limited antitrust exemption that permits certain broadcast agreements that would otherwise be illegal. The exemption expressly excludes agreements involving telecasts distributed through subscription television services rather than over the air. Agreements giving a pay-television service, like DirecTV, sole distribution rights are precisely what the law does *not* permit.

On August 8, 2016, the NFL Defendants moved to dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(6). DirecTV moved to compel arbitration. On June 30, 2017, the district court dismissed Plaintiffs' CAC with prejudice and denied DirecTV's motion to compel arbitration as moot.

STATEMENT OF ISSUES

1. Whether the district court erred by holding, as a matter of law, that the challenged agreements could have no anticompetitive effects.

2. Whether the district court erred by holding, as a matter of law, that agreements centralizing the teams' telecasting rights in the league could not violate Sections 1 or 2 of the Sherman Act.

3. Whether the district court erred by holding, as a matter of law, that the defendants could not have restrained competition within the markets Plaintiffs pleaded.

4. Whether the district court erred by holding that Plaintiffs did not have standing to challenge certain aspects of the telecasting agreements.

An addendum of statutes is bound with this brief.

STATEMENT OF FACTS

I. Agreements Between the NFL, Television Networks, and DirecTV Artificially Limit the Availability of Professional Football Telecasts

The NFL is an association of its thirty-two teams. II-ER-59-61 (CAC ¶¶28-30). The teams are not one collective single entity. "Each of the teams is a substantial, independently owned, and independently managed business." *Am. Needle Inc. v. NFL*, 560 U.S. 183, 196 (2010). "'[T]heir general

corporate actions are guided or determined' by 'separate corporate consciousnesses,' and '[t]heir objectives are' not 'common.'" *Id.* (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984)). The teams compete "not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel," and "in the market for intellectual property." *Id*. at 196-97.

The teams have nonetheless expressly agreed not to compete in the telecasting of their games. Instead, they have each agreed to convey their telecasting rights to the league, which has entered into a set of agreements designed to sharply limit competition between NFL telecasts. II-ER-76-81(CAC ¶¶81-98).

Under these agreements, CBS and Fox combine to produce telecasts of all Sunday-afternoon games but have agreed with the NFL to distribute only one game at a time in any local market. II-ER-76-77 (CAC ¶84). They coordinate with each other and the NFL to ensure that only two or three Sunday-afternoon games are aired in each market, even though eleven to thirteen games are played every Sunday afternoon. II-ER-76-77 (CAC ¶¶84-85). Only two NFL telecasts—*at most*—are aired head-to-head at a given time in any local television market. *Id*.

To protect these local telecasts from the other NFL telecasts, the NFL and networks agreed that all other Sunday-afternoon games will be available nationally only through a limited, non-basic, subscription service. II-ER-74-75 (CAC ¶¶77-80).

That service is Sunday Ticket, which DirecTV has offered since 1994. It provides access to all "out-of-market" Sunday-afternoon games—*i.e.*, all games other than the two or three available on local, over-the-air networks. II-ER-78-79 (CAC ¶89). Sunday Ticket is available only from DirecTV.[1] In most cases, consumers must also subscribe to a basic television package from DirecTV to get Sunday Ticket. Because most households subscribe to different pay television services (often in conjunction with Internet service, which DirecTV does not offer), or to no television service at all, DirecTV's exclusivity significantly reduces the number of Sunday Ticket subscribers. II-ER-80 (CAC ¶93). This limitation of telecasts to a fraction of potential viewers is unique in major American sports. II-ER-54-55 (CAC ¶14). Other

[1] Of the roughly 100 million pay-television subscribers in the United States, only about 20 million are DirecTV subscribers.

leagues offer subscription services through most pay-television providers and offer Internet versions that do not require a television subscription. *Id*.

Because DirecTV is the exclusive provider of Sunday Ticket, it commands extraordinary prices. It is by far the most expensive of the major league packages, even though it offers the fewest telecasts. II-ER-55-56 (CAC ¶16). The consumer price per telecast for Sunday Ticket is roughly twenty times greater than for Major League Baseball's Extra Innings package, which is also offered through DirecTV, but without the exclusive telecasting rights it enjoys by agreement with the NFL. *Id*. Commercial entities—such as bars or hotels—can pay as much as 200 times more per NFL telecast than per MLB telecast. *Id*.

The agreements are designed to work together to benefit DirecTV, the networks, and the NFL—at consumers' expense. They benefit the NFL and its teams because distributors will pay more for exclusive rights. They benefit the two networks because DirecTV's exclusivity and high pricing limit the universe of potential subscribers to Sunday Ticket. The networks (and their local affiliates) are thus protected from competition from other potential providers of Sunday telecasts, enabling them to raise the prices they charge advertisers and distributors. II-ER-53-54 (CAC ¶¶11, 12). And

just as DirecTV's suppression of output protects the networks, the limitation on over-the-air telecasts to just two or three games protects DirecTV, allowing it to charge supracompetitive prices for both Sunday Ticket and its standard programming. II-ER-74-75, 79-80 (CAC ¶¶77, 91, 94).

This is not the first antitrust challenge to Sunday Ticket. In *Shaw v. Dallas Cowboys Football Club, Ltd.*, the Eastern District of Pennsylvania denied the NFL's motion to dismiss, holding:

> The plaintiffs here have specifically pled the participants (the NFL and its member clubs), the purpose (to restrict output and so raise prices), and the motive (monetary gain to the defendants). Plaintiffs allege an agreement among the clubs and the NFL; they allege that the agreement unreasonably restricts output of non-network broadcasts of professional football, thus raising the market price to tune into those games. That is enough to state a claim that the agreement is illegal.

No. 97-5184, 1998 WL 419765, at *5 (E.D. Pa. June 23, 1998). The Third Circuit affirmed the district court's denial, 172 F.3d 299 (3d Cir. 1999), and the case was settled shortly thereafter.

II. The Legal History of Football Broadcasting

This case is the latest in a string of antitrust actions, dating back to the dawn of television, arising from anticompetitive football telecasting arrangements.

In 1951, the Department of Justice sued the NFL after the teams agreed not to telecast their games in a team's local market whenever that team was playing at home or broadcasting their games locally. II-ER-70 (CAC ¶62); *United States v. NFL*, 116 F. Supp. 319, 321 (E.D. Pa. 1953)("*NFL I*"). Because most games were played on Sunday and because individual teams independently arranged for television broadcasts in their home markets of their away games, the teams' agreement prevented games not involving a local team from being telecast in the local team's market. *NFL I*, 116 F. Supp. at 321.

After trial, the court held that the restraint against broadcasts into another market where the team was not playing a home game, but was simply broadcasting its game on local television, was an unreasonable restraint of trade. It found that the purpose of this restraint was "to enable the clubs in the home territories to sell monopoly rights to purchasers of

television rights," and was consequently prohibited by the Sherman Act. *Id.* at 326.

Following this ruling, from 1953 to 1961, NFL teams entered into agreements with television networks individually, just as Plaintiffs allege they could and would do now in the absence of the contractual restraints at issue. II-ER-71 (CAC ¶65). The individual teams had agreements not only with local stations, but also national networks. By 1960, professional football was available on all major national networks pursuant to those independently negotiated arrangements. *Id*.

In 1961, the NFL sought to centralize control over the teams' broadcast rights. II-ER-71-72 (CAC ¶¶66-67). The league and the teams agreed to enter broadcast agreements through one collective joint-marketing arrangement, thereby preventing individual teams from competing against each other. *Id*. The DOJ moved to enjoin the proposed pooling of rights as anticompetitive and a violation of *NFL I*. The court agreed, concluding that, "by agreement, the member clubs of the League have eliminated competition among themselves in the sale of television rights to their games." *United States v. NFL*, 196 F. Supp. 445, 447 (E.D. Pa. 1961)("*NFL II*").

In response to *NFL II*, the NFL lobbied for an exemption from the antitrust laws. II-ER-72 (CAC ¶68). Congress responded with the SBA, a limited antitrust exemption for a "joint agreement … 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 … engaged in or conducted by such clubs." 15 U.S.C. § 1291. By its terms, it applies only to "sponsored telecasting," meaning over-the-air television and excluding paid cable or satellite telecasts (such as those offered by DirecTV). *See Telecasting of Prof. Sports Contests,* H. Rep. No. 87-1178, at 5 (1961)("The bill does not apply to closed circuit or subscription television."); *Shaw*, 172 F.3d at 303.

The SBA does not protect agreements that prohibit televising games in "any area, except within the home territory of a member club of the league on a day when such club is playing a game at home." 15 U.S.C. § 1292. Congress thus expressly preserved the framework of *NFL I*, which only allowed geographical blackouts to protect in-person attendance, and purposely retained the holding of *NFL II* as it is applied to telecasts carried on subscription television.

The compromise Congress struck was simple: teams could consolidate their telecasting rights in the league, but only if they did not impose geographical restraints on distribution (other than to protect attendance) and kept the games on free, over-the-air television. In all other respects, it retained the holdings of *NFL I* and *II*: that the suppression of inter-team competition for the sale of telecasts of live games violates the antitrust laws.

Despite the exemption's narrowness, the NFL's centralized control over over-the-air broadcast rights dramatically increased its telecasting revenues while decreasing the telecasts a given consumer could watch by approximately one-third. Ira Horowitz, *Sports Broadcasting*, in *Government and the Sports Business* 275, 306-07 (Roger G. Noll ed., 1974).

The league argued below that its centralized licensing system is procompetitive, but history shows otherwise, and economists agree that centralization of sports television rights decreases output and increases prices. II-ER-93 (CAC ¶128); *see also* Roger G. Noll, *Broadcasting and Team Sports*, 54 Scot. J. Pol. Econ. 400, 419 (July 2007).

The anticompetitive effects of broadcast centralization were confirmed by *NCAA v. Board of Regents of the University of Oklahoma*, 468

U.S. 85 (1984). Like the NFL now, the NCAA strictly controlled its members' telecasts, limiting them to two television networks. The NCAA defended its restraints on the same grounds asserted by the NFL below. *See* Br. for Pet'r at 20, 35-46, *NCAA*, 1983 WL 919058, at 20, 35-46 (Dec. 1, 1983). The Supreme Court rejected them all, concluding that the NCAA's rules constituted a "naked restraint" on competition. 468 U.S. at 110. [2]

The season following *NCAA*, the number of college football games broadcast rapidly multiplied, and advertising rates plummeted. *See* Brian L. Porto, *The Supreme Court and the NCAA* 74 (2012); II-ER-94-96 (CAC ¶¶132-34); *see also ABC*, 747 F.2d at 512 ("Immediately [after *NCAA*], most universities with football programs began to renegotiate television

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[2] Shortly after the Supreme Court's *NCAA* decision, this Court found a likelihood of success on the merits to a lawsuit challenging a broadcasting arrangement resembling the one here. S*ee Regents of the Univ. of Cal. v. AB*C, 747 F.2d 511 (9th Cir. 1984). In *ABC*, several colleges contested an agreement between ABC and certain college football teams (organized as the "College Football Association" or CFA). *Id.* at 512-13. The agreement required CFA teams not to broadcast games in competition with any CFA game carried on ABC. This Court held that the arrangement, "just as the NCAA television plan that fell before it, shares the dual infirmities of an intentional reduction in output along with the imposition of sharp restraints on individual school competition." *Id.* at 518. Likewise, here, each team agrees not to telecast their games in competition with the games carried over-the-air or via Sunday Ticket.

contracts. Similarly, the television networks … eagerly sought to acquire the broadcasting rights previously disbursed by the NCAA.”).

Together with technological advances that have dramatically increased the number of channels available to consumers, *NCAA* has resulted in an enormous increase in college football programming. On a typical Saturday, over forty college football games are telecast on over-the-air and national cable networks. Dozens of different networks and Internet outlets, including all four of the major over-the-air networks, vie for viewers by carrying college football games at the same time. II-ER-81-82, 95 (CAC ¶¶100, 133).

When *NCAA* was decided, it did not affect the NFL because, at that time, all NFL games were broadcast over the air, consistent with the SBA. The Court did, however, recognize that the SBA reflected an assumption that NFL-controlled broadcasting practices, like those challenged here, would be anticompetitive:

> [I]t is not without significance that Congress felt the need to grant professional sports an exemption from the antitrust laws for joint marketing of television rights. … The legislative history of this exemption demonstrates Congress’ recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act,

> and in particular reflects its awareness of the decision in [*NFL I*]….

468 U.S. at 104 n.28.

Sunday Ticket is an example of precisely what Congress, the courts, and economists have long understood to be an antitrust violation: an agreement protecting telecasts from competition by making competing telecasts available only through an exclusive, high-priced, subscription-television service. The arrangement is a classic restraint of trade, with predictable results: less consumer choice, less telecast availability, lower viewership, higher prices, and monopoly profits for the participants.

III. The District Court's Decision

The district court held that the horizontal agreement between the teams to pool their broadcasting rights and the vertical agreement between the NFL and DirecTV to sell those rights exclusively to DirecTV were independent agreements whose legality must be analyzed separately. The court refused to view these interdependent agreements (and the related agreements with the networks) as part of one overall anti-competitive arrangement because the teams did not directly contract with DirecTV, but rather did so through the league. I-ER-16.

The district court then held that Plaintiffs have "antitrust standing to challenge the vertical agreement," but did not plausibly allege that the vertical agreement was anticompetitive. I-ER-20-26. While the court recognized that the exclusive agreement would be anticompetitive if it "reduces output," it held that output was not reduced as a matter of law because a telecast is produced of every game. The court did not believe it was a reduction of output even if the vast majority of those productions are only available through a high-priced package offered exclusively through a single distributor. I-ER-21-23. The court also held that even if the exclusive arrangement with DirecTV inflates prices, as Plaintiffs alleged, this does not harm competition. I-ER-26.

The court held that the SBA does not immunize the teams' agreement to consolidate their rights in the league. I-ER-27-28. The court nonetheless held the arrangement lawful because, "as Defendants explained at oral argument," the broadcasts "are owned by the NFL, rather than by the NFL teams." I-ER-29. This finding assumed as legal the very arrangement Plaintiffs challenge. It was also contrary both to Plaintiffs' allegation that the teams, not the league, originally own the rights and to decisional law. *See, e.g., Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490, 493-94

(W.D. Pa. 1938). It also ignored the animating purpose of the SBA and the Supreme Court's holding that teams "cannot simply get around antitrust liability by acting through a third-party intermediary or 'joint venture'." *Am. Needle*, 560 U.S. at 202 (quotation omitted).

Notwithstanding the Supreme Court's holding in *NCAA* that the NCAA was not necessary in order for college football games to be telecast, 468 U.S. at 117, the district court held that the pro-competitive benefits of the pooling arrangement outweighed any alleged harm because "there would be no way to broadcast the game footage" absent a collective agreement among the teams and the league. I-ER-30.

The court held that Plaintiffs have antitrust standing to challenge the NFL's agreement with DirecTV but do not have standing to challenge the predicate agreement among the teams to consolidate their rights because Plaintiffs did not purchase any product directly from the NFL. I-ER-33-34.

The court then held that while Plaintiffs had "sufficiently established the relevant market," they had failed "to show" that "Defendants have restrained trade within that market" or that Defendants had sufficient "power as to artificially drive prices up" in that market. I-ER-36. The court

also held that Plaintiffs failed to plead a viable submarket for out-of-market telecasts. I-ER-38.

Finally, the court denied Plaintiffs' Section 2 Monopolization claim because Plaintiffs "failed to adequately plead antitrust injury" and "failed to establish facts" indicating that "Defendants had the specific intent to monopolize." I-ER-39.

STANDARD OF REVIEW

In reviewing a decision dismissing claims as a matter of law, this Court reviews each conclusion *de novo*. *See, e.g., Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029 (9th Cir. 2009). The Court must accept Plaintiffs' allegations as true and must draw all reasonable inferences in Plaintiffs' favor. *Id*. at 1029-30.

Plaintiffs "need only allege 'enough facts to state a claim to relief that is plausible on its face.'" *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 45 n.12 (2011)(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is sufficient when the facts alleged allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of

those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (citations omitted).

SUMMARY OF ARGUMENT

This case should not have been resolved on the pleadings. The district court made extensive factual findings—without the benefit of an evidentiary record—that are inconsistent with prior cases decided on full records, as well as decades of economic scholarship.

By accepting Defendants' fact-based arguments about the nature of the markets at issue and the economic impact of their restraints, the court was led to the remarkable conclusion that Defendants are immune from antitrust scrutiny even if their agreements—which expressly limit competition—substantially *increase* prices and *decrease* access to professional football telecasts. That is the very definition of anticompetitive conduct, yet the court endorsed it. The court did so not based on any antitrust exemption—it correctly held that the SBA does not apply—but because it concluded that the restraints were procompetitive as a matter of law.

The court believed that it was required to compartmentalize and analyze separately the agreement between the league and DirecTV and the

agreements between the teams and the NFL centralizing each team's television rights in the league. As a result, it assessed the "vertical" DirecTV agreement as though it were made in the context of a competitive market, rather than as part of a web of contracts that operate together to restrain competition. This approach conflicts with the Supreme Court's admonition that the "character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Cont'l Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 699 (1962).

The court's formalistic isolation of the agreements also led it to conclude that Plaintiffs had antitrust standing to challenge only the DirecTV "vertical" agreement, and not the teams' "horizontal" agreement. The court misunderstood how these interconnected agreements operate and misapplied the "direct purchaser" rule articulated in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *Illinois Brick* has no bearing on Plaintiffs' injunctive claims. *See, e.g., Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1235 (9th Cir. 1998). Nor does it bar Plaintiffs' damages claims because the purpose of the teams' agreements is to grant DirecTV a monopoly whereby *DirecTV* can set price and output levels free from

nearly all competition. DirecTV is the direct beneficiary from this arrangement. It is not a middle-man victim, as was the case in *Illinois Brick*, that passes overcharges imposed upon it on to consumers.

Accepting the district court's analysis would lead to absurd results. If all U.S. automobile manufacturers agreed with a single sales agent to sell their cars solely through that agent, the arrangement would violate the antitrust laws. *See NCAA,* 468 U.S. at 109 n.39. It would be no less objectionable for the manufacturers to jointly incorporate a separate entity called the "National Car League" to whom they sold their cars, which in turn agreed to distribute "NCL automobiles" only through "DirectCar." Yet under the district court's analysis, these machinations would inoculate the manufacturers, the NCL, and DirectCar from an antitrust suit filed by injured consumers.

Affirming the decision below would provide a roadmap for firms in every industry to evade antitrust liability, even though the Supreme Court has consistently rejected the elevation of form over substance. The district court's opinion upends settled antitrust jurisprudence and conflicts with longstanding economic theory and multiple holdings of the Supreme

Court. The Court should reverse and remand to allow the record to be developed through discovery and expert evidence.

ARGUMENT

I. By Analyzing the Telecast Arrangements in Isolation, the District Court Failed to Appreciate How They Work Together to Achieve Anticompetitive Ends

The district court concluded that a cartel (the combination of teams) that uses a jointly-controlled entity (the NFL) to market and sell their pooled property through an exclusive sales agent (DirecTV) engages in no anticompetitive conduct that is actionable by the sales agent's customers. The court artificially separated the teams' horizontal agreements to sell their individually-owned telecast rights through the NFL from the exclusive distribution agreement between the NFL and DirecTV, assessing their effects independently, as if one-half of these agreements could exist in a world where the other half did not. I-ER-16 n.7.

This artificial compartmentalization of Plaintiffs' case was wrong because the agreements are designed to work together to minimize competition. II-ER-76-81 (CAC ¶¶81-98). The district court's siloed approach has been rejected repeatedly, most notably in *American Needle*, where the Supreme Court held, "[W]e have eschewed such formalistic

distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." 560 U.S. at 191.[3] The Court expressly held that teams "cannot simply get around antitrust liability by acting through a third-party intermediary or 'joint venture'." *Id.* at 202 (quotation omitted).

The district court's analysis of the "vertical" agreement between the league and DirecTV highlights the error of viewing the agreements in isolation.[4] The court relied on cases observing that exclusive vertical arrangements are often permissible or even "presumptively legal." I-ER-20-21. In doing so, the court ignored each team's predicate agreement to centralize the sale of rights in the league, and consequently did not consider whether the combination of the teams' agreements and the

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[3] *See also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67 (1992)("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.").

[4] It is incorrect to characterize DirecTV's participation as merely "vertical." The horizontal arrangement among the teams *includes* DirecTV because DirecTV has agreed to be the conduit through which the clubs have combined their broadcast rights to harm consumers. As the NFL itself recognized below, this is a "*horizontal* theory of harm." II-ER-47 (NFL Reply, at 3:20)(emphasis in original).

DirecTV agreement, which work together to make DirecTV the sole source of the telecasts, has anticompetitive effects.

Courts view exclusive distributorship arrangements as procompetitive when they promote *interbrand* competition. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 (1977). General Motors and Ford, for example, might each employ exclusive distributors of their own cars to facilitate competition between their respective brands. But, as the Supreme Court observed in *NCAA*, "a court would not hesitate in enjoining a domestic selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent." 468 U.S. at 109 n.39.

Here, DirecTV is not distributing one team's telecasts in competition with distributors of other teams' games. Rather, the exclusive arrangement *prevents* interbrand competition because it consolidates each team's otherwise-competing telecasts within Sunday Ticket.[5]

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[5] The prevention of interbrand competition distinguishes this case from *Rutman Wine Co. v. E.& J. Gallo Winery*, 829 F.2d 729 (9th Cir. 1987). The Court there held that an exclusive distributorship does not harm competition simply by harming a competing distributor. *Id*. at 735. To

The importance of viewing "vertical" agreements in context is illustrated in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). Addressing a vertical minimum-pricing agreement, the Court observed that "[t]o the extent a vertical agreement … is entered upon to facilitate" a horizontal cartel (at either the manufacturing or retail level), it would be unlawful. 551 U.S. at 893. That analysis would be impossible under the district court's approach.

The court adopted its formalistic methodology because it believed *In re Musical Instruments & Equipment Antitrust Litigation* required it to separate the vertical and horizontal components of a scheme and consider their effects independently. 798 F.3d 1186 (9th Cir. 2015); *see* I-ER-16 n.7 ("[E]ven if the agreements are symbiotic and, when taken together, form one overarching intent to control the broadcasts of NFL games, this does not change the Court's conclusion that, for antitrust purposes, the Court should examine each portion of the overall agreement separately.").

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sustain a Section 1 claim, the exclusive deal must – as it does here by preventing the teams from competing against one another – "harm competition in the relevant market." *Id*.

The court confused two issues. The first is deciding *which* analytical framework is to be applied to a challenged restraint, and the second is *how* that framework is applied. Restraints are analyzed either under the *per se* rule or the "rule of reason." Because certain kinds of "horizontal agreements 'always or almost always tend to restrict competition and decrease output,'" they violate the Sherman Act *per se*, and are therefore analyzed under the *per se* rules. *Musical Instruments*, 798 F.3d at 1191 (quoting *BMI v. CBS*, 441 U.S. 1, 19-20 (1979)). "Vertical agreements, on the other hand, are analyzed under the 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." *Id*. at 1191-92 (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

As the court recognized, to determine whether an agreement can be condemned *per se*, it is typically necessary to identify whether the agreement is horizontal or vertical. I-ER-17-18. But that is not the question

here, because the rule of reason governs all the agreements, as it does in many cases involving sports leagues. *See, e.g., NCAA*, 468 U.S. at 103.[6]

The issue here is not whether the rule of reason is required; it is *how it is to be applied*. There is no precedent requiring a court to separately analyze the effects of discrete parts of a multi-faceted scheme under the rule of reason. The notion is foreign to the very idea of the rule of reason, which rejects such formalism in favor of consideration of the totality of the scheme and its effects on competition. "Under this rule, the factfinder weighs *all of the circumstances of a case* in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin*, 551 U.S. at 885 (emphasis added)(quoting *Cont'l T.V.*, 433 U.S. at 49).

The need to analyze the agreements collectively is especially important in this case, because they are designed to work together. The

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[6] In *Musical Instruments*, the plaintiffs admitted that they could not prevail without plausibly alleging the *existence* of the horizontal agreement—the absence of which would leave a rimless-wheel conspiracy—and the court concluded that they had not done so. 798 F.3d at 1193, 1198. In this case, the existence of the agreements is not in dispute.

teams and the league neither produce nor distribute the products at issue—telecasts and bundles of telecasts. Unlike a typical manufacturing cartel, they cannot control output by limiting production (except by the number of games they play). They exercise their market power by imposing contractual provisions that require the producers and distributors of the telecasts to restrict *their* output of telecasts.

The networks and DirecTV have agreed to these limits because restraining output permits them to charge supracompetitive prices for these telecasts. But they must be assured that the *other* distributors will also maintain their output of telecasts below the competitive level—including a requirement that each individual team will not offer telecasts of their own games as they had done before the SBA.

The district court's compartmentalization of the agreements also caused it to misunderstand the economics of DirecTV's exclusivity. It held that DirecTV's exclusive arrangement could not cause harm "because once an entity has a monopoly in an industry—as the NFL does with professional football here—'there is no additional monopoly profit to be made by creating a monopoly in the retail distribution of the product.'" I-ER-20 (quoting *E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 30

(2d Cir. 2006)). Leaving aside that the only reason the NFL has this monopoly is because the teams have unlawfully combined their rights in the league, the analysis incorrectly assumes that the league independently sets the level of output of the products at the monopolist's profit-maximizing level *before* selling telecasting rights to DirecTV. As *E & L Consulting* makes clear, that theory rests on the assumption that "[t]he power to restrict output to maximize profit is complete in the manufacturing monopoly," 472 F.3d at 30. But here, there is no simple resale or distribution of the same product, as with the lumber in *E & L Consulting*. Rather, DirecTV and the networks, not the league, create the products and control price and output.

Moreover, the single-monopoly-profit theory assumes that both the monopolist and distributor are trying to maximize profits *of the product in question*. But if DirecTV were maximizing the profits on Sunday Ticket *alone*, it obviously would not limit sales to DirecTV's customers. It does so to make additional profits on its *other* products—including its basic television service, which is required in order to purchase Sunday Ticket. The league has no ability to generate those profits—they require DirecTV—and the result is output below the monopolist's profit-maximizing level for

Sunday Ticket alone. The league and the teams benefit from a limited Sunday Ticket audience because they share in the monopoly rents earned by DirecTV and because they generate additional profits for the NFL's over-the-air licenses by shielding them from the increased competition that would result if the Sunday Ticket telecasts were more widely available.

In assessing DirecTV's agreement as purely vertical, the district court ignored the horizontal aspects of DirecTV's participation in the scheme, including the NFL's self-described "partnership" with DirecTV and the agreed-upon limitations of the distribution of live games via the Internet. II-ER-89 (CAC ¶¶115-16). DirecTV's agreement with the NFL requires that the league [redacted] *See, e.g.*, III-ER-232 ("[redacted]."). [7] This is an anticompetitive arrangement that requires horizontal competitors to limit

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[7] In addition, based on reporting by Greg Easterbrook at ESPN, Plaintiffs allege that there may be an agreement between the NFL, DirecTV, and the networks to cap the number of Sunday Ticket subscribers to further protect the networks. II-ER-74-75 (CAC ¶77).

their output. Even though it is contained in a "vertical" contract with the league, its purpose and effect is to coordinate and limit output horizontally, which is unquestionably a violation of the Sherman Act. *See Leegin*, 551 U.S. at 893; *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012)("Some types of vertical agreements can also injure competition by facilitating horizontal collusion.")(citation omitted); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 935–36 (7th Cir. 2000)(analyzing "vertical" agreements used to effect horizontal restraints and concluding, "That is a horizontal agreement.").

In short, under the rule of reason, assessing the anticompetitive effects of the challenged practices requires a view of the entire market, and of the interconnected agreements that define it. Analyzing DirecTV's agreement as though the league were a traditional manufacturer, setting output and then selling through an exclusive distributor, is to misunderstand fundamentally the market for telecasting NFL games.

II. The Holding That NFL Telecast Arrangements Cannot—as a Matter of Law—Have Anticompetitive Effects Is Mistaken

A. The Arrangements Decrease Output

1. The District Court Improperly Measured Output Solely by the Number of Games Available, No Matter Their Cost or Accessibility

NFL telecasts are among the most popular programming on television, yet most consumers have access to fewer professional football telecasts than any other major sport. II-ER-54-55 (CAC ¶14). On a typical Sunday afternoon, most consumers can watch only the three games made available to them on CBS and Fox. Only DirecTV subscribers even have the option of buying the Sunday Ticket service to watch the remaining games.[8]

This artificial scarcity allows DirecTV to garner monopoly profits (from both Sunday Ticket and the prerequisite DirecTV basic television package), while at the same time protecting over-the-air networks from

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[8] In addition, as opposed to all other major league sports, the NFL, by agreement with the networks, allows just one version of each telecast to be produced. For professional baseball, hockey, and basketball, each club typically produces its own version of the game so that fans can watch their favored club's broadcast (with local announcers and a focus on the preferred team). Not infrequently, a national broadcaster, such as ESPN, produces a *third* version of the same game.

competition, which allows those networks to raise their prices to advertisers and distributors. This is in stark contrast with college football, where dozens of games are available on many television channels (and Internet streams) at the same times in direct competition with one another.

It is hard to imagine a clearer case of supply being artificially suppressed below competitive levels to inflate prices, but the district court found there was no reduction in output. It held that output could *only* be suppressed if the agreements put "a limit on the ability to broadcast games at all." I-ER-22. In the district court's view, so long as every game is produced, and the resulting telecasts are available to at least some people in some locations at some price, there is no output reduction.

The court mistakenly relied on the fact that the output restriction in *NCAA* operated by limiting the number of games that could be broadcast. The NCAA broadcasting restrictions "limit[ed] the total amount of televised intercollegiate football and the number of games that any one team" could televise. *NCAA*, 468 U.S. at 94. As a leading commentator has noted, this approach made sense as a proxy for consumption (that is, viewership) in that case. "In focusing on output, the Supreme Court considered the number of games that would be broadcast on television as a

proxy for total viewership. This surrogate valuation method often will be correct." Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 Emory L.J. 463, 477 (1990). When games are only available on over-the-air television channels, price is not a determinant of viewership, so the number of games available is a reasonable way to estimate viewership.

In any event, the fact that horizontally restricting the *number* of games broadcast is a restriction on output—by limiting the choices consumers have—does not mean that restricting access to, and viewership of, games is not *also* a restriction on output. Under the district court's logic, if owners of movie theaters collectively agreed to raise the price of tickets by $5 and, as a result, fewer people attended the movies, it would not be a reduction in output so long as the total number of movies exhibited remained the same. Under this approach, successful antitrust challenges to the publishing and recording industries, such as *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010), and *In re Electronic Books Antitrust Litigation*, 859 F. Supp. 2d 671 (S.D.N.Y. 2012), would be wrongly decided.

The district court's analysis also contradicts the Supreme Court's position in *BMI v. CBS*, which viewed the possibility of the same songs being available from multiple sources as essential to its upholding BMI's blanket music licenses. 441 U.S. at 23-24. For a market in which access to telecasts is limited by television provider and price, using the number of games produced as the sole measure of output is clear error.

2. The District Court Did Not Use the Proper But-For World to Measure Effect on Output

Viewership of NFL telecasts is lower than it would be without these restraints because the telecasts carried on Sunday Ticket are available only through DirecTV and DirecTV charges exorbitant prices. In the absence of the restraints, two things would happen. First, a package of all out-of-market games would be available from more distributors. Second, teams and their broadcast partners would be free to distribute their own telecasts in competition with Sunday Ticket and other NFL telecasts (*e.g.*, a Dallas

Cowboys channel or Internet stream). These changes would increase accessibility to the telecasts, increase viewership, and lower prices.[9]

Nevertheless, the district court held that the challenged agreements could not have reduced viewership because before DirecTV created Sunday Ticket in 1994, those telecasts were not available out-of-market at all. I-ER-23-24. This was a mistake because "the correct baseline to determine whether exclusionary conduct causes an increase in monopoly power is *not* how high prices, profits, or shares were in the *past*." Einer R. Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 338 (2003). "Instead, the correct baseline compares the actual extent of monopoly power to the degree of power the defendant would have had without the exclusionary conduct." *Id*. Anticompetitive consequences obtain when "[p]rice is higher and output lower than they *would otherwise be*." *NCAA*, 468 U.S. at 107 (emphasis added); *see also, e.g.*, Areeda &

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[9] Output and price are two sides of the same coin. Artificially reducing output causes prices to rise and supracompetitive prices cause output to fall, as fewer consumers are willing to accept the monopoly price. *See, e.g., Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 777 (1999)("'If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too-in other words, output will be restricted.'")(quoting *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594-95 (7th Cir. 1984)).

Hovenkamp, IIA Antitrust Law ¶394 (3d ed. 2007); *Laumann v. NHL*, 56 F. Supp. 3d 280, 300-302 (S.D.N.Y. 2014).

Here, there is every reason to believe that consumption of NFL telecasts would be greater without these restraints. In our interconnected world, with vastly more channel options and ever-growing Internet distribution, it is not realistic to expect that teams would limit the availability of their telecasts to pre-1994 levels. Without the restrictive agreements, telecasts would be more available, and viewership would rise. II-ER-53, 81-88 (CAC ¶¶11, 99-113). Networks would be free to contract with individual teams to offer competing telecasts as they did in the past. Other television providers would have access to games currently carried only on DirecTV. The explosion in programming of sports without similar restraints, including college football, confirms this.

Similarly, common sense dictates that output would increase if Sunday Ticket were available on other pay-television services, instead of being limited to the one-fifth of the market that subscribes to DirecTV. Sunday Ticket prices to residential customers in the U.S. far exceed those in Canada (where no exclusivity exists), II-ER-55-57 (CAC ¶¶15, 17), and DirecTV knows that consumers benefit from enhanced competition when

distribution of live sports telecasts is non-exclusive. *See, e.g.*, II-ER-87-88 (CAC ¶¶112-13)(citing an internal DirecTV report finding that once the channel carrying San Diego Padres games was made available on a non-exclusive basis, there was significantly greater competition among television distributors.).

History also shows that output would increase if Sunday Ticket were available on other pay-television services. In 2007, Major League Baseball tried to replicate the NFL's exclusive deal with DirecTV, agreeing that DirecTV would be the only provider of its "out-of-market" package, Extra Innings. II-ER-84-85 (CAC ¶109). Reflecting the broadly held view that such exclusivity would harm consumers, the Senate held hearings on the matter. *See Exclusive Sports Programming: Examining Competition and Consumer Choice: Hearing Before the Sen. Comm. on Commerce, Sci. and Trans.*, 110th Cong. 1067 (2007). MLB eventually agreed to sell its package through additional distributors. The amount DirecTV had agreed to pay MLB for the exclusive rights to MLB Extra Innings was not only more than it ultimately agreed to pay for the non-exclusive license, it was more than the *entire market* subsequently paid MLB for those rights. Decl. of Roger G. Noll, at 83-84, *Laumann v. NHL*, No. 12-1817 (S.D.N.Y. Sept. 19, 2014), ECF

No. 265. Because DirecTV's attempt to obtain exclusivity was unsuccessful, more consumers were able to access more MLB programming, but the parties' monopoly profits were reduced. II-ER-84-85 (CAC ¶109).

The reported $1.5 billion annual rights fee DirecTV pays the NFL reinforces Plaintiffs' allegation that the same thing is happening here. II-ER-63 (CAC ¶39). The NFL agrees to limit access to only DirecTV subscribers because DirecTV is willing to pay them more for exclusive rights than the market—as a whole—would pay for non-exclusive rights. As Stephen Ross, the Director of the Penn State Institute for Sports Law, Policy, and Research, has explained, the NFL is willing to limit Sunday Ticket to DirecTV alone "because DirecTV is bribing them" by paying so much. Zachary Zagger, *NFL Must Play Good Defense in DirecTV Sunday Ticket Row*, Law360 (Aug. 18, 2016), https://www.law360.com/articles/829905/nfl-must-play-good-defense-in-directv-sunday-ticket-row. DirecTV's monopoly profits from its exclusivity are so important that when AT&T purchased DirecTV, it insisted on DirecTV maintaining its

monopoly over Sunday Ticket as a condition for completing the merger. II-ER-57 (CAC ¶18).[10]

In assessing whether DirecTV's exclusivity reduces viewership, the district court, relying on *Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002), mistakenly compared current output to pre-Sunday Ticket output. In *Kingray*, the district court analyzed the effect on output of the NBA's package of out-of-market games. As here, the court analyzed a temporal change in output instead of asking what output would be in the "but-for world" absent the alleged restraints. 188 F. Supp. 2d at 1195. And while the *Kingray* court likely erred in doing so, *Kingray* was decided only a few years after the creation of the NBA package, and it was at least arguable that output before the package was available might serve as a proxy for the "but-for world" output. By contrast, the court here used a benchmark that is more than twenty years in the past, before digital

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[10] In its recent complaint challenging the proposed AT&T/DirecTV-Time Warner merger, the DOJ quotes internal AT&T/DirecTV documents that describe "the traditional pay-TV model as a 'cash cow' and 'the golden goose.'" Complaint at ¶1, *United States v. AT&T*, No. 1:17-cv-02511 (D.D.C. Nov. 20, 2017), ECF No. 1.

television and the Internet completely changed the sports-broadcasting landscape.

Kingray, moreover, concerned a challenge to the NBA's right to bundle NBA telecasts in the first place.[11] Plaintiffs here are *not* challenging the existence of Sunday Ticket itself, but rather restraints that prevent *additional* options from coming to market. This is a critical distinction. Courts have emphasized that where a package of products from potential competitors is the exclusive source of products, it prevents competition, while a non-exclusive bundle may simply be "one alternative competing on the basis of price and services with others." *Buffalo Broad. Co. v. ASCAP*, 744 F.2d 917, 934 (2d Cir. 1984)(Winter, J., concurring).

The Supreme Court made this point in *NCAA*: "Ensuring that individual members of a joint venture are free to increase output has been

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[11] *Kingray* is distinguishable for other reasons as well. The court there found that the plaintiffs presented a "bare" argument based on DirecTV's exclusive distribution agreement with the NBA, without properly alleging that the defendants "intend[ed] to or actually … harm[ed] competition in the relevant market." 188 F. Supp. 2d at 1196. Here, Plaintiffs have made extensive allegations of harm. In addition, unlike Sunday Ticket, the package in *Kingray* was *not* exclusive to DirecTV, as the NBA also licensed it to In Demand, a consortium of cable companies. *Id.*

viewed as central in evaluating the competitive character of joint ventures." 468 U.S. at 114 n.54; *see also BMI*, 441 U.S. at 24 (upholding joint selling of music licenses, but only where "there was no legal, practical, or conspiratorial impediment to … obtaining individual licenses."). "Far from being 'presumptively legal,' such [exclusive-bundling] arrangements are exemplars of the type of anticompetitive behavior prohibited by the Sherman Act." *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 242 (2d Cir. 2003).

B. The Arrangements Increase Price and Decrease Choice

Increased prices and decreased consumer choices are core antitrust injuries. When considering the NCAA's broadcast restraints, the Supreme Court held that the "anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference." *NCAA*, 468 U.S. at 106-07; *see also, e.g.*, *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 (1983)(holding that one form of antitrust injury is "[c]oercive activity that prevents its victims from making free choices between market alternatives.").

Plaintiffs alleged that consumer choice and viewership were and are limited by the restraints and that the price of Sunday Ticket is higher than it would be in a competitive market. Despite this, the court found that Plaintiffs' allegations were insufficient, because they were "'fully consistent with a free, competitive market.'" I-ER-25 (quoting *Brantley,* 675 F.3d at 1202). But the market for professional football telecasts is anything but "a free, competitive market." The league's joint-marketing arrangement is so obviously anticompetitive that the basic structure of that arrangement required an exemption to the antitrust laws. From the beginning, Defendants designed the scheme to prevent competition between the teams, the networks (and would-be networks), and the distributors (and would-be distributors).

By contrast, *Brantley*, the case relied on by the district court, involved an allegation that, *without any restraint on competition*, separate programmers, acting independently were forcing consumers to purchase bundles of channels that included channels they did not want. The Court stressed that this bundling practice was not the product of an anticompetitive agreement among competing programmers. 675 F.3d at 1202-03. The Court specifically noted that "reduced consumer choice and

increased prices … *when they are the result of an anticompetitive practice,* constitute antitrust injury." 675 F.3d at 1202 n.11 (emphasis added).

Together with its mistaken holding that only the number of games produced is relevant to output regardless of how limited the availability of the telecasts, the court's decision means that Defendants could restrict accessibility to any level at all—and thereby increase prices without limit—and there would be no competitive harm. Under that reasoning, the antitrust laws would condone the practices they were enacted to condemn.[12]

C. The Arrangements Are Not Procompetitive

The district court also erred when it found "that there are other, various procompetitive effects" from the challenged agreements. I-ER-25. A court cannot properly make findings of fact about these effects on a

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[12] The district court also erred in holding that the agreements did not restrain competition because other distributors have competed for the right to distribute Sunday Ticket. I-ER-26. This is a *non sequitur*. If members of a cartel decide to sell through a single sales agent that gets a share of their supracompetitive profits, it does not eliminate that anticompetitive effect if many entities seek monopoly rent by bidding against each other.

motion to dismiss. *See, e.g., Samsung Elecs. Co., Ltd. v. Panasonic Corp.*, No. C 10-03098, 2015 WL 10890655, at *7 (N.D. Cal. Sept. 30, 2015).

The Supreme Court has emphasized that explicit restraints on competition in sports broadcasting markets "place upon [Defendants] a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." *NCAA*, 468 U.S. at 113. Defendants cannot meet this "heavy burden" of proof of an affirmative defense on a motion to dismiss—particularly given the extensive and detailed allegations in Plaintiffs' CAC concerning the absence of procompetitive benefits and the availability of less restrictive means to achieve legitimate objectives. II-ER-90-93 (CAC ¶¶119-28); *see also Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998)(holding that courts must consider whether less restrictive alternatives exist).

The district court made its finding because the NFL Defendants "argue[d]" that "exclusivity encourages DirecTV's 'substantial investment in innovation and promotion to make Sunday Ticket appealing to

consumers.'" I-ER-25.[13] But that is all this was, an argument. It cannot be accepted as true on a motion to dismiss, especially when it is not supported by any evidence and when the applicable legal standard required the court to give Plaintiffs, not Defendants, the benefit of the doubt.[14]

Without arguing the facts here, Plaintiffs merely note that the NCAA made the same arguments for procompetitive effects that the NFL does here. None was found to be sufficient after trial. Similarly, when MLB and the NHL made the same arguments on a full summary-judgment record,

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[13] The court suggested that, "other facets of Sunday Ticket, such as 'NFL Sunday Ticket Max,' which includes the 'Red Zone Channel, DirecTV Fantasy Zone Channel, and NFL.com fantasy,'" justified the restraints. I-ER-25. In a competitive market, however, there would be every incentive to offer similarly attractive features to increase viewership against competing football programming. For example, ESPN GoalLine is a college-football analog to Red Zone Channel and is widely available. *See* Mike Reynolds, *Verizon FiOS, Disney, ESPN Media Networks Group Ink Advanced Media Carriage Pact*, Multichannel News, http://www.multichannel.com/news/cable-operators/verizon-fios-disney-espn-media-networks-group-ink-advanced-media-carriage-pact/328352.

[14] The claim that DirecTV's exclusivity encourages investment is wrong legally, as well as factually, because "the incentive for added investment is inflated profit stemming from limited competition." *Laumann*, 56 F. Supp. 3d at 299. "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id*. (quotation removed).

the district court found them "far from compelling." *Laumann*, 56 F. Supp. 3d at 301.

III. The Holding That NFL Telecasts Are "Collectively Owned Property" Disregards Plaintiffs' Allegations and Conflicts with Controlling Supreme Court Precedent

Directly contradicting prior courts addressing the same issue, the district court concluded that, because of the structure of the league, the teams' decisions to centralize their television rights in the league "is reasonable as a matter of law." I-ER-30. It found that each NFL broadcast "constitutes collectively owned property," therefore only the NFL—as a collective—could sell each game's broadcast rights. I-ER-27. The court based this holding on its adoption of Defendant's contentions "at oral argument" that "broadcasts are owned by the NFL, rather than by the NFL teams." I-ER-29. Thus, it reasoned, "the NFL must be involved in the sale of every game's broadcast." I-ER-30. This conclusion is wrong because it assumes as legal the very thing Plaintiffs are challenging—the pooling of rights in the league.

Since 1938, it has been established that individual professional sports teams own the broadcast rights to their home games. *See Pittsburgh Athletic,* 24 F. Supp. at 493-94; *Laumann v. NHL*, 907 F. Supp. 2d 465, 474, 485

(S.D.N.Y. 2012) ("In both the NHL and MLB, each team owns the initial right to control telecasts of its home games ...").

The league "owns" the broadcasts only because the teams jointly agree to assign their separate rights to it. II-ER-71-72 (CAC ¶66). That agreement is at the center of Plaintiffs' challenge in this case, just as it was in *NFL II*, where the court enjoined the rights collectivization because of its suppression of competition. "It is implicit in the 1961 contract that the member clubs have agreed among themselves and with the League that each club will not sell its television rights separate and apart from those of the other clubs. . . . and that only the resulting package of pooled television rights will be sold to a purchaser." *NFL II*, 196 F. Supp. at 446–47. "Thus, by agreement, the member clubs of the League have eliminated competition among themselves in the sale of television rights to their games." *Id.* at 447. That is precisely the situation here, and it is equally anticompetitive.

The district court correctly noted that (unlike the agreement initially enjoined by the court in *NFL II*) the SBA "does not immunize the horizontal agreements between the NFL and the NFL teams" in this case. I-ER-28. Yet it effectively made the SBA's limitation to over-the-air broadcasts a nullity, holding that agreements between the NFL and the teams are not subject to

antitrust scrutiny as a matter of law, because the league owns the rights. But the limited SBA exemption exists because collective, league ownership would otherwise violate the antitrust laws.

The holding below also contradicts the Supreme Court's recognition that such agreements can be found to violate the antitrust laws: "The legislative history of [the SBA] demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act …." *NCAA*, 468 U.S. at 104 n.28.

That the teams have formally transferred ownership to the league does not change the analysis because teams "cannot simply get around antitrust liability by acting through a third-party intermediary or 'joint venture.'" *Am. Needle,* 560 U.S. at 202 (quotation omitted).

The district court's conclusion that the NFL broadcast rights must be viewed collectively, and that their collective nature immunizes them from the antitrust laws, is the very error the Supreme Court corrected in *American Needle*. The Seventh Circuit had "carved out a zone of antitrust immunity for conduct arguably related to league operations by reasoning that coordinated team trademark sales are necessary to produce 'NFL

football,' a single NFL brand …." *Am. Needle*, 560 U.S. at 199 n.7. "But defining the product as 'NFL football' puts the cart before the horse. Of course the NFL produces NFL football, but that does not mean that cooperation among NFL clubs is immune from § 1 scrutiny. Members of any cartel could insist that their cooperation is necessary to produce the 'cartel product' and compete with other products." *Id*.

The district court apparently concluded that the restraints are necessarily procompetitive because cooperation is needed "in order for the games to be broadcast at all." I-ER-30. But the need for some cooperation does not immunize an otherwise anticompetitive agreement. The court ignored "longstanding precedent that agreements limiting the telecasting of professional sports games are subject to antitrust scrutiny, and analyzed under the rule of reason. Even if certain agreements by sports leagues with respect to telecasting games may be essential if the product is to be available at all this does not give league agreements regarding television

rights blanket immunity from antitrust scrutiny." *Laumann*, 907 F. Supp. 2d at 488 (citations and quotations omitted).[15]

The legal consequence of the need for some cooperation is just what the Court stated in *NCAA*: The need for some restraints on competition to make the product available means that the *rule of reason* applies, rather than potential *per se* condemnation. *NCAA*, 468 U.S. at 100-01. There is no basis for the district court's conclusion that such restraints are *per se lawful*.

The court's conclusion is also wrong factually. Centralized restraints are not justified by any need for "multiple entities [to] act collectively." I-ER-30. Until 1961, teams had no trouble obtaining television coverage without collective decision-making by the league. II-ER-70-71 (CAC ¶¶60-65). To this day, each team negotiates individual radio broadcasting contracts, which compete against each other through all manner of radio distribution platforms. II-ER-83 (CAC ¶104). The centralization that followed passage of the SBA substantially *reduced* output, it did not

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[15] The district court's reasoning mirrors the arguments rejected in *American Needle*. There, the NFL argued: "Production of NFL Football requires the collective deployment of this intellectual property; no club alone could supply the intellectual property necessary to produce a single NFL game." NFL Resp'ts Br. at 6, *Am. Needle*, 560 U.S. 183 (No. 08-661).

increase it. The district court ignored this history, including the holdings of *NFL I* and *II*—neither of which is cited in its opinion—which reached the opposite conclusion on a full factual record.

Similarly, the NCAA unsuccessfully argued that its restraints were justified by the need for cooperation and were output enhancing. *See* Brief for Petitioner at 39, 42, *NCAA*, 468 U.S. 85. The Supreme Court's rejection of those arguments was proven correct—output of NCAA college football telecasts increased dramatically after its decision led to decentralization. II-ER-95 (CAC ¶133).

The district court relied on *Washington v. NFL*, 880 F. Supp. 2d 1004 (D. Minn. 2012), and *Spinelli v. NFL*, 96 F. Supp. 3d 81 (S.D.N.Y. 2015), in holding that collective ownership justified the restraints. In *Washington*, the court held that the NFL's refusal to provide former players with rights to films and images from games in which they played did not violate the Sherman Act. 880 F. Supp. 2d at 1008 ("[T]his is a royalties issue, not an antitrust issue."). The *Washington* court distinguished *American Needle* because it "involved intellectual property that each team owned separately from the NFL," whereas it found that the "historical football game footage"

to which the plaintiffs wanted access was not separately owned by an individual team and never had been. *Id*. at 1006.[16]

In *Spinelli*, professional photographers alleged that the NFL violated the Sherman Act by entering into exclusive licensing arrangements for stock photos. 96 F. Supp. 3d at 95. The court held that the plaintiffs' claims failed because their complaint contained "no facts to suggest that the challenged conduct reduced output of commercial licenses for NFL photographs or raised prices for consumers." *Id*. at 108-109. Relying on *Washington*, the court then held that because "the photographs at issue contain intellectual property owned by the NFL and at least one NFL Club … [they] necessarily contain the intellectual property of more than one entity, and constitute 'collectively owned' property …" *Id*. at 114.

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[16] In dicta, *Washington* appears to overstate the holding of *American Needle*, suggesting that the Supreme Court would condone any NFL conduct where the teams "must cooperate…" *Washington*, 880 F. Supp. 2d at 1006. As explained above, that is not what the Court held. *NCAA* also specifically rejected the argument that the need for some cooperation among teams to broadcast a game justifies restraints on game telecasts. *See* 468 U.S. at 117 ("The specific restraints on football telecasts that are challenged in this case do not … fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.").

Here, in contrast to *Spinelli* and *Washington*, it has long been settled that the teams, not the league, own the original broadcast rights. II-ER-53 (CAC ¶11). As the court noted in *Laumann*, "[l]ike the intellectual property at issue in *American Needle*, the [television] rights at issue here belong initially to the individual clubs." 907 F. Supp. 2d at 485. That fact underlay *NFL I*, *NFL II*, and the SBA itself.[17]

"Decisions by NFL teams to license their separately owned [property] collectively and to only one vendor are decisions that 'deprive the marketplace of independent centers of decisionmaking,' and therefore of actual or potential competition." *Am. Needle*, 560 U.S. at 197 (quoting *Copperweld*, 467 U.S. at 770). By consolidating their separately-owned broadcasting rights into the league, and selling them to an exclusive provider, the teams—potential competitors—are depriving the marketplace of independent centers of decisionmaking and therefore competition.

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[17] In addition, Plaintiffs' CAC contains concrete allegations that the challenged agreements reduce output and raise prices—something the courts found not to be the case in *Spinelli*, 96 F. Supp. 3d at 108-09, and *Washington*, 880 F. Supp. 2d at 1007.

IV. The Holding That Defendants Could Not Have Restrained Trade in a Relevant Product Market Is Incorrect

Plaintiffs set forth two relevant product markets in their complaint. First, they alleged that live telecasts of professional football games constitute a relevant market. II-ER-67-70 (CAC ¶¶53-59). They also contended that, because of Defendants' manipulation of the market, there exists a submarket for the out-of-market football telecasts carried on Sunday Ticket. *Id*. The district court held that Plaintiffs had properly pleaded the market for live broadcasts of professional football games, but it rejected the alleged sub-market as a matter of law. I-ER-36. While the court accepted Plaintiffs' broader market definition, it held that Plaintiffs had failed to show how Defendants—who effectively control the *entire* market for professional football telecasts—could have restrained that market.

As an initial matter, *NCAA* held that defining a relevant market in which the defendants have market power is not required where the defendants have engaged in explicit restraints on output. "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, no elaborate industry analysis is

required to demonstrate the anticompetitive character of such an agreement." 468 U.S. at 109 (quotation omitted); *see also FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986).

Moreover, "[b]ecause market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market." *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001)(Sotomayor, J.).[18]

Given Plaintiffs' minimal burden at this stage, there should be no question that Plaintiffs' allegations are adequate. Individual sports and their telecasts have long been held to be relevant product markets for these purposes. *See, e.g., NCAA*, 468 U.S. at 111; *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1393 (9th Cir. 1984)("NFL football has limited substitutes from a consumer standpoint …."); *Laumann*, 907 F. Supp. 2d at

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[18] *See also, e.g., Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008)("[S]ince the validity of the 'relevant market' is typically a factual element rather than a legal element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by summary judgment or trial."); *High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993)(holding that the market definition depends on "a factual inquiry into the 'commercial realities' faced by consumers").

491 ("It is well established that there are peculiar and unique characteristics that set major league men's ice hockey and baseball apart from other sports or leisure activities, that close substitutes do not exist.")(quotation omitted).

The Supreme Court has also recognized that within a broad market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). A court may determine the boundaries of such a submarket by examining "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.*

While this is again a fact-specific analysis, each of these factors supports finding a submarket for out-of-market telecasts. Sunday Ticket is recognized as a separate product from locally available games. It has peculiar characteristics and uses, namely the ability to watch out-of-market games as they happen. It has distinct customers for the same reasons—commercial establishments and individuals that want to be able to watch games that would not otherwise be available. And Defendants have

substantial pricing power because of Sunday Ticket's position in the market. Defendants may dispute these allegations, but it is not an issue that can be resolved on a motion to dismiss.[19]

Moreover, however the market is defined, Defendants have extraordinary market power. The NFL controls the rights to the entire professional football telecast market. DirecTV and the few networks that carry games together control the entire market for telecasts. And DirecTV controls the entire market for out-of-market football telecasts. *Cost Mgmt. Servs., Inc. v. Wash. Natl. Gas Co.*, 99 F.3d 937, 951 (9th Cir. 1996)("[A]n allegation of a specific market share is sufficient, as a matter of pleading, to withstand a motion for dismissal.")(citing *Hunt–Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919 (9th Cir. 1980)).

In reaching a contrary conclusion, the court mistakenly relied on the fact that certain telecasts—local, over-the-air broadcasts—are offered for

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[19] In its challenge to the proposed AT&T/DirecTV-Time Warner merger, the DOJ similarly asserted two separate markets: an "All Video Distribution" market and a "Multichannel Video Distribution" submarket. Complaint at ¶¶27-30, *United States v. AT&T*, No. 1:17-cv-02511 (D.D.C. Nov. 20, 2017), ECF No. 1.

"free," while others—Sunday Ticket telecasts—are offered at a high price.[20] The court reasoned that out-of-market game prices either are constrained to competitive levels by the free telecasts (in which case there is no market power) or they are not (in which case each telecast is its own market and competition among them cannot lower prices).[21]

Markets are not so simple. What the district court failed to appreciate is that each NFL game is a substitute, but not a perfect substitute, for another. NFL telecasts are "differentiated products," meaning that they have different qualities or characteristics that affect consumer choices. That is hardly uncommon:

> Products are differentiated when many buyers regard them as different though the products still perform the same essential function. … Many machines performing the same function—such as copiers, computers, or automobiles—differ not only in brand name but also in performance, physical appearance, size, capacity, cost, price, reliability, ease of use,

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[20] The telecasts are not free. Most people obtain access to the games through pay-television services that pay per-subscriber fees. Those fees are artificially inflated by the restraints at issue and passed on to consumers as part of their standard television packages.

[21] This reasoning is inconsistent with the district court's holding that NFL football telecasts *do* constitute a relevant market.

> service, customer support, and other features. Nevertheless, they generally compete with one another sufficiently that the price of one brand is greatly constrained by the price of others.

Areeda & Hovenkamp, *Antitrust Law,* ¶563a at 383–84 (3d. ed. 2007). "Most courts correctly define the presumptive market to include similar products, though differentiated by brand or features." *Id.* ¶563d at 389.

As with other differentiated product markets, consumers differ in their demand characteristics. Some consumers are content to simply watch the games available on local television. Others, including all class members, are willing to pay a premium to watch certain teams or to obtain the option to watch any game. Many are in between—they would pay for some or all out-of-market games depending on the price. Defendants have segmented the market to capitalize on the differences in consumer preferences and price-sensitivities, offering a handful of games over the air to appeal to most consumers, while forcing more dedicated (or less price-sensitive) fans

who want to be able to watch any of the Sunday games to purchase Sunday Ticket.[22]

Sunday Ticket would be even more expensive if no games were available on local television, just as it would be less expensive if more telecasts were available widely. That some football telecasts are offered for "free" does not resolve anything. Under the district court's logic, if all the distributors of streaming music (Apple, Spotify, Pandora, and so on)

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[22] In a competitive market, there would not be "out-of-market" games, because all games would be more easily accessible in all markets. But Defendants have constrained the overall market so that consumers are faced with an artificially limited set of choices and then increased the price for a targeted set of consumers. *See* Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines § 4.1.4 (2010)("If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers …."). The district court argued that a submarket of just "out-of-market" game amounted to a "post-hoc narrowing of the relevant market to cover only those products over which Plaintiffs allege that Defendants have control." I-ER-38. This is mistaken because the market narrowing, though certainly artificial, is not Plaintiffs' doing. It is the result of *Defendants'* anticompetitive carving up of the professional football telecast market to create an artificial scarcity of certain telecasts. The cases the district court cites are thus inapposite. *Id*. (citing *Adidas Am., Inc. v. NCAA*, 64 F. Supp. 2d 1097 (D. Kan. 1999); *Queen City Pizza, Inc. v. Domino's Pizza, Inc*., 124 F.3d 430 (3d Cir. 1997); *TV Commc'ns Network, Inc. v. Turner Network Television, Inc*., 964 F.2d 1022 (10th Cir. 1992)).

entered into a horizontal agreement to permit only a single source of music over the Internet, they could never be found to have market power if a consumer could still listen to a limited selection of music for free on over-the-air advertising-supported radio. That would be mistaken both economically and legally.

The question for market definition is whether the products are sufficiently close that controlling them permits a monopolist to exert market power—to profitably raise prices or lower output relative to a competitive market. *See, e.g., United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391–95 (1956). The core purpose of the restraints at issue is to limit the amount of professional football telecasts available to consumers to inflate the prices paid by consumers and increase the profitability of those telecasts. Because those allegations are more than plausible, the court should not have ruled that Plaintiffs' market definitions failed as a matter of law.

V. The Holding That Plaintiffs Failed to Plead a Section 2 Claim Is Incorrect

Plaintiffs base their Section 2 monopolization claim against the NFL and teams on the teams' agreement "to consolidate all licensing rights for

live video presentations of regular season NFL games into a single entity [(the League)], with the purpose, intent, and effect of monopolizing the relevant market and submarket described above." II-ER-103 (CAC ¶161).

The district court dismissed this claim based on its holdings under Section 1. I-ER-38-40. It also found that Plaintiffs had not alleged that the Defendants had the "specific intent … to control prices or to restrain competition unreasonably." I-ER-39 (quotation omitted). But, as Plaintiffs' allegations show, the very purpose of the scheme is to restrain competition. *See, e.g.*, II-ER-49, 50-58, 81-90, 103-104 (CAC ¶¶1, 4-20, 99-118, 159-163). Plaintiffs also explicitly alleged that the NFL and its teams operated with this "intent." II-ER-103 (CAC ¶161).[23]

As the district court held in *NCAA*: "'When a product is controlled by one interest, without substitutes available, there is monopoly power.' In this case, NCAA controls all of regular season college football television. … It has formed an insurmountable barrier to the entry of competitors into

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[23] At another point in its opinion, the court appeared to recognize this. *See* I-ER-16 n.7 ("[E]ven if the agreements are symbiotic and, when taken together, form *one overarching intent* to control the broadcasts of NFL games …")(emphasis added).

the market by prohibiting its members, under threat of sanctions, from televising their games other than pursuant to the NCAA controls. … Therefore, the Court concludes that NCAA has monopolized the market of college football television, in violation of § 2 of the Sherman Act." *Bd. of Regents of Univ. of Oklahoma v. NCAA*, 546 F. Supp. 1276, 1323 (W.D. Okla. 1982)(quoting *DuPont*, 351 U.S. at 394).

Just as in *NCAA*, the NFL is maintaining monopoly power by preventing the individual teams from freely competing. *See also Laumann*, 907 F. Supp. 2d at 492 ("[P]laintiffs have plausibly alleged that the NHL and MLB have used their monopoly power to restrict the broadcast of television programming in a manner that harms competition.").[24]

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[24] The district court's segregation of the various contracts is also inconsistent with the "monopoly broth" analysis applicable under Section 2. "There are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under Section 2 if done by a monopolist." *City of Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980); *see also City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376, 1378 (9th Cir. 1992)("[I]t would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect.").

VI. The Holding That Plaintiffs Do Not Have Standing to Challenge These Agreements Disregards Plaintiffs' Allegations and Rests on a Misreading of Precedent

The district court concluded that while Plaintiffs had standing to challenge the agreement between DirecTV and the league, they lacked standing to challenge the horizontal agreement between the teams that made the league the exclusive seller of rights, including to DirecTV, because Plaintiffs are "indirect" purchasers from the league.

Illinois Brick addressed a situation in which a cartel sells something at supracompetitive prices to direct purchasers, who resell that product and pass on some of their injury to indirect purchasers further downstream. In those cases, the indirect purchasers lack antitrust standing to recover for their passed-on overcharge. The direct purchasers initially bore the full brunt of the antitrust injury, and are presumed to have adequate incentives to sue, even though they may have passed on some of the injury. *Illinois Brick* reasoned that allowing suits by direct and indirect purchasers would

require complicated inquiries into the extent to which the inflated prices were passed on. 431 U.S. at 732-33.[25]

While the *Illinois Brick* rule is described as a limitation on "standing," it is not a limitation on an indirect purchaser's ability to *challenge* any practices. It is a limitation only on seeking passed-through damages. It is well settled, for example, that "indirect purchasers are not barred from bringing an antitrust claim for injunctive relief against manufacturers." *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1235 (9th Cir. 1998); *see also* Areeda & Hovenkamp, *Antitrust Law* ¶¶346a, 346d (2015). "Apportionment challenges and duplicative recovery simply do not come into play in suits seeking injunctive relief and thus *Illinois Brick* does not apply." *Pecover v. Elec. Arts Inc.*, 633 F. Supp. 2d 976, 980 (N.D. Cal. 2009).

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[25] "The underlying purposes for the rule are (1) "'to eliminate the complications of apportioning overcharges between direct and indirect purchasers,' (2) 'to eliminate multiple recoveries,' and (3) to 'promote the vigorous enforcement of the antitrust laws.'" *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 748 (9th Cir. 2012)(quoting *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 208, 212, 214 (1990)).

Plaintiffs seek injunctive relief as well as damages, so regardless of whether they are direct or indirect purchasers, they have standing to challenge the agreements between the teams and the league. Moreover, those agreements bear directly on the competitive effects of DirecTV's agreement with the league, for which Plaintiffs undisputedly have standing to challenge and seek damages. "Some types of vertical agreements can also injure competition by facilitating horizontal collusion." *Brantley*, 675 F.3d at 1198 (citing *Leegin*, 551 U.S. at 893). It makes no sense to permit a challenge to a vertical arrangement made possible by horizontal collusion, but then foreclose the ability to sue for damages resulting from that collusion.

In any event, the claim here is *not* that the NFL injured DirecTV by overcharging it—it did not—and that DirecTV then passed on some of the overcharge to its customers. Plaintiffs' injury is a *direct* result of DirecTV's exploitation of *its* monopoly position in the market in selling Sunday Ticket, where that position arises because of its agreement with the league, the agreements between the teams, and the agreements with the networks. Plaintiffs are injured directly by DirecTV because the interconnected

agreements provide DirecTV the ability to control price and output free from nearly all competition.[26]

The district court relied upon *ATM Fees*, but that opinion illustrates why *Illinois Brick* does not apply here. There, the plaintiffs were users of automatic teller machines. They alleged that "interchange fees" paid by a customer's bank to the owner of a foreign ATM were unlawfully inflated, and that those fees, in turn, caused customers to pay their banks inflated "foreign ATM fees." 686 F.3d at 749-50.

The plaintiffs alleged that were entitled to recover on a pass-through theory of damages under the "coconspirator exception" to the direct purchaser rule, because, they alleged, the ATM owners were coconspirators in the scheme to set wholesale "interchange fees" and then passed the overcharge to consumers. This Court held that the coconspirator exception did not apply where the intermediary conspired to increase the upstream fee, as the plaintiffs there alleged, and would only apply if they had conspired to fix the retail, "foreign ATM fee." *Id*. at 755-56.

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[26] "To test standing … the court should assume the existence of a violation and then ask whether the … standing elements are shown." Areeda & Hovenkamp, *Antitrust Law* ¶¶335f (2015).

Here, Plaintiffs do not assert a pass-through theory. This is not a conspiracy to raise prices paid by DirecTV at the league level that has an indirect effect on DirecTV customers. It is a multilevel conspiracy whose very purpose is to ensure that DirecTV and the networks restrain their output below competitive levels so that DirecTV and the networks can charge inflated prices. Consumers are *directly* harmed by these practices, and DirecTV is a direct beneficiary, not an injured party.

As a matter of economics, moreover, the rights fee paid by DirecTV to the league could not be passed through. In contrast to *ATM Fees*, the fee paid by DirecTV to the league is a flat fee, rather than a per-subscriber fee. II-ER-51-52, 80-81 (CAC ¶¶7, 95-96). Economically, this means that the fee DirecTV pays the NFL cannot impose a marginal cost on DirecTV, so it has no effect on the profit-maximizing price DirecTV charges consumers. If the rights fee were reduced by half or doubled or eliminated entirely, it would not affect Sunday Ticket's profit-maximizing price.

The fee DirecTV pays the league is not an antitrust "overcharge," it is the sharing of monopoly profits generated *by DirecTV*. DirecTV, not the league, sets the monopoly price and generates the monopoly profits. These profits include monopoly profits from the sale of the prerequisite basic

DirecTV packages, which *only* DirecTV could generate. The price consumers pay does not incorporate any pass-through of another, independently inflated price, as was the case in *ATM Fees*. Rather, "DirecTV is bribing" the NFL with a share of its monopoly rents. Zagger, *supra* at 36. Just as with injunctive relief, "[a]pportionment challenges and duplicative recovery simply do not come into play … and thus *Illinois Brick* does not apply." *Pecover*, 633 F. Supp. 2d at 980.

Plaintiffs have suffered *other* damages that arguably involve a measure of passed-through overcharges. The networks—ESPN, Fox, NBC, and CBS and their affiliates—charge per-subscriber fees to DirecTV for carriage, and those fees have been artificially inflated by the scheme. DirecTV passes those overcharges on to consumers, including class members, who pay excessive amounts for their basic packages as a result.[27] Plaintiffs are not seeking any such passed-through overcharges (although they are seeking injunctive relief related to these harms). Plaintiffs seek

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[27] They also pay additional excessive amounts for their DirecTV basic packages. That overcharge is not a passed-through injury; it is direct.

only the overcharges directly arising from Sunday Ticket, which involves no pass-through.

In any case, the district court's reading of *ATM Fees* cannot be correct. It held that under *ATM Fees*, multilevel conspiracies are only actionable where the conspirators agree to fix the retail price. What *ATM Fees* holds is that, in a price-fixing case, "the price paid by a plaintiff must be set by the conspiracy and not merely affected by the setting of another price." 686 F.3d at 754. But this case is not an explicit price-fixing case. Here, defendants have manipulated the market not by an explicit agreement on price, but through a series of agreements to divide the market and restrain *output* at the retail level, which results in supracompetitive pricing. It is well-settled that "raising price, reducing output, and dividing markets have the same anticompetitive effects," *Gen. Leaseways*, 744 F.2d at 594-95, and here—as *ATM Fees* requires—the prices consumers paid for Sunday Ticket was a direct, not derivative, result of the conspiracy.

Under the district court's interpretation, conspirators would be exposed to antitrust liability if they collude on price, but not if they collude on output. That makes no sense. If, as here, the retail price is inflated by a market manipulation at the retail level—by agreeing on a price, limiting

output, or dividing markets—rather than by the passing-on of an inflated wholesale price, there is no pass-through and no indirect-purchaser concern.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse and remand.

Respectfully submitted,

DATED: February 5, 2018

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STATEMENT OF RELATED CASES

Per Ninth Circuit Rule 28-2.6, Plaintiffs, by and through their counsel of record, hereby certify that they are not aware of any related cases pending in this Court.

Respectfully submitted,

DATED: February 5, 2018

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STATUTORY ADDENDUM

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Sherman Act § 1, codified at 15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Sherman Act § 2, codified at 15 U.S.C. § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Clayton Act § 4, codified at 15 U.S.C. § 15

§ 15. Suits by persons injured.

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

Clayton Act § 16, codified at 15 U.S.C. § 26

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . .

Sports Broadcasting Act, codified at 15 U.S.C. § 1291

The antitrust laws, as defined in section 1 of the Act of October 15, 1914, as amended (38 Stat. 730) [15 U.S.C. § 12], or in the Federal Trade Commission Act, as amended (38 Stat. 717) [15 U.S.C. § 41 *et seq*.], shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests 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, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs. In addition, such laws shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income tax under section 501(c)(6) of the Internal Revenue Code of 1986 [26 U.S.C.A. 501(c)(6)], combine their operations in expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.

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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The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

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Signature of Attorney or Unrepresented Litigant: /s/ Marc M. Seltzer

Date: 02/05/2018

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

9th Circuit Case Number(s) 17-56119

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Signature (use "s/" format) s/ Marc M. Seltzer

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