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17 Attorneys for the United States of America

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA
20 SAN FRANCISCO DIVISION

21 CITY OF OAKLAND,

22
23 Plaintiff,

24 vs.

25 THE OAKLAND RAIDERS, a California
26 limited partnership; ARIZONA CARDINALS
FOOTBALL CLUB LLC; ATLANTA
27 FALCONS FOOTBALL CLUB, LLC;
BALTIMORE RAVENS LIMITED
28 PARTNERSHIP; BUFFALO BILLS, LLC;

No. 3:18-cv-07444-JCS

**STATEMENT OF INTEREST OF
THE UNITED STATES**

Date: July 19, 2019
Time: 9:30 a.m.

The Honorable Joseph C. Spero
Courtroom G, 15th Floor

1 PANTHERS FOOTBALL, LLC; THE
2 CHICAGO BEARS FOOTBALL CLUB,
3 INC.; CINCINNATI BENGALS, INC.;
4 CLEVELAND BROWNS FOOTBALL
5 COMPANY LLC; DALLAS COWBOYS
6 FOOTBALL CLUB, LTD; PDB SPORTS,
7 LTD; THE DETROIT LIONS, INC.; GREEN
8 BAY PACKERS, INC.; HOUSTON NFL
9 HOLDINGS, LP; INDIANAPOLIS COLTS,
10 INC.; JACKSONVILLE JAGUARS, LLC;
11 KANSAS CITY CHIEFS FOOTBALL
12 CLUB, INC.; CHARGERS FOOTBALL
13 COMPANY, LLC; THE RAMS FOOTBALL
14 COMPANY, LLC; MIAMI DOLPHINS,
15 LTD.; MINNESOTA VIKINGS FOOTBALL,
16 LLC; NEW ENGLAND PATRIOTS LLC;
17 NEW ORLEANS LOUISIANA SAINTS,
18 LLC; NEW YORK FOOTBALL GIANTS,
19 INC.; NEW YORK JETS LLC;
20 PHILADELPHIA EAGLES, LLC;
21 PITTSBURGH STEELERS LLC; FORTY
22 NINERS FOOTBALL COMPANY LLC;
23 FOOTBALL NORTHWEST LLC;
24 BUCCANEERS TEAM LLC; TENNESSEE
25 FOOTBALL, INC.; PRO-FOOTBALL, INC.;
26 and THE NATIONAL FOOTBALL
27 LEAGUE,
28

Defendants.

1 **INTEREST OF THE UNITED STATES**

2 The United States respectfully submits this statement pursuant to 28 U.S.C. § 517, which
3 permits the Attorney General to direct any officer of the Department of Justice to attend to the
4 interests of the United States in any case pending in a federal court. The United States enforces
5 the federal antitrust laws and has a strong interest in their correct application both in public and
6 private antitrust enforcement actions in order to protect competition for the benefit of consumers.
7 The United States files this statement to explain that tax revenues lost by governmental entities
8 are not recoverable under the Clayton Act as injury to “business or property.” Such expansive
9 recovery would be contrary to the language of the statute and to precedent, and could lead to
10 anticompetitive effects from over-deterrence.

11 The United States believes its participation in the scheduled hearing for pending motions
12 would be useful to the Court and respectfully requests the opportunity to make an oral argument.

13 **BACKGROUND**

14 The Raiders, a professional football franchise of the National Football League (NFL),
15 currently perform in Oakland but recently announced plans to move to Las Vegas. The City of
16 Oakland filed a complaint against the NFL and each of its member franchises, alleging that
17 Defendants conspired to 1) boycott and refuse to deal with Oakland and 2) fix prices for the
18 presence of a professional football team, in facilitating the Raiders’ move from Oakland to Las
19 Vegas. Compl., Doc. 1, ¶¶ 14-15, 86, 99-105, 111-116, 124-127, 134-135.¹

20 Oakland seeks damages for investments and debt exceeding \$240 million and for the
21 diminished value of the Oakland Coliseum. Compl. ¶ 96. Oakland asserts that the Coliseum is
22 “jointly owned by the City of Oakland and Alameda County and is leased to the Oakland-
23 Alameda County Coliseum Financing Corporation, which, in turn, has assigned its rights under
24 that lease to the [Oakland-Alameda County Coliseum] Authority.” Pl. Opp., Doc. 48, at 8.

25 Oakland also seeks “significant tax and other income that it derives from the presence of the
26
27

28 ¹ Plaintiff also seeks recovery under various state contract law claims which are not addressed in
this statement.

1 Raiders and the economic activity their presence generates,” among other unspecified damages.
2 Compl. ¶ 96.

3 Defendants moved to dismiss the complaint, arguing that Oakland does not have standing
4 to recover under Section 4 of the Clayton Act, along with other legal and factual defects. *See*
5 Def. Mot., Doc. 41; Def. Reply, Doc. 49. Defendants assert Oakland is an improper plaintiff
6 because it “cannot allege that it purchases anything from or sells anything to the NFL or any of
7 its teams.” Def. Mot. at 10. According to Defendants, Oakland’s standing is improperly
8 grounded in “indirect injury,” because Oakland is a remote participant in any relevant market
9 with no more than a shareholder or landlord interest in the Oakland Coliseum. *Id.* at 10-11.
10 Defendants also move the Court to reject Oakland’s other claimed source of injury. They argue
11 Oakland cannot use the move’s effect on tax revenue as a basis for standing, “because taxation is
12 a sovereign activity, not a commercial transaction.” *Id.* at 10

13 ARGUMENT

14 Section 4 of the Clayton Act provides that “any person who shall be injured in his
15 business or property by reason of anything forbidden in the antitrust laws” may sue for treble
16 damages. 15 U.S.C. § 15. Plaintiff City of Oakland seeks to recover lost tax revenue from the
17 Raiders’ departure, but tax injuries are not cognizable under Section 4 and must be dismissed as
18 a matter of law. As a threshold matter, a government party’s interest in collecting tax revenue is
19 a sovereign interest that is outside the “business or property” scope of the Clayton Act.
20 Additionally, tax losses are an improper basis for antitrust standing because they are entirely
21 derivative of the harm to market participants who miss out on welfare-enhancing transactions.
22 To find otherwise would entitle a government entity to threefold recovery rights for lost tax
23 revenues, on top of the private damages incurred by the market participants, any time
24 anticompetitive effects occurred in its jurisdiction. The threat of such liability will have the
25 effect of over-detering, inducing entities to minimize risk by curtailing otherwise pro-
26 competitive behavior. Accordingly, this Court should dismiss as a matter of law any Section 4
27 claims to the extent they are based on lost tax revenues. The United States takes no position on
28 whether Plaintiff’s other allegations of harm are cognizable injuries under the antitrust laws, nor

1 does it take any position on the merits of any theory of harm for which Plaintiff may have
2 suffered a cognizable injury.

3 **I. Tax Revenue Losses Are Not “Business or Property” as Required by Section 4**

4 Any party injured in its “business or property” by an antitrust law violation may
5 recover damages under Section 4. 15 U.S.C. § 15(a). The Supreme Court characterized
6 injury to “business or property” under Section 4 as injury to “commercial interests or
7 enterprises.” *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972). In *Hawaii*,
8 the state sought antitrust damages for excessive prices it paid for petroleum product the
9 state had purchased from the defendants, but also for general harm to the state’s
10 economy. *Id.* at 255. The Court noted that injury to the state’s general economy was
11 inevitably duplicative of the injury to business and property of its citizens. Thus, the
12 Court looked for “a clear expression of a congressional purpose” to provide for such
13 excessive recovery, but found none. *Id.* at 265. The Court analogized to Section 4A,
14 which authorizes antitrust damages suits by the United States. It held that Section 4A
15 limits recovery to “those injuries suffered in [the United States’] capacity as a consumer
16 of goods and services,” that is, injury to its “business or property.” *Id.* The Court went
17 on to reason that “the conclusion is nearly inescapable that Section 4, which uses
18 identical language, does not authorize recovery for economic injury to the sovereign
19 interests of a State,” but only for injury to its “commercial interests” as a direct
20 participant in the market. *Id.* at 264-65; *see also Reiter v. Sonotone Corp.*, 442 U.S. 330,
21 341-42 (1979) (*Hawaii* holds “injury to a state’s total economy...was not cognizable
22 under Section 4” because it was not harm to its “commercial interests,” that is, not harm
23 to Hawaii “as a party to a commercial transaction”).²

24 _____
25 ² Oakland observes that *Hawaii* plaintiffs sought recovery under a *parens patriae* claim, whereas
26 Oakland brings the case on behalf of itself. Pl. Opp., at 10. The Court was very clear, however,
27 that “[t]he question in this case is not whether Hawaii may [sue] on behalf of its citizens, but
28 rather whether the injury for which it seeks to recover is compensable under [Section] 4....”
Hawaii, 405 U.S. at 259. Finding that governments cannot recover for economic injuries to their
sovereign interests, the Court classified sovereign interests as outside the scope of “business or
property.” *Id.* at 265.

1 Like injury to a state’s “general economy,” lost tax revenue is not an injury that a
2 government suffers as a party to a commercial transaction but an injury to its sovereign
3 interests. The Supreme Court explained this distinction in the context of taxation by
4 Indian tribes. “[A] tribe acts as a commercial partner when it agrees to sell the right to
5 the use of its land for mineral production, but the tribe acts as a sovereign when it
6 imposes a tax on economic activities within its jurisdiction.” *Kerr-McGee Corp. v.*
7 *Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985). Because taxation was a sovereign
8 act, the tribe could tax activity on its land without approval of the Interior Secretary. *Id.*;
9 *see also McCulloch v. Maryland*, 17 U.S. 316, 338-39 (1819) (“the right of taxing
10 property...[t]his is the highest attribute of sovereignty, the right to raise revenue....”).
11 The Court should here apply the same distinction: Oakland does not act as a market
12 participant or party to the commercial transaction for purposes of the antitrust laws when
13 it merely taxes transactions that might be affected by alleged anticompetitive conduct.

14 Oakland disagrees, arguing unpersuasively that the Court should follow the dissent in a
15 RICO case involving an alleged scheme to evade taxes, *Hemi Group, LLC v. City of New York,*
16 *LLC*, 559 U.S. 1 (2010). Pl. Opp. at 10. In *Hemi*, the City of New York brought a private action
17 under the RICO statute for the cigarette tax revenue it lost when the defendants allegedly
18 violated the Jenkins Act by selling and mailing cigarettes into the state without filing required
19 reports to identify the sales. According to New York City, the Jenkins Act violation was part of
20 a scheme designed to evade the tax collection, and constituted a RICO conspiracy to commit
21 mail and wire fraud. The question before the Supreme Court was whether New York City could
22 recover the lost cigarette tax revenue in a private action for losses to “business and property”
23 under the RICO statute, 18 U.S.C. § 1964(c).

24 The majority rejected the private cause of action for tax revenue for lack of causation.
25 The failure to file reports was too indirectly related to New York City’s losses. *See* 559 U.S. at
26 8. In so deciding, the majority did not need to reach the question whether tax revenues fell into
27 the definition of “business or property,” recoverable under the RICO statute, 18 U.S.C.
28 § 1964(c). *Id.*

1 The dissent would have found sufficient causation in part because defendants allegedly
2 misrepresented their sales “*in order to*” bring about the tax losses. 559 U.S. at 23 (Breyer, J.,
3 dissenting) (“It knew the loss would occur; it *intended* the loss to occur; one might even say
4 it *desired* the loss to occur.”). Additionally, the dissent pointed out, the tax losses were the kind
5 of harm that the predicate statute—the Jenkins Act—was designed to prevent. *Id.* Given this
6 level of causation, the dissent would have gone on to hold lost tax revenue was injury to
7 “business or property” recoverable in a private right of action under the RICO statute. Here
8 again, though, the dissent relied on the intended reach of the predicate statute. It explained that
9 laws against fraud are consistently interpreted to recognize tax evasion as a type of prohibited
10 behavior, and to recognize the associated tax losses as recoverable in an action for damages. *Id.*
11 at 30-31. The dissent specifically distinguished these types of losses from the antitrust claims in
12 *Hawaii*, discussed above. It explained that, in addition to being more generalized than tax losses,
13 *Hawaii*’s claimed “business or property” losses were merely “derivative” of harms to individual
14 businesses, which are the target of the antitrust laws. *Id.* at 30-31. The tax losses in *Hemi*, on
15 the other hand, were particularized harms suffered by the tax-collecting governments, whose
16 interests were protected by the predicate statute underlying the RICO claim. *Id.*

17 In sum, the *Hemi* dissent’s interpretation of “business or property” as it appears in the
18 RICO statute sheds only minimal light on the meaning of “business or property” in Section 4 of
19 the Clayton Act. To the extent the dicta is persuasive, it actually suggests the opposite
20 conclusion from what Oakland argues here. The Clayton Act’s reference to “business or
21 property” is distinct from the definition under RICO (and its predicate statutes) because the
22 target of the two laws is different. Tax revenues might be “business or property” when the
23 illegal acts target or directly interfere with the business of tax collecting, but under the Clayton
24 Act, “business or property” refers to the fruits of an individual entity’s participation in a market.

25 This conclusion is consistent with *Hawaii* and other precedent cited above, holding that a
26 government can recover under an antitrust theory of harm only when it acted as a market
27 participant, and not when it acted as a sovereign. This Court should therefore hold that Oakland
28 does not have standing to bring an antitrust claim based on the allegation that it will lose tax

1 revenue if the Raiders move to Las Vegas. If the Court reaches this categorical conclusion, it
2 need not reach the issue addressed in the next section: whether the type of tax revenues at issue
3 in this case are sufficiently related to the harm to constitute an antitrust injury.

4
5 **II. Tax Revenue Losses Are Too Remote from Harm to Competition to Satisfy the**
6 **Standing Requirements of Section 4**

7 A Section 4 injury must be caused “by reason of” conduct proscribed by the antitrust
8 laws. 15 U.S.C. § 15. In other words, Section 4 contains a proximate cause requirement.
9 Although an antitrust violation “may be expected to cause ripples of harm to flow through the
10 Nation’s economy,” the Supreme Court has held that not every person “tangentially affected” by
11 an antitrust violation can recover damages. *Blue Shield of Virginia, Inc. v. McCready*, 457 U.S.
12 465, 476-477 (1982). In evaluating whether an alleged injury is too remote or removed, courts
13 apply an antitrust standing framework based on: “(1) ...the physical and economic nexus
14 between the alleged violation and the harm to the plaintiff, and (2), more particularly ... the
15 relationship of the injury alleged with those forms of injury about which Congress was likely to
16 have been concerned in making defendant’s conduct unlawful and in providing a private remedy
17 under § 4.” *Id.* at 478. Oakland’s claim for the tax revenue loss it would allegedly suffer if the
18 Raiders move to Las Vegas satisfies neither test.

19 **A. Tax losses are merely derivative of harm to direct market participants**

20 Following *McCready*, the Court reiterated the need to assess the “directness or
21 indirectness of the asserted injury,” and limit Section 4 recoveries to those injuries directly
22 connected to alleged violations. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council*
23 *of Carpenters* (“AGC”), 459 U.S. 519, 540 (1983). After observing “the chain of causation
24 between the [plaintiff’s] injury and the alleged restraint . . . contains several somewhat vaguely
25 defined links,” the AGC Court considered it “obvious that any such injuries were only an indirect
26 result of whatever harm may have been suffered by [direct market participants].” *Id.* at 540-41.

27 Oakland’s lost tax revenues are derivative and indirect by the very nature of taxation –
28 the taxed entity, not the taxing entity, is the direct victim of any competitive harm. Oakland

1 contemplates taxation of everything from ticket sales to concessionaire sales to hotel bookings
 2 and any other taxable commerce stimulated by the presence of the Raiders. Compl. ¶ 96. Each
 3 of these taxed enterprises is a more direct plaintiff to state a claim for competitive injury. The
 4 existence of such a class of more direct victims “diminishes the justification for allowing a more
 5 remote party...” to seek relief under Section 4. *AGC*, 459 U.S. at 542.

6 **B. Tax losses are not an injury of the type likely caused by competitive harm**

7
 8 *McCready* further limits recoverable injuries to those associated with competitive harm,
 9 as previously articulated by the *Brunswick* Court: “Plaintiffs must prove antitrust injury, which is
 10 to say injury of the type the antitrust laws were intended to prevent and that flows from that
 11 which makes defendants’ acts unlawful.... It should, in short, be ‘the type of loss that the
 12 claimed violations . . . would be likely to cause.’” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,
 13 429 U.S. 477, 489 (1977) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100,
 14 125 (1969)). “The antitrust laws were enacted for ‘the protection of *competition*, not
 15 *competitors*.” *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990), citing *Brown*
 16 *Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). As a general matter, it is not at all clear
 17 whether tax revenue would usually increase or usually decrease as competitive harm increased
 18 within a sovereign’s jurisdiction. For instance, the sovereign could tax supra-competitive profits
 19 earned by per se illegal price-fixing. Indeed, Oakland’s tax revenues to date may have been
 20 inflated by limitations on competition in the professional football market. Lost tax revenue is
 21 therefore not the type of injury that is likely to flow from competitive harm. *Cf. AGC*, 459 U.S.
 22 at 539 (reasoning the plaintiff was improper in part because “[i]t is not clear whether the Union’s
 23 interests would be served or disserved by enhanced competition in the market”).

24 **III. Allowing Governmental Entities to Recover Treble Lost Tax Revenues Could**
 25 **Create an Over-deterring, Anticompetitive Effect**

26 The automatic treble damages provision of Section 4 is an uncommonly powerful tool,
 27 serving both to incent private enforcement and to deter wrongdoers. Wielded indiscriminately,
 28 however, it can impose more harm than good: “Given the potential scope of antitrust violations

1 and the availability of treble damages, an over-broad reading of § 4 could result in
2 ‘overdeterrence,’ imposing ruinous costs on antitrust defendants, severely burdening the judicial
3 system and possibly chilling economically efficient competitive behavior.” *Greater Rockford*
4 *Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 394 (7th Cir. 1993). Section 4’s rigorous
5 standing requirements are intended to mitigate this risk: “[B]y restricting the availability of
6 private antitrust actions to certain parties, we ensure that suits inapposite to the goals of the
7 antitrust laws are not litigated and that persons operating in the market do not restrict
8 procompetitive behavior because of a fear of antitrust liability.” *Todorov v. DCH Healthcare*
9 *Auth.*, 921 F.2d 1438, 1449 (11th Cir. 1991).

10 Oakland’s claim for lost tax revenues poses the very threat contemplated by these courts.
11 If upheld, local governments could bring substantial Section 4 claims anytime anticompetitive
12 conduct was found to reduce economic activity in their jurisdictions. Even if tax revenue losses
13 were limited to instances where governmental entities were *also* a direct commercial victim of
14 competitive harm, allowing recovery for lost tax revenues would greatly exceed the amount
15 awarded to an equivalent, non-governmental party, even though the harm *to competition* would
16 be the same in both cases.

17 * * *

18 Lost tax revenue is not a cognizable injury under Section 4 because it is not an injury to
19 the City’s “business or property,” but rather to its sovereign interests. Additionally, the lost tax
20 revenue would be too remote and disconnected from the alleged anticompetitive conduct to
21 support recovery. Accordingly, Oakland’s claims for lost tax revenues should not be the basis
22 for the Court to find that the City has standing to pursue antitrust claims against the Raiders or
23 the NFL in this case.

24 Respectfully submitted,
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Dated: July 12, 2019

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