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Ticket to an Antitrust Violation? Why the NFL and DirecTV's Exclusive Distributorship Agreement for Sunday Ticket May Violate Antitrust Laws, and How the U.S. District Court for the Central District of California May Have Gotten It Wrong

Haig Siranosian

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INTRODUCTION

Do you live outside of your hometown but still desire to watch your hometown's NFL team every week? Do you want to watch players from other teams for fantasy football purposes, watch your favorite team from another city, or simply want to watch every game available? Unless you are willing to pay for an expensive annual subscription to watch NFL Sunday Ticket, DirecTV's anticompetitive exclusive agreement for the live broadcast of out-of-market games could prohibit you from doing so.[1]

The NFL is the premier provider of professional football in the United States, with an average of 16.5 million viewers per week during the regular season in 2016.[2] Beginning in 1994, the NFL and DirecTV entered into an agreement whereby DirecTV became the exclusive provider of broadcasts of out-of-market NFL games via its Sunday Ticket package.[3] From 1994, when the initial exclusive agreement was made, to 2015, each NFL team was independently incorporated, owned, and operated.[4] This changed in 2015 when the NFL decided to "[incorporate] as the National Football League, Inc., with its headquarters in New York, New York," and

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* Haig Siranosian, J.D. Candidate, U.C. Hastings. I would like to thank Professor Sam Miller for his encouragement and assistance with this topic.

1. *Sunday Ticket Only on DirectTV*, DIRECTTV (Jan. 5, 2017), http://www.espn.com/nfl/story/_/id/18412873/nfl-tv-viewership-drops-average-8-percent-season [perma.cc/AN5V-ZVSS].

2. Darren Rovell, *NFL TV Viewership Dropped an Average of 8 Percent this Season*, ESPN (Jan. 5, 2017), http://www.espn.com/nfl/story/_/id/18412873/nfl-tv-viewership-drops-average-8-percent-season [perma.cc/3FRZ-69C3].

3. In re Nat'l Football League Sunday Ticket Antitrust Litig., No. ML 15-02668-BRO(JEMX) 2017 WL 3084276, at *3 (C.D. Cal. June 30, 2017).

4. *Id*. at *2.

simultaneously created NFL Enterprises, LLC "to hold the broadcast rights of the thirty-two NFL teams and to license them to various Multichannel Video Programming Distributors (MVPDs)."[5] Today, the thirty-two NFL teams grant the NFL the right to negotiate pooled television rights on their behalf.[6] The NFL contracts with five networks, CBS, FOX, NBC, ESPN, and NFL Network, to provide a limited number of live broadcasts every Sunday, Monday night, and Thursday Night.[7] The only way to watch games that are not broadcasted on one of the five networks, (e.g. out-of-market games), is to purchase DirecTV's Sunday Ticket package.[8]

The United States District Court for the Central District of California recently heard a challenge to DirecTV's exclusive distributorship agreement with the NFL.[9] A class of individuals and business owners who had purchased DirecTV's package sued the NFL and DirecTV alleging that the exclusive agreement between DirecTV and the NFL was anticompetitive and violated the Sherman Antitrust Act.[10] The Plaintiffs further alleged that Sunday Ticket resulted in consumers paying supra-competitive prices for out-of-market games and that the NFL Defendants have entered into an illegal horizontal agreement, e.g., an agreement between competitors, that restricted supply.[11] Additionally, they argued that but for the horizontal agreement between the NFL Defendants, teams would "create [their] own broadcasts," and compete with each other in the marketplace, thereby promoting competition and reducing prices for consumers.[12] Thus, the Plaintiffs pleaded two causes of action: 1) a restraint on competition in violation of Section 1 of the Sherman Antitrust Act, and 2) monopolization of "the live video presentation of regular season NFL games," in violation of Section 2 of the Sherman Antitrust Act.[13] Rather than allowing proceedings to continue and potentially ending DirecTV's anticompetitive monopoly, the court granted the defendants' motions to dismiss both the Section 1 and Section 2 claims.[14]

This Note addresses and rebuts the court's decision regarding two issues which the court answered in the negative: 1) whether the vertical agreement between DirecTV and the NFL Defendants and the horizontal

5. *Id.*
6. *Id.* at *3.
7. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276 at *3.
8. *Id.*
9. *Id.* at *1.
10. *Id.*
11. *Id.* at *3.
12. *Id.*
13. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276 at *4.
14. *Id.* at *18.

agreement among the NFL defendants were anticompetitive and violated Section1 of the Sherman Antitrust Act; and 2) whether the Defendants have created an unlawful monopoly in violation of Section 2 of the Sherman Antitrust Act.

Parts I and II below address issues one and two presented above respectively. Each part begins with a review of the relevant statutes and legal standards for determining whether a Sherman Antitrust Act violation exists. Each sub-part then reviews in detail relevant case law and provides an analysis which attempts to show that the court's judgment was incorrect, and that in fact an antitrust violation may exist. This Note advances the following reasons for why the court may have erred in granting the motion to dismiss: first, in dismissing the Plaintiffs' Section 1 claim, the court relied on inapposite case law to determine that the vertical agreement does not restrict output; relied on inapposite case law and failed to consider important factors in determining that the vertical agreement does not artificially inflate prices; relied on inapposite case law and disregarded relevant case law that the Plaintiffs cited in determining that the horizontal agreement between the NFL Defendants was not anticompetitive; incorrectly held that the NFL Defendants have not restrained trade within the relevant market; and incorrectly held that the exclusive distributorship here was lawful. Second, in reliance on its determination that Plaintiffs failed to allege facts sufficient to survive a motion to dismiss the Plaintiffs' Section 1 claim, the District Court for the Central District of California erroneously dismissed Plaintiffs' Section 2 claim as well.

I. THE SECTION 1 CLAIM – RESTRAINT OF TRADE OR COMMERCE

Section 1 of the Sherman Antitrust Act states that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal," and every person who engages in such illegal activity is guilty of a felony.[15] Section 4 of the Clayton Act allows private civil actions to be brought by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[16] However, not every agreement that restrains competition violates the Sherman Act; rather, to be unlawful, the agreement must unreasonably restrain competition.[17] The unreasonableness of the agreement is analyzed

15. 15 U.S.C. §1 (2018).

16. 15 U.S.C. §15(a) (2018).

17. Kingray, Inc. v. NBA, Inc., 188 F.Supp. 2d 1177, 1187 (S.D. Cal. 2002) (citing McDaniel v. Appraisal Inst., 117 F.3d 421, 422 (9th Cir. 1997)).

under either a per se rule of illegality or a rule of reason analysis.[18]

Per se violations restrict competition on their face and require no further analysis.[19] The rule of reason analysis requires the plaintiff to establish (1) an agreement or conspiracy between two or more persons or entities; (2) through which the persons or entities intend to harm or restrain competition; and, (3) that actually does restrain competition.[20] The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.[21] Additionally, [p]roving injury to competition ordinarily requires the claimant to prove the relevant geographic and product markets and to demonstrate the effects of the restraint within those markets.[22] Since horizontal agreements between sports teams and vertical agreements are not anticompetitive on their face, the court properly applied the rule of reason analysis.[23]

In addition to satisfying the requirements for a Section 1 claim outlined above, a plaintiff must adhere to the applicable pleading standards. Federal Rules of Civil Procedure 8(a) (FRCP 8(a)) provides that a complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief.[24] Failure to satisfy FRCP 8(a)'s evidentiary standard may lead to the opposing party filing a motion to dismiss under FRCP 12(b)(6).[25] Therefore, to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'[26] To be plausible on its face, a plaintiff must "plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[27] However, as detailed below, after applying the rule of reason, the District Court for the Central District of California ("Central District of California") improperly held that Plaintiffs failed to allege facts sufficient to survive the Defendants' motion to dismiss.

A. THE VERTICAL AGREEMENT – MARKET FORECLOSURE AND LACK OF COMPETITIVE PRODUCTS

18. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ.of Okla., 468 U.S. 85, 100 (1984).
19. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276 at *6.
20. L.A. Mem'l Coliseum Commc'n v. Nat'l Football League, 726 F.2d 1381, 1391 (9th Cir. 1984).
21. Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
22. Thurman Indus. Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1373 (9th Cir. 1989).
23. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276 at *8.
24. FED. R. CIV. P. 8(a).
25. FED. R. CIV. P. 12(b)(6).
26. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).
27. *Id.*

Vertical agreements are those which are entered in to among different levels of the supply chain, for example between a manufacturer and a distributor. Exclusive distributorship arrangements are presumptively legal.[28] Under the antitrust "rule of reason," an exclusive dealing arrangement violates Section 1 only if its effect is to foreclose competition in a substantial share of the line of commerce affected.[29] Therefore, foreclosure in excess of forty percent creates a presumption of anticompetitive behavior and can serve as the asserted basis for an antitrust violation.[30] Further, the plaintiff must prove that the exclusive arrangement is likely to keep at least one significant competitor of the defendant from doing business in a relevant market.[31]

The Central District of California relied on the United States Court of Appeals for the Ninth Circuit's holding in *Rutman* that an agreement between a manufacturer and a distributor to establish an exclusive distributorship is not, standing alone, a violation of antitrust laws."[32] However, the Central District of California failed to further explore *Rutman* or analogize *Rutman*'s facts to the facts before it regarding DirecTV and the NFL. In *Rutman*, the Ninth Circuit affirmed the lower court's dismissal of the plaintiff wine distributor's antitrust claims against the defendant.[33] Rutman argued that Gallo terminated its distributorship agreement as part of a conspiracy or combination with Wine Distributors, Inc. (WDI) to restrain trade."[34] The plaintiff also alleged that because it is the exclusive dealer of two of Gallo's chief competitors, the injury to its own ability to compete in turn harms the public by substantially reducing or eliminating competition in the sale of wine in the relevant market.[35] The Ninth Circuit noted that while appellant clearly pleads injury to itself, its conclusion that competition has been harmed thereby does not follow.[36]

Gallo's termination of its agreement with Rutman and subsequent agreement with WDI did not foreclose competition in a substantial share of

28. Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods Inc., 129 F.3d 240, 245 (2d Cir. 1997).

29. Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP, 592 F.3d 991, 996 (9th Cir. 2010) (quoting Omega Envtl, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997)).

30. Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 ANTITRUST L.J. 311 (2002).

31. Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 394 (7th Cir. 1984).

32. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276, at *9 (quoting Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987)).

33. *Rutman*, 829 F.2d at 738.

34. *Id*. at 734.

35. *Id*. at 734.

36. *Id.*

the line of commerce.[37] Rutman itself admitted that it also distributed wines produced by two of Gallo's biggest competitors.[38] Consequently, Rutman was still active in the affected market as Gallo was not the only wine producer in the country.

However, the NFL's exclusive distributorship with DirecTV does foreclose competition in the relevant market. The Central District of California properly defined the "relevant market" here as the live broadcast of professional football games.[39] Unlike the wine industry, the NFL faces no competition as it is the only professional football league in the United States and its teams have entered in to a horizontal agreement not to compete with respect to the live broadcast of games. Sunday Ticket accounts for ten of the sixteen games played per week. The remaining six are aired on Fox, CBS, ESPN, and NFL Network.[40] Accordingly, Sunday Ticket makes up 62.5% of the market for live broadcasts of professional football games during the regular season, far greater than the generally accepted forty percent threshold requirement. As a result, the exclusive distributorship forecloses competition in a substantial share of the relevant market.[41]

It is true that when a manufacturer and distributor so agree to establish an exclusive distributorship, the termination of other distributors may necessarily result.[42] Additionally, an exclusive distributorship agreement between a manufacturer and a distributor is not, *standing alone*, a violation of antitrust laws.[43] However, foreclosing a substantial portion of the market is not Sunday Ticket's only anticompetitive effect. The Supreme Court held that a manufacturer of a product that is readily available in the market from other equivalent manufacturers may select his exclusive distributor, and if nothing more is involved and if competitive products are readily available to others, this restriction, is not a per se violation of the Sherman Act.[44]

Here, several of the factors mentioned in *Schwinn* are not met. First, the only "other and equivalent brands" available are competing teams.[45] However, the NFL teams' horizontal agreements not to compete with each

37. Allied Orthopedic, 592 F.3d at 996 (quoting Omega Environmental, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997)).

38. *Rutman*, 829 F.2d at 734.

39. In re NFL Antitrust Litigation, 2017 WL 3084276 at *17.

40. *Id*. at *3.

41. Allied Orthopedic, 592 F.3d at 996 (quoting Omega Environmental, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997).

42. *Rutman*, 829 F.2d at 735.

43. *Id*. at 735 (emphasis added).

44. United States v. Arnold, Schwinn & Co., 338 U.S. 365, 376 (1967).

45. *Id*. at 365.

other for broadcasts, eliminated alternative brands from the market. Second, there are also no "competitive products readily available" to other distributors.[46] Other sports, such as basketball, baseball, or soccer, are not competitive products. As the Central District of California noted, multiple courts have recognized that a market may be limited to one professional sport, because professional sports attract a unique and specific audience.[47] Thus, by virtue of the NFL teams' horizontal agreement and the recognition that other sports are not competitive products, there are no readily available competitive products.

Proponents of the Central District of California's decision may contest the argument in the preceding paragraph on the grounds that it suggests that sports organizations may never enter in to exclusive distributorship agreements. That is not the intent of the preceding argument. In this specific instance, there are additional factors that make the agreement between DirecTV and the NFL illegal as it is not "an exclusive distributorship . . . standing alone."[48] Courts will consider the length of an exclusive distributorship when determining if the agreement is anticompetitive.[49] One factor is contractual length, as Exclusive dealing contracts are lawful if limited to one year.[50] For example, General Motors, Ford, and Chrysler invite tire manufacturers to bid for exclusive rights to have their tires used in the manufacturer's cars.[51] Further, the longer the exclusive agreement is, the more anticompetitive it tends to be. As opposed to the agreements in *Motion Pictures* and those between auto manufacturers and tire manufacturers, DirecTV's contract for Sunday Ticket spans eight years.[52] By the time the current deal expires in 2022, DirecTV will have been the exclusive distributor of Sunday Ticket for twenty-eight consecutive years.[53]

In addition to the length of the agreement, the exclusive distributorship also eliminates interbrand and intrabrand competition. The effect on intrabrand competition is not relevant if there is intense interbrand competition, and the barriers to entry into the market are low.[54] Here, there

46. *Id.*

47. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276, at *17.

48. *Rutman*, 829 F.2d at 735.

49. Paddock Publ'ns v. Chi. Tribune Co., 103 F.3d 42, 47 (7th Cir. 1996).

50. *Id.*; *see* FTC v. Motion Pictures Advertising Service Co., 344 U.S. 392, 395–96 (1953).

51. *Paddock*,103 F.3d at 45.

52.Darren Rovell, *NFL, DirecTV extend deal for 8 years*, ESPN (Oct. 1, 2014), http://www.espn.com/nfl/story/_/id/11624442/nfl-extends-sunday-ticket-deal-directv [perma.cc/SYC7-88H6].

53. *Id.*

54. Murphy v. Business Cards Tomorrow, Inc., 854 F.2d 1202, 1205 (9th Cir. 1988) (citation omitted).

is no intense interbrand competition for two reasons: first, the NFL is the only professional football league in the relevant market, and second, interbrand competition between the teams was eliminated when they agreed not to compete against each other for broadcasts out of their respective markets. Consequently, the effect on intrabrand competition is relevant. The combination of foreclosure of competition to a substantial portion of the relevant market, the lack of interbrand competition, and the duration of the contract has a negative effect on intrabrand competition between potential distributors because there is little or no opportunity for them to compete in the relevant market. Further, the barriers to entry into the relevant market here are high. Several attempts to compete with the NFL have been made in the past, and almost all have failed.[55] Arguably, the only remaining competitor to the NFL is the Arena Football League, which produces an altogether different product.

The aforementioned arguments show that the exclusive arrangement is likely to keep at least one significant competitor of the defendant from doing business in the market.[56] None of DirecTV's competitors such as Xfinity, Comcast, Spectrum, Dish Network, or others compete for the live broadcast of professional football games due to the foreclosure of competition, the length of the agreement, and the lack of alternative brands. At the very least, sufficient facts exist to survive a motion to dismiss regarding a claim of an anticompetitive exclusive distributorship between the NFL Defendants and DirecTV.

B. THE VERTICAL AGREEMENT–DEFINITION AND RESTRICTION OF OUTPUT

The Central District of California improperly relied on *Board of Regents of University of Oklahoma* to define "output."[57] In rejecting the Plaintiffs' definition of output as "the number of broadcasts of Sunday afternoon NFL games," the Central District of California found the Supreme Court's decision in *Board of Regents of University of Oklahoma* instructive.[58] There, the NCAA implemented a television broadcasting plan in order to protect attendance of NCAA football games, and licensed the right to broadcast games to ABC and CBS.[59] The plan limited the total number of games that were broadcast and limited the number of games that

55. ESPN Research, *Other football leagues of the past*, ESPN (Dec. 12, 2008), http://www.espn.com/extra/afl/news/story?id=3764806 [perma.cc/3ZBX-JH7R].

56. *Roland Machinery Co.*, 749 F.2d at 394.

57. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

58. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276 at *10.

59. *Id*. (citing *Bd. of Regents of Univ. of Okla*., 468 U.S. at 91–94 (1984)).

any team could appear in in a season.[60] In response, the College Football Association (CFA) entered in to its own agreement with NBC to televise additional games and increase revenues for the schools it sought to protect.[61] The NCAA counteracted the CFA's agreement by threatening to sanction any team that joined the CFA-NBC agreement.[62] The Supreme Court held that the NCAA's agreement was anticompetitive because it prevented games from being broadcast at all, and therefore decreased output.[63]

While the definition of output and whether it was restricted in *Board of Regents of University of Oklahoma* was correct in the context of that case, there are important factors that, when considered together, distinguish the agreement between DirecTV and the NFL. As with the NFL in the current agreement, in *Board of Regents of University of Oklahoma* (*Board of Regents*) the NCAA licensed the right to broadcast games to multiple networks.[64] However, unlike the agreement for Sunday Ticket, the networks were not required to provide their broadcasts to a single provider due to a vertical agreement between the NCAA and a cable or satellite TV provider, such as DirecTV. Thus, there was competition between networks for the right to broadcast games, competition between providers to enter in to agreements with networks for the broadcasts, and competition between providers for subscribers. The restriction on output was the fact that the NCAA limited the number of games that could be broadcast.[65] In the current scenario with Sunday Ticket, there is competition between networks for broadcasting rights, but beyond that competition is eliminated by the vertical agreement. It is true that there is competition when the contract between the NFL and DirecTV is up for renewal, but as noted above in Part I(A), several factors make this exclusive distributorship illegal and DirecTV has been the provider for the last twenty-four years. Therefore, the only way to watch out-of-market NFL games is to subscribe to DirecTV's Sunday Ticket package. Instead of allowing anyone to purchase the package regardless of their cable or satellite provider as the NCAA did, users must subscribe to DirecTV.

Nonetheless, the Central District of California held that the agreement between the NFL and DirecTV does not restrict output because it does not limit the number of games that can be broadcast.[66] Concededly, it is a

60. *Id*. (citing *Bd. of Regents of Univ. of Okla*., 468 U.S. at 106–07 (1984)).
61. *Id*. (citing *Bd. of Regents of Univ. of Okla*., 468 U.S. at 94–95 (1984)).
62. *Id*. (citing *Bd. of Regents of Univ. of Okla*., 468 U.S. at 94–95 (1984)).
63. *Bd. of Regents of Okla*., 468 U.S. at 106–07.
64. *Id*. at 92.
65. *Bd. of Regents of Okla*., 468 U.S. at 105–07.
66. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276, at *11.

stretch to say that DirecTV is the only provider independently restricting output. As the Central District of California correctly noted, prior to 1994, when the NFL and DirecTV entered in to their first agreement to provide Sunday Ticket, out-of-market games were generally unavailable on TV.[67] Additionally, in theory, a single broadcast could reach more viewers than multiple broadcasts.

However, that is not the case here. In *Board of Regents*, the Supreme Court held one of the anticompetitive effects of the NCAA's policy was that output was lower than it *would otherwise be*.[68] Thus, in its rationale for no anticompetitive behavior Central District of California focused that prior to Sunday Ticket's initial broadcast in 1994, viewers only had access to no more than three NFL Sunday afternoon games broadcast in any given market, but through Sunday Ticket, viewers can access as many as thirteen games.[69] But this reasoning ignores that the agreement between the NFL and DirecTV still restricts output today, and not relative to what the output was prior to the 1994 agreement.

DirecTV was founded in 1990,[70] just four years before their initial agreement with the NFL. Satellite television was still new and innovative at that time, and therefore there was less competition. Fast-forward twenty-three years and the landscape is very different: DirecTV, Dish Network, Comcast, Spectrum, Xfinity, AT&T U-Verse, Verizon FiOS and others constantly compete for subscribers. In addition, there are a variety of online streaming services offering live television broadcasts.

As opposed to 1994, a multitude of providers can broadcast out-of-market NFL games if the exclusive distributorship were broken. Making Sunday Ticket nonexclusive would grant millions of additional viewers the opportunity to watch out-of-market games and would promote inter-provider competition. For example, an average of 16.5 million viewers watched regular season NFL games every week in 2016.[71] Yet only about two million of those viewers were able to watch out-of-market games via Sunday Ticket.[72] Assuming those figures are accurate, about 14.5 million people who watched the NFL every week could only watch nationally broadcast games. Even if only fifty percent of those people would also

67. *Id.*

68. *Bd. of Regents of Okla.*, 468 U.S. at 107.

69. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276 at *11.

70. *The Evolution of DIRECTV into The Best Satellite TV Provider*, http://www.att-services.net/directv/directv-history.html [perma.cc/Y6LY-HCDZ].

71. Rovell, *supra* note 2.

72. Lisa Richwine, *DirecTV keeps NFL Sunday Ticket in $1.5 Billion a Year Deal*, REUTERS (Oct. 1, 2014), http://www.reuters.com/article/us-directv-nfl/directv-keeps-nfl-sunday-ticket-in-1-5-billion-a-year-deal-idUSKCN0HQ54U20141001 [perma.cc/NS6K-E5CF].

subscribe to Sunday Ticket, but for the super competitive prices charged by DirecTV due to its exclusive distributorship agreement, around 7.25 million viewers more per week for out-of-market games. Therefore, in practice, the DirecTV and the NFL agreement does restrict output.

The Central District of California also relied on *Kingray, Inc. v. National Basketball Association, Inc.*, where the court found that the plaintiffs failed to allege sufficient facts to show that "NBA League Pass" restricted output.[73] In *Kingray*, a class of plaintiffs sued the National Basketball Association (NBA) and DirecTV alleging that their NBA League Pass package violated antitrust laws.[74] NBA League Pass is the NBA's equivalent of Sunday Ticket and is the exclusive means to license out-of-market games for satellite viewing.[75] In August of 1999, DirecTV became the exclusive distributor of the package.[76] Then, in 2000, the NBA contracted with iNDemand to provide the NBA League Pass to residential cable subscribers on a pay-per-view basis.[77] The court held that because prior to 1994-95, when NBA League Pass was first offered, out-of-market games were completely unavailable, NBA League Pass increased rather than decreased output.[78] From this factual similarity, *Kingray* is arguably on point to the *In re NFL Antitrust Litigation*.

However, there is a crucial distinguishing fact between the Plaintiffs' case against the NFL and DirecTV from *Kingray*. When *Kingray* was decided, NBA League Pass was available on a non-exclusive basis through both DirecTV and iN Demand.[79] iN Demand, in turn, is available on a pay-per-view basis through Comcast, Charter, Cox, Cable One, FiOS, and several other digital cable providers.[80] Today, in addition to DirecTV and iN Demand, NBA League Pass is also available through Frontier Communications, Dish Network, and AT&T U-verse.[81] Even though each NBA team allowed the NBA to negotiate broadcasting rights on their behalf just as the NFL teams have done, there is still competition between

73. Kingray, Inc. v. NBA, Inc., 188 F. Supp. 2d 1177, 1196 (S.D. Cal. 2002).

74. *Id*. at 1183.

75. *Id*. at 1184.

76. *Id.*

77. *Id.*

78. Kingray Inc. v. NBA Inc., 188 F. Supp. 2d 1177, 1195 (S.D. Cal. 2002).

79. *Id.* at 1184.

80. *Who We Are*, INDEMAND http://www.indemand.com/who-we-are/ [perma.cc/MRQ5-A74U?type=image].

81. *See NBA Superfans Deserve More*, FRONTIER COMMUNICATIONS, https://frontier.com/nba-league-pass [perma.cc/QUT4-KE3L]; *All the Best Basketball*, MYDISH, https://www.mydish.com/pay-per-view/sports-and-events/basketball[perma.cc/WM2Z-GHKH]; *NBA League Pass activation on U-verse TV*, ATT, https://www.att.com/esupport/article.html#!/u-verse-tv/KM1009830 [perma.cc/6RK5-VNFD].

providers for the contract with the NBA, and a second level of competition between providers for subscribers.[82] Pertinent to the issue of output, the non-exclusive nature of NBA League Pass lessens the likelihood of a situation similar to the one NFL fans face, where restricted output leads to only two million viewers watching out-of-market games via Sunday Ticket,[83] when an average of 16.5 million viewers per week watch NFL games during the regular season.[84] The nonexclusivity of NBA League Pass means anyone who subscribes to any of the cable or satellite providers previously mentioned, which account for nearly the entire pay TV market,[85] has access to the package. Making Sunday Ticket nonexclusive would afford NFL fans the same opportunity. Had *In re NFL Antitrust Litigation* proceeded to discovery, it may have revealed that a portion of those 16.5 million viewers would subscribe to Sunday Ticket if they were not forced to switch cable providers and pay super competitive prices, thereby increasing overall output.

C. THE VERTICAL AGREEMENT–ARTIFICIALLY INFLATED PRICES WHICH HARM COMPETITION

Individuals who desire to watch out-of-market live broadcasts of football games must pay $359 for a full season of Sunday Ticket MAX.[86] A regular full-season package cost $269.94.[87] In 2015, commercial subscribers paid between $1,458 to more than $120,000 per season.[88] These prices are artificially inflated and harm competition.

Mere allegations that an agreement reduces consumers' choices or increased prices does not sufficiently allege an injury to competition. Both effects are fully consistent with a free and competitive market.[89] Additionally, the fact that DirecTV could be charging inflated prices for Sunday Ticket *does not, on its own,* constitute harm to competition.[90] Relying on these two statements, the Central District of California quickly addressed and disregarded the Plaintiffs' claim that the vertical agreement

82. *Kingray*, 188 F.Supp. 2d at 1183.
83. *Rovell*, *supra* note 53.
84. *Rovell*, *supra* note 2.
85. Trefis Team, *Where Do Comcast and Dish Stand in the Pay TV Market*, FORBES (Aug. 22, 2016), https://www.forbes.com/sites/greatspeculations/2016/08/22/where-do-comcast-and-dish-stand-in-the-pay-tv-market/#32ae347ea213 [perma.cc/9MFF-WL86].
86. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276 at *3.
87. *NFL Sunday Ticket*, http://www.nfl.com/nflsundayticket [perma.cc/72B7-FPKB].
88. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276 at *3.
89. *Id*. at *12 (quoting Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1202 (9th Cir. 2012)).
90. *Id*.

artificially inflates prices.[91]

The Central District of California's reliance on *Brantley* is misguided. In *Brantley*, the Ninth Circuit affirmed the defendant programmers' motion to dismiss a Section 1 antitrust claim brought by Plaintiffs, a class of retail cable subscribers'.[92] Plaintiffs alleged that the defendants used their market power to force distributors to buy undesired channels as a condition to buying "must have" channels.[93] As a result, there was reduced choice and increased price that injured competition.[94] The Ninth Circuit held that reduction in choice or increase in price does not equate to injury to competition because both of those results are consistent with a free market.[95] In reaching this conclusion, the Ninth Circuit stated Plaintiffs failed to allege the contracts between Programmers and Distributors forced either Distributors or consumers to forego the purchase of other low-demand channels, and only asserted consumers could not purchase programs a la carte."[96]

Brantley is inapposite for two reasons. First, similar to the argument against the Central District of California's reliance on *Board of Regents of Oklahoma* and *Kingray*, in *Brantley* there were multiple distributors competing for each programmer's bundle of channels. If one distributor chose to raise prices to supra-competitive levels, consumers had several other distributors to turn to for what the consumer considered was a fair price. The Central District of California also overlooked an important fact—the agreements in *Brantley* were not exclusive distributorships. Neither NBC nor any of the other programmer defendants, entered into exclusive agreements with distributors. Each programmer could contract with multiple distributors. Due to DirecTV's anticompetitive exclusive distributorship agreement with the NFL, DirecTV is the only distributor of "Sunday Ticket." Consumers can only choose between subscribing to DirecTV and paying the supra-competitive price, or not having access to out-of-market live broadcasts of games. Due to the NFL's popularity, DirecTV can exploit its position as the exclusive distributor. Absent the factors described in section I(A) above, this would be a legal exercise of their monopoly position. However, due to the foreclosure to competition, the restriction on output, the lack of alternative brands, and the elimination of interbrand and intrabrand competition, there is harm to competition and DirecTV's artificially inflated prices harm the plaintiffs as a result.

91. *Id.*
92. Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1204 (9th Cir. 2012).
93. *Id*. at 1195.
94. *Id*. at 1202.
95. *Id.*
96. *Id*. at 1203.

Second, the Ninth Circuit noted that Plaintiffs did not have to forego the purchase of other low-demand channels, as a result of the contracts between the programmers and distributors, so there was no injury to competition.[97] The plaintiffs in *Brantley*, then, could purchase channels from various distributors if they wanted to. The plaintiffs in *In re NFL Antitrust Litigation* did not have the same luxury as the plaintiffs in *Brantley*. Because of the anticompetitive exclusive distributorship and the NFL defendants' horizontal agreement not to compete, consumers only have one source for out-of-market broadcasts. Thus, instead of having other options, such as only certain teams' games or alternate distributors, as they would in a competitive environment, Plaintiffs are forced to pay supra-competitive prices for "Sunday Ticket."

Aside from *Brantley* being inapposite, additional facts also support the theory that DirecTV has artificially inflated prices and harmed competition. For example, compared to the $269.94 and $359 charged per year in the United States for a regular-season or MAX package for individuals respectively, individual subscribers in Canada only have to pay $15.66 USD per month, or about $188 per year, to stream Sunday Ticket through DAZN.[98] The monthly price for streaming via DAZN also includes access to other sports and European soccer matches.[99] Prior to the shift to online streaming for the 2017-2018 season,[100] customers in Canada paid approximately $27 USD per month for access to Sunday Ticket plus access to all live games of other major sports leagues.[101] Due to public dissatisfaction with DAZN's service, DAZN has deals with Canadian cable and satellite providers to redistribute Sunday Ticket .[102] Whether Sunday Ticket is purchased on a nonexclusive basis via DAZN or a cable or satellite provider, Canadian customers pay less for both Sunday Ticket and other live games combined than customers in the U.S. pay for the former.

Moreover, in 2002, the NFL declined iNDemand's offer of $400 to $500 million per season for the non-exclusive right to Sunday Ticket.[103] In

97. Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1203 (9th Cir. 2012).

98. John Kryk, *Canadians Getting Return of Sunday Ticket NFL packages on Cable*, TORONTO SUN (Oc.7, 2017), http://www.torontosun.com/2017/10/07/canadians-getting-return-of-sunday-ticket-nfl-packages-on-cable/wcm/b125aeb4-d079-4c56-8fa7-bd65884b0d8e [perma.cc/XX28-ACTP].

99. Kryk, *supra* note 98.

100. John Kryk, *Streaming Service DAZN Buys Canadian NFL Rights*, TORONTO SUN (July 20, 2017), http://www.torontosun.com/2017/07/20/streaming-service-dazn-buys-canadian-nfl-rights/wcm/839a8da0-2232-469c-bc96-4e9681386a48 [perma.cc/X5RZ-5THC].

101. Kryk, *supra* note 98.

102. Kryk, *supra* note 98; *see* John Kryk, *Rogers reacquires NFL's 'Sunday Ticket' package*, TORONTO SUN (Oct.13, 2017), http://torontosun.com/2017/10/13/rogers-reacquires-nfls-sunday-ticket-package/wcm/022b5b6b-e739-4a71-bca7-1098f8d3fc1c [perma.cc/D2XY-J8G3].

103. *In re Nat'l Football Leagues Sunday Ticket Antitrust Litig.*, 2017 WL 3084276, at *12 (C.D.

comparison, the NFL and DirecTV's last exclusive distributorship agreement signed in 2014 is worth $1.5 billion per season.[104] The NFL tripled its contract price solely by refusing to make Sunday Ticket nonexclusive; there is no added benefit to consumers for the inflated prices they continue to have to pay. Maintaining the exclusive nature of Sunday Ticket also allowed DirecTV to maintain its supracompetitive prices. This evidence, combined with the distinctions from *Brantley*, shows but for DirecTV's anticompetitive exclusive distributorship, customers in the United States would not be paying artificially inflated prices for Sunday Ticket.

D. THE HORIZONTAL AGREEMENT

As noted above, a horizontal agreement is an agreement between competitors that restricts supply. The Central District of California held Plaintiffs lacked standing to challenge the horizontal agreement between the NFL defendants because they were indirect purchasers under *Illinois Brick*.[105] Nonetheless, the court analyzed the horizontal agreement claim and determined that it did not violate Section 1 of the Sherman Antitrust Act because the collective agreement between the teams involves intellectual property owned by more than one entity that requires the NFL defendants to cooperate to sell their rights.[106] Although it is not controlling precedent for the Central District of California, the United States District Court for the Southern District of New York's holding in *Laumann* is persuasive and shows that indirect purchasers may not always be barred by the *Illinois Brick* rule.[107]

Illinois Brick established that a plaintiff must be a direct purchaser to have standing to sue for damages in a civil antitrust action.[108] In *Laumann*, the court held that the plaintiffs who had purchased out-of-market packages were not barred by the specific *Illinois Brick* rule, and had standing.[109] There, the plaintiffs brought a class action suit against the NHL, MLB, and

Cal. June 30, 2017).

104. *Id*. at 2.

105. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276at *15.

106. *Id.* at 13 ("Nonetheless, the Court finds that Plaintiffs still fail to plead a viable section 1claim as to the horizontal agreements, because the collective agreement between the teams involves intellectual property owned by more than one entity (i.e., both teams playing any given game) and thus '"constitute[s] 'collectively owned' property,"' which requires the NFL Defendants to cooperate in order to sell the rights." (quoting Spinelli v. Nat'l Hockey League, 96 F. Supp. 3d 81, 114 (S.D.N.Y. 2015))).

107. Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465 (S.D.N.Y. 2012).

108. Illinois Brick Co. v. Illinois, 431 U.S. 720, 746-47 (1977).

109. *Laumann*, 907 F. Supp. 2d at 484.

their teams, alleging, as the Plaintiffs did in *In re NFL Antitrust Litigation*, that each team entered in to an illegal horizontal agreement not to compete for out-of-market broadcasts and allowed their respective leagues to control their broadcasting rights.[110] As with the networks in *In re NFL Antitrust Litigation*, Regional Sports Networks (RSNs) produced games and sold them to Multichannel Video Programming Distributors (MVPDs) such as Comcast and DirecTV, who in turn distributed them to customers.[111] Similar to DirecTV's practice with Sunday Ticket, the MVPDs would black out the home team's game in the RSNs territory and only provide out-of-market broadcasts.[112] The out-of-market games were only available through NHL Center Ice and MLB Extra Innings, which are the NHL and MLB's equivalent to Sunday Ticket.[113] The plaintiffs alleged that the agreements between each leagues' teams and between the RSNs and MVPDs harmed competition by reducing output and increasing prices.[114] The defendants argued, among other things, that the case should be dismissed because plaintiffs lacked standing as "indirect purchasers."[115] The District Court for the Southern District of New York disagreed and held that where intermediate purchasers in the chain of distribution (here RSNs and MVPDs) are alleged to be participants in the conspiracy, the first purchasers who are not part of the conspiracy have standing.[116] In such a situation, the *Illinois Brick* bar does not apply.[117]

Relying on the Ninth Circuit's holding in *In re ATM Fee Antitrust Litigation*, the Central District of California held the Plaintiffs lacked standing to sue the NFL Defendants for their horizontal agreements.[118] In *In re ATM Fee Antitrust Litigation*, the Ninth Circuit has limited the boundaries of the co-conspirator exception to apply only when the conspiracy involves setting the price paid by plaintiffs.[119] Since the Plaintiffs did not allege that the NFL Defendants and DirecTV conspired to set a price for DirecTV the co-conspirator exception as defined in *In re ATM Fee Antitrust Litigation* did not apply.[120]

While *In re ATM Fee Antitrust Litigation* is binding precedent in the Ninth Circuit where the Central District of California sits, the Ninth Circuit

110. *Id*. at 471.
111. *Id*. at 474.
112. *Id.*
113. *Id*. at 475.
114. Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465, 475 (S.D.N.Y. 2012).
115. *Id*. at 476.
116. *Id*. at 482.
117. *Id*. at 481.
118. *In re Nat'l Football Leagues Sunday Ticket Antitrust Litig*., 2017 WL 3084276, at *16.
119. *Id*. (quoting *In re ATM Antitrust Fee Litig*., 686 F.3d 741, 755 (9th Cir. 2012)).
120. *Id.*

could expand the scenarios in which plaintiffs are not barred by *Illinois Brick* without overruling *In re ATM Fee Antitrust Litigation*. The purpose of *Illinois Brick* was not to prevent the only non-conspirators in a multi-level distribution chain—consumers no less—from bringing a private antitrust suit.[121] Holding that the first purchaser who is not party to the unlawful agreements to restrain trade has standing to sue is not an *exception* to *Illinois Brick*, but rather recognition that *Illinois Brick* bans Clayton Act lawsuits by persons who are not direct purchasers *from the defendant antitrust violators*.[122] Thus, to bar the Plaintiffs in *In re NFL Antitrust Litigation* from bringing suit solely because they did not allege price fixing of the retail price runs counter to *Illinois Brick*'s purpose of *Illinois Brick*. The absence of retail price fixing does not preclude plaintiffs from being the first party harmed due to an unlawful agreement to restrain trade. For example, while there was not explicit retail price fixing in *In re NFL Antitrust Litigation*, the Plaintiffs are still the first parties who are not part of the agreement to suffer from restricted output and artificially inflated prices caused by the unlawful exclusive distributorship between the NFL and DirecTV. Even though inflated prices are not necessarily fixed prices, the NFL's rejection of iNDemand's offer to carry Sunday Ticket on a nonexclusive basis in favor of the much more lucrative deal to keep DirecTV's unlawful exclusive distributorship in place has a similar effect. By accepting the exclusive deal for $1.5 billion per year, the cost to DirecTV is higher. In turn, DirecTV can continue to charge supra-competitive inflated prices. Thus, though the price was not fixed at a specific rate, the parties' intent to the agreement may have been to sustain the artificially high prices to unlawfully benefit themselves at consumers' expense. Allowing plaintiffs to sue for this type of harm is consistent with the purpose of *Illinois Brick*.

Further, the Central District of California's reliance on *Washington v. NFL* and *Spinelli v. NFL* is misguided. In *Washington*, former NFL players sued the NFL, alleging an antitrust violation because the NFL refused to grant them rights to their historical game footage.[123] The plaintiffs in *Washington* relied on *American Needle*, where the Supreme Court found a Section 1 violation surrounding the entity created by all of the NFL's teams to make decisions around the teams' separately owned intellectual property.[124] The *Washington* distinguished *American Needle* because "the

121. *Laumann*, 907 F.Supp. 2d at 482.

122. *Id.* (quoting In re Linerboard Antitrust Litig., 305 F.3d 145, 158–60 (3d Cir. 2002) (emphasis added)).

123. Washington v. NFL, 880 F. Supp. 2d 1004, 1005 (D. Minn. 2012).

124. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276, at *14.

intellectual property involved in *Washington* was historical football game footage, something that individual teams do not separately own, and never have separately owned."[125] Accordingly, *Washington* held while the NFL and its teams may potentially violate the Sherman Act when they conspire to market a team's individually owned property, they do not violate the Sherman Act when they market collectively owned property between the NFL and the teams.[126]

Similarly, the Central District of California pointed out in *Spinelli*, because "NFL photographs, because they necessarily contain multiple entities' intellectual property, constitute 'collectively owned' property under *Washington*," and even though the entities were required to act collectively to produce and sell the images, their conduct did not contravene the Sherman Act.[127] Based on *Washington* and *Spinelli*, the Central District of California held that "the games [which are broadcast] necessarily involve intellectual property rights owned by multiple entities, including the NFL [Defendants] . . . As the *Washington* court explained, and the *Spinelli* court echoed, the *multiple entities must act collectively* to broadcast the games in order for the games to be broadcast at all."[128]

However, the Central District of California's reliance on *Washington* and *Spinelli* is misguided. For instance, in *Washington*, the historic footage was something never individually held by the teams.[129] As opposed to the intellectual property at issue in *Washington*, the live broadcasts of NFL games contain intellectual property that the Central District of California itself said that NFL teams owned predating the NFL Enterprises, LLC, which was organized to hold the broadcast rights of the thirty-two NFL teams in 2015.[130] The fact that each team controlled its own intellectual property prior to 2015 undermines the Central District of California's reliance on *Spinelli*'s rationale requiring all the teams act together based on the premise that the NFL owns all of the team's intellectual property rights.[131] The teams separately acted prior to 2015, and only act together now because of their horizontal agreement not to compete for the broadcast of out-of-market games and the establishment of NFL Enterprises, LLC in 2015. The Central District of California also emphasized the difference between the NFL and other professional leagues such as the MLB or NHL,

125. *Id*. (quoting *Washington*, 880 F. Supp. 2d at 1006).

126. *Id*. (quoting *Washington*, 880 F. Supp. 2d at 1006).

127. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276, *14 (quoting *Spinelli v. NFL*, 96 F. Supp. 3d 81, 114 (S.D.N.Y. 2015)).

128. *Id*. (emphasis added).

129. *Washington*, 880 F. Supp. 2d at 1006.

130. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276, *1.

131. Spinelli v. NFL, 96 F. Supp. 3d 81, 114 (S.D.N.Y. 2015).

as the NFL must be involved in the sale of every game's broadcast rights; without an agreement between the NFL and its teams, there would be no way to broadcast the game footage.[132] Yet the NFL teams could cooperate without agreeing not to compete and thereby facilitating the unlawful exclusive distributorship between the NFL and DirecTV. Both the MLB and NHL, like the NFL, require two teams to compete against each other to have a product to sell. But rather than entering in to the type of anticompetitive horizontal agreement that the NFL teams have entered in to, the teams in the MLB and NHL have mutually agreed to permit the visiting team to produce a separate telecast of the games.[133] The only reason that the NFL must be involved is because it incorporated and set up NFL Enterprises, LLC for the purpose of controlling the teams' broadcasting rights, potentially to attempt to get around the holding of *American Needle, Inc. v. NFL*.

In *American Needle*, the Supreme Court concluded that the activities of the NFL's teams "and a corporate entity that they formed to manage their intellectual property . . . constitute[d] concerted action that is not categorically beyond the coverage of Section 1."[134] The Court held that "concerted action under Section 1 does not turn simply on whether the parties involved are legally distinct entities. Instead, the Court gotten rid of such formal distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."[135] American Needle, Inc. was one of National Football League Properties' (NFLP) licensees and was permitted to manufacture and sell apparel bearing team insignias.[136] In 2000, the teams acting through NFLP, granted Reebok the exclusive rights to manufacture apparel for all 32 teams and subsequently did not renew American Needle's nonexclusive license."[137] American Needle sued alleging that the agreements between the NFL, its teams, NFLP, and Reebok violated Sections 1 and 2 of the Sherman Act."[138] The issue before the Court was whether the NFL respondents were capable of engaging in a "contract, combination . . ., or conspiracy" as defined by Section1orwhether the alleged activity by the NFL respondents must be viewed as that of a single enterprise for purposes of Section 1.[139]

132. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276, at *15.
133. *Laumann*, 907 F. Supp. 2d at 473.
134. *American Needle, Inc. v. NFL*, 560 U.S. 183, 186 (2010).
135. *Id.* at 191.
136. *Id.* at 187.
137. *Id.*
138. *Id.*
139. *Id.* at 189 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984)).

The Court found numerous instances where members of a facially legal single entity violated Section 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle of ongoing concerted activity.[140] Therefore, the relevant inquiry is if there is a contract, combination, or conspiracy amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of the independent centers of decision making.[141] The Court found although acting under the guise of NFLP, the teams compete in intellectual property market and each team has its own economic interests.[142] Therefore, the agreement between the NFL teams and NFLP deprived the marketplace of independent centers of decision making.[143]

The Central District of California never compared *In re NFL Antitrust Litigation* to *American Needle*. Rather, it relied on *Washington* and only quoted *American Needle* in a parenthetical for the proposition that the fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a logical rationale for making collective decisions.[144] However, there are several similarities between *In re NFL Antitrust Litigation* and *American Needle*. For example, both cases involve the licensing of each team's intellectual property; in both cases the teams agreed not to compete against one-another in the respective area, (i.e., apparel and television broadcasts); and in both cases a separate entity was used to license the intellectual property exclusively.

There are several distinguishing factors as well: 1) *American Needle* was decided prior to 2015 when the NFL incorporated and established NFL Enterprises, LLC; 2) *American Needle* itself held that the NFL's inherently cooperative nature justifies collective decision making,"[145]; and 3) the teams split the revenues from the NFL's television contracts,[146] so they are working toward a unified goal and are acting as a single entity through NFL Enterprises, LLC.

Each of these distinguishing factors can be reconciled with the facts of *In re NFL Antitrust Litigation*. First, *American Needle* held the Courts

140. *Id*. at 191.

141. *Id*. at 195 (citations omitted).

142. *Id*. at 197–98.

143. *Id*. (citations omitted).

144. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276at *15 (quoting *American Needle*, 560 U.S. at 202).

145. *American Needle*, 560 U.S. at 202.

146. Arthur Weinstein, *NFL teams shared $7.8 billion in revenue last year, up 10 percent*, SPORTING NEWS (July 11, 2017), http://www.sportingnews.com/nfl/news/nfl-teams-shared-8-billion-2016-10-percent-increase/xq0olewhxo2d1a5mmrll4w4fz [perma.cc/9CNM-ASSG].

should eschew formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.[147] Further, Section 1 may be violated where an entity is controlled by a group of competitors and serve[s], in essence, as a vehicle for ongoing concerted activity.[148]

Thus, it is not dispositive that in 2015 the NFL incorporated and organized NFL Enterprises, LLC. to control teams broadcasting rights. Even though the teams may be considered one legal entity under the umbrella of NFL, Inc., each team is still independently owned and operated, and each still competes with others for wins, for fans, for apparel and ticket sales, and for revenues. Further, without the teams acting as competitors, NFL Enterprises, LLC. would serve little to no purpose as there would be no individual intellectual property to consolidate and manage.

Consequently, NFL Enterprises, LLC is controlled by a group of competitors and serve[s], in essence, as a vehicle for ongoing concerted activity.[149] In addition, the teams are separate economic actors pursuing separate economic interests, such that the agreement "deprives the marketplace of the independent centers of decision making."[150] If not for the horizontal agreement not to compete, each team would compete with each other for viewers within each other's localities. Due to the horizontal agreement, each team has relinquished its decision making power to NFL, Enterprises, LLC, hence "'depriving the marketplace of the independent centers of decision making.'"[151] Ironically, the NFL's decision to incorporate and organize NFL Enterprises, LLP to establish a more formal single entity came after the Supreme Court's decision in *American Needle*. This may have been a reaction to the holding rather than a coincidence, perhaps because the NFL noticed that the exclusive distributorship with DirecTV, like the one between NFLP and Reebok, could fall under *American Needle*'s holding and be considered anticompetitive. Therefore, *American Needle* is analogous to *In re NFL Antitrust Litigation* even though *American Needle* was decided prior to 2015 when NFL, Inc. and NFL Enterprises, LLC were established.

Second, "[t]he fact that NFL teams . . . must cooperate in the production and scheduling of games[] provides a perfectly sensible justification for making a host of collective decisions," does not mean that

147. American Needle, 560 U.S. at 191.
148. *Id.*
149. *Id.*
150. *Id*. at 196 (citations omitted).
151. *Id.*

the Supreme Court condones the type of horizontal agreement that is at issue between the NFL's teams, especially when it is combined with an unlawful exclusive distributorship.[152] Indeed, the Supreme Court itself has held that "agreements limiting the telecasting of professional sports games are subject to antitrust scrutiny, and analyzed under the rule of reason."[153] Further, "a horizontal agreement that allocates a market between competitors and restricts each [team's] ability to compete for the other's business may injure competition."[154] Therefore, consumers are not prohibited from bringing suit because the "production and scheduling of games[] provides perfectly sensible justification for making a host of collective decisions."[155]

Assuming that plaintiffs, such as those in *In re NFL Antitrust Litigation*, are not barred by *Illinois Brick*, *Laumann* does not "conflict[] . . . with the Ninth Circuit's holding in *In re ATM Fee Antitrust Litigation*," and is persuasive.[156] As previously discussed when addressing standing, the facts in *Laumann* and the facts in *In re NFL Antitrust Litigation* are nearly identical. One main difference is that unlike the NFL, the MLB and NHL have not incorporated and, though necessarily cooperating to produce inter-club games, each club operates as an independently owned and managed business and each team owns the initial right to control telecasts of its home games.[157] However, as noted, the Court favors a functional analysis, over formalistic distinctions when examining parties' conduct[158] The fact that the NFL has incorporated does not mean that the teams act as a single entity and as a result do not fall under the holding of *American Needle*, as discussed above. In *Laumann*, the court held that plaintiffs have adequately alleged harm to competition with respect to the horizontal agreements among individual hockey and baseball clubs, as part of the NHL and MLB, to divide the television market.[159] As a result of the analogous facts between *Laumann* and *In re NFL Antitrust Litigation*, the Plaintiffs in *In re NFL Antitrust Litigation* have also adequately alleged harm to competition with respect to the horizontal agreements, between the NFL Defendants.[160]

Lastly, some may argue that since the teams split the revenues from

152. *American Needle*, 560 U.S. at 202.
153. *Laumann*, 907 F. Supp. 2d at 488 (citing *NCAA*, 468 U.S. at 99).
154. *Brantley*, 675 F.3d at 1198.
155. *American Needle*, 560 U.S. at 202.
156. *In re Nat'l Football Leagues Sunday Ticket Antitrust Litig.*, 2017 WL 3084276 at *16.
157. *Laumann*, 907 F. Supp. 2d at 473.
158. *American Needle*, 560 U.S. at 191.
159. *Laumann*, 907 F. Supp. 2d at 491.
160. *Id.*

the NFL's television contracts,[161] they are working toward a unified economic goal and are acting as a single entity through NFL Enterprises, LLC. Common economic interests, though, do not always equate to a league acting as a single entity. The Seventh Circuit had held NFL teams share a vital economic interest in collectively promoting NFL football to compete with other forms of entertainment. Therefore, the teams are the one source of economic power which control NFL promotion.[162] The Supreme Court rejected the idea that a common economic interest is enough to establish that there is a "single entity" when it reversed the Seventh Circuit's grant of defendants' motion to dismiss.[163] While the teams split revenues from the television contracts, they still compete for ticket sales, for fans, for apparel, and for wins on the football field, all of which contribute to their economic success. NFL teams also received $6 billion in local revenues in 2016,[164] further evincing their economic independence. As a result of the horizontal agreement between the teams, television revenues may be the only area where teams do not compete for revenues. This evidence shows that the NFL teams are separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of the independent centers of decision making.[165] In combination with the factors discussed above, it is, plausible this horizontal agreement violates Section 1 and is anticompetitive.

E. RESTRAINT ON TRADE WITHIN THE RELEVANT MARKET

As held in *American Needle*, proving injury to competition ordinarily requires the claimant to prove the relevant geographic and product markets and to demonstrate the effects of the restraint within those markets.[166] A product market is typically defined by the pool of goods or services that qualify as economic substitutes for each other because they enjoy reasonable interchangeability of use and cross-elasticity of demand.[167]

Since the Central District of California neither found that the exclusive distributorship here is unlawful, that Defendants restricted output, that Defendants artificially inflated prices, or that the horizontal agreement between NFL Defendants is anticompetitive, it also held the

161. Weinstein, *supra* note 146.
162. *American Needle v. NFL*, 538 F.3d 736, 744 (7th Cir. 2008).
163. *American Needle*, 560 U.S. at 204.
164. Kryk, *supra* note 102.
165. *American Needle*, 560 U.S. at 196 (citations omitted).
166. *Thurman Industries Inc*., 875 F.2d 1369, 1373 (9th Cir. 1989).
167. *Id*. at 1374.

NFL Defendants did not restrain trade.[168] The court agreed the Defendants lacked power to artificially inflate prices because viewers could still watch free in-market games instead of the unavailable out-of-market games, and alternatively that if the free in-market games are not substitutes, then Plaintiffs failed to show how selling the broadcast rights to out-of-market games would reduce prices.[169]

First, by accepting the Defendants' argument that they lack power to artificially inflate prices because viewers can substitute free in-market games for out-of-market games, the Central District of California contradicts the definition of a relevant market. A relevant market *requires* goods or services that are economic substitutes, meaning they are reasonably interchangeable in terms of use and cross-elasticity of demand.[170] By the Defendants' logic, because there are free in-market games that serve as substitutes, Defendants cannot inflate prices. However, this reasoning begs the question as to when a plaintiff would be able to successfully define a relevant market, including substitutes, without simultaneously undermining their own claim that the defendant has power to artificially inflate prices. Every Section 1 claim requires that a relevant market be defined, and every relevant market requires substitutes to be identified. By punishing plaintiffs for meeting these requirements as the Central District of California has done, courts may discourage plaintiffs from bringing valid Section 1 claims.

Second, the definition of a product market cited by the Central District of California states that substitutes should enjoy reasonable interchangeability of use and cross-elasticity of demand, and not that they must be perfect substitutes.[171] Thus, the court's examples that a consumer could watch free in-market games or that a consumer who only wants to watch one team's games takes away DirecTV's power to artificially inflate prices are inapplicable. Consumers may also desire to watch all games that are broadcast, and not only those that are free or only those of their favorite team. And as discussed above, in 2016 16.5 million people tuned in to watch regular season NFL games every week.[172] Thus, even with the free in-market games acting as substitutes, or even if a consumer only wanted to watch one team's games, there is still ample demand for DirecTV to capitalize on and artificially inflate prices. If there was no unlawful exclusive distributorship, DirecTV would have to compete with all other

168. *In re Nat'l Football Leagues Sunday Ticket Antitrust Litig*., 2017 WL 3084276 at *16.
169. *Id*. at *18.
170. Thurman Industries Inc., 875 F.2d at 1374.
171. Thurman Industries Inc., 875 F.2d at 1374.
172. Rovell, *supra* note 2.

providers who would carry Sunday Ticket to attract these consumers.

The preceding arguments demonstrate that at the very least the Plaintiffs had alleged facts sufficient to make it plausible that there is 1) an agreement or conspiracy between two or more persons or entities; 2) through which the persons or entities intend to harm or restrain competition; and, 3) that actually does restrain competition.[173]

II. THE SECTION II CLAIM–MONOPOLIZATION

Section 2 of the Sherman Antitrust Act states that "[e]very 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."[174] In *in re NFL*, the Plaintiffs had alleged two monopolization claims: one for conspiracy to monopolize, and one for actual monopolization.[175] To establish a conspiracy to monopolize claim, Plaintiffs must plead: 1) the existence of a combination or conspiracy to monopolize; 2) an overt act in furtherance of the conspiracy; 3) the specific intent to monopolize; and 4) causal antitrust injury.[176] To establish a claim for actual monopolization, a plaintiff must show a) the possession of monopoly power in the relevant market; b) the willful acquisition or maintenance of that power; and c) causal antitrust injury.[177] A firm has monopoly power if it can profitably raise prices substantially above the competitive level.[178]

Because the Central District of California dismissed Plaintiffs' Section 1 claim, and Plaintiffs conceded that their section 2 claim rose and fell along with their Section 1 claim the Court also dismissed Plaintiffs' Section 2 claim.[179] However, because Plaintiffs' Section 1 claim is plausible on its face, and therefore the Section 2 claim is as well. Regarding the conspiracy to monopolize claim, the unlawful exclusive distributorship itself is a combination to monopolize the live presentation of professional football broadcasts, not because it is exclusive, but because it is unlawfully exclusive; the length of the agreement, lack of substitute brands, restriction

173. Los Angeles Memorial Coliseum Comm'n, 726 F.2d at 1391 (9th Cir. 1984).

174. 15 U.S.C. §2.

175. *In re Nat'l Football League Sunday Ticket Antitrust Litig.*, 2017 WL 3084276at *19.

176. *Id.* (quoting *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003).

177. *In re Nat'l Football Leagues Sunday Ticket Antitrust Litig.*, No. ML1502668BROJEMX, 2017 WL 3084276, at *20 (C.D. Cal. June 30, 2017) (quoting *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013) (citation omitted)).

178. *United States v. Microsoft Corp.*, 253 F.3d 34, 52 (D.C. Cir. 2001).

179. *In re Nat'l Football Leagues Sunday Ticket Antitrust Litig.*, 2017 WL 3084276 at *19.

of output, artificially inflated prices, and other factors analyzed above show an overt act in furtherance of the conspiracy and intent to monopolize; and the harm to competition and consumers because of the aforementioned factors show a causal antitrust injury.

The same evidence also suffices to show that the Plaintiffs have a plausible actual monopolization claim. Monopoly power is evident because the Defendants can charge artificially inflated prices above the competitive level, as evinced by the fact that consumers in the US, where the unlawful exclusive distributorship exists, pay more for Sunday Ticket than consumers in Canada, where Sunday Ticket is provided on a non-exclusive basis and there is competition for viewers. Further, the Central District of California agreed with the Plaintiffs that there is a relevant market for the live presentation of professional football games. Again, the length of the agreement, lack of substitute brands, restriction of output, artificially inflated prices, and other factors previously analyzed show willful acquisition and maintenance of Defendants' monopoly power, and harm to competition and consumers because of the aforementioned factors show a causal antitrust injury. Hence, Plaintiffs have alleged facts sufficient to show that their claims of conspiracy to monopolize and actual monopolization are plausible on their face.

III. CONCLUSION

While this Note may not prove that there are definite Section 1 and Section 2 Sherman Antitrust Act violations resulting from the NFL and DirecTV's exclusive distributorship agreement for Sunday Ticket the arguments above provide reason to believe that there may be. In fact, a group of the Plaintiffs have filed an appeal to the Central District of California's decision that it is pending before the Ninth Circuit.[180] Should the Ninth Circuit adopt some of the views advanced above, antitrust violations may be proved after all.

180. *In Re: Ninth Inning, Inc., et al. v. Directv, LLC, et al.*