

No. 08-661

In the
Supreme Court of the United States

AMERICAN NEEDLE, INC.,
PETITIONER,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,
RESPONDENTS

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

**BRIEF FOR ATP TOUR, INC., WTA TOUR, INC.,
MAJOR LEAGUE SOCCER, L.L.C., AND NATIONAL
ASSOCIATION FOR STOCK CAR AUTO RACING, INC.
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

Amici are professional sports leagues and circuits based in the United States.

Amicus ATP Tour, Inc. (“ATP”) is a Delaware non-profit, non-stock membership corporation whose members are men’s professional tennis players and tournaments. ATP’s annual circuit, the ATP World Tour, consists of 61 tournaments played in 31 countries, culminating with its season-ending championship, the Barclays ATP World Tour Finals.

Amicus WTA Tour, Inc. (“WTA”) is a New York not-for-profit, non-stock membership corporation whose members are women’s professional tennis players, tournaments, and the International Tennis Federation, Ltd. WTA’s annual circuit, the Sony Ericsson WTA Tour, consists of 52 tournaments played in 32 countries, leading up to its season-ending championship, the Sony Ericsson Championships.

Amicus Major League Soccer, L.L.C. (“MLS”) is a Delaware limited liability company that operates the premier professional soccer league in the United States. MLS owns each of its 15 clubs (with various MLS equity holders operating clubs on a day-to-day basis) and enters into employment contracts with all

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their counsel made a monetary contribution to its preparation or submission. Counsel of Record for all parties have consented to this brief’s filing. The letters of consent have been filed with the Clerk.

of the players in the league. MLS teams compete during a 30 game regular season to advance to the MLS Cup Playoffs and the championship MLS Cup game.

Amicus National Association for Stock Car Auto Racing, Inc. (“NASCAR”) is a Florida corporation that sanctions races in a multitude of NASCAR stock car and stock truck racing circuits. Its premier series, the Sprint Cup Series, consists of 36 races during its season throughout the United States.

Like Respondent NFL, each of the *amici* produce a league or circuit product that none of their individual members, shareholders, teams, or races can produce alone. And like the NFL and other sports leagues and circuits, *amici* have endured multiple threatened and filed antitrust litigations in recent years purporting to rely on Section 1 of the Sherman Act, 15 U.S.C. § 1, to challenge *amici*’s fundamental rights to self-governance and to control the nature of their products. Litigating those cases under the Rule of Reason has come at a considerable cost to *amici* both in time and money, particularly given the costs of electronic discovery and the necessity of expert testimony to address key Rule of Reason issues.

Critically, none of the recent challenges to *amici*’s conduct — really, grievances by members or other stakeholders that simply disagreed with a league or circuit decision — has yielded a judgment and relief for the plaintiffs. And each case could have been dismissed early and at much less cost if *amici*’s core internal decisions about their products were properly viewed, as a matter of law, as unilateral conduct outside the purview of § 1. *Amici* therefore have a

significant interest in this case and in a holding that, regardless of the particular organizational structure of sports leagues or circuits, their internal decisions about the fundamental *who, what, where, how* and *when* that define their products do not raise the “antitrust dangers” of concerted conduct and, therefore, that disgruntled stakeholders cannot use the threat of protracted § 1 litigation as a cudgel to try to alter *amicus*’s rules, policies, and self-governance.

SUMMARY OF ARGUMENT

By their very nature, professional sports leagues and circuits require the collective, cooperative action of their members to jointly produce the agreed product — a centrally calendared season of events, conducted under a single set of rules and regulations, culminating in a championship event.² No single league or circuit member can produce such a product on its own and, therefore, in the absence of a league or circuit structure, individual members would not compete with each other to produce a season product. Indeed, a league or circuit structure (and, therefore a league or circuit product) could not exist if individual members sought to improve their own market share or profits at the expense of other members. Thus, like the parent-subsidiary relationship examined in *Copperweld Corp. v. Independence Tube Corp.*, sports leagues and circuits do not “deprive[] the

² Whereas a league structure generally is used in team sports, such as football, a circuit structure generally is used in non-team sports, such as tennis, auto-racing, golf, etc. to produce a structured series of branded competitions over the course of a season leading to a circuit championship.

marketplace of the independent centers of decisionmaking that competition assumes and demands.” 467 U.S. 752, 769, 772 (1984). Each is, of necessity, a single (albeit collective) producer of a single league or circuit sports product.

Unlike businesses in nearly any other industry, however, sports leagues and circuits have faced a barrage of § 1 claims challenging virtually every type of internal decision about how they produce their products and operate their businesses. Plaintiffs have filed claims challenging, for example, scoring rules, player eligibility requirements, decisions on what teams or venues to include in a league or circuit, the time and place of events, the overall “format” of the season, the distribution of events by telecast and other means, and website requirements, as well as licensing of intellectual property. The vast majority of these claims have resulted in no judgment of liability, but often only after years of costly, time-consuming and distracting discovery and litigation analyzing the league or circuit’s internal decision under the Rule of Reason — an analysis that was never intended to apply to the internal decisions of a business about its own product and operations.

The tremendous (and increasing) costs of litigation, along with the risk of treble damages, emboldens plaintiffs to file suits, hoping that they will force leagues and circuits into settling. Because almost every internal decision will disappoint at least one stakeholder (*e.g.*, members, licensees, telecasters, venues, etc.), sports leagues and circuits now operate under the substantial risk that their day-to-day business decisions will lead to costly and burdensome discovery and litigation. The result is a

chilling effect that interferes with and suppresses the discretion that leagues and circuits must have to shape their own products and operations to maximally compete with other offerings in the sports and entertainment market.

None of this serves the competition-enhancing purpose of the Sherman Act. And none of it is necessary. The principles set forth in *Copperweld* and in *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006) support a holding here that, regardless of the precise way in which a league or circuit needs or chooses to organize itself, its internal decisions concerning the production, distribution, and promotion of its product are “unilateral” and not “concerted” conduct and, therefore, are not subject to review under § 1. Upholding “single entity” status for sports leagues and circuits will help deter the many baseless § 1 challenges to core business decisions that leagues and circuits currently face or, as in the case below, will permit the threshold issue of “concerted” conduct to be determined early in the case. Doing so will still permit § 1 review of the formation of leagues or circuits and of their dealings with entities outside their own organization (such as rival leagues or circuits), as well as preserve review of league or circuit “unilateral” conduct under § 2.

ARGUMENT

I. THE DECISIONS OF NON-COMPETING ENTITIES CONCERNING THE OPERATION OF A LAWFUL ENTERPRISE ARE NOT SUBJECT TO § 1 REVIEW

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) and *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006) recognize that the threshold requirement under § 1 of “concerted” action must be

determined by the functional, economic “reality” of the business at issue and is not limited by the particular juridical form of the entities involved. If ostensibly separate entities cooperate in an otherwise lawful enterprise to produce a product as to which they fundamentally are not actual or potential competitors, the fact of cooperation does not give rise to any of the “antitrust dangers” with which § 1 is concerned because the marketplace has not been deprived of otherwise “independent centers of decisionmaking” with respect to that product. *Copperweld*, 467 U.S. at 769; *Dagher*, 547 U.S. at 6 (joint venture pricing policy was conduct of a “single entity,” not agreement “between competing entities with respect to their competing products”). From the perspective of the competitive marketplace, the cooperative decisions of such lawfully combined, non-competing entities about their jointly-produced product are just as much “unilateral” activity as the internal decisions of any stand-alone firm. The internal decisions by a producing entity about the production, distribution, and promotion of its product do not meet the threshold requirement of concerted activity under § 1 and, therefore, are not subject to scrutiny for “reasonableness” or under any other standard. *Copperweld*, 467 U.S. at 776 (unilateral conduct “falls outside the reach” of § 1 regardless of any alleged anticompetitive effects).

In *Copperweld*, the absence of competition arose from the fact that the cooperating entities were a parent and its wholly-owned subsidiary. Even if, for its own management or other reasons, the parent had permitted the subsidiary substantial independence, the bottom line was that the subsidiary could never truly “compete” with its

parent in the sense of placing economic pressure on the parent in the hope that the parent would exit the marketplace, leaving a greater share to the subsidiary. Thus, for antitrust purposes, any “agreements” between the parent and its subsidiary were competitively “unilateral” action and, therefore, not within the purview of § 1.

In *Dagher*, the absence of competition arose from the voluntary agreement of former competitors to “end competition” and to create financial interdependence between themselves in the form of a joint venture (at least for the duration of, and with respect to the subject of, the joint venture).³ Despite the wholly voluntary nature of the combined enterprise, *Dagher* reasoned that — for purposes of the “antitrust” concerns of § 1 — the decisions of joint venturers with respect to the venture and its product are properly viewed as those of a “single entity” precisely because the decisions do not concern “competing entities” with “competing products.” 547 U.S. at 5-6. *Dagher* thus further underscored that the touchstone for determining whether there is “concerted action” under § 1 is the presence or

³ No claim was made in *Dagher* that the formation of the joint venture itself was unlawful. So too, of the many § 1 claims to which *amici* have been subjected since *Copperweld*, none has directly asserted that any of *amici* — whether found as a non-stock, membership corporation, a limited liability company or otherwise — are unlawful in their formation. Indeed, to the extent that plaintiffs have asserted classic “corporate governance” claims — such as claims against the *amici* or their board of directors for breach of fiduciary duty — the claims reflect the reality that leagues and circuits are understood to be and function as single decisionmaking entities in the market.

absence of competition with respect to the conduct being challenged, regardless of the particular form under which the entities cooperate. *See, e.g., Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 271-77 (8th Cir. 1988) (electrical cooperative treated as single entity under § 1 with respect to decisions concerning production and distribution of product despite members being separately incorporated, “autonomous” entities that “manage[d] [their] own profits and losses”); *Healthamerica Pa., Inc. v. Susquehanna Health Sys.*, 278 F. Supp. 2d 423, 433-36 (M.D. Pa. 2003) (organization with two incorporated hospitals as members was single entity where organization set overall business policies for hospitals); *Jack Russell Terrier Network v. Am. Kennel Club*, 407 F.3d 1027, 1034-36 (9th Cir. 2005) (club and affiliates not capable of conspiring when they shared common goals and economic interest in increasing value of dog breed); *Williams v. Fischer*, 999 F.2d 445, 447-48 (9th Cir. 1993) (franchisor and franchisee conducted a common enterprise in non-competitive environment among franchisees).

II. MEMBERS OF A SPORTS LEAGUE OR CIRCUIT ARE INTERDEPENDENT PRODUCERS, NOT INDEPENDENT COMPETITORS, IN THE PRODUCTION, DISTRIBUTION, AND PROMOTION OF THEIR EVENTS

Although many sports leagues and circuits (including *amici* here) are single entities either because they are corporations (as in *Copperweld*) or lawful joint ventures (as in *Dagher*), each also is a single entity because there is an absence of competition among members of a sports league or circuit that fundamentally flows from the interdependence and cooperation necessary to

produce a league or circuit product. That league or circuit product is a wholly different product from any “exhibition” that an individual team might produce on its own. *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 296 (2d Cir. 2008) (citing undisputed fact that league baseball is a “vastly different and more marketable product” than individually presented “scrimmage” events). As the Seventh Circuit correctly observed below, by definition, the member teams of the NFL “can function only as one source of economic power when collectively producing NFL football.” *Am. Needle, Inc. v. NFL*, 538 F.3d 736, 743 (7th Cir. 2008). Unlike the production and sale of copper tubing or gasoline, a professional sports league can only be carried out jointly. *Chicago Prof'l Sports Ltd. P'ship v. NBA (“Bulls II”)*, 95 F.3d 593, 598-600 (7th Cir. 1996) (a league “produces a single product” as to which “cooperation is essential (a league with one team would be like one hand clapping)”; *see also NBA v. Williams*, 45 F.3d 684, 689 (2d Cir. 1995) (leagues “need many common rules” to function). No individual team can make even one league game, let alone create a season-long progression of competitions culminating in a championship event. *Am. Needle*, 538 F.3d at 743; *Salvino*, 542 F.3d at 296.

Because a league product requires a league to produce it, individual teams would not otherwise be “competing” with each other in the production of a league product. The decisions of league members concerning their joint product do not, therefore, “deprive[] the marketplace” of “independent centers of decisionmaking.” Accordingly, under *Copperweld* and *Dagher*, internal decisions concerning the “core

functions” of the league — namely, the production, distribution, and promotion of the league product — are the decisions of a single (albeit cooperative) producing entity, not “concerted activity” subject to any level of review under § 1. *Accord Seabury Mgmt. v. PGA*, 878 F. Supp. 771, 777-78 (D. Md. 1994), *aff’d in relevant part*, 52 F.3d 322 (4th Cir. 1995) (PGA and its member sections functioned as a single economic unit in collectively producing professional golf tour); *Eleven Line, Inc. v. N. Texas State Soccer Ass’n*, 213 F.3d 198, 205 (5th Cir. 2000) (“*Copperweld* renders infeasible” concerted action among soccer associations functioning jointly under national federation to promote soccer); *Lokomotiv Yaroslavl v. NHL*, 06 CV 9421, slip op. at 86 (S.D.N.Y. Nov. 15, 2006) (NHL rules on negotiation for transfer of players in other leagues are “core activities of a joint venture . . . and thus, would not constitute a combination in restraint of trade”).

The same absence of competition and presence of necessary interdependence exists in “tours” and “circuits” in non-team sports, such as *amici* ATP (men’s professional tennis), WTA (women’s professional tennis), and NASCAR (stock car racing). The tours and circuits produced by *amici* consist of an annual season of calendared events in which competitors play or race under a single set of rules to earn prize money as well as ranking points that determine (among other things) a player’s progression in a season-long race to a championship. Although stand-alone tournaments or exhibition events exist in individual sports, consumers in the sports and entertainment marketplace (fans, broadcasters, and sponsors) recognize a coordinated circuit as a fundamentally different product — one

that they can follow over the course of a season, for example, through live attendance, televised events, and standings reports on the internet and in other media.

Like the products offered by the NFL and other leagues, by definition, a circuit product cannot be produced by any individual event. Nor is a circuit merely a coordination of competing events each seeking merely to achieve efficiencies in the sale of its own “product.” No single event can set a calendar for the entire season. Indeed, the day-to-day operation of a circuit requires a constant series of internal decisions on the fundamental who, what, where, when, and how of the circuit product.

With respect to the sports and entertainment marketplace, no single event can offer fans and broadcasters the excitement of a “story” to follow over the course of the season. It is that different, larger product that only a circuit can produce. And the production of that circuit could not exist if there were competition among the individual circuit events. For example, a circuit could not exist if individual tournaments could simply schedule (or reschedule) their events to try to capture “preferred” calendar dates, locations, or players — let alone if individual events could compete for fans by implementing their own entry criteria, rules of play, or point systems to try to create a more attractive event.

Like the teams in leagues such as the NFL or *amicus* MLS, circuit members are therefore interdependent, not independent, decisionmakers. MLS, a Delaware limited liability company, also has the added attributes of owning each of its clubs

(albeit with various MLS equity holders operating clubs on a day-to-day basis) and directly contracting with its players. The success of each of the circuits' products depends on the health and success of each circuits' individual members. Members do not seek to improve their individual returns at the expense of other members. Nor could they. Whereas competitors would be better off if they were the only ones left selling a product to consumers and, therefore, seek to put pressure on rivals in the marketplace, teams and events within a league or circuit would be worse off if other teams or events in the same league or circuit were financially weakened or went out of business, thereby undoing the league or circuit product being offered to consumers.

It is this basic fact of necessary coordination to produce a single, integrated product that takes the production of a league/circuit product outside the realm of § 1. The particular form in which various leagues and circuits choose to carry out such coordination is, therefore, irrelevant to whether § 1 scrutiny should apply. For example, whether and to what extent a league or circuit permits individual members to retain profits or control over certain aspects of the product may be impacted by and indicative of many things — such as the history of the particular league/circuit or sport, the national and/or international nature of the sport, the corporate/tax laws to which the league/circuit is subject, the particular financial and central infrastructure needs of the league/circuit and its members, and internal choices about how best to market and present its product. But none of those things change the fact that one league/circuit member is not seeking to profit *at the expense of*

another (thereby weakening the league/circuit structure), let alone to “compete” with other members to put them out of business (destroying the league/circuit).

As this Court observed in *Copperweld*, “[t]he economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise’s conduct seriously threatens competition.” 467 U.S. at 772-73 (“Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability.”). Here, *amici* are single entities by virtue of their corporate structure (like the entities in *Copperweld*) or contractually-agreed sharing of profits and losses in a common venture (like the joint venturers in *Dagher*). But in addition, they are single entities because they are single, economic producers in the marketplace by virtue of the nature of a league/circuit product. There is no need to test for § 1 concerted action using state law based structures (such as the requirements of a “joint venture” or “effective merger”) when the market-based analysis taught by *Copperweld* and *Dagher* most directly — and accurately — distinguishes “concerted” and “unilateral” activity by asking whether the collective decision of “separate entities” actually raises relevant “antitrust dangers” by depriving the market of otherwise competitive decisionmakers.

Importantly, the league/circuit product includes not only the on-field contests, but also the associated

intellectual property and “brand” that are built based on those contests. Internal decisions concerning those aspects of the jointly-produced product do not raise any greater “antitrust dangers” than decisions concerning the production of the core athletic contest that creates and drives the value of the brand. The fact that (according to Petitioners) some consumers might prefer if subsets of the product were sold or distributed differently is irrelevant to the question of whether § 1 *requires* the joint producers of the product (including the intellectual property) to justify their internal choices about how to produce, price, distribute, or promote any aspect of their product.

As it did in *Copperweld*, the Court also should reject the suggestion (proposed here by the Solicitor General) that “concerted” versus “unilateral” action should be determined, in part, by the downstream competitive effects of a business decision. *Copperweld*, 467 U.S. at 776 (test for “concerted action” is not “whether the coordinated conduct . . . may ever have anticompetitive effects”). The application of § 1 turns solely on the nature of the conduct — *i.e.*, unilateral conduct “falls outside the reach” of § 1 regardless of any alleged anticompetitive effects. *Id.* (Effects test “would obliterate the Act’s distinction between unilateral and concerted conduct”).

Contrary to the claims of Petitioner (and the *amici* supporting it), treating leagues/circuits as single entities under § 1 does not provide leagues/circuits with antitrust immunity. Unilateral conduct remains subject to § 2’s constraints. And recognition that a league or circuit’s *internal* decisions are unilateral conduct would not exempt a

league or circuit's *external* agreements with separate entities from § 1 review. Thus, there is no merit to Petitioner's suggestion that affirming single-entity treatment of a sports league or circuit is equivalent to broad antitrust "immunity" for such entities. *Copperweld* correctly rejected similarly baseless predictions that treating a parent and subsidiary as a single entity would "cripple antitrust enforcement." 467 U.S. at 777.

III. SUBJECTING THE INTERNAL DECISIONS OF SPORTS LEAGUES AND CIRCUITS TO § 1 REVIEW NEEDLESSLY IMPEDES THE ABILITY OF LEAGUES AND CIRCUITS TO RESPOND TO MARKET FORCES

Copperweld and *Dagher* teach that the distinction between "concerted" and "unilateral" conduct is not a mere technicality. Coordination within a single economic actor "may be *necessary* if a business enterprise is to compete effectively" in the marketplace. *Copperweld*, 467 U.S. at 769 (emphasis added); *see also Bulls II*, 95 F.3d at 598 ("[A]ntitrust law permits, indeed encourages, cooperation inside a business organization the better to facilitate competition between that organization and other producers."). Subjecting the internal decisions of a business to § 1 review under any standard threatens to substitute external second-guessing for the "discretion" that any entity "must have" with respect to the core aspects of its business. *Dagher*, 547 U.S. at 6. Thus, the proper threshold identification of single entities is necessary to protect against the chilling — and ultimately market-distorting — threat of "treble damages from private state tort suits masquerading as antitrust actions." 467 U.S. at 777.

As shown above, sports leagues and circuits are, by definition, single economic actors in the marketplace. Yet, unlike producers in any other industry, Respondent NFL, *amici*, and other sports leagues and circuits (and their members) routinely face antitrust challenges to their decisions concerning the most integral, core aspects of their business. For example, in just the post-*Copperweld* period alone, plaintiffs have filed antitrust claims that resulted in no judgment of relief (either due to dismissal or settlement) that challenged numerous types of league/circuit decisions such as:

- Scoring and player eligibility rules (*Clarett v. NFL*, 369 F.3d 124 (2d Cir. 2004) (judgment for NFL); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059 (9th Cir. 2001) (dismissed); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992) (judgment for defendant); *Michael Bryan, et. al. v. ATP Tour, Inc., et al.*, No. H-05-3082 (S.D. Tex.) (settled without judgment); and *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106 (E.D. Cal. 2002) (summary judgment));
- Tournament eligibility rules (*Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955 (6th Cir. 2004) (judgment for NCAA); and *Eleven Line, Inc. v. N. Texas State Soccer Ass'n*, 213 F.3d 198 (5th Cir. 2000) (summary judgment on § 1 claims));
- Rules governing where and when players play (*Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002) (summary judgment));

- Changes in overall tour format, including changes to tour calendar, branding, prize money, tournament “tiers” and quality standards, and player entry and minimum play requirements (*Deutscher Tennis Bund v. ATP Tour, Inc.*, No. 07-178 (D. Del. 2008) (judgment for defendants; on appeal));
- Decisions on locations and scheduling of events and franchise relocation (*St. Louis Convention & Visitors Comm’n v. National Football League*, 154 F.3d 851 (8th Cir. 1998) (judgment for defendant); *Ky. Speedway, LLC v. Nat’l Ass’n for Stock Car Auto Racing, Inc.*, Civ. A. No. 05-138 (WOB) 2008 U.S. Dist. LEXIS 1076 (E.D. Ky. Jan. 7, 2008) (summary judgment; on appeal); *Ferko v. National Ass’n for Stock Car Auto Racing, Inc.*, 216 F.R.D. 392 (E.D. Tex. 2003) (settled without judgment); *Baseball at Trotwood, LLC v. Dayton Prof’l Baseball Club, LLC*, 113 F. Supp. 2d 1164 (S.D. Ohio 1999), *aff’d*, 204 Fed. Appx. 528 (6th Cir. 2006) (dismissed); *Indianapolis Tennis Championships, Inc., et al. v. Miles, et al.*, No. IP-02-0196 (S.D. Ind.) (settled without judgment));
- Player entry and participation rules (*Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005) (dismissed); *Lokomotiv Yaroslavl v. NHL*, 06 CV 9421, slip op. (S.D.N.Y. Nov. 15, 2006));
- Distribution of league games by telecast (*Chicago Prof’l Sports Ltd. P’ship v. NBA*,

95 F.3d 593 (7th Cir. 1996) (dismissed on remand); *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002) (dismissed); *Kingray, Inc. v. NHL Enter., Inc.*, No. 00-cv-1544, slip op. (S.D. Cal. July 2, 2002));

- Website standards and licensing of digital media rights (*Madison Sq. Garden, L.P. v. Nat'l Hockey League*, No. 07 CV 8455 (LAP), 2007 WL 3254421 (S.D.N.Y. Nov. 2, 2007), *aff'd*, No. 07-4927-cv, 2008 WL 746524 (2d Cir. Mar. 19, 2008) (dismissed after denial of preliminary injunction));
- Intellectual property licensing (in addition to *American Needle; Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008) (summary judgment); *Seabury Mgmt. v. Prof'l Golfers' Ass'n of Am.*, 52 F.3d 322 (4th Cir. 1995) (judgment for defendant); *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392 (N.D. Ga. 2001) (NASCAR dismissed as defendant); *Weber v. National Football League*, 112 F. Supp. 2d 667 (N.D. Ohio 2000) (dismissed));
- Decisions regarding franchise ownership (*Seattle Totems Hockey Club, Inc. v. National Hockey League*, 783 F.2d 1347 (9th Cir. 1986) (dismissed); *Warnock v. National Football League*, 356 F. Supp. 2d 535 (W.D. Pa.), *aff'd*, 154 Fed. Appx. 291 (3d Cir. 2005) (dismissed)); and
- Rules regarding equipment certification and use (*Brookins v. Int'l Motor Contest Ass'n*, 219 F.3d 849 (8th Cir. 2000)

(summary judgment); *Weight-Rite Golf Corp. v. United States Golf Ass'n*, 953 F.2d 651 (11th Cir. 1992) (summary judgment); *Eureka Urethane, Inc. v. Profl Bowlers' Ass'n of Am.*, 935 F.2d 990 (8th Cir. 1991) (summary judgment)).

The concrete impact of such litigation on the day-to-day operations of a league or circuit cannot be overstated. Because of the uniquely cooperative nature of sports enterprises, most § 1 claims challenging league or circuit action are analyzed under the Rule of Reason — a fact-intensive analysis that nearly always requires one or more experts to examine the relevant markets and the alleged competitive impacts on those markets. Such full-blown antitrust litigation is, by any measure, expensive, time consuming, and resource draining to the defendant organizations that are forced to bear legal fees, discovery costs (which grow larger and larger in the era of electronic discovery),⁴ expert witness fees, and the distraction of key executives, managers, and employees required to focus on the litigation (document collection, depositions, interrogatory responses, and trial) instead of on league/circuit business.

For example, in *Deutscher Tennis Bund v. ATP Tour, Inc.*, *amicus* ATP and six of its individual Board members endured more than 18 months of

⁴ In *Bell Atlantic Corp. v. Twombly*, the Court cited the “unusually high cost of discovery in antitrust cases” as among the reasons not to permit claims to proceed where there is no basis to claim concerted action. 550 U.S. 544, 558 (2007).

litigation entailing dozens of depositions around the world, voluminous document discovery, and eleven days of jury trial in response to claims by two disgruntled tournament members unhappy with changes to the basic format of the tour — changes enacted by the corporation’s board of directors in response to detailed consumer research. The claims were extraordinarily broad and, in essence, challenged ATP’s core right to self-governance and its fundamental ability to create and operate a viable professional tennis circuit. The length, breadth, and complexity of the litigation resulted in ATP incurring legal and expert fees and costs in excess of \$17 million. In addition, the bulk of the Board and all of ATP’s most senior executives were required, together, to devote hundreds of hours to the case. After a full presentation of the evidence, the District Court granted motions for judgment as a matter of law under Fed. R. Civ. P. 50 on many of the plaintiffs’ claims and the jury squarely rejected the remaining claims under §§ 1 and 2, finding that plaintiffs had failed to prove the most basic elements of concerted action and a relevant market. (Plaintiffs have appealed certain aspects of the judgment.) As described above, in recent years, ATP has faced two other similar antitrust suits by members dissatisfied with basic rule and format decisions by ATP’s board.

Similarly, in *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002), *amicus* MLS endured five years of litigation, including full-blown discovery, a three-month jury trial, and appeal — at substantial cost to the then-fledgling league. Each of the plaintiffs’ antitrust claims ultimately was rejected at the appellate level for failure to prove a relevant market, a fundamental element of any

antitrust claim. Other examples similarly demonstrate that leagues routinely face such costly, protracted, and baseless antitrust claims in which, from an operational and cost perspective, the leagues, in some respects, “lose” even when they win. *See, e.g., MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008) (more than six years of litigation including three years of discovery); *Bulls II*, 95 F.3d at 598-99 (six years of litigation); *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002) (more than two years of litigation).

At least as important as the costs and impact of actual full-blown litigation is the chilling effect that the threat of such litigation (and treble damages) has on the willingness of leagues/circuits to evolve and respond to marketplace demands. Almost every league or circuit decision is bound to disappoint at least one stakeholder (be it a member, applicant, venue, licensee, or vendor). As shown by the breadth and variety of § 1 claims that have been made, the willingness of courts to assume (incorrectly) that such decisions constitute “concerted action” sufficient to state a claim under § 1 emboldens such stakeholders to pursue ultimately meritless claims, hoping that the risks of treble damages and the costs to “win” will force the league/circuit to settle and revise its decision. Thus, unlike virtually any other industry, sports leagues and circuits operate under the constant threat of crippling antitrust litigation. The result is that business decisions are less likely to be made based on market and consumer needs alone, but may be tempered (or abandoned altogether) to avoid costly grievances “masquerading as antitrust actions.” Discouraging commercial entities from making market-based decisions is antithetical to the

competition-enhancing goal of the antitrust laws. Thus, it is no answer to say to that sports leagues and circuits may prevail under a Rule of Reason analysis. U.S. Br. at 26.

More fundamentally, relying on the Rule of Reason to distinguish lawful and unlawful decisions concerning cooperative products cannot be squared with the principled distinctions between “unilateral” and “concerted” action laid down in *Copperweld* and *Dagher*. As shown above, there is not and could not be “competition” in any relevant antitrust sense among the members of a league or circuit with respect to the production, distribution and promotion of the league/circuit product. It therefore makes no sense to ask a fact finder to assess the anti-competitive and pro-competitive “effects” of decisions concerning such a product among the cooperating members. Such an illogical inquiry is, in fact, fraught with danger. In the absence of competition “in the antitrust sense,” the fact finder may mistake intra-league conflicts or application processes for “competition” and assess the effect of a rule or decision on such internal dynamics — in direct contravention of the established law that the “reasonableness” of internal decisions and conflicts is beyond the scope of § 1. *Copperweld*, 467 U.S. at 776.

Both the actual costs of litigation and the chilling “threat” of § 1 challenges can be avoided by recognizing (as the Seventh Circuit did below) that, from the perspective of consumers in the sports and entertainment market, the decisions of league or circuit members concerning the necessarily cooperative presentation of a professional sports product are just as much “unilateral” action of a

single, economic decisionmaker as the internal decisions concerning the management of any company or joint venture. Affirming the decision below will permit courts to focus on the economic “reality” of sports leagues and circuits, rather than their particular juridical form, and will bring long-needed clarity to the application of § 1 to the sports industry. The result will be to lift the cloud of legal uncertainty that now hangs over sports leagues and circuits and to allow those organizations to make their business decisions based on the needs of the marketplace — and not on a litigation handicap.

CONCLUSION

For all of the above reasons and those stated in the briefs of the respondents, *amici* respectfully submit that the decision of the court of appeals should be affirmed.

Respectfully submitted.

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