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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 OF ECONOMISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of a group of economists with experience in analyzing the economics of sports, antitrust and/or industrial organization issues ("Responding Economists").[1] The Responding Economists include leading economics professors from world-renowned universities, deans from top-ranked business schools, and economists who have analyzed industrial organization issues in the context of the sports and entertainment industry.

The Responding Economists submit this *amicus* brief to provide the Court with background on economic theory about the nature of a firm, in this case in the context of the centralized promotion and trademark licensing operations of NFL Properties LLC ("NFL Properties"). The Responding Economists disagree with a number of assertions made by a group of economists who filed an *amicus* brief in support of the Petitioner American Needle (hereafter "Petitioner Economists"). In particular, Responding Economists disagree that some of the assertions made in that brief reflect a "consensus among research economists." (Amicus Curiae Brief of Economists in Support of Petitioner ("Pet. Econ. Br." 2.)

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae* and their counsel. The Responding Economists are listed on the inside cover. Letters consenting to the filing of this brief are on file with the Clerk of this Court.

As citizens and as professional economists, Responding Economists have a substantial interest in the appropriate use of economics in antitrust. This brief provides economic input to assist the Court's analysis in this case.

SUMMARY OF ARGUMENT

This case raises the question of whether NFL Properties should be considered a combination of competitors for each of NFL Properties' trademark licensing decisions.[2] From an economics perspective, the issue should be addressed in light of the economic theory of a firm and not based on the legal corporate structure of the league or of NFL Properties. Economic theory suggests that there exist legitimate, procompetitive reasons why professional sports teams would organize themselves as a league that centralizes certain functions. For the reasons explained below, NFL Properties, in promoting NFL football and licensing the trademarks of the thirty-two NFL teams, can function as a single economic

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[2] This brief does not address league operations beyond the one raised in the case—namely the centralized promotion and licensing of team trademarks. In particular, it does not address any issues relating to a sports league's employment of players or coaches. Further, and contrary to some press descriptions of this case, Responding Economists do not view this case as suggesting that there should be an antitrust exemption for the NFL. The actions of NFL Properties still could be evaluated just as any other single firm conduct would be reviewed under Section 2 of the Sherman Act. To the extent that NFL Properties entered into an agreement with a third party (*e.g.*, Reebok), that vertical agreement also would be subject to antitrust review.

actor that competes with a variety of sports and entertainment providers.

ARGUMENT

I. SEPARATE CORPORATE ENTITIES CAN FUNCTION AS A SINGLE ECONOMIC ACTOR.

Individuals or separately owned businesses often decide that they can compete more effectively in the marketplace if they combine their operations. Consider, for example, a group of individual professionals who elect to form a partnership. These individuals could have competed against each other for clients or patients, but upon formation the partnership acts as a single economic unit in the marketplace and determines the prices and terms on which it will offer services to the market. The individual partners may disagree on various issues—they may disagree as to the level of rates to be charged, they may disagree as to whether to open a new office or close an existing one, and in almost every partnership they will disagree about what compensation each partner should receive. For a law firm, the partners may also disagree about whether the partnership should limit its representation to accept work only for plaintiffs or only for defendants. None of these internal debates undercuts the economic reality that the partnership is a single economic actor when facing the rest of the market.

From the perspective of the economic theory of firms, one should look beyond the corporate structure of the NFL or NFL Properties to see how that entity competes in the market. Economic substance, and not legal corporate form, should guide the analysis. As 2009 Nobel Prize Recipient Professor Oliver

Williamson has written, the "inability of courts . . . to verify what is common knowledge between the parties to an exchange could induce a move from interfirm to intrafirm organization." Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38:3 J. Econ. Lit. 595, 603 (Sept. 2000). Indeed, some economists have expressed concern that legal standards can cause firms (including sports leagues) to adopt legal structures that the firm or league would not have selected for pure efficiency or competition reasons. *See* Dennis W. Carlton, Alan S. Frankel and Elisabeth M. Landes, *The Control of Externalities in Sports Leagues: An Analysis of Restrictions in the National Hockey League*, 112 J. Polit. Econ. S268, S271 n.9 (Feb. 2004) (noting that the split among circuit courts on single entity issue had caused some professional sports leagues to organize with all teams owned by a single corporation); *see also* Oliver E. Williamson, *The Economics of Governance*, 95:2 Am. Econ. Rev. 1, 9-10 (May 2005) (noting that courts have had the good sense to refuse to hear disputes between one internal division and another).

Economists generally agree that individual suppliers combine to form firms when the costs of transactions (exchanging goods, services and money) are lower inside the firm than in the external market. In his seminal article, *The Nature of the Firm*, Nobel Prize Recipient Ronald Coase explained that firms exist because they are able to substitute internal production for the use of more costly markets.[3] According to Professor Coase:

> A firm will tend to expand until the costs of organising an extra transaction within the firm become equal to the costs of carrying out the same transaction by means of an exchange on the open market or the costs of organising in another firm.

Id. at 395. In particular, the firm structure may provide advantages over a market exchange in efforts to reduce transaction costs, pool and diversify risk, lower search costs, and address opportunism or free-riding concerns.[4] The existence of organizations or firms enables parties to carry out activities that involve high relationship-specific investments within the firm rather than through the marketplace.[5]

Firms that have shared assets or are mutually dependent upon one another (like the NFL teams) are particularly likely to merge into a single economic firm or to adopt some centralized hierarchy. In announcing Professor Oliver Williamson as one of

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[3] Ronald H. Coase, *The Nature of the Firm*, 4 Economica 386 (1937).

[4] Daniel F. Spulber, *Market Microstructure: Intermediaries and the Theory of the Firm* xiii (1999). Free riding refers to an externality in a market in which one entity may benefit from the actions of other entities without incurring the costs. This is a market failure resulting in an inefficient outcome, which often justifies a restriction on a firm's conduct.

[5] Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications*, 25-26, 29-30, 39-40 (1975); Oliver E. Williamson, *The Economics of Governance*, 95:2 Am. Econ. Rev. 1, 10 (May 2005).

this year's Nobel laureates, the Royal Swedish Academy of Science observed:

> Williamson expects hierarchical organizations to emerge when transactions are complex or non-standard, and when the parties are mutually dependent. Perhaps the most typical case of mutual dependence is that parties have assets, either physical assets or knowledge, which are only valuable inside a relationship.

Economic Governance: The Organization of Cooperation, The Prize in Economic Sciences 2009, Information for the Public, at 4.[6] Both Professors Coase and Williamson take issue with "the uncritical propensity of antitrust specialists using the lens of choice to invoke monopoly to explain deviations from simple market exchange." Oliver E. Williamson, *The Lens of Contract: Private Ordering*, 92:2 Am. Econ. Rev. 438, 439 (May 2002). A closer analysis may reveal a pro-competitive reason for the deviation from the "simple market exchange." As Williamson explained, "such practices and structures are often better understood as private ordering efforts to

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[6] Found at http://nobelprize.org/nobel_prizes/economics/laureates/2009/info.pdf (last visited Nov. 19, 2009). The announcement's discussion of Laureate Elinor Ostrom's work also resonates with the issues presented in this case. *Id.* at 2 ("[T]he main lesson is that common property is often managed on the basis of rules and procedures that have evolved over long periods of time. As a result they are more adequate and subtle than outsiders—both politicians and social scientists—have tended to realize.").

accomplish economizing purpose and to realize mutual gain." *Id.* at 439-40.

Economic theory of firm organization applies to the NFL and NFL Properties. Separate NFL team ownership does not mean that the acts of the league—and in this particular case NFL Properties—reflect the actions of thirty-two different economic players with respect to trademark licensing. Economists would expect members of a venture without market power to adopt an efficient combined structure.[7] Just as a law firm partnership establishes billing rates for its attorneys, a joint venture—once formed—can act as a single economic entity as it prices and sells its products.

As a senior economist at the Antitrust Division of the Department of Justice wrote, "[w]hen a joint venture itself participates in the marketplace, its ordinary actions as a market participant are those of a single entity." Gregory J. Werden, *Antitrust Analysis of Joint Ventures*, 66 Antitrust L.J. 701, 704-05 (1998). Werden endorses treating joint ventures "as single entities for limited purposes" to allow courts to reject as a matter of law meritless claims that the joint venture constitutes a group-boycott and price fixing agreement. *Id.* at 705 n.18. Indeed, Werden cites certain aspects of the NFL as examples of single firm conduct. *Id.*

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[7] Petitioner Economists appear to agree that, in a competitive industry, a decision by a small group to compete through a joint venture "is driven solely by efficiency considerations." (Pet. Econ. Br. 17.)

In short, from an economics perspective, the formal corporate structure is not determinative. Just as a parent corporation and its wholly owned subsidiary act as a single economic actor in the marketplace, a joint venture, a partnership or another combination of previously separate businesses can function as a single economic player.

II. THERE EXIST LEGITIMATE ECONOMIC REASONS FOR THE NFL TO ORGANIZE AS A LEAGUE WITH SEPARATELY OWNED TEAMS BUT TO CENTRALIZE FUNCTIONS SUCH AS TRADEMARK LICENSING.

Professional sports leagues may raise some unique economic considerations, but the economic theory of the firm—and particularly Professor Williamson's insights as to mutual dependence among the actors within the firm—help explain why a league can act as a single economic entity in some contexts. The NFL teams cannot individually create the NFL product—the teams must cooperate off the field in order to create the athletic competition that occurs on the field. As discussed below, a league structure with separate team owners can aid the NFL in competing with other products.

A. No NFL Team Could Produce the NFL Product Alone.

The NFL and other sports leagues produce entertainment products and the teams in a league share the risk of loss as well as enjoy the opportunities for profit that result from the relative success or failure to attract fans. No NFL team can individually create NFL football; nor can any team individually create a championship season.[8] Given the joint creation of this entertainment product, NFL teams are not separate economic entities whose membership in the league "suddenly bring[s] together economic power that was previously pursuing divergent goals." *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 769 (1984). Their mutually dependent, collective goal is to increase the appeal of the NFL game so that the teams can compete successfully with other entertainment products and share in the resulting revenue growth. NFL Properties, by promoting the NFL entertainment product, helps the league effect this effort.

Petitioner Economists acknowledge that creating a schedule of matches that leads to a championship "has value because consumers express greater demand for sports that . . . identify the best team over a season of matches." (Pet. Econ. Br. 20.) Rather than recognizing the mutual dependence between league teams that is necessary to create this entertainment product, however, Petitioner Economists attempt to characterize the league production of games as a standard setting activity analogous to the product standards adopted by electronics manufacturers who participate in the

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[8] In his 1964 article, *The Peculiar Economics of Professional Sports*, Walter Neale characterized the league as the decision-making unit. In addition, Neale, noted that "only a single league can produce that most useful of all products joint, the World Champion." Walter Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. Econ. 1, 6 (Feb. 1964).

Electronics Industry Association. (*See id.*) That analogy falls far short.

Unlike the NFL teams, the electronics companies or similar firms in a standard setting organization can create their products independently. They do not need the collective participation and active efforts of other electronics companies in order to create their product and generate their revenues and profits. There exist procompetitive reasons for an industry to adopt standards, but the electronics firms (or others subject to standard setting) could compete without those standards. No single NFL team could offer the championship season without the collective action of the other NFL teams, so the description of a sports league as a standard setting activity is misplaced.

B. A League With Separate Team Ownership Can Aid the NFL in Competing with Other Entertainment Products.

The NFL, like other sports leagues, is a business and attempts to sell its NFL product in competition with other entertainment products. From an economics perspective, centralized promotional efforts can increase the appeal of, and the demand for, the NFL product. As a profit maximizing entity, the NFL seeks to produce and promote a product that draws consumers away from other options and causes the consumers to devote their attention—and their dollars—to the NFL. The NFL, similar to other sports leagues in the United States, competes for these entertainment dollars by offering a schedule of league games that leads to the ultimate crowning of the championship team.

Petitioner Economists suggest that the European approach of independent soccer teams or that a barnstorming team (a la The Bingo Long Traveling All Stars) presents an alternate form of entertainment that could appeal to football fans. But if that approach would draw more fans and yield greater profits, microeconomic theory would predict that the NFL (and other leagues) would move to that approach or new firms would form to capture that economic opportunity.[9] The continued use of the league structure suggests that the NFL has determined that it best competes with other professional sports and entertainment offerings through a championship season. Each NFL season provides a fresh start for each team and an increased sense of drama and excitement as the season

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[9] The Harlem Globetrotters, perhaps one of the best known barnstorming teams, have entertained audiences of all ages with their basketball skills and comedic routines. But that entertainment product lacks the competition and league-produced championship season of the National Basketball Association and draws a much smaller total attendance. The Globetrotters have had fewer licensed products bought by consumers than the NBA. *See Top 100 Global Licensors,* 12 Global License! 19 (Apr. 2009), ***available at*** http://www.licensemag.com/licensemag/data/articlestandard//licensemag/172009/594392/article.pdf.

progresses and teams fight first for playoff spots and eventually for the title of Super Bowl Champion.[10]

The NFL may increase the appeal of its entertainment product by having separate team ownership rather than a controlling corporate entity with divisions or subsidiaries running the teams. Sports fans can be passionate about their favorite team (fan is, after all, merely a shortened form of the word fanatic). That loyalty may be displayed by fans who paint their faces in team colors or who purchase team-logoed apparel, hats, calendars, and other products. In many cases, the principal owner of a professional team can become a symbol of that team and its most visible fan—present at most games, cheering for his/her team, and effectively causing casual fans to become more aware of or interested in the NFL games and products.

Limiting single entity treatment based on the legal, rather than on the economic, structure of a sports league can undercut a league's ability to compete. The NFL, like other entertainment providers, presumably wants to enhance consumer demand for NFL product (whether in the form of NFL games or licensed product). Fans are likely to feel less loyalty and passion if they view an NFL game not as a heated battle with a bitter division rival but instead as an intramural exercise between two unincorporated divisions (or wholly owned

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[10] One of the Petitioner Economists agrees that a league model may prove the best approach. *See* Stefan Szymanski, *The Economic Design of Sporting Contests*, 41 J. Econ. Lit. 1137, 1149 (2003).

subsidiaries) of NFL, Inc. *See* George Daly, *The Baseball Player's Labor Market Revisited*, *reprinted in* Diamonds Are Forever: The Business of Baseball 11, 18 (P. Sommers ed. 1992); *see also* Franklin M. Fisher, Christopher C. Maxwell, and Evan Sue Schouten, *The Economics of Sports Leagues and The Relocation of Teams: The Case of the St. Louis Rams,* 10 Marq. Sports L.J. 193, 195 (2000). The economic success of the league depends, in part, on the perceived legitimacy of the athletic contest, and independent team ownership enhances fans' perception of an intense rivalry between the teams on the field. *See* Daly, *supra*, at 18 (contest legitimacy is enhanced by independent ownership and management of sports teams). Causing sports leagues to organize as a single corporate entity would likely diminish the league's popularity as it competes for consumers' entertainment dollars. That approach also would deprive the league of the marketing and promotion benefits that can result from separate team ownership (and perhaps even from some owners whom only their own fans love).[11]

The suggestion by Petitioner Economists that European soccer teams have followed a different league structure does not imply that the centralized sports leagues of the United States are not the more

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[11] Some economists have warned that the split among the courts of appeals on the single entity issue may have caused some professional sports leagues to organize with all teams owned by a single corporation. *See* Carlton et al., *supra*, at S271 n.9; *see also* Dan Ackman, *XFL Terminated,* Forbes (May 11, 2001), *available at* www.forbes.com/2001/05/11/0511topnews.html (failed XFL not a league of separately owned teams).

appropriate vehicle in the United States. As one of the Petitioner Economists, Professor Szymanski, has written:

> The analysis of normative problems in sports, as in many activities, is often made more difficult by the role of culture. A contest design that is optimal for a particular group of consumers may not be to the taste of another. A good example is the attitude toward player trading in team sports. In North America most fans seem to frown upon player mobility and place the greatest value on players who remain loyal to the same team over their entire career. In Europe, however, player trading has always been an accepted part of the soccer system.

Szymanski, *supra* note 10, at 1149. To the extent that U.K. soccer teams may drop down or move up to a different level of league, those teams still function as a member of a league in any given season. Moreover, according to Professor Szymanski, "the dominant European soccer leagues that have long operated the system of promotion and relegation are not in the best of health. Several teams in England have fallen into administration, the U.K. equivalent of Chapter 11." Stefan Szymanski and Tommaso Valletti, *Promotion and Relegation in Sporting Contests*, Revista de Politica Economica 3, 4 (July 11, 2005).

The NFL has a successful business enterprise that offers an entertainment product through a league structure with separate team ownership. Courts should not mandate structures that prevent a business entity from competing in the manner it determines to be most effective.[12]

III. CENTRALIZED PROMOTION AND LICENSING ALLOW THE NFL TO ADDRESS CERTAIN EXTERNALITIES AND TO ACHIEVE EFFICIENCIES.

The centralized licensing of the NFL team and league trademarks makes inherent sense because the popularity of the jointly created NFL games affects the demand for NFL marks and licensed product. All else being equal, gains in the NFL's popularity relative to other sports and entertainment are likely to increase the demand for NFL licensed product. Conversely, economics would suggest that a team's marks would drop in value if play were interrupted by a strike or lockout or if the team left its association with the NFL.[13] *See Major League Baseball Props., Inc. v. Salvino, Inc.,* 542 F.3d 290, 296, 332 (2d Cir. 2008) (demand for MLB licensed product dropped during player strike). Just as the creation and

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[12] According to Professor Szymanski, one of the Petitioner Economists, the "promotion and relegation" approach of the European model makes teams less willing to share revenues. To the extent that revenue sharing is considered beneficial for consumers who prefer more balanced contests, the promotion and relegation model may reduce social welfare. Szymanski and Valletti, *supra*, at 31.

[13] Relatively little trademark licensing value exists today for such former NFL teams as the Houston Bulldogs, Minneapolis Red Jackets and Providence Steam Rollers. Even teams that have more recently changed their names, such as the former Houston Oilers, would expect the value of the older name to diminish without a team playing under that name.

popularity of the NFL championship season depends on the collective efforts of the NFL teams, so too does the value of the NFL team trademarks depend on the appeal of the jointly created on-field competition.

In addition, a sports league can benefit from the promotional efforts of the companies that sell products bearing league and team trademarks. The advertising undertaken by licensees to sell retail product can have the effect of promoting the NFL entertainment product. The NFL also may select league-wide charitable efforts (*e.g.*, NFL and United Way) that help position the league's image so that the NFL, and not just the charity, benefits from the association. NFL Properties, as a centralized promotion and licensing entity, can adopt a promotion and trademark licensing plan that best serves the league's overall interests and that positions the league to compete against other providers of sports and entertainment.

A. Any Analysis of the NFL Trademark Licensing Operations Should Consider Externalities.

Petitioner Economists devote no attention to the issue of externalities—and particularly to the risk of free riding. *See* Carlton et al., *supra*, at S271-72; Andrew Abere, Peter Bronsteen & Kenneth Elzinga, *The Economics of NASCAR*, 1 The Oxford Handbook of Sports Economics (Leo H. Kahane & Stephen Szymanski eds., forthcoming 2010) (discussing possible negative effects on other NASCAR races if problems arise at one race); *see also* Franklin M. Fisher, Christopher Maxwell, and Evan Sue Schouten, *The Economics of Sports Leagues—The Chicago Bulls Case*, 10 Marq. Sports L.J. 1, 4, 8-11

(1999). Responding Economists believe that externalities must be considered.

An externality occurs when the actions of one firm impose a cost or confer a benefit to others and such costs or benefits are not part of the firm's profit and loss calculations. Free riding is one type of externality. Free riding occurs when the actions of one firm benefit another firm without the latter firm (the free rider) having to pay for that benefit.

The NFL faces free riding issues because the NFL championship season is a jointly created product and because the NFL's league-wide promotion efforts benefit all NFL teams.[14] A team that failed to pay its share of league promotional expenses would still benefit from the league's centralized promotional effort. If teams could refuse to contribute to the promotional efforts (and thus engage in free riding), the NFL would have less to spend on promotion than the league would otherwise choose. The lower promotional spending, in turn, would likely reduce the NFL's ability to attract new fans and keep existing ones. The NFL would want to correct the free riding problem to assure a more desirable level of promotion.

Free riding also applies in the context of trademark licensing. The NFL has developed a valuable brand and its accompanying intellectual property, including its trademarks and logos. The value of an individual team's trademarks derives

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[14] For example, the NFL logo—a red, white and blue shield with an outline of a football and the letters NFL—is instantly recognized by most football fans.

from its joint participation in the production of the NFL product. As in the promotion context, free riding by an individual club may undermine the collective interest of the league.

Centralizing trademark licensing can reduce free riding, and thus benefit the league, its member teams and consumers. For example, NFL Properties checks to ensure that licensed products satisfy the NFL's quality standards.[15] One team's decision to license the use of team trademarks on low quality or shoddy product could negatively affect not only the perceived value of that one team's licensed products but also customers' perception of all NFL licensed products and the NFL. A single, centralized trademark licensing organization allows the league to adopt a strategy that ensures consistent quality standards and eliminates the possibility that lower quality licensees will free ride on the investments of others. Such consistent quality standards help position the league to compete against other licensors of intellectual property.

Second, in order to induce a licensee to more heavily promote NFL licensed product, NFL Properties may decide to grant an exclusive license for the use of the league trademarks on a category of product. NFL Properties may pursue this option

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[15] These quality standards could relate to the quality of the marks used (*e.g.*, ensuring that the proper shade of blue ink is used for products with New York Giants marks) and/or that the licensed product is of a sufficient quality so that consumers associate NFL licensed product with quality apparel (and not product on which colors run or fade on the first wash).

because the league believes the added promotional and sales efforts by the licensee will result in more consumers switching from competing products to buy NFL-logoed products. The exclusivity would give the licensee increased incentive to promote the licensed line because the licensee would know that, with exclusive trademark rights in the category, the licensee will receive the benefits of those promotional and sales efforts. On the other hand, if an individual team could license its team marks in that same category of product, the team licensee would free ride on the promotional efforts of the league licensee, with the effect that the league licensee will not capture all the returns on its promotion investment. This free riding undercuts the league licensee's incentive to promote the league trademarks and brand and, as a result, weakens the competitive position of the leagues' trademarks.

The *amicus* brief of Petitioner Economists offers no analysis of the externalities and free riding concerns faced by the NFL generally or with respect to trademark licensing in particular. Responding Economists would expect free riding concerns to be considered as part of any economic analysis as to why a professional sports league (such as the NFL) might elect to centralize certain commercial functions.

B. Centralized Licensing Operations Through NFL Properties Allow the NFL to Achieve Efficiencies.

Petitioner Economists concede that "the NFL as it is currently structured may be an efficient way to organize professional football in the United States" but they argue that the standard should be "whether efficient standardization by a league *requires* *centralization of all core business activities*." (Pet. Econ. Br. 27, emphasis added. This argument is misplaced in two regards.

First, the current case does not require the Court to address and identify every aspect of the NFL that is or is not appropriate for single entity treatment. Rather, American Needle has challenged the decision by NFL Properties not to renew American Needle's license to use NFL team trademarks on headwear (hats) and instead to award Reebok the exclusive rights to use those marks on headwear.[16]

Second, in analyzing the centralized licensing of trademark rights, the appropriate question is not whether centralization of a particular commercial

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[16] Petitioner Economists make several arguments relating to television broadcasting of sporting events. This brief does not analyze the broadcasting issues because American Needle has not challenged a broadcasting agreement. Even if the Court were to address broadcasting issues, these are complex issues and the quantity of broadcasting output is not simply a count of how many games are televised. *See* Stephen F. Ross and Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations*, 16 Marq. Sports L. Rev. 213, 239 (2006) (significant pro-competitive benefits would result from transferring control of team broadcasting rights to a non-owner controlled league office rather than having individual teams control broadcasting rights). As one of the Petitioner Economists has acknowledged, sporting events should be viewed as heterogeneous products. *See* Roger G. Noll, *Broadcasting and Team Sports*, 54:3 Scot. J. Polit. Econ. 400, 401 (July 2007). A robust analysis of broadcasting issues not only would consider the number of games televised but also would account for such factors as total number of viewers, the portion of the country for which the game is broadcast, and the quality of the broadcasts.

activity is "required." Few (if any) mergers or acquisitions would meet a "required" standard, and economists instead evaluate whether such transactions cause anticompetitive effects. In evaluating the formation or creation of a centralized entity that sells the jointly created products (here NFL Properties), the inquiry should be whether the centralized operation would enable the league to realize efficiencies and/or compete more effectively. If combining NFL promotion and trademark licensing operations (rather than having separate operations for each team) creates efficiencies and enhances competition, economic theory would support the league control and would treat the subsequent licensing decisions of NFL Properties as the actions of a single economic firm.

Petitioner Economists "offer no conclusion as to whether the efficiency justification is valid in this case," (Pet. Econ. Br. 32),[17] yet they argue that "[i]f such efficiencies do not exist, a joint venture for product licensing is a collusive cartel of horizontal competitors." (*Id.* at 34.) This prospective "collusive cartel" hypothesis is meritless because reasonable economic assumptions and common sense suggest that centralized trademark enforcement, promotion and licensing through NFL Properties permit the

[17] Petitioner Economists appear to suggest that if they are unable to cite to a published article as to why it is efficient for the NFL teams to jointly license their marks and logos, economics has little to contribute to the examination or to provide procompetitive reasons for the centralized licensing. In fact, economic analysis can contribute much, particularly to an understanding of the role of externalities and efficiencies.

NFL to realize efficiencies that the various NFL teams could not achieve individually.[18] Licensees reduce their transaction costs and thus produce their licensed products more efficiently when they can obtain a single license from NFL Properties rather than 33 separate licenses (32 teams plus the league).

Centralized licensing also allows the NFL (and licensees) to avoid the "hold out" problem, by which the last club to license its rights insists on a premium or it will prevent the licensee from having the rights for all 32 teams' marks.[19] A prospective licensee for the rights to use the Super Bowl name and the NFL logo on apparel will also want the ability to use the marks and names of the teams playing in the Super Bowl. The risk of a hold out problem makes licensees less likely to pursue trademark licenses because the prospective licensee fears either being without rights to the marks to one of the teams in the Super Bowl

[18] At least one of the Petitioner Economists appears to recognize this point, having written that the design and licensing of professional sports merchandise—jerseys, hats, jackets, etc.—would include at least some functions most efficiently done on a league-wide basis. *See* Ross and Szymanski, *supra*, at 230. As an example, they acknowledge that "[t]here are obvious economies of scale in granting licenses for a particular item to one or a few manufacturers." *Id.*

[19] Obtaining the rights to use the logos of all 32 teams—and not just some group of teams—can be important to a variety of licensees. For example, if a video game maker needed to negotiate separately with 32 teams, not only would negotiating (transaction) costs increase but the last teams to license their trademark rights would have significant negotiating leverage. This could cause teams to attempt to position themselves as the last to sign.

(or AFC/NFC Championship Game) or being forced to overpay for those rights. *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 420 F. Supp. 2d 212, 217 (S.D.N.Y. 2005) (discussion of hold out problem and actual instance when, prior to centralized licensing through MLB Properties, Houston club refused to license club photo for baseball card). "One stop shopping" at NFL Properties assures the licensee of the complete licensed rights package and avoids this concern.

In the trademark licensing area, one would expect NFL Properties to realize economies of scale and scope with respect to quality control, marketing, product development and intellectual property enforcement. NFL Properties licenses not only rights to team logos but also the rights to use those team logos with league marks (*e.g.*, NFL shield or Super Bowl trademark) and the NFL name. NFL Properties can develop, for example, a marketing campaign for an entire clothing line with advertisements that display the various styles of products using different team logos. A single ad could show both the breadth of the licensed line and the product availability in all team colors and with any team logo. Moreover, by using the NFL shield logo in the ads, the league can assure potential customers that the products meet the NFL level of quality. In addition, the centralized trademark licensing enables teams to benefit from any new product developments without needing independent team employees for product development. Given these obvious efficiencies, there exist procompetitive economic reasons for the NFL to centralize its licensing operations in NFL Properties. *See also*

Major League Baseball Prop., 542 F.3d at 337 (MLB Properties "offers substantial efficiency-enhancing benefits that the individual Clubs could not offer on their own") (Sotomayor, J., concurring).

This conclusion is not affected by Petitioner Economists' assertion that "[e]conomics research supports the conclusion that none of these efficiency claims [described by the 7th Circuit] applies to all core business activities of the member teams of the NFL." (Pet. Econ. Br. 32.) As a preliminary matter, this argument again goes beyond the challenge by American Needle to NFL Properties' decision not to renew American Needle's trademark license and instead to license only Reebok in the headwear product category. Further, the logic of their argument is the equivalent to a statement that "NFL statistics support the conclusion that none of the benefits of punting applies to every 4th down situation." The statement is likely true, but punting is the appropriate action on many occasions, even if in certain circumstances a team may elect instead to kick a field goal or to try for a first down or touchdown. This case involves only the promotion and trademark licensing aspects of the NFL: the efficiencies for centralized promotion and trademark licensing demonstrate why a sports league would adopt that approach rather than cause each team to attempt to handle licensing operations on its own.

For these reasons, economic analysis suggests that NFL Properties functions as a single economic actor for the centralized promotion and licensing of NFL trademarks.

IV. A MARKET LIMITED TO NFL TRADEMARK RIGHTS IS NOT REASONABLE.

Petitioner Economists recognize that, in a competitive industry, a decision by a small group to compete through a joint venture "is driven solely by efficiency considerations." (Pet. Econ. Br. 17.) Nonetheless, in suggesting that there exists a "consensus" among economists contrary to the NFL's position, Petitioner Economists appear to assume that the NFL teams hold a dominant market share in the relevant product market in which the NFL licenses its intellectual property. Responding Economists disagree with that assumption because it is unreasonable to assume that the NFL dominates any market for licensing trademark rights.

In the trademark licensing context, the NFL competes with the owners of a variety of other intellectual property for use on various consumer products. *See NFL v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, C.J., dissenting from denial of cert.) ("the league competes as a unit against other forms of entertainment"). To accept the assertion that the relevant market consists only of NFL marks, one must conclude that the next closest substitutes for any one team's marks are the trademarks of other NFL teams.

Looked at from a fan's perspective, and using the Chicago Bears' trademarks as an example, a purported market of only NFL team marks means that a Bears' fan would turn to Packers, Colts or Vikings gear before that fan would substitute Bulls, Cubs, Blackhawks, White Sox, Illini or Northwestern products.[20] No lengthy economic study or trip to Chicago's Soldier Field is needed to question that market definition assumption. Indeed, several courts that have viewed the relevant market issue with the benefit of an evidentiary record (including expert opinions) concluded that a league specific market was not sustained. *See Major League Baseball Props.,* 542 F.3d at 298-300, 329-330; *Ky. Speedway L.L.C. v. NASCAR*, No. Civ. A. 05-138 (WOB), 2008 WL 113987 (E.D. Ky. Jan. 7, 2008) (rejecting proposed market definition and market test proposed by one of the Petitioner Economists).

From the licensee's point of view, a licensed right to use the NFL trademarks on retail product is an input that the licensee uses to increase the appeal of its product to consumers. *See Top 100 Global Licensors*, *supra* note 9, at 19. If the licensee manufactures apparel, for example, the licensee anticipates that the popularity of NFL football will cause more of its apparel product to be bought if that apparel (or some lines of that apparel) bears an NFL mark. There exist a number of other trademarks or associations that the manufacturer might license to use on its retail product, including the marks from

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[20] In his textbook, Petitioner Economist Rodney Fort recognizes the fallacy of this assumption, noting that "in the hearts of fans there is no substitute for the home team[.] Packers fans are not Vikings fans, and Yankees fans couldn't care less about the rest of MLB except insofar as they are the competition." Rodney D. Fort, *Sports Economics* 139 (2d ed. 2006).

other sports entities, from colleges and universities,[21] and from a variety of entertainment offerings (*e.g.*, Disney, Nickelodeon, MTV, Simpsons). An apparel manufacturer also has the option of selling products with no marks, with public names or associations (*e.g.*, D.C. or FBI) or with the company's self-created mark (e.g., Tommy Hilfiger, Old Navy, or Nike "swoosh"). Each of the prospective licensors presumably tries to convince prospective licensees that the popularity of that licensor's brand (which in the NFL's case is driven by the popularity of the jointly created NFL championship season) would enable the licensee to sell more product than it would sell otherwise. But the prospective licensee of NFL marks has a number of intellectual property licensing options, and it is unreasonable to assume that NFL Properties has the power to cause anticompetitive effects in the market for the licensing of marks for use on retail products.

Absent market power, an entity that pursues its own interests is also pursuing the interests of its

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[21] For the 2001-02 school year, the University of North Carolina reported that it received more than $3.5 million in trademark royalties, with 75% of the revenues going to scholarships and the remaining 25% to the athletic program. *See* Press Release, University of North Carolina, Trademark Licensing Review Sets New UNC Record (Sept. 25, 2002) www.unc.edu/news/FYI/license092502f.htm. Harvard reportedly received $1.40 million in trademark licensing fees for 2008 and Princeton received $266,000. *See* Joanne Chong, *U Grosses $266,000 From Trademark, Logo*, Daily Princetonian (Mar. 27, 2009), *available at* http://www.dailyprincetonian.com/2009/03/27/23172.

consumers. Courts should not interfere with these business decisions. Because NFL Properties competes with a variety of intellectual property licensors, it lacks the ability to raise price above the competitive level. NFL Properties has no choice but to compete and to act in a way that attempts to attract fans and potential customers.

V. COMPETITIVE BALANCE IS A LEGITIMATE CONCERN OF SPORTS LEAGUES.

Successful and less successful teams exist in all leagues, but the overall success of a league requires that teams be relatively evenly matched in terms of playing ability. *See* John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 Duke L.J. 1013, 1018 n.17 (1984). As Professor Neale once noted, "[w]hen, for a brief period in the late fifties, the Yankees lost the championship and opened the possibility of a non-Yankee World Series, they found themselves—anomalously—facing sporting disgrace and bigger crowds." Neale, *supra* note 8, at 2; *see also* Abere et al. *supra* (outcome uncertainty keeps fans engaged in sporting event).

In the context of centralized league trademark licensing, the revenues from product licensing are driven largely by the success and popularity of the football season that the teams collectively create. To the extent that the season has a number of teams vying for the last playoff slots, that competitive balance can generate more interest in the NFL game product and, in turn, in licensed product.[22] All of the teams, even the losing ones, contribute to the creation of the season and they share the revenues from the centralized product licensing, which in turn may allow teams with lower local revenues to afford higher player payrolls.

Petitioner Economists devote a number of pages to a discussion of competitive balance, but their arguments are misplaced. Most of the issues they raise relate to labor issues, not trademark licensing. This includes their stated concern that revenue sharing may not result in equal payrolls for all teams. These labor arguments are not relevant here because they do not address the relevant market for licensing NFL trademarks, the externality and free riding concerns related to trademark licensing, or the efficiencies realized by centralized licensing.

In addition, Petitioner Economists' competitive balance arguments acknowledge the need for some competitive balance but appear to reflect their disagreement with how much competitive balance is optimal and where the NFL should locate its teams. They agree, for example, that attendance is affected by the quality of the teams playing in the game (Pet. Econ. Br. 30), but they suggest that leagues should move talented players away from their current teams and to teams located in "markets in which revenues are more responsive" to team quality. (*Id.* at 40). They also opine that "the leagues exacerbate

[22] Young Hoon Lee, *The Impact of Postseason Restructuring on the Competitive Balance and Fan Demand in Major League Baseball*, 10 J. Sports Econs. 219 (Jan. 2009).

whatever competitive balance problems they have by placing too few teams in the largest markets." (*Id*. at 45). The NFL no doubt disagrees with Petitioner Economists as to the fan reaction to these proposals,[23] and the NFL presumably believes that its current approach to competitive balance better serves the league as the NFL competes with other sports and entertainment products. In this case, the Court need not consider how much competitive balance is optimal or how that affects player assignments or team location. Rather, what matters is that competitive balance—the competitiveness of the contest on the field—can affect the popularity of the NFL product and, accordingly, is a legitimate consideration for a sports league.

None of the economic studies cited by Petitioner Economists appears to provide any meaningful analysis as to how competitive balance affects a league's centralized licensing of league and team trademarks. The studies also do not appear to counter the concept that centralized league licensing operations can allow all teams to share in the licensing revenues that flow from their jointly created entertainment product. Further, while many of the studies cited by Petitioner Economists conclude that the issue of competitive balance is difficult to assess

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[23] Petitioner Economists' approach ignores that common property rules and procedures that have evolved over long periods of time can be "more adequate and subtle than outsiders – both politicians and social scientists – have tended to realize." Royal Swedish Academy of Science, *supra*, at 2 (discussing work of 2009 Nobel laureate Elinor Ostrom).

and that further statistical analysis should be undertaken, at least one of the cited studies concludes that leagues can increase fan demand (as measured by attendance) by creating rules or postseason structures that create more uncertainty as to which teams will advance to the playoffs. *See* Lee, *supra*. In other words, by increasing the uncertainty as to who will win the ultimate championship, leagues can increase fan demand for their products and enable the leagues to better compete with other entertainment products.

There exists no consensus among economists that competitive balance is not a proper consideration for a professional sports league and Petitioner Economists appear to recognize that some level of relative competitive equality (perhaps with some teams that are more successful) makes the NFL more appealing to fans. As two of the Petitioner Economists have written, the "special problem for sports leagues is the need to develop a degree of competitive balance on the field that is acceptable to fans." *See* Rodney Fort & James Quirk, *Cross-subsidization, Incentives, and Outcomes in Professional Team Sports Leagues*, 33 J. Econ. Lit. 1265, 1265 (1995). Centralized trademark licensing can generate shared revenues that will enable teams to move toward a more competitively balanced position. Therefore, a league, acting as a rational economic entity, would consider competitive balance concerns in determining how to organize and operate its trademark licensing function.

CONCLUSION

For the foregoing reasons, the Responding Economists respectfully submit that economic analysis and research support the Respondents' argument that the NFL is a single economic actor with respect to centralized trademark licensing.

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