

No. 08-661

In The
Supreme Court of the United States

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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**

—◆—
**AMICUS CURIAE BRIEF OF VF IMAGEWEAR, INC.
IN SUPPORT OF RESPONDENTS**

—◆—
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INTEREST OF AMICUS CURIAE¹

VF Imageware, Inc. (“VFI”) is a wholly-owned subsidiary of VF Corporation, a publicly held company. VFI’s Licensed Sports Group division designs, manufactures and markets high-profile sports and lifestyle apparel bearing trademarks and logos that it owns or licenses from major sports leagues, other selected organizations, and individual athletes. The Licensed Sports Group division currently manufactures fanwear and sports apparel under licenses granted by the National Football League (“NFL”), Major League Baseball, the National Basketball Association, the National Hockey League, NASCAR, ESPN, Inc. and many colleges and universities.

The apparel VFI manufactures for these licensors is sold in department stores, sporting goods and athletic specialty stores, mass market retailers, and other retail outlets, as well as through e-commerce to domestic and international customers. VFI’s marketing strategy emphasizes its ability to manage a complex mix of products where speed-to-market, product customization, and superior service and quality make the company a formidable competitor in its markets.

¹ Counsel for Amicus are the sole authors of this Brief. Amicus is the sole contributor to the cost of this brief. The parties’ written consents to file this brief have been lodged with the Court.

VFI and its predecessor entities have been licensees of NFL Properties LLC (“NFLP”) for more than twenty years, with a current five-year apparel license. VFI’s license rights under this arrangement include tee-shirts, fleeces, tops, bottoms, fashion knits, polos, sweatshirts, and other apparel products sold to the public through retail channels. VFI has not entered into license agreements with individual NFL teams.

NFLP, which represents all thirty-two teams in the NFL, invites competitive bids by prospective apparel licensees by using a request for proposal (“RFP”) process that is open to any apparel manufacturer meeting NFLP’s announced requirements. Apparel licenses awarded through this process usually remain in force for multiple years and are rebid about one year before they expire. Each prospective licensee submits an independent proposal addressing the manufacturing, marketing, product quality, sourcing and distribution plans for its products requested by NFLP. VFI understands that NFLP grants such licenses based on a licensee’s product qualities, distribution capabilities, and reputation, as well as NFLP’s past experience with the licensee, in terms of brand protection and optimization.

VFI believes that this competitive bidding process results in an optimized sourcing, manufacture and distribution model that enables high-quality NFL-licensed apparel to be made available to consumers at more favorable prices than would be available if

licenses were granted by individual teams through a process that invariably would be less efficient and more costly.

Petitioner contends that this rational and time-tested marketing environment damages the interests of consumers of these products and stifles competition. For the reasons articulated herein, VFI disagrees, and respectfully offers its views for this Court's consideration.



INTRODUCTION AND SUMMARY OF ARGUMENT

As a licensee of many sports enterprises, including the NFL, VFI brings a broad perspective to its business and marketing efforts in this regard. VFI believes there are two paramount, almost indisputable factors that should be considered by the Court in this case.

First, from VFI's perspective, the teams that are part of the NFL comprise a single economic entity with a uniform objective of promoting a joint product (the NFL), not thirty-two individual teams with separate promotional interests.

Second, VFI needs and wants all of the clubs' trademarks and logos for its NFL products. That collection of trademarks and logos, and the coherence brought to them under the league's umbrella, is of great value to VFI as a marketer of NFL apparel.

This intellectual property would be considerably less attractive and valuable to VFI if it were licensed by individual teams to a dispersed group of licensees. Various efficiencies and transaction cost savings would be lost under such arrangements, and prices to consumers invariably would be higher and output potentially lower.

In short, VFI believes that treating the NFL as a single entity for the purposes addressed here is pro-competitive. When the facts are fairly appreciated, the entertainment consumer, the league, and its vendor community are served more efficiently and more economically under the current licensing arrangement. From both a competitive and consumer perspective, there are no losers in this licensing environment.



ARGUMENT

NFLP, NFL AND NFL TEAMS FUNCTION AS A SINGLE ENTITY WHEN LICENSING NFL TEAMS' INTELLECTUAL PROPERTY AND THUS DO NOT VIOLATE SECTION 1 OF THE SHERMAN ACT

The decision of the court of appeals should be affirmed. The logic of the Court's interpretation of the "single entity" concept in *Copperweld v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984), does not apply only to the actions of a parent corporation and its wholly-owned subsidiary. VFI thus incorporates by

reference the arguments presented by Respondents on this point. Of particular note here, this Court has recently stated that joint ventures are regarded as a single enterprise not subject to the strictures of Section 1 of the Sherman Act, 15 U.S.C. §1, when firms in such a venture that might otherwise be competitors “pool their capital and share the risk of loss as well as the opportunities for profit.” *Texaco, Inc. v. Dagher*, 547 U.S. 1, 6 (2005).

The fully integrated operations of NFLP in the licensing of NFL trademarks, logos, and other intellectual property fall squarely within this rule. As this Court has previously recognized, such integration achieves efficiencies that result in the substantial lowering of costs that is beneficial to both licensor and licensees. *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 22-23 (1978). An examination of the relationship between VFI and NFLP reinforces these conclusions.

NFLP is a desirable and highly efficient “one-stop shop” for NFL league and team trademarks and logos, centralizing the licensing of such intellectual property within a single source. VFI has not entered into license agreements with thirty-two individual NFL teams, nor would it want to do so. Such a process would be too cumbersome, too expensive and too unpredictable, a common-sense business perspective confirmed by history. *See, e.g., Major League Baseball Props., Inc. v. Salvino, Inc.*, 420 F. Supp. 2d 212, 217 (S.D.N.Y. 2005) (describing what happened in 1965, when the Houston Astros refused to permit

Topps Chewing Gum to make or sell an Astros baseball card), *aff'd*, 542 F.3d 290 (2d Cir. 2008). Under the current centralized NFLP license model, VFI has achieved substantial cost savings and enhanced product consistency and quality to the benefit of VFI, the NFL, and consumers. If VFI were required to enter into separate license arrangements, requiring separate negotiations and leading to disparate contractual arrangements with each NFL team, it would inevitably follow that manufacturing, administrative and procurement costs would increase; overhead expenses would increase; and ultimately, the price of goods to the consumer would increase, as VFI would need to recoup the cost of these inefficiencies.

Under the present integrated licensing arrangement, VFI is able to achieve design efficiencies, economies of scale in manufacturing and sourcing of materials and products, better quality control, more efficient distribution, and ease in dealing with any retailer and consumer inquiries or concerns that may arise with respect to the products involved. NFLP's licensing procedures enhance product quality and consistency by emphasizing standardization of the product offerings. These procedures in turn allow VFI to better monitor and manage its customer and vendor base as well as its own in-house manufacturing process. Timely delivery and product availability are enhanced by this process as well. Thus, in addition to the resulting cost efficiencies to VFI, the arrangement makes NFL products more desirable for

consumers and consequently achieves cost efficiencies for everyone involved. These savings and efficiencies are further enhanced by NFLP's centralized intellectual property protection and enforcement. Additionally, NFLP and VFI are better able to monitor and manage the intellectual property rights associated with the NFL and team brands with regard to counterfeit products. This, in turn, protects consumers from numerous would-be counterfeiters selling inferior quality, unlicensed products.

This "NFL model" is the norm among professional sports leagues, and those other sports entertainment outlets and their consumers also benefit from similar efficiencies and economies.

Conversely, when VFI has been required to enter into separate license agreements with individual sports league licensors, VFI has experienced a reduction in efficiency and higher transaction-related costs. Higher prices for the end-consumer are an inevitable consequence even if VFI determines that the cumbersome and costly negotiations with individual licensors or a "holdout" licensor merits the increased effort and expense. In those instances in which VFI has determined that such negotiations do not merit that effort and expense, the result is reduced output and less product available to consumers.

From VFI's perspective, there is no economic or other benefit from balkanized negotiations. This is especially true in professional sport leagues. The

league itself, not individual teams, enhances the value of team trademarks and logos by sponsoring and promoting competition on the field and rivalries that encourage consumers to identify with their favorite teams by purchasing products that allow them to show their team loyalties. Licensing collectively at the league level for national distribution ensures adequate incentive to manufacturers like VFI to make appropriate investment in the manufacturing, distribution and marketing of its products for the benefit of consumers.

Finally, it is well-established that the competitive bidding process by which NFLP selected VFI as a licensee – “competition-in-the-contract” – is procompetitive. *See, e.g., Digene Corp. v. Third Wave Techs., Inc.*, 323 Fed. Appx. 902, 911-12 (Fed. Cir. 2009); *Paddock Pubs, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996), *cert. denied*, 520 U.S. 1265 (1997). That process is beneficial both to sports leagues and their licensees, and *particularly* in the context of “all-in” bidding for league-wide rights, generally leads to lower consumer prices than would be achieved through inefficient, less valuable and more costly individual team licensing.

Our antitrust laws were not intended to promote inefficiency or to increase costs to suppliers, retailers, and consumers.



CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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