American Bar Association
Forum on the Entertainment and Sports Industries
2016 Annual Meeting
October 6-8, 2016 (Las Vegas, NV)

Litigation Roundup

Saturday, October 8, 2016
9:00am-10:30am

Moderator
Kenneth Freundlich
Freundlich Law (Encino, CA)

Panelists
William J. Briggs, II
Partner, Venable LLP (Los Angeles, California)

Helene M. Freeman
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Jennifer Scullion
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This last year has seen landmark decisions on a variety of issues in sports, music, film, television, and other key areas. Join our expert panel for review of some of the most significant developments passed down from the courts this past year. Take home practice tips and lessons learned from recent litigation and how these cases will affect the way you counsel your clients moving forward. Learn about discernable trends and cases likely to be a major factor in entertainment law in the coming year.
1. Creation of Fiduciary Relationship

A. Contractual


2. A person cannot become the agent of another merely by representing herself as such. To be an agent she must actually be so employed by the principal or "the principal intentionally, or by want of ordinary care, [has caused] a third person to believe another to be his agent who is not really employed by him." Pagarigan v. Libby Care Center, Inc., 99 Cal. App. 4th 298, 301-302 (2002).

3. Indicia of Relationship:

   a. Strong indications of an agency relationship are the agent’s power to alter legal relations between the principal and others, a fiduciary relationship, and the principal’s right to control the agent’s conduct. Valley Investments, L.P. v. BancAmerica Commercial Corp., 88 Cal. App. 4th 816 (2001).

   b. Examples of the agency relationship can be found between a typical talent agent and artist, business manager and artist, personal manager and artist, sports agent and athlete. See, e.g., Gershunoff v. Panov, 430 N.Y.S.2d 299, 77 A.D.2d 511, 512-13 (N.Y. App. Div. 1980) (fiduciary relationship created by manager-performer relationship). In each of these examples, the agent or manager typically has the authority to act for and negotiate deals on behalf of the artist or athlete which alter the legal relations between that artist/athlete and others. Additionally, a fiduciary relationship generally arises between a talent agent and artist, business manager and artist, personal manager and artist, sports agent and athlete because in each of these relationships the artist normally invests trust and confidence in their agents and managers by looking to those advisors for advice on matters with the specialized knowledge of that person. In these instances, the law imposes on the agent the duty of loyalty, duty to avoid conflicts of interest, duty not to undertake adverse trust, and duty to keep property separate and identified. Cal. Civ. Code § 2322. An important indicator that a fiduciary relationship arises between artists and agents and
managers is that the managers and agents have some level of control over the artist or athlete. Generally, written contracts between these representatives and artists contain provisions stating that the agent or manager will counsel and advise the artist in the selection of entertainment work to undertake and authorize the agent and manager to negotiate the material deal points of an agreement on behalf of the artist. While the authority of the agent to negotiate such contracts is granted by the artist or athlete, the artist or athlete provides express authority to the agent to control the negotiations, and in many instances agrees to material deal points on behalf of the artist and athlete.

c. According to some legal commentators, “[a]n agent is a fiduciary, whose obligation of diligent and faithful service is the same as that of a trustee.” *Witkin Summary of California Law, Agency and Employment, (10th Ed.)* (2005).

d. In *Yngwie-Malmsteen v. Berdon, LLP*, 595 F.Supp.2d 299 (S.D.N.Y. 2009), the plaintiff was a musician who claimed that his personal manager and business manager breached their fiduciary duties to him by embezzling millions of dollars from him. The musician also claimed that the business manager enabled the personal manager to embezzle the funds by failing to properly monitor the musician’s income that was being deposited into a bank account maintained by the personal manager. The court held that a reasonable jury could conclude that among the duties assumed by the business manager was the duty to monitor income being deposited in the bank account maintained by the personal manager, since the business manager agreed “to make sure that all of plaintiff’s income was collected and accounted for and looked at and put in the right spot.”

e. In the Entertainment Industry, Personal Managers and Talent Agents generally promise to help an artist secure employment. Business managers promise to take care of the financial interest of the artist or athlete. Each of these promises may give rise to fiduciary duties.

f. In *Davis v. Williams*, 2016 WL 1221626 (M.D.Tenn.), a case currently pending in Tennessee, the lead bass player for the band Paramore (“Plaintiff”) is suing other band members, personal artist managers, accountants, and music publishers, alleging (among other claims) breach of fiduciary duty for failing to appropriately advise and account for Plaintiff’s creative contributions to the musical compositions and sound recordings embodied on the album *Paramore*. 
2. FIDUCIARY DUTIES

A. Under California law, a fiduciary has a duty of care, a duty of loyalty, a duty to avoid conflict of interest, a duty to keep property separate and identified, and a duty of disclosure. Cal. Civ. Code § 2322.

1. Duty of Care

a. As a general rule, an agent is under a duty to use reasonable care, diligence, and skill in performing his or her work. Cal. Lab. Code §§ 2854, 2858. And an agent who holds himself out as possessing special skills or knowledge is held to a higher standard of care. (See, e.g., Colpe Inv. Co. v. Seeley & Co., 132 Cal.App. 16 (1933) (It is the duty of an agent to exercise good faith and reasonable diligence to procure insurance on the best terms he can obtain; and if he is a professional agent he should be required to exercise the particular skill reasonably to be expected of such an agent, and to have knowledge as to the different companies and terms available with respect to the commission assumed by him).)

2. Duty of Loyalty


b. The duty of loyalty embraces several obligations: duty to refrain from competing with the principal; duty to refrain from taking action on behalf of or otherwise assisting the principal’s competitors; duty to refrain from acquiring a material benefit from a third party in connection with actions taken through agent’s use of the agent’s position; and duty not to use or communicate confidential information of the principal for agent’s own purposes or those of a third party. Huong Que, Inc. v. Luu, 150 Cal. App. 4th 400 (2007).

c. An example of an agent’s breach of the duty of loyalty by communicating confidential information is the recent case of Jonathan Goldsmith v. Butch Klein. (See attached cross-complaint.) Goldsmith is an actor, famous for his portrayal of the Most Interesting Man in the World. Goldsmith’s former manager, Klein, sued Goldsmith for failure to pay commissions. Goldsmith filed a cross-complaint for breach of fiduciary duty, alleging that Klein had disclosed the terms of Goldsmith’s confidential deal with Dos Equis. This case is pending in California Superior Court.
3. Conflict of Interest

a. A widely accepted rule is that an agent may not obtain an interest adverse to the principal. *Thompson v. Stoakes*, 46 Cal. App. 2d 285 (1941). (“An agent must exercise the utmost good faith and must acquire no secret interest adverse to his principal, and he cannot lawfully make a secret personal profit out of the subject of the agency.”)


c. In *Store of Happiness v. Carmona & Allen*, 152 Cal. App. 2d 266 (1957), the plaintiff was a retail jeweler who engaged an advertising agency to handle television spot announcements. The jeweler understood that the television station would pay the agency a 15% commission, but the jeweler was unaware that the television station gave a “frequency discount” to the advertising agency. The agency billed the jeweler for the gross price of the advertisement, and the agency received both its commission and an additional sum ranging from 15% to 22%. The court held that agency had a fiduciary obligation to the plaintiff for the secret profit.

d. In the entertainment industry, the following scenario plays out on a daily basis. Personal managers negotiate deals on behalf of artists where both the manager and artist will receive producer credit on a television show or feature film. The personal manager also negotiates payment for services he claims to render on the project as the so-called producer. In some instances, the personal manager commissions the artist on the same project and receives the producer fee, which may include a portion of the back-end. This scenario would appear to be a conflict of interest, and obtaining a secret profit clearly violates the manager’s duty of “unqualified loyalty and good faith” to the artist and duty not to act in any manner contrary to the best interest of the artist.

i. How can a personal manager comply with his duty to avoid a conflict of interest and still negotiate a deal under which he or she receives a producer credit and part of the back-end of the project in which his client the artist is also seeking producer credit and part of the back-end?

ii. Is it permissible for a personal manager to obtain both a producer fee on the same project for which he receives a commission from his client’s compensation?
4. Self-Dealing


b. In *Reznor v. J. Artist Management, Inc.*, 365 F.Supp.2d 565 (S.D.N.Y. 2005), the lead singer of the rock band Nine Inch Nails, Michael Trent Reznor, sued his long-time manager, John Malm. Reznor claimed that Malm engaged in fraud, breach of contract, breach of fiduciary duty, and various other claims. As a manager, Malm received 20% commission on any contract or engagement entered into by Reznor. Malm subsequently formed a separate record label with Reznor, and Malm received 50% share in the profits of that company in addition to his commission. And Malm formed a merchandising company in which he split the profits with Reznor, in addition to collecting his 20% commission. Additionally, when Nine Inch Nails registered its name for trademark registration, Malm’s company was listed as a joint owner of the trademark. Furthermore, Reznor contributed more than $3.6 million to the joint companies, which funds were used for, among other things, payment of rent and overhead. Malm used the companies’ offices for his own company. According to the District Court, a reasonable jury could find that Malm’s special position as trusted advisor to Reznor created a fiduciary duty to Reznor. As a fiduciary, Malm was bound by a standard of fairness, good faith, and loyalty. The District concluded that “a jury could find that Malm breached his duty by engaging in self-dealing resulting in Reznor losing considerable amounts of money.

c. In *Ronald Isley et al. v. E’Lyse Murray*, 2015 WL-6502167 (S.D.N.Y) (Complaint Pending), the famed lead singer of the Isley Brothers sued a booking agency for breach of fiduciary duty and fraud. Ronald Isley alleged that he engaged Murray to act as the group’s booking agent, and that Murray received $30,000 as a deposit for booking the Isley Brothers a date at the Hollywood Casino in West Virginia. Isley alleged that Murray kept the $30,000 and used those monies for her own benefit. Isley also alleges that Murray forged Isley’s name and obtained a $60,000 loan.

d. In *Cameron Jabril Thomaz p/k/a Wiz Khalifa v. Grinberg*, 2016 (Los Angeles Superior Court, BC 622178) (Complaint Pending), Wiz Khalifa alleges that his former manager breached his fiduciary duty by, among other things, self-dealing. Grinberg is alleged to have set up his own record label to which he signed Wiz Khalifa as a recording artist and simultaneously managed him. Under the terms of the 360 deal under which Grinberg had Wiz Khalifa sign to Grinberg’s label, Grinberg
allegedly took 60% of Wiz Khalifa’s earnings from record sales and publishing in addition to Grinberg’s commission on Wiz Khalifa’s earnings.

e. In a recent suit filed by Cher in Los Angeles Superior Court, Cher claims that SAIL Venture Partners and its principals defrauded her out of $1.3 million and it breached its fiduciary duties to her through dubious investments in failed sustainable energy and clean water startups. Cher alleges that SAIL Venture Partners mismanaged her money by putting it into risky and unsound ventures, hiding their failures, and then engaging in fraudulent actions to run up millions in management fees for themselves. According to the lawsuit, Cher’s business manager encouraged her to put $1.3 million in two investment partnerships, both of which allegedly tanked.

f. In a suit filed early this summer, Dallas Cowboys running back Darren McFadden sued his longtime business manager for misappropriation and breach of fiduciary duties. McFadden claims he lost $15 million. According to the lawsuit, McFadden alleges that his former business manager obtained a fraudulent power of attorney and later fabricated fictitious financial records to hide what he was doing. One of the allegations is that the business manager tried to sell McFadden a building that the business manager purchased with McFadden’s own funds.

5. Disclosure of Information

a. In 2013, Terrell Owens, former NFL wide receiver, sued his former agent, Drew Rosenhaus, and his brother Jason Rosenhaus for breach of fiduciary duty, fraud, and negligence. Owens claims that he lost $6.5 million because Rosenhaus encouraged Owens to allow a now-banned financial advisor, Jeff Rubin, to manage Owens’ finances. According to the suit, Rubin placed Owens’ money – $5 million – in a series of bad investments, including a bankrupt casino project in Alabama. Owens alleges that Rosenhaus failed to warn Owens of various red flags in Rubin’s background and practices such as an accusation that Ruben had been accused of stealing from clients in the past. Owens alleges that Rosenhaus knew that Rubin was a neophyte financial advisor, lacked the skill and education and experience possessed by accomplished investment advisors, and was highly unethical, but Rosenhaus failed to inform Owens of these facts.

b. An agent who has been authorized to sell property and who buys it for himself has the burden to establish that the transaction is proper in all respects. Otherwise, the principal can avoid the transaction as unfair
despite the price being adequate. This rule applies even to transactions where the agent operates either through a third party (purchase through a corporation) or indirectly through another (purchase through a relative, friend, or employee) and profits from the transaction. This key issue is whether the agent fully disclosed all facts to the principal. Batson v. Stehlow, 68 Cal. 2d 662 (1968).

6. LIABILITY OF AGENT TO PRINCIPAL

a. General Liability

- Secret Profits. A principal may recover the secret profits made by the agent from the agency. Service Employees Int. Union, Local 250 v. Colcord, 160 Cal. App. 4th 362, 371 (2008) (employer was entitled to recoup salary and benefits from its employee, who secretly took action to harm his employer, in violation of employee’s fiduciary duty).

- Failure to Account. An agent is required to render an account to the principal upon demand. (Labor Code § 2861; Kennard v. Glick, 183 Cal. App. 2d 246 (1960) (agent who operated store and kept the books and misappropriated money was required to account for all that came into his possession on behalf of the principal).

COMPLAINT

1) Declaratory Relief Pursuant to Cal. Labor Code § 2855;
2) Constructive Fraud; and
3) Breach of Fiduciary Duty
Plaintiff Cameron Jibril Thomas, professionally known as Wiz Khalifa, for his Complaint against Defendants Benjamin M. Grinberg, also known as Benjy Grinberg, Rostrum Records, LLC, and Does 1 through 50, and each of them, alleges as follows:

**NATURE OF COMPLAINT**

1. Plaintiff is an award-winning songwriter, performer, and recording artist, who seeks enforcement of his rights under the seven-year statute, California Labor Code Section 2855, in ending a so-called “360 deal” induced by Plaintiff’s former personal managers, Benjy Grinberg and his alter ego, Rostrum Records, in May of 2005. Plaintiff was but a minor in high school when Grinberg induced the commencement of Plaintiff’s services under such contract, which has reached for more than a decade into virtually every aspect of Plaintiff’s professional life, from the rendering of Plaintiff’s exclusive recording services for Rostrum, to its sharing of income streams derived from Plaintiff’s other services as a songwriter and in his touring, live performance, and merchandising activities. Needless to say that eleven years of Plaintiff’s rendering of personal services for his managers, when it should have always been the other way around, is more than enough.

2. Aside from the 360 contract, Grinberg and Rostrum also induced Plaintiff to enter into a series of other transactions, all in further violation of the rule against self-dealing in which Plaintiff’s former managers have profited at Plaintiff’s expense. In each instance, Grinberg and Rostrum owed a strict duty to act solely in the best interest of Plaintiff and to refrain from entering into any transaction with Plaintiff regarding his professional activities without full disclosure of all material facts necessary to obtain Plaintiff’s informed consent to the transaction. In each instance, however, Grinberg and Rostrum acted as faithless fiduciaries in direct contravention of their obligations to Plaintiff. Accordingly, Plaintiff also seeks damages against Grinberg and Rostrum and the imposition of a constructive trust over their ill-gotten gains, based on claims including constructive fraud and breach of fiduciary duty.
3. Plaintiff Cameron Jabril Thomas, professionally known as Wiz Khalifa, is an individual who is a resident of and conducts business in Los Angeles County, California.

4. Defendant Benjamin M. Grinberg (“Grinberg”), also known as Benjy Grinberg, is an individual who is a resident of and conducts business in Los Angeles County, California.

5. Defendant Rostrum Records, LLC (“Rostrum”) is a limited liability company, which has its principal place of business in Los Angeles County, California.

6. Plaintiff is unaware of the true names and capacities of the Defendants sued herein as Does 1 through 50, inclusive, and for that reason, sues said Defendants by such fictitious names. Plaintiff will amend his complaint to allege the true names and capacities of said fictitiously named Defendants upon ascertaining the same. Plaintiff is informed and believe, and upon that basis allege, that each fictitiously named Defendant is responsible in some manner for and proximately caused the harm and damages alleged.

7. Grinberg founded Rostrum on or about October 7, 2002, and has at all relevant times been its principal owner and chief executive. At the time that Grinberg formed Rostrum, he had been working for a limited period of time as an assistant to Antonio “L.A.” Reid, then the chief executive of Arista Records, a wholly owned label of Sony Music Entertainment.

8. Through Rostrum, Grinberg acts not only as an independent record label, but also a management house rendering personal management services to artists in the music industry. Rostrum’s website describes its enterprise thusly, “Rostrum Records is an independent music label and management company founded in Pittsburgh, Pennsylvania in 2003 by Benjy Grinberg.” Grinberg and Rostrum market their offerings
in both areas as a selling point for a competitive advantage over other record labels or management companies in the industry.

9. In or about the Summer of 2004, Grinberg met Plaintiff after hearing his performance on a mixtape of various Pittsburgh artists that attracted Grinberg’s interest. At the time, Plaintiff was still a student at Taylor Allderdice High School in the Squirrel Hill neighborhood of Pittsburgh, Pennsylvania, the same high school from which Grinberg had graduated years before. Although Plaintiff was only 16 years of age when they met, Grinberg has explained in media reports that he took an immediate interest in Plaintiff because he had the maturity and lyricism of someone who has been rapping for decades.

10. Almost immediately, Grinberg approached Plaintiff about representing him as his personal manager. To induce Plaintiff’s consent to this arrangement, Grinberg represented that he had developed substantial clout in the music industry having worked for the head of a major record label with prominent recording artists such as Whitney Houston, Usher, TLC, Avril Lavigne, and Toni Braxton, and that Plaintiff would have the best of both worlds, a relatively powerful, well-connected manager who would provide Plaintiff with the time and personal attention that only a small company like Rostrum could provide. Relying upon Grinberg’s representations, Plaintiff orally agreed with Grinberg and Rostrum for them to serve as Plaintiff’s personal managers beginning in or about the Summer or Fall of 2004.

11. As Plaintiff’s personal managers, Grinberg and Rostrum undertook to develop, guide, enhance, oversee and otherwise manage Plaintiff’s artistic career in all aspects, including matters of business, finance and personal importance. Among other functions, Grinberg and Rostrum assumed responsibility for advising and counselling Plaintiff and representing him regarding all business transactions instrumental to his career, including whether to sign with a record company, or to perform at particular venues, and what should be the structure or the deal points for any such transactions and
other professional endeavors. In acting as personal managers for Plaintiff, Grinberg and Rostrum also undertook the task of advising and counselling Plaintiff regarding the creative processes important to his career, including the selection of a producer or deciding what songs to perform or record, assembling Plaintiff’s professional team, including lawyers, business managers and agents, and managing all of their work, while also promoting Plaintiff’s career.

12. Grinberg and Rostrum, and each of them, continued to act as personal managers for Plaintiff at all relevant times from approximately the Summer or Fall of 2004 until March 11, 2014, when they were notified of their termination of such services, effective immediately. At all times during the period that they acted as Plaintiff’s personal managers, Grinberg and Rostrum, and each of them, owed Plaintiff a fiduciary duty to act in the best interests of Plaintiff and to refrain from entering into any transaction with Plaintiff regarding his professional or commercial endeavors without full disclosure to Plaintiff of all material facts necessary to obtain his informed consent to the transaction.

13. During the period that Grinberg and Rostrum acted as Plaintiff’s personal managers, they induced Plaintiff to enter into a series of transactions in which Grinberg and Rostrum placed their own interests over those of Plaintiff and failed to disclose to Plaintiff material information necessary to obtain his informed consent for such transactions. One such transaction involves a written agreement (the “360 Agreement”) between Plaintiff and Rostrum made on or about May 24, 2005, providing that Plaintiff render his exclusive recording services for Rostrum and that Rostrum also share in income streams from Plaintiff’s other services as a songwriter and in his touring and merchandising activities.

14. As Plaintiff’s managers, Grinberg and Rostrum, and each of them, owed to Plaintiff a fiduciary duty to act solely in his best interest in inducing Plaintiff to enter into the 360 Agreement and to render full disclosure to Plaintiff of all material facts
necessary to obtain his informed consent to the transaction. In inducing Plaintiff to enter into the 360 Agreement, however, Grinberg and Rostrum placed their own interests over those of Plaintiff and failed to disclose to Plaintiff, among other things, alternative arrangements, which were more beneficial to Plaintiff.

15. Among other provisions, the 360 Agreement contemplated a Term comprising an Initial Period of up to twelve months following completion and delivery of certain demonstration master recordings, plus up to five option periods, each with a recording commitment of at least one Album. The 360 Agreement further provided, however, that in no event shall Plaintiff be required to perform for, or deliver, more than an aggregate of five full-length studio albums in fulfillment of his recording commitment under the contract. In that respect, as more fully alleged below, Plaintiff has already completed and delivered six full-length studio albums under the 360 Agreement, which are titled, *Show and Prove*, *Deal or No Deal*, *Rolling Papers*, *O.N.I.F.C.*, *Blacc Hollywood* and *Khalifa*.

16. A second transaction, which Grinberg and Rostrum induced Plaintiff to enter into during the period in which they managed Plaintiff, is an amendment to the 360 Agreement made on or about October 11, 2005. This amendment purports to waive Plaintiff’s right to disaffirm the 360 Agreement upon reaching the age of eighteen years.

17. As Plaintiff’s managers, Grinberg and Rostrum, and each of them, owed to Plaintiff a fiduciary duty to act solely in his best interest in inducing Plaintiff to enter into the October 11, 2005 amendment to the Recording Agreement and to render full disclosure to Plaintiff of all material facts necessary to obtain his informed consent to the transaction. In inducing Plaintiff to enter into such amendment, however, Grinberg and Rostrum placed their own interests over those of Plaintiff and failed to disclose to Plaintiff, among other things, alternative arrangements, which were more beneficial to Plaintiff.
18. A further transaction, which Grinberg and Rostrum induced Plaintiff to enter into during the period in which they managed Plaintiff, is the delivery to Rostrum of a full-length studio album titled, *Show and Prove*, which Rostrum released on or about September 5, 2006, for commercial exploitation of Plaintiff’s performances of certain musical compositions embodied thereon titled as follows: *Intro; Pittsburg Sound (All in my Blood); Bout Mine; I Choose You; Damn Thing; Keep the Conversation; Stay in Ur Lane; Stand Up; Too Late; I’m Gonna Ride; Gotta Be a Star (Remix); Let Em Know; Sometimes; Locked & Loaded; Burn Sumthin; Crazy Since the 80s; and History in the Making*. Among the credits published for the album are those for Rostrum Records and Benjy Grinberg as Executive Producer, and Grinberg and Rostrum, and each of them, have also wrongfully received other benefits to which they are not entitled from the release and exploitation of these recordings, including an unknown amount of revenues and other ill-gotten gains to be determined according to proof at trial.

19. As Plaintiff’s managers, Grinberg and Rostrum, and each of them, owed to Plaintiff a fiduciary duty to act solely in his best interest in inducing Plaintiff to deliver the album, *Show and Prove*, for release by Rostrum and to render full disclosure to Plaintiff of all material facts necessary to obtain his informed consent to the transaction. In inducing Plaintiff to deliver such album, however, Grinberg and Rostrum placed their own interests over those of Plaintiff and failed to disclose to Plaintiff, among other things, alternative arrangements, which were more beneficial to Plaintiff.

20. A further transaction, which Grinberg and Rostrum induced Plaintiff to enter into during the period in which they managed Plaintiff, is an amendment to the 360 Agreement made on or about November 16, 2006. This amendment purports to have extended the Initial Period of the 360 Agreement to the earlier of December 31, 2007 and the date on which Rostrum enters into a Distribution Agreement.

21. As Plaintiff’s managers, Grinberg and Rostrum, and each of them, owed to Plaintiff a fiduciary duty to act solely in his best interest in inducing Plaintiff to enter
into the November 16, 2006 amendment to the Recording Agreement and to render full disclosure to Plaintiff of all material facts necessary to obtain his informed consent to the transaction. In inducing Plaintiff to enter into such amendment, however, Grinberg and Rostrum placed their own interests over those of Plaintiff and failed to disclose to Plaintiff, among other things, alternative arrangements, which were more beneficial to Plaintiff.

22. A further transaction, which Grinberg and Rostrum induced Plaintiff to enter into during the period in which they managed Plaintiff, is an inducement letter to an agreement dated April 13, 2007, between Rostrum and Warner Bros. Records Inc., for the exclusive recording services of Plaintiff.

23. As Plaintiff’s managers, Grinberg and Rostrum, and each of them, owed to Plaintiff a fiduciary duty to act solely in his best interest in inducing Plaintiff to enter into the inducement letter for the recording contract with Warner Bros. Records and to render full disclosure to Plaintiff of all material facts necessary to obtain his informed consent to the transaction. In inducing Plaintiff to enter into such transaction, however, Grinberg and Rostrum placed their own interests over those of Plaintiff and failed to disclose to Plaintiff, among other things, alternative arrangements, which were more beneficial to Plaintiff.

24. A further transaction, which Grinberg and Rostrum induced Plaintiff to enter into during the period in which they managed Plaintiff, is the delivery to Rostrum of a second full-length studio album titled, Deal or No Deal, which Rostrum released on or about November 24, 2009, for commercial exploitation of Plaintiff’s performances of certain musical compositions embodied thereon titled as follows: Bout Y’all; Chewy; Friendly; Goodbye; Hit tha Flo; Lose Control; Moola & the Guap; Studio Lovin; Right Here; Red Carpet; Superstar; Take Away; This Plane; Who I Am; and Young Boy Talk. Among the credits published for the album are those for Rostrum Records and Benjy Grinberg as Executive Producer, and Grinberg and Rostrum, and each of them, have also
wrongfully received other benefits to which they are not entitled from the release and exploitation of these recordings, including an unknown amount of revenues and other ill-gotten gains to be determined according to proof at trial.

25. As Plaintiff’s managers, Grinberg and Rostrum, and each of them, owed to Plaintiff a fiduciary duty to act solely in his best interest in inducing Plaintiff to deliver the album, Deal or No Deal, for release by Rostrum and to render full disclosure to Plaintiff of all material facts necessary to obtain his informed consent to the transaction. In inducing Plaintiff to deliver such album, however, Grinberg and Rostrum placed their own interests over those of Plaintiff and failed to disclose to Plaintiff, among other things, alternative arrangements, which were more beneficial to Plaintiff.

26. A further transaction, which Grinberg and Rostrum induced Plaintiff to enter into during the period in which they managed Plaintiff, is an inducement letter to an agreement dated February 1, 2010, between Rostrum and Atlantic Recording Corporation, for the exclusive recording services of Plaintiff.

27. As Plaintiff’s managers, Grinberg and Rostrum, and each of them, owed to Plaintiff a fiduciary duty to act solely in his best interest in inducing Plaintiff to enter into the inducement letter for the recording contract with Atlantic Records and to render full disclosure to Plaintiff of all material facts necessary to obtain his informed consent to the transaction. In inducing Plaintiff to enter into such transaction, however, Grinberg and Rostrum placed their own interests over those of Plaintiff and failed to disclose to Plaintiff, among other things, alternative arrangements, which were more beneficial to Plaintiff.

28. A further transaction, which Grinberg and Rostrum induced Plaintiff to enter into during the period in which they managed Plaintiff, is the delivery to Rostrum of a third full-length studio album titled, Rolling Papers, which Rostrum released on or about March 29, 2011, in association with Atlantic Records for exploitation of Plaintiff’s performances of certain musical compositions embodied thereon titled as follows: When
I’m Gone; On My Level; Black and Yellow; Roll Up; Hopes and Dreams; Wake Up; The Race; Star of the Show; No Sleep; Get Your Shit; Top Floor; Fly Solo; Rooftops; and Cameras. Among the credits published for the album are those for Rostrum Records and Benjy Grinberg as Executive Producer, and Grinberg and Rostrum, and each of them, have also wrongfully received other benefits to which they are not entitled from the release and exploitation of these recordings, including an unknown amount of revenues and other ill-gotten gains to be determined according to proof at trial.

29. As Plaintiff’s managers, Grinberg and Rostrum, and each of them, owed to Plaintiff a fiduciary duty to act solely in his best interest in inducing Plaintiff to deliver the album, Rolling Papers, for release by Rostrum and to render full disclosure to Plaintiff of all material facts necessary to obtain his informed consent to the transaction. In inducing Plaintiff to deliver such album, however, Grinberg and Rostrum placed their own interests over those of Plaintiff and failed to disclose to Plaintiff, among other things, alternative arrangements, which were more beneficial to Plaintiff.

30. A further transaction, which Grinberg and Rostrum induced Plaintiff to enter into during the period in which they managed Plaintiff, is the delivery to Rostrum of a fourth full-length studio album titled, O.N.I.F.C., which Rostrum released on or about December 4, 2012, in association with Atlantic Records for exploitation of Plaintiff’s performances of certain musical compositions embodied thereon titled as follows: Intro; Paperbond; Bluffin, Let It Go; The Bluff; Work Hard, Play Hard; Got Everything; Fall Asleep; Time; It’s Nothin; Rise Above; Initiation; Up in It; No Limit; The Plan; Remember You; and Medicated. Among the credits published for the album are those for Rostrum Records and Benjy Grinberg as Executive Producer, and Grinberg and Rostrum, and each of them, have also wrongfully received other benefits to which they are not entitled from the release and exploitation of these recordings, including an unknown amount of revenues and other ill-gotten gains to be determined according to proof at trial.
31. As Plaintiff’s managers, Grinberg and Rostrum, and each of them, owed to Plaintiff a fiduciary duty to act solely in his best interest in inducing Plaintiff to deliver the album, *O.N.I.F.C.*, for release by Rostrum and to render full disclosure to Plaintiff of all material facts necessary to obtain his informed consent to the transaction. In inducing Plaintiff to deliver such album, however, Grinberg and Rostrum placed their own interests over those of Plaintiff and failed to disclose to Plaintiff, among other things, alternative arrangements, which were more beneficial to Plaintiff.

32. A further transaction, which Grinberg and Rostrum induced Plaintiff to enter into during the period in which they managed Plaintiff, is an amendment to the 360 Agreement made on or about April 1, 2013. This amendment purported to provide that the album titled, *O.N.I.F.C.*, shall be deemed the Second Album for purposes of delivery of such album under the recording agreement between Rostrum and Atlantic Records.

33. As Plaintiff’s managers, Grinberg and Rostrum, and each of them, owed to Plaintiff a fiduciary duty to act solely in his best interest in inducing Plaintiff to enter into the April 1, 2013 amendment to the Recording Agreement and to render full disclosure to Plaintiff of all material facts necessary to obtain his informed consent to the transaction. In inducing Plaintiff to enter into such amendment, however, Grinberg and Rostrum placed their own interests over those of Plaintiff and failed to disclose to Plaintiff, among other things, alternative arrangements, which were more beneficial to Plaintiff.

34. A further transaction, which Grinberg and Rostrum induced Plaintiff to enter into during the period in which they managed Plaintiff, is the purported obligation to deliver to Rostrum of a fifth full-length studio album titled, *Blacc Hollywood*, which Rostrum released on or about August 19, 2014, in association with Atlantic Records for exploitation of Plaintiff’s performances of certain musical compositions embodied thereon titled as follows: *Hope*; *We Dem Boyz*; *Promises*; *KK*; *House in the Hills*; *Ass Drop*; *Raw*; *Stayin Out All Night*; *The Sleaze*; *So High*; *Still Down*; *No Gain*; *True
Colors; We Dem Boyz (Remix); and You and Your Friends. Among the credits published for the album are those for Rostrum Records, and Rostrum has also wrongfully received other benefits to which it is not entitled from the release and exploitation of these recordings, including an unknown amount of revenues and other ill-gotten gains to be determined according to proof at trial.

35. On or about February 5, 2016, Rostrum released a sixth full-length studio album titled, Khalifa, in association with Atlantic Records and Taylor Gang Records for exploitation of Plaintiff’s performances of certain musical compositions embodied thereon titled as follows: BTS; Celebrate; Elevated; City View; Cowboy; Bake Sale; Call Waiting; Make a Play; Most of Us; Zoney; Lit; No Permission; and iSay.

36. On May 27, 2016, Plaintiff gave notice pursuant to California Labor Code Section 2855, subdivision (b)(1), specifying that from and after May 31, 2016, Plaintiff will no longer render service under the 360 Agreement by reason of subdivision (a) of such statute.

37. At no time prior to the accrual of the applicable statute of limitations did Plaintiff know or suspect or have any reason to know or suspect the wrongful and tortious conduct alleged herein by Defendants, the effect of such conduct, or that such conduct was the cause of Plaintiff’s injuries as alleged herein.

FIRST CAUSE OF ACTION
(Declaratory Relief Pursuant to Cal. Labor Code § 2855)

38. Plaintiff repeats and re-alleges the allegations contained in Paragraphs 1 through 37 as if set out in full herein.

39. An actual controversy has arisen and now exists between Plaintiff and Rostrum regarding the parties’ respective rights and obligations under California Labor Code Section 2855, with respect to the 360 Agreement between Plaintiff and Rostrum. Among other things, Plaintiff contends that the 360 Agreement is a contract for personal services of Plaintiff that cannot be enforced against Plaintiff at any time from and
beyond May 31, 2016, pursuant to California Labor Code Section 2855. Plaintiff further contends that Rostrum is not entitled to recover damages against Plaintiff, for any alleged failure to render service in the production of a specific quantity of phonorecords, within the meaning of the statute, for reasons including that Rostrum has no right to enforce the 360 Agreement against Plaintiff and that Plaintiff has in any event already delivered to Rostrum all of the phonorecords to which it is entitled within the meaning of the statute.

40. Plaintiff is informed and believes and based thereon alleges that Rostrum disputes Plaintiff’s contentions.

41. Plaintiff desires a judicial determination of the parties’ respective rights and obligations pursuant to California Labor Code Section 2855, including a declaration that the 360 Agreement is a contract for personal services of Plaintiff that cannot be enforced against Plaintiff at any time from and beyond May 31, 2016, and a declaration that Rostrum is not entitled to recover damages against Plaintiff, for any alleged failure to render service in the production of a specific quantity of phonorecords, within the meaning of the statute.

42. A judicial determination of the parties’ respective rights and obligations under California Labor Code Section 2855 is necessary and appropriate in order to resolve their disputes with respect thereto and avoid interference with the parties’ respective rights and further litigation between them regarding their rights and obligations pursuant to the statute.

SECOND CAUSE OF ACTION
(Constructive Fraud)

43. Plaintiff repeats and re-alleges the allegations contained in Paragraphs 1 through 42 as if set out in full herein.

44. At all times relevant hereto, Defendants Grinberg and Rostrum, and each of them, as personal managers for Plaintiff, stood in a confidential or fiduciary
relationship with Plaintiff, pursuant to which Grinberg and Rostrum each owed special
duties to Plaintiff, including the duties of undivided loyalty, full disclosure, strict
confidentiality, and utmost good faith and fair dealing, in all aspects of Plaintiff’s
professional life and commercial endeavors. Included in these duties are the obligations
of Grinberg and Rostrum, and each of them, to act in Plaintiff’s best interests and to
render full disclosure to Plaintiff of all material information relating to his professional
career, including the exploitation of Plaintiff’s services and results thereof as a musician,
performer, recording artist, songwriter and entertainer, and in connection with the
exploitation of Plaintiff’s name and likeness or other rights of publicity.

45. At all times relevant hereto, Plaintiff reposed trust and confidence in
Defendants Grinberg and Rostrum, and each of them, in undertaking to act and in acting
as managers for Plaintiff in all aspects of his professional life and commercial
endeavors, including in connection with the development of Plaintiff’s professional
career, the exploitation of his services and the results thereof as a musician, performer,
recording artist, songwriter and entertainer, and the exploitation of Plaintiff’s name and
likeness or other rights of publicity.

46. Defendants Grinberg and Rostrum, and each of them, wrongfully breached
their duties to Plaintiff by, among other things, inducing Plaintiff to enter into a series of
transactions in which Defendants failed to act in the best interests of Plaintiff and failed
to provide full disclosure to Plaintiff of all material information needed in order for
Plaintiff to make an informed decision regarding such transactions. These transactions
include, but are not limited to, the 360 Agreement between Rostrum and Plaintiff, the
amendments thereto, the agreement between Warner Bros. Records and Rostrum to
furnish the exclusive recording services of Plaintiff, and the agreement between Atlantic
Records and Rostrum to furnish the exclusive recording services of Plaintiff. In each of
those transactions, as alleged hereinabove, Defendants Grinberg and Rostrum not only
failed to act in the best interests of Plaintiffs, but knowingly and intentionally placed
their own interests over those of Plaintiff and wilfully and intentionally concealed material information from Plaintiff, in order to profit at his expense.

47. At all times relevant hereto, Plaintiff labored under the misbelief that Defendants were acting in his best interest when, in fact, Defendants were acting in their own self-interest, to the detriment of Plaintiff. Had Defendants disclosed the truth to Plaintiff, he would not have entered into any of the transactions with Defendants on the terms provided or at all.

48. As a direct and proximate result of Defendants’ constructive fraud as alleged herein, Plaintiff has suffered damages in excess of $1 million according to proof at trial.

49. As a further direct and proximate result of Defendants’ constructive fraud as alleged herein, Plaintiff is entitled to the imposition of a constructive trust over and disgorgement from Defendants of all of their ill-gotten gains, including, but not limited to, all royalties, fees, commissions or other compensation wrongfully gained by Defendants by reason of their constructive fraud and all tangible or intangible property rights that Defendants wrongfully gained by reason of such fraud.

50. In doing the acts alleged herein, Defendants have acted with oppression, fraud and malice in conscious disregard of Plaintiff’s rights, and with intent to defraud Plaintiff and profit at his expense, all so as to entitle Plaintiff to exemplary and punitive damages in an amount to be determined at trial.

THIRD CAUSE OF ACTION
(Breach of Fiduciary Duty)

51. Plaintiff repeats and re-alleges the allegations contained in Paragraphs 1 through 50 as if set out in full herein.

52. At all times relevant hereto, Defendants Grinberg and Rostrum, and each of them, as personal managers for Plaintiff, stood in a fiduciary relationship with Plaintiff, pursuant to which Grinberg and Rostrum each owed special duties to Plaintiff,
including the duties of undivided loyalty, full disclosure, strict confidentiality, and utmost good faith and fair dealing, in all aspects of Plaintiff’s professional life and commercial endeavors. Included in these duties are the obligations of Grinberg and Rostrum, and each of them, to act in Plaintiff’s best interests and to render full disclosure to Plaintiff of all material information relating to his professional career, including the exploitation of Plaintiff’s services and results thereof as a musician, performer, recording artist, songwriter and entertainer, and in connection with the exploitation of Plaintiff’s name and likeness or other rights of publicity.

53. At all times relevant hereto, Plaintiff reposed trust and confidence in Defendants Grinberg and Rostrum, and each of them, in undertaking to act and in acting as managers for Plaintiff in all aspects of his professional life and commercial endeavors, including in connection with the development of Plaintiff’s professional career, the exploitation of his services and results thereof as a musician, performer, recording artist, songwriter and entertainer, and the exploitation of Plaintiff’s name and likeness or other rights of publicity.

54. Defendants Grinberg and Rostrum, and each of them, wrongfully breached their fiduciary duties to Plaintiff by, among other things, inducing Plaintiff to enter into a series of transactions in which Defendants failed to act in the best interests of Plaintiff and failed to provide full disclosure to Plaintiff of all material information needed in order for Plaintiff to make an informed decision regarding such transactions. These transactions include, but are not limited to, the 360 Agreement between Rostrum and Plaintiff, the amendments thereto, the agreement between Warner Bros. Records and Rostrum to furnish the exclusive recording services of Plaintiff, and the agreement between Atlantic Records and Rostrum to furnish the exclusive recording services of Plaintiff. In each of those transactions, as alleged hereinabove, Defendants Grinberg and Rostrum not only failed to act in the best interests of Plaintiffs, but knowingly and intentionally placed their own interests over those of Plaintiff and wilfully and
intentionally concealed material information from Plaintiff, in order to profit at his expense.

55. As a direct and proximate result of Defendants’ breach of fiduciary duty as alleged herein, Plaintiff has suffered damages in excess of $1 million according to proof at trial.

56. As a further direct and proximate result of Defendants’ breach of fiduciary duty as alleged herein, Plaintiff is entitled to the imposition of a constructive trust over and disgorgement from Defendants of all of their ill-gotten gains, including, but not limited to, all royalties, fees, commissions or other compensation wrongfully gained by Defendants by reason of their breach of fiduciary duties to Plaintiff and all tangible or intangible property rights that Defendants wrongfully gained by reason of such wrongful conduct.

57. In doing the acts alleged herein, Defendants have acted with oppression, fraud and malice in conscious disregard of Plaintiff’s rights, and with intent to defraud Plaintiff and profit at his expense, all so as to entitle Plaintiff to exemplary and punitive damages in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as follows:

1) For a declaration of the parties’ respective rights and obligations under California Labor Code Section 2855, including that the 360 Agreement between Plaintiff and Rostrum is a contract for personal services of Plaintiff that cannot be enforced against Plaintiff at any time from and beyond May 31, 2016, pursuant to California Labor Code Section 2855, and that Rostrum is not entitled under such statute to recovery of any damages against Plaintiff, for any alleged failure to render service in the production of a specific quantity of phonorecords, within the meaning of the statute;
2) For compensatory damages in an amount in excess of $1 million according to proof at trial;
3) For punitive damages in an amount according to proof at trial;
4) For costs of suit, including reasonable attorneys' fees to the fullest extent allowed by law; and
5) For pre-judgment interest and such other relief as the Court deems just and proper.

Dated: May 31, 2016

VENABLE LLP

By: Alex M. Weingarten
Attorneys for Plaintiff
CAMERON JABRIL THOMAS, p/k/a WIZ KHALIFA
JORDAN LEE, INC., a California corporation d/b/a Gold Levin Talent,

Plaintiff,

v.

JONATHAN GOLDSMITH, a/k/a “The Most Interesting Man in the World,” an individual;
JONATHAN GOLDSMITH PRODUCTIONS, INC., a California corporation; and DOES 1-10, inclusive,

Defendants.

JONATHAN GOLDSMITH, an individual,

Cross-Complainant,

v.

JORDAN LEE, INC., a California corporation d/b/a Gold Levin Talent; BUTCH KLEIN, a/k/a “Tim Jordan,” an individual,

Cross-Defendants.

CASE NO. BC596371
Hon. Barbara A. Miers

CROSS-COMPLAINT FOR:
1. INTERFERENCE WITH CONTRACT;
2. INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE;
3. NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE; AND
4. BREACH OF FIDUCIARY DUTY.

Complaint: October 2, 2015
FAC: November 10, 2015
Trial Date: None Set
Defendant and Cross-Complainant Jonathan Goldsmith ("Jonathan"), for his Cross-Complaint against Cross-Defendants Jordan Lee, Inc., d/b/a Gold Levin Talent ("GLT") and Tim Jordan, a/k/a "Butch Klein", hereby alleges as follows:

INTRODUCTION

1. Butch Klein, a/k/a "Tim Jordan", a failed "C" list actor who appears in "D" movies, and now a failed personal manager. Aware that his attempt to break into Hollywood through an acting career was going nowhere fast, Butch Klein decided to try his hand at managing the careers of other actors. However, Butch Klein's fatal character flaw, among his other faults, prevented him from barely getting the company off the ground.

2. Yet, Butch Klein's failures do not prevent him from living in a fantasy world. He has assumed a fake name (going by the moniker "Tim Jordan") so that he can presumably fool others about his so-called career as a personal manager. And, he believes that by using the name Butch Klein in his acting career, while his alter ego, "Tim Jordan" attempts to operate as a talent manager, he can somehow avoid the proscription against an actor also being a personal manager. That he goes to great lengths to hide who he is is evident by the fact that the name of his company is Jordan Lee, Inc., and does business as Gold Levin Talent even, though his former partner's name is Tom Gardener. Who is the Gold and who is the Levin? What does Butch Klein have to hide?

3. One thing is known about Butch Klein, a/k/a Tim Jordan: his management skills were nonexistent and he called upon others to rescue and operate his management company. Enter Barbara Buky, a well-regarded and respected talent agent. Once Barbara joined the company, she assumed the mantel of running the company and began the long arduous process of securing paying jobs for the few clients of the company. Yet, for every dollar brought into the company by Barbara, Butch Klein would do his level best to spend, spending the company's money as if it were his own and endangering its ability to operate, service its clients, and pay its employees.

4. This case is about no less than one man's outsized greed and con man instincts. It is a case about a failed actor turned failed manager who will do anything and say anything to
keep his gravy train rolling. And, his willingness to say anything has led him to disclose
confidential information about one of his company's clients. It is Butch Klein's loose lips that
have put in peril his company's largest client. Those loose lips violate a host of obligations,
including those owed by a fiduciary.

PARTIES

5. Cross-Complainant Jonathan Goldsmith is a highly successful and respected actor, popularly known through his commercial success as Dos Equis beer's "Most Interesting Man In The World." He is a permanent resident of the State of Vermont.

6. Upon information and belief, Cross-Defendant GLT is a California corporation with its principal place of business in the County of Los Angeles, State of California. GLT purports to be a talent management company in the entertainment industry.

7. Upon information and belief, Cross-Defendant Butch Klein, a/k/a "Tim Jordan", is an individual residing and conducting business in the County of Los Angeles.

8. Upon information and belief, at all times relevant hereto, Cross-Defendants GLT and Butch Klein, and each of them, were the agents, employees, servants, and/or alter egos of each other, and each Cross-Defendant was acting in the scope of its authority as such agent and/or employee of each other Cross-Defendant, and with the knowledge of each Cross-Defendant. Cross-Defendants GLT and Butch Klein and hereinafter referred to collectively as "Cross-Defendants."

9. Upon information and belief, at all times relevant hereto, Cross-Defendant GLT, in undertaking the acts herein alleged, was operated, controlled, and owned by Cross-Defendant Butch Klein, was undercapitalized, and was a mere alter ego, shell, and instrumentality of Cross-Defendant Butch Klein, such that the separate corporate existence of Cross-Defendant GLT has ceased to exist, and Cross-Defendants Butch Klein and GLT should be held responsible for the actions of the other.

10. Upon information and belief, at all times relevant hereto, there existed a unity of interest between Cross-Defendants GLT and Butch Klein such that any individuality and separateness between them has ceased to exist.
11. Upon information and belief, at all times relevant hereto, (1) Cross-Defendant GLT did not observe corporate formalities; (2) Cross-Defendants GLT and Butch Klein commingled funds; and (3) Cross-Defendant GLT was not adequately capitalized; and, therefore, an inequitable result will follow if the acts complained of herein are treated as those of any one Cross-Defendant alone.

JURISDICTION AND VENUE

12. This action seeks damages in excess of the jurisdictional minimum of this Court.

13. Jurisdiction is proper in this Court because GLT's principal place of business is located in California.

14. Venue is proper in this Court because each of the causes of action arose in Los Angeles County.

GENERAL ALLEGATIONS

15. In 2002, Jonathan was a talented, respected, but commercially unknown actor working in Los Angeles, California. Jonathan was represented by Barbara Buky ("Barbara") as his agent and, later, manager.

16. In 2002, GLT was a small talent management company operating in the entertainment industry in the County of Los Angeles. Upon information and belief, GLT was owned by Butch Klein, going by the name "Tim Jordan," and Tom Gardener.

17. Beginning in approximately April 2000, Barbara worked as a talent agent for the Morgan Agency in Orange County, California. While working for the Morgan Agency, Barbara met Butch Klein, an actor who was represented at that time by the Morgan Agency.

18. In approximately January 2004, Barbara left the Morgan Agency and began searching for a new job. She was soon contacted by GLT, through its owner, the man going by "Tim Jordan," and a meeting was scheduled to discuss the possibility of Barbara joining GLT as a manager. Tim Jordan presented himself and acted as if he was a licensed talent agent. However, GLT was not a licensed talent agency. During the meeting, Barbara was surprised to discover that Tim Jordan and Butch Klein were one and the same person. For ease of reference, Butch Klein, a/k/a Tim Jordan, will be referred to hereinafter as "Butch".
19. Barbara agreed to join GLT as a manager in April 2004. From the day Barbara joined GLT until her last day as a GLT employee, Barbara effectively managed the business. She identified, courted, and signed nearly all of the talent represented by GLT, while Butch was off traveling or auditioning for acting roles as Butch Klein. At the time she joined GLT, Barbara was already an established and well-regarded talent agent, and she used her reputation to secure new talent and other tangible benefits for GLT, including a business arrangement with a well-respected company that provides casting information to reputable talent representatives in Los Angeles. GLT had been unable to secure the services of this company prior to Barbara’s involvement. After Barbara joined GLT, she actively managed Jonathan’s career.

20. During her representation of Jonathan, Jonathan and Barbara fell in love and were married. Barbara remains, to this day, Jonathan’s loving and supportive wife.

21. In 2006, as a result of Barbara’s advice and counsel, Jonathan was hired to become the face of Dos Equis beer and the centerpiece of its new advertising campaign, as “The Most Interesting Man in The World.” Jonathan entered into an agreement with Euro RSCG Worldwide, agent for Heineken USA Inc. d/b/a Cervezas Mexicanas (collectively, “Advertiser”) to provide advertising services in connection with the Dos Equis beer brand. The Dos Equis deal was entirely of Barbara’s and Jonathan’s making. Barbara found the opportunity, cultivated it, brought it in, negotiated the terms, and managed the business relationship. Jonathan secured the deal through his demonstrated talent. Cross-Defendants did nothing but cash Jonathan’s commission checks. In short, the Dos Equis deal was a windfall for Cross-Defendants.

22. The “Most Interesting Man In the World” advertising campaign was an overwhelming success. It has been, without exaggeration, the most successful advertising campaign Dos Equis has ever had, by a large margin. Barbara’s foresight and business acumen, combined with Jonathan’s unique talent, made millions of dollars for the Dos Equis brand.

23. In February 2010, Barbara and Jonathan decided to move to Vermont full time. Because Barbara would regularly be away from Los Angeles, she asked Butch to assist with
administrative tasks relating to Jonathan’s work on the Dos Equis advertising campaign, such as scheduling shoots and making travel arrangements. Because Barbara remained thankful that Butch had hired her to work at GLT back in 2004, Jonathan continued to pay GLT a commission, despite the facts that: (1) Cross-Defendants provided no management services to Jonathan; and (2) Cross-Defendants had no role in connection with securing or managing Jonathan’s Dos Equis deal.

24. Beginning in late 2011, Jonathan and Advertiser negotiated a new contract pursuant to which Jonathan would continue to provide advertising services as Dos Equis beer’s “Most Interesting Man In The World.” Jonathan and Advertiser executed their new agreement in January 2012 (the “2012 Agreement”).

25. The 2012 Agreement contains a broad confidentiality clause which includes a strict prohibition on disclosure of any terms of the 2012 Agreement.

26. Upon information and belief, Cross-Defendants disclosed the terms of the confidential 2012 Agreement, in violation of the agreement’s strict confidentiality provision and Cross-Defendants’ fiduciary relationship with Jonathan.

27. Cross-Defendants’ willful and malicious decision to disclose the terms of the confidential 2012 Agreement has badly damaged Jonathan’s business relationship with Advertiser and jeopardized his future as the spokesman for Dos Equis beer. Cross-Defendants were aware of the terms of the 2012 Agreement and, specifically, that it contains a broad confidentiality clause. Despite the fact that GLT purports to represent Jonathan’s interest as his manager, and claims the right to collect a cut of his pay, Cross-Defendants purposefully sought to destroy Jonathan’s relationship with Advertiser and his career through disclosure of the 2012 Agreement.
FIRST CAUSE OF ACTION
Tortious Interference with Contract
(Against All Cross-Defendants)


29. Beginning on or about January 19, 2012, Jonathan was a party to a contract with Advertiser, the 2012 Agreement, pursuant to which Jonathan agreed to provide his services as an actor in the role of “The Most Interesting Man In The World” on behalf of the Dos Equis beer brand in exchange for payment. The 2012 Agreement includes a broad confidentiality provision prohibiting any party from disclosing any of its terms.

30. At all relevant times, Cross-Defendants knew of the existence of the 2012 Agreement and knew that it contained a broad confidentiality provision prohibiting any party from disclosing any of its terms.

31. Notwithstanding knowledge of the 2012 Agreement and the confidentiality provision contained therein, Cross-Defendants wrongfully and intentionally interfered with and induced a breach of the 2012 Agreement by publicly disclosing the terms of the confidential 2012 Agreement in express violation thereof.

32. As a direct and proximate result of the interference with contract caused by Cross-Defendants, as alleged herein, the 2012 Agreement was breached through the public disclosure of its terms.

33. As a direct and proximate result of the conduct of Cross-Defendants, as alleged herein, Jonathan’s relationship with Advertiser has been damaged and he has lost paying promotional opportunities. As a direct and proximate result of Cross-Defendants’ conduct, Jonathan has been damaged and will continue to be damaged in an amount to be proven at trial. When Jonathan has ascertained the full amount of its damages, he will seek leave of Court to amend this Cross-Complaint accordingly.

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SECOND CAUSE OF ACTION

Intentional Interference with Prospective Economic Advantage

(Against All Cross-Defendants)

34. Jonathan hereby realleges and incorporates by reference Paragraphs 1-27 and 29-31, inclusive, as though fully set forth herein.

35. At all relevant times, Jonathan had an existing business relationship with Advertiser, pursuant to which Jonathan provided his services as an actor in the role of "The Most Interesting Man In The World" on behalf of the Dos Equis beer brand in exchange for payment.

36. At all relevant times, Jonathan enjoyed a probability of future economic benefit arising from his existing business relationship with Advertiser.

37. At all relevant times, Cross-Defendants knew of Jonathan’s existing business relationship with Advertiser and the probability that Jonathan would enjoy future economic benefits from said relationship. Further, Cross-Defendants knew of the existence of the 2012 Agreement between Jonathan and Advertiser, and knew that it contained a broad confidentiality provision prohibiting any party from disclosing any of its terms.

38. Notwithstanding Cross-Defendants’ knowledge of Jonathan’s existing business relationship with Advertiser and the probability that Jonathan would enjoy future economic benefits from said relationship, as alleged herein, Cross-Defendants wrongfully, knowingly, and intentionally interfered with Jonathan’s prospective economic benefits by publicly disclosing the terms of the confidential 2012 Agreement in express violation thereof.

39. As a direct and proximate result of the conduct of Cross-Defendants, as alleged herein, Jonathan’s existing and prospective economic relationship with Advertiser has been damaged and he has lost paying promotional opportunities. As a direct and proximate result of Cross-Defendants’ conduct, Jonathan has been damaged and will continue to be damaged in an amount to be proven at trial. When Jonathan has ascertained the full amount of its damages, he will seek leave of Court to amend this Cross-Complaint accordingly.

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THIRD CAUSE OF ACTION

Negligent Interference with Prospective Economic Advantage

(Against All Cross-Defendants)


41. At all relevant times, Jonathan had an existing business relationship with Advertiser, pursuant to which Jonathan provided his services as an actor in the role of "The Most Interesting Man In The World" on behalf of the Dos Equis beer brand in exchange for payment.

42. At all relevant times, Jonathan enjoyed a probability of future economic benefit arising from his existing business relationship with Advertiser.

43. At all relevant times, Cross-Defendants have purported to act in a capacity as Jonathan's talent manager and, accordingly, have a special relationship with Jonathan that gives rise to a duty of care.

44. At all relevant times, Cross-Defendants knew of Jonathan's existing business relationship with Advertiser and the probability that Jonathan would enjoy future economic benefits from said relationship. Further, Cross-Defendants knew of the existence of the 2012 Agreement between Jonathan and Advertiser, and knew that it contained a broad confidentiality provision prohibiting any party from disclosing any of its terms.

45. Notwithstanding Cross-Defendants' knowledge of Jonathan's existing business relationship with Advertiser and the probability that Jonathan would enjoy future economic benefits from said relationship, and notwithstanding the fact that Cross-Defendants have a special relationship with Jonathan giving rise to a duty of care, Cross-Defendants wrongfully and unreasonably interfered with Jonathan's prospective economic benefits by publicly disclosing the terms of the confidential 2012 Agreement in express violation thereof.

46. As a direct and proximate result of the conduct of Cross-Defendants, as alleged herein, Jonathan's existing and prospective economic relationship with Advertiser has been damaged and he has lost paying promotional opportunities. As a direct and proximate result of Cross-Defendants' conduct, Jonathan has been damaged and will continue to be damaged in an
amount to be proven at trial. When Jonathan has ascertained the full amount of its damages, he
will seek leave of Court to amend this Cross-Complaint accordingly.

FOURTH CAUSE OF ACTION

Breach of Fiduciary Duty

(Against All Cross-Defendants)

47. Jonathan hereby realleges and incorporates by reference Paragraphs 1-27, 29-31,
35-38, and 41-45, inclusive, as though fully set forth herein.

48. At all relevant times, Cross-Defendants purported to act as Jonathan’s manager in
the entertainment industry. As Jonathan’s manager, Cross-Defendants owed Jonathan a
fiduciary duty.

49. At all relevant times, in their capacity as Jonathan’s manager, Cross-Defendants
knew of the existence of the 2012 Agreement and knew that it contained a broad confidentiality
provision prohibiting any party from disclosing any of its terms.

50. Cross-Defendants breached their fiduciary duty to Jonathan by publicly disclosing
the terms of the confidential 2012 Agreement in express violation thereof.

51. As a direct and proximate result of Cross-Defendants’ breach of their fiduciary
duty to Jonathan, Jonathan has been damaged and will continue to be damaged in an amount to
be proven at trial. When Jonathan has ascertained the full amount of his damages, he will seek
leave of Court to amend this Cross-Complaint accordingly.

52. The conduct alleged herein was made with an intent to injure Jonathan and
satisfies each of the elements of malice, oppression, and fraud under California Civil Code
section 3294, and thereby warrants the imposition of punitive damages against Cross-
Defendants.

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WHEREFORE, Jonathan prays for judgment against Cross-Defendants as follows:

**FIRST CAUSE OF ACTION**

Interference with Contract  
(Against All Cross-Defendants)

1. For actual damages in an amount according to proof at trial;
2. Interest on the aforesaid amount at a legal rate from and after the time it is found that said amounts were due and owing to Jonathan;
3. For costs of suit, including reasonable attorneys’ fees to the fullest extent allowed by law;

**SECOND CAUSE OF ACTION**

Intentional Interference with Prospective Economic Advantage  
(Against All Cross-Defendants)

4. For actual damages in an amount according to proof at trial;
5. Interest on the aforesaid amount at a legal rate from and after the time it is found that said amounts were due and owing to Jonathan;
6. For costs of suit, including reasonable attorneys’ fees to the fullest extent allowed by law;

**THIRD CAUSE OF ACTION**

Negligent Interference with Prospective Economic Advantage  
(Against All Cross-Defendants)

7. For actual damages in an amount according to proof at trial;
8. Interest on the aforesaid amount at a legal rate from and after the time it is found that said amounts were due and owing to Jonathan;
9. For costs of suit, including reasonable attorneys’ fees to the fullest extent allowed by law;
FOURTH CAUSE OF ACTION

Breach of Fiduciary Duty

(Against All Cross-Defendants)

10. For actual damages in an amount according to proof at trial;
11. For punitive damages in an amount according to proof at trial;
12. Interest on the aforesaid amount at a legal rate from and after the time it is found that said amounts were due and owing to Jonathan;
13. For costs of suit, including reasonable attorneys' fees to the fullest extent allowed by law;

AS TO ALL CAUSES OF ACTION

14. All costs incurred herein by Jonathan as may be provided by law;
15. Interest as provided by law; and
16. Such other and further relief as the Court deems to be just and appropriate.

Dated: February 9, 2016

VENABLE LLP

By: William J. Briggs

Attorneys for Defendant/Cross-Complainant
Jonathan Goldsmith and Defendant Jonathan Goldsmith Productions, Inc.
DEMAND FOR JURY TRIAL

Cross-Complainant Jonathan Goldsmith hereby demands a trial by jury.

Dated: February 9, 2016

VENABLE LLP

By:

William J. Briggs

Attorneys for Defendant/Cross-Complainant
Jonathan Goldsmith and Defendant Jonathan
Goldsmith Productions, Inc.
PROOF OF SERVICE

STATE OF CALIFORNIA   )
COUNTY OF LOS ANGELES ) ss.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Venable LLP, 2049 Century Park East, Suite 2100, Los Angeles, California.

On February 9, 2016, I served a copy ☑ / original ☐ of the foregoing document(s) described as CROSS-COMPLAINT on the interested parties in this action addressed as follows:

Bryan J. Freedman, Esq.                Attorneys for Plaintiffs
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☑ By placing true copies thereof enclosed in a sealed envelope(s) addressed as stated above.

☑ BY MAIL (CCP §1013(a)&(b)): I am readily familiar with the firm’s practice of collection and processing correspondence for mailing with the U.S. Postal Service. Under that practice such envelope(s) is deposited with the U.S. postal service on the same day this declaration was executed, with postage thereon fully prepaid at 2049 Century Park East, Suite 2100, Los Angeles, California, in the ordinary course of business.

☐ BY OVERNIGHT DELIVERY (CCP §1013(c)&(d)): I am readily familiar with the firm’s practice of collection and processing items for delivery with Overnight Delivery. Under that practice such envelope(s) is deposited at a facility regularly maintained by Overnight Delivery or delivered to an authorized courier or driver authorized by Overnight Delivery to receive such envelope(s), on the same day this declaration was executed, with delivery fees fully provided for at 2049 Century Park East, Suite 2100, Los Angeles, California, in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 9, 2016, at Los Angeles, California.

Anne L. Brum
Video Programming and Distribution
Litigation Update
Jennifer Scullion, Proskauer Rose LLP, New York

I. Video Programming and Distribution: Antitrust Issues

A. Sports League TV Packages

1. In re National Football League's "Sunday Ticket" Antitrust Litigation, C.D. Cal., 2:15-
   ml-02668 (BRO)

2. Background

   a) NFL game telecast rights are centrally licensed through the NFL.

   b) Typically, one game shown on national broadcast or pay TV on Sunday, Monday, and
      Thursday nights.

   c) Additionally, up to 13 games are televised on Sunday afternoons, split between CBS
      and FOX. But the CBS and FOX broadcasts are regionalized. Viewer in a particular
      region can access 1-3 Sunday afternoon game telecasts through free, over-the-air
      broadcasts.

   d) NFL Sunday Ticket is a subscription package that supplements the free, over-the-air
      CBS and FOX broadcasts of Sunday games. Package allows customer to watch all
      Sunday game broadcasts other than those already available through the regional
      broadcast in the customer's region. It is thus an "out-of-market" package.

   e) U.S. distribution has been licensed exclusively to DirecTV for many years.

3. The Cases

   a) In 2015, more than twenty putative class actions were filed by residential and
      commercial subscribers to NFL Sunday Ticket against the NFL, each team, and
      DirecTV,

   b) Consolidated before Judge Beverly Reid O'Connell in the Central District of
      California.

   c) Essential theories of the case:

      (1) NFL Sunday Ticket allegedly is the product of unlawful pooling of rights to
          broadcast games and to license distribution of the broadcasts.

      (2) Absent intra-league agreement among the teams, each team individually would
          arrange for live game video to be distributed nationally either by broadcast, pay
          TV, streaming, or some combination. The result would be competition among the
          teams allegedly producing more choices and lower prices for fans.

      (3) Plaintiffs additionally claim that exclusively licensing NFL Sunday Ticket to
          DirecTV is unlawful exclusive dealing.
d) Claims

(1) Section 1: The intra-league agreement and the NFL/DirecTV agreements each alleged to be an unlawful restraint of trade because the anticompetitive effects outweigh any procompetitive justifications.

(2) Section 2: NFL and the teams have unlawfully monopolized the market for live NFL game telecasts by centrally pooling all rights. Additionally, the NFL, the teams, and DirecTV have unlawfully conspired to grant DirecTV a monopoly in out-of-market telecasts.

4. Prior Cases


b) Kingray v. NBA (S.D. Cal. 2002): Class action by commercial subscriber alleging NBA out-of-market package and exclusive license of package to DirecTV violated antitrust laws. Parallel case concerning NHL out-of-market package. Claims dismissed on the pleadings. Exclusive license was not alleged to harm competition in the relevant market. Package itself added to the games available to viewers and fact that it was offered only in an all-team package and not team by team (or game by game) did not make it unlawful.

c) Laumann v. NHL & Garber v. MLB (S.D.N.Y. 2012): Class actions by fans challenging intra-league agreements defining team television territories ("in-market") and pooled, joint sale of "out-of-market" game programming through league packages (e.g., NHL Center Ice and MLB Extra Innings). Alleged unlawful agreements both among the teams (horizontal) and with the pay TV networks and distributors (vertical). Trial court found sufficient factual disputes to allow claims to survive summary judgment and rejected application of the Baseball Antitrust Exemption, but ultimately certified only an injunction class after finding that plaintiffs failed to put forth a workable model of class-wide damages. Cases settled in 2015 and 2016 on agreements, among other things, to offer "single team" packages.

5. Key Issues

a) Application of Sports Broadcasting Act

(1) SBA exempts from antitrust laws any joint agreement among the major professional sports league teams to license "sponsored telecasting" of games. SBA was enacted in 1961 in direct response to the district court's decision in U.S. v. NFL (E.D. Pa.) that enjoined a pooled rights agreement between the NFL and CBS.

(2) "Sponsored telecasting" has been interpreted to mean free, over-the-air broadcasting only and not pay TV telecasts, even when such telecasts are sponsored by advertisers.
(3) NFL and teams contend that the underlying agreement to pool all rights in the NFL for joint sale to over-the-air broadcasters (currently, CBS and FOX) is exempt and, therefore, any claim must be focused exclusively on proof that there is some additional competitive effect that results from a follow-on agreement.

(4) Question is whether NFL's subsequent agreement to re-package the CBS and FOX Sunday afternoon broadcasts in a pay TV package harms competition, i.e., but for the Sunday Ticket agreement, would those broadcasts be made available individually by the teams as plaintiffs allege or would they simply not be aired outside the regions that the NFL determines within the confines of the SBA exemption?

b) Necessary Cooperation v. Intra-League Competition

(1) Premise of the case is that teams own the broadcasts rights in the games that they play and, but for the challenged agreements, teams would make individual decision about how, where, and on what terms to license live telecast/streaming of games in which they play.

(2) But that premise assumes the lawfulness of the underlying agreements that create the games in the first place, namely the agreement to show up and play games according to a league schedule and without the ability to "hold out" until a suitable rights agreement is reached between the two teams, each of which is necessary for the game to exist at all.

(3) Question is whether there is any principled basis in the antitrust laws to condone the agreements that are needed to create the in-person viewing experience, but then to condemn agreements that also make it possible to extend the in-person viewing to remote viewing by telecast or streaming?

c) Bundled v. A la Carte Sales

(1) Plaintiffs may also be claiming harm from fact that Sunday Ticket is sold only in a bundled, all-or-nothing form. Claiming that, in but-for world, options would be available to buy more tailored packages, such as team or conference packages.

(2) Brantley v. NBC Universal (9th Cir. 2012): owner of collection of programming can require that it be distributed to consumers only on a bundled basis (i.e., NBC-U can prohibit cable operator from offering its channels on an a la carte basis).

(3) But see Laumann v. NHL (S.D.N.Y. 2012): limiting Brantley to situations in which one entity lawfully owns or controls the content.

(4) Added twist here because the SBA plainly exempts the underlying pooling agreement that gives NFL central control over the game telecast rights.

d) Legality of exclusive carriage agreements.

(1) Exclusive distributorship itself is not an antitrust violation. To the contrary, exclusive licenses are "presumptively legal."

   i) Procompetitive benefits of exclusive licensing are well-recognized in television industry.
ii) FCC has abandoned its blanket prohibition on exclusive licensing of vertically-integrated cable networks, but has retained a rebuttable presumption that exclusive licensing of vertically integrated regional sports networks violates the Program Access rules.

(2) Need proof, at a minimum, that the restraint at the distributor level in fact harms competition in the relevant market.

(3) Less choice and allegedly higher prices at distributor level typically found to be insufficient.

(4) Challenge to the "vertical" exclusivity really seems to be an offshoot of the underlying challenge to the "horizontal" pooling agreement.

e) Additional Issues

(1) Relevant market definition

i) Tension between market definition that includes all NFL game telecasts and fact that between one and three free telecasts are available each Sunday afternoon, since the free telecasts. If truly part of the same market, will tend to prevent supra-competitive pricing of the package.

ii) Similarly, tension in claiming there is a sub-market just for out-of-market games with allegations that, in but-for world, each team would compete individually with every other team in licensing of broadcast rights.

(2) Standing and Antitrust Injury: Are these the right plaintiffs to complain about alleged restraints in market for broadcast rights?

(3) Monopolization claims: NFL and its clubs have a "natural monopoly" over their own broadcast rights if one assumes NFL game telecasts are a cognizable market. What have they done, outside the SBA, to unlawfully enhance or leverage that monopoly?

B. Channel Bundling


2. Background:

a) Viacom offers Core Networks (Comedy Central, Nickelodeon, BET, MTV), as well as Suite Networks (e.g., CMT, MTV Hits, Nicktoons, VHI Classic).

b) 2011-2012, Viacom allegedly coerces carriage of Suite Networks by threatening to charge more for the Core Networks alone than for Core and Suite Networks together. Allegedly would impose a $1 billion or more penalty on Cablevision.

c) Cablevision signs the deal in 2012, then sues in 2013 seeking damages and equitable reformation of the contract to eliminate requirement to carry the Suite Networks.

3. Two Claims

a) Per Se Tying: Viacom allegedly used market power with respect to the desirable Core Networks to coerce carriage of the less desirable Suite Networks. Cablevision
claimed it had limited "real estate" to carry channels and that, absent the coercion, Cablevision would have sought out other "general programming" channels from other sources.

b) Block Booking: Essentially a claim for leveraging copyright "monopoly." Licensing desirable content only on condition that Cablevision also license less desirable content.

4. District Court Allows Both Claims to Go Forward

a) Per Se Tying

(1) Sufficient allegations that Core Networks and Suite Networks are separate products for antitrust purposes.

i) Viable allegations that each Core Network is its own "relevant market."

ii) Viable allegations that "commercially critical" channels are distinct market from "general programming."

iii) SIGNIFICANCE: Most valuable content is exclusive to whatever network produces it, just as a brand is exclusive to its owner, and continues to be produced because it is responsive to some consumer demand. Without more rigorous analysis, “single channel” product markets threaten to collapse the distinct issues of market definition and market power and penalize competitive success — e.g., better programming.

iv) SIGNIFICANCE: Market definitions driven principally by relative popularity of content could be particularly troubling in the video industry where most content is sold in some “bundled” form — a bundle of episodes in a season, a bundle of programs on a channel, a bundle of channels on a service, etc. — and where each bundle consists of more and less popular pieces. As linear viewing gives way to binge releases, on-demand episodes, and minutes-long clips, antitrust plaintiffs may seek to attack more bundled sales forms as unlawful “tying” of “popular” content to less compelling, “general” viewing.

(2) No "anticompetitive effects" are needed because tying is a per se violation of Section 1. Court finds that sufficient effects are pled in any event based on Cablevision's claim that it has limited budget and channel "real estate" and would have sought out other general programming to license instead of the Viacom Suite Networks.

i) SIGNIFICANCE: Debate continues to rage within the antitrust bar on whether and when "tying" is a per se violation. Per se violations are those that are so pernicious that no proof of actual anticompetitive effect is needed and no competitive justifications can be offered. But some courts hold that tying requires proof of anticompetitive effects and others have considered justifications for tying products (although the latter group may actually be looking at whether the products are truly separate).
b) Block Booking

(1) Is block booking still a viable claim after the Supreme Court's 2006 decision in Illinois Tool Works v. Independent Ink (patent does not confer presumptive market power in the covered products)?

(2) Yes, where there is market power in the desired content.

(3) SIGNIFICANCE: Court revived an old theory that has not been actively used since 1960s or maybe '80s. Antitrust law has changed in significant ways since then, particularly with respect to vertical licensing issues. Block Booking claims, in theory, do not require proof of separate markets for the desired and undesired content, although the requirement for proof of market power may presume a cognizable market. Unclear whether Block Booking claims require proof of anticompetitive effect or can be rebutted by proof of pro-competitive justifications.

5. Cablevision and Viacom settled in October 2015, leaving District Court opinion unreviewed.

II. Video Programming and Distribution: Licensing Issues

A. AT&T/DirecTV Post-Merger

1. Herring Networks v. AT&T, 16-cv-01636 (C.D. Cal.)

2. Background

   a) Prior to announcement that AT&T would seek to acquire DirecTV, Herring Networks (One America News and AWE (formerly Wealth TV)) negotiated with AT&T for carriage on AT&T's U-Verse systems.

   b) AT&T allegedly represented that it intended to expand U-Verse. Post-acquisition of DirecTV, however, AT&T allegedly actively moved subscribers from U-Verse to DirecTV. Herring alleges AT&T's representations during negotiations were fraudulent.

   c) Herring also claims that, after the U-Verse agreement was signed, AT&T made an oral offer for an additional deal: publicly support AT&T's acquisition of DirecTV and lobby the FCC for approval and DirecTV will carry Herring Networks' channels for five years on terms comparable to the U-Verse deal, although at a lower rate. Herring claims it accepted the offer and performed by supporting the acquisition, including lobbying the FCC to approve the deal, but AT&T reneged and refuse to carry.

   d) NOTE: Herring has long had difficulties securing carriage for its channels. It previously brought, but ultimately lost, a contentious FCC Program Carriage proceeding against Time Warner Cable, Comcast, Cox Communications, and Bright House Networks.

3. Claims

   a) Fraud/Misrepresentation, with respect to the alleged misrepresentations concerning intent to expand U-Verse. NB: Herring does not allege fraud in the inducement.
b) Promissory Estoppel/Oral Contract, with respect to alleged $100 million quid pro quo of 5-year carriage deal with DirecTV in exchange for supporting and lobbying for approval of AT&T’s acquisition of DirecTV.

4. District Court Denies Motion to Dismiss

a) Sustains fraud claims based on alleged false representations of intent to expand U-Verse.
   (1) Reliance could be pled despite contract provisions allowing AT&T to cease distribution on existing systems and to decline distribution as it added any new systems.
   (2) Alleged falsity of representations of intent is "plausible;" even though AT&T did not know whether its acquisition of DirecTV would be approved, it's plausible that it had already formed intent to switch customers to DirecTV if the deal was approved, making the representations of intent to expand U-Verse false.
   (3) Herring sufficiently alleged harm because (1) plausible that Herring would have negotiated a different deal with more protections had AT&T been forthcoming about possible DirecTV plans and (2) Herring claimed it invested in AWE and OAN in reliance on U-Verse expansion.

b) Sustains $100 Million Oral Agreement Claims
   (1) Not an oral modification of existing written contract, but an alleged new, additional oral contract.
   (2) Sufficiently specific terms allegedly offered (subject, length, price).
   (3) Not barred by Statute of Frauds despite five-year length because Herring alleges full performance (lobbying in favor of AT&T/DirecTV deal).

c) SIGNIFICANCE
   (1) Extremely pro-programmer decision that appears driven, in part, by the bargaining disparities between independent networks and large distributors.
   (2) Conversely, calls into question how a large entity can protect itself from he said/she said claims of oral representations that precede written contracts.
   (3) If AT&T was making promises of DirecTV carriage before agency approvals, was it gun-jumping in violation of Hart-Scott-Rodino? Was AT&T required to disclose the promises allegedly made to secure lobbying? Was Herring required to disclose the quid pro quo for its lobbying?

B. Charter/Time Warner Cable/Bright House Post-Merger

   a) After approval and closure of the Charter/Time Warner Cable/Bright House transaction, New Charter allegedly informed the plaintiff networks that it would carry programming on all systems (i.e., legacy Charter, TWC, and BHN systems) under the terms of the Time Warner Cable carriage deals.
b) TWC deals almost always would have lower rate than Old Charter deals because of TWC's size and importance of New York market.

c) Each of the networks is challenging Old Charter's assertion that it can proceed to carry under the TWC contract:

(1) Univision claims TWC contract expires end of December and does not apply to Old Charter systems and that the Old Charter contract expired at the end of June. In theory, Univision could pull the feed from all New Charter systems at year end.

(2) Fox News claims that its carriage agreement with Old Charter was drafted to account for the possibility of a Charter merger or consolidation with another distributor and that, upon closure of the Charter/TWC/BHN deal, all systems were swept under the Old Charter deal and that the TWC contract (at a lower per subscriber rate) terminated.

(3) Showtime claims are similar to Fox News: after the transaction closed, all systems were governed by the Old Charter agreement and the TWC deal was terminated.

(4) A key issue in each case is whether all the cable systems are now owned, managed, and controlled by New Charter or whether the creation of a new entity, Spectrum, that allegedly is controlled by TWC and holds all the cable system assets, means that all the systems are now TWC systems and governed by the prior TWC agreement. All three networks allege that New Charter is estopped from claiming that Spectrum controls and manages the systems because Charter represented to public officials and investors that Charter would manage the new entity.

2. All three cases are only in the pleading stage. But each highlights important issues when multiple licensees are merged or otherwise brought under common control:

a) Are the licenses assignable without consent? If consent is required, can it be reasonably withheld?

b) Does each pre-merger agreement continue to govern the legacy licensees?

c) Are systems migrated from one agreement to the other?

d) What happens if the terms the agreements are such that both agreements arguably apply to certain systems?

3. Often, contracts themselves will address the issues through "acquired systems," change of control, and other provisions.

4. But there may be many situations where the answers are not clear:

a) Programmers often do not control the forms of the agreements, especially if programmer is smaller or independent or distributor is relatively large and powerful. Result is that, post-transaction, the parties may be dealing with trying to reconcile provisions in two very different carriage deals.

b) Reconciliation of deals is even more challenging if, as commonly is the case, one or both carriage deals is a term sheet that was never reduced to long form with carefully crafted change of control provisions, etc.
c) Also likely to have situations in which one deal is fairly old (mid-1990s) and drafted to anticipate concerns that existed at that time, while the other is more "modern."
1. Brantley v. NBC-Universal, 675 F.3d 1192 (9th Cir. 2012)


3. Fox News Network v. Charter Commc’ns, 653777/2016 (N.Y. County Supreme Ct.)


5. In re NFL Sunday Ticket Antitrust Litig., ML 15-02668-BRO (C.D. Cal.)


10. Showtime v. Charter Commc’ns, 654356/2016 (N.Y. County Supreme Ct.)

11. Univision v. Charter Commc’ns, 653568/2016 (N.Y. County Supreme Ct.)


Hello, McFly?
In re NFL “Sunday Ticket” Antitrust Litigation (C.D. Cal.)

• Can the NFL and its teams agree to pool “out-of-market” game telecasts or must teams sell telecasts in competition with one another?

• What is the scope of the Sports Broadcast Act Immunity?

• Can the NFL exclusively license NFL Sunday Ticket to DirecTV?
In re NFL “Sunday Ticket” Antitrust Litigation

- Pittsburgh Athletic Co. v. KQV Broad. Co. (W.D. Pa. 1938)

- U.S. v. NFL (E.D. Pa. 1953 and 1961)

- Shaw v. Dallas Cowboys (3d Cir. 1999)

- Kingray v. NBA & NHL (S.D. Cal. 2002)

- Laumann v. NHL & Garber v. MLB (S.D.N.Y 2012)
Bundle of joy?
Cablevision v. Viacom
(S.D.N.Y.)

• Tying: when can a programmer charge more for its "premium" networks alone than for the bundle of all networks?

• Block Booking: can a programmer license its networks on an all or nothwithstanding basis?
Herring Networks v. AT&T
(C.D. Cal.)

• Alleged fraudulent representation concerning intent to expend U-Verse.

• Alleged breach of covenant of good faith for switching customers to DirecTV.

• Alleged breach of oral agreement for $100 million, five-year carriage deal.
This group must somehow form a family!
Post-Merger License Disputes
(New York Supreme Court)

• Has there been a change of control?

• Is the license assignable to the new entity? Is consent required? Can it reasonably be withheld?

• Can systems be migrated from one agreement to another?

• What happens if the network agreements overlap post-merger?
Fall 2016 Litigation Update

A. Sports Law Update

I. Third Circuit Strikes Down New Jersey Sports Gambling Law...Again – Amanda Alasauskas

In early August 2016, an en banc Third Circuit United States Court of Appeals struck down a New Jersey law that legalized sports gambling, finding that the state law conflicts with a federal law that bans state-sanctioned sports gambling in a majority of states.

This federal law is the Professional and Amateur Sports Protection Act (PASPA), passed in 1992, in an effort to prohibit state-sanctioned sports gambling. 28 U.S.C. §§ 3701–3704. Within PASPA, there is a provision allowing sports leagues whose games may be subject to gambling to bring an action to enjoin such gambling. 28 U.S.C. § 3703. However, PASPA does include exceptions for Nevada, Oregon, and Delaware. 28 U.S.C. § 3704(a). New Jersey was included in this exception, but only if a system for sports gambling was enacted within a year of PASPA’s enactment. New Jersey failed to do so.

In 2012, New Jersey enacted the Sports Wagering Act (“2012 Law”) after a referendum wherein sixty-four percent of New Jersey voters voted in favor of amending the state’s Constitution in order to permit sports gambling. N.J. Stat. Ann. §§ 5:12A-1 et seq. (2012). The 2012 Law regulated sports wagering in casinos and racetracks in New Jersey, and created a regulatory scheme, which included licenses for operators and minimum cash reserves. However, this law was short lived, as five sports leagues—the National Collegiate Athletic Association (NCAA), National Football League (NFL), National Basketball Association (NBA), National Hockey League (NHL), and the Office of the Commissioner of Baseball, collectively referred to as “the Leagues”—sued in an effort to enjoin the law due to its violation of PASPA. The District Court enjoined the implementation of the 2012 Law, holding that PASPA was constitutional and was affirmed by the Third Circuit Court of Appeals in NCAA v. Governor of New Jersey, 730 F.3d 208 (3d. Cir. 2013) (Christie I).

However, none of this dissuaded New Jersey, as the state’s legislature passed SB 2460 in 2014 (“2014 Law”). The 2014 Law included language specifically prohibiting wagering on New Jersey college teams’ competitions, as well as any collegiate competition that would occur within the state of New Jersey. N.J. Stat. Ann. § 5:12A-7. It also restricted any sports wagering to those persons’ age twenty-one or over. Id. Again, the Leagues filed suit to enjoin the 2014 Law, and again, the District Court held that the 2014 Law violated PASPA. The District Court reasoned that Christie I held that PASPA offered two choices, maintain sports gambling prohibitions or repeal them entirely, and that PASPA preempts the 2014 Law because it is a partial repeal.

On appeal, New Jersey argued that the 2014 Law was in compliance with PASPA and constituent with Christie I because the state legislature had effected a repealer that was specifically permitted with Christie I. Further, New Jersey argued that any injunctive relief granted should be limited to those games of entities who are parties to the action and that the Leagues have supported sports gambling in other contexts, and, therefore, have unclean hands. On the other hand, the Leagues argue that the 2014 Law “authorizes” and “licenses” sports gambling, thus violating PASPA. Again, the Third Circuit held that the 2014 Law violates PASPA due to its authorization of sports gambling. The court pointed to the “repeal” language used in the 2014 Law, rejecting New Jersey’s argument that the 2014 Law simply repealed the sports wagering prohibition, which is not the same as authorizing sports wagering. The court also pointed to the language in the 2014 Law dictating who could participate and where sports gambling could occur, citing the definition of the word “authorize”—“[t]o empower; to give a right or authority to act.” Authorize, Blacks Law Dictionary (6th ed. 1990). This definition enables the court’s position that the 2014 Law authorized those persons’ twenty-one years and older to participate in sports wagering in casinos, gambling house, and horse racetracks. While the 2014 Law contains a construction provision that stated that the 2014 Law was not to be “intended and... construed as causing the State to sponsor, operate, advertise, promote, license or authorize by law or compact” sports wagering, the court ruled that “clever drafting” does not save the law, as this provision mirrored language in PASPA. N.J. Stat. Ann. § 5:12A-8; 28 U.S.C. § 3702(1). NCAA v. Governor of N.J., 799 F.3d 259, http://www2.ca3.uscourts.gov/opinarch/144546p.pdf. The Third Circuit reaffirmed its decision following an en banc hearing in February 2016. It is likely that New Jersey will seek cert from the United States Supreme Court in the future.

While the Third Circuit’s ruling is binding for three states, it also sets precedent for the entire United States.
While not controlling for other circuits, the Third Circuit’s finding will undoubtedly weigh heavily on the scales for states who are considering legalizing sports betting in the future, a hot topic in many states today. It is also likely that this decision will weigh heavily on future regulations on Daily Fantasy Sports, which could also bring up similar concerns with PASPA. See also Dustin Gouker, If New Jersey Wins Sports Betting Appeal, What Might Happen Next in U.S.?, LEGAL SPORTS REP. (Feb. 16, 2016), http://www.legalsportsreport.com/7524/new-jersey-sports-betting-case-impacts/; John Brennan, Federal court ruling could be a fatal blow to legal sports betting in N.J., N. JERSEY (Aug. 9, 2016), http://www.northjersey.com/news/federal-court-ruling-could-be-a-fatal-blow-to-legal-sports-betting-in-n-j-1.1642017.

II. Jenkins v. NCAA Reopens the Door to Compensation for Student Athletes – Patrick Ouellette

Any discussion of Jenkins v. NCAA begins with the backdrop of the famous O'Bannon v. NCAA court holding in August 2014 that continues to have far-reaching ramifications. In O'Bannon, Northern District of California federal Judge Claudia Wilken held that the NCAA's efforts to ban student athletes from using their names and likenesses constituted "unreasonably restrained trade" and, therefore, violated the Sherman Act—the federal antitrust law—15 U.S.C. § 1. The court issued an injunction to the NCAA to end its anti-competitive prohibitions and stated that students may receive up to $5,000 per year for the use of their likenesses. The United States Court of Appeals for the Ninth Circuit later upheld Judge Wilken's decision, but it removed the $5,000 allowance and barred any compensation beyond the scholarship to the full cost of attendance. The removal of the allowance was a small victory for the NCAA because the Ninth Circuit made specific references to protecting amateurism. Both parties have appealed to the United States Supreme Court and will likely hear by late September or early October if the Court will take the case.

The status of the O’Bannon case will loom large in the Jenkins class action case, which also features Judge Wilken on the bench. The Jenkins Plaintiff class is made up of student-athletes who played NCAA Division I Football, Bowl Subdivision football, and men's and women's basketball from March 5, 2014 to present. The class argued that the NCAA’s cap on the grant-in-aid (GIA), which included only the value of tuition, fees, room and board and required course books, violates the Sherman Act because it prevents schools from competing to recruit athletes based on compensation beyond what is allowable under the GIA cap. The Plaintiffs in Jenkins requested an injunction against the NCAA’s rules limiting compensation for student-athletes, and some of the consolidated Plaintiffs sought damages for the difference between the GIAs awarded and the cost of attendance. The class also challenged NCAA rules prohibiting the provision of other "benefits" and "in-kind" compensation and cash compensation. Alternatively, the NCAA argued that removal of the GIA cap would mean the end of amateurism and moved for judgment on the pleadings in accordance with FED. R. CIV. P. 12(c) by arguing that “offering [student-athletes] cash sum untethered to education expenses was not a less restrictive alternative to the NCAA’s current rules under the rule of reason.” On December 4, 2015, the Jenkins court granted the Plaintiffs' amended joint motion for class certification under FED. R. CIV. P. 23 and also dismissed the consolidated Plaintiffs' claim under California's Unfair Competition Act.

Though O'Bannon technically opened the door for athletes to challenge the NCAA’s ability to control how they are compensated for their likenesses to a degree, the Jenkins Plaintiffs' lead attorney Jeffrey Kessler would like to open that door completely by arguing that there should be no compensation restrictions at all. While there will likely continue to be some type of limits on amateur athlete compensation, Kessler and the Plaintiffs’ argument that the NCAA policies equate to anticompetitive behavior will likely depend on how the court views O'Bannon. Specifically, the argument will be affected by whether the court focuses on the "unreasonably restrained trade" portion of the O'Bannon District Court holding or the Appellate Court’s decision to continue promoting amateurism in the NCAA. Defendant NCAA’s motion for judgment on the pleadings was denied on August 5, 2016. Jenkins v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), 2016 U.S. Dist. LEXIS 103703 (N.D. Cal. Aug. 5, 2016).

III. Third Circuit Determines Fans Lack Standing Over Super Bowl Tickets – Patrick Ouellette

The lead Plaintiffs in the class-action Finkelman v. NFL lawsuit were Ben Hoch-Parker and Josh Finkelman. Finkelman bought two Super Bowl XLVIII tickets for himself and Hoch-Parker through a third-party reseller at higher than face value for the tickets. Finkelman and Hoch-Parker alleged that their inability to access face value tickets through the National Football League (NFL), forcing them to resort to the resale market, was in violation of New Jersey's Ticket Law. The Ticket Law...
is found under New Jersey's Consumer Fraud Act, which bars the withholding of more than five percent of the available seating from sale to the general public. N.J. Stat. Ann. § 56:8-35.1. The Plaintiffs also argued that the NFL’s actions led to unjust enrichment for the NFL, which responded that it has no connection to third party ticket vendors.

Finkelman filed a putative class action suit against the NFL in January 2014 in the United States District Court for the District of New Jersey and later filed an amended complaint to bring on more defendants and identified Hoch-Parker as the second named Plaintiff. The New Jersey District Court held that much of Finkelman’s argument, which alleged that the NFL gave the majority of face-value Super Bowl tickets to its “insiders,” was based on speculation and, therefore, lacked Article III standing. Finkelman was unable to prove that he would have been able to purchase a face value ticket directly from the NFL if not for the NFL’s alleged withholding of the tickets. Further, he could not prove that he paid a higher resale price directly because of the NFL’s alleged withholding of the tickets.

Following the District Court granting the NFL’s motion to dismiss the complaint on January 20, 2015, for failure to state a claim, the Plaintiffs brought the case to the United States Court of Appeals for the Third Circuit. The Third Circuit stated that it lacked jurisdiction to adjudicate their claims because Hoch-Parker and Finkelman sued the NFL in federal court and were unable to allege the proper standing elements. As a result, the appeals court affirmed the District Court’s Hoch-Parker judgment and vacated the District Court’s Finkelman judgment to the District Court for further proceedings. Notably, the NFL did not initially bring up Finkelman’s Article III standing before the District Court. In partially affirming the District Court’s decision, the Third Circuit referenced the need to dismiss Hoch-Parker’s claim because he did not actually purchase tickets and mere potential buyers do not have standing to make a claim under Article III. The court also added that the Plaintiffs were free to bring the suit to New Jersey courts. Though the Third Circuit found the Plaintiffs’ decision to bring the case to federal court to be questionable, the Plaintiffs’ failure to show causation related to the NFL’s ticket practices was the key to the January 14, 2016 decision. This case also reaffirms that courts require evidence greater than mere speculation for fans attempting to prove fraud when a league did not sell them tickets directly. Finkelman v. NFL, 810 F.3d 187 (3d Cir. 2016).

IV. Afraid of Foul Balls and Broken Bats? – Patrick Ouellette

Lead Plaintiffs Gail Payne, Robert Gorman, and Stephanie Smith made claims for negligence, fraudulent concealment, and various statutory violations against Major League Baseball (MLB) with the primary goal of obtaining injunctive relief that mandates enhanced safety netting at all MLB ballparks “from foul pole to foul pole.” The group has alleged that the league has failed to provide a consistent policy for safety netting and filed suit against MLB in the United States District Court for the Northern District of California on July 14, 2015. The MLB moved to dismiss based on FED. R. CIV. P. 12(b)(1) lack of standing; FED. R. CIV. P. 12(b)(2) lack of personal jurisdiction over clubs that are out of state; 28 U.S.C. § 1391 improper venue; and FED. R. CIV. P. 12(b)(6) failure to state a claim.

On April 8, 2016, the District Court granted a partial dismissal and only focused on the personal jurisdiction over the out-of-state clubs claim, ordering MLB to provide Plaintiffs with limited jurisdictional discovery and both parties to provide a seven-page supplemental briefing directly relating to their standing with respect to only California stadiums. This discovery period was intended to provide Plaintiffs the opportunity to obtain more information on “the probability that a given individual, seated in plaintiffs’ specific sections at the two California stadiums in question, will be hit by a stray ball or bat in the course of a given game or season.” Reciprocal discovery was to end on July 8, 2016, and the Plaintiffs’ supplemental brief was due by July 19, 2016, while the Defendants’ reply was due by August 2, 2016. The court set a further hearing on the motion to address this issue on August 23, 2016 at 2 p.m. The court chose to wait on ruling on the remainder of the motion pending the contemplated jurisdictional discovery on standing and the respective briefings. Considering the court referenced the Supreme Court’s requirement that the "threatened injury must be certainly impending to constitute injury in fact," the court’s minimum threshold for Plaintiffs to prove Article III standing was made clear during the April 8 hearing. Payne v. Office of the Comm'r of Baseball, 2016 U.S. Dist. LEXIS 47971 (N.D. Cal. Apr. 8, 2016).

V. NFL Has a Say in Usage of Football Footage in Right-of-Publicity Suit – Harris Shain

Defendant’s affiliate, NFL Films, creates films centered on significant games, seasons and/or players throughout the leagues history. Most of these productions contain game footage supplemented with
interviews from players, coaches and other individuals. These films are sold to consumers, licensed to distributors such as ESPN, and broadcasted on the league’s television network and website.

Plaintiffs John Dryer, Elvin Bethea and Edward White are former NFL players who appeared in some of these films through footage from games they participated in as well as interviews. The Plaintiffs argued that the NFL’s use of any game footage in which they appeared without their permission violated their right of publicity in several states and created a false endorsement in violation of § 1125 of the Lanham Act. The District Court granted summary judgment in favor of the Defendant on both claims, and the United States Court of Appeals for the Eighth Circuit affirmed.

With respect to the state law right-of-publicity claims, the issue was whether these claims were preempted by the federal Copyright Act of 1976. This determination ultimately hinged on whether the films were commercial speech or expressive speech. If the films were commercial in nature, the right-of-publicity suit could be understood as an exercise of a state’s interest in protecting consumers from misleading advertising and, therefore, could have purposes unrelated to the aims of federal copyright law. Alternatively, if the films were expressive in nature, the consumer protection justification was nonexistent and the right-of-publicity claims had to be understood as an attempt to subvert the copyright holders’ exclusive right to exploit their original work in direct contravention of the Copyright Act. Applying the factors espoused in Porous Media Corp. v. Pall Corp., 186 F.3d 1077 (8th Cir. 1999), the Eighth Circuit agreed with the District Court that the films were expressive speech and the state law right-of-publicity claims were thereby preempted by federal copyright law.

As to the false endorsement claim under § 1125 of the Lanham Act, to survive the motion for summary judgment, the Plaintiffs were required to establish that statements made by the Defendant were either literally false or literally true/ambiguous, but convey a false impression. The Eighth Circuit held that the Plaintiffs failed to meet this burden having been unable to present any evidence that the Defendant’s films included misleading or false statements regarding the Plaintiff’s current endorsement or association with the Defendant. Moreover, the fact the videos may have caused some members of the public to misunderstand the extent to which the Plaintiffs continued to associate or endorse the Defendant was not sufficient to overcome summary judgment. Dryer v. NFL, 814 F.3d 938 (8th Cir. 2016).

This case is noteworthy for a couple of reasons. First, it is clear that professional athletes are fighting a steep uphill battle when it comes to controlling the dissemination of footage from games in which they participated. More importantly, it reinforces the verbatim application of the Porous factors (or other similar tests) as the proper means by which to analyze the commercial or expressive nature of speech in the context of copyright and right-of-publicity claims. This is important, as other federal circuits have criticized a literal application of the Porous factors and their brethren as outdated and unable to account for modern advertising techniques that focus on “brand” advertising. See Jordan v. Jewel Food Stores, Inc., 743 F.3d 509 (7th Cir. 2014).

VI. Eighth Circuit Reverses District Court’s Vacatur of Arbitration Decision Upholding Discipline Against NFL Running Back Adrian Peterson – Kyle Simmons


Pursuant to Article 46 in the collective bargaining agreement (CBA) between the National Football League (NFL) and the National Football League Players Association (NFLPA), the Commissioner promulgated a Personal Conduct Policy that applies to all players. The Policy specifies behavior that may be considered detrimental conduct, and the policy explains the types of penalties violators may receive. In 2014, Peterson was charged with misdemeanor reckless assault on one of his children. The National Football League’s Commissioner, Roger Goodell, suspended Minnesota Vikings running back Adrian Peterson during the 2014 football season. Peterson agreed to plea nolo contender and Commissioner Goodell used that plea to discipline Peterson under "conduct detrimental to the game of professional football." Commissioner Goodell suspended Peterson indefinitely and fined Peterson a sum equivalent to six games’ pay.

Peterson appealed his discipline to an arbitrator, who affirmed the suspension and fine. Peterson petitioned the District Court to vacate the arbitration decision. The court granted the petition, and the League appealed. Currently, Peterson has resumed playing professional football, and this appeal case does not involve his eligibility to play. The remaining dispute concerns whether the League may collect the fine imposed by the Commissioner and upheld by the arbitrator.
The appeals court reviewed this case de novo and held that the courts have a limited role when reviewing arbitration decisions. The role of the court is not to decide what discipline is appropriate or whether the arbitrator correctly interpreted the contract, but whether the arbitrator acted within the scope of his authority. In this case, the arbitrator decided that the ability to impose fines was within the power of the Commissioner in Article 46 and that because the arbitrator’s award draws its essence from the collective bargaining agreement the losing party should not be permitted to challenge simply because it’s unfavorable.

This issue is important because the NFLPA continues to challenge the authority of the Commissioner of the NFL and the CBA and is likely to be a substantive issue regarding negotiations in the next contract year. Currently, the CBA is in effect through the last day of the 2020 league year. National Football League, Collective Bargaining Agreement Between the NFL and the NFL Players Association (Article 69), https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf).

VII. Federal Court Rules That Women's National Team CBA Includes No-Strike Clause – Kyle Simmons

In June 2016, a federal judge ruled on whether there was a valid collective bargaining agreement (CBA) between the United States Soccer Federation (USSF) and the United States Women’s National Soccer Team Players Association (Players Association). The USSF stated that the parties had a CBA that was in effect through 2012 and the parties agreed to a memorandum of understanding (MOU) that addressed particular items and carried over the remaining articles from the 2012 contract. The MOU was to expire in 2016. The Players Association disagrees with this position and argued that the MOU was not a valid CBA and that the MOU’s failure to specifically identify any articles that were to be carried over also does not apply. The Players Association threatened to strike unless a new CBA was made. The USSF argued that although the No Strike Clause was in the 2012 CBA, it was also carried over into the MOU and, therefore, prevents the Players Association from striking. The USSF brought forward the lawsuit for an anticipatory breach of contract and declaratory judgment.

U.S. District Judge Sharon Johnson Coleman of the Northern District of Illinois ruled the team remains bound by a no-strike provision from its 2005–2012 collective bargaining agreement. She further stated that“[f]ederal law encourages courts to be liberal in their recognition and interpretation of collective bargaining agreements, so as to lessen strife and encourage congenial relations between unions and companies. . . . A collective bargaining agreement may be partly or wholly oral and a written collective bargaining agreement may be orally modified.” U.S. Soccer Fed'n, Inc. v. U.S. Women’s Nat’l Soccer Team Players Ass’n, 2016 U.S. Dist. LEXIS 72482, 206 L.R.R.M. 3418 (N.D. Ill. June 3, 2016).

The issue in this case came about when several women soccer players were being paid less than their male counterparts. Although, the courts have ruled that the MOU in fact incorporates articles from the 2012 contract including the no strike clause, the CBA does not address the wage disparity issue. It is likely the Players Association was going to use the ability to strike as a mechanism to leverage the USSF in addressing the wage disparity. Historically, labor unions utilized strikes to leverage management to improve wages and working conditions. Although, the ability to strike was eliminated as a result of this decision, the issue regarding pay parity between men and women was heightened and should help in future negotiations. See Judge says U.S. women’s soccer team bound by no-strike clause, ESPN (June 3, 2016), http://www.espn.com/espnw/sports/article/15929670/judge-says-us-womens-soccer-team-bound-no-strike-clause; Matt Bonesteel, Judge rules that U.S. women’s soccer team can’t go on strike before Olympics, WASH. POST (June 3, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/06/03/judge-rules-that-u-s-womens-soccer-team-cant-go-on-strike-before-olympics/; Ahiza Garcia, U.S. Women’s Soccer team can’t strike, court says, CNN: MONEY, http://money.cnn.com/2016/06/03/news/us-soccer-womens-team-strike/; Judge: US women’s soccer team bound by no-strike clause, MSNBC (June 3, 2016), http://www.msnbc.com/msnbc/judge-us-womens-soccer-team-bound-no-strike-clause.

VIII. Arbitrator Issues Lengthy Ruling Concerning NFL’s Revised Personal Conduct Policy – Kyle Simmons

In April 2016, arbitrator Jonathan B. Marks ruled on the case involving the National Football League (NFL) and its Personal Conduct Policy. This decision comes after the NFL’s unilateral implementation of the NFL Commissioners Exempt List, the allowance of persons other than the Commissioner issuing discipline and the players personal conduct policy overall. The player’s union and the NFL attempted to negotiate the impact and effects of this new conduct policy, but as the negotiations began to breakdown, the National Football
League’s Players Association (NFLPA) filed a grievance challenging several portions of the Player Personal Conduct Policy, saying it contradicted the collective bargaining agreement (CBA).

The NFLPA challenged whether the Commissioner can place players on the Commissioner's Exempt List, which constitutes paid administrative leave for committing violent crimes, and also whether the Commissioner can appoint a disciplinary officer to hand out punishments. Moreover, the NFLPA argued that the Exempt List was, in a sense, another method for the Commissioner to suspend players before determining guilt.

The arbitrator ruled in favor of the NFL as it related to the Exempt List, because the Commissioner has the authority to discipline players for conduct detrimental to the league within the CBA and the Exempt List is consistent with that language on its face. Nonetheless, the arbitrator stated that the NFL, through the Commissioner, must follow certain due process like procedures outlined in the CBA when utilizing the Exempt List. On the other hand, the NFLPA successfully argued that the NFL cannot delegate the Commissioner’s exclusive authority to impose discipline.


IX. Case Dismissed: Sterling Has No Cause of Action Against NBA – Kyle Simmons

On March 6, 2015, Donald Sterling, former National Basketball Association (NBA) owner of the Los Angeles Clippers, filed his first amended complaint citing three federal causes of action. Sterling stated that the NBA violated his due process rights, § 1 of the Sherman Act, and the Health Insurance Portability and Accountability Act (HIPPA). Furthermore, Sterling asserted state law claims against the NBA as well.

As a matter of record, Donald Sterling is the former NBA owner that was captured on a recording expressing deeply offensive, demeaning, and discriminatory views toward African Americans, Latinos, and ‘minorities’ in general. The recording was aired through different media channels, such as TMZ, and the NBA began to terminate Sterling’s ownership interest in the Clippers.

The U.S. District Court for the Central District of California held that Sterling lacked the evidence to prove that the NBA denied him his due process rights and for that reason, the charge was dismissed with prejudice. The second claim made by Sterling was a violation of § 1 of the Sherman Act. The court noted that this claim, too, was barred by res judicata because the state recently affirmed the probate’s court order referencing the sale of the Clippers to Steve Ballmer. Moreover, the court held that claimants must plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors in the market. For that reason, Sterling’s claims of antitrust injury are not an injury to competition, but rather disappointment that he lost ownership of the Clippers as a result of the probate court’s order. This charge was also dismissed with prejudice.

The third cause of action that Sterling alleged are that the NBA parties, his wife Rochelle, and the doctor Defendants were liable for violating HIPAA, because he never consented to, nor provided written authorization for the release of his medical records. Sterling’s cause of action failed for two reasons. First, HIPAA itself provides no private right of action. Second, Sterling expressly waived any right to assert a cause of action for violation of his privacy rights under HIPAA.

The last claim that Sterling made was a state law claim based on breach of contract. Pursuant to 28 U.S.C. § 1367(c)(3), the court may decline to exercise supplemental jurisdiction when the court has dismissed all claims over which it has original jurisdiction. In this case, that is exactly what happened, considering the court held that all of the causes of action were dismissed with prejudice. The court also ruled that the state claims were dismissed with prejudice.
This case is extremely important in the realm of sports law because it is common for team doctors and trainers to aid players in recovery by providing painkillers in an effort to get players back on the field faster. The issue is whether the team doctors, in their attempts to help players heal faster, are providing medicine without full explanation of the side effects. In light of the concussion settlement and other cases involving the state of health of athletes it is likely that this painkiller case will see some traction. Evans v. Ariz. Cardinals Football Club LLC, 2016 U.S. Dist. LEXIS 86207 (N.D. Cal. July 1, 2016); Dent v. NFL, No. C 14-02324 WHA, 2014 U.S. Dist. LEXIS 174448, 2014 WL 7205048, at *1 (N.D. Cal. Dec. 17, 2014); Cramer v. Consolidated Freightways, Inc., 255 F.3d 683, 689–93 (9th Cir. 2001).

X. NFL Players Sue Clubs for Medication Use – Kyle Simmons

In July 2016, the United States District Court for the Northern District of California weighed in on the case against the National Football League’s administration of painkiller drugs. Evans v. Arizona Cardinals Football Club LLC is a putative class action against the NFL relating to the administration of painkiller drugs. Plaintiffs include the estate of a former NFL player and twelve retired players. The named Plaintiffs, as a group, have played for every club in the NFL from 1964 to 2010. Defendants are the thirty-two member clubs of the NFL.

The Defendants moved to dismiss arguing that that claims made by the retired players are preempted by § 301 of the Labor Management Relations Act. The court summarized the law and held that if the Plaintiffs’ claim cannot be resolved without interpreting the applicable collective bargaining agreement (CBA), then the claim is preempted. Alternatively, if the claim may be litigated without reference to the rights and duties established in a CBA it is not preempted. The Plaintiff’s claim is the touchstone for this analysis. A state law claim is not preempted under § 301 unless it necessarily requires the court to interpret an existing provision of a CBA that can reasonably be said to be relevant to the resolution of the dispute. The order of the court distinguished between two cases: Dent v. NFL and Cramer v. Consolidated Freightways, Inc.

The court in Dent granted a dismissal on the grounds of preemption because the claim itself was against the NFL as a whole and that it required interpretation of the CBAs to understand the duty and roles of the clubs. This differs from this case in that the case does not require CBA interpretation and the claims are against each club. The Cramer case held that a CBA cannot preempt an illegal action.

XI. NFL & DirecTV Tackled With Antitrust Lawsuit – Katie Day

Plaintiffs challenge long-standing and pro-competitive broadcast arrangements of the National Football League (NFL) that have vastly expanded the number of televised NFL football games available to fans across the country. Each year, the NFL and its thirty-two member clubs jointly produce over 250 professional football games, culminating in the Super Bowl championship. Every Sunday afternoon regular-season game is broadcast, at least, in the two competing teams’ local markets, on free, over-the-air television on CBS and FOX; fans can typically watch three games every Sunday for free. Under the Sports Broadcasting Act (SBA), the NFL’s distribution of its games through free, over-the-air broadcasts is immune from antitrust scrutiny.

In 1994, to provide fans access to even more live NFL football entertainment, the NFL licensed DirecTV to offer Sunday Ticket—a product distributed exclusively by DirecTV. Under this arrangement, DirecTV receives the “feeds” from the Sunday afternoon games produced by CBS and FOX, packages them, and delivers the package to residential and commercial subscribers of its satellite television service. Through Sunday Ticket, fans can watch some or all of every Sunday afternoon game, including “out-of-market” games that would not otherwise be available in their home markets. Plaintiffs claim that the NFL’s exclusive distribution agreement with DirecTV is “anticompetitive” (the “vertical” claim) and Plaintiffs challenge the way in which the NFL and its member clubs—but not DirecTV—jointly create and license the Sunday Ticket package of broadcast rights (the “horizontal” claim).
If successful, this lawsuit, which is currently ongoing, has the potential to reshape televised football, which could later lead to changes across the entertainment landscape. In re: NFL’s “Sunday Ticket” Antitrust Litigation, No. 1:15-ml-02668, (C.D. Cal. 2015).

B. Intellectual Property Matters

I. The “Spirit” of Stairway to Heaven – Inspiration or Misappropriation? – Michelle M. Wahl

In June 2016, Led Zeppelin prevailed in a copyright infringement lawsuit initially brought in 2014 by Michael Skidmore—the Trustee of Spirit songwriter Randy “California” Wolfe’s estate—whereby Skidmore alleged the iconic guitar riff featured in Led Zeppelin’s 1971 hit song, “Stairway to Heaven,” infringed on Spirit’s 1968 instrumental in “Taurus.” The trial proceeded after a U.S. District Court Judge in Los Angeles ruled that there was enough evidence to advance the case to trial against Robert Plant and Jimmy Page, the surviving members of Led Zeppelin who are also credited with composing “Stairway to Heaven.”

In the many years preceding the trial, both Plant and Page vehemently denied lifting anything from “Taurus.” In part, their argument at trial centered on the suggestion that the chord sequence in question had been used for three centuries and that similar sections of the songs were comprised of common musical elements, not subject to federal copyright protection. Witnesses during trial included Page and Plant, Skidmore, musicologists, and various other experts who testified and opined as to whether the two songs were similar. Although Led Zeppelin had shared the stage with Spirit decades ago, both Page and Plant denied having access to “Taurus” and described for the jury how “Stairway to Heaven” came to fruition. After less than a day of deliberation, the jury returned a verdict favoring Led Zeppelin and concluded that although Plaintiff owned the copyright to Taurus and that Page and Plant did have access to the song, there was no substantial similarity between “Stairway to Heaven” and “Taurus,” and, therefore, no copyright infringement.

Plaintiff has since appealed to the Ninth Circuit, arguing they were unable to play “Taurus” to the jury given the 1968 audio recording was not covered by federal copyright law. Plaintiff now claims that the inability to play the song for the jury was an “insurmountable obstacle” to Plaintiff’s case (jurors were asked to compare sheet music as performed by musicians retained by each side—a guitarist for the Plaintiff and a pianist for the defense. However, federal Judge Robert G. Klausner’s decision that only the sheet music was admissible at trial was consistent with copyright infringement cases involving music that had been recorded prior to a 1972 copyright law revision that extended federal protection to sound recordings. In other words, only sheet music was covered by federal copyright protection prior to 1972. It will be interesting to see if, and if so, how, this appeal unfolds. Skidmore v. Led Zeppelin, No. CV-15-3462 RGK (AGRx), (C.D. Cal. April 8, 2016).

II. At the Tune of $1 Billion – Highsmith v. Getty: Is This for Real? - Michelle M. Wahl

Carol Highsmith, a professional photographer and pillar in the artistic community, has committed herself to traveling the country to capture American architectural monuments and in doing so, has been coined “America’s Photographer.” In the 30+ years she has contributed to the arts, she has not only published countless coffee table books, but has also brokered a deal with the Library of Congress to donate past and future works. In that respect, she is now classified as one of the top six collections in the Library’s Prints & Photographs archive. Her voluminous contributions to the Library are not only astonishing, but also inspiring given she provides her photographs to the Library for free public consumption. Steve Schlackman, Carol Highsmith Sues Getty for $1 Billion But Can She Win?, ART. L.J. (Aug. 4, 2016), http://artlawjournal.com/1-billion-getty-lawsuit/.

However, in December 2015, a firm tasked with photograph licensing Getty images, sent a letter to Highsmith, claiming that use of her own photograph online amounted to licensing infringement. Not only did the correspondence threaten legal action, it salted the wound by demanding $120.00 from her non-profit foundation, This is America! By way of background, Getty operates a series of stock photograph websites, handles the licensing transactions, and then pays artists owning those photographs accordingly. Getty also reserves its right to pursue copyright infringement relating to any images on its sites and utilizes a technology company that allows Getty’s images to be tracked. PicScout, the company employed by Getty to provide this service, scours the web in search of potentially infringing use of Getty images and when one is discovered, a third-party Getty contractor (here, License Compliance Services) sends out a demand letter to the allegedly infringing party. The process, according to some, is nothing shy of copyright trolling.
Highsmith responded to the letter and demand for payment by filing her own lawsuit against Getty, Alany (a Getty distributor) and License Compliance Services, alleging they illegally claimed right to almost 19,000 of her images and sought damages of $1 billion! Highsmith based her suit on Getty having misrepresented the terms and conditions of using the Highsmith photographs by falsely claiming a user must buy a copyright license from Getty. To support those allegations, Highsmith stated that numerous publications had been found to have used Highsmith photographs with credit to Getty, without credit to Highsmith as either the copyright claimant or sole creator of the photographs, and that Getty had profited tremendously from the sale of Highsmith photographs. More importantly, Highsmith claims that Getty failed to notify licensees that the photographs are free online.

However, many sites sell images that are otherwise free elsewhere, under the guise (at least in part) that the fees associated with the image relate to managing storage servers, perfecting images and the like. Thus, when does this conduct provide the basis for a lawsuit? Here, Highsmith argues, at least in part, that the issue arose when Getty provided false information to its licensees. Specifically, Getty superimposed a Getty watermark which, according to Highsmith, implied that Getty owned the copyright. This watermark gives rise to a potential DMCA claim as it is illegal to remove or falsify copyright management information, including one holding themselves out as a copyright owner when, in fact, they are not. Yet, if the photographs are truly in the public domain, can Highsmith assert she is the copyright claimant? It seems as though her agreement with the Library of Congress as to the public use of her collection will certainly play an important role in answering that question.

Assuming she does have standing to sue based on these allegations, how did Highsmith arrive at damages amounting to $1 billion? The DMCA provides statutory penalties up to and including $25,000 per incident. Highsmith alleges that Getty committed at least 18,755 “incidents” and asserts the DMCA’s penalty provision (i.e., treble damages) as Getty has had DMCA violations in the past three years, whereby they were ordered to pay in access of $1 million in damages. 17 U.S.C. § 1202. Proving these damages, however, might be a daunting task to Highsmith as she must establish not only that Getty falsified copyright information (somewhat easier to establish given the watermark argument), but also that the Defendants had knowledge or intent to falsify so as to induce, enable, facilitate or conceal copyright infringement. 17 U.S.C. § 1202(a).

Pursuant to § 505 of Copyright Act—“a court may award reasonable attorney’s fees to the prevailing party.” However, the District Court and the United States Court of Appeals for the Second Circuit declined to award Kirtsaeng fees. The latter declined based on case law precedent and placing substantial weight on whether the losing party’s claim or defense was objectively unreasonable (i.e., whether it was clearly without merit or devoid of legal or factual basis). Petitioner urged the Supreme Court to hear the case as the Second Circuit’s decision split the approaches of the other courts of appeals and was inconsistent with the Supreme Court’s precedent. In other words, depending on the court, the outcome of an award of reasonable attorneys’ fees varied. For example, in the Ninth or Eleventh Circuits, the issue is whether the prevailing party’s claim or defense furthered interests of the Copyright Act, with no presumptions one way or another, whereas the Fifth and Seventh Circuits apply a presumption in favor of a fee award for prevailing parties, while the Third, Fourth, and Sixth Circuits have forged another path by relying on the four non-exclusive factors listed in the Supreme Court’s 1994 decision in Fogerty v. Fantasy, namely, frivolousness, motivation, objective unreasonableness, and considerations of compensation and deterrence.

In delivering its opinion, the Supreme Court clarified the standard for awarding attorneys’ fees to prevailing parties. Kirtsaeng v. John Wiley & Sons, Inc., 136 S. Ct. 1979 (2016). The Supreme Court held that “when deciding whether to award attorney’s fees under § 505 of the Copyright Act, a District Court should give
substantial weight to the objective reasonableness of the losing party’s position…” However, the Supreme Court confirmed that objective reasonableness is not to be the controlling factor, but rather, “can be only a substantial factor” in assessing whether fees are appropriate. The Supreme Court considered other open-ended, fee-shifting statutes, emphasizing that a District Court’s discretion to award fees (as is the case under § 505 of the Copyright Act), is limited in relation to the objectives of the relevant Act. The Supreme Court determined that the relevant objectives of the Copyright Act were to enrich the general public through access to creative works via a balance between rewarding authors’ creations and enabling others to build on that work. Thus, the Supreme Court determined that parties who hold strong positions should stand on their rights, given the likelihood of recovering fees from the losing party, and those with weaker positions are deterred by the likelihood of having to pay two sets of fees.


(a) The United States Court of Appeals for the Tenth Circuit affirmed summary judgment in favor of AXS Digital Media (owner of Examiner.com, an ISP), noting it did not have actual or circumstantial knowledge of BWP Media, USA’s photographs posted to the site by individuals retained by AXS as independent contractors to provide content on Examiner.com. Plaintiff sued AXS for copyright infringement and related claims relating to the photographs, but AXS asserted the DMCA’s safe harbor provision shielded it from liability. The safe harbor provision (17 USC § 512(c)) protects ISPs from liability for copyright infringement that occurs via their service and limits injunctive relief that may be awarded against ISPs. To apply, the ISP must show the infringing content was stored “at the direction of a user.” On appeal, Plaintiff unsuccessfully argued that the independent contractors were not “users” under the safe harbor provision and that infringing content had been stored at AXS’s direction. However, evidence of AXS having told the independent contractors what they should write about fell short of the requirement that AXS direct the independent contractors to infringe—an element that would have disallowed AXS to avail itself of the safe harbor provision. BWP Media USA, Inc. v. Clarity Digital Group, LLC, 820 F.3d 1175 (10th Cir. 2016).

(b) In June 2016, after nearly seven years in New York federal court, Capitol’s long-time lawsuit against Vimeo finally came to a decision by the United States Court of Appeals for the Second Circuit and provided some insight as to the scope of the Digital Millennium Copyright Act’s (“DMCA”) Safe Harbor provisions (generally, 17 U.S.C. § 512). Capitol’s case sought to address questions remaining in the wake of the 2012 landmark decision in Viacom v. YouTube.

Capitol’s suit centered around three main issues: (1) whether the DMCA safe harbors are a defense to copyright infringement allegations involving pre-1972 sound recordings; (2) whether an ISP commits “red flag” knowledge of infringement when employees view videos containing popular sound recordings; and (3) whether Vimeo’s conduct amounted to willful blindness to its users infringements, thereby removing it from the protection of the safe harbor provision.

As for the first issue above, Capital argued that the safe harbor was inapplicable given the copyright infringements relating to pre-1972 sound recordings, which are not federally protected. The District Court agreed with that argument based on prior Copyright Office analysis, but the Second Circuit reversed, noting the safe harbors are for claims of infringement of copyright, regardless if the protections afforded derive from state or federal laws. The appeals court stated that Congress did not intend to limit the safe harbor scope and that had Congress intended to leave pre-1972 sound recordings out of the safe harbor provisions intended to insulate them, the ISPs would have been left exposed to a plethora of potential liability. As such, the Second Circuit held that the DMCA, particularly its safe harbor provision, must be read to include damages for infringements of state copyrights, including those relating to pre-1972 sound recordings.

As for issue two above, proof of “red flag” knowledge is not an easy task. For example, in Viacom, the Second Circuit interpreted “red flag” knowledge under the DMCA to mean the ISP’s subjective awareness of facts from which specific instances of infringement would be objectively obvious to a reasonable person. By way of reminder, ISPs seeking safe harbor protection are required to remove material they actually know or should know (i.e., “red flags”) to be infringing. This interpretation requires courts to determine, often unpredictably, what a hypothetical “reasonable” person might discern under the circumstances. In Capitol, the Second Circuit established that a reasonable person for DMCA purposes is what the copyright law deems an “ordinary person.” In other words, one without specialized knowledge or experience regarding copyright laws and music. Here, the appeals court held that a Plaintiff is required to provide evidence in addition to proof an employee viewed a video that contained all or most of a popular copyright song, in order to amount to “red flag”
knowledge. The appeals court further held that a narrow scope for “red flag” knowledge is consistent with Congressional intent for the safe harbors, which were accomplished primarily via the notice and takedown framework.

Willful blindness, the final issue mentioned above, was previously analyzed in the context of the DMCA safe harbors in *In Re Aimster Copyright Litigation* (6th Cir. 2003). Citing *Aimster* in *Viacom*, the Second Circuit held a plaintiff may provide that an ISP had potentially disqualifying knowledge of user infringements through a showing that the ISP was willfully blind (i.e., made a deliberate effort to avoid knowing). Here, Capitol argued that Vimeo monitored infringement of visual but not audio content, that facts gave Vimeo a duty to further investigate (which it failed to do) and that video encouraged users to post infringing material by turning a blind eye. However, the Second Circuit rejected these arguments, noting the duty to remove material in instances falling short of actual knowledge, is limited to the discovery of facts that make infringement objectively obvious, and that facts that simply give rise to suspicion fail to give rise to this duty. More importantly, in *Viacom*, the Second Circuit emphasized that whether Viacom’s knowledge was actual or “red flag,” it had to relate to infringements of Plaintiffs’ copyrights. Here, Capitol failed to meet that burden. However, the appeals court stated that the outcome may have been different, had Capitol established that Vimeo encouraged users to post infringing material actually owned by Capitol.

**V. CBS and Paramount Sue for Crowdfunded ‘Star Trek’ Film – Harris Shain**

*Star Trek* is one of the most famous and highest grossing entertainment franchises of all time. Among other things, the franchise is well known for its loyal “die-hard” fans, who are notorious for their fan fiction—stories that draw on various elements of the *Star Trek* universe. In mid-2014 Defendants crowdfunded and released a short film on YouTube entitled *Prelude to Axanar*, which tells the story of the war that precedes the first episode of the *Star Trek* television series. The Defendants also initiated a second crowdsourcing campaign for a feature-length film entitled *Axanar* and indicated that the script for this second film had been completed.

In late 2015, Plaintiffs filed suit alleging various forms of copyright infringement on the grounds that the Defendants film and proposed second film are unlicensed and unauthorized derivative works that are not entitled to the affirmative defenses of fair use or parody.

In response, the Defendants filed a motion to dismiss arguing that the Plaintiffs claims were procedurally deficient because, inter alia, they failed to provide proper notice, were based on bare allegations of information and belief and, with respect solely to the proposed second film, were premature and an impermissible prior restraint. The Defendants also believed the Plaintiffs claims to be substantively deficient on the grounds that the Plaintiffs could not demonstrate, as a matter of law, that the “protectable elements, standing alone, are substantially similar.”

On May 9, 2016, the United States District Court for the Central District of California denied the Defendant’s motion to dismiss. In rejecting the Defendants motion in its entirety, the court noted, among other things, that Plaintiffs were only required to allege “representative acts of infringement rather than a comprehensive list” and that bare allegations of information and belief were permissible where, as here, it was based on factual information that makes the inference of culpability plausible. The court also held that the claims pertaining to the proposed film, *Axanar*, were not premature or an impermissible prior restraint given that the Plaintiffs had taken concrete steps towards creating the film and had not filed an injunction, but merely put the Defendants on notice that the Plaintiffs alleged copyright infringement. Finally, as to the issue of substantial similarity, the court noted that the Plaintiffs had permissibly sought to establish substantial similarity as to the entirety of their copyrighted works and not as to each individual element.

This case is worth following more for what happens outside the courtroom than for what happens inside it. Around the time the Defendants motion to dismiss was denied, multiple news outlets reported that *Start Trek* producer and franchise custodian J. J. Abrams publicly announced that the lawsuit would soon be dropped, yet as of the writing of this case summary there appeared to be no evidence this had in fact occurred. The Plaintiffs also released a list of ten “guidelines” for the creation of fan-generated content and pledged that if all ten rules are followed, they will not “object to, or take legal action against” those responsible for the content.

The Plaintiffs in this case and those similarly situated have always been in the precarious position of trying to straddle the boundary between copyright protection and the desire to promote fan fiction. Given that modern technology has made it easier to raise money and cheaper to produce quality content, it will be interesting to see whether the “guidelines” offered by the Plaintiffs will become the norm in the industry. One has to wonder whether the proliferation of such guidelines will depend on their strict enforcement, or lack thereof,
by the Plaintiffs in this case, who are, for better or worse, trailblazers on this front, and whether strict enforcement will proliferate the number of copyright infringement lawsuits against fans who violate such guidelines in the future. *Paramount Pictures Corp. & CBS Studios Inc. v. Axanar Productions, Inc. & Peters*, No. 2:15-cv-09938 (C.D. Cal. 2016).

VI. *Inmate Sues Lil Wayne for Copyright Infringement, Taunting* – Harris Shain

Plaintiff Anthony Woods is an inmate at the Sheridan Correctional Center in Sheridan, Illinois. Prior to his time in prison, the Plaintiff was a self-professed producer and singer of rap music, and had made several albums, which he distributed “on the streets” and the internet. Defendant Dwayne Carter is a famous rapper best known by his stage name, “Lil Wayne.” The Plaintiff, representing himself, alleged copyright infringement on the grounds that the Defendant had copied his lyrics and other elements from his mixtape, *Mr. Thraxxx*, and that the Defendant had taunted him through coded language in the Defendant’s songs. The Plaintiff did not allege that he knew the Defendant personally, nor that any facts existed that would show that the Defendant had the opportunity to listen to Mr. Thraxxx.

The Plaintiff’s principal argument centered on his song *My Shit* and its similarities with an unidentified song on the Defendants album *I Am Not a Human Being Part 2*. The Plaintiff noted that both contain the words “sinsay” [sic], “bitch,” “phones,” “shit,” and “Rolls Royce,” both mention “villains and carpooling,” and that they share the same context and feel. The Plaintiff also argued that Defendant has been taunting and harassing him through lyrics such as “I wish [someone] would, like a tree in this bitch…That’s my M.O., Ida B to that bitch” which, according to the Plaintiff, refers to him through the play on the word “would” and because “Ida B” is the name of his former public housing complex.

The U.S. District Court for the Northern District of California court rejected the Plaintiff’s copyright infringement claim on the grounds that the common words shared between the two songs are not protected by copyright and are ubiquitous in popular music. Additionally, allegedly being taunted by the Defendant has “nothing to do with copyright.” The court, therefore, concluded that the Plaintiff’s complaint at best highlighted minor “cosmetic” similarities between the music of both individuals and was therefore not actionable as copyright infringement or otherwise.

This case will (hopefully) stand as a warning to Woods that time and access to a law library does not an attorney make. *Woods v. Carter*, No. 15 C 9877 (N.D. Ill. Feb 18, 2016).

VII. *Adidas Wins Suit Against Counterfeit Distributors* – Harris Shain

On February 4, 2016, Plaintiffs filed suit against forty-six individuals, partnerships, and business associations alleging that the Defendants are selling counterfeit and confusingly similar goods in contravention of, inter alia, the Lanham Act and common law trademark infringement. The following day the Plaintiffs filed an *Ex Parte Application for Entry of a Temporary Restraining Order* (“TRO”), a Preliminary Injunction, and an Order Restraining Transfer of Assets.

Based on strong evidence of the Defendant’s counterfeiting and satisfied that the Plaintiff had established all the necessary requirements, the U.S. District Court for the Southern District of Florida granted the TRO. As part of said TRO, the court also set a hearing on the Plaintiffs’ request for a Preliminary Injunction, the purpose of which was to extend the relief granted in the TRO until the case was decided on the merits.

The court granted the Preliminary Injunction, having found that the Plaintiffs offered clear evidence that the Defendants were selling goods bearing copies of Plaintiffs’ marks and thereby confusing the public as to the origin of said goods. Moreover, the court noted that allowing the Defendants’ conduct to continue would irreparably harm the reputation and goodwill associated with the Plaintiffs’ marks and by allowing Defendants to continue to profit from the unauthorized use of same. Finally, enjoining the Defendants’ conduct serves the public interest.

This case is simply another episode in the never-ending war between copyright holders and counterfeiters. It sends a familiar but juxtaposed message—that Plaintiffs face a great challenge in a increasingly digital world but will continue to use all available resources and maintain vigilance in the face of this challenge. *Adidas AG v. footballbangkok.com*, No. 0:16-cv-60220 (S.D. Fla. 2016).

VIII. *Sixth Circuit Affirms Attorney’s Fees in ‘Almost Sorry’ Copyright Infringement Suit* – Kaaren Fehsenfeld

In a contentious copyright infringement suit between songwriters Landon and Murphy, and performer Sergey Lazarev, Lazarev was found to have a
valid sublicense to use the song *Almost Sorry*. The performer was awarded thousands of dollars in attorney’s fees and costs by the United States Court of Appeals for the Sixth Circuit. *Murphy v. Lazarev*, 2016 U.S. App. LEXIS 11633 (6th Cir. Tenn. 2016).

Plaintiffs Murphy and Landon first brought a copyright infringement claim against Sergey Lazarev and Style Records (“Style”), a Cyprian record label operating in Russia, in 2010. Plaintiffs also brought a breach of contract claim against Style Records. The case was not adjudicated until 2012, but before the case went to trial, Plaintiffs dropped their claim against Style Records without explanation. *Landon v. Lazarev*, 2012 U.S. Dist. LEXIS 118630 (M.D. Tenn. Aug. 22, 2012). Plaintiffs subsequently added a breach of contract claim against Lazarev.

The Plaintiffs contended they entered into a licensing contract (referred to as the “Second License Agreement” below) with Style in 2007, which granted Style the right to use the song *Almost Sorry*, which the Plaintiffs co-authored, for five years as well as the right to grant sublicenses. In return, Style agreed to pay royalties and an advance to Plaintiffs. The contract is governed by Russian law. In 2005, Style and Lazarev had entered into a separate “Producer’s Agreement,” which provided that Style would license musical works for and pay royalties to Lazarev; Style subsequently licensed *Almost Sorry* to Lazarev and his version of the song became a hit. Plaintiffs allege that Style did not pay royalties owed to them under their licensing contract, though Style did pay Plaintiffs an advance. Before bringing suit, Plaintiffs unsuccessfully tried to secure their royalties from Style.

In August 2012, the District Court dismissed Plaintiffs’ breach of contract claims against Lazarev, determining that no contract existed between the parties. In addition to breach of contract, Plaintiffs had also contended that Lazarev did not have a valid sublicense to use *Almost Sorry* because, “(1) the Licensing Contract was never effective in the first place; (2) Style Records’ failure to pay full royalties to the plaintiffs effectively rescinded the Licensing Contract and the associated license; and/or (3) Style Records went bankrupt at some point in or before the year 2010, thereby rescinding the Licensing Contract by operation of law.” *Id.* The court held that Plaintiffs’ contract with Style was valid and binding, noting that under Russian law, Plaintiffs could have brought a breach of contract claim against Style, but that the contract remained binding whether or not Style fully performed. Furthermore, the court found Plaintiffs had not canceled the contract in compliance with Russian law, making the contract valid. Finally, the court held that even if Style went bankrupt, the contract would not be nullified under Russian law. The court, therefore, granted summary judgment to Lazarev and dismissed Plaintiffs’ claims against him with prejudice.

In December 2012, Plaintiffs filed a motion to alter or amend judgment under FED. R. CIV. P. 59 with regard to their copyright claims against Lazarev. *Murphy v. Lazarev*, 2012 U.S. Dist. LEXIS 175993 (M.D. Tenn. Dec. 12, 2012). The District Court granted Plaintiffs’ motion, finding that summary judgment in favor of Lazarev would be unjust in light of a post-hoc translation of the licensing contract between Style and Lazarev, which Plaintiffs argued showed Lazarev had never received a valid sublicense to use *Almost Sorry*. Plaintiffs further claimed the licensing agreement between Plaintiffs and Style had ended in 2011. The court found the expiration date of the licensing agreement between Style and Plaintiffs to be ambiguous and granted Plaintiffs the right to conduct further discovery to resolve factual discrepancies. The court accordingly denied a motion Lazarev had filed for attorney’s fees.

The parties appeared before the District Court again in 2013, when Lazarev filed a motion for summary judgment on Plaintiffs’ copyright infringement claims. *Landon v. Lazarev*, 2013 U.S. Dist. LEXIS 173065 (M.D. Tenn. Dec. 10, 2013). In opposition to Lazarev’s motion, Plaintiffs argued Lazarev was not licensed to use *Almost Sorry* before 2008 or after 2009 and that licensing agreements with Style were void because Plaintiffs had not received signed copies of the agreements. During the 2013 proceedings, Plaintiffs referenced, for the first time, two additional licensing agreements (the Levant & Partners “Sub-License Agreement” and the “First License Agreement”), which they previously failed to reference in their complaint. Plaintiffs entered into the Sub-License Agreement in 2007 with Levant & Partners, a law firm not associated with the music industry. The Plaintiffs reportedly understood that the purpose of the contract was to allow Lazarev to record *Almost Sorry* and to grant exclusive rights to Levant & Partners for use of the song in Russia from 2007 to 2013. Plaintiffs received an advance from Levant & Partners. However, in early 2008, a representative from Style contacted Plaintiffs and claimed that the Sub-License Agreement with Levant & Partners had been a “bad contract.” Notably, in 2008, Plaintiffs expressed no objection to Lazarev recording *Almost Sorry*. Plaintiffs subsequently entered into the First License Agreement with Style in early 2008. However, the contract was backdated to 2006, because Style reportedly sought to recoup rights Plaintiffs signed away in the Sub-License Agreement with Levant & Partners. The contract contained no choice of law or
time limit provision, and Style paid an advance to Plaintiffs after the contract was signed. Plaintiffs claim they never received a signed copy of the First License Agreement.

In mid-2008, Plaintiffs signed another agreement (“the Second License Agreement”) with Style. This contract was also backdated to 2006. While Plaintiffs ignored the Sub-License and First License Agreements in their original and amended complaint, Plaintiffs did refer to the Second License Agreement in their complaints. The Second License Agreement promised an advance and royalty payments for granting Style the right to sub-license Almost Sorry. The contract had a five-year term, specified that Russian law governed, and granted Style the right to exploit the song worldwide. Plaintiffs again contend they never received a signed copy of the agreement from Style. The Plaintiffs also contended that Lazarev had waived his affirmative defenses when he failed to file a formal answer to Plaintiffs’ amended complaint. The court rejected this argument, finding that Lazarev did not waive any defenses in support of his motion for summary judgment because the Plaintiffs were on notice of Lazarev’s defenses, which he first raised in a pro se letter in 2011. The court further pointed out that Plaintiffs failed to mention the Sub-License Agreement and the First License Agreement in their initial complaints, and that even their mention of the Second License Agreement contained material misrepresentations. Plaintiffs’ pleadings had alleged that they made agreements with Style in 2006 and 2007, in fact the contracts were entered into in 2008. The court concluded the record showed that Plaintiffs’ agreements with Style were mutually agreed upon, rejecting Plaintiffs’ contention that the agreements were invalid and/or never executed. The court held that while the agreements did not take effect until 2008, Lazarev did not violate the Plaintiff’s copyright interests from 2006 to 2007, because Plaintiffs testified that they had no objection to Lazarev’s exploitation of Almost Sorry during that time, though they were aware he had recorded and exploited the song. Further, Plaintiffs entered into the First and Second License Agreements with the specific intention of backdating the license to 2006; in doing so, the court found the Plaintiffs retroactively validated Lazarev’s use of the work.

The court accordingly granted Lazarev’s motion for summary judgment and dismissed Plaintiffs’ remaining claims, holding that under the First and Second License Agreements, Style failed to pay the royalties it owed to Plaintiffs, but that Lazarev did not owe Plaintiffs money under those agreements. The court further held that Lazarev could no longer exploit Almost Sorry until he reached a new licensing agreement with Plaintiffs. Plaintiffs subsequently appealed the District Court’s motion for summary judgment in Murphy v. Lazarev, 589 Fed. Appx. 757 (6th Cir. 2014). On appeal, Plaintiffs argued 1) that the District Court erred when it found Lazarev did not waive his affirmative defenses and 2) that Lazarev infringed their copyright of Almost Sorry. The Sixth Circuit reviewed the District Court’s finding that Lazarev did not waive his defenses under an abuse of discretion standard and held that, because Plaintiffs received notice of Lazarev’s affirmative defense, even if that notice was not made known through the pleading process, Plaintiffs did not suffer prejudice. The Sixth Circuit also rejected Plaintiffs’ infringement claim, noting Lazarev had a valid sublicense agreement until 2013. The appeals court affirmed the District Court’s finding that the Second License Agreement modified the First License Agreement and accordingly affirmed the District Court’s finding that Plaintiffs had allowed Style to sublicense Almost Sorry. In particular, Plaintiffs granted Style the right to sublicense Almost Sorry to Lazarev, a right which did not expire until 2013. The Sixth Circuit also affirmed the District Court’s finding that Lazarev did not infringe Plaintiffs’ rights before 2008 on account of Plaintiffs’ shown intent to authorize Lazarev to use the work from 2006 to 2007. Accordingly, the appeals court affirmed the District Court’s grant of summary judgment in favor of Lazarev. In 2015 Lazarev filed a renewed motion to recover attorney’s fees. Murphy v. Lazarev, 2015 U.S. Dist. LEXIS 53428 (M.D. Tenn. Apr. 23, 2015). Plaintiffs filed a motion in opposition, arguing that Lazarev waived the right to argue for attorney’s fees because 1) he did not plead them as “special damages” under Fed. R. Civ. P. 9(g), 2) he did not specify the fee amounts in his motions, 3) the court should not apply the Russian fee shifting rule, and 4) because the discretionary factors in § 505 of the Copyright Act weigh against Lazarev.

The District Court rejected Plaintiffs’ arguments, granting Lazarev’s motion to recover attorney’s fees under Fed. R. Civ. P. 54(d) and Local Rule 54.01. The court held that Lazarev properly asserted his claim to fees under Fed. R. Civ. P 54(d), which requires attorney’s fees be requested through a motion, not a pleading, as Plaintiffs had contended. The court also pointed out that Local Rule 54.01, which requires a party to demand costs within thirty days of a judgment, is applicable under the Copyright Act. Finally, the court held that nothing in the Copyright Act barred Lazarev from requesting attorney’s fees; in fact, the Act allows both plaintiffs and defendants to recover
fees in copyright infringement suits. Lazarev did not have to plead fees and costs as “special damages” under § 505 of the Copyright Act. While the court declined to rule on the applicability of the fee-shifting system under Russian law, the District Court limited its analysis to the claim for fees under the Copyright Act. The court held the fees of $80,295.50 were reasonable and granted them to Lazarev. The court also concluded that Plaintiffs had pursued meritless claims when they took inconsistent legal positions as to the efficacy of the Second License Agreement with Style when they first argued they were entitled to payment under the contract, and later argued the contract was invalid because they had not received a signed copy of it. The court opined the Plaintiffs also pursued meritless claims when they argued inconsistently as to whether Lazarev had violated their copyright when he used Almost Sorry before 2008, and prolonged litigation by failing to resolve the copyright and breach of contract issues with Lazarev before filing suit.

Plaintiffs subsequently appealed the award of fees and costs. Murphy v. Lazarev, 2016 U.S. App. LEXIS 11633 (6th Cir. 2016). On appeal, the Sixth Circuit reviewed the District Court’s decision under an abuse of discretion standard, holding the District Court did not err when it found Plaintiffs owed attorney’s fees and costs to Lazarev. The appeals court noted that Plaintiffs’ allegations of copyright infringement had no basis in law or fact and that this lack of factual and legal merit should have been apparent to Plaintiffs from the onset of litigation. The court further noted that while the Plaintiffs had ample opportunity to develop their arguments against Lazarev, the Plaintiffs failed to do so when they did not raise their objections in response to Lazarev’s Rule 59(e) motion for fees. Because these issues were never properly raised before the District Court, the court of appeals opined these issues could not be considered on appeal. The appeals court also found that Plaintiffs had prolonged litigation and that on appeal, the Plaintiffs simply reiterated arguments relating to the underlying copyright infringement claim and had failed to develop any argument beyond perfunctory acknowledgement of Lazarev’s claim for attorney’s fees and costs. Because Plaintiffs failed to develop any real argument in opposition to Lazarev’s claims, the appeals court deemed Plaintiffs had waived the issue of attorney’s fees and costs and upheld the District Court’s grant of fees and costs to Lazarev.

The Sixth Circuit granted attorney’s fees and costs to the Defendant in this case because the Plaintiffs utterly failed to 1) bring meritorious claims against Defendant, 2) properly defend their claims in District Court and on appeal, and 3) repeatedly failed to challenge the Defendant’s demands for costs and fees.

Furthermore, the case is also unique because the court allowed Plaintiffs to challenge Lazarev’s sublicense to use Almost Sorry. While the court pointed out Lazarev was not the proper party to sue, the case continued through years of litigation. Plaintiffs challenged Style’s sublicense to Lazarev, when in fact the contracts at issue in the case ultimately proved to be Plaintiffs own contracts with Style.

IX. TVEyes on the Prize: Infringement or Fair Use?
   – Kaaren Fehsenfeld

The United States Court of Appeals for the Second Circuit was set to hear an appeal of Fox v. TVEyes, on appeal from the United States District Court for the Southern District of New York. Fox News Network, LLC v. TVEyes, Inc., 43 F. Supp. 3d 379 (S.D.N.Y. 2014); Fox News Network, LLC v. TVEyes, Inc., 2015 U.S. Dist. LEXIS 163301 (S.D.N.Y. Nov. 6, 2015). In the District Court, Fox sued TVEyes for violations under the federal Copyright Act and state law for misappropriation.

TVEyes provides a service to its clients, for a monthly fee of $500, of recorded, downloadable, and live streamed TV broadcasts. TVEyes “monitors and records all content broadcast by more than 1,400 television and radio stations twenty-four hours per day, seven days per week, and transforms the content into a searchable database for its subscribers. Subscribers, by use of search terms, can then determine when, where, and how those search terms have been used, and obtain transcripts and video clips of the portions of the television show that used the search term. TVEyes serves a world that is as much interested in what the television commentators say, as in the news they report.” Fox News Network, LLC v. TVEyes, Inc., 43 F. Supp. 3d 379 (S.D.N.Y. 2014). Subscribers can save, edit, and download material onto their personal computers. The service is used by the government and businesses to track the news, but is not available to the general public. Fox alleged that TVEyes violated its copyright by using Fox’s video content to create clips TVEyes subscribers can play, download, and share. Fox specifically pointed out nineteen one-hour programs aired on Fox’s networks between October 2012 and July 2013. Id. at 387. TVEyes asserted that downloading and sharing clips, among other uses, constituted fair use under § 107 of the Copyright Act, specifically under the first and fourth fair use factors.

Fox news licenses its content to businesses like Yahoo!, Hulu, and other third party websites. It also licenses to cable companies, who have permission to broadcast Fox’s content; most of Fox’s revenue is gained...
by these types of licensing agreements with cable companies.

TVEyes claims it does not infringe Fox’s copyright based on the first and fourth factors of fair use. On the first factor, TVEyes asserts that its services are transformative, likening itself to Google Books, an application in which users access “snippets” of original works, but where the snippets cannot act as a substitute for the original work. Fox, on the other hand, argues TVEyes’ use of its works is not transformative and does act as a substitute for Fox’s services. On the fourth fair use factor, TVEyes dismisses the contention that its services affect Fox’s market, while Fox counters with evidence of actual and potential loss due to TVEyes’ services.

In 2014 the District Court held that while the misappropriation claim was preempted by the Copyright Act, TVEyes’ database and provision of clips to its subscribers was sufficiently transformative to constitute fair use; the court stated it needed more information regarding whether the ability to download and distribute clips was fair use under the Copyright Act. In August 2015, the District Court ruled on those issues, holding that the archive function is fair use, the download function is not fair use, the share-by-email function can be fair use if TVEyes develops and implements adequate protective measures, and that the search by date and time function is not fair use. *Fox News Network, LLC v. TVEyes, Inc.*, 2015 U.S. Dist. LEXIS 163301 (S.D.N.Y. Nov. 6, 2015). In November 2015, the court ordered TVEyes to either shut down or modify the infringing features, including TVEyes’ download and search functions. Both Fox and TVEyes appealed the District Court’s injunction. TVEyes had advocated that only the nineteen clips mentioned in Fox’s suit be barred from use; Fox, on the other hand, sought stricter rules on sharing content, including limits on how many times a subscriber could watch a clip.

The Copyright Alliance and others submitted *amicus curiae* briefs in support of Fox news, arguing that the District Court’s interpretation, if affirmed on appeal, will obliterate copyright protections because it will allow the wholesale copying and distribution of copyrighted works. *Brief of Plaintiff-Appellee-Cross Appellant, Fox News Network, LLC v. TVEyes Inc.*, No. 15-3885 (2nd Cir. June 22, 2016). This precedent, the Alliance argued, could allow any internet service to copy works and redistribute them for their own financial gain, even though the act of doing so directly violates authors’ rights of distribution. However, *amicus curiae* briefs were also submitted to support TVEyes. A group of Intellectual Property law professors filed in support of TVEyes, arguing that the fair use factors favor TVEyes because compiling video into a searchable database is transformative, and that it is important for political and cultural commentators to have access to this information to spread knowledge to the general public. The brief also argued that the download, save, and archive functions in TVEyes are fair use because they are necessary steps to achieve the final output of social commentary. *Brief of Defendant-Appellant-Cross Appellee, Fox News Network, LLC v. TVEyes Inc.* No. 15-3885 (2nd Cir. March 23, 2016).

X. **Musician Files Suit Against NBA2K16 for Copyright Infringement** – Kaaren Fehsenfeld

Jazz and avant-garde musician John J. Simon, of the band Melisma, filed suit June 20, 2016, in California Federal Court against Visual Concepts Entertainment and 2K Games Inc. Simon claimed that the Defendants included an audio work by artist RJD2 entitled “Clean Living” in the video game *NBA 2K16*. RJD2’s song used samples of Simon’s original copyrighted work entitled “Everything You Are To Me,” including vamps and lyrics. In his complaint, Simon alleges he was the sole author of the work, though the audio recording of the work performed vocals on the track. Simon contends the singer did not exercise any control over the recording. Simon alleges he then decided to include the track on his band Melisma’s album, entitled *Like Trolls*. Complaint & Demand for Jury Trial, *Simon v. Visual Concepts Entertainment*, No. 3:16-cv-3440 (N.D. Cal. June 20, 2016). Simon contends that he then registered his work in 1979, has not assigned his copyright to anyone else since, and did not give Melisma the right to sublicense the song. Simon alleges the samples in the RJD2 song lasted from 1.1 to 7 seconds each. He claims the Defendants reproduced, distributed, and created derivative works of his original copyrighted work without authorization. Simon seeks compensatory damages and attorney’s fees and costs. As of this writing, the case was currently pending before the court.

Defendants published and released the basketball video game, *NBA 2K16*, in 2015. Simon alleges Defendants used his copyrighted work as part of the game’s soundtrack without his consent and subsequently distributed millions of copies of the work. Simon alleges Defendants wrongfully profited from the use of his song in the game.

If the court rules the Defendants infringed Plaintiff’s copyright, a party who licenses music from a DJ or electronic artist who uses samples could be held liable for the use of each sampled work in the artists’ song. Instead of holding the DJ or electronic artist liable, here Plaintiff filed suit against the video game producer,
who likely licensed the RJD2 song. If the court finds for the Plaintiff, holding the licensor responsible for every sample in an artists’ song, the case could cause a proliferation of copyright infringement suits and could limit licensor’s desire to work with artists who use samples in their music.

XI. Disney Seeks to Enforce Its Intellectual Property Rights in Its Movie ‘Cars’ – Kaaren Fehsenfeld

In June 2016, Disney filed suit in the Shanghai Pudong New Area People’s Court against Blue MTV, Beijing G-Point, and PPLive Inc., alleging copyright infringement and unfair competition. The suit concerned the Chinese film The Autobots, which Disney alleged infringed its intellectual property rights in the film Cars. The suit comes after Shanghai fined several local hotels in 2015, charging the businesses with trademark and unfair competition violations when they used the “Disney” trademark without permission. In 2015, China also imposed a one-year “special action” protecting Disney’s trademark in anticipation of the opening of Disney’s Shanghai theme-park in 2016.


In August 2016, however, U.S. District Judge John G. Koeltl of the Southern District of New York stated that the ABS v. CBS case must wait for the rulings of two prominent appeals before the case can continue. The first case, in the New York Court of Appeals (Flo & Eddie v. Sirius XM, No. 15-1164 (2nd Cir. 2016)), will determine whether Sirius XM must pay royalties for songs recorded before 1972. The second case, a sister case to the New York ABS case, (ABS Entm’t, Inc. v. CBS Corp., 2016 U.S. Dist. LEXIS 71470 (C.D. Cal. May 30, 2016)), will determine whether pre-1972 songs remastered after 1972 are sufficiently original to be “new” songs and are, therefore, protected by federal copyright law.

A ruling in favor of CBS could strip pre-1972 songwriters of their rights simply because a song has been remastered. A ruling that an author loses their rights in a copyrighted work once that work has been remastered would go against express provisions in the Copyright Act designed to protect authors of original works. A finding that the pre-1972 recordings are protected by state common law, on the other hand, could empower authors of pre-1972 works to gain control of and exercise their rights well into the future. Furthermore,
allowing a separate copyright as a derivative work could allow record labels to secure copyright in and exploit artists’ pre-1972 works indefinitely. *ABS Entmt’, Inc. v. CBS Corp.*, 2016 U.S. Dist. LEXIS 19514 (S.D.N.Y. Feb. 17, 2016)

XIII. *The Captain Has Turned Off the ‘Free Music’ Sign* – Sara Cruse

In *UMG Recordings, Inc. v. Global Eagle Entertainment, Inc.*, Plaintiffs brought multiple claims against an in-flight entertainment company. These claims included infringement of sound recordings and musical compositions under the federal Copyright Act of 1976, copyright infringement under California law, violation of California’s Unfair Competition Law (UCL), and common-law unfair competition. In the action, the record company Plaintiffs alleged the Defendants, an in-flight entertainment provider, contracted with various airlines to provide the airlines with over 4,500 sound recordings and music videos. The contract allowed the airlines to publicly perform the entertainment for the benefit of their passengers. Plaintiffs contended Defendants did not have licenses or authorizations to publicly perform the copyrighted sound recordings and music videos. Because of these performances, Plaintiff asserted the alleged infringement had a material adverse effect on profits. In a countersuit, Defendants allege they had contracts with airlines to provide audio entertainment, including recordings produced by Plaintiffs, with permission.

In 2009, Defendants asserted they contacted Plaintiffs using an intellectual property firm in the United Kingdom to correct “licensing gaps” with songs used in the United States. Allegedly, Plaintiffs agreed to the licenses and assured Defendants that while the contracts were being finalized, the continued use and distribution of the recordings were permitted. However, this was not the case and the Plaintiffs decided to sue. Defendants believed the misrepresentations were intentional. They also asserted Plaintiffs intentionally interfered with the business relationships of Defendants’ airlines clients by directly communicating and negotiating agreements with them. The combination of the interference and a cease and desist letter caused Defendants to stop distribution of Plaintiff’s works in the United States and to only use the works abroad, where the licenses were valid. Defendants claimed severe damages.

In April 2016, after two years of litigation, the District Court held the Defendants willfully infringed on the 4,500 songs owned by the Plaintiffs. The parties agreed to settle instead of going to trial. On August 12, 2016, the Defendants agreed to immediately give the Plaintiffs “a cash payment of $15,000,000 plus the issuance by the Company of 1,360,544 shares of its common stock within two business days, followed by another cash payment of $5 million on or prior to March 31, 2017.” This case reflects the “be careful messing with the big dogs” mentality when working with top record companies. Getting record companies to sign off on licensing agreements is already a hard feat to accomplish. Overall, the idea of asking permission before use makes sense. Using property without properly asking may not yield great results. In the future, those who want to use music for commercial gain should make sure everything is in accordance to law. Copyright lawyers should view this case as a parable. $20 million is a hefty price to pay for stepping on the toes of giants. *UMG Recordings, Inc. v. Glob. Eagle Entmt’, Inc.*, F. Supp. 3d, (C.D. Cal. June 22, 2015). U.S. Securities and Exchange Commission, 001-35176, (2016), https://www.sec.gov/Archives/edgar/data/1512077/0001144204161118844/v446886_8k.htm.

XIV. *No More Birthday Money for Warner/Chappell; Free At Last!* – Sara Cruse

In *Good Morning to You Productions Corp. v. Warner/Chappell Music Inc.*, Plaintiffs filed a class action suit in the U.S. District Court for the Central District of California against Defendants over the ownership of a famous song. In 2013, filmmaker Plaintiffs filed a suit against music production company Defendants, who claimed to own copyrights to the song “Happy Birthday To You (Happy Birthday).” Plaintiffs alleged the Defendants did not own the rights and, therefore, unlawfully garnered millions of dollars’ worth of royalties. “Happy Birthday” has the same melody as the song, “Good Morning to All (Good Morning),” which was purportedly written around 1893, by sisters Mildred and Patty Hill. The sisters assigned their rights to “Good Morning” to Clayton F. Summy (“Summy”) and his company. “Good Morning” has since entered into the public domain. Defendants, who had acquired Summy’s company, alleged that the Hill sisters, specifically Patty Hill (“Patty”), wrote the lyrics to “Happy Birthday” and transferred the rights to Summy, who later registered the copyrights to “Happy Birthday” in 1934. Plaintiffs alleged that Patty may not have written the song, the copyrights were lost before the lyrics were published, and Patty did not transfer her rights to Summy. The court held that although Patty may have assigned the “Happy Birthday” melody to Summy, she did not assign the lyrics. Therefore, because Summy never owned the rights, the Defendants never owned the

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rights. The parties agreed to settle rather than go to trial. Defendants agreed to create a $14 million settlement fund to repay those who paid licensing fees in the past.

This is a monumental case for the future of copyright and fair use. With the backing of this victory, those who view the sync licensing fees of copyright owners as more of a petty nuisance than a blessing may be more willing to fight back. In fact, the same legal team who fought for the public rights of “Happy Birthday,” is now tackling what the Library of Congress calls “the most powerful song of the 20th century.” The law firm of Wolf Haldenstein is attempting to free the anthem, “We Shall Overcome.” In the same fashion as “Happy Birthday,” the suit is being brought by a documentary filmmaker. Plaintiffs contend American folk singer Pete Seeger published the song in a 1946 periodical and the periodical was copyrighted in 1948, therefore, entering into the public domain by 1976. The Defendants claim that they filed a copyright in 1960 with new words and musical arrangements. In a country where ownership of your own work is revered, creativity and anti-monopolization is also encouraged. If the case is ruled in favor of the Plaintiffs, the idea of copyright protection may be scrutinized more than ever. Good Morning to You Productions Corp. v. Warner/Chappell Music Inc., No. 2:13-cv-04460 (C.D. Cal. September 23, 2015).

XV. Gaye Estate Wants to ‘Get It On’ with Ed Sheeran for Copyright Infringement – Katie Day

A Marvin Gaye hit song is yet again claimed at the heart of a copyright infringement, this time against Ed Sheeran for the alleged unauthorized reproduction, distribution and/or public performance of the copyrighted musical composition of Marvin Gaye’s “Let’s Get It On” in Sheeran’s hit song “Thinking Out Loud.”

The musical composition, “Let’s Get It On” was written by Marvin Gaye and Ed Townsend and recorded by Gaye, in 1973. According to the complaint by Townsend’s estate, it is undisputed by all parties that the Townsend heirs, Gaye heirs, and David Pullman own 100% of the copyright. The complaint alleges that the harmonic progressions and melodic elements, as observed in “Let’s Get It On,” have made it one of the most well-known and instantly recognizable songs in history and that the writers of “Thinking Out Loud” intentionally and willfully copied the “heart” of “Let’s Get It On” and repeated it contiguously throughout “Thinking Out Loud.” This has, therefore, allegedly infringed Plaintiffs’ copyright on the song.

The essence of the complaint is that the melodic, harmonic, and compositions of “Thinking Out Loud” are “substantially and/or strikingly similar” to the drum composition from “Let’s Get It On.” A main question is whether “substantially and/or strikingly similar” is sufficient, as copyright law generally does not protect generic ideas. If the Plaintiffs are successful, it may expand the protections offered by copyright law and affect future music recordings. See Travis M. Andrews, Ed Sheeran sued for copyright infringement for second time this year, WASH. POST (Aug. 10, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/08/10/ed-sheeran-sued-for-copyright-infringement-for-second-time-this-year/; Eric M. Johnson, Musician Ed Sheeran faces copyright lawsuit over ‘Thinking Out Loud’, REUTERS (Aug. 10, 2016), http://www.reuters.com/article/us-music-edsheeran-lawsuit-idUSKCN10L04X.

XVI. Contributory Infringement and the Tune of $25 Million – Katie Day

In 2015, BMG Rights Management (BMG) sought to hold Cox Communications, Inc. and CoxCom, LLC (Cox) secondarily liable for the reproduction and distribution of 1,397 musical composition copyrights by users of Cox’s high speed internet service between February 2, 2012 and November 26, 2014. A Virginia federal jury found Cox not liable for vicarious infringement, but liable for willful contributory infringement and awarded BMG $25 million in statutory damages. Cox brought a motion for a judgment as a matter of law on the basis that the Plaintiff failed to show direct infringement, failed to provide evidence of its liability for contributory infringement and failed to claim evidence of willfulness.

The judge upheld the ruling, writing that "providing internet access that supplies the means to infringe would not, standing alone, be contributory infringement," but that here there was "an ongoing relationship between a defendant and direct infringers" that presents a potential for “culpability quite beyond distribution or design.” The judge also concluded that there was sufficient evidence for the jury to find Cox was aware of the infringing activity and acted recklessly or with deliberate disregard. The judge also rejected BMG’s motion for a permanent injunction, writing that BMG failed to show the injunction was warranted here and that the balance of hardships and public interest would not support an injunction in this instance. The judge’s decision in this case interprets the term “repeat offender” in the Copyright Act and could encourage internet service providers to work harder to create a solution to reduce

**XVII. Holy Victory, Batman! DC Comics Wins Lawsuit for Copyright of Batmobile — Gabriella Martin**

Plaintiff DC Comics (DC) owns the character of Batman, who made his debut in 1939 in Detective Comics #27. In the comics, Batman is equipped with several weapons, sidekicks and, of course, his famous vehicle, the Batmobile. Used to navigate the superhero through the streets of Gotham, the Batmobile is said to have a jet black, bat-like appearance and be fitted with advance weaponry and technology. Defendant Mark Towle owned a custom car shop, Gotham Garage, where he, amongst other things, designed and sold replicas of the Batmobile as featured in the 1966 *Batman* TV show and the 1989 *Batman* movie. Towle owned the domain, batmobilereplicas.com, where he sold the replicas and he admitted that he advertised his replicas as Batmobiles to attract the attention of Batman fans. In May 2011, DC brought suit in the U.S. District Court for the Central District of California against Towle for infringement of the Batmobile copyright. DC claimed that they retained the copyright interest in the Batmobile as a character regardless of the modifications that had been made in the TV show and film. DC also argued that their licensing agreements with American Broadcasting Company and Batman Productions for the TV show and film, respectively, did not affect their underlying copyright interest in the Batmobile. Towle argued that his cars were modeled after those in the film and TV show, and that it did not resemble the Batmobile in the comic books. As such, Towle claimed DC Comics did not have a claim of copyright infringement against him. Towle also attempted to raise a defense of latches, which the court struck down because they held that Towle willingly infringed upon the Batmobile copyright and, by extension, the Batman copyright. The trial court granted DC’s motion for summary judgment, holding that the Batmobile was entitled to copyright protection, in part, because its consistent name identifies it as being Batman’s vehicle.

Towle appealed the order. The appellate court affirmed the trial court’s decision holding that the Batmobile, although an extension of the Batman character, was itself a character and, therefore, entitled to copyright protection. The Ninth Circuit cited a test of distinctiveness, which looked at such elements as whether the character had physical as well as conceptual qualities, had distinctive character traits and displayed consistent, widely identifiable traits. More importantly, the appeals court held that DC retained the underlying copyright interest in the Batmobile, even with the licensing agreements and the modifications in the film and TV show. Such a ruling will no doubt act as a landmark as more and more comic books, video games, and other properties are now being developed in record numbers for film and television; and of course with such rapid development the demand for replicas of objects shown in these productions is at an all-time high. DC’s win in this case will help protect companies like Marvel, Mattel, and others from blatant copyright infringement. *DC Comics v. Towle,* 802 F.3d 1012 (9th Cir. 2015), cert. denied, 136 S. Ct. 1390 (2016)

**XVIII. Dancing Baby Affects DMCA & Fair Use — Gabriella Martin**

At issue in this case was a video uploaded by Plaintiff Stephanie Lenz on video-hosting site YouTube. The twenty-nine second home video, published in 2007, shows Lenz’s two children dancing to Prince’s song, “Let’s Go Crazy.” Defendant Universal, who at the time of the incident was responsible for enforcing Prince’s copyrights, continually monitored YouTube for potential infringements and would issue a takedown notice vis-a-vis YouTube when necessary. This monitoring brought Lenz’s video to Universal’s attention and after review, they determined that “Let’s Go Crazy” was indeed the focus of the video and, as such, constituted an infringement. Per Universal’s request, YouTube took the video down and notified Lenz of its removal.

Lenz sent a counter-notification, which was provided to Universal for review. Universal affirmed that the video did infringe upon the copyright of “Let’s Go Crazy” because neither Lenz nor YouTube had a license to use or reproduce any portion of the song. Lenz brought suit in the U.S. District Court for the Northern District of California against Universal in an attempt to get the video reinstated on YouTube. Lenz argued that Universal failed to consider her use of Prince’s song in her video as fair use and thereby exempt to copyright infringement action. She claimed that Universal had misrepresented their good faith belief that the video was not an authorized use of the copyrighted material when it requested that YouTube take down the video. Universal argued that the fair use doctrine was an affirmative defense to a copyright infringement suit and, therefore, does not fall under the language of 17 U.S.C. § 512(c)(3)(A)(v), which requires a good faith belief that the use of the copyrighted content is not authorized by the copyright owner, its agent, or the law.

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Both the District Court and the U.S. Court of Appeals for the Ninth Circuit rejected this argument reiterating that the fair use doctrine is a right granted by the Copyright Act of 1976. Further, the courts held that fair use must be considered before sending out a takedown notice. However, the test of that consideration is a subjective one and hinged on whether Universal formed a good faith belief that the infringing content did not constitute fair use. The Ninth Circuit cautioned that such a subjective test must be reasonable and would not protect copyright holders who claim that they considered fair use and had a good faith belief that fair use was not at issue when there is evidence to the contrary. It was this contrary evidence that Lenz failed to provide in order to demonstrate that Universal had reason to believe that the video constituted fair use and took deliberate actions to avoid learning of it. *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (amended 9th Cir. 2016)

C. Entertainment Industry Update

I. The Future of ASCAP/BMI Consent Decrees – Calm or Chaos? – Michelle Wahl

On June 29, 2016, ASCAP and BMI (U.S. performing rights societies (“PROs”)) met jointly with the Department of Justice Antitrust Division to hear the government’s proposal regarding ASCAP’s and BMI’s respective consent decrees, which have been under formal review for the past couple years. Among other proposed changes, ASCAP and BMI music publishers sought the right to withdraw digital licensing from the blanket licenses in order to cut direct deals, and the ability to bundle additional licensing with additional rights under the PROs blanket licenses. Over the years, numerous individuals and entities within the music industry have contributed to the discussion and supported the position that these consent decrees are antiquated and that revisions are critical to the livelihood of songwriters and publishers alike.

Not only were the proposed revisions declined, the current proposal issued by the Department of Justice would require that ASCAP and BMI license all songs in their respective repertories on a 100% basis, ending the long-standing industry practice of “fractional share” licensing. If enforced, the PROs would no longer be able to engage in fractionalized licensing—meaning that any rightsholder in songs with multiple songwriters who may be represented by different PROs has the right to license the entire song to a user, as long as the rightsholder accounts to and pays the other songwriters. Unfortunately, the Department of Justice indicated that because of the complexities of the transition to this 100% licensing requirement, it would not consider the updates ASCAP and BMI requested to their consent decrees, but indicated the same would be revisited after a transition period.

As could be expected, the PROs strongly disagree with the view asserted by the Department of Justice and are disappointed that focus turned to the issue of fractionalized licensing, which was not directly raised by the parties subject to the decrees. Joint statements by the PROs provided that this approach would create instability, chaos, and harm to both music creators and users and would inhibit competition and innovation in the modern music marketplace. The PROs further stated that “even more troubling is the fact that the government chose this path, despite the fact that more than 15,000 songwriters and composers, as well as the U.S. Copyright Office, members of Congress and others in the industry, registered their strong opposition to 100% licensing with the DOJ.”

Some key concerns raised by the PROs regarding the proposed 100% licensing scheme include: (1) reduced royalty rates for songwriters because it will allow music services to rate-shop among the licensors for the lowest rate; and (2) financial ramifications of this ruling may cut down on collaborations, with some songwriters choosing only to collaborate with fellow songwriters within their own PRO.

ASCAP, BMI and key industry stakeholders have joined forces to utilize teams of legal in evaluating the Department of Justice’s proposal, and legislative and legal remedies are already underway. ASCAP President Paul Williams stated that in joining efforts, ASCAP will spearhead the push for legislation in Congress to address these antiquated consent decrees in favor of legislative solutions that make sense for the future of American music, while BMI will tackle the challenge to the DOJ’s decision on 100% licensing in the federal rate court. Paul Williams, *Message from ASCAP President Paul Williams on Strategy to Fight DOJ Consent Decree Interpretation*, ASCAP (Aug. 4, 2016), [http://www.ascap.com/playback/2016/07/action/doi-strategy.aspx](http://www.ascap.com/playback/2016/07/action/doi-strategy.aspx). In its pre-motion letter to Southern District of New York federal Judge Louis Stanton, BMI sought interpretation and potential modification to include (1) a determination that BMI’s consent decree allows for fractional licensing, or (2) a Court order modifying the decree to allow for fractional licensing; or (3) a reasonable transition period after a final ruling, to provide ample time for the PROs to comply with the DOJ’s current interpretation of the consent decrees. *BMI & ASCAP Join Forces to Fight the Department of Justice’s Interpretation of Their Consent Decrees*, BMI (Aug. 4, 2016),
On the other side of the spectrum, however, President and CEO of the National Association of Broadcasters, Gordon Smith, stated that local radio and television broadcasters strongly support the DOJ’s decision in not modifying the consent decrees, agreeing with the DOJ’s conclusion that no changes were warranted. Dennis Wharton, NAB Statement on Justice Department Decision on ASCAP and BMI Consent Decrees, NAT’L ASS’N. OF BROAD. (Aug. 4, 2016), http://www.nab.org/documents/newsRoom/pressRelease.asp?id=3989.

We certainly have not heard the last of this matter. Stay tuned!

II. Gawker & Reality Television: The Hulk Hogan Impact on Unscripted Programming – Bernetta M. Hardy

In March 2016, a jury in a Florida trial court held that the posting of a video featuring professional wrestler, Terry Bollea (“Hulk Hogan”) in an uncompromising position, was not newsworthy, and, therefore, violated his right to privacy; the jury awarded him $115 million in compensatory damages and $25 million in punitive damages. This decision may prove problematic for reality television shows that heavily rely on sensational programming being categorized as “newsworthy.”


Within the lawsuit, the main issue of contention consisted of the evaluation of the “newsworthiness” of the content within the video. Hulk Hogan’s legal team argued that Gawker’s actions constituted an unlawful publication of private facts. Michael Lambert, Courts Wrestle with Defining Newsworthiness in Privacy Cases, 39 NEWS, MEDIA & L 52 (FALL 2015), http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2015/courts-wrestle-defining-newsw. Most states prohibit the publication of private facts if the information has not been previously revealed to the public, the information is not of legitimate public concern, and publication of the information would be offensive to a reasonable person. Publication of Private Facts, Legal Guide, DIG. MEDIA L. PROJECT, http://www.dmlp.org/legal-guide/publication-private-facts. However, Gawker claimed the publication of the video was lawful because the content was “newsworthy.” Lambert, supra. Published information is deemed “newsworthy” if the facts are of legitimate public concern. Publication of Private Facts, Legal Guide, supra. Gawker argued that because Hulk Hogan is a celebrity, and the video was imbedded with an article about the prevalent societal fascination with celebrity sex tapes, the footage featuring Hulk Hogan in sexual situations constituted newsworthy material; and consequently, is protected by the First Amendment. Sarah Kaplan, Gawker on trial: Hulk Hogan sex tapes ‘very amusing’ and ‘newsworthy’, WASH. POST (Mar. 11, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/03/10/gawker-on-trial-hulk-hogan-sex-tapes-very-amusing-and-newsworthy/. A Florida jury disagreed and ruled in favor of Hulk Hogan. The ruling was upheld by a Florida Circuit judge. Gardner, supra.

The Gawker decision may have significant implications for unscripted programming producers and distributors. For years, production companies depended on the characterization of unscripted programming as “newsworthy” to shield themselves from court-compelled requests for footage.

In 2001, Joseph Kinsella was filmed as a patient in the emergency room of Jersey Shore Medical Center for the unscripted hospital program, “Trauma: Life in the ER.” Although Kinsella consented to being filmed, he joined a class action suit against the production company network alleging invasion of privacy, and requested unaired footage. Wendy Tannenbaum, Hospital reality show falls within ‘news’ definition, 27 NEWS MEDIA & L 49 (SUMMER 2003), http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-
The Defendants classified themselves as journalists and contended the footage was newsworthy; thus permitting the application of the state shield that protected reporters from being compelled to reveal sources and other confidential information. Devon Douglas-Bowers, “Freedom of the Press” and “The Shield Law”: “Protecting the Public” from Independent Alternatives to the Mainstream Media, GLOB. RESEARCH (Apr. 8, 2014), http://www.globalresearch.ca/freedom-of-the-press-and-the-shield-law-protecting-the-public-from-independent-alternatives-to-the-mainstream-media/5377081.

The Superior Court of New Jersey provided an inclusive perspective, noting that in light of “the variety of topics covered by news shows and [the shadowy] boundary between 'news' and 'entertainment,'” a show that presents “primarily human interest stories,” but has “educational and public policy aspects” may be considered a form of “news media” under the law.” Tannenbaum, supra. The Superior Court cited case law that provided a “broad definition of news, broad definition of news media, and a shield law that applies to unpublished and unaired as well as confidential information." Id.

In consideration of this ruling, and the fact that New Jersey contains one of the strongest shield laws in the United States of America, many producers of unscripted content, as well as networks that distribute unscripted programming, categorize unscripted programming as “news programming.” Id.


Because many producers of unscripted programming continually classify their shows as “news program,” the Gawker ruling may have a compelling effect on reality television. The Gawker case included a prominent journalistic entity that hosted over 23 million visitors per month in 2015. Gawker, SIMILARWEB (July 19, 2016), https://www.similarweb.com/website/gawker.com#. In addition, the case involved the publication of footage containing a celebrity, a person whose privacy rights are invaded for sport by the paparazzi and whose banal, daily activities are even deemed newsworthy by The New York Times. Stephanie Marcus, Kim Kardashian is Newsworthy, Even the New York Times Thinks So, HUFFINGTON POST (Mar. 5, 2015), http://www.huffingtonpost.com/2015/03/05/kim-kardashian-newsworthy-new-york-times_n_6809526.html.

In light of these elements, how much longer can reality television entities that do not practice traditional journalism and lean on the participation of private citizens, rely on the categorization of their programming as “newsworthy?”

III. Pokémon Go and Sue for Nuisance! – Amanda Alasauskas

If you haven’t heard by now, Pokémon Go, a game in which players use their smartphones to “catch” Pokémon in the real-world surroundings of the player by utilizing the camera and GPS features, has taken the world by storm. It was only released in early July and already has more than 25 million users hunting their favorite Pokémon on a daily basis. Throughout the game, players are able to stop at real locations that have been set as “Pokéstops”—where a user can collect valuable items to use through the game—and “gyms”—where users are able to battle their Pokémon to earn coins to spend in the game store. In light of such popularity, Pokémon Go has also been the centerpiece for legal concerns across the board, whether it be privacy, personal injury, or employment. One growing concern that surrounds the game is that of nuisance.

On July 29, 2016, Jeffrey Marder, a homeowner in New Jersey, filed a class action lawsuit against Niantic, Inc. (the game developer), The Pokémon Company, and Nintendo Co. Ltd. (who both co-own the franchise) in the Northern District of California. Marder v. Niantic, Inc., No. 4:16-cv-04300-KAW, https://www.scribd.com/document/319936053/Marder-v-Niantic-Complaint-7-29. The proposed class includes “[a]ll persons in the United States who own property (i) the GPS coordinates of which were designated by Defendants, without authorization, as Pokéstops or Pokémon gyms in the Pokémon Go mobile application or (ii) abutting property the GPS coordinates of which were designated by Defendants, without authorization,
as Pokéstops or Pokémon gyms in the Pokémon Go mobile application.”

In his complaint, Marder alleges that the developers of Pokémon Go placed many of the Pokéstops and gyms “on or directly adjacent to private property” without the consent of the property owners and this has led to trespassers impeding on the enjoyment and use of the properties, thus, constituting a nuisance. Marder states that during the week of the game’s release, he noticed strangers lingering on his property—at least five of those individuals had knocked on his door to ask for access to his backyard in order to catch a Pokémon—and an increase in vehicular traffic in his neighborhood allegedly due to the release of the game. Marder also cites to other instances, such as a similarly situated homeowner in Massachusetts, as well as the fact that Pokéstops had been placed inside of the United States Holocaust Memorial Museum in Washington, D.C.

Owners of private and commercial property have the right to protect their property, as well as their enjoyment of that property. Therefore, property owners are able to bring a suit for common law trespassing against an individual or they may follow Marder’s example and file a claim for public nuisance. With respect to homeowners, a claim against individual trespassers is always possible, but at the rate it seems to be happening due to Pokémon Go, this route may become costly and time consuming. Meanwhile, business owners and managers may be covered by a commercial general liability policy. However, this does not enable property owners to ignore the problems that come with games such as Pokémon Go.

There are, however, alternatives to funding litigation costs and filing suit. There are, of course, the “traditional” ways of dealing with trespassing and nuisance of this sort: signage displaying “no trespassing” and enlisting the help of local governments. Signage gives an explicit warning, meaning that liability may be greater for a person who ignores it and local government help can help create leverage if it comes down to a lawsuit. The game itself also offers an option through a request form, which is used to add or remove a stop or gym from a property. As the game is still fairly new, the viability of this method is unseen, but it is possible that proof of requests will help in the event of a lawsuit.

IV. Wiz Khalifa Pulls a 180 on Record Company Concerning 360 Deal – Amanda Alasauskas

What do you get when an up-and-coming teenage artist signs a 360 deal with his manager and recording company? Well, in the instance of Wiz Khalifa, you get a lawsuit if you’re the manager and record company. Wiz Khalifa—whose legal name is Cameron Jibril Thomaz—now 28, sued his former manager and label in May 2016 in order to void a 360 deal he signed when he 16. He is seeking $1 million plus punitive damages and legal fees. A 360 deal gives a percentage of profits from all of the commercial activities of the artist to the artist’s management and label. Not to be overlooked is the fact that Benjy Grinberg, Khalifa’s former manager, is also conveniently the founder and president of Rostrum Records, the label being sued. Grinberg began representing Khalifa in 2004.

Khalifa is suing for fraud and breach of fiduciary duty, and alleges that Grinberg and Rostrum had “induced” the rapper into signing a “360 agreement,” allowing for Rostrum to share in Khalifa’s songwriting, touring, and merchandising income streams. It further alleges that Grinberg failed to disclose alternative arrangements that had the opportunity to be more beneficial to Khalifa, but instead failed to disclose all material information required to make an informed decision and that Khalifa was persuaded to sign an agreement that “reached for more than a decade into virtually every aspect” of Khalifa’s professional life.

Because Khalifa filed in California state court, he is able to invoke California’s seven-year statute, which states that workers are not able to be held to personal service contracts for longer than seven years once service begins. Under the statute, if a musician is contracted for the production of a specified number of “phonorecords,” the employer can sue for damages if the musician does not meet that obligation. Cal. Labor. Code. Sect. 2855(b). In his complaint, Khalifa claims that he has delivered six studio albums when the deal he signed required him to deliver only five.

In response to the lawsuit, Grinberg has stated he was “very disappointed and surprised” at the “egregious lawsuit filled with inaccuracies” and that it is disheartening when you support an artist for years and they turn on you. He wasn’t too disappointed to file a cross-complaint against Khalifa in response. Grinberg and Rostrum are suing Khalifa for $2 million dollars for an alleged breach in their operative agreement, which states that Rostrum and Grinberg are entitled to receive fifteen percent of all royalties earned, fifteen percent of

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tour proceeds, and twenty percent of merchandise sales from Khalifa.

While this bout was just getting started, as Khalifa’s attorney, Alex Weingarten, has stated, “[a]n artist’s most trust advisor is his or her personal manager. Generally nothing good comes out when the manager decides to go into business against his artist.” It will be interesting to see how the seven-year statute argument plays out, as this has notoriously been a problem with recording artists. The seven-year statute recently came to light when Kesha sought a preliminary injunction to nullify her contract so that she may record without involvement from Dr. Luke. Other acts, such as 30 Seconds to Mars and Metallica, have cited the statute in an effort to void their contract with their labels, but settlements have been reached before the statute could properly be reevaluated. Because a one or two album option has the possibility of tying a musician up quite a significant amount of time and labels are using 360 deals, more money is at a higher stake than ever before.


V. DISH Network and Insurer Battle Over Forum Shopping – Kaaren Fehsenfeld

DISH Network Corp. has been in litigation with four major television networks (ABC, NBC, FOX, and CBS) since 2012 regarding Hopper, a technology allowing customers to record prime-time network programming, remove advertisements, and subsequently stream programs via mobile device. According to a complaint it filed in 2012, Ace American Insurance Co., DISH’s insurer, denied any obligation to defend or indemnify DISH for the claims submitted by the networks. Complaint for Declaratory Judgment, ACE American Insurance Co. v. DISH Network Corp. et al., No. 1:16-cv-01280-RBJ, (D. Colo. May 26, 2016.). DISH disputed Ace’s denial of coverage in 2015.

Ace has contested its responsibility to pay DISH’s litigation expenses related to the copyright claims brought by the television networks, claiming that 1) its excess policy does not apply to DISH’s lawsuits; 2) the $500,000 retained limit (the amount Dish must pay before Ace will provide coverage) has not been met to trigger coverage; and 3) exclusions in the policy exempt Ace from its responsibility to cover Dish, including Dish’s alleged “knowing violation of rights of another.” Ace’s coverage includes coverage for bodily injury, property damage liability, personal, and advertising injury liability.

In an unrelated suit, Ace Am. Ins. Co. v. DISH Network, LLC, 2016 U.S. Dist. LEXIS 40274 (D. Colo. Mar. 28, 2016), Ace won a declaratory judgment providing that Ace was not obligated to provide insurance coverage to DISH in a suit in which the United States and four states alleged DISH violated the Telemarketing Act and the Telephone Consumer Protection Act. U.S. v. DISH Network LLC, No. 3:09-cv-03073 (C.D. Ill.).

Ace filed suit against DISH in the United States District Court for the District of Colorado, claiming it did not owe payment to DISH to cover the litigation expenses incurred fighting copyright infringement lawsuits related to its Hopper technology. Specifically, in its complaint, Ace asserts that there is no alleged property damage or bodily injury and that it is not obligated under several policy exclusions, including exclusions for “expected or intended” behavior, “contractual liability,” “breach of contract,” copyright infringement, and insureds in media and internet type business, among others. Ace sought a declaratory judgment pursuant to 28 U.S.C. §§ 2201–02. Ace seeks judgment that it has no obligation to pay “allocated loss adjustment expenses” to DISH with respect to the lawsuits with the television networks. According to Ace’s complaint, each lawsuit with the networks’ alleged primary or secondary copyright infringement and breach of contract. However, in each case the parties either reached a settlement, the case has been stayed, or the case has not yet been resolved.

Subsequently, DISH filed suit against Ace in the U. S. District Court for the Southern District of New York (DISH Network Corp. and DISH Network LLC v. Ace American Insurance Co., No. 1:16-cv-0401, (filed May
whether DISH has actually violated the rights of another before denying coverage on that basis.

VI. The Continuing Saga of the Sony Hack – Sara Cruse

In Possibility Pictures, LLC v. Sony Pictures Worldwide Acquisitions, Inc., the production company Plaintiffs are suing the movie distribution company Defendants for breach of contract. In 2014, Sony Pictures Entertainment, Inc. was the victim of a cyberattack. As a result of the attack, five films, including To Write Love On Her Arms were illegally distributed online. In earlier class actions against Sony over the hacking, the focus was on the negligence of the Defendants. However, in this particular case, the Plaintiffs are pointing out a specific provision in the contract that states, "to protect the Picture worldwide on the Internet directly or through third party vendors, representative or agents." The Plaintiffs are asking for the defendants to pay the projected revenue of $8.7 million.

The Entertainment and Sports Lawyer (ESL) has commented on the faulty practices of the Defendants and how it affected the world; however, it is important to mention that this is more than mere negligence. This lawsuit is about a failed written obligation that both parties agreed upon. Allegedly, during a July 2016 discussion, the Defendants stated they had, "no obligation ... to take any anti-piracy measures whatsoever.” As Maia Spilman noted in her ESL article, ‘Takeaways From The Sony Hack,' “under U.S. law no entertainment company is required to encrypt personal data, or any data.” However, under this contract, the Defendants may have been obligated. The other class actions suits against the Defendants repeatedly examine the mere negligence of the movie distributor and questions of how to prevent this harm in the future. This lawsuit will examine the written obligation that defendants had at that moment. Possibility Pictures, LLC v. Sony Pictures Worldwide Acquisitions, Inc., (M.D. Fla., June 27, 2016). Maia Spilman, Takeaways From The Sony Hack, 33 ENT’M’T & SPORTS LAWYER, Issue 4, Winter (2016).

VII. Interns Are Employees Too? – Gabriella Martin

Plaintiffs Glatt, Footman and Antalik worked as unpaid interns in various departments during the production of Defendant Fox Searchlight Pictures’ film Black Swan. Each of the Plaintiffs were either enrolled or had been previously enrolled in a graduate studies program when they began their internships. Two of the
Plaintiffs did not receive credit for their internships for reasons not related to the case. During the course of their internships, the Plaintiffs performed various jobs in departments, such as production and post-production, accounting, and publicity. The interns worked at most fifty hours a week over the course of a five-day workweek.

Plaintiffs brought suit against Fox claiming they, and others similarly situated, were owed unpaid wages and overtime pay for work they did as unpaid interns during the film’s production. The Plaintiffs claimed that they fell under the category of employees as protected by the Fair Labor Standards Act (FLSA) and New York Labor Laws (NYLL). Fox argued that the Plaintiffs were the primary beneficiaries of their working relationship and, as such, the Plaintiffs were correctly categorized as interns and are not protected by FLSA or NYLL. The United States Court of Appeals for the Second Circuit held that under their six-part test, which examined several factors of the internship, the Plaintiffs were not employees as defined by FLSA or NYLL. The appeals court agreed with the Defendants in that it was the interns, and not Fox, who were the primary beneficiaries of their relationship—by way of the educational opportunities the internship provided. Furthermore, the court stated that this was not a case in which the interns were taken advantage of and made to serve as a means of free labor.

The case stands for the idea that unpaid interns do not fall under the protections of the Fair Labor Standards Act because they do not fall under the classification of employees, so long as the internship program they are enrolled in provides educational benefits and training similar to that which would be provided in any other educational environment. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016)

The cases, topics, and summaries for this Litigation Update were compiled and edited by Brian A. Rosenblatt, Stan Soocher, and Amanda Alasauskas.

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No. 09–56785.
Argued and Submitted March 7, 2011.
Filed March 30, 2012.

Background: Retail cable and satellite television subscribers brought putative class action against television programmers and distributors, alleging that programmers' practice of selling multi-channel cable packages violated Sherman Act and seeking to compel programmers and distributors of television programming to sell each cable channel separately. The United States District Court for the Central District of California, Christina A. Snyder, J., 649 F.3d 1078, dismissed action. Plaintiffs appealed.

Holding: The Court of Appeals, Ikuta, Circuit Judge, held that requirement of selling high demand and low demand channels together in packages to consumers did not injure competition under rule of reason. Affirmed.

West Headnotes

[1] Antitrust and Trade Regulation 29T ḅ 535

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(A) In General

29Tk532 Judicially Created Tests of Legality
29Tk535 k. Rule of reason. Most Cited Cases

A court generally evaluates whether a practice unreasonably restrains trade in violation of the Sherman Act under the "rule of reason"; in its design and function the rule of reason distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest. Sherman Act, § 1, 15 U.S.C.A. § 1.

[2] Antitrust and Trade Regulation 29T ḅ 537

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(B) Cartels, Combinations, Contracts, and Conspiracies in General
29Tk537 k. In general. Most Cited Cases

In order to state a Sherman Act unreasonable restraint of trade claim under the rule of reason, plaintiffs must plead facts which, if true, will prove (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition; and (4) that they were harmed by the defendant's anti-competitive contract, combination, or conspiracy, and that this harm flowed from an anti-competitive aspect of the practice under scrutiny, which generally is referred to as "antitrust injury" or "antitrust standing." Sherman Act, § 1, 15 U.S.C.A. § 1.

[3] Antitrust and Trade Regulation 29T ḅ 972(3)

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk972 Pleading
29Tk972(2) Complaint

On a Sherman Act unreasonable restraint of trade claim, in order to plead injury to competition, a claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably; rather, a claimant must, at a minimum, sketch the outline of the injury to competition with allegations of supporting factual detail, such allegations must raise a reasonable expectation that discovery will reveal evidence of an injury to competition, and plaintiffs must plead an injury to competition beyond the impact on the plaintiffs themselves. Sherman Act, § 1, 15 U.S.C.A. § 1.

A horizontal agreement, either explicit or tacit, to set prices may injure competition, and thus unreasonably restrain trade in violation of the Sherman Act, because the result of such an agreement, if effective, is the elimination of one form of competition, namely price, or a group of competitors may act in concert to harm another competitor or exclude that competitor from the market and thus protect dealers from real or apparent price competition from the targeted competitor. Sherman Act, § 1, 15 U.S.C.A. § 1.

A Sherman Act unreasonable restraint of trade claim, the type of vertical agreement that creates a restraint known as “tying” which is defined as an arrangement where a supplier agrees to sell a buyer a product, but only on the condition that the buyer also purchases a different, or tied, product; the potential injury to competition threatened by this practice is that the tying arrangement will either harm existing competitors or create barriers to entry of new competitors in the market for the tied product, or will force buyers into giving up the purchase of substitutes for the tied product. Sherman Act, § 1, 15 U.S.C.A. § 1.
A plaintiff bringing a rule of reason tying case cannot succeed in stating injury to competition on a Sherman Act unreasonable restraint of trade claim merely by alleging the existence of a tying arrangement, because such an arrangement is consistent with pro-competitive behavior; rather, the plaintiff must allege an actual adverse effect on competition caused by the tying arrangement. Sherman Act, § 1, 15 U.S.C.A. § 1.

On a Sherman Act unreasonable restraint of trade claim, plaintiffs may not substitute allegations of injury to the claimants for allegations of injury to competition; plaintiffs must plead “antitrust injury,” in addition to, rather than in lieu of, injury to competition; that is, in order to state a claim successfully, plaintiffs must allege both that defendant's behavior is anticompetitive and that plaintiff has been injured by an anti-competitive aspect of the practice under scrutiny. Sherman Act, § 1, 15 U.S.C.A. § 1.
Vertical agreements that directly prohibit retail price reductions, eliminating downward competitive pressure on price and thereby resulting in higher consumer prices, commonly referred to as resale price maintenance agreements, are not unlawful under the Sherman Act absent a showing of actual anticompetitive effect. Sherman Act, § 1, 15 U.S.C.A. § 1.


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Glenn D. Pomerantz, Esq., Munger Tolles & Olson LLP, Los Angeles, CA, and Arthur J. Burke, Esq., Davis Polk & Wardwell LLP, Menlo Park, CA, for defendants-appellees NBC Universal, Inc., et al.

Appeal from the United States District Court for the Central District of California, Christina A. Snyder, District Judge, Presiding. D.C. No. CV 07–6101 CAS (VBKx).


OPINION

IKUTA, Circuit Judge:

Plaintiffs, a putative class of retail cable and satellite television subscribers, appeal the dismissal of the third version of their complaint against television programmers (Programmers) and distributors (Distributors). The complaint alleged that Programmers' practice of selling multi-channel cable packages violates Section 1 of the Sherman Act, 15 U.S.C. § 1. In essence, plaintiffs seek to compel programmers and distributors of television programming to sell each channel separately, thereby permitting plaintiffs to purchase only those channels that they wish to purchase, rather than paying for multi-channel packages, as occurs under current market practice. Plaintiffs appeal the dismissal with prejudice of their complaint for failure to state a claim. We affirm.

The television programming industry can be divided into upstream and downstream markets. In the upstream market, programmers such as NBC Universal and Fox Entertainment Group own television programs (such as "Law and Order") and television channels (such as NBC's Bravo and MSNBC, and Fox Entertainment Group's Fox News Channel and FX) and sell them wholesale to distributors. In the downstream retail market, distributors such as Time Warner and EchoStar sell the programming channels to consumers.

Plaintiffs acknowledge three categories of distributors, namely, cable providers, satellite providers, and telephone companies. Plaintiffs have filed suit only against the cable and satellite providers.

According to plaintiffs' third amended complaint, Programmers have two categories of programming
channels: “must-have” channels with high demand and a large number of viewers, and a group of less desirable, low-demand channels with low viewership. Plaintiffs allege that “[e]ach programmer defendant, because of its full or partial ownership of a broadcast channel and its ownership or control of multiple important cable channels, has a high degree of market power vis-a-vis all distributors,” and that Programmers exploit this market power by requiring distributors, “as a condition to purchasing each programmer’s broadcast channel and its ‘must have’ cable channels,” to “also acquire and resell to consumers all the rest of the cable channels owned or controlled by each programmer” and “agree they will not offer unbundled [i.e., individual] cable *1196 channels to consumers.” “As a consequence,” plaintiffs contend, “distributors can offer consumers only prepackaged tiers of cable channels which consist of each programmer’s entire offering of channels.” Plaintiffs allege that these business practices impair competition among Distributors for consumer business, and therefore the Programmers and Distributors are in violation of Section 1 of the Sherman Act. Plaintiffs seek monetary damages under 15 U.S.C. § 15. Plaintiffs also seek an injunction to compel Programmers to make channels available on an individual basis.

FN4. Section 15 states in pertinent part:

Except as provided in subsection (b) of this section [relating to damages payable to foreign states and their instrumentalities], any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person’s pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances.


The district court dismissed plaintiffs’ first amended complaint without prejudice on the ground that plaintiffs failed to show that their alleged injuries were caused by an injury to competition. In their second amended complaint, plaintiffs alleged that Programmers’ practice of selling packaged cable channels foreclosed independent programmers from entering and competing in the upstream market for programming channels. The district court subsequently denied defendants’ motion to dismiss, holding that plaintiffs had adequately pleaded injury to competition.

After preliminary discovery efforts on the question whether the Programmers’ practices had excluded independent programmers from the upstream market, the plaintiffs decided to abandon this approach. Pursuant to a stipulation among the parties, plaintiffs filed their third amended complaint, which deleted all allegations that the Programmers and Distributors’ contractual practices foreclosed independent programmers from participating in the upstream market, along with a motion requesting the court to rule that plaintiffs did not have to allege foreclosure in the upstream market in order to defeat a motion to dismiss. The parties also agreed that Programmers and Distributors could file a motion to dismiss, and that if Programmers and Distributors prevailed, this third complaint would be dismissed with prejudice. The district court entered an order on October 15, 2009 granting Programmers and Distributors’ motion to dismiss the third amended complaint with prejudice because plaintiffs failed to allege any cognizable injury to competition. The district court also denied plaintiffs’ motion to rule on the question whether allegations of foreclosed competition are required to state a Section 1 claim. Plaintiffs timely appeal.

FN5. Programmers and Distributors claim that plaintiffs decided to discontinue discovery after preliminary review showed there was no evidence to support their claim that the packaging of channels foreclosed competition in the upstream market.

II

Section 1 of the Sherman Act prohibits “[e]very
contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the *1197 several States.” 15 U.S.C. § 1. While Section 1 could be interpreted to proscribe nearly all contracts, the Supreme Court has never “taken a literal approach to [its] language,” Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S.Ct. 1276, 164 L.Ed.2d 1 (2006); see also Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918). Rather, the Court has repeatedly observed that Section 1 “outlaw[s] only unreasonable restraints.” State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997).

We generally evaluate whether a practice unreasonably restrains trade in violation of Section 1 under the “rule of reason.” See Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007). “In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.” Id. at 886, 127 S.Ct. 2705. The parties do not dispute that the rule of reason applies in this case, FN6 and the pleading requirements for a rule of reason case therefore apply.


FN7. In the case of “tying” claims, a per se rule is applied in some circumstances. A tying arrangement will constitute a per se vio-

lation of the Sherman Act if the plaintiff proves “(1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a not insubstantial volume of commerce in the tied product market.” Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 913 (9th Cir.2008) (quoting Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1159 (9th Cir.2003)) (internal quotation marks omitted). The parties have disclaimed any contention that the tying practices in this case are per se antitrust violations.

We review de novo a district court’s dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1046 (9th Cir.2008). In order to state a Section 1 claim under the rule of reason, plaintiffs must plead four separate elements. First, plaintiffs must plead facts which, if true, will prove “(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition.” Id. at 1047; see also Oltz v. St. Peter’s Cmty. Hosp., 861 F.2d 1440, 1445 (9th Cir.1988) (same). In addition to these elements, plaintiffs must also plead (4) that they were harmed by the defendant’s anti-competitive contract, combination, or conspiracy, and that this harm flowed from an “anti-competitive aspect of the practice under scrutiny.” Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990). This fourth element is generally referred to as “antitrust injury” or “antitrust standing.” See, e.g., id.

*1198 [3] In order to plead injury to competition, the third element of a Section 1 claim, sufficiently to withstand a motion to dismiss, “a section one claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably.” Les Shockley Racing, Inc. v. Nat’l Hot Rod Ass’n, 884 F.2d 504, 507–08 (9th Cir.1989). “Rather, a claimant must, at a minimum, sketch the outline of [the injury to competition] with allegations of supporting factual...
Such allegations must “raise a reasonable expectation that discovery will reveal evidence of” an injury to competition. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Thus, a complaint’s allegation of a practice that may or may not injure competition is insufficient to “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955; see also *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (“Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.”) (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955) (internal quotation marks omitted)). In addition, plaintiffs must plead an injury to competition beyond the impact on the plaintiffs themselves. *McGinelly v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir.1988).

In sketching the outline of an injury to competition for purposes of this third element, the claimant must identify a contract, combination or conspiracy that has an anticompetitive effect. Courts have held that agreements between competitors in the same market (referred to as “horizontal agreements”) may injure competition. For example, a horizontal agreement that allocates a market between competitors or “restrict[s] each company’s ability to compete for the other’s [business]” may injure competition. *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir.1991). A horizontal agreement (either explicit or tacit) to set prices may injure competition because the resultant price increase eliminates competition. *United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150, 213–14, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397, 47 S.Ct. 377, 71 L.Ed. 700 (1927)). Or a group of competitors may act in concert to harm another competitor or exclude that competitor from the market and “protect ... dealers from real or apparent price competition” from the targeted competitor. *United States v. Gen. Motors Corp.*, 384 U.S. 127, 146–47, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966). Plaintiffs’ complaint does not allege the existence of any horizontal agreements.

[6] Courts have also concluded that agreements between firms operating at different levels of a given product market (referred to as “vertical agreements”), such as agreements between a supplier and a distributor, may or may not cause an injury to competition. Vertical agreements that foreclose competitors from entering or competing in a market can injure competition by reducing the competitive threat those competitors would pose. Some types of vertical agreements can also injure competition by facilitating horizontal collusion. See *Leegin*, 551 U.S. at 893, 897–98, 127 S.Ct. 2705. Other types of vertical agreements do not necessarily threaten an injury to competition. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54–57, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) (“Such restrictions, in varying forms, are widely used in our free market economy” and “there is substantial scholarly and judicial authority supporting their economic utility.”).

*1199* [7] The complaint in this case focuses on a type of vertical agreement that creates a restraint known as “tying.” Tying is defined as an arrangement where a supplier agrees to sell a buyer a product (the tying product), but “only on the condition that the buyer also purchases a different (or tied) product.” *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 1937, 1949, 2 L.Ed.2d 545 (1958). The potential injury to competition threatened by this practice is that the tying arrangement will either “harm existing competitors or create barriers to entry of new competitors in the market for the tied product,” *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984), abrogated in part on other grounds by *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006); *Cascade*, 515 F.3d at 912, or will “force buyers into giving up the purchase of substitutes for the tied product,” *United States v. Loew’s*, 371 U.S. 38, 45, 83 S.Ct. 97, 9 L.Ed.2d 11 (1962), abrogated in part on other grounds by *Ill. Tool Works*, 547 U.S. 28, 126 S.Ct. 1281.

But courts distinguish between tying arrangements in which a company exploits its market power by attempting “to impose restraints on competition in the market for a tied product” (which may threaten an injury to competition) and arrangements that let a company exploit its market power “by merely enhancing the price of the tying product” (which does not). *Jefferson Parish*, 466 U.S. at 14, 104 S.Ct. 1551. For example, in *Blough v. Holland Realty, Inc.*, we concluded that an alleged tying arrangement did not threaten an injury to competition. 574 F.3d 1084, 1088 (9th Cir.2009). In that case, plaintiffs entered into
contracts with defendant-homebuilders to purchase undeveloped lots plus newly constructed homes. In order to purchase the developed lots, plaintiffs were required to pay a percentage fee to defendant-realtors on top of the purchase price. **Id.** Plaintiffs alleged that the homebuilders were unlawfully tying the realtors' services to the sale of developed lots in violation of the Sherman Act. **Id.** We disagreed, holding that because the plaintiffs would not have otherwise purchased realtor services, the percentage fee was best viewed as part of the cost of purchasing the developed lot. **Id. at 1090.**

Further, market conditions may be such that a specific tying arrangement does not have anticompetitive effects. See **Driskill v. Dallas Cowboys Football Club, Inc.,** 498 F.2d 321, 323 (5th Cir.1974). For example, in **Driskill,** the plaintiff alleged that defendant, the Dallas Cowboys, had unlawfully tied the sale of undesirable preseason tickets to the sale of season ticket packages. **Id. at 322.** But the court noted that the Dallas Cowboys had a lawful monopoly in the market for the tied product, preseason tickets, so the tying arrangement could not adversely affect competition in the tied product market; there was no competition to affect. **Id. at 323.** As the Supreme Court has noted, “when a purchaser is ‘forced’ to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.” **Jefferson Parish, 466 U.S. at 16, 104 S.Ct. 1551; see also Blough, 574 F.3d at 1090 (‘[W]here there is no competition in the tied market, there can be no antitrust violation.’” (quoting **Reifert v. S. Cent. Wis. MLS Corp.,** 450 F.3d 312, 318 (7th Cir.2006))).

Indeed, courts have noted that a tying arrangement may be a response to a competitive market rather than an attempt to circumvent it. See **Jefferson Parish, 466 U.S. at 16, 104 S.Ct. 1551** (“Buyers often find package sales attractive; a seller's decision to offer such packages can merely *be an attempt to compete effectively—conduct that is entirely consistent with the Sherman Act.*”). Like other vertical restraints, tying arrangements may promote rather than injure competition. See **Continental, 433 U.S. at 54–57, 97 S.Ct. 2549 (1977)** (identifying ways in which non-price vertical restraints may benefit competition); **Leegin, 551 U.S. at 895–96, 127 S.Ct. 2705** (noting that even though vertical price restraints can lead to higher prices, “prices can be increased in the course of promoting pro-competitive effects”). In **Continental,** the Supreme Court made clear that manufacturer-imposed vertical restraints, even when their “intent and competitive impact” is to “limit[] the freedom of the retailer to dispose of the purchased products as he desire[s],” are often pro-competitive. **433 U.S. at 46, 54–55, 97 S.Ct. 2549.** While such restraints limit intrabrand competition, they may increase interbrand competition, such as by “induc[ing] retailers to engage in promotional activities or to provide service[s]” that “might not be provided by retailers in a purely competitive situation.” **Id. at 55, 97 S.Ct. 2549.**

**[8]** Therefore, a plaintiff bringing a rule of reason tying case cannot succeed in stating the third element of a **Section 1** claim merely by alleging the existence of a tying arrangement, because such an arrangement is consistent with pro-competitive behavior. See **Hirsh v. Martindale–Hubbell, Inc.,** 674 F.2d 1343, 1349 n. 19 (9th Cir.1982) (“[I]nter[s] upon consumers' freedom of choice by compelling the purchase of unwanted products ... has been implicitly rejected by the Supreme Court as a sufficient independent basis for antitrust liability.”). Rather, the plaintiff must allege an “actual adverse effect on competition” caused by the tying arrangement. **Jefferson Parish, 466 U.S. at 31, 104 S.Ct. 1551.**

**[9]** Plaintiffs may not substitute allegations of injury to the claimants for allegations of injury to competition. Plaintiffs must plead “antitrust injury,” the fourth element necessary to state a **Section 1** claim, in addition to, rather than in lieu of, injury to competition. See **Atl. Richfield, 495 U.S. at 334–35, 344, 110 S.Ct. 1884.** That is, in order to state a claim successfully, plaintiffs must allege both that defendant's behavior is anticompetitive and that plaintiff has been injured by an “anti-competitive aspect of the practice under scrutiny.” **Id. at 334, 110 S.Ct. 1884 (“[I]t is inimical to the antitrust laws to award damages for losses stemming from continued competition.”** (quoting **Cargill, Inc. v. Monfort of Colo., Inc.,** 479 U.S. 104, 109–10, 107 S.Ct. 184, 93 L.Ed.2d 427 (1986))). Specifically, to plead this element, plaintiffs must allege facts that if taken as true would allow them to recover for “an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.” **Big Bear...**
First, it is clear that the complaint does not allege the types of injuries to competition that are typically alleged to flow from tying arrangements. The complaint does not allege that Programmers’ practice of selling “must-have” and low-demand channels in packages excludes other sellers of low-demand channels from the market, or that this practice raises barriers to entry into the programming market. Nor do the plaintiffs allege that the tying arrangement here causes consumers to forego the purchase of substitutes for the tied product. Nothing in the complaint indicates that the arrangement between the Programmers and Distributors forces Distributors or consumers to forego the purchase of alternative low-demand channels. Indeed, Plaintiffs disavow any intent to allege that the practices engaged in by Programmers and Distributors foreclosed rivals from entering or participating in the upstream or downstream markets.

But as explained above, tying arrangements, without more, do not necessarily threaten an injury to competition. Therefore, the complaint’s allegations regarding the two separate tying arrangements do not, by themselves, constitute a sufficient allegation of injury to competition. Rather, plaintiffs must also allege facts showing that an injury to competition flows from these tying arrangements. We conclude that such allegations are not present in the complaint.

**FN9.** Thus, there is effectively “zero foreclosure” of competitors. *Blough, 574 F.3d at 1090–91.*

**[11][12]** Instead of identifying such standard-issue threats to competition, the complaint alleges that the injury to competition stems from Programmers’ requirement that channels must be sold to consumers in packages. According to the complaint, the required sale of multi-channel packages harms consumers by (1) limiting the manner in which Distributors compete with one another in that Distributors are unable to offer a la carte programming, which results in (2) reducing consumer choice, and (3) increasing prices. These assertions do not sufficiently allege an injury to competition for purposes of stating a Section 1 claim. First, because Section 1 does not proscribe all contracts *1202* that limit the freedom of the contracting parties, a statement that parties have entered into a contract that limits some freedom of action (in this case, circumscribing the distributors’ ability to

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Even vertical agreements that individually does not state a cognizable injury to competition. See Continental, 433 U.S. at 46, 54–55, 97 S.Ct. 2549; Bd. of Trade, 246 U.S. at 238, 38 S.Ct. 242 ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."). Businesses may choose the manner in which they do business absent an injury to competition. See Pac. Bell Tel. Co. v. Linkline Comm’ns, Inc., 555 U.S. 438, 448, 129 S.Ct. 1109, 172 L.Ed.2d 836 (2009). Therefore, the mere allegations that Programmers have chosen to limit the ability of Distributors to offer Programmers’ channels for sale individually does not state a cognizable injury to competition.

FN10. A rule to the contrary could cast doubt on whether musicians would be free to sell their hit singles only as a part of a full album, or writers to sell a collection of short stories. Indeed, such a rule would call into question whether Programmers and Distributors could sell cable channels at all, since such channels are themselves packages of separate television programs.

[13] Second, allegations that an agreement has the effect of reducing consumers’ choices or increasing prices to consumers does not sufficiently allege an injury to competition. Both effects are fully consistent with a free, competitive market. See Leegin, 551 U.S. at 895–97, 127 S.Ct. 2705; Continental, 433 U.S. at 55, 97 S.Ct. 2549. Even vertical agreements that directly prohibit retail price reductions, eliminating downward competitive pressure on price and thereby resulting in higher consumer prices (commonly referred to as resale price maintenance agreements), are not unlawful absent a showing of actual anticompetitive effect. See Leegin, 551 U.S. at 895, 127 S.Ct. 2705. As Leegin explained, higher consumer prices can result from pro-competitive conduct. Id. at 895–97, 127 S.Ct. 2705. Had the plaintiffs succeeded in pleading an injury to competition, the complaint’s allegations of reduced choice (due to the inability to purchase a la carte programming) and increased prices would sufficiently plead the fourth element of a Section 1 claim, namely that they had been harmed by the challenged injury to competition. But here, these allegations show only that plaintiffs have been harmed as a result of the practices at issue, not that those practices are anticompetitive. FN11 Therefore, these allegations do not, without more, allege an injury to competition “that is plausible on its face.” Twombly, 550 U.S. at 570, 127 S.Ct. 1955.

FN11. Plaintiffs claim that Theme Promotions, Inc. v. News America Marketing FSI, 546 F.3d 991, 1004 (9th Cir. 2008), supports their argument that reduced consumer choice and increased prices are sufficient to establish an injury to competition. Plaintiffs are mistaken: Theme Promotions held only that such injuries, when they are the result of an anticompetitive practice, constitute antitrust injury, not that any practice causing such harms was anticompetitive. Rather, the injury to competition in Theme Promotions was that plaintiff’s right-of-first-refusal agreements had “foreclosed competition in a substantial share of [the] market.” Id. at 1001–03. The case is inapposite.

[14] Plaintiffs disagree, and argue that under the rule in Loew’s, 371 U.S. 38, 83 S.Ct. 97, and Ross v. Bank of America, N.A. (USA), 524 F.3d 217 (2d Cir. 2008), they have sufficiently alleged an injury to competition by alleging that the agreements have the effect of reducing choice and increasing prices. This argument is unavailing. In Loew’s, the United States brought antitrust actions against six major film distributors, alleging that the defendants had conditioned the license or sale of one or more feature films upon the acceptance*1203 by television stations of a package or block containing one or more unwanted or inferior films. Id. at 40, 83 S.Ct. 97. The Court observed that the restraint injured competition because the movie studios’ block booking forced the television stations to forego purchases of movies from other distributors. Id. at 49, 83 S.Ct. 97. The relevant injury in Loew’s was to competition, not to the ultimate consumers, because the challenged practice forced television stations to forego the purchase of other movies, and therefore created barriers to entry for competing movie owners. Cf. Jefferson Parish, 466 U.S. at 14, 104 S.Ct. 1551. Here, Plaintiffs have not alleged that the contracts between Programmers and Distributors forced either Distributors or consumers to forego the purchase of other low-demand channels (a result analogous to the competitive injury in Loew’s), but only that consumers could not purchase programs a la carte and they did not want all of the channels they were required to buy from Distributors. “[C]ompelling
the purchase of unwanted products” is not itself an injury to competition. Hirsh, 674 F.2d at 1349 n. 19.

We have explained why this is so:

In order to obtain desired product A, let us suppose, the defendant's customer is forced to take product B, which it does not want, cannot use, and would not have purchased from anyone. This is typically the equivalent of a higher price for product A. From the viewpoint of the defendant seller, its revenue on product A consists of the A price plus the excess of the B price over B's cost to the seller. From the viewpoint of the customer, the cost of obtaining the desired product A is the nominal A price plus the excess of the B price over its salvage value. This has nothing to do with gaining power in the B market or upsetting competition there.

Blough, 574 F.3d at 1089–90 (quoting IX Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1724b, at 270 (2004 & Supp. 2009)); see also Jefferson Parish, 466 U.S. at 14, 104 S.Ct. 1551 (“When the seller's power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised.”). Nor does plaintiffs' citation to Ross support their argument; that case involved allegations of horizontal collusion, which has not been alleged by plaintiffs in this case, and pertained to standing, not injury to competition. 524 F.3d at 223, 225.

Plaintiffs also contend that because most or all Programmers and Distributors engage in the challenged practice, we should hold that in the aggregate, the practice constitutes an injury to competition. We cannot rule out the possibility that competition could be injured or reduced due to a widely applied practice that harms consumers. See Leegin, 551 U.S. at 897, 127 S.Ct. 2705 (indicating that vertical restraints, such as resale price maintenance, “should be subject to more careful scrutiny” if the practice is adopted by many competitors). But the plaintiffs here have not alleged in their complaint how competition is injured or reduced by the widespread practice of packaging low- and high-demand channels. FN12

FN12. Indeed, because Plaintiffs' complaint alleges that the restraints at issue in this case were imposed by Programmers, not Distributors, Leegin suggests that any competitive threat is diminished. 551 U.S. at 898, 127 S.Ct. 2705 (“If ... a manufacturer adopted the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct.”).

IV

Injury to competition must be alleged to state a violation of Sherman Act § 1. Kendall, 518 F.3d at 1047. Plaintiffs' complaint does not allege facts that “raise a reasonable expectation that discovery will reveal evidence of” injury to competition. Twombly, 550 U.S. at 566, 127 S.Ct. 1955. Thus, plaintiffs' complaint did not allege facts that, taken as true, “state a claim to relief that is plausible on its face.” Id. at 570, 127 S.Ct. 1955. Dismissal was proper.

AFFIRMED.

C.A.9 (Cal.), 2012.

Brantley v. NBC Universal, Inc.


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Plaintiffs Cablevision Systems Corporation and CSC Holdings, LLC (collectively, “Cablevision”), bring this antitrust action against Defendants Viacom International Inc. and Black Entertainment Television LLC (collectively, “Viacom”) pursuant to 15 U.S.C. § 1 and New York General Business Law § 340. Asserting that provisions of its licensing agreement with Viacom, which requires Cablevision to license a dozen less popular programming networks (termed “Suite Networks” in the Complaint) in order to gain license rights to what Cablevision alleges are “four commercially critical” programming networks, which Cablevision terms “Core Networks.” Cablevision alleges that Viacom threatened it with a substantial financial “penalty” for declining to purchase the licenses for, and distribute, the Suite Networks along with the Core Networks. Cablevision further alleges that the channels on which it is able to offer programming are limited and that, were it to be able to forego the Suite Networks, it would seek out programming from other suppliers.

MEMORANDUM ORDER

LAURA TAYLOR SWAIN, District Judge.

Plaintiffs Cablevision Systems Corporation and CSC Holdings, LLC (collectively, “Cablevision”), bring this antitrust action against Defendants Viacom International Inc. and Black Entertainment Television LLC (collectively, “Viacom”) pursuant to 15 U.S.C. § 1 and New York General Business Law § 340. Asserting that provisions of its licensing agreement with Viacom, which requires Cablevision to contract for certain programming networks in addition to the programming networks that Cablevision considers most desirable, constitute illegal tying and block booking arrangements under the federal antitrust laws and also violate New York state law, Cablevision seeks damages and injunctive relief pursuant to 15 U.S.C. §§ 15(a) and 26, and declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202. The Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1337.

Viacom moves to dismiss each of the claims asserted in Plaintiffs’ amended complaint. In the alternative, Viacom moves to strike Cablevision’s request for equitable relief. The Court has reviewed and considered carefully all of the parties’ submissions and arguments. For the following reasons, the motion is denied in its entirety.

BACKGROUND

The following brief factual summary is drawn from Cablevision’s amended complaint (the “Complaint”). Cablevision entered into a licensing agreement with Viacom in 2012. In the negotiations, Viacom required Cablevision to license a dozen less popular programming networks (termed “Suite Networks” in the Complaint) in order to gain license rights to what Cablevision alleges are “four commercially critical” programming networks, which Cablevision terms “Core Networks.” Cablevision alleges that Viacom threatened it with a substantial financial “penalty” for declining to purchase the licenses for, and distribute, the Suite Networks along with the Core Networks. Cablevision further alleges that the channels on which it is able to offer programming are limited and that, were it to be able to forego the Suite Networks, it would seek out programming from other suppliers.

DISCUSSION

In deciding a motion to dismiss a complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court accepts as true the non-conclusory factual allegations in the complaint and draws all reasonable inferences in the plaintiffs’ favor. Roth v. Jennings, 489 F.3d 499, 501 (2d Cir. 2007); see also Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009). “A pleading that offers labels and conclusions or a formulaic recitation of elements of a cause of action will not do.” Iqbal, 556 U.S. at 677 (internal citations omitted). Rather, to survive a motion to dismiss, a complaint must plead “enough facts to state a claim to relief that is plausible on its face.” Bell Atlantic v. Twombly, 550 U.S. 544, 570 (2007). The Court addresses each of Cablevision’s claims, and Viacom’s principal arguments, in turn.

Per Se Tying Claim Under 15 U.S.C. § 1

Cablevision alleges that its agreement with Viacom constitutes a per se illegal tying arrangement in violation of 15 U.S.C. § 1. See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984) (“[C]ertain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable ‘per se’ ”). The harm that the per se illegal tying doctrine is intended to address is the “substantial potential for impact on competition” that occurs when a seller’s dominant position in a tying product market is used as leverage to force the sale of tied products. Id. at 14–15. Cablevision asserts that Viacom uses the Core Networks as a tying product to force the licensing of Suite Networks.

The parties generally agree that, to determine whether a particular tying arrangement is illegal per se, a court must examine whether there exists: (1) a tying and tied product;
(2) evidence of actual coercion by the seller that forced the buyer to accept the tied product; (3) sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; and (4) the involvement of a “not insubstantial” amount of interstate commerce in the tied market. See *In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d 124, 13 n. 5 (2d Cir.2001); *In re Wireless Telephone Services Antitrust Litig.*, 385 F.Supp.2d 403, 414 (S.D.N.Y.2005). Viacom’s first attack on Cablevision’s per se tying claim is premised on the assertion that a fifth factor—anticompetitive effects—must be pleaded and proven. The per se tying doctrine and the cases applying it do not, however, support Viacom’s position. As Judge Cote has cogently explained:

> [analysis under the per se rule is, by definition, without inquiry into actual market conditions. Put another way, where a tying arrangement may be condemned as illegal per se, plaintiffs need not allege, let alone prove, facts addressed to the [anticompetitive effects] element. If a plaintiff succeeds in establishing the existence of sufficient market power to create a per se violation, the plaintiff is also relieved of the burden of rebutting any justifications the defendant may offer for the tie. *In Re Wireless Telephone Services Antitrust Litig.*, 385 F.Supp.2d at 414 (internal citations and quotations omitted).

Cablevision has, in any event, pleaded facts sufficient to support plausibly an inference of anticompetitive effects. For example, Cablevision alleges that if it were not forced to carry the Suite Networks, it “would carry other networks on the numerous channel slots that Viacom’s Suite Networks currently occupy.” (Compl.¶ 10.) Cablevision also alleges that Cablevision would buy other “general programming networks” from Viacom’s competitors absent the tying arrangement. (Id.) Viacom’s motion is therefore denied to the extent it seeks dismissal of Cablevision’s per se tying claim for failure to allege anticompetitive effects.

Viacom also argues that the tying claim is insufficient because Cablevision has failed to identify distinct tying and tied product markets. “To survive a 12(b)(6) motion to dismiss, an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes—analysis of the interchangeability of use or the cross-elasticity of demand, and it must be plausible.” *Todd v. Exxon Corp.*, 275 F.3d 191, 200 (2d Cir.2001) (internal citations and quotations omitted).

Here, Cablevision has offered three alternative definitions of the relevant tying product market. First, it asserts that each of the so-called Core Networks—Nickelodeon, Comedy Central, BET, and MTV—may be considered a standalone tying product market based on consumer demand for its particular programming. (Compl.¶¶ 40–59.) Second, Cablevision posits that the “Core Networks,” comprised of the Nickelodeon, Comedy Central, BET, and MTV networks, as a group, constitute a relevant tying product market based on the combined market power of the Core Networks. (Compl.¶¶ 60–62.) Third, Cablevision offers programming type classifications and posits that the relevant tying markets can be distinguished on the basis of the programming type and the popularity of a particular Core Network within that programming type—for example, “Popular Comedy Programming” or “Popular Children’s Programming.” (Compl.¶¶ 62–98.) Cablevision alleges that each of the Core Networks is so dominant in its class as to give Viacom market power within the particular class. (Id.)

As for the tied product, Cablevision denominates the group of all other networks it is required to carry under the licensing agreement as “Suite Networks.” These “Suite Networks” are, Cablevision alleges, part of a “general programming market” consisting of all “non-local programming that does not fall into a commercially critical category” (i.e., all such programming other than the defined “Tying Networks”). (Compl. ¶ 118; see generally Compl. ¶¶ 102–25.) Cablevision has proffered subscription, demographic and other statistical information, as well as factual allegations regarding cross-elasticity of demand and barriers to entry, that suffice at this pleading stage to make plausible its market definition allegations. Accordingly, Viacom’s motion is denied insofar as it is premised on insufficiency of market definition allegations.

**Donnelly Act Claim**

Act claim for the reasons set forth in the preceding section of this Memorandum Order.

**Block-booking Claim Under 15 U.S.C. § 1**

*4* Cablevision alleges that its agreement with Viacom constitutes an illegal block-booking arrangement in violation of 15 U.S.C. § 1. (Compl.¶¶ 186–90.) In a 1948 opinion outlawing movie production companies' practice of conditioning the sale and exhibition of popular movies on the exhibition of less desirable movies, the Supreme Court defined block-booking as “the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period.” *United States v. Paramount Pictures*, 334 U.S. 131, 156–58 (1948). The Supreme Court reasoned that, “[w]here a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights.” *Id.* at 158. Viacom asserts that the block-booking doctrine has been abrogated and seeks dismissal of Cablevision’s claim on that basis. Viacom’s cited authority does not, however, support its abrogation assertion. *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 44 (2006), on which Viacom relies, abrogated the presumption or inference of market power based on a patent, not the doctrine of block-booking itself, which was derived from the notion that the use of tying arrangements to extend the monopoly privileges inherent in a patent or copyright is improper. See *Paramount Pictures* at 158–59; *Illinois Toolworks*, 547 U.S. at 38–40. It appears that block-booking claims are not prohibited but would, rather, properly be subjected to market power analysis under the principles enunciated in *Jefferson Parish*. See *Illinois Toolworks*, 547 U.S. at 42–43. For this reason, and for the reasons set forth in the Court’s discussion of Cablevision's tying claim, Viacom's motion to dismiss the block-booking claim is denied.

**Viacom's Motion to Strike**

In its prayer for relief, Cablevision requests that, *inter alia*, the Court void the licensing agreement and issue a mandatory injunction prohibiting Viacom from conditioning the licensing of the Core Networks on licensing of Suite Networks, and compelling Viacom to license its Core Networks and provide ancillary services with respect to those Networks to Cablevision on the existing contract terms. Viacom attacks this demand as legally unfounded and inequitable. The Court declines to address the propriety and viability of the demand at this early stage of the litigation. The motion to strike the demand is therefore denied, without prejudice to the parties' positions.

The Court has considered all of Viacom’s other arguments and finds them insufficient to warrant dismissal of the Complaint.

**CONCLUSION**

For the foregoing reasons, Viacom’s motion to dismiss the amended complaint is denied, without prejudice to the parties’ positions concerning the propriety and viability of Cablevision's demand for an order requiring Viacom to license only the Core Networks to Cablevision on the terms specified for those Networks and ancillary services in the current agreement. This Order resolves docket entry number 27.

*5* SO ORDERED.

**All Citations**

Slip Copy, 2014 WL 2805256, 2014-2 Trade Cases P 78,836
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

FOX NEWS NETWORK, LLC,

    Plaintiff,

    -against-

CHARTER COMMUNICATIONS HOLDING COMPANY, LLC; CHARTER COMMUNICATIONS, INC.; CHARTER COMMUNICATIONS HOLDINGS, LLC; TIME WARNER CABLE INC.; SPECTRUM MANAGEMENT HOLDING COMPANY, LLC,

    Defendants.

Plaintiff, Fox News Network, LLC ("Fox News Network"), by its counsel, for its Complaint against Defendants alleges on personal knowledge as to matters relating to itself and on information and belief as to all other matters except as noted, as follows:

**NATURE OF THIS ACTION**

1. The Complaint seeks declaratory, monetary, and related relief for Defendants’ breach of contract, fraud, and other related causes of action, based on their anticipatory repudiation and breach of, *inter alia*, a January 1, 2014, Affiliation Agreement between Plaintiff and Defendant Charter Communications Holding Company, LLC, concerning distribution of Fox News Channel and Fox Business Network. (Defendant Charter Communications Holding Company, LLC, together with Defendants Charter Communications, Inc., Charter Communications Holdings, LLC, and Spectrum Management Holding Company, LLC, are hereinafter referred to as “Charter”.) The Charter Agreement as defined below was drafted to survive any acquisitions covered by its terms, and it specifically survives Charter’s
acquisition of Defendant Time Warner Cable Inc. ("TWC"). To avoid the clear application of the Charter Agreement, which has higher rates than Fox News Network’s contracts with TWC, Charter is claiming that TWC was the party that survived the acquisition and that TWC’s contracts with Fox News Network survive as a result. Not only does Charter’s position fail as a matter of plain language of the Charter Agreement; Charter’s position that TWC acquired Charter is a ruse, acting as a fraud on Plaintiff and on the public generally – a point no more clearly seen than that, since its acquisition of TWC, Charter has reportedly decided to vacate the Time Warner Center and move all operations to Charter’s offices in Connecticut.

2. Plaintiff is entitled to a declaration that the Charter Agreement covers both legacy Charter as well as TWC cum Charter subscribers; that the TWC Agreements (as defined below) are of no force or effect in accordance with their terms; and that Defendants are liable to Plaintiff for compensatory and exemplary damages in amounts to be ascertained at trial.

3. Assignment to the Commercial Division is requested.

THE PARTIES

4. Plaintiff Fox News Network, LLC is a limited liability company organized and validly existing under the laws of the State of Delaware, with its principal place of business at 1211 Avenue of the Americas, New York, New York 10036, in the City, County and State of New York.

5. Defendant Charter Communications Holding Company, LLC is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business at 6399 S. Fiddlers Green Circle, Greenwood Village, Colorado 80111. Defendant Charter Communications Holding Company, LLC is a wholly-owned subsidiary of Defendant Charter Communications, Inc.
6. Defendant Charter Communications, Inc. is a Delaware corporation authorized to do business in New York, with its principal place of business at 400 Atlantic Avenue, Stamford, Connecticut 06901.

7. Defendant Time Warner Cable Inc. is a Delaware corporation, with its principal place of business at 60 Columbus Circle, New York, New York 10023. Time Warner Cable Inc. is the successor-in-interest to Time Warner Cable LLC, which was a Delaware limited liability company.

8. Defendant Charter Communications Holdings, LLC is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business at 12405 Powerscourt Drive, St. Louis, Missouri, 63131. Defendant Charter Communications Holdings, LLC is a wholly-owned subsidiary of Defendant Charter Communications, Inc.

9. Defendant Spectrum Holding Company, LLC ("Spectrum") is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business at 400 Atlantic Avenue, Stamford, Connecticut 06901. Defendant Spectrum is a wholly-owned subsidiary of Defendant Charter Communications, Inc.

**FACTS COMMON TO ALL CAUSES OF ACTION**

10. Fox News Network operates the Fox News Channel, a 24-hour television news channel, as well as other offerings, including the Fox Business Network, a financial news channel. In order to reach subscribers of cable, satellite, and other television programming distributors, Fox News Network has entered into affiliation agreements with such system operators.
11. Fox News Network entered into affiliation agreements with TWC’s predecessor-in-interest, Time Warner Cable LLC, by agreements dated as of December 28, 2006, as amended ("TWC Agreements").

12. Fox News Network entered into an affiliation agreement with Charter Communications Holding Company, LLC by agreement dated as of January 1, 2014 ("Charter Agreement"). At the time of the negotiations of the Charter Agreement, the parties were aware that Charter was interested in acquiring and intended to acquire system operators such as TWC.

13. Paragraph 11(a) of Exhibit 1 to the Charter Agreement provides in pertinent part both that a party in TWC’s position will, on combining with Charter, be covered under the Charter Agreement and that upon the combination the prior agreement (in this case that of TWC) will be of no force or effect:

Acquired Systems. Without limiting the generality of any other provision of this Agreement, whenever in this Agreement an obligation is imposed upon Affiliate [Charter] with respect to its Systems as of the date hereof, Affiliate acknowledges and agrees that, except as otherwise provided herein, such obligation shall be deemed imposed upon all Systems which are acquired by Affiliate or an Affiliated Company subsequent to the date hereof or otherwise qualify as “Systems” pursuant to Section 1(c) of this Exhibit 1 ("Subsequently Acquired Systems") including, without limitation, the launch and distribution obligations with respect to the Services hereunder. Effective upon the date that a Subsequently Acquired System is first acquired by Affiliate or any Affiliated Company or otherwise first qualifies as a “System” hereunder, any other agreement(s) with respect to the carriage of the Service(s) on such Subsequently Acquired System ("Prior Agreement(s)") shall be deemed terminated with respect to such Subsequently Acquired System, notwithstanding anything to the contrary contained in such Prior Agreement(s).

14. Paragraph 14 of Exhibit 1 to the Charter Agreement supports paragraph 11 and provides in pertinent part, "No system or facility that meets the definition of System hereunder shall, during the Term, be subject to the provisions of any other agreement for carriage
of the Service(s), notwithstanding anything to the contrary contained in any such carriage agreement . . . .” The Term of the Charter Agreement continues until August 31, 2018 (Charter Agreement ¶ 1).

15. Exhibit 1 to the Charter Agreement, ¶¶ 1(a), (c), (m), defines the terms Affiliated Company, System(s), and Service in pertinent part as follows:

“Affiliated Company” means, with respect to Affiliate [Charter], any other person or entity directly or indirectly controlling, controlled by, or under common control (i.e., the power to direct affairs by reason of ownership of voting stock, by contract or otherwise) with Affiliate.

“Affiliated System(s)” or “System(s)” means each Cable Television System (as such term is defined at 47 C.F.R. Sec. 76.5(a)) in which Affiliate and/or an Affiliated Company now or hereafter (i) owns at least twenty five percent (25%) ownership interest, or (ii) manages as a general manager pursuant to a written management agreement and has sole responsibility for entering into programming agreements . . . .

“Service” means, individually and together, Fox News and Fox Business, and all feeds (including the standard definition and high definition feeds), formats and versions of each.

16. On May 18, 2016, Charter acquired TWC and Bright House Networks, making the cable systems formerly operated by TWC and systems operated under the Bright House brand (collectively, the “Former TWC Systems”) Subsequently Acquired Systems under the Charter Agreement. The Bright House Network systems were historically managed as to various programming matters by TWC and thus were included under the TWC Agreements. Accordingly, by letter dated June 9, 2016, Fox News Network notified TWC that the TWC Agreements with Fox News Network were deemed terminated in their entirety as of May 18, 2016, the closing date of Charter’s acquisition of TWC, and that the Former TWC Systems and subscribers would be covered under the Charter Agreement. A copy of said letter is annexed hereto as Exhibit A.
17. Charter – not TWC – responded to Fox News Network’s June 9, 2016 letter by letter dated June 24, 2016. Charter claimed that “as publicly reported, the Transactions [with TWC] were not self-explanatory”. Charter then asserted that defendant Spectrum Management Holding Company was purportedly “a ‘Time Warner Company’” and was the company that acquired not just the systems under the TWC Agreements but also those under the Charter Agreement. A copy of said letter is annexed hereto as Exhibit B.

18. Despite Charter’s assertion to the contrary, it is Charter that acquired TWC.

19. The letter from Charter was signed by Richard R. Dykhouse, Executive Vice President, General Counsel & Corporate Secretary of Charter. According to Charter’s website, Dykhouse has been with Charter – not TWC – since 2006, and has held his current position since 2013 (see http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-govBio&ID=209207).

20. According to the information available from Charter’s Corporate Leadership webpage (http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-govmanage), of the sixteen (16) members of Charter’s “Leadership” group, fifteen (15) – all but one – have been with Charter since before its acquisition of TWC. The only exception is one of Charter’s thirteen Executive Vice-Presidents, Philip Meeks, who apparently came over from TWC – and Mr. Meeks reports to Charter’s pre-existing President and CEO.

21. It has also been reported that Charter is closing TWC’s corporate headquarters in Manhattan in a few months, and relocating to Stamford, Connecticut, where Charter has offices (see http://www.bloomberg.com/news/articles/2016-06-28/new-york-s-time-warner-center-gets-rare-vacancy-as-charter-exits).
22. Moreover, Charter’s May 18, 2016 8-K filing with the SEC states that the result of the transaction with TWC is that Charter was the ultimate parent company: “Legacy Charter and TWC became wholly owned subsidiaries of New Charter” and “[f]ollowing the consummation of the Mergers, New Charter became the new public company parent that holds the operations of the combined companies. New Charter is now named ‘Charter Communications, Inc.’ and trades under the same ticker symbol ‘CHTR’ on NASDAQ.” (https://www.sec.gov/Archives/edgar/data/1091667/000119312516600775/d198771d8k.htm).

23. New Charter is an Affiliated Company of Charter under the Charter Agreement. New Charter – which acquired TWC – has the same name, the same ticker symbol, and virtually the same leadership as Charter did before May 18, 2016, yet Charter falsely asserted to Plaintiff Fox News Network in the letter annexed as Exhibit B that it was TWC that acquired the subject cable operations.

24. Because Charter admits that TWC became a wholly owned subsidiary of New Charter as a result of the May 2016 transactions, and New Charter – an Affiliated Company of Charter – directly or indirectly thus owns at least 25% of the Former TWC Systems and/or manages such systems, the Former TWC Systems are Subsequently Acquired Systems under the Charter Agreement regardless of the intricacies of the corporate structure Charter attempted to create below New Charter.

25. Defendant Spectrum is an Affiliated Company of Charter under the Charter Agreement, and it and/or another Charter Affiliated Company owns at least 25% of the Former TWC Systems and/or manages those Systems.

26. As noted above, paragraph 11(a) of Exhibit 1 to the Charter Agreement provides, inter alia, that a Subsequently Acquired System falls under the Charter Agreement as
of the date it “is first acquired” by Charter or an Affiliated Company. As set forth in the examples below, Charter and TWC have repeatedly admitted, in SEC and other filings and statements – both before and after May 18, 2016 – that Charter was “acquiring” TWC.


28. Charter’s and TWC’s Joint Proxy Statement dated August 20, 2015 (https://www.sec.gov/Archives/edgar/data/1091667/000119312515297454/d948531ddem14a.htm) includes multiple statements that reference Charter’s acquisition of TWC. The proxy statement states: “Charter and TWC have agreed to a series of mergers, pursuant to which both Charter and TWC will become wholly owned subsidiaries of New Charter, which is currently a wholly owned subsidiary of Charter” (id. at 4). In describing the merger’s accounting treatment, it states: “The TWC transactions and BHN transactions will be accounted for using the acquisition method of accounting with Charter as the accounting acquirer” (id. at 72; see also id. at 61, 234 (“The mergers and BHN transactions will be accounted for using the acquisition
method of accounting with Charter considered the accounting acquirer of TWC and Bright House”).

29. The August 20, 2015 Joint Proxy Statement also references “the systems to be acquired from TWC and BHN” (id. at 98). A section on “Risks Related to the Mergers” notes, “The merger agreement limits TWC’s ability to pursue alternatives to the mergers and may discourage other companies from trying to acquire TWC for greater consideration than what Charter has agreed to pay” (id. at 109).

30. In its discussion of the historical background of the Charter-TWC transaction, the Joint Proxy Statement asserts: “the Charter board of directors authorized Charter’s management to make an offer to acquire TWC for an implied nominal value of approximately $172.50 per TWC share based on Charter’s share price as of May 4, 2015” (id. at 144), and “the Charter board of directors authorized Charter management to offer to acquire TWC for an implied nominal value of $190 per TWC share” (id. at 147).

31. The Joint Proxy Statement includes in its discussion of “Charter’s Reasons for the Mergers and Other Transactions; Recommendation of the Charter Board of Directors” the following: “the increased scale of Charter’s operations following the transactions, including the fact that the transactions will result in Charter acquiring approximately a net 13 million video customers, increasing Charter’s video customer base from 4.3 million in December 2014 to approximately 17.3 million upon completion of the transactions” (id. at 158).

32. The Charter/TWC Joint Proxy Statement also includes four May 23, 2015, opinion letters to TWC’s board of directors, each of which reflects an understanding that, through the transactions set forth in the merger agreement, Charter would acquire TWC. In describing those letters, the Joint Proxy Statement expressly states: “For purposes of the
respective opinions and related analyses of TWC’s financial advisors described in this joint proxy statement/prospectus, (i) “transaction” means the acquisition of TWC by Charter” (id. at 40, 161; see also id. at 41, 176 (same definition re analyses of financial advisor to TWC’s independent directors). Specifically, the opinion letter from Allen & Company LLC states that the parties “propose to enter into an Agreement and Plan of Mergers . . . pursuant to which Charter will acquire TWC” (id. at L-1). The opinion letter from Citigroup Global Markets Inc. similarly states: “As more fully described in the Merger Agreement, Charter will acquire TWC” (id. at M-1). Morgan Stanley & Co., LLC’s opinion letter states that the Merger Agreement “provides . . . for the acquisition by Charter of TWC” (id. at N-1). Finally, Centerview Partners LLC’s opinion letter states: “The Merger Agreement provides, among other things, that Charter will acquire TWC” (id. at O-1).

33. In TWC’s April 28, 2016 Form 10-K/A (Amendment No. 1) amending its Annual Report for the fiscal year ended December 31, 2015, TWC states at page 12: “On May 23, 2015, TWC and Charter entered into the Charter merger agreement pursuant to which the Company would be acquired by Charter and a new public company would be created that would include the operations of TWC and Charter”.

(https://www.sec.gov/Archives/edgar/data/1377013/000119312516564173/d186621d10ka.htm).

34. After the merger, in a June 10, 2016 press release entitled “What’s Next for Charter Communications Customers”, Charter references “our newly acquired customers” and “what our customers – longtime and newly acquired – can expect from us.” The press release also states: “[S]ignificant work lies ahead as we integrate the recently acquired Time Warner Cable and Bright House Networks” (https://newsroom.charter.com/news-views/2016/whats-next-charter-communications-customers/).
35. Further, in their June 24, 2016 letter to Plaintiff (Ex. B), Defendants claimed not only that the Former TWC Systems were still owned by a TWC entity, but that even the Charter Systems had changed control and were now owned and managed by a “Time Warner Company” (see Ex. B at 1). Defendants’ own submissions to the Federal Communication Commission (“FCC”) and the New York Public Service Commission (“NYPSC”) demonstrate that this claim is unsupportable and false.

36. On June 25, 2015, Defendants submitted a Public Interest Statement to the FCC in connection with their application for consent to transfer the control of their licenses. The licenses were not being transferred to TWC, but to New Charter. Defendants’ own position to the FCC was that while TWC’s transfer to New Charter was a substantial change in control requiring FCC approval, Charter’s transfer of its own licenses to New Charter was “at most, pro forma”:

Charter believes the ownership changes impacting its own licenses and authorizations constitute, at most, pro forma transfers of control. Nevertheless, because Charter is filing at the FCC under the FCC’s substantial change of control procedures for all FCC licenses held by Time Warner Cable and Bright House Networks in connection with these related transactions, Charter is also submitting its applications for its own licenses under the same procedures to facilitate the Commission’s review.


37. In their NYPSC submission, Defendants specifically admitted, "Time Warner Cable [is] one of the cable operators that today owns systems that Charter is acquiring" (id. at 62, 115).

38. There is no doubt that Charter acquired TWC and the Former TWC Systems, and that TWC transferred substantial control of its licenses while Charter did not. To the extent that Charter is now taking the position that the opposite is true – that TWC is the acquiring entity, and that Charter’s licenses are now controlled by TWC – Charter has committed fraud in its SEC, FCC, and other governmental filings and public pronouncements, and its communications to Fox News Network. In either event, Defendants are liable to Fox News Network.

39. Plaintiff has satisfied any and all preconditions to claim, suit, and recovery, excepting only those that have been waived.

**FIRST CAUSE OF ACTION**

(Declaratory Judgment (CPLR 3001))

40. Plaintiff repeats and realleges as if fully set forth herein all other paragraphs of this pleading except those alleged in this cause of action.

41. As set forth above (supra ¶ 22), as a result of May 18, 2016 transactions, "Legacy Charter and TWC become wholly owned subsidiaries of New Charter” and “New Charter became the new public company parent that holds the operations of the combined companies. New Charter is now named ‘Charter Communications, Inc.’ and trades under the same ticker symbol ‘CHTR’ on NASDAQ."

42. New Charter or, alternatively, another entity involved in the May 18, 2016 transaction, is an entity directly or indirectly controlling, controlled by, or under common control
(i.e., the power to direct affairs by reason of ownership of voting stock, by contract or otherwise) with Charter, satisfying the criteria for an “Affiliated Company” of Charter.

43. Charter, and/or New Charter and/or another entity that qualifies as an Affiliated Company of Charter acquired TWC as of May 18, 2016.

44. Such Affiliated Company of Charter as of May 18, 2016 owns at least a twenty-five percent (25%) ownership interest in TWC. Accordingly, each of the Former TWC Systems is now a “System” under the Charter Agreement as of May 18, 2016.

45. Charter, and/or New Charter and/or another entity that qualifies as an Affiliated Company of Charter manages as a general manager pursuant to a written management agreement and has sole responsibility for entering into programming agreements for the Former TWC Systems. Accordingly, each of the Former TWC Systems is now a “System” under the Charter Agreement as of May 18, 2016.

46. Pursuant to the Charter Agreement, including Paragraph 11(a) of Exhibit 1 thereof, the Former TWC Systems are now governed by the Charter Agreement, and the TWC Agreements are deemed terminated as of May 18, 2016.

47. Charter has refused to abide by the terms of the Charter Agreement.

48. A live case or controversy exists between Plaintiff and Defendants. Plaintiff is entitled to a judgment declaring that as of May 18, 2016, the Former TWC Systems are Subsequently Acquired Systems under the Charter Agreement, that the legacy Charter Systems and the Former TWC Systems are governed by the Charter Agreement as of May 18, 2016, and that accordingly the TWC Agreements are deemed terminated as of May 18, 2016.
SECOND CAUSE OF ACTION

(Breach of Contract, Anticipatory Repudiation)

49. Plaintiff repeats and realleges as if fully set forth herein all other paragraphs of this pleading except those alleged in this cause of action.

50. The Charter Agreement expressly states that its provision regarding Subsequently Acquired Systems applies “notwithstanding anything to the contrary contained in” the TWC Agreements. Moreover, the Charter Agreement states that, “No system or facility that meets the definition of System hereunder shall, during the Term, be subject to the provisions of any other agreement for carriage of the Service(s), notwithstanding anything to the contrary contained in any such carriage agreement . . . .”

51. Based on the express language in the Charter Agreement, Plaintiff gave notice to TWC on June 9, 2016, that “the TWC Agreements are deemed terminated in their entirety as of the Closing Date”.

52. In response, Charter – writing for the TWC Defendants – stated that, rather than the Former TWC Systems falling under the Charter Agreement, to the contrary the Charter Systems “will be governed by the terms of the applicable TWC Agreement” (June 24, 2016, Charter letter).

53. The only interpretation of this statement is that Defendants intend to terminate the Charter Agreement, or claim that the Charter Agreement has already terminated, while refusing to acknowledge the termination of the TWC Agreements.

54. By claiming that they are governed by the terms and conditions of the TWC Agreements, including the lower rates therein, and that their Systems are covered by the TWC Agreements and not the Charter Agreements, Defendants have breached their contracts with Plaintiff and/or anticipatorily repudiated the Charter Agreement.
55. Plaintiff has been damaged by Defendants’ actions. Plaintiff is entitled to judgment against Defendants for breach of contract, awarding Plaintiff its damages and applicable interest, plus its Liabilities and Costs as set forth hereafter.

THIRD CAUSE OF ACTION

(Breach of Contract; Breach of Obligation of Good Faith and Fair Dealing; Unjust Enrichment; Indemnity)

56. Plaintiff repeats and realleges as if fully set forth herein all other paragraphs of this pleading except those alleged in this cause of action.

57. The actions of Defendants set forth herein violate the obligation of good faith and fair dealing inherent in every contract. The parties expressly negotiated the application of the Charter Agreement to Subsequently Acquired Systems such as the Former TWC Systems based on Charter’s structure and intent to acquire system operators such as TWC. Defendants’ actions – including, but not limited to, their attempted bad-faith gerrymandering of the Charter/TWC transaction to claim that the lower rates of the TWC Agreements apply to the Charter System as well as to the Former TWC Systems – have the effect of destroying or injuring Plaintiff’s benefit of its bargain with Charter, including the higher rates under the Charter Agreement.

58. By asserting that their obligations to Plaintiff are governed by the TWC Agreements, with their lower rates, and not the Charter Agreement, Defendants are being unjustly enriched at Plaintiff’s expense. Because the Charter Agreement was knowingly and specifically drafted and executed to govern an acquisition such as the Charter/TWC transaction, it is against equity and good conscience to permit Defendants to retain the benefits they seek from application of the lower rates and other terms and conditions in the TWC Agreements.
59. The TWC Agreements provide that “Affiliate [TWC] agrees to indemnify and hold harmless [Fox News] Network and its parents, affiliates, subsidiaries and permitted successors and assigns, and the respective owners, officers, directors, agents and employees of each, from and against all Liabilities and Costs caused by or arising out of: (i) Affiliate’s breach . . . of this Agreement” (TWC Agreements ¶ 11(e)). The TWC Agreements define Liabilities and Costs as “all liability, actions, claims, demands, losses, damages or expenses (including reasonable attorneys’ fees, disbursements and court costs)” (id. ¶ 11(c)).

60. Defendants’ actions herein have violated the duty of good faith and fair dealing, and breached their agreements with Fox News Network, including the TWC Agreements, causing damage to Plaintiff. Defendants are also being unjustly enriched at Plaintiff’s expense by their actions. Plaintiff is entitled to judgment against Defendants for breach of contract and/or unjust enrichment, awarding Plaintiff its damages and applicable interest, plus its Liabilities and Costs, including but not limited to attorneys’ fees.

FOURTH CAUSE OF ACTION
(Estoppel; Fraud; Misrepresentation)

61. Plaintiff repeats and realleges as if fully set forth herein all other paragraphs of this pleading except those alleged in this cause of action.

62. Defendants should be estopped from benefitting from the lower rates of the TWC Agreement. Defendants are also liable to Plaintiff for fraud and misrepresentation.

63. Defendants were aware that, at the time of the negotiation of the Charter Agreements, Plaintiff understood that Charter was interested in making acquisitions of system operators such as TWC.

64. Plaintiff justifiably relied on Defendants’ material representations that Charter was interested in acquiring and intended to acquire system operators such as TWC, who
had prior affiliation agreements with Plaintiff that had lower rates than the rates being negotiated with Charter. Plaintiff's reliance was demonstrated in part by the careful drafting of the language in the Charter Agreement requiring the application of its higher rates with respect to Subsequently Acquired Systems "notwithstanding" any other agreement between Plaintiff and other system operators, language that Charter accepted. Defendants knew or should have known that Plaintiff would rely on those representations.

65. Defendants have misled Plaintiff, including by attempting to gerrymander their transaction as one where TWC is purportedly the acquiring entity, and should be estopped from seeking to enforce the TWC Agreements. Estoppel should operate to hold Defendants to the terms of the Charter Agreement, and its application to the Defendants' Systems.

66. Moreover, Defendants' actions and statements amounted to misrepresentations and worked a fraud on Plaintiff, assuming it is determined that Defendants' current position -- that a "Time Warner Company" now "owns and manages" both the Former TWC Systems and the Charter Systems -- is determined to be true. Such a position demonstrates that their prior statements to Plaintiff, to the SEC, to the FCC, to other governmental entities, and to the public were untrue.

67. Plaintiff has been damaged by Defendants' misrepresentations and fraud.

68. Plaintiff is entitled to judgment against Defendants estopping them from benefiting from the TWC Agreements and/or awarding Plaintiff its damages for fraud and misrepresentation, plus all applicable punitive, exemplary, special, or consequential damages, including without limitation lost profits and revenues, plus its Liabilities and Costs, including but not limited to attorneys' fees.
WHEREFORE, Plaintiff seeks judgment against Defendants as follows:

A. Declaring that as of May 18, 2016, the Former TWC Systems are Subsequently Acquired Systems under the Charter Agreement, that the legacy Charter Systems and the Former TWC Systems are governed by the Charter Agreement as of May 18, 2016, and that the TWC Agreements are deemed terminated as of May 18, 2016;

B. Finding Defendants liable for breach of contract, and awarding Plaintiff its damages, plus applicable interest;

C. Finding Defendants liable for breach of the duty of good faith and fair dealing as well as unjust enrichment, and awarding Plaintiff its damages, plus applicable interest;

D. Finding Defendants estopped and/or liable for fraud and misrepresentation, and awarding Plaintiff its damages, interest, plus all applicable punitive, exemplary, special or consequential damages, including without limitation lost profits and revenues;

E. Awarding Plaintiff its loss, liabilities, and costs, including but not limited to attorneys’ fees; and

F. Awarding Plaintiff such other and further relief as the Court deems just and proper.
Dated: New York, New York
July 19, 2016

GREENBERG TRAURIG, LLP
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Attorneys for Plaintiff
I. INTRODUCTION

On March 9, 2016, plaintiff Herring Networks, Inc. (“Herring”) initiatied this action against defendants AT&T Services, Inc. (“AT&T Services”) and AT&T, Inc. (collectively, “defendants”). Dkt. 1. Plaintiff asserts claims against defendants for: (1) fraud by concealment; (2) intentional misrepresentation; (3) negligent misrepresentation; (4) breach of the implied covenant of good faith and fair dealing; (5) promissory estoppel; (6) breach of oral contract; and (7) breach of implied in fact contract. Id.

On April 25, 2016, defendant AT&T Services filed a motion to dismiss for failure to state a claim upon which relief can be granted, Dkt. 14, and defendant AT&T, Inc. filed a motion to dismiss for lack of personal jurisdiction, Dkt. 16.1 On May 23, 2016, plaintiff filed oppositions to both of these motions, Dkt. 32, 33, and on June 13, 2016, defendants filed replies in support of their respective motions, Dkt. 37, 38. Having carefully considered the parties’ arguments, the Court finds and concludes as follows.

1 To the extent the Court denies AT&T, Inc.’s motion to dismiss for lack of personal jurisdiction, AT&T, Inc. states that it joins AT&T Services’ motion to dismiss for failure to state a claim upon which relief can be granted, Dkt. 14, at 3 n.3.
II. BACKGROUND

Plaintiff’s complaint alleges the following facts: Herring is an independent, family-owned television programming company that owns and operates two television networks—a lifestyle entertainment channel called A Wealth of Entertainment (“AWE”) and a news channel called One America News Network (“OAN”). Compl. ¶¶ 16-19. Herring is a California Corporation with its principal place of business in San Diego, California. Id. ¶ 8. Defendants AT&T, Inc. and AT&T Services are Delaware corporations with their principal places of business in Dallas, Texas. Id. ¶ 9. AT&T, Inc. is the parent company of AT&T Services. Id. ¶ 10. Collectively, defendants are the second largest provider of mobile telephone services and the largest provider of fixed wireline telephone services in the United States. Id. ¶ 20. Defendants also provide broadband internet and subscription television services. Id. In June 2006, defendants launched AT&T U-verse (“U-verse”), a multi-channel television distribution service. Id. ¶ 21. From its launch, defendants included AWE as one of the channels on the U-verse platform. Id. ¶ 23. Several years thereafter, defendants also began including OAN on the U-verse platform. Id. ¶ 25.

Owners of television networks, such as Herring, generate revenue through carriage (i.e. distribution) agreements with defendants. Id. Defendants’ customers, or subscribers, would pay a fee to obtain access to a variety of networks available on the U-verse platform. Id. In turn, defendants would pay the network owners an agreed upon licensing fee to distribute their content. Id. In early 2014, Herring and defendants entered into a renewed licensing agreement (the “U-verse Agreement”). Id. ¶ 26. Pursuant to the U-verse Agreement, defendants agreed to carry both AWE and OAN for a customary five-year period with one-year renewals and to pay Herring a monthly licensing fee of $0.18 per subscriber. Id.

According to Herring, when the parties negotiated the U-verse Agreement, defendants led Herring to believe that they were committed to expanding their U-verse platform and increasing its subscriber base. Id. ¶ 27. Nonetheless, Herring contends that AT&T’s true intention was to wind down U-verse, acquire a competitor, DirecTV, and move subscribers from the U-verse platform to DirecTV’s platform. Id. ¶ 29. Herring alleges that defendants deliberately withheld this information from Herring. Id. In particular, Herring alleges that Ryan Smith, Vice President of Content at AT&T Services,
made the following representations to Charles Herring, the President of Herring: (1) defendants expected U-verse to challenge and surpass its competitor Time Warner Cable (“TWC”)—at the time U-verse had less than half as many subscribers as TWC (approximately 5.3 million for U-verse compared to 11.4 million for TWC); (2) defendants were continuing U-verse’s expansion to additional markets and capturing a larger market share in the markets where U-verse had already launched; and (3) defendants had ambitious expansion plans.  Id. ¶ 28.  Herring further alleges that these representations were consistent with defendants’ public statements regarding their intention to grow U-verse.  Id. ¶ 33.  For example, in one of their Annual Reports, defendants stated:

As part of Project Velocity IP (VIP), we [AT&T] plan to expand our IP-broadband service to approximately 57 million customer locations, including U-verse services to a total of 33 million customer locations.  We expect to be substantially complete in the 2015 and 2016 timeframe.

Id. Finally, Herring alleges that defendants misrepresented their plans to grow U-verse in public filings by AT&T, Inc.’s top executives, which Herring relied on.  Id. ¶¶ 90, 97.

In an early draft of the U-verse agreement, there was a clause that would have required defendants to carry Herring’s networks on any subsequently-acquired platforms.  Id. ¶ 31.  However, towards the end of the parties’ negotiations, new language was inserted into the U-verse agreement, which stated:

For the avoidance of doubt, nothing herein shall obligate AT&T to launch and carry the Services on any System that AT&T acquires during the Term if such System is not already distributing or obligated to distribute the Services.

Dkt. 17, Smith Decl, Ex. A, “U-verse Agreement” ¶ 4.B.  Herring contends that this language effectively excused AT&T from any obligation to carry Herring’s networks on newly-acquired platforms, such as the DirecTV platform.  Compl. ¶ 31.

A month after the U-verse Agreement was finalized, defendants announced their plans to acquire DirectTV.  Id. ¶ 46.  In order for defendants to acquire DirecTV they...
needed to obtain regulatory approval from the Federal Communications Commission (“FCC”). Id. ¶ 48. According to Herring, the FCC has a Congressional mandate to foster a diverse, robust, and competitive marketplace for video programming, which includes ensuring fair and equal treatment for independent programmers. Id. ¶ 50. Thus, in order to obtain the necessary governmental approvals, defendants needed support and lobbying from independent programmers, such as Herring. Id. To this end, shortly after announcing the planned acquisition of DirecTV, executives from Herring and defendants met at AT&T Services’ Los Angeles offices. Id. ¶ 55. At this meeting, Aaron Slator, the president of AT&T Services, made the following proposal: If Herring publicly supported defendants throughout its acquisition of DirecTV, including by lobbying the FCC, defendants would ensure that DirecTV carried Herring’s networks on its platform. Id. ¶ 56. Slator said that the terms of carriage on DirecTV’s platform would be similar to the U-verse Agreement and that this new agreement would be reduced to writing after the acquisition of DirecTV was completed. Id. ¶ 57. He also stated that the new agreement would be for a customary five year term, with automatic one-year renewals—i.e., identical to the U-verse Agreement. Id. Finally, Slator informed Herring’s executives that while DirecTV would need to pay Herring less than the $0.18 per subscriber set forth in the U-verse Agreement, carriage on DirecTV’s platform would still be very lucrative for Herring. Id. ¶ 59. Slator told Herring’s executives that he had been authorized to make this proposal by his superiors at AT&T, Inc. Id. ¶¶ 55, 58. Herring agreed to this proposal and, thereafter, began advocating on defendants’ behalf and in favor of the DirecTV acquisition. Id. ¶¶ 60, 66-69. On July 24, 2015, AT&T’s acquisition of DirecTV was approved by the FCC and the AT&T/DirecTV merger was consumated. Id. ¶ 76. Nonetheless, defendants have not made either of Herring’s networks available on the DirecTV platform. Id. ¶ 36.

In addition, Herring contends that, since acquiring DirecTV, defendants have aggressively solicited U-verse subscribers to move to DirecTV. Id. ¶ 35. AT&T has also publicly announced that it plans to make DirecTV its television service and wind down U-verse. Id. ¶ 37. Defendants’ efforts to phase out U-verse have been successful. Since the acquisition of DirecTV, U-verse has lost approximately 325,000 subscribers, while DirecTV has gained more than 200,000 during the same time. Id. As noted above, under the U-verse Agreement, Herring’s licensing fee is based on the number of U-verse subscribers. Accordingly, Herring contends that, by shifting subscribers from U-verse to DirecTV, defendants are undermining Herring’s bargained-for benefit under the U-verse Agreement. Id. ¶ 36-39.
III. LEGAL STANDARD

A. Motion to Dismiss for Lack of Personal Jurisdiction

When a defendant moves to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2), the plaintiff bears the burden of demonstrating that the court may properly exercise personal jurisdiction over the defendant. Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006). Where, as here, a court decides such a motion without an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss. Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995); Doe v. Unocal Corp., 27 F. Supp. 2d 1174, 1181 (C.D. Cal. 1998), aff’d, 248 F.3d 915 (9th Cir. 2001). Plaintiff’s version of the facts is taken as true for purposes of the motion if not directly controverted, and conflicts between the parties’ affidavits must be resolved in plaintiff’s favor for purposes of deciding whether a prima facie case for personal jurisdiction exists. AT & T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir. 1996); Unocal, 27 F. Supp. 2d at 1181. If the defendant submits evidence controverting the allegations, however, the plaintiff may not rely on its pleadings, but must “come forward with facts, by affidavit or otherwise, supporting personal jurisdiction.” Scott v. Breeland, 792 F.2d 925, 927 (9th Cir.1986) (quoting Amba Mktg. Servs., Inc. v. Jobar Int’l, Inc., 551 F.2d 784, 787 (9th Cir.1977)).

Generally, personal jurisdiction exists if (1) it is permitted by the forum state’s long-arm statute and (2) the “exercise of that jurisdiction does not violate federal due process.” Pebble Beach, 453 F.3d at 1154-55 (citing Fireman’s Fund Ins. Co. v. Nat’l Bank of Coops., 103 F.3d 888, 893 (9th Cir. 1996). California’s long-arm jurisdictional statute is coextensive with federal due process requirements, so that the jurisdictional analysis under state and federal law are the same. Cal. Civ. Proc. Code § 410.10; Roth v. Garcia Marquez, 942 F.2d 617, 620 (9th Cir. 1991). The Fourteenth Amendment’s Due Process Clause requires that a defendant have “minimum contacts” with the forum state so that the exercise of jurisdiction “does not offend traditional notions of fair play and substantial justice.” Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Depending on the nature of the contacts between the defendant and the forum state, personal jurisdiction is characterized as either general or specific.
A court has general jurisdiction over a nonresident defendant when that defendant’s activities within the forum state are “substantial” or “continuous and systematic,” even if the cause of action is “unrelated to the defendant’s forum activities.” Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 446-47 (1952); Data Disc, Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977). The standard for establishing general jurisdiction is “fairly high” and requires that the defendant’s contacts be substantial enough to approximate physical presence. Bancroft & Masters, Inc. v. Augusta Nat’l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000). “Factors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state’s markets, designates an agent for service of process, holds a license, or is incorporated there.” Id. (finding no general jurisdiction when the corporation was not registered or licensed to do business in California, paid no taxes, maintained no bank accounts, and targeted no advertising toward California).

A court may assert specific jurisdiction over a claim for relief that arises out of a defendant’s forum-related activities. Rano v. Sipa Press, Inc., 987 F.2d 580, 588 (9th Cir. 1993). The test for specific personal jurisdiction has three parts:

1. The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;

2. the claim must be one which arises out of or relates to the defendant's forum-related activities; and

3. the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) (citing Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987)); see also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985). The plaintiff bears the burden of satisfying the first two prongs, and must do so to establish specific jurisdiction. Schwarzenegger, 374 F.3d at 802.
If the plaintiff establishes the first two prongs, then it is the defendant’s burden to “present a compelling case” that the third prong, reasonableness, has not been satisfied. Schwarzenegger, 374 F.3d at 802 (quoting Burger King, 471 U.S. at 477). The third prong requires the Court to balance seven factors: (1) the “extent of the defendant’s purposeful injection into the forum”; (2) the burdens on defendant from litigating in the forum state; (3) the “extent of conflict with the sovereignty of the defendant’s state,” (4) the forum state’s “interest in adjudicating the dispute”; (5) the “most efficient judicial resolution of the controversy”; (6) the “importance of the forum to the plaintiff’s interest in convenient and effective relief”; and (7) the existence of an alternative forum. Ziegler v. Indian River County, 64 F.3d 470, 475 (9th Cir. 1995).

B. Motion to Dismiss for Failure to State a Claim

A motion pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in a complaint. Under this Rule, a district court properly dismisses a claim if “there is a ‘lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.’ ” Conservation Force v. Salazar, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting Balisteri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1988)). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). “[F]actual allegations must be enough to raise a right to relief above the speculative level.” Id.

In considering a motion pursuant to Rule 12(b)(6), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998). The complaint must be read in the light most favorable to the nonmoving party. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). However, “a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009); see Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (“[F]or a complaint to survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be
Unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). In re American Cont’l Corp./Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524, 1537 (9th Cir. 1996), rev’d on other grounds sub nom Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). A court may, however, consider exhibits submitted with or alleged in the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999); see Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when “the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.” Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986).

IV. ANALYSIS

A. AT&T Inc.’s Motion to Dismiss for Lack of Personal Jurisdiction

Plaintiff has named two defendants in this action—AT&T Services and its parent company, AT&T, Inc. AT&T, Inc. moves to dismiss for lack of personal jurisdiction. In brief, AT&T, Inc. contends that it has not engaged in any of the conduct underlying the claims raised in plaintiff’s complaint. Rather, AT&T, Inc. contends that those activities were performed by its subsidiary AT&T Services. Accordingly, AT&T, Inc. argues that it lacks the requisite “minimum contacts” to subject it to this Court’s jurisdiction.

As noted above, there are two types of personal jurisdiction—general and specific. However, as an initial matter, plaintiff concedes that general personal jurisdiction is not appropriate over AT&T, Inc. in California. See Opp’n., at 9 n.3 (“Herring has never asserted general jurisdiction as a basis for jurisdiction”). Accordingly, the Court only
addresses whether specific personal jurisdiction is appropriate over AT&T, Inc. in California.

1. Specific Jurisdiction

A court may assert specific jurisdiction over a claim for relief that arises out of a defendant’s forum-related activities. Rano, 987 F.2d at 588. As noted above, the Ninth Circuit uses the following three-part test to determine whether specific jurisdiction may be exercised over a particular defendant:

(1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;

(2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and

(3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d at 802.

The first prong of this test is, in turn, separated into two distinct concepts: “purposeful direction” and “purposeful availment.” The “purposeful availment analysis is most often used in suits sounding in contract,” where as the “purposeful direction analysis . . . is most often used in suits sounding in tort.” Id. Here, plaintiff’s claims against AT&T, Inc. sound in both contract and tort (i.e., fraud). Accordingly, both the purposeful direction and purposeful availment tests are applicable and the Court addresses each in turn.
a. Whether AT&T Purposefully Directed its Activities Towards California

In a purposeful direction analysis, courts apply the “effects” test first set forth by the Supreme Court in Calder v. Jones, 465 U.S. 783 (1984). See Mavrix Photo, 647 F.3d at 1228 (9th Cir. 2011) (“In tort cases, we typically inquire whether a defendant ‘purposefully direct[s] his activities’ at the forum state, applying an ‘effects’ test”). This test requires that “the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” Brayton Purcell, 606 F.3d at 1128.

Here, the Court finds that plaintiff has identified at least one intentional act committed by AT&T, Inc. Specifically, plaintiff alleges that AT&T, Inc.’s CEO and Chairman, Randall Stephenson (“Stephenson”), expressly authorized the President of AT&T Services, Aaron Slator (“Slator”), to promise plaintiff that if it publicly supported AT&T, Inc.’s acquisition of DirecTV, plaintiff’s networks would be carried on DirecTV’s platform. Plaintiff also alleges that this promise was reiterated several months later by another AT&T Services executive, James Cicconi (“Cicconi”) and that Cicconi stated that his superiors at AT&T, Inc. authorized him to make this promise.2 And plaintiff alleges Cicconi reported directly to Stephenson and was responsible for leading AT&T, Inc.’s efforts to gain government approval for the DirecTV acquisition. Compl. ¶ 71. In this capacity, Cicconi allegedly directed Herring’s activities to promote the DirecTV acquisition, which included, among other things, lobbying the FCC, the Department of Justice, and members of Congress, filing briefs with the FCC, and

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2 AT&T, Inc. argues that Cicconi’s statements do not support jurisdiction in California because he met with plaintiff in Washington, D.C., not California. This argument misses the mark. For jurisdictional purposes, physical presence in the forum is not required. See Burger King, 471 U.S. at 476 (“So long as a commercial actor’s efforts are ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.”)
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:16-cv-01636-CAS-AGR Date July 25, 2016
Title HERRING NETWORKS, INC. V. AT&T SERVICES, INC., ET AL.

soliciting other independent programmers to support AT&T, Inc.’s acquisition of DirecTV. Compl. ¶¶ 66, 68, 74.3

These allegations are uncontroverted by the affidavits submitted by AT&T, Inc. Instead, AT&T, Inc. contends that these intentional acts cannot support personal jurisdiction over AT&T, Inc. because they were committed by employees of AT&T Services. AT&T, Inc. also cites several cases in which courts have held that, as a general matter, parent companies, such as AT&T, Inc., may not be subject to personal jurisdiction based on the contacts of their subsidiaries. See, e.g., Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523, 540 (Cal. Ct. App. 2000) (“We start with the firm proposition that neither ownership nor control of a subsidiary corporation by a foreign

3 Plaintiff identifies a number of other purported intentional acts committed by AT&T, Inc. Specifically, plaintiff alleges: (1) AT&T, Inc. “set company-wide corporate policies and practices” for its subsidiaries, including AT&T Services; (2) AT&T, Inc.’s CEO and Chairman of the Board, Randall Stephenson, made false statements to the public regarding AT&T’s intent to expand U-verse; (3) AT&T, Inc. “planned, orchestrated and ultimately consummated” the acquisition of DirecTV; and (4) AT&T, Inc. expressed an interest in acquiring a stake in plaintiff. Nonetheless, the Court finds that these acts do not support the exercise of specific personal jurisdiction over AT&T, Inc. With respect to the allegations that AT&T, Inc. set corporate policies for its subsidiaries, that its CEO and Chairman made false statements to the public, and that AT&T, Inc. planned the acquisition of DirecTV, plaintiff cannot establish that these acts were “expressly aimed” at California, let alone plaintiff. Indeed, it does not appear that these acts were directed at any state in particular. See also James M. Wagstaffe, Federal Civil Procedure Before Trial Ch. 3, Personal Jurisdiction (The Rutter Group 2016) ¶ 3:172.5 (“[T]he ‘expressly aimed’ requirement distinguishes cases where plaintiff fortuitously lives in the forum state with the conduct directed, e.g., to the nation as a whole, from those in which the intentional conduct is directed uniquely to the forum itself.”) (citing Clemens v. McNamee, 615 F.3d 374, 380 (5th Cir. 2010) (defamatory statements made in New York to national publication about a Texas resident insufficient)). And, as for AT&T, Inc.’s purported interest in acquiring a stake in plaintiff, while arguably directed towards California, this act is unrelated to plaintiff’s claims in this action—i.e., plaintiff’s claims do not “arise out of” this alleged contact with California.
parent corporation, without more, subjects the parent to the jurisdiction of the state where
the subsidiary does business.”). Nonetheless, a parent company may still be subject to
jurisdiction based on its own contacts with a forum state. And, to the extent AT&T, Inc.
directed and/or authorized AT&T Services to engage in conduct in California, those
actions may be attributed to AT&T, Inc. for purposes of evaluating personal jurisdiction.
See also Weaver v. Johnson & Johnson, Ethicon, Inc., 2016 WL 1668749, at *5 (S.D.
Cal. Apr. 27, 2016) (Curiel, J.) (“A parent corporation may be amenable to specific
jurisdiction in a forum state, through an agency relationship, if it itself targeted the forum
or it ‘purposefully availed itself of a forum by directing its agents or distributors to take
action there.’ ”) (quoting Daimler AG v. Bauman, 134 S. Ct. 746, 759 n.13 (2014));
(Croskey, J.) (noting that jurisdiction may be appropriate over a defendant-parent
company where a “defendant has purposefully directed its activities at the forum state by
causing a separate person or entity to engage in forum contacts.”). Here, plaintiff alleges
that executives at AT&T, Inc., including the Chairman and CEO of AT&T, Inc.,
authorized and instructed both Slator and Cicconi to promise plaintiff that its networks
would be carried on DirecTV’s platform. Moreover, plaintiff alleges that it supported the
acquisition of DirecTV on AT&T, Inc.’s behalf and at the direction of Cicconi, who
reported directly to Stephenson. Accordingly, the Court finds that these intentional acts
may fairly be attributed to AT&T, Inc.4

4 Additionally, under principles of California agency law, Slator and Cicconi’s
conduct can be attributed to AT&T, Inc. under the theory that they acted with actual—or
at least apparent—authority from AT&T, Inc. Plaintiff alleges that Slator and Cicconi
had express instructions from AT&T, Inc. to promise plaintiff that its networks would be
carried on DirecTV’s platform. Moreover, plaintiff alleges that Slator and Cicconi
categorically represented to plaintiff that they were acting on behalf of their superiors at
AT&T, Inc. Under California law, when an agent acts under actual or ostensible (i.e.,
apparent) authority, the principal is bound by the agent’s actions. Cal. Civ. Code. §§ 2330, 2334. Moreover, an agency relationship may be created by either “precedent
authorization or a subsequent ratification.” Cal. Civ. Code § 2307. Here, accepting
plaintiff’s uncontroverted allegations as true, AT&T, Inc. conferred actual authority upon
Slator and Cicconi to promise plaintiff that its networks would be carried on DirecTV’s
platform. See also Penthouse Int’l, Ltd. v. Barnes, 792 F.2d 943, 947-48 (9th Cir. 1986)
(photographer acted within actual implied authority per Penthouse magazine’s,
Next, the Court finds that AT&T, Inc.’s conduct was expressly aimed at California. Plaintiff alleges that AT&T, Inc. authorized and instructed Slator and Cicconi to make promises to plaintiff—a California corporation. AT&T, Inc. argues that, under recent Supreme Court and Ninth Circuit precedent, the mere fact that a resident of a forum has been injured is insufficient to invoke personal jurisdiction. See, e.g., Walden v. Fiore, 134 S.Ct. 1115, 1125 (2014) (“mere injury to a forum resident is not a sufficient connection to the forum”). However, in those cases the defendant had only attenuated contacts with the forum state, and the courts held that the fact that the plaintiff happened to be from the forum state was insufficient to support the assertion of personal jurisdiction. For example, in Walden v. Fiore, two Nevada residents sued a DEA agent in a Nevada court based on a search the agent had conducted in Georgia. 134 S.Ct. at 1119. The Supreme Court held that the Nevada court lacked jurisdiction over the agent reasoning that “the plaintiff cannot be the only link between the defendant and the forum.” Id. at 1122. Similarly, in Picot v. Weston, 780 F.3d 1206, 1214 (9th Cir. 2015), a California resident brought suit against a Michigan resident for making various threats to stop a business transaction. The Michigan resident had engaged in no conduct in California and the underlying business transaction had been negotiated in Michigan and was expected to be performed in Michigan. Id. at 1212. Accordingly, relying on

instructions to present contracts to models); In re Nelson, 761 F.2d 1320, 1322 (9th Cir. 1985) (husband had actual implied authority to encumber wife’s interest in property where wife knew he signed her name to loan documents and husband reasonably believed he had authority to do so). Furthermore, it is appropriate for the Court to consider California agency law in evaluating personal jurisdiction. See James M. Wagstaffe, Federal Civil Procedure Before Trial Ch. 3, Personal Jurisdiction (The Rutter Group 2016) ¶ 3:83.3 (“Whether the person whose forum-related acts give rise to jurisdiction was acting as an agent of the nonresident defendant, or as an independent contractor, is determined in accordance with applicable state law.”) (citing Ochoa v. J.B. Martin and Sons Farms, Inc., 287 F.3d 1182, 1189 (9th Cir. 2002) (looking to Arizona law to determine whether personal jurisdiction existed based on contacts of purported agent); Vázquez-Robles v. CommoLoCo, Inc., 757 F.3d. 1182, 1189 (9th Cir. 2014) (same applying Puerto Rican law)); Cf. Daimler, 134 S.Ct. 746, 759 n.13 (2014) (“Agency relationships, we have recognized, may be relevant to the existence of specific jurisdiction . . . As such, a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there.”).
Walden, the Ninth Circuit held that the defendant’s out-of-state actions “did not connect him with California in a way sufficient to support the assertion of personal jurisdiction over him.” Id. at 1215.

By contrast, in this case, plaintiff has not merely alleged that jurisdiction is appropriate because it is a resident of California who suffered harm. Rather, plaintiff alleges that AT&T, Inc. authorized Slator and Cicconi to make promises to plaintiff which envisioned an ongoing business relationship whereby plaintiff’s networks would be carried on DirecTV’s platform for a term of five years. See also Walden, 134 S.Ct. at 1125 (“[W]e have upheld the assertion of jurisdiction over defendants who have purposefully ‘reach[ed] out beyond’ their State and into another by, for example, entering a contractual relationship that ‘envisioned continuing and wide-reaching contacts’ in the forum State.”) (citing Burger King, 471 U.S. at 479–480). And plaintiff alleges that Slator made this promise in the Los Angeles offices of AT&T Services—i.e., in California. Accordingly, the Court finds that Walden and Picot are distinguishable and that AT&T, Inc.’s conduct was expressly aimed at California.

Finally, the Court finds that plaintiff has adequately alleged that AT&T, Inc. knew plaintiff would suffer harm in California. AT&T, Inc. contends that plaintiff has failed to adequately allege that AT&T, Inc. knew its intentional acts would cause harm in California. But, at all times relevant to this action, plaintiff has been a California corporation doing business in San Diego, California. Moreover, AT&T, Inc.’s subsidiary, AT&T Services, had a contractual relationship with plaintiff spanning nearly ten years, and throughout that relationship plaintiff was a California corporation. Lastly, AT&T, Inc. authorized Slator to make promises to plaintiff, and Slator made those promises in California. See also Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1114 (9th Cir. 2002) (finding effects test satisfied where “[t]he principal place of business of [plaintiff was] California, and [plaintiff’s] managers in California were induced to approve the injurious transactions.”). In light of these allegations, the Court finds that plaintiff has adequately established that AT&T, Inc. was aware that any harm resulting from its conduct would be felt in California.

Accordingly, all three elements of the “effects” test are satisfied and the Court finds that AT&T, Inc. purposefully directed its conduct towards California.
b. Whether AT&T Purposefully Availed Itself of California

The Court also finds that AT&T, Inc. has purposefully availed itself of California. "‘Purposeful availment’ requires that the defendant ‘have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state.’ ” Sher v. Johnson, 911 F.2d 1357, 1362 (9th Cir. 1990) (quoting Sinatra v. Nat'l Enquirer, Inc., 854 F.2d 1191, 1195 (9th Cir. 1988)). Here, AT&T, Inc. instructed Slator and Cicconi to solicit a California corporation to engage in lobbying efforts on its behalf. In exchange for those lobbying efforts, AT&T, Inc. authorized Slator and Cicconi to promise plaintiff an ongoing contractual relationship whereby plaintiff’s television networks would be carried on DirecTV’s platform. By this conduct, AT&T, Inc. purposefully availed itself of the privilege of conducting business in California. See also Burger King, 471 U.S. at 475-76 (“where the defendant ‘deliberately’ has engaged in significant activities within a State or has created ‘continuing obligations’ between himself and residents of the forum he manifestly has availed himself of the privilege of conducting business there . . .”) (emphasis added) (citations omitted); Peterson v. Highland Music, Inc., 140 F.3d 1313, 1320 (9th Cir. 1998) (negotiating a contract in California with a California resident satisfies “purposeful availment”).

Again, AT&T, Inc.’s affidavits do not controvert these allegations. Instead, AT&T, Inc. contends that neither Slator nor Cicconi is an employee of AT&T, Inc. However, as already stated, because AT&T, Inc. purportedly instructed and authorized Slator and Cicconi to make promises to plaintiff, their conduct can be imputed to AT&T, Inc.

c. Whether Plaintiff’s Claims “Arise Out of or Relate” to AT&T, Inc.’s Forum-Related Contacts

Under the second prong of the specific personal jurisdiction analysis, the Court must assess whether plaintiff’s claims arise out of or relate to AT&T, Inc.’s forum-related contacts. “[A] lawsuit arises out of a defendant’s contacts with the forum state if a direct nexus exists between those contacts and the cause of action.” In re Western States Wholesale Nat. Gas Antitrust Litig., 715 F.3d 716, 742 (9th Cir. 2013) (citations omitted).
Here, as explained above, AT&T, Inc.’s contacts with California consist of authorizing and instructing Slator and Cicconi to promise plaintiff that, if plaintiff publicly supported AT&T, Inc.’s acquisition of DirecTV, defendants would carry plaintiff’s networks on DirecTV’s platform. In the complaint, plaintiff has asserted several claims against AT&T, Inc. directly predicated on this promise. See also Dole, 303 F.3d at 1114 (claims arose out of forum-related contacts where contacts were an “integral and essential part[]” of the allegations underlying plaintiff’s claims). Accordingly, plaintiff’s claims against AT&T, Inc. “arise out of or relate to” AT&T, Inc.’s forum-related contacts.

d. Whether it Would be Unreasonable to Subject AT&T, Inc. to Personal Jurisdiction in California

Finally, the Court must assess whether it would be reasonable to subject AT&T, Inc. to personal jurisdiction in California. The burden is on defendant to present a “compelling case that the exercise of jurisdiction would not be reasonable.” Menken v. Emm, 503 F.3d. 1050, 1057 (9th Cir. 2007). In evaluating whether the exercise of personal jurisdiction is reasonable, courts consider the following factors: “(1) the extent of the defendant’s purposeful interjection into the forum state, (2) the burden on the defendant in defending in the forum, (3) the extent of the conflict with the sovereignty of the defendant’s state, (4) the forum state’s interest in adjudicating the dispute, (5) the most efficient judicial resolution of the controversy, (6) the importance of the forum to the plaintiff’s interest in convenient and effective relief, and (7) the existence of an alternative forum.” In re Western States, 715 F.3d at 745 (citing Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1088 (9th Cir.2000)) . Here, the Court finds that the majority of these factors weigh in favor of exercising personal jurisdiction over AT&T, Inc.

First, as discussed above, plaintiff has alleged that Slator and Cicconi promised plaintiff that, if it publicly supported AT&T, Inc.’s acquisition of DirecTV, defendant would carry plaintiff’s networks on DirecTV’s platform. Moreover, plaintiff alleges that at least one of these promises was made in California. AT&T, Inc. argues that “it is not reasonable to hale AT&T, Inc. into a California court based on the contacts of individuals employed by other AT&T entities”—i.e., Slator and Cicconi. Mot., at 13. But, plaintiff has alleged that AT&T, Inc.’s officers and directors instructed and ratified Slator and Cicconi’s promises to plaintiff that form the basis for this lawsuit. In light of these
contacts, the Court finds that the “purposeful interjection” factor weighs in favor of exercising jurisdiction. See Panavision Intern., L.P. v. Toeppen, 141 F.3d 1316, 1323 (9th Cir. 1998) (finding “purposeful interjection” factor weighed “strongly in favor of the district court’s exercise of personal jurisdiction” where the defendant knew its conduct would harm plaintiff in California and sent a letter to plaintiff in California.).

Regarding the next two factors, AT&T, Inc. does not explain how it will be burdened by litigating this case in California, nor does it identify any relevant conflict between the laws of California and Delaware and Texas, where AT&T, Inc. is incorporated and headquartered, respectively. Accordingly, these factors weigh in favor of exercising jurisdiction.

California also has an interest in adjudicating this action, which concerns a California corporation and where at least some of the relevant conduct occurred in California. See also Burger King, 471 U.S. at 474 (“A State generally has a ‘manifest interest’ in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.”). In addition, given that plaintiff is headquartered in California and particularly given that defendants concede that jurisdiction is appropriate in California over AT&T Services, it is arguably most efficient to resolve plaintiff’s claims against AT&T, Inc. in this forum as well. Thus, these two factors also weigh in favor of exercising jurisdiction.

Finally, AT&T, Inc. correctly notes that plaintiff could conceivably pursue its claims against AT&T, Inc. in either Delaware or Texas—the jurisdictions where AT&T, Inc. is incorporated and headquartered. Accordingly, this factor weighs against the exercise of jurisdiction. Nonetheless, given that all of the other factors courts consider weigh in favor of exercising jurisdiction, the Court finds that it is not unreasonable to subject AT&T, Inc. to personal jurisdiction in California.

Thus, plaintiff has satisfied all three prongs of the Ninth Circuit’s personal jurisdiction test. The Court, therefore, DENIES AT&T, Inc.’s motion to dismiss for lack of personal jurisdiction.
B. AT&T Service’s Motion to Dismiss for Failure to State a Claim

In the complaint, plaintiff asserts seven claims for relief against defendants: (1) fraud by concealment; (2) intentional misrepresentation; (3) negligent misrepresentation; (4) breach of the implied covenant of good faith and fair dealing; (5) promissory estoppel; (6) breach of oral contract; and (7) breach of implied in fact contract. These claims roughly divide into three legal theories. First, plaintiff contends that defendants fraudulently represented that they intended to grow their U-verse platform when, in reality, they intended to wind-down the platform. Second, plaintiff contends that AT&T Services breached the covenant of good faith and fair dealing implicit in the U-verse Agreement by deliberately shifting customers away from the U-verse platform. And third, plaintiff alleges that defendants entered into an oral agreement—which they subsequently breached—to place plaintiff’s network on DirecTV in exchange for plaintiff’s assistance lobbying the government to approve AT&T’s acquisition of DirecTV. Defendants contend that none of these theories states a viable basis for relief. For the following reasons the Court disagrees.

1. Plaintiff’s Fraud Claims

Plaintiff asserts claims for fraud by concealment (claim one), intentional misrepresentation (claim two), and negligent misrepresentation (claim three). In each of these claims, plaintiff alleges that defendants intentionally or negligently misrepresented that they were committed to and intended to grow their U-verse platform. Nonetheless, plaintiff alleges that defendants true intention was to acquire DirecTV, wind down the U-verse platform, and transition customers to DirecTV’s platform. Plaintiff alleges that, in reliance on defendants’ allegedly false representation that it intended to grow the U-verse platform, it entered into the U-verse Agreement. Defendants now move to dismiss each of plaintiff’s fraud claims. Because these claims raise similar issues the Court addresses them together.

Defendants’ first argue that plaintiff has failed to allege actionable misrepresentations of fact. “It is hornbook law that an actionable misrepresentation must be made about past or existing facts.” Samica Enters., LLC v. Mail Boxes Etc., USA, Inc., 637 F. Supp. 2d 712, 726 (C.D. Cal. 2008) (emphasis added). As such, statements and predictions about future events are generally considered to be mere opinions that are not actionable. See In re West Seal, Inc. Sec. Litig., 518 F. Supp. 2d 1148, 1168 (C.D. Cal. 2008).
Cal. 2007) (“Predictions and forecasts which are not of the type subject to objective verification are rarely actionable.”). Nonetheless, misrepresentations about future events are actionable “if they were intended and accepted as a representations of fact and involved matters peculiarly within the speaker’s knowledge.” Eade v. Reich, 120 Cal. App. 32, 35 (1932).

Here, plaintiff alleges that defendants represented, among other things: (1) that they intended to expand U-verse to additional markets and capture a larger market share in existing markets; (2) that they intended to exceed the market share of their competitor, TWC; and (3) that they had “ambitious expansion plans” for U-verse. Defendants argue that these statements constitute mere opinions or puffery about U-verse’s potential for future growth. Defendants also cite several cases finding that similar statements constituted mere statements of opinion that were not actionable. See, e.g., In re Energy Recovery Inc. Sec. Litig., 2016 WL 324150, at *19 (N.D. Cal. Jan. 27, 2016) (statement such as “projecting excellent results,” “blowout winner product,” and “significant sales gains” are not actionable); In re Wet Seal, 518 F. Supp. 2d at 1168 (statements such as “growth that positions us beautifully,” “measurable progress,” “continuing improvements,” “a sizable lead over our competition,” and “resilience in the face of mounting debt” are not actionable). However, plaintiff does not merely contend that it relied on defendants predictions about U-verse’s potential growth. Rather, implicit in each of these statements was a representation that defendants were, at a minimum, committed to their U-verse platform and intended to take steps to grow U-verse’s market share. Indeed it is unclear how defendants could have expected to exceed their competitor TWC’s market share, a feat that would have apparently required more than doubling U-verse’s subscriber base, if they did not have at least some intention of growing the U-verse platform. In short, while defendants predictions regarding the potential growth of U-verse may not be actionable, to the extent those statements indicated a commitment to growing the U-verse platform and taking steps to expand U-verse’s market share, they may form the basis of an actionable fraud claim. See also Jolley v. Chase Home Fin., LLC, 213 Cal. App. 4th 872, 892 (Cal. Ct. App. 2013) (“well recognized is that there may be liability for an opinion where it is expressed in a manner implying a factual basis which does not exist.”) (citations omitted); Brakke v. Economic Concepts, Inc., 213 Cal. App. th 761, 769 (Cal. Ct. App. 2013) (statements of opinion may be actionable “where a party states his opinion as an existing fact or as implying facts which justify a belief in the truth of the opinion.”).
Second, defendants argue that plaintiff’s have failed to plausibly plead reliance. Specifically, they contend that the U-verse Agreement contained several provisions expressly stating that defendants might acquire a new television distribution platform upon which plaintiff would have no right to air its programming. Defendants point to the Acquired Systems Clause, paragraph 4.B. of the U-verse Agreement, which states that defendants might acquire a new platform and that defendants would have no obligation to carry plaintiff’s networks on such a platform:

For the avoidance of doubt, nothing herein shall obligate AT&T to launch and carry the Services on any System that AT&T acquires during the Term if such System is not already distributing or obligated to distribute the Services.

Smith Decl, Ex. A, “U-verse Agreement” ¶ 4.B. And defendants point to paragraph 3.C. of the U-verse Agreement in which defendants reserved the right to shut down U-verse in whole or in part at any point in the future:

Upon sixty (60)-days advance written notice to Network, AT&T may terminate this Agreement in full if AT&T ceases operation of the System(s) as a whole, or if AT&T discontinues its delivery of video programming in any geographic area(s) being served by the System(s), then AT&T can terminate this Agreement as to such geographic area(s)

Id. ¶ 3.C. However, regardless of what the U-verse Agreement states regarding defendants obligations to carry plaintiff’s network on later-acquired platforms or their ability to terminate the U-verse Agreement, plaintiff still could have relied upon defendants’ representation that they were committed to and intended to grow the U-verse platform. Indeed, plaintiff contends that it agreed to sign an agreement containing disclaimers regarding later-acquired platforms because of defendants representation that they intended to grow the U-verse platform. See, e.g., Compl. ¶ 91 (AT&T made these fraudulent statements with the intent to induce Herring to sign the [U-verse] Agreement with language that excused AT&T from any obligation to carry Herring’s networks on [a platform] that AT&T acquires, such as DirecTV.”). Moreover, given that under the U-verse Agreement plaintiff’s licensing fees were directly tied to U-verse’s subscriber base, it is at least plausible that plaintiff would have relied on defendants’ statements that they
intended to grow U-verse’s market share (i.e., the number of U-verse subscribers).
Lastly, the Court notes that reliance is generally considered to be a question of fact rarely
amenable to resolution at the pleadings stage.  See Alliance Mortg. Co. v. Rothwell, 10
Cal. th 1226, 1239 (1995) (“Except in the rare case where the undisputed facts leave no
room for a reasonable difference of opinion, the question of whether a plaintiff’s reliance
is reasonable is a question of fact.”) (citations omitted).

Third, defendants contend that plaintiff has failed to plead with requisite
particularity that defendants alleged statements were false when made.  To plead a claim
for fraud, a plaintiff “must allege facts sufficient to plausibly establish that the statement
was false when made.”  Muse Brands, LLC v. Gentil, 2015 U.S. Dist. LEXIS 99143, *13
(N.D. Cal. July 28, 2015).  Here, defendants argue that plaintiff has failed to plausibly
allege that when defendants made their purportedly false statements regarding the future
of U-verse in 2014, they knew or should have known that they intended to wind down U-
verse’s business and transition U-verse subscribers to DirecTV’s platform.  Defendants
note that the acquisition of DirecTV was uncertain and required government approval—a
process that ultimately lasted more than one year.  And defendants contend that there is
an obvious alternative explanation for defendants’ alleged misrepresentation; namely,
that defendants “intended to do precisely what [they] said with respect to U-verse in early
2014, but changed [their] minds over a year later once the DirecTV acquisition became a
reality.”  Mot., at 14.

Nonetheless, the Court finds that plaintiff has adequately alleged falsity.  Plaintiff
alleges that in early 2014 and up and until plaintiff signed the U-verse Agreement with
AT&T Services, defendants continued to represent that they intended to grow the U-verse
platform.  Nonetheless, in May 2014, only a month after plaintiff signed the U-verse
Agreement, defendants announced their plan to acquire DirecTV for $65 billion.  As both
parties acknowledge, this was a massive undertaking, involving extensive lobbying
efforts by defendants as well as numerous third parties.  It is simply implausible that this
planned acquisition first arose in the weeks after the U-verse Agreement was finalized.
Rather, based on the allegations in the complaint, it seems far more plausible that,
throughout the period in which the parties were negotiating the U-verse Agreement,
during which time defendants continued to represent that they planned to grow the U-
verse platform, defendants were preparing for and planning to acquire DirecTV.
Moreover, given the magnitude of the DirecTV acquisition and the considerable efforts
purportedly required to make the acquisition a reality, it also seems plausible that
defendants could have formulated a plan to wind down their U-verse platform in order to take advantage of DirecTV’s existing platform in advance of announcing the planned acquisition of DirecTV.

With respect to defendants’ “obvious alternative explanation,” defendants contend that plaintiff has failed to plead facts tending to exclude this explanation. However, plaintiff has alleged that defendants engaged in conduct that was arguably inconsistent with their “alternative explanation.” Specifically, plaintiff’s allegation that defendants took steps to acquire an alternative television distribution platform (DirecTV) is arguably inconsistent with defendants’ contemporaneous statements that they intended to grow their existing platform (U-verse). Indeed, even defendants concede that acquisition of an alternative platform could detrimentally affect their U-verse platform. Reply, at 10 (“It goes without saying that, if AT&T acquired an alternative platform, the acquisition could impede U-verse.”). Thus, by alleging facts that are arguably inconsistent with defendants “alternative explanation,” the Court finds that plaintiff’s have adequately addressed this claimed alternative explanation for purposes of a motion to dismiss. See also Muse Brands, LLC v. Gentil, 2015 WL 4572975, at *4 (N.D. Cal. Jul 29, 2015) (“[T]o plead falseness, the plaintiff must provide an explanation as to why the disputed statement was untrue or misleading when made[,] which may be done by pointing to inconsistent contemporaneous statements or information . . .”) (citation omitted). Lastly, as with reliance, the Court finds that falsity is an issue better decided either on a motion for summary judgment or by the trier of fact at trial. See also Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011) (where there are “two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff’s complaint survives a motion to dismiss under rule 12(b)(6).”).

Fourth, defendants allege that plaintiff has failed to adequately allege that it suffered any harm as a result of defendants’ purportedly false statements. Defendants argue that, at most, plaintiff has alleged that, had it known defendant’s’ true intentions regarding the U-verse platform, it would not have entered into the U-verse Agreement in the first place or, at a minimum, would have insisted on an agreement with better terms, such as an obligation to place plaintiff’s networks on later-acquired platforms. Defendants’ argue that, had plaintiff not entered into the U-verse agreement at all, it would have been in a worse position than it is purportedly in now—having lost out on the subscriber fees that were generated by the U-verse Agreement. And defendants argue that the potential that plaintiff would have been able to negotiate a different agreement...
with better terms is pure speculation that cannot support a claim for damages. However, the issue of what profits plaintiff may have foregone or what losses it may have avoided by not agreeing to the U-verse Agreement is again a question of fact to be decided at a later stage in this litigation. See also Qwest Commc’n v. Herakles, LLC, 2008 WL 3864826, at *6 (E.D. Cal. Aug. 19, 2008) (finding allegations of harm and damages to be proven at trial were sufficient to survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)). And the Court cannot find that it is implausible that had plaintiff known about defendants’ intentions regarding U-verse it would not have been able to negotiate an agreement with different or more favorable terms. Indeed it seems unlikely that, had plaintiff known that defendants intended to wind down their U-verse platform, it would have agreed to an agreement that excused defendants from any obligation to carry plaintiff’s networks on later-acquired platforms. Moreover, defendants fail to acknowledge all of the purported harms identified in the complaint. For example, plaintiff alleges that, in reliance on defendants’ representations, it expended substantial resources strengthening its program offerings on OAN and AWE. Thus, the Court finds that plaintiff has adequately alleged harm.

Finally, defendants argue that plaintiff’s fraud claims are barred by the economic loss rule. Specifically, defendants argue that plaintiff’s fraud claims are based on the same conduct underlying their claim for breach of the implied covenant of good faith and fair dealing and thus impermissibly conflate a claim for fraud with a claim for breach of contract. In short, the economic loss rule states “that no tort cause of action will lie where the breach of duty is nothing more than a violation of a promise which undermines the expectations of the parties to an agreement.” Oracle USA, Inc. v. XL Global Services, Inc., 2009 WL 2084154, at *4 (N.D. Cal. July 13, 2009); see also JMP Securities LLP v. Altair Nanotechnologies, Inc., 880 F. Supp. 2d 1029, 1042 (N.D. Cal. Jul. 23, 2012) (“This rule serves to prevent every breach of a contract from giving rise to tort liability and the threat of punitive damages”).

However, the economic loss rule does not apply where, as here, the defendants’ tortious conduct is separate and apart from the alleged breach of contract. Here, plaintiff has asserted distinct claims for fraud and for breach of the implied covenant of good faith and fair dealing. In the fraud claims, plaintiff alleges that defendants falsely represented that they intended to grow the U-verse platform. In reliance on these representations, plaintiff contends that it agreed to enter into the U-verse Agreement and took efforts to expand its existing networks. By contrast, in plaintiff’s implied covenant claim, it alleges
that, after agreeing to the U-verse Agreement, defendants breached that agreement by failing to make a good faith effort to grow their U-verse platform and, in fact, taking steps to shrink the platform. Thus plaintiff’s fraud claims are based on separate and distinct conduct from their breach of contract claims and the economic loss rule does not apply. See also Silver v. Goldman Sachs Grp., Inc., 2011 WL 1979241, at *5 (C.D. Cal. May 19, 2011) (“a plaintiff can separately allege a claim for negligent misrepresentation stemming from a contract, as courts have held that the claim for negligent misrepresentation is a traditional common law tort claim, and that by alleging this tort, a plaintiff alleges a violation of duties independent of the contract.”) (citations omitted); Rejects Skate Magazine, Inc. v. Acutrack, Inc., 2006 WL 2458759, at*5 (N.D. Cal. Aug. 22, 2006) (finding that claims for negligent and intentional misrepresentation alleged “violations of duties independent of the contract” and therefore the economic loss rule did not apply).

Accordingly, the Court finds that plaintiff’s fraud claims are sufficiently alleged in the complaint and, therefore, DENIES defendants’ motion to dismiss these claims.

2. Plaintiff’s Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing

Plaintiff asserts a claim, solely against AT&T Services, for breach of the implied covenant of good faith and fair dealing. In this claim, plaintiff alleges that AT&T Services breached the covenant of good faith and fair dealing implied in the U-verse Agreement by engaging in conduct to deliberately shift customers away from the U-verse platform thereby undermining its own U-verse platform.

“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc., 2 Cal. 4th 342, 371-72 (1992). The implied covenant imposes on contracting parties the duty to refrain from unfair dealing, whether or not it also constitutes breach of a consensual contract term, . . . that unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party.” Celador Intern. Ltd. v. Walt Disney Co., 347 F. Supp. 2d 846, 852 (C.D. Cal. 2004) (citations omitted).

Here, AT&T Services argues that plaintiff’s implied covenant claim improperly attempts to expand plaintiff’s contractual rights and preclude AT&T Services from
exercising rights it expressly reserved under the U-verse Agreement. In particular, AT&T Services notes that the U-verse Agreement places no obligations on it to maintain a certain number of subscribers or to take efforts to expand U-verse’s subscriber base. AT&T Services also notes that, under the U-verse agreement, AT&T Services reserves the right to shut down the U-verse platform, in whole or in part, at any time. See also Guz v. Bechtel Nat’l, Inc., 24 Cal. 4th 317, 349–50 (2000) (the implied covenant “cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.”).

However, plaintiff does not merely allege that AT&T Services failed to take adequate steps to expand U-verse’s subscriber base or maintain existing subscribers; rather, plaintiff alleges that AT&T Services is deliberately taking steps to reduce the number of U-verse subscribers. See Compl. ¶ 35 (“AT&T is now aggressively soliciting U-verse subscribers to move to DirecTV.”). For example, plaintiff contends that “using AT&T’s logo, DirecTV sent U-verse TV customers a solicitation offering money to move to DirecTV.” Id. And plaintiff asserts that “AT&T has told U-verse subscribers that the networks or channels they have on U-verse will be available on DirecTV”—despite the fact that plaintiff’s networks are not on DirecTV. Id. While this conduct may not be expressly forbidden by the terms of the U-verse Agreement, the implied covenant exists to “supplement[ ] the express contractual terms ‘to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party’s rights to the benefits of the contract.’ ” Americanwest Bank v. Banc of California, 2014 WL 1347166, at *6 (C.D. Cal. Apr. 4, 2014) (citing Racine & Laramie, Ltd. v. Dep't of Parks & Recreation, 11 Cal. App. 4th 1026, 1031–32 (Cal. Ct. App. 1992)). Per the U-verse Agreement, plaintiff’s right to compensation is based entirely on the number of U-verse subscribers. See Compl. ¶¶ 26, 108. Thus, by taking steps to reduce the total number of U-verse subscribers—including by actively soliciting existing subscribers to move to a different platform—AT&T Services is frustrating plaintiff’s rights to its per-subscriber license fees. Accordingly, the Court finds that plaintiff has adequately stated a claim for breach of the implied covenant of good faith and fair dealing. See also Fortaleza v. PNC Fin. Servs. Grp., Inc., 642 F. Supp. 2d 1012, 1021–22 (N.D. Cal. 2009) (in order to plead breach of the implied covenant, “a plaintiff must establish the existence of a contractual obligation, along with
conduct that frustrates the other party’s rights to benefit from the contract.”). The Court, therefore, DENIES AT&T Services’ motion to dismiss this claim.

3. Plaintiff’s Lobbying Claims

Plaintiff asserts three claims against defendants predicated on defendants’ alleged promise that, if plaintiff publicly supported AT&T, Inc.’s acquisition of DirecTV, defendants would carry plaintiff’s networks on DirecTV’s platform (“the DirecTV Promise”). In particular, plaintiff asserts claims against defendants for: (1) promissory estoppel (claim five); (2) breach of oral contract (claim six); and (3) breach of implied in

5 AT&T Services also contends that plaintiff’s implied covenant claim violates the parol evidence rule. The parol evidence rule bars a plaintiff from using extrinsic evidence “to alter or add to the terms of [a fully integrated] writing.” Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass’n, 55 Cal. 4th 1169, 1174 (2013) (citing Cal. Code Civ. Proc. § 1856; Cal. Civ. Code § 1625); see also Masterson v. Sine, 68 Cal. 2d 222, 225 (1968) (“When the parties to a written contract have agreed to it as an ‘integration’—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms.”) (citations omitted). However, the parol evidence rule is inapplicable here. Plaintiff does not seek to add additional terms or alter the existing terms of the U-verse Agreement through its implied covenant claim; rather, the implied covenant is already implied into the U-verse Agreement as a matter of California law. See also Amloc Companies, Inc. v. Cypress Abbey Co., 2006 WL 1462908, at *7 (Cal. Ct. App. 2006) (unpublished) (parol evidence rule inapplicable where evidence was “not used to supplement or vary the terms of the [agreements].”). Moreover, the fact that the implied covenant may impose obligations on parties that are not expressly stated in their agreement does not change this analysis. Courts recognize that that implied covenant imposes on contracting parties an obligation to refrain from conduct which, while not expressly prohibited by the terms of a contract, nonetheless frustrates the other parties’ bargained for expectations. See, e.g., Americanwest Bank, 2014 WL 1347166, at *6. This argument is, therefore, unavailing.
fact contract (claim seven). Defendants contend that all three of these claims fail to state a claim upon which relief can be granted.

First, defendants argue that the Lobbying Claims are barred by a provision in the U-verse Agreement which states that the agreement “may only be amended or modified by a written agreement of both Parties.” Dkt. 17, Smith Decl, Ex. A, “U-verse Agreement”, at 36 ¶ P. Defendants contend that the Lobbying Claims attempt to modify the U-verse Agreement, which expressly states that defendants have no obligation to carry plaintiff’s networks on later acquired platforms, such as DirecTV. Defendants’ further contend that, because the DirecTV Promise was, if anything, an oral agreement, it violates the provision of the U-verse Agreement requiring that all amendments or modification be in writing. This argument mischaracterizes plaintiff’s allegations. Plaintiff does not contend that, in making the DirecTV Promise, defendants were proposing a modification of plaintiff’s existing agreement. Rather, plaintiff is alleging that defendants were proposing a new agreement, distinct from the U-verse Agreement. See also Performance Plastering v. Richmond Am. Homes of Cal., Inc., 153 Cal. App. 4th 659, 671 (Cal. Ct. App. 2007) (contractual provision requiring that modifications be in writing was inapplicable where oral agreement was not a modification, but rather a separate contract); Bing Ting Ren v. Wells Fargo Bank, N.A., 2013 WL 2468368, at *4 (N.D. Cal. Jun. 7, 2013) (oral promise separate from any contractual provision was not a modification to written contract). As such, the provision of the U-verse Agreement defendants rely upon is inapplicable.

6 For simplicity and because these claims raise similar issues, the Court refers to these claims collectively as plaintiff’s “Lobbying Claims.”

7 Defendants argue that plaintiff’s are improperly characterizing the DirecTV Promise as a “new” contract when in reality it is nothing more than an attempted oral modification of the U-verse Agreement. However, plaintiffs have alleged that their new DirecTV contract contained materially distinct terms from the U-verse Agreement. For example, while as plaintiff received $0.18 per subscriber under the U-verse Agreement, it allegedly would have received $0.12 per subscriber under a DirecTV contract. See Compl. ¶ 118. Moreover, given that the U-verse Agreement expressly excused defendants from any obligation to carry plaintiff’s networks on later acquired platforms, such as DirecTV, it arguably makes sense that the parties would need to form a new
Second, defendants argue that, to the extent any agreement was formed by the DirecTV Promise, it is barred by California’s statute of frauds. California Civil Code section 1624(a)(1) provides that “[a]n agreement that by its terms is not to be performed within a year from the making thereof” is invalid unless made in writing. Cal. Civ. Code § 1624(a)(1). Here, plaintiff alleges that, pursuant to the DirecTV Promise, defendants agreed that “DirecTV would carry both of Herring’s networks, OAN and AWE . . . [for] a customary five-year term.” Compl. ¶ 81. Thus, the statute of frauds applies to this agreement because, by its terms, it would require five years to complete. Nonetheless, Courts have recognized several exceptions to the statute of frauds. And, as relevant here, one of those exceptions applies when a party has rendered full performance under an oral agreement. See, e.g., Corvello v. Wells Fargo Bank, NA, 728 F.3d 878, 885 (9th Cir. 2013) (“Wells Fargo separately contends that the Lucias’ breach of contract claim cannot survive the statute of frauds because it is an oral agreement to modify a mortgage. The Lucias, however, have alleged full performance of their obligations under the contract. They therefore may enforce the remaining promises.”); Griffin v. Green Tree Servicing, LLC, 2015 WL 10059081, at *8 (C.D. Cal. Oct. 1, 2015) (“Under California law, full performance by the party seeking enforcement of an oral contract removes the contract from the statute of frauds.”) (Morrow, J.). Here, plaintiff alleges that it fully performed its obligations under its agreement with defendants. Specifically, plaintiff alleges that it lobbied the FCC, the DOJ, and members of Congress, that it solicited other independent programmers to support the acquisition of DirecTV, and that it filed briefs in support of the acquisition, amongst many other activities. Plaintiff further alleges that it reported to one of AT&T Services’ executives, James Cicconi, who gave plaintiff instructions on how it should support the acquisition, and plaintiff alleges that, ultimately, AT&T, Inc.’s acquisition of DirecTV was approved by the requisite regulatory bodies. Accordingly, under the terms of the parties’ agreement, as alleged in the complaint, plaintiff has fulfilled its side of the bargain and thus the statute of fraud does not prevent plaintiff from enforcing the DirecTV Promise.8 Finally, defendants allege that plaintiff has failed to agreement providing carriage on DirecTV’s platform. Accordingly, the Court finds that plaintiff has plausibly alleged that the parties intended the DirecTV Promise as a distinct contract from the U-verse Agreement.

8 Defendants contend that plaintiff has not fully performed under the parties purported agreement. Specifically, defendants contend that, in order to fully perform...
adequately allege a clear and enforceable promise. Under each of the Lobbying Claims, plaintiff must allege the existence of a promise that is clear and unambiguous in its terms. See, e.g., US Ecology, Inc. v. State, 129 Cal. App. 4th 887, 901 (Cal. Ct. App. 2005) (elements of a promissory estoppel claim include “a promise clear and unambiguous in its terms”); Weddington Prods., Inc. v. Flick, 60 Cal. App. 4th 793, 811(1998) (“In order for acceptance of a proposal to result in the formation of a contract, the proposal must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.”). Defendants contend that plaintiff has failed to allege the existence of a promise with the requisite specificity. The Court disagrees. In the complaint, plaintiff alleges that defendants “made a clear and unambiguous promise to Herring” that:

if Herring used its status as an owner of two independent cable television networks to lobby in support of AT&T’s acquisition of DirecTV, AT&T would provide Herring’s networks with carriage on DirecTV post-Acquisition. AT&T promised that Herring would receive $20 to $25 million per year, i.e., $0.12 per subscriber for 85% of DirecTV’s subscribers, in licensing fees from DirecTV, including a five year term, as with Herring’s existing [U-verse] Agreement with AT&T.

plaintiff was required to tender its channels to defendants for carriage on DirecTV. However, as alleged in the complaint, the parties’ agreement did not require plaintiff to tender its channels to defendants in order for defendants to become obligated to carry those channels on DirecTV. Rather, plaintiff alleges that, pursuant to the DirecTV Promise, plaintiff agreed that in exchange for lobbying on defendants’ behalf defendants would carry plaintiff’s channels on DirecTV. Here, plaintiff alleges that it fully performed its lobbying obligations under the DirecTV Promise. Moreover, even assuming that plaintiff was required to tender its channels to defendants, there is no indication that plaintiff did not attempt to tender those channels—indeed, plaintiff alleges that it desired to place its channels on DirecTV and only engaged in the lobbying efforts alleged in the complaint so that it could place those channels on DirecTV. And, in any event, defendants arguably frustrated plaintiff’s ability to tender its channels by allegedly reneging on the DirecTV Promise and refusing to carry plaintiff’s networks. Accordingly, this argument is unavailing.
Compl. 112. Thus, plaintiff has alleged the existence of a promise that clearly sets forth plaintiff’s own obligations (to support AT&T’s acquisition of DirecTV), the obligations of defendants (to provide plaintiff’s networks with carriage on DirecTV), the time for defendants’ performance (post-acquisition of DirecTV), the method by which plaintiff would be compensated ($0.12 per subscriber for 85% of DirecTV’s subscribers), and the length of the agreement (five years). This is more than sufficient at the pleading stage. See Alvarado v. Aurora Loan Servs. LLC, 2012 WL 4475330, at *3 (C.D. Cal. Sep. 20, 2012) (“[A] plaintiff can successfully plead a breach of contract claim by alleging the substance of its relevant terms.”); see also 1 Witkin, Summary of Cal. Law, Contracts, § 137 (2005 10th ed.) (“The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.”) (quoting Rest. 2d Contracts, § 33).

Accordingly, the Court finds that plaintiff has adequately pleaded its Lobbying Claims and DENIES defendants motion to dismiss these claims.

V. CONCLUSION

In accordance with the foregoing, the Court DENIES AT&T, Inc.’s motion to dismiss for lack of personal jurisdiction and DENIES AT&T Services motion to dismiss for failure to state a claim upon which relief can be granted.

IT IS SO ORDERED
United States District Court,
S.D. California.

KINGRAY, INC. d/b/a the Beer Hunter, a California corporation, et al., Plaintiffs,
v.
NATIONAL BASKETBALL ASSOCIATION, INC. et al., Defendants.

No. CIV. 00CV1545–L.

Purchasers of satellite broadcast of bundled package of professional basketball games brought antitrust action against National Basketball Association (NBA) and satellite and pay-per-view television providers, in connection with contract between NBA and providers that gave them exclusive rights to broadcast out-of-market games. NBA and distributors filed motions to dismiss. The District Court, Lorenz, J., held that: (1) evidence was insufficient to support price fixing claim; (2) evidence was insufficient to support claim for restriction of output; (3) purchasers waived tying arrangement claim; (4) purchasers did not have standing to bring antitrust action for damages against NBA; and (5) purchasers did not have standing to seek injunctive relief.

Motions granted.

West Headnotes

[1] Antitrust and Trade Regulation 29T §972(6)

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk972 Pleading
29Tk972(2) Complaint
29Tk972(3) k. In General. Most Cited Cases
(Formerly 265k28(6.2))

Essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to defeat a motion to dismiss; and if the alleged facts do not at least outline or adumbrate a violation of the Sherman Act, the plaintiffs will get nowhere merely by dressing them up in the language of antitrust. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[2] Antitrust and Trade Regulation 29T §972(3)

A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws; conclusory allegations that the defendant violated those laws are insufficient. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[3] Antitrust and Trade Regulation 29T §972(3)

Generally, courts are hesitant to dismiss antitrust actions before the parties have had an opportunity for discovery, because the proof of illegal conduct lies largely in the hands of the alleged antitrust conspirators.

[4] Antitrust and Trade Regulation 29T §980
Whether specific conduct is anticompetitive for purposes of antitrust liability is a question of law.

[5] Antitrust and Trade Regulation 29T 537

A plaintiff alleging existence of a conspiracy or agreement that unreasonably restrained trade must prove an agreement between two or more persons to restrain trade, because unilateral conduct is not illegal under Sherman Act. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[6] Antitrust and Trade Regulation 29T 535

Not every agreement that restrains competition violates the Sherman Act; rather, to be unlawful, the agreement must unreasonably restrain competition. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[7] Antitrust and Trade Regulation 29T 534

The per se rule used to determine if an agreement is an unreasonable restraint of trade in violation of the Sherman Act applies only where the practice at issue facially appears to be one that would always or almost always tend to restrict competition and decrease output. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.
“Per se violations” of Sherman Act’s conspiracy in restraint of trade provision are naked restraints of trade with no purpose except stifling of competition, and have been characterized as so plainly anti-competitive and lacking any redeeming virtue that they are presumed illegal under Sherman Act. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Some practices, such as horizontal price-fixing, are subject to a per se analysis under Sherman Act’s conspiracy in restraint of trade provision. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Agreements that are not presumed unreasonable under the per se category are analyzed under the “rule of reason” test to determine if they violated Sherman Act’s conspiracy in restraint of trade provision. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Under a rule of reason antitrust analysis, the plaintiff must show: (1) an agreement or conspiracy among two or more persons or distinct business enti-
ties; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually restrains competition.

**[14] Antitrust and Trade Regulation 29T C=823**

29T Antitrust and Trade Regulation  
29TX Antitrust and Prices  
29TX(C) Resale Price Maintenance  
29Tk823 k. In General. Most Cited Cases  
(Formerly 265k17(1.12))


**[15] Antitrust and Trade Regulation 29T C=824**

29T Antitrust and Trade Regulation  
29TX Antitrust and Prices  
29TX(C) Resale Price Maintenance  
29Tk824 k. Per Se Illegality. Most Cited Cases  
(Formerly 265k17(1.12))

A vertical price fixing scheme setting minimum prices is generally subject to per se analysis under Sherman Act's conspiracy in restraint of trade provision. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

**[16] Antitrust and Trade Regulation 29T C=823**

29T Antitrust and Trade Regulation  
29TX Antitrust and Prices  
29TX(C) Resale Price Maintenance  
29Tk823 k. In General. Most Cited Cases  
(Formerly 265k17(1.12))

Vertical price fixing in violation of Sherman Act's conspiracy in restraint of trade provision is not present when the supplier only dictates the wholesale price. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

**[17] Antitrust and Trade Regulation 29T C=563**

29T Antitrust and Trade Regulation  
29TV1 Antitrust Regulation in General  
29TV1(D) Illegal Restraints or Other Misconduct  
29Tk562 Refusals to Deal  
29Tk563 k. In General. Most Cited Cases  
(Formerly 265k17(2.2))

Sherman Act does not preclude a party from unilaterally determining the parties with whom it will deal and the terms on which it will transact business. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

**[18] Antitrust and Trade Regulation 29T C=972(3)**

29T Antitrust and Trade Regulation  
29TXVII Antitrust Actions, Proceedings, and Enforcement  
29TXVII(B) Actions  
29Tk972 Pleading  
29Tk972(2) Complaint  
29Tk972(3) k. In General. Most Cited Cases  
(Formerly 265k28(6.2))

Purchasers of National Basketball Association (NBA) “league pass” that allowed them to view package of game broadcasts from satellite television and pay-per-view providers failed to state claim for vertical price fixing under Sherman Act against NBA and satellite television broadcaster, where contract between NBA and broadcaster that gave broadcaster exclusive right to broadcast out-of-market games in return for paying NBA a set percentage price as royalty also gave broadcaster discretion to set its own prices, and purchasers failed to allege a separate conspiracy or contract pursuant to which defendants agreed to fix prices. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

**[19] Antitrust and Trade Regulation 29T C=882**

29T Antitrust and Trade Regulation  
29TX Antitrust and Prices  
29TX(G) Particular Industries or Businesses  
29Tk882 k. Manufacturers. Most Cited Cases  
(Formerly 265k17(1.12))

A contract giving a distributor discretion to set the
price for product but requiring the distributor to pay the manufacturer a set percentage or minimum price as a royalty does not constitute price fixing. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[20] Antitrust and Trade Regulation 29T 972(3)

Antitrust and Trade Regulation 29T Antitrust Actions, Proceedings, and Enforcement 29TXVII Actions 29Tk972 Pleading 29Tk972(2) Complaint 29Tk972(3) k. In General. Most Cited Cases
(Formerly 265k28(6.2))

Purchaser of National Basketball Association (NBA) “league pass” that allowed them to view package of game broadcasts from satellite television and pay-per-view providers failed to state claim for restriction of output under Sherman Act against NBA and providers, in connection with “black out” of rebroadcast of certain NBA games to maintain “protected territories” of certain NBA teams; black-out provisions only blacked-out games that were televised by league's national over-the-air broadcast network or by its national cable carriers, did not restrict output, but only affected what channel game was available on, and output of out of market regular season games increased by virtue of package. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[21] Antitrust and Trade Regulation 29T 979

Antitrust and Trade Regulation 29T Antitrust Actions, Proceedings, and Enforcement 29TXVII Actions 29Tk972 Pleading 29Tk972(2) Complaint 29Tk972(3) k. In General. Most Cited Cases
(Formerly 265k28(6.2))

Purchasers of National Basketball Association (NBA) “league pass” that allowed them to view package of game broadcasts from satellite television and pay-per-view providers failed to state exclusive distributorship claim under Sherman Act against NBA and satellite television broadcaster; purchasers' allegation that broadcaster “devoured” the only other distributor under NBA contract to become sole distributor was insufficient to support their contention that broadcaster's agreement with NBA was anti-competitive, since NBA could agree to exclusive distributorship without implicating Sherman Act. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[22] Antitrust and Trade Regulation 29T 992

Antitrust and Trade Regulation 29T Antitrust Regulation in General 29TVI Particular Industries or Businesses 29Tk592 k. Manufacturers. Most Cited Cases
(Formerly 265k17(2.3))

Agreement between a manufacturer and a distributor to establish an exclusive distributorship is not, standing alone, a violation of antitrust laws, and in most circumstances does not adversely affect competition in the market; for an antitrust violation to occur, the exclusive agreement must intend to or actually harm competition in the relevant market. Sherman

[24] Antitrust and Trade Regulation 29T 592

29TVVI Antitrust Regulation in General
29TVI(E) Particular Industries or Businesses
29Tk592 k. Manufacturers. Most Cited Cases
(Formerly 265k17(2.3))

A manufacturer can terminate distributors and agree to an exclusive distributorship without implicating Sherman Act, and such termination does not create an inference that harm to competition was intended. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[25] Antitrust and Trade Regulation 29T 564

29TVVI Antitrust Regulation in General
29TVI(D) Illegal Restraints or Other Misconduct
29Tk562 Refusals to Deal
29Tk564 k. Exclusive Dealing Arrangements/Agreements/Distributorships. Most Cited Cases
(Formerly 265k17(2.3))


[26] Antitrust and Trade Regulation 29T 967

29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties
29Tk960 k. In General. Most Cited Cases
(Formerly 265k28(1.6))

In determining whether a plaintiff has antitrust standing to bring private cause of action under Clayton Act, courts must evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. Clayton Act, § 4(a), 15 U.S.C.A. § 15(a).

[27] Antitrust and Trade Regulation 29T 960

29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties
29Tk960 k. In General. Most Cited Cases
(Formerly 265k28(1.6))

Rule that remote or indirect purchaser lacks standing to seek damages against the manufacturer for alleged violations of federal antitrust laws serves to avoid the complications of apportioning overcharges between direct and indirect purchasers and to eliminate multiple recoveries, and ensures antitrust laws are enforced by those purchasers who have been most

[29] Antitrust and Trade Regulation 29T 967

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties
29Tk967 k. Indirect Purchasers. Most Cited Cases
(Formerly 265k28(1.6))

Co-conspirator exception to rule that remote or indirect purchaser lacks standing to seek damages against the manufacturer for alleged violations of federal antitrust laws, states that the bar against indirect purchasers is inapplicable to claims against remote sellers when the plaintiffs allege that the sellers conspired with intermediaries in the distribution chain to fix the price at which the plaintiffs purchased. Clayton Act, § 4(a), 15 U.S.C.A. § 15(a).

[30] Antitrust and Trade Regulation 29T 967

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties
29Tk967 k. Indirect Purchasers. Most Cited Cases
(Formerly 265k28(1.6))

Co-conspirator exception to rule that remote or indirect purchaser lacks standing to seek damages against the manufacturer for alleged violations of federal antitrust laws did not apply to provide standing to purchasers of NBA “league pass” from satellite television and pay-per-view providers to bring antitrust action against National Basketball Association (NBA); purchasers’ allegations that distributors and NBA conspired to provide league pass to cable subscribers at artificially inflated and fixed levels were conclusory, and distributors could not have engaged in conspiracy with NBA, since NBA and distributors were engaged in different lines of business, and were not competitors. Clayton Act, § 4(a), 15 U.S.C.A. § 15(a).

[31] Antitrust and Trade Regulation 29T 967

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties
29Tk967 k. Indirect Purchasers. Most Cited Cases
(Formerly 265k28(1.6))

Any exception to the rule that remote or indirect purchaser lacks standing to seek damages against the manufacturer for alleged violations of federal antitrust laws is to be construed narrowly. Clayton Act, § 4(a), 15 U.S.C.A. § 15(a).

[32] Antitrust and Trade Regulation 29T 822

29T Antitrust and Trade Regulation
29TX Antitrust and Prices
29TX(B) Price Fixing in General
29Tk822 k. Horizontal Arrangements. Most Cited Cases
(Formerly 265k17(1.12))

“Horizontal price fixing” occurs when competitors agree to set prices and thereby interfere with free market forces. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[33] Antitrust and Trade Regulation 29T 960

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties
29Tk960 k. In General. Most Cited Cases
(Formerly 265k28(1.6))

To meet standing requirements to seek injunctive relief under Clayton Act, plaintiff must generally meet all the requirements that apply to the damages plain-
tiff, except that the injury itself need only be threatened, damage need not be quantified, and occasionally a party too remote for damages might be granted an injunction; however, a plaintiff must still demonstrate that injunctive relief is necessary to prevent injury to its interests rather than those of others. Clayton Act, § 16, 15 U.S.C.A. § 26.

[(34) Antitrust and Trade Regulation 29T]©965

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk959 Right of Action; Persons Entitled to Sue; Standing; Parties
29Tk965 k. Consumers. Most Cited Cases
(Formerly 265k28(1.6))

Purchasers of “league pass” that allowed them to view package of professional basketball game broadcasts from satellite television and pay-per-view providers did not have standing to bring private antitrust action against National Basketball Association (NBA) for injunctive relief, under Clayton Act; although purchasers argued that they were injured by price of “league pass,” distributors, and not NBA set prices, and purchasers’ claims that they were injured by inability to select packages of games other than league pass was waived after they stated that they were not alleging tying arrangement. Clayton Act, § 16, 15 U.S.C.A. § 26.


ORDER RE: (1) DIRECTV, INC.’S MOTION TO DISMISS; AND (2) NBA DEFENDANTS’ MOTION TO DISMISS

LORENZ, District Judge.

This matter comes before the Court on Defendants’ motions to dismiss the First Amended Complaint. The Court finds these motions suitable for determination without oral argument pursuant to Civil Local Rule 7.1(d)(1).

FACTUAL BACKGROUND

Plaintiffs, individuals and commercial establishments, have filed this lawsuit on behalf of commercial and residential purchasers of the “NBA League Pass,” the broadcast of a bundled package of NBA basketball games. (First Amended Complaint (“FAC”) ¶¶ 1, 55.) Plaintiffs purchased this subscription through DirecTV, a provider of satellite television programming. (FAC ¶¶ 21, 33.) Plaintiffs allege the NBA League Pass violates federal and state antitrust laws and California’s Unfair Competition Act. Defendants are the National Basketball Association, Inc. (“NBA”), NBA Properties, Inc. (“NBA Properties”), DirecTV, and several professional basketball organizations. (FAC ¶¶ 10–16.) NBA, NBA Properties, and NBA Teams are hereinafter collectively referred to as “NBA Defendants.”

professional sports leagues successfully lobbied for an exemption from the SBA, which carves out an exception for a clearly delineated class of such agreements. Id. Under the SBA, the antitrust laws “shall not apply to any joint agreement [concerning] organized professional team sports of football, baseball, basketball, or hockey ... in the sponsored telecasting of the games of football, baseball, basketball, or hockey.” (FAC ¶ 43 (quoting 15 U.S.C. § 1291) (emphasis in original)). “Sponsored telecasting” under the SBA pertains only to network broadcast television and does not apply to non-exempt channels of distribution such as cable television, pay-per-view, and satellite television networks. Id.

The NBA is currently comprised of 29 independently owned and operated professional basketball teams that have joined the NBA to compete in its professional basketball league. (FAC ¶ 48.) Each of the 29 NBA Teams is franchised by the NBA and is an independent business entity. FN1 (FAC ¶¶ 49–50.) Each NBA team competes with one another for, inter alia, the acquisition of players, coaches, and management personnel. (FAC ¶ 50.) Each NBA team derives separate revenues from local television and radio, parking, concessions, and box seating. Id. The NBA Teams do not share their expenses, profits, or losses. Id.

FN1 In addition to the NBA team Defendants, the NBA franchise teams operate under the following names: Boston Celtics, Miami Heat, New Jersey Nets, Orlando Magic, Philadelphia 76ers, Washington Wizards, Atlanta Hawks, Charlotte Hornets, Cleveland Cavaliers, Detroit Pistons, Indiana Pacers, Milwaukee Bucks, Toronto Raptors, Dallas Mavericks, Denver Nuggets, Houston Rockets, Minnesota Timberwolves, San Antonio Spurs, Vancouver Grizzlies, Golden State Warriors, Phoenix Suns, and Seattle SuperSonics. (FAC ¶ 49.)

The NBA Teams have authorized the NBA, through its Board of Governors and Commissioner, and/or NBA Properties, to contract on their behalf for the live video telecasting of certain regular season and post-season games. (FAC ¶ 51.) Each NBA team has agreed with the other NBA teams and/or with the NBA not to compete in the sale of rights for the live video telecasting of regular season games. (FAC ¶ 52.) The NBA Teams have, pursuant to the SBA, jointly agreed to sell the rights to selected regular season games to the NBA to sell to television networks for over-the-air sponsored (free) broadcasting. (FAC ¶ 53.) The NBA Teams have also jointly agreed to sell rights to other selected regular season games to the TNT or TBS stations for non-sponsored (pay) national cable broadcasting. Id. By agreement, each of these regular season games can be broadcast only within each team’s protected geographical territory (“in-market games”). (FAC ¶ 54.) With few specified exceptions, the agreement(s) among the NBA and the NBA Teams forbid the broadcast of any NBA game in any geographic market except those licensed by the NBA Team in that geographic market (“out-of-market games”). Id.

Beginning in the 1994–95 NBA season, the NBA Defendants agreed to sell jointly their broadcast rights at what Plaintiffs contend is artificially inflated prices. *1184 (FAC ¶ 53.) Plaintiffs allege the NBA Defendants conspired with DirecTV for the broadcast of a bundled package of NBA out-of-market basketball games, agreeing to restrict output of those games according to geographical market, price, and quantity. (FAC ¶ 55.) Pursuant to this combination, conspiracy, and/or contract, the Defendants made available for purchase at a fixed price, a package to residential and commercial satellite dish owners, using a DirecTV-compatible C-band or Ku-band DSS satellite dish antenna broadcasts, of up to 40 out-of-market regular season NBA games per week and more than 1000 regular season games per year. (FAC ¶ 56.) This package is called the “NBA League Pass.” Id. Such satellite users may not opt to purchase these out-of-market games individually, but are required to buy the entire package. Id.

The Defendants have agreed that the NBA League Pass is the exclusive means by which out-of-market games may be licensed for satellite viewing by individual consumers and/or commercial establishments. (FAC ¶ 57.) The Defendants have further agreed that these games will not be distributed via sponsored telecasts. Id.

Defendants have agreed to “black out” the re-broadcast of certain NBA games to maintain “protected territories” of certain NBA Teams. (FAC ¶ 58.) Specifically as to the NBA League Pass, the Defendants have also agreed to black out games publicly advertised as included in the NBA League Pass even when those games are outside of the “protected terri-
As of 1998, satellite users must purchase the NBA League Pass through DirecTV. (FAC ¶ 61.) No other satellite provider is authorized to provide the NBA League Pass games. *Id.* On April 22, 1998, DirecTV and the NBA executed a renewal contract for the distribution of the NBA League Pass. (FAC ¶ 62.) That contract stated that DirecTV’s rights were “non-exclusive.” *Id.* It further provided that only two distribution licenses would be issued, one to DirecTV and one to PrimeStar, and that if DirecTV “became aware” of the termination of PrimeStar’s license, it would have the right to become the exclusive distributor of the NBA League Pass. *Id.* Less than one week later, DirecTV acquired PrimeStar and exercised its contractual option to become the exclusive distributor of the NBA League Pass. *Id.* On August 4, 1999, DirecTV and the NBA executed an amended distribution contract confirming that DirecTV was the exclusive distributor of the NBA League Pass. (FAC ¶ 63.) According to Plaintiffs, one DirecTV competitor, Echostar, offers high power direct broadcast satellite service but is barred from distributing the NBA League Pass. (FAC ¶ 64.)

Beginning in 2000, the NBA contracted with iN Demand to provide the NBA League Pass to residential cable subscribers on a pay-per-view basis. *FN2* (FAC ¶ 66.) “Pay-per-view” programming allows cable subscribers to watch certain events on television for a cost additional to their existing cable rates. *Id.* iN *1185* Demand provides “pay-per-view” programming to cable companies and their subscribers nationwide. *Id.* Cable subscribers must order the NBA League Pass through iN Demand although their payments may be processed through the local cable providers and their service is routed through their local cable companies. *Id.*

**FN2.** The Court notes that the FAC alleges “Defendant iN Demand” in its factual background section. (see FAC ¶ 66), but does not list iN Demand as a Defendant in the section listing the Defendants to this action. (See FAC ¶¶ 8–20.) Insofar as the FAC purports to add iN Demand as a Defendant, its efforts are not well taken. By order dated June 18, 2001, this Court allowed Plaintiffs leave to amend their complaint, but specifically stated that they could not add iN Demand as a Defendant because they had unequivocally asserted in their briefs that they were not seeking to add new defendants, but only new plaintiffs. (June 18, 2001, Order at 26 n. 5, 30–31.)

Plaintiffs allege the agreement to restrain the sale of rights to any NBA game outside of the team's assigned geographic territory except through the “NBA League Pass” is not reasonably necessary to achieve any legitimate business objective. (FAC ¶ 59.) According to Plaintiffs, the system of exclusive geographic territories is not necessary to preserve the viability of any individual NBA Team in attracting fans to live games, but only serves to artificially increase prices and reduce output. *Id.* Plaintiffs further contend that the system of exclusive territories is not necessary to preserve the quality and attractiveness of NBA games by promoting competitive balance among NBA teams as this concern could be addressed, as it is in Major League Baseball, by a system of revenue-sharing. *Id.* According to Plaintiffs, the continuing agreement and conspiracy among the Defendants was to fix, raise, stabilize, and maintain prices for the rights to, and to restrict the output of, video broadcasts of out-of-market NBA games. (FAC ¶ 60.)

**PROCEDURAL BACKGROUND**

Plaintiffs Garrett Crayton (“Crayton”) and Jill Miller (“Miller”) have filed this action on their individual behalf and on behalf of all persons who purchased the residential service package of the NBA League Pass from DirecTV in a jurisdiction subject to the laws of the United States. (FAC ¶¶ 6, 21.) Crayton and Miller also bring this action on their individual behalf and on behalf of all persons who purchased the residential service package of the NBA League Pass from DirecTV in a jurisdiction subject to the laws of California. (FAC ¶ 22.) Plaintiff Gregory Cuff (“Cuff”) brings this action on his individual behalf and on behalf of all persons and entities who have purchased the residential service package of the NBA League Pass from a cable television service provider in a jurisdiction subject to the laws of the United States. (FAC ¶¶ 7, 27.) Cuff also brings this action on his individual behalf and on behalf of all other persons and entities who have purchased the residential service package of the NBA League Pass from a cable television service provider in a jurisdiction subject to the laws of the States of California. (FAC ¶ 28.)

Plaintiffs Danray, Inc. d/b/a The Beer Hunter, Rayban, Inc., d/b/a The Beer Hunter, and Bobray Restaurants, Inc. d/b/a The Beer Hunter (collectively referred to as “The Beer Hunters”) bring this action on their individual behalf and on behalf of all persons and entities who have purchased the commercial package of the NBA League Pass from DirecTV in a jurisdiction subject to the laws of the United States. (FAC ¶¶ 3–5, 32.) The Beer Hunters also bring this action on their individual behalf and on behalf of all persons and entities who purchased the commercial package of the NBA League Pass from DirecTV in a jurisdiction subject to the laws of California. (FAC ¶ 33.)

Plaintiffs allege that beginning in 1994 and to the present, Defendants have engaged in a continuing contract, combination, and conspiracy that unreasonably restrains trade and commerce in violation of Section 1 of the Sherman Act. Plaintiffs also allege that Defendants have violated California's Cartwright Act and California's Unfair Competition Act.

FN3. Unless otherwise noted, all future citations to “Section” reference the Sherman Act.

*1186 DirecTV challenged the initial complaint with a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) or in the alternative, motion to compel arbitration. While these motions were under submission with the Court, Plaintiffs filed a motion to amend the Complaint. By order dated June 18, 2001, this Court granted in part and denied in part DirecTV's motion to dismiss, denied DirecTV's motion to compel arbitration, and granted Plaintiffs leave to amend the complaint. Plaintiffs subsequently filed the FAC that is the subject of the instant motions to dismiss.


DISCUSSION

I. Applicable Law.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir.2001). Dismissal of a claim under this Rule is appropriate only where “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Navarro, 250 F.3d at 732. Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir.1984); see Neitzke v. Williams, 490 U.S. 319, 326, 109 S.Ct. 1452, 14 F.3d 449, 453–54 (9th Cir.1993); 250 F.3d at 732 (9th Cir.2001); 146 F.3d 699, 705–06 (9th Cir.1998); 803 F.2d 336, 337–38 (9th Cir.1996). Nevertheless, the legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir.1987); Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir.1981). When ruling on a motion to dismiss, the court may consider the facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the Court takes judicial notice. Parrino v. FHP, Inc., 146 F.3d 699, 705–06 (9th Cir.1998); Branch v. Tunnell, 14 F.3d 449, 453–54 (9th Cir.1994); MGIC Indem. Co. v. Weisman, 803 F.2d 500, 504 (9th Cir.1986). In addition, the court may consider “documents crucial to the plaintiff's claims, but not explicitly incorporated in his complaint.” Parrino, 146 F.3d at 706.

II. The Sherman Act Section 1 Claims.

[1][2][3][4] In analyzing the sufficiency of the FAC's antitrust allegations, the Court is mindful that generally, “courts are hesitant to dismiss antitrust actions before the parties have had an opportunity for discovery, because the proof of illegal conduct lies largely in the hands of the alleged antitrust conspirators.” Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 560 (8th Cir.1998). Nevertheless, the essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to defeat a motion to dismiss. Id. at 558. If the alleged facts “do not at least outline or adumbrate a violation of the Sherman Act, the plaintiffs will get nowhere merely by dressing them up in the language of antitrust.” *1187 Rutman Wine Co. v. E. & J. Gallo Win-
A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws. For example, that a practice that facially appears to restrict competition “is presumed unreasonable without inquiry into the particular market context in which it is found.” Some practices, such as horizontal price-fixing, are subject to a per se analysis. National Collegiate, 468 U.S. at 101, n. 21.

[11][12][13] Agreements that are not presumed unreasonable under the per se category are analyzed under the “rule of reason” test. Levine, 72 F.3d at 1546. Under a rule of reason analysis, the plaintiff must show: (1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually restrains competition.’” Thurman Indus., 875 F.2d at 1373 (quoting Oltz v. St. Peter’s Community Hosp., 861 F.2d 1440, 1445 (9th Cir.1988)). “An essential element of a Section 1 violation under the rule of reason is injury to competition in the relevant market.” Alliance Shippers, Inc. v. Southern Pac. Transp. Co., 858 F.2d 567, 570 (9th Cir.1988). Thus, the antitrust violation must harm competition, not just competitors. See National Collegiate, 468 U.S. at 101–102 (9th Cir.1988).

In the FAC, Plaintiffs’ Section 1 claims rest on four theories: first, that the NBA Defendants and DirecTV engaged in vertical price-fixing; second, that DirecTV and the NBA Defendants engaged in a vertical conspiracy to limit output; third, that the exclusive distribution agreement between the NBA Defendants and DirecTV unreasonably restrains trade; and finally, that the NBA Defendants engaged in a horizontal conspiracy to divide the market and fix prices. The Court will address each of these theories in turn.

A. Price Fixing Theory.

[14][15][16][17][18] Vertical price fixing occurs when a supplier attempts to fix the prices charged by those who resell its products. General Cinema Corp. v. Buena Vista Distrib. Co., 681 F.2d 594, 597 (9th Cir.1982); see Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988) (“Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.”). A vertical price fixing
scheme setting minimum prices is generally subject to per se analysis. Business Eats. Corp., 485 U.S. at 725–27, 108 S.Ct. 1515; Electronics Communications Corp. v. Toshiba America Consumer Prods., Inc., 129 F.3d 240, 243 (2d Cir.1997); 1 Julian O. von Kalinowski et al., Antitrust Laws and Trade Regulation § 18.02[2] at 18–5 (2d ed.2000). Vertical price fixing is not present when the supplier only dictates the wholesale price. Mesirow v. Pepperidge Farm, Inc., 703 F.2d 339, 344 (9th Cir.1983). Further, “it is a longstanding antitrust principle that Section 1 of the Sherman Act does not preclude a party from unilaterally determining the parties with whom it will deal and the terms on which it will transact business.” 49er Chevrolet, Inc. v. General Motors Corp., 803 F.2d 1463, 1468 (9th Cir.1986).

FN5. Vertical agreements fixing maximum resale prices, and vertical restraints not involving price fixing are generally analyzed under the rule of reason test. Electronics Communications, 129 F.3d at 243; 1 Julian O. von Kalinowski et al., Antitrust Laws and Trade Regulation § 18.02[3] at 18–9 (2d ed.2000).

In dismissing Plaintiffs' vertical price fixing claim as alleged in the original complaint, this Court found that the pleading was ambiguous as to DirecTV's role in the alleged price fixing scheme. (June 18, 2001, Order at 12.) In particular, some of the allegations of the Complaint contended that DirecTV was involved in a conspiracy to fix prices whereas other allegations indicated the NBA Defendants acted alone. (See June 18, 2001, Order at 12–13.) Plaintiffs were therefore given leave to amend the complaint to add factual allegations clarifying DirecTV’s role in a vertical price fixing scheme. (June 18, 2001, Order at 16.)

The FAC alleges that one of the terms of the Defendants' alleged contract, combination, and conspiracy was to “fix, raise, stabilize, and maintain prices for the rights to ... live video satellite and cable television broadcasts of NBA professional basketball games through non-exempt channels of distribution.” (FAC ¶ 75; see FAC ¶ 60.) For purposes of formulating and effectuating this contract, combination, and conspiracy, the Defendants allegedly “[c]ontracted, conspired, and agreed to set the prices of the ‘NBA League Pass’ at artificially inflated and fixed levels, using a vertical price-fixing scheme setting minimum prices (‘Deemed Prices’) which Deemed Prices have in reality been the prices charged to consumers.” (FAC ¶¶ 76(d).) As a result, “[c]onsumer prices have been raised, fixed, maintained, and stabilized at artificially high and non-competitive levels.” (FAC ¶ 77(b).)

Defendants contend the FAC's vertical price fixing allegations fail to state a claim because they do not contain any facts but rather are as conclusory as those contained in the original complaint. Defendants further argue that the terms of the contract between the NBA Defendants and DirecTV establish DirecTV has sole discretion to set the price for the NBA League Pass, and therefore Plaintiffs' price fixing allegations fail as a matter of law.

Regarding the sufficiency of their allegations, Plaintiffs respond that they are not required to provide specific facts to support their price-fixing theory. According to Plaintiffs, given Federal notice pleading standards and limited discovery provided in this case, “‘mere conclusory’ allegations of conspiracy in the complaint are ‘enough to survive a motion to dismiss.’ ” (Plts' Oppo. to DirecTV's Mtn. to Dismiss FAC at 3 (quoting Program Eng'g, Inc. v. Triangle Pubs., Inc., 634 F.2d 1188, 1193 (9th Cir.1980)); Plts' Oppo to NBA Defs' Mtn. to Dismiss FAC at 4 (quoting Program Eng'g, 634 F.2d at 1193).) Plaintiffs further argue that the terms of the NBA–DirecTV contract do not control this action because they have alleged “the NBA Defendants and DirecTV have, in reality, agreed to fix prices at artificially high and non-competitive rates.” (Plts' Oppo. to NBA Defs' Mtn. to Dismiss FAC at 13 & n. 17; Plts' Oppo. to DirecTV's Mtn. to Dismiss FAC at 8.)

Having carefully reviewed the FAC, the Court finds it fails to state a claim for vertical price fixing. This Court's June 18, 2001 Order and applicable pleading standards do not require the Plaintiffs to plead detailed evidentiary facts in support of their claims. Rather, the facts alleged must be sufficient to describe an agreement to fix prices. See Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 507–08 (9th Cir.1989) (stating that a plaintiff “must, at a minimum, sketch the outline of the antitrust violation with allegations of supporting factual detail”); Rutman, 829 F.2d at 736 (stating a complaint must at least "outline or adumbrate a violation of the Sherman Act") (internal quotations omitted). Contrary to
Plaintiffs' assertion, conclusory statements that defendants violated antitrust laws are insufficient. “Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief.” TV Communications, 964 F.2d at 1024. Rather, “[a] plaintiff must allege sufficient facts to support a cause of action under the antitrust laws. Conclusory allegations that the defendant violated those laws are insufficient.” Id. Program Eng’g, which predates Rutman, should not be read to relax the pleading standard. In the portion of Program Eng’g that Plaintiffs quote from, the Ninth Circuit was reviewing whether the district court properly granted summary judgment in favor of the appellants when discovery had been limited to whether any overt act had been committed pursuant to the alleged conspiracy during a specific time period. Program Eng’g, 634 F.2d at 1192–94. The appellants argued the discovery order should be construed to mean that assuming there was a conspiracy, did any overt act occur during the limitation period. Id. at 1193. In the passage Plaintiffs quote from, the court stated that “[t]he allegations of conspiracy in the complaint are mostly mere conclusory statements, enough to survive a motion to dismiss, but not enough to support the suggested construction of the district court’s discovery order.” Id. (emphasis added). Accordingly, contrary to Plaintiffs' assertion, Program Eng’g did not suggest that an antitrust complaint can *1190 survive a motion to dismiss with only conclusory statements. Indeed, earlier in the opinion the court reviewed the district court's order granting a Rule 12(b)(6) motion as to one of the plaintiffs for lack of standing. Id. at 1191–92. In upholding the district court's order, the Ninth Circuit pointed out the lack of factual allegations demonstrating the plaintiff had standing to sue. Id.

Other than alleging the existence of an unlawful agreement to fix prices at artificially high levels—an allegation too conclusory to maintain a Section 1 claim—the only facts alleged in the FAC to support such an agreement are contained in paragraph 76(d). That paragraph states that the Defendants used “a vertical price-fixing scheme setting minimum prices (‘Deemed Prices’) which Deemed Prices have in reality been the prices charged to consumers.” (FAC ¶ 76(d)). Although the FAC does not attach a copy of the NBA–DirecTV contract nor specifically cite to it, paragraph 76(d)'s discussion of “Deemed Prices” is a direct reference to the NBA–DirecTV contract, which this Court may consider on a motion to dismiss. See Parrino, 146 F.3d at 706 (holding that the court may consider “documents crucial to the plaintiff's claims, but not explicitly incorporated in his complaint”).

“Deemed Prices,” as discussed in the NBA–DirecTV contract, are for purposes of calculating the minimum royalty that DirecTV pays to the NBA. (Mishkin Decl. Exh. A–19 to A–24; Williams Decl. Exh. A at 18–23.) As to residential consumers, the contract provides:

DIRECTV shall have the right, in its sole discretion, to set the price of the Service for Residential Consumers. Notwithstanding DIRECTV's right to determine such price(s), DIRECTV shall account to the NBA for the purposes of Residential Gross Receipts (as defined below in Section 2(a)(i)) on the basis of the higher of (x) the actual sales price to the Residential Service Subscriber, or (y) a “deemed” sales price (“Residential Deemed Price”), in both cases, net of taxes and other charges pursuant to Section 2(a)(i). The Residential Deemed Price with respect to each of the packages set forth below shall equal the following:

Notwithstanding the foregoing, the NBA agrees to consider in good faith adjustments to the various Residential Deemed Prices set out above as necessary to conform to changes in market factors.

(Mishkin Decl. Exh. A–19, A–21; Williams Decl. Exh. A at 18, 20.) The contract similarly states that for commercial establishments:

DIRECTV shall have the right, in its sole discretion, to set the price of the Service for Commercial Establishments. Notwithstanding DIRECTV's right to determine such price(s), DIRECTV shall account to the NBA for the purpose of Commercial Gross Receipts (as defined in Section 2(a)(ii) below) on the basis of the higher of (x) the actual sales price to the Commercial Service Subscriber or (y) a “deemed” sales price (“Commercial Deemed Price”), in both cases, net of taxes, and other charges pursuant to Section 2(a)(ii). The Commercial Deemed Prices with respect to the Half Season Package and the Full Season Package shall equal the following:

. . . . .
Notwithstanding the foregoing, the NBA agrees to consider in good faith adjustments to the various Commercial Deemed Prices set out above (including, without limitation, adjustments based on calculating the Commercial Deemed \*1191 Price on a per seat basis) as necessary to conform to changes in market factors.


Therefore, the contract's Deemed Prices provision does not require DirecTV to sell the NBA League Pass for a specific price, but rather sets forth a formula to set a wholesale price that DirecTV must pay the NBA for each unit of the NBA League Pass. As such, according to Defendants, there is no price fixing under General Cinema. Plaintiffs respond that General Cinema is inapposite to this case.

In General Cinema, the plaintiff was an exhibitor of motion pictures to the public and defendant was a distributor of films produced by Walt Disney Productions. General Cinema, 681 F.2d at 595. Defendant earned its revenues by renting motion pictures to exhibitors under a license agreement. Id. Plaintiff challenged the system used by defendant to determine the amount of rent paid to defendant. Id. at 595–96. Under that system, an exhibitor such as the plaintiff was required to pay either (i) a stated percentage (e.g., 70%) of each ticket sold, or (ii) the same percentage of a “minimum per capita amount” (minimum admission price) set in the license agreement, whichever was greater. Id. at 596. Plaintiff was free to set its own prices, although if it set prices below the minimum admission price, the rental fee due the defendant would be a higher proportion of the ticket price than if it charged the minimum admission price or higher. Id. at 596, 598. The Ninth Circuit affirmed the district court's order entering judgment on the pleadings, 188 F.Supp.2d 1177, 2002 Trade Cases P 73,700 (Cite as: 188 F.Supp.2d 1177)


Further, Plaintiffs' contention that Defendants cannot hide behind the terms of the NBA–DirecTV contract is not persuasive. In their opposition, Plaintiffs maintain that notwithstanding the terms of the contract, the FAC alleges that in reality there was an agreement among the Defendants to fix prices. In support, Plaintiffs cite paragraphs 60, 75, 76, and 77. (Plts' Oppo. to NBA Defs' Mtn. to Dismiss FAC at 13 & n. 17; Plts' Oppo. to DirecTV's Mtn. to Dismiss FAC at 8.) Paragraphs 60 and 75 allege there was an agreement among the Defendants to, inter alia, fix \*1192 prices. (FAC ¶¶ 60, 75.) Paragraph 76 lists certain actions the Defendants took to effectuate their conspiracy and in relevant part, contains the above-discussed language regarding “Deemed Prices.” (FAC ¶ 76(d).) Paragraph 77 lists the effects of the Defendants' conspiracy. (FAC ¶ 77.) None of these paragraphs nor any other portion of the FAC suggests that, notwithstanding the terms of the written NBA–DirecTV contract, there existed a separate conspiracy or contract pursuant to which the Defendants agreed to fix prices. Rather, the FAC's discussion of “Deemed Prices” suggests that the pleading is relying on the NBA–DirecTV written contract as the illegal agreement between the parties. Further, Plaintiffs cannot now add allegations that there existed an agreement among the Defendants separate from the written contract to survive the instant motion to dismiss. See Schneider v. California Dep't of Correc-
tions, 151 F.3d 1194, 1197 n. 1 (9th Cir.1998) (“The ‘new’ allegations contained in the [plaintiff’s] opposition motion ... are irrelevant for Rule 12(b)(6) purposes.”).

Accordingly, in light of the conclusory nature of the FAC’s allegations and because the terms of the NBA–DirecTV contract show that the NBA Defendants did not attempt to fix the price of the NBA League Pass, the FAC fails to state a claim for vertical price fixing. See General Cinema, 681 F.2d at 597 (stating that vertical price fixing occurs when a supplier attempts to fix the prices charged by those who resell its products).

B. Restricting Output Theory.

[20] When dismissing Plaintiffs’ original complaint, this Court found that because the pleading was unclear as to DirecTV’s role in the alleged conspiracy, it failed to state a Section 1 claim based on restricting outputs. (June 18, 2001, Order at 16.) Accordingly, Plaintiffs were granted leave to amend these allegations. Id. The FAC contends one of the terms of the Defendants’ contract, combination, and conspiracy was to restrict the output of live video satellite and cable television broadcasts of NBA professional basketball games through non-exempt channels of distribution. (FAC ¶¶ 60, 75, 76(b).) To this end, the Defendants agreed to divide North America into exclusive geographic territories for the sale of satellite television broadcast rights to regular season NBA games. (FAC ¶¶ 54, 76(a).) The FAC alleges Defendants:

agreed to “black out” the rebroadcast of certain NBA games to maintain “protected territories” of certain NBA Teams. Further, specifically with respect to NBA League Pass, these conspirators have also agreed to black out games publicly advertised as included in the NBA League Pass even when those games are outside of the above-referenced “protected territories.”

(FAC ¶ 58.)

Defendants argue the FAC fails to state a claim based on restricting output because the “black out” provision relied on by Plaintiffs does not restrict output. Rather, the NBA–DirecTV contract provides that every NBA game that is “blacked out” is otherwise available via free local over-the-air broadcasts or via local and national cable channels. Accordingly, output has not been restricted. Second, Defendants maintain that the Plaintiffs have admitted that the NBA League Pass in fact increased rather than reduced output of live video broadcasts of NBA professional basketball games because before its creation, out-of-market games were unavailable to consumers. Plaintiffs respond that their allegations are sufficient, and the fact that the NBA League Pass increased output of “out-of-market” games compared to what existed prior to its development is irrelevant because the NBA Defendants had been artificially suppressing output of out-of-market games. Rather, citing National Collegiate, Plaintiffs contend what matters is not whether the output is lower now that it was before, but whether it is lower than it would otherwise be.

The majority of the FAC’s allegations regarding output restrictions are conclusory, and only differ from the original complaint in that they now state that DirecTV was involved in a conspiracy to restrict output. (See FAC ¶ 60 (“[t]he substantial terms of the continuing agreement and conspiracy among [all Defendants] was to ... restrict the output of ] video broadcasts of out-of-market NBA games”); FAC ¶ 76(b) (alleging Defendants “[a]greed, conspired, and/or contracted to restrict the output of the broadcasts of NBA professional basketball games in non-exempt channels of distribution (such as satellite broadcasting”).) The only factual allegations added in the FAC are those relating to “black outs.”

FN6 Insofar as Plaintiffs now contend that they have properly alleged a theory of output restrictions because satellite users must purchase the NBA League Pass on an all-or-nothing basis, that theory fails because Plaintiffs waived this argument in their opposition to DirecTV’s motion to dismiss the original complaint where they stated they were not alleging the bundled nature of the NBA League Pass is an illegal tying arrangement. (Plts’ Oppo to DirecTV’s Mtn. to Dismiss Complaint or in the Alternative, to Compel Arbitration at 4–5 (arguing that their claim is for price fixing and not based on a tying theory).)

The Court agrees with Defendants that as alleged, the FAC fails to allege how the “black outs” could
restrict output. The NBA–DirecTV contract provides that the only time a game is “blacked out” on the NBA League Pass is because it is otherwise available to view on a free local over-the-air broadcast or via local and national channels. (Mishkin Decl. Exh. A–15; Williams Decl. Exh. A at 14.) Specifically, the NBA–DirecTV contract states that:

1(d) ...

(ii) ... DIRECTV shall have no right under this Agreement to distribute a live telecast or retelecast of any NBA playoff game. No games telecast by NBC, TNT or TBS will be made available to DIRECTV or to any Other Distributor, except as those entities may permit such distribution (including by means of HDTV) by separate agreement or via compulsory copyright license or the like; provided, however, that, notwithstanding any such separate agreement, DIRECTV will cause the “blackout” within thirty-five (35) miles from the home team’s city of operations of all games telecast on TNT and TBS, and those WGN telecasts that are licensed for national distribution by the NBA will be deemed OTA NBA Games for purposes of the second sentence of Section 1(d)(iii) below and will be “blacked out” by DIRECTV pursuant to any applicable rules of the Federal Communications Commission (e.g., 47 C.F.R. 76.67).

FN7. NBA OTA Games “are defined as and include all NBA Games (other than playoff games) licensed by a team for distribution by broadcast television.” (Mishkin Decl. Exh. A–14; Williams Decl. Exh. A at 13.)

(iii) For each RSN NBA Game carried by DIRECTV, Service Subscribers in the Home Market of each participating NBA team and Service Subscribers within the area extending from the Home Market to the boundary created by the area within 150 miles of the corporate or unincorporated limits of the city … of operation of each participating team and as otherwise specified by the NBA in conformance with the NBA’s rules (“RSN Market(s)”), shall not be knowingly authorized by DIRECTV to receive such NBA Games unless DIRECTV provides such NBA Games to Service Subscribers in each team’s RSN Market pursuant to Section 1(a)(iii) or Section 1(h). For each OTA NBA Game carried by DIRECTV, Service Subscribers (A) in the Home Market of each participating NBA team, and (B) within the Grade–B Contour of the City in which an over-the-air network affiliated licensed by a participating team is located (collectively, the “OTA Market(s)”), shall not be knowingly authorized by DIRECTV to receive such NBA Games. In the event that a participating team has not authorized the local telecast in its Home Market of a particular NBA Game by any means of distribution technology, DIRECTV shall not knowingly authorize any Service Subscribers in the Home Market of such team to receive such NBA Game.

FN8. RSN NBA Games “are defined as and include NBA Games (other than playoff games) licensed by a team for distribution by non-broadcast television technology.” (Mishkin Decl. Exh. A–14; Williams Decl. Exh. A at 13.)

FN9. Section 1(a)(iii) of the contract states that DirecTV is authorized, as part of DirecTV’s regular carriage of the programming of any regional sports network (“RSN”) pursuant to DIRECTV’s agreement with such RSN, to deliver any NBA Games distributed by such RSN in the applicable Home Market … or, where applicable, the RSN market of the NBA team with which such RSN has a then-current television license agreement.” (Mishkin Decl. Exh. A–7; Williams Decl. Exh. A at 6.) DirecTV is also authorized to distribute to its subscribers who are authorized to receive the programming of an RSN, retelecasts of regular season NBA Games that are distributed by such RSN in the applicable Home Market. (Mishkin Decl. Exh. A–7; Williams Decl. Exh. A at 6.)

FN10. Section 1(h) of the contract provides that “[w]ith respect to any NBA team that, for any reason, does not distribute telecasts of NBA games in which it participates via an RSN within its Home Market, and that desires to distribute some of such NBA Games via DIRECTV within its Home Market, DIRECTV shall in good faith consider making available to such team a distribution package of such team’s NBA Games to DI-
RECTV Subscribers located in that team's Home Market or, at NBA's sole discretion, to Subscribers located in that team's RSN Market, subject in either instance to then-current NCAA rules regarding game telecast distribution and the terms of Section 1(d)(iii) above ....” (Mishkin Decl. Exh. A–34; Williams Decl. Exh. A at 33.)

(Mishkin Decl. Exh. A–15; Williams Decl. Exh. A at 14.) These provisions therefore only black-out games that are televised by the NBA League's national over-the-air broadcast network (NBC) and all games televised by its national cable carriers (TBS and TNT), thus protecting the exclusivity granted to those stations. They further provide that DirecTV is to refrain from distributing within the home market of an NBA team any game that has already been licensed to a local telecaster or cablecaster for telecast within the team's home market, except where DirecTV has been authorized to televise the game as part of DirecTV's carriage of a regional sports network. Accordingly, the NBA League Pass's black-out provision does not restrict output; it only affects what channel the game is available on. See Chicago Prof'l Sports Ltd. P'ship v. National Basketball Ass'n, 961 F.2d 667, 670 (7th Cir.1992) (noting that “[i]f the league arranges for the broadcast of every game (or if the clubs may broadcast every game the league does not), there is no reduction in output.”).

Further, the Court finds Plaintiffs' reliance on National Collegiate unpersuasive. There, the National Collegiate Athletic Association ("NCAA") adopted a plan for televising college football games of its member institutions. National Collegiate, 468 U.S. at 90–91, 104 S.Ct. 2948. The plan stated its purpose was to reduce the adverse effect of live television upon football game attendance. Id. at 91, 104 S.Ct. 2948. To that end, the plan limited the total amount of televised intercollegiate football games and the number of games that any one college could televise, and prohibited any member of the NCAA from selling television rights except in accordance with the plan. Id. at 91–94, 104 S.Ct. 2948. The plaintiffs were members of the NCAA as well as the College Football Association ("CFA"), which was organized to promote the interests of major football-playing colleges within the NCAA. Id. at 89, 94, 104 S.Ct. 2948. CFA members felt they should have a greater voice in the formation of football television policy, and negotiated a contract with the National Broadcasting Company ("NBC") that would have allowed a more liberal number of television appearances for each college and would have increased the revenues realized by CFA members. Id. at 94–95, 104 S.Ct. 2948. In response, the NCAA publicly announced it would take disciplinary action against any CFA member that complied with the CFA–NBC contract. Id. at 95, 104 S.Ct. 2948. The plaintiffs filed an action and obtained a preliminary injunction preventing the NCAA from initiating disciplinary proceedings or otherwise interfering with CFA's efforts to perform its agreement with NBC. Id. After a full trial, the district court found that competition in the relevant market—defined as "live college football television"—had been restrained in part because the plan placed an artificial limit on the production of televised college football. Id. at 95–96, 104 S.Ct. 2948. The Court of Appeals held that the NCAA television plan constituted illegal per se price fixing. Id. at 97, 104 S.Ct. 2948. The United States Supreme Court found that NCAA's plan restricted output by limiting the quantity of television rights for sale. Id. at 99, 104 S.Ct. 2948. Analyzing the plan as a horizontal output restriction, the Court found that the record supported the district court's conclusion that the plan violated the Sherman Act by curtailing output and blunting the ability of member institutions to respond to consumer preference. Id. at 120, 104 S.Ct. 2948.

National Collegiate noted that one of the anti-competitive consequences of the NCAA plan is that output was lower than it would otherwise be. Id. at 107, 104 S.Ct. 2948. Plaintiffs' opposition cites this language, arguing that because of the NBA League Pass, output of NBA games is lower than it would otherwise be. The allegations of the FAC, however, undermine this contention and distinguish it from the facts presented in NCAA. In particular, the FAC alleges that prior to the 1994–95 season, with few specified exceptions, out-of-market games were not available to the public. (See FAC ¶ 54 (stating that an agreement among the NBA and NBA Teams “forbade the broadcast of any NBA game in any geographic market except those licensed by the NBA Team in that geographic market ‘out-of-market games’ ”).) In contrast to the plan in NCAA which limited the number of broadcasts permitted, beginning in the 1994–95 season, the NBA League Pass has made available for purchase “up to forty out-of-market regular season NBA games per week and more than 1000 regular season games per year.” (FAC ¶ 56.) Accordingly, output of out-of-market NBA games increased by
virtue of the NBA League Pass, rather than decreased.

[21] Insofar as Plaintiffs contend that output of out-of-market games could be increased if satellite users were not required to purchase the entire NBA League Pass on an all-or-nothing basis, Plaintiffs have already waived this argument in their opposition to DirecTV’s motion to dismiss *1196 the original complaint where they stated they were not alleging the bundled nature of the NBA League Pass is an illegal tying arrangement. (Plts' Oppo. to DirecTV's Mtn. to Dismiss Complaint or in the Alternative to Compel Arbitration at 4–5 (arguing that they alleged a price fixing scheme and were not relying on a tying theory).) Further, Plaintiffs have not cited, nor is the Court aware of, any authority indicating that when a defendant offers a new product in a competitive manner (e.g., all out-of-market games via the NBA League Pass), a party can allege a Section 1 violation on the basis the product is not being offered in the manner the plaintiffs would prefer (out-of-market games in a non-bundled format). Antitrust laws are to ensure competition is not unlawfully harmed; economic market forces will dictate whether the product will be successful.

Finally, Plaintiffs’ contention that prior to the 1994–95 season the NBA Defendants artificially suppressed output is irrelevant to the issue of whether the NBA League Pass itself reduced output. Indeed, the FAC acknowledges that the NBA Defendants’ agreements regarding broadcasts were made pursuant to the SBA. (FAC ¶¶ 53–54.)

Accordingly, because the FAC’s allegations regarding output restrictions are conclusory and unsupported by factual allegations, this Section 1 theory fails to state a claim.

C. Exclusive Distributorship Theory.

[22] This Court’s June 18, 2001, Order found that insofar as the original complaint relied on an exclusive distributorship theory, its allegations were insufficient to state a claim because Plaintiffs had not alleged any facts demonstrating an intent to harm competition or antitrust injury. (June 18, 2001, Order at 16–17.) The FAC also relies on an exclusive distributorship in alleging a Section 1 violation. In particular, Plaintiffs maintain the NBA Defendants and DirecTV have established an exclusive distributorship at the exclusion of Echostar that adversely affects competition and eliminates the possibility of a competitive product. (FAC ¶¶ 64, 76(e)-(f), 77(d).)

Defendants argue these allegations should be dismissed because Plaintiffs have not satisfied this Court’s order or Ninth Circuit pleading requirements that Plaintiffs allege specific intent to harm competition and anticompetitive conduct from which such specific intent may be inferred. Defendants further argue that even if the Plaintiffs had alleged sufficient facts, they have admitted that DirecTV did not have an exclusive distributorship for the NBA League Pass. As alleged in the FAC, in Demand was also authorized to distribute the NBA League Pass to cable television subscribers.

Plaintiffs respond that they are not required to plead or prove intent to harm; rather, an antitrust violation occurs if the exclusive agreement is intended to or actually does harm competition in the relevant market. According to Plaintiffs, they have properly alleged that the NBA–DirecTV contract excludes DirecTV’s competitor, Echostar, and that DirecTV “devoured its competitor PrimeStar” to become the exclusive distributor and obtain a dominant market position. Plaintiffs further argue that the NBA League Pass is the exclusive means by which out-of-market games may be licensed for satellite viewing by consumers, whether at home or at commercial establishments.

[23] “[A]n agreement between a manufacturer and a distributor to establish an exclusive distributorship is not, standing alone, a violation of antitrust laws, and in most circumstances does not adversely affect competition in the market.” Rutman, 829 F.2d at 735. For an antitrust violation *1197 to occur, the exclusive agreement must intend to or actually harm competition in the relevant market. Id.; Electronics Communications, Corp., 129 F.3d at 243–46.

The FAC alleges that the Defendants created this exclusive distributorship for the purpose of artificially raising and fixing prices and reducing and restricting output. (FAC ¶¶ 65, 77(a)-(c).) Insofar as these allegations suggest intent to harm competition, they are conclusory and insufficient to withstand a motion to dismiss. See Rutman, 829 F.2d at 735. As discussed above, the FAC’s allegations that Defendants engaged in anticompetitive vertical price fixing and output restrictions are conclusory and fail to state a claim.
Further, Plaintiffs' oppositions to the motions to dismiss contend they are not required to allege intent to harm competition, indicating they are relying on their allegations that the NBA–DirecTV exclusive distributorship has in fact harmed competition.

[24][25] The FAC's allegations regarding actual harm to competition are insufficient. First, the FAC's allegation that DirecTV "devoured" PrimeStar to become the exclusive distributor is irrelevant and not a sufficient factual allegation to support Plaintiffs' contention the NBA–DirecTV agreement is anticompetitive. A manufacturer can terminate distributors and agree to an exclusive distributorship without implicating Section 1. Rutman, 829 F.2d at 735. Further, such termination does not create an inference that harm to competition was intended. Id. at 736. It would seem to follow then that a distributor can purchase another distributor and thereby become the exclusive distributor of a product without running afoul of Section 1. Plaintiffs have presented no authority suggesting otherwise.

Second, the FAC alleges Defendants “[a]greed, conspired, and/or contracted to distribute [the NBA League Pass] to satellite dish owners/users on an exclusive basis through DirecTV, thereby limiting and restricting competition at the consumer level,” as consumers have been deprived of the benefit of free and open competition among satellite television providers. (FAC ¶¶ 76(c), 77(d).) The FAC further alleges that no other satellite provider, such as Echostar, is authorized to provide NBA League Pass games. (FAC ¶¶ 64, 76(f).) These allegations are bare legal conclusions and insufficient to withstand a motion to dismiss. See Rutman, 829 F.2d at 735. Further, the fact that other satellite providers such as Echostar are not authorized to broadcast the NBA League Pass does not, standing alone, properly allege a violation of antitrust laws. See id. (stating that “an exclusive distributorship is not, standing alone, a violation of antitrust laws”); A.H. Cox & Co. v. Star Machinery Co., 653 F.2d 1302, 1306 (9th Cir.1981) (“Manufacturers therefore may grant exclusive dealerships, and even cut off an existing dealer in order to do so.”). To some extent would mean that exclusive distributorships would be a per se violation of Section 1.

Plaintiffs contend that Rutman is inapplicable because the facts in the two cases are different. First, Plaintiffs argue that the NBA as a whole, rather than the 29 individual teams, selected DirecTV as the satellite distributor of NBA League Pass. Plaintiffs further argue that Rutman is inapposite because this case is price related. Plaintiffs cite no authority to support their claim these facts render Rutman's pleading requirements inapplicable. The Court finds that Rutman's discussion of the necessary allegations to state an antitrust claim provide the legal framework for analyzing Plaintiffs' claims. Further, although Plaintiffs have alleged a vertical price fixing claim, they have also alleged antitrust violations based on an exclusive distributorship, and those allegations must be analyzed on their own merits.

Accordingly, the FAC's allegations that the NBA–DirecTV distributorship violates Section 1 are conclusory and do not pass muster under Rutman, and therefore are dismissed FN11.

FN11. It is further questionable whether the NBA–DirecTV distributorship is in fact exclusive in light of the FAC's allegations that NBA has also contracted with iN Demand to provide the NBA League Pass to cable subscribers on a pay-per-view basis. (See FAC ¶ 66.) Plaintiffs argue that the relevant market is the NBA League Pass for satellite viewing, and that there is no real competition between satellite and cable. Because the FAC's allegations are conclusory, it is unnecessary for this Court to determine whether the availability of the NBA League Pass through cable renders the NBA–DirecTV contract non-exclusive.

D. NBA Defendants' Horizontal Conspiracy.

The FAC alleges the NBA Defendants engaged in a horizontal conspiracy to divide the market and fix prices whereby each of the separately owned and operated NBA teams retains the right to license and broadcast the majority of its games within its designated home territory, but assigns the right to license its games outside of its designated home territories to a single seller. Plaintiff also argues that each NBA team agrees to forego any sale or broadcasting of its games into another club's designated territory. Absent these agreements, Plaintiffs maintain rival clubs would compete with one another and offer their out-of-market game broadcasts to consumers, placing downward pressure on the price of the NBA League Pass and result in increased output and another com-
petitive choice for consumers. The NBA Defendants challenge Plaintiffs' horizontal conspiracy allegations, arguing that because Plaintiffs are indirect purchasers of the NBA League Pass, they do not have standing to bring this claim and second, they also lack standing because any claimed actual or threatened injury is remote and indirect and not proximately caused by the alleged conspiracy.


   [26][27] Plaintiffs, as private individuals, are seeking to enforce Section 1 of the Sherman Act and obtain damages against the Defendants pursuant to Section 4 of the Clayton Act. (See FAC ¶ 41.) Section 4 of the Clayton Act authorizes private suits to recover damages for violations of the Sherman Act: “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages; ...” Co. v. United States, 358 U.S. 319, 79 S.Ct. 493, 3 L.Ed.2d 355 (1959). The Ninth Circuit has explained that “[d]espite the apparent breadth of the phrase ‘any person,’ the Supreme Court has held that Congress did not intend to afford a remedy to everyone injured by an antitrust violation simply on a showing of causation.” Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d at 979, 987 (9th Cir.2000); Garabet v. Autonomous Techs. Corp., 116 F.Supp.2d 1159, 1166 (C.D.Cal.2000). The Ninth Circuit has explained that “[i]f the plaintiff is an indirect purchaser, the right to recover under Section 4 of the Clayton Act is subject to limitations on recovery, including whether the plaintiff is an antitrust ‘co-conspirator’ exception to Illinois Brick, which states that the bar against indirect purchasers is “inapplicable to claims against remote sellers when the plaintiff allege that the sellers conspired with intermediaries in the distribution chain to fix the price at which the plaintiffs purchased.” State of Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1212 n. 2 (9th Cir.1984).

   [28] The Supreme Court analyzed Section 4 of the Clayton Act in Illinois Brick Co. v. Illinois, 431 U.S. 720, 726, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). The Court held that an indirect or remote purchaser lacks standing to seek damages against the manufacturer for alleged violations of federal antitrust laws. Illinois Brick, 431 U.S. at 728–29, 737–47, 97 S.Ct. 2061. This rule “serves to avoid the complications of apportioning overcharges between direct and indirect purchasers and to eliminate multiple recoveries.” Lucas Automotive Eng’g. Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1233 (9th Cir.1998); Illinois Brick, 431 U.S. at 737–47, 97 S.Ct. 2061. In addition, the Illinois Brick bar ensures antitrust laws are enforced by those purchasers who have been most directly injured by the antitrust violation. Illinois Brick, 431 U.S. at 731, 97 S.Ct. 2061.

   [29][30] Plaintiffs allege the NBA Defendants engaged in a horizontal market division and price fixing scheme pursuant to which they created the NBA League Pass. (FAC ¶¶ 54–56.) The FAC also alleges that DirecTV and in Demand are distributors of the NBA League Pass. (FAC ¶¶ 63, 66.) The FAC alleges that Plaintiffs purchased the NBA League Pass from DirecTV and in Demand. (FAC ¶¶ 21, 22, 32, 33.) Plaintiffs, therefore, are indirect purchasers of the NBA League Pass, and the Illinois Brick rule may bar their Sherman Act claim for a horizontal conspiracy by the NBA Defendants. In opposing the NBA Defendants’ motion, Plaintiffs rely on the “co-conspirator” exception to Illinois Brick, which states that the bar against indirect purchasers is “inapplicable to claims against remote sellers when the plaintiffs allege that the sellers conspired with intermediaries in the distribution chain to fix the price at which the plaintiffs purchased.” Illinois Brick, 431 U.S. 720, 726, 97 S.Ct. 2061. In analyzing whether Plaintiffs fall within the co-conspirator exception, the Court must be mindful that any exception to the Illinois Brick rule is to be construed narrowly. See Illinois Brick, 431 U.S. at 745, 97 S.Ct. 2061. Plaintiffs' allegations of a vertical conspiracy between the NBA Defendants and DirecTV are conclusory for the reasons discussed above. Further, insofar as Plaintiffs allege the NBA Defendants conspired with in Demand, those allegations are also insufficient to put this case within the “co-conspirator” exception. In allegations that parallel those regarding the NBA–DirecTV contract, Plaintiffs contend the NBA Defendants and in Demand con-
spired to provide the NBA League Pass to residential cable subscribers at artificially inflated and fixed levels, restrict output, and engage in an unlawful exclusive distributorship. (FAC ¶¶ 66–71, 80–87.) Thus, those allegations are equally conclusory and fail to allege sufficient facts to support a vertical conspiracy theory.

[32] Further, DirecTV and iN Demand could not engage in horizontal conspiracy with the NBA Defendants. Horizontal price fixing occurs when competitors agree to set prices and thereby interfere with free market forces. See Business Elecs., 485 U.S. at 730, 108 S.Ct. 1515 ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints."). As alleged in the FAC, DirecTV is “a provider of high power*1200 direct broadcast satellite service,” (FAC ¶ 19), and iN Demand “provides ‘pay-per-view’ programming to cable companies and their subscribers nationwide.” (FAC ¶ 66.) The NBA Defendants, in contrast, govern and participate in a professional basketball league. (FAC ¶¶ 48–50.) Accordingly, the NBA Defendants are not competitors with DirecTV and iN Demand and therefore cannot engage in a horizontal conspiracy.

2. Plaintiffs' Standing Under Clayton Act Section 16.

[33][34] Plaintiffs allege their horizontal conspiracy claim against the NBA Defendants is also viable and not barred by Illinois Brick because they can seek injunctive relief. FN12 Plaintiffs are correct. Section 16 of the Clayton Act allows a private party to obtain an injunction for a violation of the Sherman Act: “any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief ... against threatened loss or damages by a violation of the antitrust laws.” 15 U.S.C. § 26. To meet the standing requirements under this section of the Clayton Act, a plaintiff:

FN12. Plaintiffs also argue that a third exception to Illinois Brick is a state law remedy. Plaintiffs are correct. California v. ARC America, 490 U.S. 93, 101–02, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989). However, this exception is relevant only to Plaintiffs’ state law causes of action, and do not support a horizontal conspiracy claim against the NBA Defendants under the Sherman Act.

must generally meet all the requirements that apply to the damages plaintiff, except that the injury itself need only be threatened, damage need not be quantified, and occasionally a party too remote for damages might be granted an injunction. Lucas, 140 F.3d at 1234; Garabet, 116 F.Supp.2d at 1170. “However, a plaintiff must still demonstrate that injunctive relief is necessary to prevent injury to its interests rather than those of others.” Garabet, 116 F.Supp.2d at 1170.

Plaintiffs argue they have been injured not only by the artificially high prices, “but by the artificial suppression of consumer choice inherent in the conspiracies at issue.” (Plt's Oppo. to NBA Defs' Mtn to Dismiss FAC at 19.) Accordingly to Plaintiffs, “[a]bsent the agreed upon market division scheme, consumers would be able to select packages of out-of-market games other than the expensive all-encompassing ‘NBA League Pass.’ ” Id. Insofar as Plaintiffs contend that they have been injured by the price of the NBA League Pass, as discussed above in Section II.A., the NBA–DirecTV contract provides that DirecTV sets the price of the NBA League Pass. Further, the allegations in the FAC are conclusory as to the NBA Defendants' purported role in setting those prices. Accordingly, there is no actual or threatened injury to the Plaintiffs as a result of the NBA Defendants' alleged horizontal conspiracy.

Second, to the extent Plaintiffs now contend they have been injured by their inability to select packages of out-of-market games other than the NBA League Pass, that argument is essentially that the NBA League Pass as a bundled package is an illegal tying arrangement. However, as noted above, Plaintiffs have already waived this argument in their opposition to DirecTV's motion to dismiss the original complaint where they stated they were not alleging the bundled nature of the NBA League Pass is an illegal tying arrangement. (Plts' Oppo. to DirecTV's Mtn. to Dismiss Complaint or in the Alternative, to Compel Arbitration at 4–5 (arguing that they alleged a price fixing scheme and were not relying on a tying theory).) Accordingly, this argument fails to show *1201 Plaintiffs have properly plead a threatened injury caused by the alleged violation.

III. Remaining State Law Claims.
Because the Court grants Defendants' motions to dismiss Plaintiffs' Sherman Act claims, which formed the basis for the Court's jurisdiction over this case, the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law causes of action and hereby **DISMISSES** Plaintiffs' state law claims. 

*See 28 U.S.C. § 1367(c)* (court may decline to exercise supplemental jurisdiction over state law claims where it has dismissed the claims on which its original jurisdiction was based).

**CONCLUSION**

For the foregoing reasons, having carefully considered the parties' briefs, applicable law, and good cause appearing, **IT IS HEREBY ORDERED:**

1. DirecTV's motion to dismiss is **GRANTED**.

2. NBA Defendants' motion to dismiss is **GRANTED**.

3. The first and second causes of action for violation of Section 1 of the Sherman Antitrust Act are **DISMISSED WITH PREJUDICE**.

4. The remaining state law claims under the Cartwright Act and California's Unfair Competition Act are **DISMISSED** under 28 U.S.C. § 1326 and **WITHOUT PREJUDICE** to being re-filed in state court.

**IT IS SO ORDERED.**

S.D.Cal.,2002.
Kingray, Inc. v. NBA, Inc.
188 F.Supp.2d 1177, 2002-1 Trade Cases P 73,700

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56 F.Supp.3d 280
United States District Court,
S.D. New York.

Thomas LAUMANN, Robert Silver, Garrett Traub, and David Dillon, representing themselves and all other similarly situated, Plaintiffs,
v.
NATIONAL HOCKEY LEAGUE, et al., Defendants.

Marc Lerner, Derek Rasmussen, and Garrett Traub, representing themselves and all other similarly situated, Plaintiffs,
v.


Synopsis

Background: Subscribers to television and/or Internet services that included live telecasts of professional hockey and baseball brought putative class actions against professional ice hockey league and various individual clubs, professional baseball league and various individual clubs, and several broadcasters or distributors of professional hockey and/or baseball programming, alleging violations of Sherman Act. Defendants moved for summary judgment.

Holdings: The District Court, Shira A. Scheindlin, J., held that:

[1] baseball's antitrust exemption did not apply to territorial broadcasting restrictions;

[2] rule of reason, rather than per se approach, was appropriate standard for testing whether restrictions restrained trade;

[3] fact issues existed as to overall competitive impact of restrictions;

[4] fact issues existed as to whether broadcasters or distributors engaged in some concerted action with respect to enforcing restrictions; and

[5] fact issues existed as to whether broadcasters or distributors engaged in tacit agreement among themselves.

Motions denied.

West Headnotes (28)

[1] Antitrust and Trade Regulation
Cartels, Combinations, Contracts, and Conspiracies in General
Crucial question in a restraint-of-trade suit under the Sherman Act is whether the challenged conduct stems from an independent decision or from an agreement, tacit or express. Sherman Act, § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[2] Antitrust and Trade Regulation
Cartels, Combinations, Contracts, and Conspiracies in General
Antitrust and Trade Regulation
Restraints and misconduct in general
In order to prove a conspiracy in a restraint-of-trade suit under the Sherman Act, the plaintiff must present direct or circumstantial evidence that reasonably tends to prove that the defendant and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. Sherman Act, § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[3] Antitrust and Trade Regulation
Restraints and misconduct in general
Parallel conduct can be probative evidence bearing on the issue of whether there is an antitrust conspiracy in a restraint-of-trade suit under the Sherman Act, although parallel conduct, alone, will not suffice as evidence of such a conspiracy, even if the defendants knew the other defendants were doing likewise. Sherman Act, § 1, 15 U.S.C.A. § 1.
To show that there is an antitrust conspiracy in a restraint-of-trade suit under the Sherman Act, parallel conduct must be accompanied by “plus factors,” such as a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of inter-firm communications. Sherman Act, § 1, 15 U.S.C.A. § 1.

If the parties to vertical agreements have knowledge that other market participants are bound by identical agreements, and their participation is contingent upon that knowledge, they may be considered participants in a horizontal agreement in restraint of trade under the Sherman Act. Sherman Act, § 1, 15 U.S.C.A. § 1.

To establish a violation of the Sherman Act’s restraint of trade section, the plaintiff must demonstrate concerted action between at least two legally-distinct economic entities that constitutes an unreasonable restraint of trade either per se or under the rule of reason. Sherman Act, § 1, 15 U.S.C.A. § 1.

Certain agreements that have manifestly anticompetitive effects and lack any redeeming virtue are deemed per se violations of the Sherman Act’s prohibition of restraints of trade. Sherman Act, § 1, 15 U.S.C.A. § 1.

Outside the category of per se restraints on trade, the “rule of reason,” which distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest, is the accepted standard for testing whether a practice restrains trade in violation of the Sherman Act. Sherman Act, § 1, 15 U.S.C.A. § 1.

In applying the rule of reason to determine whether a practice restrains trade in violation of the Sherman Act, courts weigh all of the circumstances surrounding the challenged acts to determine whether the alleged restraint is unreasonable, taking into account specific information about the relevant business, the restraint’s history, nature, and effect, and whether the businesses involved have market power. Sherman Act, § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote


Presumptions and burden of proof

In applying the rule of reason to determine whether a practice restrains trade in violation of the Sherman Act, courts employ a burden-shifting framework, under which the plaintiffs bear an initial burden to demonstrate the defendants' challenged behavior had an actual adverse effect on competition as a whole in the relevant market, and, if the plaintiffs satisfy this burden, the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement, and, assuming the defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by the defendants could have been achieved through less restrictive means. Sherman Act, § 1, 15 U.S.C.A. § 1.

1 Cases that cite this headnote

[12] Antitrust and Trade Regulation

Rule of reason

Antitrust and Trade Regulation

Market Power; Market Share

Under the burden-shifting framework used in applying the rule of reason to determine whether a practice restrains trade in violation of the Sherman Act, plaintiffs can meet their initial burden of demonstrating an actual adverse effect on competition by showing that the defendants had market power and that their actions had an adverse effect on price, output, or quality. Sherman Act, § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[13] Antitrust and Trade Regulation

Elements in General

In order to state a claim for monopolization under the Sherman Act, the plaintiffs must establish (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Sherman Act, § 2, 15 U.S.C.A. § 2.

Cases that cite this headnote

[14] Antitrust and Trade Regulation

Elements in General

Rule of reason

Antitrust and Trade Regulation

Market Power; Market Share

To support a claim for monopolization under the Sherman Act, the plaintiffs must establish that the defendant (1) engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. Sherman Act, § 2, 15 U.S.C.A. § 2.

Cases that cite this headnote

[15] Antitrust and Trade Regulation

Indirect purchasers

Generally, only direct purchasers have standing to bring civil antitrust claims under the Sherman Act. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[16] Antitrust and Trade Regulation

Indirect purchasers

Where intermediate purchasers in the chain of distribution are participants in an antitrust conspiracy, the first purchasers who are not part of the conspiracy are entitled to collect damages from both the manufacturers and their intermediaries if conspiracy and overcharges can be established. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[17] Antitrust and Trade Regulation
Sports

Baseball’s antitrust exemption did not apply to territorial broadcasting restrictions, as sports broadcasting agreements were not central to business of baseball; in Toolson v. New York Yankees, Inc., Supreme Court limited its holding that Congress did not intend to include “the business of baseball within the scope of federal antitrust laws” to contours of its prior decision in Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, which rested entirely on interstate commerce grounds and did not involve broadcasting-related allegations, language and structure of Sports Broadcasting Act (SBA) suggested that Congress understood sports broadcasting agreements to fall outside of exemption, and, even in rejecting its holdings in Federal Baseball and Toolson, Supreme Court, in Flood v. Kuhn, made specific reference to baseball’s reserve system throughout its analysis, thus permitting narrower reading of exemption. Clayton Act, § 27(b)(1–3), 15 U.S.C.A. § 26b(b)(1–3).

Cases that cite this headnote

[18] Antitrust and Trade Regulation

Sports

Antitrust and Trade Regulation

Television and radio

Congressional Budget Office (CBO) cost estimate, which suggested that Curt Flood Act would retain baseball’s antitrust exemption for, inter alia, “broadcast rights,” was not persuasive evidence of congressional intent to cover sports broadcasting agreements under that exemption, where statutory language expressly did not change application of antitrust laws with respect to any topic other than “employment of major league baseball players.” Clayton Act, § 27, 15 U.S.C.A. § 26b.

Cases that cite this headnote

[19] Antitrust and Trade Regulation

Antitrust Exemptions and Defenses

Exceptions to the antitrust laws are to be construed narrowly.

[20] Antitrust and Trade Regulation

Sports

Antitrust and Trade Regulation

Television and radio

Rule of reason, rather than per se approach, was appropriate standard for testing whether territorial broadcasting restrictions by professional hockey and professional baseball leagues restrained trade, in violation of Sherman Act; while territorial divisions of market were normally per se violations, teams within each league were necessarily interdependent and pro-competitive benefit of challenged scheme was not so obvious that challenge to those restrictions, as asserted by subscribers to live telecasts of leagues’ games, easily could be resolved in favor of leagues. Sherman Act, § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote


Antitrust and price discrimination cases

Genuine issues of material fact existed, under rule of reason analysis, as to overall competitive impact of territorial broadcasting restrictions by professional hockey and professional baseball leagues, precluding summary judgment in favor of leagues in Sherman Act suit alleging that restrictions represented illegal restraint of trade, as asserted by subscribers to live telecasts of leagues’ games. Sherman Act, § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[22] Antitrust and Trade Regulation

Rule of reason

On an illegal restraint of trade claim under the Sherman Act, the rule of reason does not support a defense based on the assumption that competition itself is unreasonable. Sherman Act, § 1, 15 U.S.C.A. § 1.
Maintaining competitive balance is a legitimate and important goal for professional sports leagues for purposes of the rule of reason analysis on an illegal restraint of trade claim under the Sherman Act. Sherman Act, § 1, 15 U.S.C.A. § 1.

Restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with the fundamental goal of antitrust law. Sherman Act, § 1, 15 U.S.C.A. § 1.

Genuine issues of material fact existed as to whether broadcasters or distributors of professional hockey and/or baseball programming engaged in some concerted action with respect to enforcing territorial broadcasting restrictions imposed by professional hockey and professional baseball leagues, precluding summary judgment in favor of broadcasters or distributors in Sherman Act suit alleging that restrictions represented illegal horizontal agreement to restrain trade, as asserted by subscribers to live telecasts of leagues' games. Sherman Act, § 1, 15 U.S.C.A. § 1.

Potential for significantly increased profits from the restraint represents a strong motive for concerted action, as required to support the finding of an antitrust conspiracy in a restraint-of-trade suit under the Sherman Act. Sherman Act, § 1, 15 U.S.C.A. § 1.

Downstream entity need not participate in the initial creation of the alleged restraints in order to be liable under the Sherman Act for adopting them later. Sherman Act, § 1, 15 U.S.C.A. § 1.


Jonathan D. Schiller, Esq., Alan Vickery, Esq., Christopher Duffy, Esq., Boies, Schiller & Flexner LLP, New York, NY, for Defendants Yankee Entertainment and Sports Networks, LLC and New York Yankees Partnership.


**OPINION AND ORDER**

SHIRA A. SCHEINDLIN, District Judge:

I. INTRODUCTION

Plaintiffs bring these putative class actions against the National Hockey League (“NHL”) and various individual clubs in the league (the “NHL Defendants”); Major League Baseball (“MLB”) and various individual clubs in the league (the “MLB Defendants”) (together the “League Defendants”); multiple regional sports networks (“RSNs”) that produce and distribute professional baseball and hockey programming; 1 two multichannel video programming distributors (“MVPDs” or “distributors”), Comcast and DIRECTV (together with the RSNs, the “Television Defendants” or “broadcasters”); Madison Square Garden Company and the New York Rangers Hockey Club (the “MSG Defendants”); and New York Yankees Partnership and Yankee Entertainment & Sports Network, LLC (“YES”) (together the “Yankee Defendants”). Plaintiffs allege violations under Sections 1 and 2 of the Sherman Antitrust Act (the “Sherman Act”).

On July 27, 2012, the defendants jointly moved to dismiss the Complaints in both actions, **Garber v. Office of the Commissioner of Baseball (“Garber”)** and **Laumann v. National Hockey League (“Laumann”)**. In an Opinion and Order dated December 5, 2012, I granted the motion in part and denied it in part. 2 Plaintiffs Fernanda Garber and Peter Herman were 286 dismissed from both cases, and plaintiff Robert Silver was dismissed from the **Garber** case, for lack of antitrust standing. Additionally, I dismissed plaintiffs' claims under Section 2 of the Sherman Act against the Television Defendants. 3

On August 19, 2013, Comcast and its affiliated RSNs (the “Comcast Defendants”) filed a motion to compel arbitration against Garrett Traub, Silver, Vincent Birbiglia, Thomas Laumann, and Derek Rasmussen, and to stay the claims of David Dillon and Marc Lerner pending resolution of the arbitration. Comcast's motion was granted as to Traub, Laumann, and Rasmussen, but denied as to Silver, Birbiglia, Dillon, and Lerner. The same day, DIRECTV and its affiliated RSNs (the “DIRECTV Defendants”) filed a motion to compel arbitration against Lerner. DIRECTV'S motion was denied in full. 4
The Comcast Defendants, the DIRECTV Defendants, the NHL Defendants, and the MLB Defendants now move for summary judgment on the remaining claims. For the reasons that follow, all four motions are DENIED in full.

II. BACKGROUND

NHL is an unincorporated association of thirty major league professional ice hockey clubs, nine of which are named as defendants in Laumann. MLB is an unincorporated association of thirty professional baseball clubs, nine of which are named as defendants in Garber. The clubs within each League are competitors—both on the field and in the contest to broaden their fan bases. However, the clubs must also coordinate in various ways in order to produce live sporting events, including agreeing upon the game rules and setting a schedule of games for the season. Both leagues divide their member teams into geographic territories and assign each team a home television territory (“HTT”) for broadcasting purposes. Neither the Comcast Defendants nor the DIRECTV Defendants played a role in the initial creation of the Leagues’ HTTs.

The structure of the territorial broadcasting system is largely uncontested. By League agreement, each club agrees to license its games for telecast only within its designated HTT. The clubs then contract with RSNs through Rights Agreements. The Rights Agreements generally provide each RSN the exclusive right to produce a club’s games and telecast them in the HTT. The Agreements do not permit the RSNs to license telecasts for broadcast outside the HTTs. The Rights Agreements also require the RSNs to provide their telecasts to the Leagues without charge for use in the out-of-market packages (“OOM packages”). The clubs keep the revenue from their respective Rights Agreements. There are significant differences in the economic value of the various HTTs.

In order to produce the telecasts of live games, the RSNs invest in equipment, production facilities, and a large staff. They also produce “shoulder” programming such as pre-game and post-game shows. The RSNs then sell their programming to MVPDs like Comcast and DIRECTV through Affiliation Agreements, and the MVPDs televise the programming through standard packages sold to consumers within the HTT. Even when an MVPD agrees to carry a RSN, it does not always distribute that RSN throughout its entire territory. The MVPDs acquire the rights to broadcast the games subject to the territorial restrictions in the RSNs’ agreements with the Leagues. The MVPDs black out games in unauthorized territories in accordance with those restrictions.

Fans can watch out-of-market games in one of two ways. First, some games are televised nationally through contracts between the Leagues and national broadcasters like ESPN and Fox. The clubs have agreed to allow the Leagues to negotiate national contracts on their behalf. The Leagues’ agreements with national broadcasters contain provisions requiring the Leagues to preserve the HTTs. The revenues from national broadcasts are shared equally among the clubs.

Second, the Leagues produce OOM packages in both television and Internet format. The television packages—NHL Center Ice and MLB Extra Innings—are available for purchase through MVPDs, including Comcast and DIRECTV. The Internet packages—NHL GameCenter Live and MLB.tv—are available for purchase directly from the Leagues. The OOM packages are comprised of local RSN programming from each of the clubs. As with the national broadcasts, revenues from the OOM packages are shared equally among the clubs.

Each of the OOM packages requires the purchase of the full slate of out-of-market games, even if a consumer is only interested in viewing the games of one team. The OOMs exclude in-market games to “avoid diverting viewers from local RSNs that produce the live game feeds that form the OOM packages.”

In sum, each RSN is the sole producer of its club’s games and the sole distributor of those games within the HTT aside from limited nationally broadcasted games. The OOM packages do not show in-market games to avoid competition with the local RSN. Additionally, the territorial broadcast restrictions allow each RSN to largely avoid competing with out-of-market games produced by other RSNs.

Internet streaming rights are owned by the Leagues and/or the clubs. The RSNs have no right to license their programming for Internet streaming directly. The Internet
OOM packages are the primary way for fans to view games on the Internet. Additionally, some MVPDs have negotiated with the Leagues to provide Internet streaming of out-of-market games to subscribers of the OOM television packages. Internet streaming of in-market games remains largely unavailable to consumers.

III. STANDARD OF REVIEW
Summary judgment is appropriate “only where, construing all the evidence in the light most favorable to the non-movant and drawing all reasonable inferences in that party’s favor, there is ‘no genuine issue as to any material fact and ... the movant is entitled to judgment as a matter of law.’” A fact is material if it might affect the outcome of the suit under the governing law, and an issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

In deciding a motion for summary judgment, “[t]he role of the court is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried.” “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences” are jury functions, not those of a judge.

IV. APPLICABLE LAW
A. Section 1 of the Sherman Act
Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.” The crucial question in a Section 1 case is whether the challenged conduct stems from independent decision or from an agreement, tacit or express. In order to prove a conspiracy, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.” A business decision may be lawful when made unilaterally but unlawful when made pursuant to an agreement.

[3] [4] [5] “Parallel conduct can be probative evidence bearing on the issue of whether there is an antitrust conspiracy. However, parallel conduct alone will not suffice as evidence of such a conspiracy, even if the defendants ‘knew the other defendant companies were doing like wise....’” Parallel conduct must be accompanied by “plus factors,” such as “a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications.”

If the “parties to vertical agreements [ ] have knowledge that other market participants are bound by identical agreements, and their participation is contingent upon that knowledge, they may be considered participants in a horizontal agreement in restraint of trade.”

[6] The Supreme Court has clarified that Section 1 “outlaw[s] only unreasonable restraints.” To establish a Section 1 violation, a plaintiff must demonstrate “concerted action between at least two legally distinct economic entities” that “constitute[s] an unreasonable restraint of trade either per se or under the rule of reason.”

[7] [8] [9] [10] Certain agreements that have “manifestly anti-competitive effects and lack ... any redeeming virtue” are deemed per se violations of the Sherman Act. Outside this category of “necessarily illegal” restraints, “[t]he rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1.” “The rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”

In applying the rule of reason, courts “weigh all of the circumstances surrounding the challenged acts to determine whether the alleged restraint is unreasonable,” taking into account “specific information about the relevant business, the restraint’s history, nature, and effect, and whether the businesses involved have market power.” Certain challenged practices warrant an “abbreviated or quick-look rule of reason analysis” where
“the great likelihood of anticompetitive effects can be easily ascertained.”

In applying the rule of reason, the Second Circuit employs a burden-shifting framework:

[P]laintiffs bear an initial burden to demonstrate the defendants' challenged behavior had an actual adverse effect on competition as a whole in the relevant market.... If the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement.... Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means.... Ultimately, the factfinder must engage in a careful weighing of the competitive effects of the agreement—both pro and con—to determine if the effects of the challenged restraint tend to promote or destroy competition.

 Plaintiffs can meet their initial burden by showing that defendants had market power and that their actions had an adverse effect on price, output, or quality.

B. Section 2 of the Sherman Act

Section 2 of the Sherman Act states that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony....” In order to state a claim for monopolization under Section 2, plaintiffs must establish “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”

Specifically, plaintiffs must establish that the defendant “(1) engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.”

C. The Baseball Exemption

In 1922, in Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, the Supreme Court held that “the business [of] giving exhibitions of baseball” was not subject to the Sherman Act. The plaintiff baseball club alleged that the defendants had destroyed the Federal League, a former competitor of the American and National Leagues, by poaching its constituent clubs. The Court affirmed dismissal and held that “exhibitions of baseball [ ] were] purely state affairs” that did not constitute interstate commerce subject to the antitrust laws.

In 1953, the Court again addressed the so-called “baseball exemption” in Toolson v. New York Yankees, Inc. In Toolson, a professional baseball player sued multiple baseball clubs and leagues for antitrust violations stemming from major league baseball's ineligibility rules, which permitted teams to transfer players without their consent. Any player who refused to comply with an involuntary transfer was branded “ineligible” and banned from playing for any other team. The plaintiff also argued in his written submissions that the defendants’ territorial broadcasting restrictions constituted an illegal restraint of trade in violation of the Sherman Act.

The district court addressed solely the plaintiff’s allegations involving the ineligibility rules and dismissed the case based on the Supreme Court's determination in Federal Baseball that the business of baseball did not constitute interstate commerce. The court discussed television broadcasting only in the context of deciding whether baseball had a sufficient interstate nexus.

The Ninth Circuit affirmed the decision without comment.

In Toolson III’s two companion cases, Kowalski v. Chandler and Corbett v. Chandler, the Sixth Circuit affirmed dismissal of antitrust claims against the League on interstate commerce grounds. As in Toolson, television broadcasting was mentioned only in the context of deciding whether baseball had a sufficient interstate nexus.

The Supreme Court affirmed all three decisions in one paragraph, reiterating Federal Baseball's holding that “the
business of providing public baseball games for profit between clubs of professional baseball players [is] not within the scope of the *293 federal antitrust laws." 72 The Court noted that the business of baseball had developed for thirty years in reliance on *Federal Baseball*, and that “if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.” 73 Thus, the Court affirmed the judgments below “on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, [ ] so far as that decision determined that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.” 74

In 1961, Congress enacted the Sports Broadcasting Act (“SBA”), which created an antitrust exemption for certain types of professional sports broadcasting agreements, particularly league-wide contracts for over-the-air broadcasts. 75 Aside from that limited exception, the SBA did not change the applicability of the antitrust laws to professional sports. 76 The Act expressly did not apply to any agreement that “prohibits ... [the] televising of any games within any [geographic] area, except within the home territory of a member club of the league on a day when such club is playing at home.” 77 The *Supreme Court* noted that the SBA:

> demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act, and in particular reflects its awareness of the decision in *United States v. National Football League*, 116 F.Supp. 319 (E.D.Pa.1953), which held that an agreement among the teams of the National Football League [not to telecast games in certain geographic areas at certain times] violated § 1 of the Sherman Act. 78

In 1972, the *Supreme Court* again addressed the baseball exemption in *Flood v. Kuhn*. 79 The plaintiff, a professional baseball player, challenged the “reserve system,” which allowed teams to transfer players without their consent and precluded players from independently signing with new teams. The Court expressly held that baseball was “a business [ ] engaged in interstate commerce,” undercutting *294 the entire legal basis for the antitrust exemption as articulated in *Federal Baseball* and *Toolson*. 80 Nonetheless, the *Court* preserved the exemption as “an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis...” 81 Because the exemption had been allowed to develop without any congressional interference despite “full and continuing congressional awareness,” 82 the *Court* held that “the remedy, if any is indicated, is for congressional, and not judicial, action.” 83 The Court specifically addressed the reserve clause in its discussion and holding, concluding that the “reserve system enjoy[s] exemption from the federal antitrust laws,” and “Congress as yet has had no intention to subject baseball’s *reserve system* to the reach of the antitrust statutes.” 84

Since *Flood*, the *Court* has expressly questioned the logic of the baseball exemption, calling it “at best of dubious validity” and refusing to extend it to other professional sports. 85 The *Court* noted that, “were [it] considering the question of baseball for the first time upon a clean slate,” it would not adopt an antitrust exemption. 86

In 1998, Congress passed the Curt Flood Act, which provided that “conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players” are “subject to the antitrust laws to the same extent” as other sports. 87 In other words, the Act removed employment-related agreements from the common law baseball exemption. The Act did not alter the applicability of the antitrust laws to “any conduct, acts, practices, or agreements other than ... employment of major league baseball players.” 88

### D. Antitrust Standing Under Illinois Brick

**[15] [16]** The Supreme Court’s decision in *Illinois Brick Co. v. Illinois* established that “[g]enerally, only direct purchasers have standing to bring civil antitrust claims.” 89 The rule serves to avoid the difficulties of “apportion[ing] the recovery among all potential plaintiffs ... from direct purchasers to middlemen to ultimate consumers,” eliminates the possibility of duplicative recovery, and promotes enforcement by purchasers who have been most directly injured by the alleged violation. 90 “[W]here intermediate purchasers in the chain of distribution ... [are] participants in the conspiracy, the first purchasers who are not part of the conspiracy ‘are *295 entitled to collect damages from both the manufacturers and their intermediaries if conspiracy and overcharges can be established.’” 91
V. DISCUSSION

A. The Baseball Exemption Does Not Apply to Territorial Broadcasting Restrictions

[17] The continued viability and scope of the baseball exemption are far from clear. The MLB Defendants argue that the territorial broadcasting restrictions at issue here fall under the exemption and preclude their liability. They base their argument principally on the holding in Toolson and the language of the Curt Flood Act. Specifically, the MLB Defendants argue that the Supreme Court in Toolson affirmed dismissal of all of the plaintiff's claims, including the factual allegations related to territorial broadcasting restrictions. Therefore, the Court must have found those restrictions to be covered by the exemption.

However, none of the published opinions in the Toolson cases—at the district, circuit, or Supreme Court levels—even mentioned the territorial broadcasting allegations. Additionally, the Supreme Court expressly limited its holding in Toolson to the contours of its decision in Federal Baseball, which rested entirely on interstate commerce grounds and did not involve broadcasting-related allegations. Indeed, because television broadcasting is an interstate industry by nature, it cannot fall within the exemption defined by Federal Baseball. It would be strange to read Toolson to expand Federal Baseball's holding to territorial broadcasting restrictions sub silentio.

Moreover, the language and structure of the SBA suggest that, as of 1961, Congress understood sports broadcasting agreements to fall outside the baseball exemption. The provision of the SBA granting limited immunity to a narrow category of broadcasting agreements would be meaningless if all baseball broadcasting agreements were already covered by the common law exemption. Moreover, the SBA expressly excluded from its safe harbor most agreements involving geographic broadcasting territories, suggesting that Congress intended such agreements to be subject to the antitrust laws.

Congressional understanding is relevant because Flood replaced Federal Baseball's and Toolson's holdings based on interstate commerce with a limited holding based only on stare decisis and inferred congressional intent. Therefore, Congress's understanding of the scope of the baseball exemption before Flood is highly persuasive.

Moreover, in rejecting the holdings in Federal Baseball and Toolson, the Flood Court made specific reference to the reserve system throughout its analysis, permitting a narrower reading of the exemption. One district court concluded that “the antitrust exemption created by Federal Baseball is limited to baseball's reserve system.” Other courts have interpreted Flood to preserve a broader exemption for professional baseball. However, defendants cite no case that applied the exemption to broadcasting restrictions except one judge's comments from the bench in granting a motion to dismiss several years before the SBA was enacted. The only published federal court opinion to address the question after the SBA, Henderson Broadcasting Corp. v. Houston Sports Association, found the exemption inapplicable to a baseball club’s radio broadcasting agreements. Henderson reasoned as follows:

[The Supreme Court] has implied that broadcasting is not central enough to baseball to be encompassed in the baseball exemption ... Congressional action does not support an extension of the exemption to radio broadcasting ... [and] lower federal courts have declined to apply the baseball exemption in suits involving business enterprises which, like broadcasting, are related to but separate and distinct from baseball.

All of these arguments apply with equal force here.

[18] Defendants argue that the Curt Flood Act reveals a congressional consensus that sports broadcasting agreements are covered by the baseball exemption. They point to language from a Congressional Budget Office (“CBO”) cost estimate suggesting that the Act would retain the antitrust exemption for a variety of topics, including “league expansion, franchise location, the amateur draft, and broadcast rights.” However, a CBO cost estimate is not persuasive evidence of congressional intent. The statutory language expressly does not change “the application of the antitrust laws” with respect to any topic other than “employment of major league baseball players,” including but not limited to “the marketing or sales of the entertainment product of organized professional baseball and the licensing of intellectual property rights owned or held by organized professional baseball teams individually or collectively.” It is a tenuous inference that Congress considered broadcasting exempt simply because “sales of the entertainment product of organized professional baseball”
and “licensing of intellectual property rights” were included in a long list of topics that would remain unchanged by the Act. The Curt Flood Act adds little to the analysis of whether territorial broadcasting restrictions fall under the common law baseball exemption.

[19] Exceptions to the antitrust laws are to be construed narrowly. Moreover, the Supreme Court has expressly questioned the validity and logic of the baseball exemption and declined to extend it to other sports. I therefore decline to apply the exemption to a subject that is not central to the business of baseball, and that Congress did not intend to exempt—namely baseball’s contracts for television broadcasting rights.

B. The League Defendants Are Not Entitled to Summary Judgment

[20] While territorial divisions of a market are normally per se violations, the Supreme Court has held that a per se approach is inappropriate in the context of sports broadcasting restrictions due to the necessary interdependence of the teams within a League. On the other hand, the procompetitive benefit of the challenged scheme here is not so obvious that the case can be resolved in favor of defendants in the “twinkling of an eye.” Therefore the rule of reason is the appropriate standard in this case.

[21] Plaintiffs have carried their initial burden of showing an actual impact on competition. The clubs in each League have entered an express agreement to limit competition between the clubs—and their broadcaster affiliates—based on geographic territories. There is also evidence of a negative impact on the output, price, and perhaps even quality of sports programming. Plaintiffs’ expert, Dr. Roger G. Noll, attests that consumers pay higher prices for live game telecasts, and have less choice among the telecasts available to them, than they would in the absence of the territorial restrictions. Similarly, Dr. Noll estimates that the price of OOM packages would decrease by about fifty percent in a world without the restrictions. Finally, defendants have not argued in these motions that the Leagues lack market power.

Defendants respond by identifying various procompetitive effects of the territorial broadcast restrictions. They claim that the rules: 1) prevent free riding, 2) preclude competition with joint venture products, 3) incentivize investment in higher quality telecasts, 4) maintain competitive balance, 5) preserve a balance between local loyalty and interest in the sport as a whole, and 6) increase the overall number of games that are telecast. Plaintiffs deny that the territorial rules serve the above interests and also challenge the validity of the interests in light of the territorial rules’ overall economic impact on competition.

First, defendants argue that the territorial rules prevent free riding. Although avoiding free riding can be a legitimate procompetitive goal in certain contexts, it is not clear how free riding would pose a threat in this case. Defendants argue that the clubs would “free ride” on the popularity and publicity of the Leagues if they were permitted to license their games nationally. However, the same argument could be made for any revenue-producing activity that an individual team undertakes, including local ticket sales. Defendants also claim that the clubs would “free ride” off the OOM packages by nationally licensing individual club broadcasts, but it is the clubs and RSNs who create the programming in the first place. If anything, the OOM packages benefit from the labor and investment of the clubs and RSNs, not the other way around. Defendants’ theory of free riding is unclear and unpersuasive.

Second, defendants argue that the Leagues have an unassailable right to prevent the clubs from competing with the “joint venture.” However, no case cited by defendants stands for the proposition that a joint venture may always prevent its members from competing with the venture product regardless of anticompetitive consequences. Rather, in each case, the court concluded based on the facts presented that the restraint in question caused no actual harm to competition. “If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from § 1, then any cartel could evade the antitrust law simply by creating a joint venture to serve as the exclusive seller of their competing products.”

[22] Third, defendants argue that territorial exclusivity encourages the RSNs to invest in higher-quality telecasts, including high-definition cameras, announcers, audio-visual effects, and related pre-game and post-game programming. However, the incentive for added investment is inflated profit stemming from limited competition. “[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.” To the extent that
Defendants also claim that the revenue sharing aspects of the OOM packages and *300 national broadcasts foster competitive balance. However, there is support in the economic community for the theory that revenue sharing in fact exacerbates competitive imbalance. 121 Even accepting the premise that revenue sharing is beneficial, defendants have not explained why broadcasting contracts are a better mechanism than more direct, limited forms of revenue sharing. 122

Fifth, defendants claim that they have a legitimate pro-competitive interest in maintaining “a balance between the promotion of [hockey and baseball] as [ ] national game[s] and the need to incentivize Clubs to build their local fan bases.” 123 Aside from the fact that these two goals appear to conflict, defendants have not explained what the ideal balance would be, or how they might quantify it. There is no objective measure the Leagues could aspire to attain. Therefore defendants cannot establish that this particular balance between local and national interests is better for consumers, or for demand, than the balance that would prevail in a free market. Moreover, the Leagues purport to bolster regional interest and team loyalty by consciously depriving consumers of out-of-market games they would prefer, which is generally not a permissible aim under the antitrust laws. 124

Finally, defendants argue that the number of telecasts created and broadcast is greater under the territorial restrictions than it would be in the plaintiffs’ “but-for” world. According to defendants, while almost every game is currently available to consumers in one format or another (national broadcast, local RSN, or OOM package), a system dependent on consumer demand could not guarantee that every game would be available everywhere because less popular teams would struggle to get their games produced or televised on their own. 125 Destroying the HTTs would also destroy content exclusivity because OOMs and both competing teams would be able to sell the same game in the same areas. 126 As a result, RSNs would be loathe to give their telecasts to the Leagues to create OOM packages, depriving consumers of the ability to access any and all out-of-market games as they do now. 127 Similarly, national broadcasters would refuse to enter into national contracts without the assurance of exclusivity. 128 Because plaintiffs do not challenge the legality of the OOM packages or national broadcasts, defendants argue, the *301 territorial system is also immune from challenge as a matter of law.

These arguments are far from compelling. Just because plaintiffs do not directly challenge the legality of the OOM packages and national broadcasts does not mean that preserving them is sufficient justification for the territorial rules. 129 Even the complete disappearance of OOM packages would not necessarily cause consumer harm if the same content could be distributed in another form (such as by RSNs nationwide). The OOMs are simply one form of delivering the content to consumers—a form made necessary by the territorial rules themselves. Moreover, it is certainly conceivable that the OOMs would continue to exist absent the territorial restrictions, given the low added cost of creating the packages and the convenience of bundling to many consumers. 130

[24] Defendants’ assumption that market demand would be insufficient to ensure access to the same number of games is questionable. 131 Indeed, the Television Defendants insist that the sports rights are so valuable that they would compete for those rights vigorously even in the absence of the territorial rules. 132 Moreover, “[a] restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with th[e] fundamental goal of antitrust law.” 133 While defendants have identified some conceivable procompetitive effects from the territorial
rules, plaintiffs have produced equally plausible (if not more plausible) arguments in opposition. It certainly cannot be said that defendants have established procompetitive benefits to the economy as a matter of law.

Defendants cite Virgin Atlantic Airways Ltd. v. British Airways PLC for the proposition that plaintiffs must identify a less restrictive alternative for any procompetitive effect defendants can identify, even if the overall effect on the economy is overwhelmingly anticompetitive. Such an interpretation, however, is inconsistent with the Supreme Court's mandate that “the essential inquiry [under the rule of reason] ... [is] whether or not the challenged restraint enhances competition.” Indeed, in United States v. Visa U.S.A., Inc., the Second Circuit balanced the alleged procompetitive and anticompetitive effects of the exclusivity rules before requiring the Government to propose any less restrictive alternatives.

*302 Most of defendants' claimed pro-competitive effects are disputable, and the overall effect on the economy is even less conclusive, especially in light of Dr. Noll's testimony that abolishing the territorial restrictions would decrease the cost of sports programming without diminishing output. Far from being implausible, plaintiffs' “but-for” world is at least as likely as defendants' prognostications. Plaintiffs have raised a genuine issue of material fact regarding the overall competitive impact of the territorial rules, foreclosing the possibility of summary judgment for the Leagues under the rule of reason.

C. The Television Defendants Are Not Entitled to Summary Judgment

1. Liability for the Vertical Agreements

The Television Defendants argue that downstream distributors who simply implement the restrictions of an upstream conspiracy through vertical agreements, without further involvement, cannot be deemed participants in the conspiracy as a matter of law. They argue that the RSNs and MVPDs played no role in creating the territorial restrictions, which were presented to them on a non-negotiable basis, and have never sought to enforce the restrictions against other horizontal participants. Therefore, they have not engaged in any “concerted action” and cannot be held liable for the territorial limits in the Rights Agreements even if those limits violate the Sherman Act.

The Television Defendants cite Bowen v. New York News, Inc., Fuchs Sugars & Syrups, Inc. v. Amstar Corp., and Levitch v. Columbia Broadcasting System, Inc., and Virgin Atlantic for the proposition that a downstream entity must either request the restraint or attempt to enforce the restraint in order to be liable. However, none of these cases support the Television Defendants' assertions. The courts in Fuchs, Virgin Atlantic, and Levitch found insufficient evidence of any agreement between the downstream and upstream entities. In all three cases, the upstream entity implemented a unilateral policy change that did not require assent, participation, or forbearance of any kind by the alleged conspirators. Here, contracts with the downstream entities explicitly incorporate the challenged restrictions. The Leagues require the assent and assistance of the RSNs to implement the restrictions, and the RSNs require the same level of participation from the MVPDs.

*303 The Television Defendants also cite Bowen, in which a newspaper publisher switched to a system of exclusive franchise dealers instead of the many competing independent dealers it had previously employed. The newspaper limited each franchise dealer to a specified exclusive territory, and attempted to cut off supply to the independent dealers to prevent competition. The court mused in dicta that “unilateral establishment and enforcement [by an upstream entity] of exclusive territories and customer limitations ... might conceivably be upheld.” However, the court refrained from deciding the question given that the newspaper and the franchise dealers had agreed to cut off supply to the independent dealers, which the court found to be a violation of the Sherman Act. Although the court noted that the dealers had asked the newspaper to cut off supply to the independents, it did not necessarily rely on that fact in reaching its conclusion. Instead, it emphasized that the newspaper's conduct was “undertaken pursuant to an agreement with the franchise dealers and for the purpose of restricting” competition.

The Television Defendants held that a downstream entity must request or enforce a restraint in order to be liable for adopting it through agreement. Nor did they indicate that each party to an allegedly unlawful agreement must have equal or even substantial negotiating power in adopting the
agreement's terms. Moreover, a downstream entity need not participate in the initial creation of the restraints in order to be liable for adopting them later. “It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators.”

*304 Indeed, it would defy common sense to require proof that the Television Defendants enforced the territorial restrictions when they knew that the structure would be secured through a series of parallel contracts effectively policed by the Leagues. Nevertheless, plaintiffs have produced some evidence that the Television Defendants have defended the territorial structure on the rare occasions that it has been threatened. In 2008, MLB attempted to adjust the territorial lines to serve customers who could not watch local games, which would have required clubs and RSNs to cede some territory to the OOM packages. The Comcast RSNs vehemently opposed the proposal and sent the following letter to MLB:

If MLB were to adopt any new MLB rule permitting MLB Extra Innings and/or MLB.TV to be distributed in unserved or underserved portions of a club's exclusive home television territory, the scope of the exclusivity purchased by the RSN would be unilaterally changed and the financial impact on the prospects and performance of the Comcast RSNs (and, by implication, on the clubs whose rights they hold) would likely be immediate and significant. Accordingly, the Comcast RSNs are unlikely to consider favorably the release of any portion of a home television territory to which an RSN currently has exclusive rights. In providing distribution information herewith, the Comcast RSNs specifically reserve all of their respective rights and remedies with respect to any change in MLB's current rules and practices that negatively impacts the clubs' respective home television territories and the breadth of the exclusive rights heretofore granted to their corresponding Comcast RSNs.

Moreover, the MVPDs' 2007 contracts with MLB for the television OOM package have clauses that read in part: “[t]he Home Television Territory of any Club shall not be materially expanded by [MLB] except in connection with and directly related to any increase or decrease in the number of franchises ... or in connection with any club relocation.” While the clause does not permit the MVPDs to enforce the territorial restrictions against competitors, it applies pressure on the Leagues to retain the current territorial restrictions or face monetary repercussions. Similarly, former MLB President Robert DuPuy testified that the RSNs “insist” on “changed circumstances” clauses in the Rights Agreements that permit the RSNs to pay less if their exclusivity is abridged. The above examples indicate that the Television Defendants are more than passive participants in a unilaterally imposed restriction.

2. The Existence of a Horizontal Agreement

[27] The Television Defendants argue that there are no plus factors that might signal interdependent action among the RSNs and MVPDs as opposed to merely parallel conduct. They point out that the Rights Agreements with the various RSNs are staggered and often have terms of several years, making coordinated action difficult. They further argue that plaintiffs have produced no evidence of a high volume of interfirm communications among the Television Defendants. Finally, they argue that it is in the economic interest of an RSN to enter into a Rights Agreement regardless of what the other RSNs do. In the absence of plus factors, parallel conduct is insufficient to survive summary judgment on a theory of horizontal conspiracy.

[28] However, the potential for significantly increased profits from the restraint is a "strong motive for concerted action." “This plus factor speaks to whether [the Television Defendants] also had a ‘rational economic motive’ to adopt those clauses jointly, as opposed to going it alone.” The Television Defendants argue that the plaintiffs' alleged conspiracy makes no economic sense because it would inflate the sports rights fees paid by the Television Defendants to the Leagues, and no entity would "conspire[] to pay more than they would otherwise pay."
This argument ignores the fact that the Television Defendants pay higher rights fees because their revenues from consumers are correspondingly greater. 158

Indeed, plaintiffs have presented ample evidence that the territorial restrictions are valuable to the Television Defendants. Boston Red Sox owner John Henry stated that the “primary benefit” of the territorial restrictions is “not to have to compete with other clubs or with [ ] baseball itself in your home television territory.” 159 According to Henry, such exclusivity is “very valuable to broadcasters” and therefore *306 “important to all clubs.” 160 Similarly, John Tortora, former NHL Director of Team Television, testified that RSNs would be harmed by “bringing another club's games into another team's sphere of influence” because “the benefit of [the RSNs'] bargaining with [the clubs] [is] exclusivity in the marketplace.” 161 In fact, the League Defendants claim that the territorial restrictions are so central to the profitability of broadcasting that the RSNs would stop producing many telecasts without them. 162 The potential for higher revenues stemming from collective action constitutes a strong motive to collude. 163

Additionally, plaintiffs plausibly argue that the terms of the Rights Agreements and Affiliation Agreements would contravene the individual economic interests of the Television Defendants in the absence of the territorial restrictions. Although the Television Defendants would likely continue to purchase broadcasting rights without the restrictions, plaintiffs have adduced evidence that they would not do so at the same price. In that sense their behavior is contingent on the knowledge that other RSNs and MVPDs are bound by the same contractual limits. Given the clear existence of parallel conduct and several plausible plus factors, a fact-finder could plausibly conclude that the RSNs' and MVPDs' decisions to enter the contracts—at the prices negotiated—were interdependent rather than unilateral.

Defendants cite PepsiCo, Inc. v. Coca–Cola Co. to argue that a series of parallel vertical restrictions, even coupled with knowledge that the restrictions will be uniformly enforced, is insufficient to establish the existence of a horizontal agreement. In PepsiCo, Coca–Cola prohibited its distributors from distributing Pepsi products. 164 Although Coca–Cola assured the distributors that it would enforce the same restriction against the other distributors and encouraged them to report violations, the court found insufficient evidence of a horizontal agreement. 165 However, in PepsiCo there was no evidence that the distributors benefitted from the restriction or paid higher prices to Coca–Cola to obtain it. Here, by contrast, the combination of parallel conduct, knowledge of assured enforcement, strong motive to conspire, attempts to protect the restrictions, and evidence that the Television Defendants would not have entered the contracts at the prices prescribed but for the territorial restrictions, is sufficient evidence from which a fact finder could infer a tacit horizontal agreement among the RSNs and MVPDs.

Whether plaintiffs have presented sufficient evidence to demonstrate concerted action between the Television Defendants and the League Defendants, or a tacit *307 agreement among the Television Defendants, is difficult to discern at this stage. Consequently, these questions are not suitable for disposition as a matter of law and are properly reserved for the fact finder in light of the totality of the evidence presented at trial. It is an unfortunate trend that judges increasingly resolve trial-worthy disputed fact issues or characterize cases as implausible, thereby disposing of them on motion rather than allowing them to proceed to trial.... [A] motion designed simply for identifying trial-worthy issues has become, on occasion, a vehicle for resolving trial-worthy issues.... The effect is to compromise the due process underpinnings of the day-in-court principle and the constitutional jury trial right without any empirical basis for believing that systemic benefits are realized that offset these consequences. 166

Because plaintiffs have presented sufficient evidence to raise a genuine dispute of material fact, the Television Defendants' motion for summary judgment is denied.

D. Illinois Brick Does Not Bar the Television Plaintiffs' Suit

I previously held that the first non-conspirator in the chain of distribution is entitled to collect damages from all of the co-conspirators. 167 The television plaintiffs purchased the relevant sports programming from the MVPDs. Therefore, their standing to sue the other defendants is contingent on the
MVPDs’ role in the conspiracy. As discussed previously, the television plaintiffs have produced sufficient evidence that a reasonable fact-finder could find the MVPDs complicit in the alleged conspiracy. Therefore, the television plaintiffs’ claims are not barred at this stage.

E. The Section 2 Claim
The League Defendants do not address the merits of plaintiffs’ monopolization claim under Section 2 of the Sherman Act. The MLB Defendants do not address the Section 2 claim at all, and the NHL Defendants argue only that the Section 2 claim must be dismissed because the Section 1 claim fails. Because the League Defendants’ motion for summary judgment on the Section 1 claim is denied, their sole argument for dismissal of the Section 2 claim has no merit.

VI. CONCLUSION
For the foregoing reasons, all four motions for summary judgment are DENIED in full. The Clerk of the Court is directed to close these motions [Dkt. Nos. 180, 183, 212, 216, 224 in Laumann, 12 Civ. 1817, and Dkt. Nos. 239, 240, 241, 261, 271, 275, *308 280 in Garber, 12 Civ. 3704]. A conference is scheduled for August 20, 2014 at 4:30 pm.

SO ORDERED.

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Footnotes
1 Several defendant RSNs are owned and controlled by defendant Comcast, several are owned and controlled by defendant DIRECTV, and two are independent of the MVPDs but share ownership with an individual club.
3 See id. at 492.
4 See Garber, No. 12 Civ. 3704, Dkt. No. 222; Laumann, No. 12 Civ. 1817, Dkt. No. 167.
5 The Yankee Defendants and the MSG Defendants have joined in the other defendants’ motions. See Garber, No. 12 Civ. 3704, Dkt. No. 280 (indicating that the New York Yankees “refer[ ] the Court to the memorandum of law and statement of material facts filed today by the other Major League Baseball club defendants in this action,” and that “YES, which is a regional sports network (“RSN”), respectfully refers the Court to the memoranda of law and statements of material facts filed today by the other RSN defendants in this action”). See also Laumann, No. 12 Civ. 1817, Dkt. No. 217 (indicating the MSG Defendants’ joinder in the NHL Defendants’ revised motion for summary judgment).
6 See NHL Defendants’ Motion for Summary Judgment (“NHL Mem.”) at 3.
7 See Memorandum of Law in Support of the MLB Defendants’ Motion for Summary Judgment (“MLB Mem.”) at 4.
8 See MLB Defendants’ Rule 56.1 Statement of Undisputed Material Facts (“MLB 56.1”) ¶¶ 4–5. See also NHL Mem. at 3.
9 See Comcast’s Statement of Undisputed Material Facts Pursuant to Local Rule 56.1 (“Comcast 56.1”) ¶ 2; NHL Mem. at 4–5; MLB 56.1 ¶ 68.
10 See Comcast 56.1 ¶ 4; The DIRECTV Defendants’ Rule 56.1 Statement of Undisputed Facts (“DIRECTV 56.1”) ¶ 4.
11 See MLB 56.1 ¶ 68; NHL Mem. at 5.
12 See NHL Mem. at 5; Comcast 56.1 ¶ 2.
13 MLB 56.1 ¶ 93; Comcast 56.1 ¶¶ 6, 14; DIRECTV 56.1 ¶ 6; NHL Mem. at 5. Plaintiffs do not challenge the clubs’ right to grant production and distribution rights for their own games to only one RSN (hereinafter “content exclusivity”). Such exclusivity is to be distinguished from the exclusivity established by the territorial rules, which prevent each RSN from televising its programming outside the HTT and protect it from competing with the programming of other teams’ games within the HTT (hereinafter “territorial exclusivity”).
14 See Comcast 56.1 ¶ 22.
15 See MLB 56.1 ¶¶ 68, 150; Comcast 56.1 ¶ 18; NHL Mem. at 6.
16 See MLB 56.1 ¶ 25; NHL Mem. at 4.
17 See MLB 56.1 ¶ 103; Comcast 56.1 ¶ 14.
18 See MLB 56.1 ¶ 104; DIRECTV 56.1 ¶¶ 17, 19; Comcast 56.1 ¶ 19.
19 See Comcast 56.1 ¶ 12; NHL Mem. at 5.
20 See MLB 56.1 ¶ 112; DIRECTV 56.1 ¶ 22.
21 See Comcast 56.1 ¶ 22; DIRECTV 56.1 ¶ 21.
22 See MLB 56.1 ¶¶ 124–125; NHL Mem. at 4.
23 See MLB 56.1 ¶ 130; NHL Mem. at 2.
24 See MLB 56.1 ¶ 1; NHL 56.1 ¶ 14.
25 See Comcast 56.1130; Memorandum of Law in Support of the DIRECTV Defendants' Motion for Summary Judgment ("DIRECTV Mem.") at 7.
26 See Comcast 56.1 ¶ 31; DIRECTV Mem. at 4.
27 See MLB 56.1 ¶¶ 68, 150; Comcast 56.1 ¶ 18; NHL Mem. at 6.
28 See MLB 56.1 ¶ 153; NHL 56.1 ¶ 14.
29 MLB 56.1 ¶ 47. Accord Comcast 56.1 ¶ 33.
30 One exception is that the teams in each League have agreed to permit the visiting team to produce a separate telecast of away games.
31 See MLB ¶ 157; DIRECTV 56.1 ¶ 29; Plaintiffs' Response to DIRECTV Defendants' Local Rule 56.1 Statement of Undisputed Material Facts ¶ 29.
32 See DIRECTV 56.1 ¶ 34. Fans must authenticate their OOM television subscription in order to access the games online.
33 See MLB 56.1 ¶ 171 (revealing that only three baseball clubs have reached agreements with MLB to permit in-market streaming of their games); DIRECTV 56.1 ¶¶ 32, 36, 38 (noting that no NHL team has conducted in-market streaming and only two baseball clubs have done so in the past, and also stating that DIRECTV has unsuccessfully tried to negotiate for in-market streaming with the Leagues).
38 Id. (quotation marks and citations omitted).
39 Brod v. Omya, Inc., 653 F.3d 156, 164 (2d Cir.2011) (quotation marks and citations omitted).
42 Mayor & Council of Baltimore v. Citigroup, Inc., 709 F.3d 129 (2d Cir.2013) (quotation marks and citations omitted).
44 See Interstate Circuit, Inc. v. United States, 306 U.S. 208, 229–30, 59 S.Ct. 467, 83 L.Ed. 610 (1939) (finding that “[t]he fact that the restrictions may have been of a kind which a distributor could voluntarily have imposed, but did not, does not alter the character of the contract as a calculated restraint” in violation of the Sherman Act); In re Publication Paper Antitrust Litig., 690 F.3d 51, 68 (2d Cir.2012) (“[T]he mere fact that following price increases announced by competitors may have been consistent with [defendant's] overall pricing strategy does not immunize [defendant] from liability if it had an illegal agreement with [a competitor] to adhere to that strategy.”); Levitch v. Columbia Broad. Sys., Inc., 495 F.Supp. 649, 672 (S.D.N.Y.1980), aff'd, 697 F.2d 495 (2d Cir.1983) (“So long as the refusal to deal is the product of an independent determination, rather than an unlawful understanding, tacit or expressed, the decision does not run afoul of the antitrust laws.”).
45 Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir.1987) (quoting Modern Home Inst., Inc. v. Hartford Accident & Indemnity Co., 513 F.2d 102, 110 (2d Cir.1975)). Accord Publication Paper, 690 F.3d at 62 ("Conscious parallelism alone, however, does not establish an antitrust violation. Such behavior is consistent with both unlawful conspiracy and lawful independent conduct.").
46 Mayor & Council of Baltimore, 709 F.3d at 136.
47 Laumann, 907 F.Supp.2d at 486–87. Accord Modern Home, 513 F.2d at 110 ("noting that "decisions [that are] interdependent ... raise the inference of a tacit agreement" "); Levitch, 495 F.Supp. at 674 ("It must be demonstrated that the parallel decisions were interdependent in order to raise the inference of a tacit agreement.").
generally requires a combination or other form of concerted action between two legally distinct entities resulting in an unreasonable restraint on trade.

50 Laumann v. National Hockey League, 56 F.Supp.3d 280 (2014) (internal quotations and citations omitted). Categorizing a restraint as per se illegal “eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work.” Id. at 886, 127 S.Ct. 2705.

51 Id. at 885–86, 127 S.Ct. 2705.

52 Id. at 886, 127 S.Ct. 2705.

53 Gatt Commc’ns, Inc. v. PMC Assoc., L.L.C., 711 F.3d 68, 75 n. 8 (2d Cir.2013) (quotation marks and citations omitted).


55 Id. The Supreme Court found an abbreviated analysis appropriate where a league agreement expressly limited the number of college football games that could be televised and fixed minimum prices for those games. See National Collegiate Athletic Ass’n v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85, 109–10, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) (“NCAA”) (“[W]hen there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.”).

56 Salvino, 542 F.3d at 317 (internal quotation omitted).


59 In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 687 (2d Cir.2009) (quoting PepsiCo, Inc. v. Coca–Cola Co., 315 F.3d 101, 105 (2d Cir.2002)).

60 Affinity LLC v. GfK Mediarmark Research & Intelligence, LLC, 547 Fed.Appx. 54, 57 (2d Cir.2013). Accord PepsiCo, 315 F.3d at 105.


62 See id. at 207, 42 S.Ct. 465.

63 Id. at 208, 42 S.Ct. 465.

64 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (1953). The Supreme Court in Toolson affirmed the decisions in three different cases on appeal from the Sixth and Ninth Circuits. See Corbett v. Chandler, 202 F.2d 428 (6th Cir.1953); Kowalski v. Chandler, 202 F.2d 413 (6th Cir.1953); Toolson v. New York Yankees, 200 F.2d 198 (9th Cir.1952).


66 In his submissions to the Ninth Circuit, the plaintiff argued that defendants had agreed amongst themselves that “no Major League club shall authorize a broadcast or telecast of any of its games from a station outside its home territory and within the home territory of any other baseball club, without the consent of such other clubs.” Petitioner’s Opening Brief on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Toolson II (No. 13228), 1953 WL 78316, at *6. As a result, plaintiff argued, the defendants had “greatly lessened and eliminated all competition in the exhibition of baseball games by means of broadcasting and televising among the several states.” Id. at *9.

67 The district court’s summary of the plaintiff’s claims omits any mention of the broadcasting allegations. See Toolson I, 101 F.Supp. at 93.

68 See id. at 94–95.

69 See id. at 94.

70 See Toolson II

71 See Kowalski, 202 F.2d at 414; Corbett, 202 F.2d at 428. In Corbett, the Sixth Circuit affirmed the district court without comment except to reference its decision in Kowalski, which was issued the same day.

72 Toolson III, 346 U.S. at 357, 74 S.Ct. 78.

73 Id.

74 Id.

75 See 15 U.S.C.A. § 1291 (West 2014) (“The antitrust laws ... shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league’s member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.”). See also NCAA, 468
U.S. at 104 n. 28, 104 S.Ct. 2948 (stating that the SBA “grant[ed] professional sports an exemption from the antitrust laws for joint marketing of television rights”).

See 15 U.S.C.A. § 1294 (West 2014) (“Nothing contained in this chapter shall be deemed to change, determine, or otherwise affect the applicability or nonapplicability of the antitrust laws to any act, contract, agreement, rule, course of conduct, or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey, except the agreements to which section 1291 of this title shall apply.”).

Id. § 1292.

NCAA, 468 U.S. at 104 n. 28, 104 S.Ct. 2948.


Id. at 282, 92 S.Ct. 2099.

Id.

Id. at 283, 92 S.Ct. 2099.

Id. at 285, 92 S.Ct. 2099.

Id. at 282–83, 92 S.Ct. 2099 (emphasis added).


Id. at 452, 77 S.Ct. 390.


Id. § 26b(b).


Laumann, 907 F.Supp.2d at 482 (quoting Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 632 (7th Cir.2002)).

See MLB Mem. at 10 (arguing that the Curt Flood Act and the official Senate Report indicate that Congress did not intend the antitrust laws to apply to broadcasting).

The SBA expressly applies to professional football, baseball, basketball, and hockey. See 15 U.S.C.A. § 1291.

See id. § 1292 (“Section 1291 of this title shall not apply to any joint agreement described in the first sentence in such section which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home.”).

See 407 U.S. at 282, 92 S.Ct. 2099 (“With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly.”); id. at 283, 92 S.Ct. 2099 (“Congress as yet has had no intention to subject baseball’s reserve system to the reach of the antitrust statutes.”).


See, e.g., Charles O. Finley v. Kuhn, 569 F.2d 527, 541 (7th Cir.1978) (concluding that the Supreme Court in Flood “intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws”);

City of San Jose v. Office of Comm’r of Baseball, No. C–13–02787, 2013 WL 5609346 (N.D.Cal. Oct. 11, 2013) (finding exemption applicable to club relocation);

Major League Baseball v. Butterworth, 181 F.Supp.2d 1316, 1332 (N.D.Fla.2001), aff’d on other grounds sub nom. Major League Baseball v. Crist, 331 F.3d 1177 (11th Cir.2003) (“It is difficult to conceive of a decision more integral to the business of major league baseball than the number of clubs that will be allowed to compete.”).


Id. at 265. As Henderson noted, a line of cases has found the exemption inapplicable to club or player contracts with third parties. See Crist, 331 F.3d at 1183 (noting that “the antitrust exemption has not been held to immunize the dealings between professional baseball clubs and third parties”); Postema v. National League of Prof’l Baseball Clubs, 799 F.Supp. 1475, 1489 (S.D.N.Y.1992), rev’d on other grounds, 998 F.2d 60 (2d Cir.1993) (finding baseball exemption inapplicable to League and club employment relations with umpires). In another case involving player contracts with third parties, the court did not discuss the baseball exemption at all. See Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139 (3rd Cir.1981) (addressing baseball card licensing agreements between players’ union and third party retailer).

MLB Mem. at 10 (quoting S.Rep. No. 105–118, at 6 (1997)).
See United States v. Penn–Olin Chem. Co., 378 U.S. 158, 169, 84 S.Ct. 1710, 12 L.Ed.2d 775 (1964) (observing that “[i]f the parent companies are in competition, or might compete absent the joint venture, it may be assumed that neither will compete with the progeny in its line of commerce,” but specifically noting that this aspect of a joint venture “often creates anticompetitive dangers”); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 214 (D.C.Cir.1986) (holding that defendant’s “market share [was] far too small for the restraint to threaten competition or to have been intended to do so”); Madison Square Garden, L.P. v. National Hockey League, No. 07 Civ. 8455, 2007 WL 3254421, at *7 (S.D.N.Y. Nov. 2, 2007), aff’d, 270 Fed.Appx. 56 (2d Cir.2008) (noting in dicta that some courts have “[u]pheld agreements among parents of a joint venture not to compete in the market in which the joint venture operates” without suggesting that all such agreements are lawful).

American Needle, 560 U.S. at 201, 130 S.Ct. 2201 (quotations and citations omitted).


See Noll Decl. at 107, 109.

See American Needle, 560 U.S. at 204, 130 S.Ct. 2201 (noting that “the interest in maintaining a competitive balance among ‘athletic teams is legitimate and important’”) (quoting NCAA, 468 U.S. at 109 n. 39, 104 S.Ct. 2948). See also Salvino, 542 F.3d at 316 (stating that “the need for competitive balance among the Clubs is essential to the well-being of [professional sports] Leagues”).

See Noll Decl. at 117.

See id. (“Economic research provides no reason to believe that restrictions in competition for television rights contribute to competitive balance, no matter how balance is defined, and some reason to believe that these restrictions actually make balance worse.”).

See id. at 118–19.
See id. at 119–20 (“Both leagues already share revenues.... If the leagues wish to share revenue more equally, simply increasing the share of total revenue that is shared is a much simpler mechanism for achieving this goal....”).

124 See NCAA, 468 U.S. at 107 n. 34, 104 S.Ct. 2948 (“Perhaps the most pernicious aspect is that under the controls, the market is not responsive to viewer preference.... Many games for which there is a large viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised.”) (quotation marks and citations omitted).

125 See MLB Mem. at 14, 19–20; NHL Mem. at 13 n. 6, 21–22. See also MLB Mem. at 19 (arguing that “certain currently less popular or less successful clubs inevitably will be inherently unable to compete fully effectively on their own in the national market for the sale of live game video rights” (quotations omitted)).

126 See MLB Mem. at 13.

127 See id. at 14 n. 28.

128 See NHL Mem. at 11, 14 n. 7.

129 The same argument applies to content exclusivity, which, although not directly offending the antitrust laws, may nonetheless fail to justify a range of other anticompetitive effects.

130 See Noll Decl. at 114 (“Because the profit margin of the league package is so large, the league could lose a very large share of the customers for its league package and still profit from continuing to offer it. Likewise ... [t]he continued existence of national telecasts of games in college sports demonstrates that such national packages are financially viable even when the broadcaster does not enjoy exclusive rights to broadcast a particular sport in a particular time period.”).

131 See id. at 95–97, 110.

132 See Comcast Mem. at 7; DIRECTV Mem. at 13–14.

133 NCAA, 468 U.S. at 107, 104 S.Ct. 2948.

134 See 257 F.3d 256, 264 (2d Cir.2001).

135 NCAA, 468 U.S. at 104, 104 S.Ct. 2948. Accord Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007) (“The rule of reason is designed and used to ascertain whether transactions are anticompetitive or procompetitive.”).

136 See 344 F.3d 229, 243 (2d Cir.2003) (affirming district court’s finding of Section 1 liability after non-jury trial because “the defendants have failed to show that the anticompetitive effects of their exclusionary rules are outweighed by procompetitive benefits”).

137 See Noll Decl. at 104, 109–10.

138 See Comcast Mem. at 1; DIRECTV Mem. at 10–12, 18.

139 522 F.2d 1242 (2d Cir.1975).

140 602 F.2d 1025 (2d Cir.1979).

141 495 F.Supp. at 649.

142 257 F.3d at 256.

143 See id. at 263 (airline’s unilateral decision to offer discounts and incentives to corporate partners and travel agents did not constitute concerted action with the partners and agents); Fuchs, 602 F.2d at 1031 (finding that sugar manufacturer made unilateral decision to change its policy in a manner that benefitted the defendant brokers, but without any involvement by the brokers); Levitch, 495 F.Supp. at 673 (finding no agreement between broadcast networks and affiliate television stations where networks made unilateral decision to use only documentaries produced in-house, and “nothing contained in any of the affiliation agreements, or any of the other contractual agreements executed by the network defendants and their affiliates, [ ] preclude[d] the affiliates from purchasing independently produced documentary or news programs”).

144 Bowen, 522 F.2d at 1256.

145 Id.

146 The Television Defendants cite dicta from Fuchs for the proposition that both parties to an unlawful agreement in restraint of trade must have “knowing and active participation ... in a scheme to coerce compliance with anticompetitive activity.” Fuchs, 602 F.2d at 1032. The Television Defendants argue that “mere acceptance of vertical distribution rights” is insufficient to meet that standard. Reply Memorandum of Law in Support of Television Defendants’ Motions for Summary Judgment at 2. However, Fuchs based its holding on the fact that the alleged co-conspirators were not independent entities, and that the challenged action was unilateral rather than the product of agreement. It did not hold that “mere acceptance” of contractual terms was insufficient participation to establish concerted action.
Additionally, a fact finder could reasonably conclude that the Television Defendants actively participated in a “scheme to coerce compliance” by signing the Rights Agreements knowing their competitors would be subject to the same terms, even if they did not personally attempt to enforce the restrictions. Moreover, there is evidence that the RSNs and MVPDs have on some occasions tried to protect and preserve the territorial structure. See infra Part V.C.2.

The Television Defendants also cite Toscano v. Professional Golfers’ Ass’n, 258 F.3d 978 (9th Cir.2001), in which the Ninth Circuit found no concerted action between a sports league and its sponsors because the league independently imposed certain contractual restrictions and the sponsors merely accepted them. See id. at 985 (“The [sponsor] defendants played no role in the creation or enforcement of those rules and regulations....”). However, Toscano is not binding law in the Second Circuit. Moreover, there was no evidence in Toscano that the “sponsors [had] an economic interest in the eligibility and participation rules challenged.” Toscano v. PGA Tour, Inc., 70 F.Supp.2d 1109, 1117 n. 10 (E.D.Cal.1999), aff’d sub nom. Toscano v. Professional Golfers Ass’n, 258 F.3d 978 (9th Cir.2001). In fact, the district court noted that the rules might actually contravene the sponsors’ economic interests. See id. at 1117.

Interstate, 306 U.S. at 227, 59 S.Ct. 467 (finding that “each distributor early became aware that the others had joined, [and] [w]ith that knowledge [ ] renewed the arrangement and carried it into effect for the two successive years”). Accord United States v. Masonite Corp., 316 U.S. 265, 275, 62 S.Ct. 1070, 86 L.Ed. 1461 (1942) (Even if it were “not clear at what precise point of time each [defendant] became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement ... it is clear that as the arrangement continued each became familiar with its purpose and scope.”); Ross v. American Exp. Co., 35 F.Supp.3d 407, 440, No. 04 Civ. 5723, 2014 WL 1396492, at *26 (S.D.N.Y. Apr. 10, 2014) (“Indeed, interdependent parallel conduct may be simultaneous or sequential.”).

Re: Request for Information—MLB Extra Innings and MLB.TV, Ex. 24 to 5/24/14 Declaration of Edward A. Diver, plaintiffs’ counsel (“Diver Decl.”), at 2. Defendants argue that Comcast was simply preserving its exclusive right to broadcast local games through its entire in-market territory, rather than protecting itself from the broadcasts of out-of-market games. Nonetheless, the letter reveals one mechanism by which the Television Defendants can “enforce” the various forms of exclusivity they have purchased from the League Defendants.

MLB Contract with DIRECTV for Extra Innings, Ex. 11 to Diver Decl., at 22–23; MLB Contract with in Demand for Extra Innings, Ex. 12 to Diver Decl., at 16. According to plaintiffs, in demand's majority owner is Comcast, and Comcast CEO Brian Roberts played a central role in determining in demand's carriage of Extra Innings. See PL Mem. at 70.


See DIRECTV Mem. at 2.

Plaintiffs have produced one email exchange indicating that in 2010, Comcast asked DIRECTV’S Pittsburgh RSN to lift its blackout of Flyers games in Penguin territory in exchange for increased distribution of a DIRECTV RSN on Comcast systems in Pennsylvania. DIRECTV apparently declined the offer. See PL Mem. at 62; 7/9/10–7/14/10 Email Exchange, Ex. 13 to Diver Decl.

See Comcast Mem. at 7; DIRECTV Mem. at 1–2.


Comcast Mem. at 1.

See Noll Decl. at 84, 104–105.

1/12/14 Henry Dep., Ex. 43 to Diver Decl., at 63:19–64:1.

Id. at 63:18, 64:10. Henry also testified that he was not aware of any other purpose for the territorial restrictions aside from protecting the clubs from competition in their home territories.


See MLB Mem. at 13–14, 19; NHL Mem. at 13 n. 6, 21–22.

While plaintiffs have produced little direct evidence at this stage that the MVPDs profit from the territorial restrictions, it is a plausible inference that each entity in the chain of distribution negotiates for some share of the revenue generated through limited competition and increased prices. At this stage all reasonable inferences must be drawn in favor of the non-moving party. See Rivera, 743 F.3d at 19.

See 315 F.3d at 104 (affirming district court's grant of summary judgment in favor of Coca–Cola).

See id. at 110.

trends in federal civil procedure). Accord *S.E.C. v. EagleEye Asset Mgmt.*, 975 F.Supp.2d 151, 159 (D.Mass.2013) (“Too often, judges substitute their own judgment for that of the jury.... This cognitive illiberalism has been rightly condemned as a form of judicial arrogance.... Juries have not only the duty, but also the right to decide cases. Encroaching upon the province of juries to decide questions of fact, such as the determination of a defendant's state of mind, violates not only the constitutional rights of the parties in a suit, but also the constitutional rights of the jurors themselves.”).

168 See NHL Mem. at 22 (“Plaintiffs’ Section 2 claim fails for the same reasons as their Section 1 claim.... [C]onduct that fails to give rise to a claim under Section 1 cannot be the basis of a monopolization scheme under Section 2.”) (quotation marks and citations omitted).

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Synopsis

Background: Subscribers to television and/or Internet services that included live hockey and baseball telecasts brought consolidated putative antitrust class action against professional hockey and baseball leagues, various clubs within leagues, regional sports networks (RSNs) that televised games, and cable television and satellite service providers that were multichannel video programming distributors (MVPDs). Defendants jointly moved to dismiss all claims for failure to state a claim.

Holdings: The District Court, Shira A. Scheindlin, J., held that:

[1] television plaintiffs satisfied Illinois Brick’s “direct purchaser” requirement for antitrust standing, as intermediate purchasers in chain of distribution were alleged to be participants in conspiracy;

[2] purchasers of out-of-market packages had antitrust standing under Associated General Contractors factors, but two plaintiffs’ injuries were too remote and third plaintiff who did not allege that he subscribed to out-of-market baseball package lacked standing in baseball case;

[3] plaintiffs adequately alleged participation on part of RSNs in conspiracy to geographically divide market for professional hockey and baseball games, and while they had not alleged horizontal agreements among MVPDs, they plausibly alleged vertical agreements that not only facilitated but were essential to horizontal market divisions;

[4] plaintiffs adequately alleged harm to competition with respect to horizontal agreements among individual hockey and baseball clubs, as part of leagues, to divide television market; and

[5] while plaintiffs plausibly alleged that leagues exercised monopoly power in relevant market and had used that power to restrict broadcast of television programming in manner that harmed competition, they failed to state claim for conspiracy to monopolize market for video presentation and Internet streaming of games against RSNs and MVPDs.

Ordered accordingly.

West Headnotes (34)

  ➔ Construction of pleadings

Federal Civil Procedure
  ➔ Matters deemed admitted; acceptance as true of allegations in complaint


Cases that cite this headnote

  ➔ Matters considered in general

For purposes of motion to dismiss for failure to state a claim, district court may consider facts alleged in complaint, documents attached to complaint as exhibits, and documents...

Cases that cite this headnote

   ➔ Insufficiency in general

Federal Civil Procedure
   ➔ Matters deemed admitted; acceptance as true of allegations in complaint

Threadbare recitals of elements of cause of action, supported by mere conclusory statements, do not suffice to withstand motion to dismiss for failure to state a claim; however, when there are well-pleaded factual allegations, court should assume their veracity and then determine whether they plausibly give rise to entitlement for relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

   ➔ Insufficiency in general

To survive motion to dismiss for failure to state a claim, allegations in complaint must meet standard of plausibility, and claim is facially plausible when plaintiff pleads factual content that allows court to draw reasonable inference that defendant is liable for misconduct alleged; “plausibility” is not akin to probability requirement but rather requires more than sheer possibility that defendant has acted unlawfully. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

   ➔ In general; injury or interest

Federal Civil Procedure
   ➔ Representation of class; typicality; standing in general

To establish Article III standing, plaintiff must allege and show that he personally has been injured, not that injury has been suffered by other, unidentified members of class to which he belongs and which he purports to represent. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[6] Antitrust and Trade Regulation
   ➔ Right of Action; Persons Entitled to Sue; Standing; Parties


Cases that cite this headnote

[7] Antitrust and Trade Regulation
   ➔ Right of Action; Persons Entitled to Sue; Standing; Parties

Antitrust and Trade Regulation
   ➔ Injury to Business or Property

Private plaintiff has standing to enforce Sherman Act sections prohibiting contracts, combinations or conspiracies in restraint of trade and monopolization or attempts to monopolize only if he or she suffered antitrust injury and is proper party to bring suit; in making this determination, court must evaluate plaintiff's harm, alleged wrongdoing by defendants, and relationship between them. Sherman Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 4(a), 15 U.S.C.A. § 15(a).

Cases that cite this headnote

[8] Antitrust and Trade Regulation
   ➔ Right of Action; Persons Entitled to Sue; Standing; Parties

Antitrust and Trade Regulation
   ➔ Injury to Business or Property

Antitrust and Trade Regulation
   ➔ Causation

Second Circuit analyzes antitrust standing under two part test, under which plaintiff must first show injury of type antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful; second, plaintiff must show that he is proper plaintiff
in light of four efficient enforcer factors of directness or indirectness of asserted injury, existence of identifiable class of persons whose self-interest would normally motivate them to vindicate public interest in antitrust enforcement, speculativeness of alleged injury, and difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries. Clayton Act, § 4, 15 U.S.C.A. § 15.

[9] Antitrust and Trade Regulation

Per se

Rule of reason

Cartels, Combinations, Contracts, and Conspiracies in General

Sherman Act section prohibiting contracts, combinations or conspiracies in restraint of trade outlaws only unreasonable restraints; to establish violation, plaintiff must allege (1) concerted action between at least two legally distinct economic entities, (2) that constitutes unreasonable restraint of trade either per se or under rule of reason. Sherman Act, § 1, 15 U.S.C.A. § 1.

[10] Antitrust and Trade Regulation

Per se

Rule of reason

Under the “per se rule,” certain agreements which courts, after considerable experience with type of restraint at issue determine to have manifestly anticompetitive effects and lack any redeeming virtue, are deemed per se violations of Sherman Act; outside this category of necessarily illegal restraints, rule of reason is accepted standard for testing whether practice restraints trade. Sherman Act, § 1, 15 U.S.C.A. § 1.


Presumptions and burden of proof

Under the “rule of reason,” Sherman Act plaintiffs bear initial burden to demonstrate that defendants’ challenged behavior had actual adverse effect on competition as whole in relevant market and evidence that plaintiffs have been harmed as individual competitors will not suffice; if plaintiffs satisfy their initial burden, then burden shifts to defendants to offer evidence of procompetitive effects of their agreement, and assuming defendants can provide such proof, then burden shifts back to plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means. Sherman Act, § 1, 15 U.S.C.A. § 1.

[12] Antitrust and Trade Regulation

“Quick look” and other tests

Certain challenged practices warrant abbreviated or “quick-look” rule of reason analysis either because great likelihood of anticompetitive effects can be easily ascertained or, on flip side, where restraints on competition are essential if product is to be available at all such that agreement is likely to survive rule of reason. Sherman Act, § 1, 15 U.S.C.A. § 1.

[13] Antitrust and Trade Regulation

Elements in General

Relevant Market

In order to state claim for monopolization under Sherman Act, plaintiffs must establish (1) possession of monopoly power in relevant market and (2) willful acquisition or maintenance of that power as distinguished from growth or development as consequence of superior product, business acumen, or historic accident. Sherman Act, § 2, 15 U.S.C.A. § 2.
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Cases that cite this headnote

[14] Antitrust and Trade Regulation
   ✪ Indirect purchasers
Under Supreme Court’s Illinois Brick decision, generally only direct purchasers have standing to bring civil antitrust claims. Clayton Act, § 4, 15 U.S.C.A. § 15.

Cases that cite this headnote

[15] Antitrust and Trade Regulation
   ✪ Damages and Other Relief
   Antitrust and Trade Regulation
   ✪ Injunction

Cases that cite this headnote

[16] Antitrust and Trade Regulation
   ✪ Indirect purchasers
“Ownership or control exception” to general rule that only direct purchasers have standing to bring civil antitrust claims, expressly recognized in Supreme Court's Illinois Brick decision where direct purchaser is owned or controlled by its customer, has been expanded to include instances where defendant owns or controls intermediary that sold goods to indirect-purchaserr plaintiff. Clayton Act, § 4, 15 U.S.C.A. § 15.

Cases that cite this headnote

[17] Antitrust and Trade Regulation
   ✪ Indirect purchasers
Under “co-conspirator exception” to general rule that only direct purchasers have standing to bring civil antitrust claims, Supreme Court's Illinois Brick decision does not limit suits where consumer plaintiff is direct purchaser from dealer who has conspired illegally with manufacturer with respect to very price paid by consumer. Clayton Act, § 4, 15 U.S.C.A. § 15.

I Cases that cite this headnote

[18] Antitrust and Trade Regulation
   ✪ Indirect purchasers
Television plaintiffs satisfied Illinois Brick's “direct purchaser” requirement for antitrust standing with respect to their claims against defendants other than multichannel video programming distributors (MVPDs) from whom they purchased programming, as intermediate purchasers in chain of distribution, the regional sports networks (RSNs) and MVPDs, were alleged to be participants in conspiracy. Clayton Act, § 4, 15 U.S.C.A. § 15.

I Cases that cite this headnote

[19] Antitrust and Trade Regulation
   ✪ Right of Action; Persons Entitled to Sue; Standing; Parties
Antitrust plaintiffs must establish that they are “efficient enforcers” of antitrust laws under factors set forth in Supreme Court's Associated General Contractors decision; these include (1) directness or indirectness of asserted injury, (2) existence of identifiable class of persons whose self-interest would normally motivate them to vindicate public interest in antitrust enforcement, (3) speculativeness of alleged injury, and (4) difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

I Cases that cite this headnote

[20] Antitrust and Trade Regulation
   ✪ Injunction

Cases that cite this headnote

[21] Antitrust and Trade Regulation
Right of Action; Persons Entitled to Sue; Standing; Parties

Antitrust and Trade Regulation

Antitrust and Trade Regulation

Antitrust and Trade Regulation

In putative antitrust class action by subscribers to television and/or Internet services that included live hockey and baseball telecasts, purchasers of out-of-market packages, whether television or Internet, had antitrust standing under factors set forth in Supreme Court’s Associated General Contractors decision; they were clearly consumers in relevant market of professional hockey and baseball games and alleged not only increased price, but also reduced consumer choice from lack of competition; moreover, because no innocent parties stood between them and alleged agreements, they were most efficient enforcers of antitrust laws. Sherman Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

[23] Antitrust and Trade Regulation

Consumers

In putative antitrust class action by subscribers to television and/or Internet services that included live hockey and baseball telecasts, plaintiff who did not allege that he subscribed to out-of-market baseball package lacked antitrust standing in baseball case under Associated General Contractors factors. Sherman Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

1 Cases that cite this headnote

[24] Antitrust and Trade Regulation

Cartels, Combinations, Contracts, and Conspiracies in General

Under Sherman Act section prohibiting concerted action in restraint of trade, question of whether arrangement is contract, combination, or conspiracy is different from and antecedent to question of whether it unreasonably restrains trade. Sherman Act, § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[25] Antitrust and Trade Regulation

Sports

Fact that professional hockey and baseball leagues were lawful joint ventures did not preclude antitrust challenge to leagues’ particular policies under rule of reason. Sherman Act, § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[26] Antitrust and Trade Regulation

Horizontal

Antitrust and Trade Regulation

Vertical

Vertical agreements can injure competition by facilitating horizontal collusion; moreover, where parties to vertical agreements have knowledge that other market participants are bound by identical agreements, and their participation is contingent upon that knowledge, they may be considered participants in horizontal

Cases that cite this headnote

[27] Antitrust and Trade Regulation
Sports

Antitrust and Trade Regulation
Television and radio

In restraint of trade claim in putative antitrust class action, subscribers to television and/or Internet services that included live hockey and baseball telecasts, adequately alleged participation on part of regional sports networks (RSNs) in conspiracy to geographically divide market for professional hockey and baseball games. Sherman Act, § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[28] Antitrust and Trade Regulation
Conspiracy or combination

In restraint of trade claim in putative antitrust class action, while subscribers to television and/or Internet services that included live hockey and baseball telecasts had not alleged horizontal agreements among multichannel video programming distributors (MVPDs), they plausibly alleged vertical agreements that not only facilitated but were essential to horizontal market divisions. Sherman Act, § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[29] Antitrust and Trade Regulation
Complaint

In order to overcome defendants' motion to dismiss Sherman Act restraint of trade claims under rule of reason, plaintiffs' allegations must raise reasonable expectation that discovery will reveal evidence of an injury to competition. Sherman Act, § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[30] Antitrust and Trade Regulation

[31] Antitrust and Trade Regulation
Horizontal

Horizontal agreement that allocates market between competitors and restricts each company's ability to compete for the other's business may injure competition. Sherman Act, § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[32] Antitrust and Trade Regulation
Sports

Antitrust and Trade Regulation
Television and radio

Phrase “sponsored telecasting” under Sports Broadcasting Act (SBA) pertains only to network broadcast television and does not apply to non-exempt channels of distribution such as cable television, pay-per-view, and satellite television networks. Sports Broadcasting Act of 1961, § 1, 15 U.S.C.A. § 1291.

Cases that cite this headnote

[33] Antitrust and Trade Regulation
Injury to business or property

In restraint of trade claim in putative antitrust class action, subscribers to television and/or Internet services that included live hockey and baseball telecasts adequately alleged harm to competition with respect to horizontal agreements among individual hockey and baseball clubs, as part of professional hockey and baseball leagues, to divide television market. Sherman Act, § 1, 15 U.S.C.A. § 1.
In monopolization claim in putative antitrust class action, while subscribers to television and/or Internet services that included live hockey and baseball telecasts plausibly alleged that professional hockey and baseball leagues exercised monopoly power in relevant market for television broadcasting of professional hockey and baseball games, and had used their monopoly power to restrict broadcast of television programming in manner that harmed competition, they failed to state claim for conspiracy to monopolize market for video presentation and Internet streaming of games against regional sports networks (RSNs) and multichannel video programming distributors (MVPDs). Sherman Act, § 2, 15 U.S.C.A. § 2.


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**ATTORNEYS AND LAW FIRMS**


**OPINION AND ORDER**

**SHIRA A. SCHEINDLIN**, District Judge.

**I. INTRODUCTION**

Plaintiffs bring this consolidated putative class action against the National Hockey League (“NHL”) and Major League Baseball (“MLB”), various clubs within the Leagues, regional sports networks (“RSNs”) that televise
the games, and Comcast and DirecTV, multichannel video programming distributors (“MVPDs”).¹ Plaintiffs challenge “defendants’ ... agreements to eliminate competition in the distribution of [baseball and hockey] games over the Internet and television [by] divid[ing] the live-game video presentation market into exclusive territories, which are protected by anticompetitive blackouts” and by “collud[ing] to sell the ‘out-of-market’ packages only through the League [which] exploit[s] [its] illegal monopoly by charging supra-competitive prices.”² Plaintiffs claim that these agreements “result in reduced output, diminished product quality, diminished choice and suppressed price competition” in violation of the Sherman Antitrust Act,³ and request statutory damages and injunctive relief on behalf of themselves and the class.⁴ Defendants jointly move to dismiss *472 all claims pursuant to Federal Rule of Civil Procedure 12(b)(6).⁵

II. BACKGROUND⁶

A. The Agreements to Telecast Baseball and Hockey

Plaintiffs are subscribers to television ⁷ and/or Internet ⁸ services that include live hockey and baseball telecasts. Defendant National Hockey League is an unincorporated association of thirty major league professional ice hockey clubs, nine of which are named as defendants in Laumann⁹ Defendant Office of the Commissioner of Baseball, doing business as Major League Baseball, is an unincorporated association of thirty professional baseball clubs, nine of which are named as defendants in Garber.¹⁰ The Complaints also name subsidiaries *473 of the Leagues that pursue their commercial opportunities, including Internet operations (together with the NHL, MLB and the named individual clubs, the “League defendants”).¹¹ Plaintiffs allege that “[p]ursuant to a series of agreements between and among Defendants, the League[s] ha[ve] obtained centralized control over distribution of live video programming of [hockey and baseball] games” and “the clubs have agreed not to compete in business matters related to the video presentation of live major-league men's professional [hockey and baseball] games.”¹²

Both the NHL and MLB are “ultimately controlled by, and operate for the benefit of the clubs.”¹³ “Though necessarily cooperating to produce inter-club games, each club operates as an independently owned and managed business, competing against each other in various markets.”¹⁴ In both the NHL and MLB, each team owns the initial right to control telecasts of its home games, and keeps the revenues it generates from the sale of these rights.¹⁵ The teams in each League have mutually agreed to permit the visiting team to produce a separate telecast of the games.¹⁶

1. “In–Market” Agreements

The vast majority of telecasts are produced by arrangement between individual teams and RSNs, a number of which are named as defendants.¹⁷ RSNs are local television networks that negotiate contracts with individual NHL or MLB clubs to broadcast the majority of the local club’s games within that club’s telecast territory.¹⁸ Several defendant RSNs are owned and controlled by defendant Comcast,¹⁹ several are owned and controlled by *474 defendant DirecTV, ²⁰ and two are independent of the MVPDs, but share ownership with an individual club. ²¹

RSNs produce the games and sell their programming to MVPDs including Comcast, a cable distributor, and DirecTV, a satellite distributor (the upstream market).²² MVPDs, in turn, sell programming to consumers (the downstream market).²³ Pursuant to agreements with the RSNs, MPVs make RSN programming available as part of standard packages sold to consumers within the RSN’s designated territory, and black out games in unauthorized territories, in accordance with the agreements between the RSNs and the Leagues.²⁴ The Complaints allege that the “regional blackout agreements,” made “for the purpose of protecting the local television telecasters,” are “[a]t the core of Defendants’ restraint of competition.”²⁵ “But for these agreements,” plaintiffs allege, “MVPDs would facilitate ‘foreign’ RSN entry and other forms of competition.”²⁶ Plaintiffs argue that the “MVPDs also directly benefit from the blackout of Internet streams of local games, which requires that fans obtain this programming exclusively from the MVPDs.”²⁷

A small percentage of games are produced under national contracts between the Leagues (pursuant to rights granted by the individual teams) and national networks.²⁸ These limited nationally televised games provide the only opportunity for
fans to watch a game not involving a local *475 team without purchasing an out-of-market package.

2. “Out–of–Market” Agreements

With the limited exception of nationally televised games, standard MVPD packages only televise “in-market” games (i.e., games played by the team whose designated home territory the subscriber resides). For a consumer to obtain out-of-market games, there are only two options—television packages and Internet packages—both of which are controlled by the Leagues. *29 Television packages—NHL Center Ice and MLB Extra Innings—are available for purchase from MVPDs, in accordance with agreements between the MVPDs and the Leagues. These packages require the purchase of all out-of-market games even if a consumer is only interested in viewing a particular game or games of one particular non-local team. They also require a subscription to the standard digital television package. *30 Internet packages—NHL Gamecenter Live and MLB.tv—are available directly through the Leagues and also require the purchase of all out-of-market games. Neither local games nor nationally televised games are available through these packages. *31 Thus, “there is no authorized method for viewing [local] games on the Internet.” *32 For example, an NHL Gamecenter Live subscriber in New York cannot watch New York Rangers games through any Internet source, but instead must subscribe to MSG through an MVPD. The alleged purpose of the limitation on Internet programming is to protect the RSNs’ regional monopolies and insulate MVPDs that carry them from Internet competition. *33

Plaintiffs allege that the market divisions and centralization of rights to distribute out-of-market games in the Leagues have “adversely affected and substantially lessened competition in the relevant markets” by reducing output of live MLB and NHL game presentations, raising prices, and rendering output “unresponsive to consumer preference to view live [MLB and NHL] games, including local games, through both Internet and television media.” *34

B. The Alleged Markets and Products

The Complaints allege relevant product/service markets for “the provision of major league professional ice hockey [and baseball] contests in North America.” *35 In addition, and “[m]ost importantly for this action, there is a relevant market for live video presentations of [professional baseball and hockey] games over media such as cable and satellite television and the Internet.” *36 These markets are “characterized by high barriers to entry” in which the NHL and MLB, as the only providers of these games, acting through and with the independent clubs that own and control the Leagues, have market power. *37 The NHL’s and MLB’s dominance in the production of professional hockey and baseball games respectively *476 “give [them] the ability, together with [their] television partners, to exercise market power in the market for live video presentations of [professional baseball and hockey] games.” *38

C. The Claims

Based on the foregoing facts, plaintiffs allege four antitrust violations: (1) for Television plaintiffs, violation of Section 1 of the Sherman Antitrust Act based on agreements to “forbid[] the carrying or online streaming of any [NHL/MLB] game in any geographic market except those licensed by the [NHL/MLB] team in that geographic market” (Claim I); *39 (2) for Television plaintiffs, violation of Section 1 based on agreements “that [NHL/MLB] will be the exclusive provider of live ‘out-of-market’ games distributed through television providers” (Claim II); *40 (3) for Internet plaintiffs, violation of Section 1 based on agreements “that [NHL/MLB] will be the exclusive provider of live ‘out-of-market’ games over the Internet” (Claim III); *41 and (4) for all plaintiffs, violation of Section 2 for conspiracy to monopolize the “market for video presentations of major league [hockey/baseball] games and Internet streaming of the same” (Claim IV). *42

Defendants make six arguments why plaintiffs’ claims must be dismissed. First, plaintiffs have not alleged harm to competition. *43 Second, plaintiffs lack standing on the following grounds: (1) plaintiffs are “indirect purchasers;” (2) plaintiffs’ injuries are “too attenuated and remote from the alleged horizontal conspiracy;” (3) the Garber plaintiffs lack standing to assert claims concerning the MLB Extra Innings television package, because none of them purchased that product; (4) five of six plaintiffs are “former subscribers who assert no intention to subscribe to any of the challenged television or Internet services in the future,” and therefore

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lack standing to request injunctive relief. 44 Third, plaintiffs allege “no cognizable conduct by Comcast, DirecTV or any of the RSN Defendants” because “[t]he only plausible allegations as to these Defendants relate to their vertical distribution, which is presumptively legal.” 45 Fourth, the alleged horizontal activities of the NHL and MLB defendants are “lawful on their face” as the “very core of what professional sports league ventures do—sell their jointly created product.” 46 Fifth, plaintiffs’ “proposed relevant market is insufficient as a matter of law” because plaintiffs fail to “allege facts regarding reasonable interchangeability or cross-elasticity of demand.” 47 Sixth, plaintiffs’ Section 2 claims must be dismissed for: (1) failure to allege any anticompetitive effect; (2) failure to allege any plausible “conspiracy” among the Leagues, the clubs and the RSNs and distributors; and (3) failure to allege any of the necessary elements of a monopolization claim. 48

*477 III. LEGAL STANDARD

[1] [2] Federal Rule of Civil Procedure 12(b)(6) provides that a complaint must be dismissed if it “fail[s] to state a claim upon which relief can be granted.” In deciding a motion to dismiss the court “accept[s] all factual allegations in the complaint as true, and draw[s] all reasonable inferences in the plaintiff’s favor.” 49 For the purposes of such a motion, “a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint” 50 as well as “documents that, although not incorporated by reference, are integral to the complaint.” 51

[3] [4] Under the “two-pronged approach” set forth by the Supreme Court in Ashcroft v. Iqbal, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” to withstand a motion to dismiss. 52 However, “[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.” 53 To survive a Rule 12(b)(6) motion to dismiss, the allegations in the complaint must meet a standard of “plausibility.” 54 A claim is facially plausible “when the pleadings plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” 55 Plausibility “is not akin to a probability requirement;” rather, plausibility requires “more than a sheer possibility that a defendant has acted unlawfully.” 56

IV. APPLICABLE LAW

A. Antitrust Standing

[5] [6] [7] [8] The Clayton Act permits private parties to institute actions under the federal antitrust laws for damages and injunctive relief. 58 However, a private plaintiff *478 has standing to enforce Sections 1 and 2 of the Sherman Act only if he or she suffered “antitrust injury” and is a “proper party” to bring suit. 59 In making this determination a court must “evaluate the plaintiff’s harm, the alleged wrongdoing by the defendants, and the relationship between them.” 60 The Second Circuit analyzes antitrust standing under a two part test. 61 First, a “ ‘plaintiff must show ... injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.’ ” 62 Second, a plaintiff must show that he is a proper plaintiff in light of four ‘efficient enforcer’ factors: (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries. 63

B. Sherman Act Section 1

[9] Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.” The Supreme Court has clarified that Section 1 “outlaw[s] only unreasonable restraints.” 64 To establish a Section 1 violation, a plaintiff must allege: “(1) concerted action between at least two legally distinct economic entities; (2) that constitute[ ] an unreasonable restraint of trade either per se or under the rule of reason.” 65

[10] Certain agreements which courts, after “considerable experience with the type of restraint at issue,” determine to have “manifestly anti-competitive effects and lack any redeeming virtue,” are deemed per se violations of the Sherman Act. 66 Outside this category of “necessarily
illegal" restraints, “[t]he rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1.” The rule of reason distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest. A court must “determine whether the [ ] restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association and thus valid.”

Under the rule of reason, plaintiffs bear an initial burden to demonstrate the defendants’ challenged behavior had an actual adverse effect on competition as a whole in the relevant market ... evidence that plaintiffs have been harmed as individual competitors will not suffice.... If the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement.... Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means....

Finally, certain challenged practices warrant an “abbreviated or quick-look rule of reason analysis” either “because the great likelihood of anticompetitive effects can be easily ascertained” or, on the flip side, where “restraints on competition are essential if the product is to be available at all [such that] the agreement is likely to survive the Rule of Reason.”

C. Sherman Act Section 2

Section 2 of the Sherman Act states that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ....” In order to state a claim for monopolization under Section 2, plaintiffs must establish “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” Specifically, “[a] plaintiff must establish ‘(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.’”

V. DISCUSSION

A. Antitrust Standing

While “[r]educed consumer choice and increased prices ... when they are the result of an anticompetitive practice, constitute antitrust injury,” the Supreme Court recognized that “Congress did not intend antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.” Defendants challenge Television plaintiffs’ standing to sue on the grounds that they are indirect purchasers of the product in question, and that their injuries are too remote from the alleged conduct.

1. Illinois Brick Direct Purchaser Requirement

The Supreme Court's decision in *Illinois Brick Co. v. Illinois* established that “[g]enerally only direct purchasers have standing to bring civil antitrust claims.” The rule serves to avoid the difficulties of “apportion[ing] recovery among all potential plaintiffs ... from direct purchasers to middlemen to ultimate consumers” and eliminate the possibility of duplicative recovery, and promotes enforcement by purchasers who have been most directly injured by the alleged violation. Because Television plaintiffs purchased programming from the MVPDs, they must show why *Illinois Brick* does not bar their claims for damages against the remaining defendants.

Plaintiffs argue that these claims fall under two recognized exceptions to *Illinois Brick*—the “ownership or control exception” and the “co-conspirator exception.” The Supreme Court expressly recognized an exception to *Illinois Brick* “where the direct purchaser is owned or controlled by its customer,” and courts have “expanded [the exception] to include instances where the defendant
owns or controls the intermediary that sold the goods to the indirect-purchaser plaintiff." 85 Additionally, courts have held that “Illinois Brick does not limit suits [where] [t]he consumer plaintiff is a direct purchaser from the dealer who ... has conspired illegally with the manufacturer with respect to the very price paid by the consumer." 86 The two exceptions share a common logic—where the relationship between the parties in a multi-tiered distribution chain is such that plaintiffs are the first or only victims of alleged anticompetitive agreements, the rationale for the Illinois Brick bar disappears.

The Second Circuit has not addressed the “co-conspirator exception,” 87 and those circuits that have addressed it have not taken a uniform view of its scope. The Fourth and Ninth Circuits have limited the exception to situations in which “[d]efendants have conspired to fix the price that [p]laintiffs paid directly”—a requirement that, if adopted, would be fatal to the Television plaintiffs’ claims, as they do not allege that the Leagues or RSNs had any role in setting prices for television programming. 482 89 In contrast, in Paper Systems Inc. v. Nippon Paper Industries Co., Ltd., the Seventh Circuit eschewed the notion of a “co-conspirator exception” instead stating simply that Illinois Brick “allocate[s] to the first non-conspirator in the distribution chain the right to collect 100% of the damages.” 90 Thus, where intermediate purchasers in the chain of distribution (here the RSNs and MVPDs) are alleged to be participants in the conspiracy, the first purchasers who are not part of the conspiracy “are entitled to collect damages from both the manufacturers and their intermediaries if conspiracy and overcharges can be established.” 91

While mindful of the Supreme Court’s admonition against even the “most meritorious of exceptions” to the direct purchaser requirement, the purpose of Illinois Brick was not to prevent the only non-conspirators in a multi-level distribution chain—consumers no less—from bringing a private antitrust suit. 92 Thus, holding that the first purchaser who is not party to the unlawful agreements to restrain trade has standing to sue is not an exception to Illinois Brick, but rather a recognition that Illinois Brick “bans Clayton Act lawsuits by persons who are not direct purchasers from the defendant antitrust violator[s].” 93

2. Standing Under Associated General Contractor Factors

[19] [20] Although they are not barred by the specific Illinois Brick rule, plaintiffs must still establish that they are “efficient enforcers” of the antitrust laws under the factors set forth in Associated General Contractors. 98 Defendants argue that plaintiffs’ claims are based on “some unidentified overcharge in the price TV plaintiffs pay Comcast or DirecTV for television service generally, regardless of whether they have ever watched, or even desired to watch an NHL or MLB game.” 99 Moreover, “the allegedly overpriced RSN channel itself includes more than just MLB or NHL programming and is but one channel among tens or hundreds of channels included in the general television packages offered by Comcast and DirecTV” and therefore “it would be impossible to ascertain what effect, if any at all, the alleged violation had on the pricing of the various packages sold by Comcast and DirecTV to consumers.” 100

[21] Here the relevant markets are for professional hockey and baseball programming. While plaintiffs argue that “consumers ... generally do meet [the standing] test,” 484 only “consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury.” 102 Purchasers of the out-of-market packages, whether television or Internet, are clearly consumers in the relevant market of professional hockey and baseball games, and allege not only increased price, but also reduced consumer choice from lack of competition. 103
Moreover, because no innocent parties stand between them and the alleged agreements, they are the most efficient enforcers.

[22] [23] In contrast, plaintiffs who merely subscribe to Comcast and DirecTV, but do not subscribe to an out-of-market package, allege that they are consumers of television generally, not that they are consumers of professional hockey or baseball games. 104 Neither Garber nor Herman alleges that she or he was prevented from viewing games as a result of the black-out agreements, nor do they claim that they were charged supracompetitive prices for games that they wished to view. These plaintiffs’ only claims are based on some unidentified increased price of their overall cable package allegedly stemming from the absence of competition from out-of-market baseball clubs and their RSNs. Their alleged injuries are both speculative and difficult to identify and apportion in light of the packaged nature of television services, not to mention their remoteness from the primary agreements among League defendants, which makes determination of the causal connection even more difficult. 105 Permitting any plaintiff who simply purchased cable or satellite programming to sue would create a class of plaintiffs for whom “it is merely coincidental that they purchased [MLB and NHL programming] at all.” 106 Thus, plaintiffs Garber and Herman are dismissed for failure to establish that they are “proper plaintiffs” under the Associated General Contractors factors. 107 Silver is dismissed from the Garber case, because he does not *485 allege that he subscribed to an out-of-market baseball package. 108

B. Section One Claims Regarding “In–Market” and “Out–of–Market” Agreements

1. Agreements Among Defendants

[24] As discussed briefly in the context of standing, plaintiffs allege a multi-level conspiracy consisting of horizontal and vertical agreements implicating the League defendants, the RSNs and the MVPDs. “The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade.” 109 Plaintiffs’ allegations arise initially out of agreements by the individual clubs, as a league, to establish exclusive local telecast territories for each club and to grant the Leagues the exclusive rights to market those games outside the local territories. In American Needle, Inc. v. National Football League the Supreme Court held that when it comes to “marketing property owned by the separate teams,” individual sports teams that together comprise a league “do not possess either the unitary decisionmaking quality or the single aggregation of economic power” of a single entity and “their objectives are not common.” 110 Where teams compete against each other in the relevant market, their concerted action may “deprive the marketplace of independent centers of decisionmaking and therefore of actual or potential competition.” 111 Like the intellectual property at issue in American Needle, the rights at issue here belong initially to the individual clubs. 112 Plaintiffs have alleged that absent these agreements the clubs would compete against each other in the markets for hockey and baseball programming. 113

[25] The fact that the NHL and MLB are lawful joint ventures does not preclude plaintiffs from challenging the Leagues’ particular policies under the rule of reason. 114 Defendants’ argument that the teams cannot unlawfully conspire with respect to out-of-market games because only the Leagues can own those games assumes the legality of the very agreements challenged here. There is no distinction between in-market and out-of-market games other than that the clubs have agreed to cede to the Leagues the right to market the games, to which they have initial rights, outside their local territories. 115 *486 American Needle conclusively established that these kinds of arrangements are subject to Section 1 scrutiny.

b. Role of RSNs

Plaintiffs argue that the RSNs have participated in a conspiracy to divide the market for professional baseball and hockey programming. 116 They assert that RSNs do not merely “pass through” the relevant product unchanged from the Leagues to the consumers: rather, RSNs purchase rights from the clubs, and produce video presentations of the games—the product in question—subject to anticompetitive agreements not to sell programming for a given hockey or baseball club outside the defined territory surrounding that club. 117 Plaintiffs argue that “[t]he fact that the clubs have a
central role in orchestrating this horizontal agreement” does not negate the horizontal character of the alleged agreements by the RSNs, because “each RSN plainly understood that it was getting a regional monopoly in exchange for an agreement to respect other RSN’s regional monopolies.” 118 Thus, “[e]ven when the focus is on the horizontal agreement at the club level, the RSNs are still liable, as their role in carrying out the clubs’ division of the market is not innocent.” 119

[26] [27] Plaintiffs do not plausibly allege that the RSNs entered into actual agreements with one another to enforce the territorial market divisions established by the League defendants, but it is not necessary that they do so in order to implicate the RSNs in the conspiracy to divide the market. First of all, courts have recognized that “vertical agreements can [ ] injure competition by facilitating horizontal collusion.” 120 It is well established, for example, that a distributor’s coordination of horizontal agreements in restraint of trade at the next distribution level by entering into a series of identical vertical agreements with multiple parties may subject all participants to antitrust liability. 121 Moreover, where parties to vertical agreements have knowledge that other market participants are bound by identical agreements, and their participation is contingent upon that knowledge, they may be considered participants in a horizontal agreement *487 in restraint of trade. 122 It defies reason to suggest that the RSNs lack knowledge that all other RSNs have analogous agreements with the respective individual clubs, and it is at least plausible that the terms of the agreement between the clubs and the RSNs are contingent upon that knowledge. Plaintiffs have therefore adequately alleged participation on the part of the RSNs in the conspiracy to geographically divide the market for professional hockey and baseball games. 123

c. Role of MVPDs

Plaintiffs claim that Comcast and DirecTV are active participants in the challenged schemes in two ways. “First, they actively control their subsidiary RSN’s in the very matters that are the subject of this lawsuit ... [and] second, the MVPDs are the only parties that can actively implement the geographical divisions for television programming ... [and] have agreed to do just that.” 124 In addition, plaintiffs claim that “MVPDs are the direct beneficiaries of restrictions that prevent Internet streaming of local games.” 125

[28] Plaintiffs do not allege that the MVPDs have agreed amongst themselves in any way, and in fact, it is clear that MVPDs compete with each other to sell packages containing hockey and baseball programming. However, plaintiffs allege that Comcast and DirecTV own and control a number of RSNs, and that the League restrictions on Internet dissemination of hockey and baseball games benefit both the RSNs and the MVPDs. These allegations indicate that the MVPD defendants are doing more than passively implementing the agreements among the Leagues and the RSNs. 126 They suggest “a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement” sufficient to allege an agreement between the MVPDs and the RSNs and League Defendants to restrain trade. 127 Thus, while plaintiffs have not alleged horizontal agreements among *488 the MVPDs, they have plausibly alleged vertical agreements that not only facilitate, but are essential to the horizontal market divisions. 128

2. Harm to Competition

[29] Plaintiffs do not argue that the agreements to divide the geographic market and cede control over out-of-market games to the Leagues constitute per se antitrust violations. 129 The question is whether these agreements have “anticompetitive effect that are harmful to the consumer” or whether they “stimulat[e] competition ... in the consumer’s best interest”—in other words, whether they survive the rule of reason. 130 In order to overcome defendants’ motion to dismiss, plaintiffs’ “allegations must ‘raise a reasonable expectation that discovery will reveal evidence of an injury to competition.’ ” 131

[30] Defendants argue that because the NHL and MLB are legitimate joint ventures, and some cooperation with respect to the production of games is necessary, that the conduct here—the production and distribution of live telecasts of games—is “core activity” immune from antitrust scrutiny. 132 However, the notion that “the exhibition of [ ] league games on television and the Internet” is clearly a “league issue” 133 is contrary to longstanding precedent that agreements limiting the telecasting of professional sports games are subject to antitrust scrutiny, and analyzed under the rule of reason. 134 Even if certain agreements by sports leagues with respect to telecasting games may be “essential if the product is to
be available at all” this does not give league agreements regarding television rights blanket immunity from antitrust scrutiny.  

To the contrary, the Supreme Court has held that an agreement that “define[s] the number of games that may be televised, establish[es] the price for each exposure, and ... the basic terms of each contract between the network and a home team” with the result that “[i]n any games for which there is a large viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised” may constitute an antitrust violation.  

a. “In–Market” Agreements

Plaintiffs allege that the Leagues' arrangements define the territory in which each individual team may televise its games, meaning that individual clubs are prohibited from telecasting their baseball and hockey games outside the designated home territory, irrespective of consumer demand for those games. Plaintiffs echo defendants MSG and the New York Rangers' argument, as plaintiffs in a different case, that “[i]n a fully competitive marketplace, the [individual clubs] could and would ... increas[e] the opportunity to view [their] games throughout the country, whether through cable, satellite or on the Internet.” In other words, the agreements result in an arrangement by which the clubs have authority over the output of their own games in their home territory, but must “forego their own output” outside their home territory and cede to the Leagues' authority over out-of-market games. As numerous courts have recognized, “a horizontal agreement that allocates a market between competitors and restricts each company's ability to compete for the other's business may injure competition.”

b. “Out–of–Market” Agreements

Defendants argue that the fact that the market division is part of a larger joint-selling arrangement, which makes all games available to the vast majority of viewers as “all-or-nothing” out-of-market packages, eliminates any harm to competition. In contrast, plaintiffs allege that the agreements to centralize control of all baseball and hockey out-of-market programming in the Leagues, as exclusive distributors, are themselves unreasonable restraints of trade. 

While Congress has exempted these types of joint agreements from antitrust scrutiny in sponsored telecasting, that exemption is inapplicable to the telecasts of the hockey and baseball games at issue here.

Contrary to defendants' argument, *Brantley v. NBC Universal, Inc.* does not sanction the alleged out-of-market “all or nothing” packages as a replacement for individual competition among the clubs. In *Brantley*, the court rejected allegations of unlawful tying where the tied television programs were owned in the first instance by the programmers who chose to market the programs as a package. The court analogized to the professional sports context noting that there is no question that individual teams may package desirable and undesirable game tickets as part of a season package. However, the arrangement here is more akin to the League commandeering the individual clubs' rights to sell tickets to sports fans outside their home territory, and, as a replacement, conditioning the purchase of a popular team's tickets on the purchase of other teams' tickets.

The Second Circuit established in *Major League Baseball Properties, Inc. v. Salvino*, that agreements by individual clubs to grant the League the exclusive right to license use of certain rights originally held by the individual clubs are analyzed under the rule of reason. At issue in *Salvino* was an agreement by MLB clubs to grant the League “the exclusive right—subject to limited exceptions—to license Club names and logos for use on retail products for national and international (i.e. not merely local) distribution ... and to be sold at retail within the Clubs' respective local markets.” The court concluded that the agreement was lawful, but only after careful consideration of the district court's factual conclusions concerning the impact of the licensing agreement on output, and the viability of MLB's justifications for its decision to consolidate licensing rights in the League. *Salvino* suggests that granting the Leagues exclusive rights to distribute out-of-market programming, and the Leagues' decision to do so largely in the form of blanket licensing, may very well be reasonable and in compliance with antitrust law. However, plaintiffs have alleged the anticompetitive effect of “forc[ing] ... consumers to forego the purchase of [these games] from other distributors [the individual clubs]” resulting in decreased consumer choice and increased price—an allegation that states an injury to competition. Defendants have not even alleged that these restraints on trade are justified, for example, by arguing that “ individual [teams] are inherently
unable to compete fully effectively” or that the agreements are “necessary to maintain a competitive balance.”

Plaintiffs have adequately alleged harm to competition with respect to the horizontal agreements among individual hockey and baseball clubs, as part of the NHL and MLB, to divide the television market. Making all games available as part of a package, while it may increase output overall, does not, as a matter of law, eliminate the harm to competition wrought by preventing the individual teams from competing to sell their games outside their home territories in the first place. And plaintiffs in this case—the consumers—have plausibly alleged that they are the direct victims of this harm to competition.

C. Section 2 Claim for Conspiracy to Monopolize the Market for Video Presentation and Internet Streaming of Games

The final claim, brought on behalf of all plaintiffs, is a Section 2 claim for conspiracy to monopolize the “market for video presentations of major league [hockey/baseball] games and Internet streaming of the same” and “use of that power for the purposes of unreasonably excluding and/or limiting competition.” Defendants argue that the Section 2 claims must be dismissed for failure to allege any of the necessary elements of a monopolization claim.

It is well established that “[t]here are peculiar and unique characteristics that set major league men's ice hockey [and baseball] apart from other sports or leisure activities, ... that close substitutes do not exist” and that the Leagues possess monopolies of their respective sports. It is also established that “[a] monopolist may not ... use its market power, whether obtained lawfully or not, to prevent or impede competition in the relevant market.” Having defined the relevant market as the market for television broadcasting of professional hockey and baseball games, plaintiffs have adequately alleged that NHL and MLB exercise monopoly power defined as “[w]hen a product is controlled by one interest, without substitues available.” Finally, as already discussed, plaintiffs have plausibly alleged that the NHL and MLB have used their monopoly power to restrict the broadcast of television programming in a manner that harms competition. However, plaintiffs have not alleged any monopoly power on the part of RSNs or MVPDs in the market for production of baseball and hockey games, nor have they alleged facts in support of a conspiracy to monopolize the market. Claim Four is therefore dismissed against the RSNs and MVPDs.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs Garber and Herman are dismissed from both cases, and Silver is dismissed from the Garber case, for lack of antitrust standing. The Section Two claim (Claim Four) is dismissed against the RSN and MVPD defendants, but may proceed against the League defendants. The Section One claims may proceed against all defendants. A conference in this matter is scheduled for December 18, 2012 at 5:00 p.m. The Clerk of the Court is directed to close these motions [Docket Entry No. 74, 12 Civ. 1817 and Docket Entry No. 65, 12 Civ. 3704].

SO ORDERED.

All Citations

907 F.Supp.2d 465, 2012-2 Trade Cases P 78,168

Footnotes

This motion to dismiss arises out of two consolidated cases. Laumann v. National Hockey League, et al., No. 12 Civ. 1817 involves professional hockey telecasting, and Garber v. Office of the Commissioner of Baseball, et al., No. 12 Civ. 3704, involves professional baseball telecasting. There are no cross-league allegations.

Laumann Second Amended Complaint ("Laumann Compl.") ¶¶ 2, 8; Garber First Amended Complaint ("Garber Compl.") ¶¶ 2, 11.

Laumann Compl. ¶ 10; Garber Compl. ¶ 13.

See Laumann Compl. at 40–41; Garber Compl. at 41–42. The Sherman Antitrust Act authorizes suit for an alleged antitrust violation in “any district court of the United States in the district in which the defendant resides or is found or has an agent” and provides for treble damages, interest, and attorneys fees and costs. 15 U.S.C. § 15(a).
Moving defendants in *Laumann* are the NHL, NHL Enterprises, L.P., NHL Interactive Cyberenterprises, LLC, and nine NHL clubs, Comcast Corporation and four of its affiliate Comcast SportsNet entities, DirecTV, LLC, DirecTV Sportsnetworks LLC and one of its affiliate Root Sports entities, and the Madison Square Garden Company. Moving defendants in *Garber* are the MLB, Major League Baseball Enterprises, Inc., MLB Advanced Media, L.P., and MLB advanced Media, Inc., eight of the nine named individual club defendants, Comcast and three of its affiliated Comcast Sportnets, DirecTV, DirecTV Sportsnetworks LLC and three of its affiliate Root Sports entities, and Yankees Entertainment & Sports Networks, LLC. An additional named club, Chicago National League Baseball Club, LLC, filed a bankruptcy notice on June 28, 2012 (Garber Dkt. No. 53) and is not party to the motion to dismiss.

Unless otherwise noted, all facts are drawn from the *Laumann* Second Amended Complaint and *Garber* First Amended Complaint and are presumed true for the purposes of this motion.

Fernanda Garber purchased video service from Comcast, which included Comcast Sportsnet California and Comcast Sportsnet Bay Area. See *Laumann* Compl. ¶ 13; *Garber* Compl. ¶ 16. Garrett Traub purchased video service from Comcast, which included channels carrying professional hockey games, and also purchased NHL Center Ice. See *Laumann* Compl. ¶ 16; *Garber* Compl. ¶ 20. Robert Silver purchased satellite service from DirecTV, which included channels carrying professional hockey games, and also purchased NHL Center Ice. See *Laumann* Compl. ¶ 15; *Garber* Compl. ¶ 19. Peter Herman (together with Garber, Silver, and Traub the “Television plaintiffs”) purchased, and continues to receive video service from DirecTV. See *Laumann* Compl. ¶ 18. The Television plaintiffs seek to represent individuals who purchased television service from DirecTV or Comcast that included live NHL or MLB games not available through a sponsored telecast. See *Laumann* Compl. ¶ 36; *Garber* Compl. ¶ 41.

Thomas Laumann has been a subscriber to the NHL Gamecenter Live Internet package from the NHL League defendants since 2010. See *Laumann* Compl. ¶ 14. David Dillon purchased NHL Gamecenter Live in 2011 and also subscribes to pay television service and “intends to purchase television and professional hockey programming services in the future.” Id. ¶ 17. Marc Lerner and Derek Rasmussen (together with Laumann and Dillon, the “Internet plaintiffs”) purchased the MLB.tv Internet package from the MLB League defendants. *Garber* Compl. ¶¶ 17–18. The Internet plaintiffs seek to represent classes of individual purchasers of NHL GameCenter Live (in *Laumann*) and MLB.TV (in *Garber*). See *Laumann* Compl. ¶ 36; *Garber* Compl. ¶ 41.

See *Laumann* Compl. ¶ 19. The clubs named as defendants are the Chicago Blackhawks Hockey Team, Inc.; Comcast–Spectator, L.P. (d/b/a “Philadelphia Flyers”); Hockey Western New York, LLC (d/b/a “Buffalo Sabres”); Lemieux Group, L.P. (d/b/a “Pittsburgh Penguins”); Lincoln Hockey, LLC (d/b/a “Washington Capitals”); New Jersey Devils, LLC; New York Islanders Hockey Club, L.P.; New York Rangers Hockey Club; and San Jose Sharks, LLC. See id. at 10–11. The Complaint also lists other NHL member clubs that are not named as defendants. See id. at 11–12.

*See Garber* Compl. ¶ 27. The MLB clubs named as defendants are: Athletics Investment Group, LLC (Oakland Athletics); Baseball Club of Seattle, L.P. (Seattle Mariners); Chicago National League Ball Club, LLC (Chicago Cubs); Chicago White Sox, Ltd.; Colorado Rockies Baseball Club, Ltd.; New York Yankees Partnership; Phillies, L.P.; Pittsburgh Baseball, Inc. (Pittsburgh Pirates); and San Francisco Baseball Associates, L.P. (San Francisco Giants). See id. at 11–12. The Complaint also lists other MLB member clubs which are not named as defendants. See id. at 12–13.

Defendant NHL Enterprises, L.P., through its subsidiary, defendant NHL Interactive Cyberenterprises LLC, operates the NHL’s website and streaming services. See *Laumann* Compl. ¶¶ 22–23. Defendant MLB Advanced Media, L.P. operates the League’s Internet streaming of live games, pursuant to rights granted by individual clubs. See *Garber* Compl. ¶¶ 25–26.

*Laumann* Compl. ¶ 5; *Garber* Compl. ¶ 8.

Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motions to Dismiss the Complaints (“Pl. Mem.”) at 4.

*Laumann* Compl. ¶ 20; *Garber* Compl. ¶ 23.

See *Laumann* Compl. ¶¶ 20, 61; *Garber* Compl. ¶¶ 23, 64. See also NHL Constitution § 4.4 (“Property Rights of Home Club. Each member hereby irrevocably conveys ... all right, title and interest ... to each hockey game played by its team as a visiting club ... to the member in whose home territory said game is played.”); MLB Constitution Art. X § 4 (granting to the commissioner “acting as [the clubs'] agent, the right to sell, on their behalf, throughout the United States ... exclusive or non-exclusive television and radio or other video or audio media rights (including the Internet and any other online technology)”)(emphasis added).

See Pl. Mem. at 6.

*See Laumann* Compl. ¶ 58; *Garber* Compl. ¶ 61.

*Id.*
The Comcast RSN defendants include Comcast Sportsnet Philly, L.P. (RSN for Philadelphia Phillies and Flyers), Comcast Sportsnet Mid-Atlantic, L.P. (RSN for Washington Capitals), Comcast Sportsnet Bay Area, L.P. (RSN for San Francisco Giants, Oakland Athletics and San Jose Sharks), Comcast Sportsnet Chicago, L.P. (RSN for Chicago Cubs, White Sox, and Blackhawks) all of which are owned and controlled by Comcast. See Laumann Compl. ¶ 30; Garber Compl. ¶ 33.

The DirecTV RSN defendants include Root Sports Pittsburgh (RSN for Pittsburgh Pirates and Penguins), Root Sports Rocky Mountain (RSN for Colorado Rockies), Root Sports Northwest (RSN for Seattle Mariners) all of which are wholly-owned subsidiaries of DirecTV and/or its subsidiary DirecTV Sports Networks LLC. See Laumann Compl. ¶ 28; Garber Compl. ¶ 31.

Defendant Yankees Entertainment and Sports Networks, LLC (“YES”) is the RSN for New York Yankees and is co-owned with the New York Yankees. See Garber Compl. ¶ 34. Defendant Madison Square Garden Company (“MSG”) owns the New York Rangers as well as two RSNs, MSG Network and MSG Plus, which carry the games of the New York Rangers and Islanders, and the New Jersey Devils and Buffalo Sabres. See Laumann Compl. ¶ 24.

See Laumann Compl. ¶¶ 70–71; Garber Compl. ¶¶ 74–75. See also Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1195 (9th Cir.2012) (dividing the television market into upstream and downstream markets).

See id.

Laumann Compl. ¶ 63–64; Garber Compl. ¶ 67–68.

Laumann Compl. ¶ 71; Garber Compl. ¶ 75.

Pl. Mem. at 10.

See id. Three networks carry MLB games nationwide. Turner Broadcast System (“TBS”) is a nationwide cable and satellite television channel whose MLB presentations during the regular season are typically blacked out in the local markets of the teams involved in the game being presented. See Garber Compl. ¶ 38. ESPN, another nationwide cable and satellite channel carries certain MLB games exclusively. See id. ¶ 39. Fox Broadcasting Company is an over-the-air television network whose MLB presentations are subject to nationwide exclusivity which prevents the presentation of non-Fox games in any market. See id. ¶ 40. The two most significant national producers of NHL games in the United States are both controlled by Comcast: NBC, an over-the-air network, that airs games nationwide, and NBC Sports Network, a pay-television sports channel available exclusively through cable and satellite providers. See Laumann Compl. ¶ 31. Fox Sports Net, Inc. owns and controls eleven RSNs that produce and present NHL games. See id. ¶ 33.

Laumann Compl. ¶ 75; Garber Compl. ¶ 79.

See id. ¶¶ 75, 80; Garber Compl. ¶¶ 79, 84.

See Laumann Compl. ¶¶ 78–81; Garber Compl. ¶ 82–86. The New York Yankees, through YES, provides in-market streams, but only to consumers who already subscribe to YES through their television provider, and at additional cost. See Garber Compl. ¶ 90.

Pl. Mem. at 13 (citing Laumann Compl. ¶ 83; Garber Compl. ¶ 86).

See id.

Garber Compl. ¶ 97; see also Laumann Compl. ¶ 93.

Laumann Compl. ¶ 55; Garber Compl. ¶ 59.

Garber Compl. ¶ 60. See also Laumann Compl. ¶ 56.

Id.

Id.

Laumann Compl. ¶ 106; Garber Compl. ¶ 113.

Laumann Compl. ¶ 112; Garber Compl. ¶ 119.

Laumann Compl. ¶ 118; Garber Compl. ¶ 125.

Laumann Compl. ¶ 123; Garber Compl. ¶ 130.

See Memorandum of Law in Support of Defendants’ Motion to Dismiss the Complaints (“Def. Mem.”) at 2.

Id. at 3–4.

Id. at 4.

Id. at 5.

Id.
As in any federal case, plaintiffs must establish Article III standing before considering the substance of the antitrust claims. See Ross v. Bank of America, N.A. (USA), 524 F.3d 217, 222 n. 1 (2d Cir.2008) (“A court proceeds to an antitrust standing analysis only after Article III standing has been established”). To establish Article III standing plaintiff “must allege and show that [he] personally ha[s] been injured, not that injury has been suffered by other, unidentified members of the class to which he belongs and which [he] purports to represent.” Lewis v. Casey, 518 U.S. 343, 357, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996).

See 15 U.S.C. § 12 et seq.; Section 4 of the Clayton Act states, in relevant part, that “[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States ..., and shall recover threefold the damages by him sustained.” Id. § 15. Section 16 states that “[a]ny person ... shall be entitled to sue for and have injunctive relief ... against threatened loss or damage by a violation of the antitrust laws.” Id. § 26.

Categorizing a restraint as per se illegal “eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work.” Id. at 885–86, 127 S.Ct. 2705 (internal quotations and citations omitted). Categorizing a restraint as per se illegal “eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work.” Id. at 886, 127 S.Ct. 2705.
In re ATM Fee Antitrust Litig., 686 F.3d at 751. Accord Dickson, 309 F.3d at 214–15. Dickson held that Illinois Brick barred allegations that a licensing agreement between computer sellers and Microsoft resulted in supracompetitive prices where computer purchasers did not allege any conspiracy between Microsoft and the sellers to set the resale price of the software, but rather claimed that overcharges were passed on to the consumers by the sellers when the consumers purchased personal computers from the sellers. See id. at 215.
To the extent that the MVPDs compete with the Leagues (vis-a-vis Internet sales) for distribution of games, the Second Circuit's holding that Illinois Brick is inapplicable where the alleged middleman "[could] not be characterized solely as a customer" of the primary seller, but "was also a competitor ... in the retail market" provides another reason that plaintiffs here are not barred by Illinois Brick. 


See Paper Sys. Inc., 281 F.3d at 631–32. While it is true that Madison Square Garden Company, a defendant in this case, did sue the NHL in 2007 for antitrust violations arising out of the very agreements at issue here, it sought only injunctive relief and ultimately settled. See 3/3/09 Stipulation and Order of Dismissal, Madison Square Garden v. National Hockey League, 07–cv–08455 ("MSG v. NHL") (dismissing MSG's case against the NHL with prejudice). It would be ironic if "a cartel-member plaintiff seek[ing] to remove [a] restraint—such that the member's interest coincides with the public interest in vigorous competition" could sue but the public (consumers) could not. Daniel v. American Bd. of Emergency Medicine, 428 F.3d 408, 440 (2d Cir.2005).

See Illinois Brick, 431 U.S. at 728–33, 741–47, 97 S.Ct. 2061. The fact that numerous RSNs and MVPDs are not joined as defendants is not a problem because, under the principal of joint and several liability, "each member of a conspiracy is liable for all damages caused by the conspiracy's entire output." Paper Sys. Inc., 281 F.3d at 632 (citing Texas Indus., Inc., 451 U.S. 630, 101 S.Ct. 2061).

See459 U.S. at 535, 103 S.Ct. 897 (in determining whether a plaintiff has antitrust standing, courts must "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them"). The standing analysis under Associated General Contractors also applies to claims for injunctive relief. See Daniel, 428 F.3d at 451 ("The extent to which these factors apply when plaintiffs sue for injunctive relief depends on the circumstances of the case.").

Def. Mem. at 36.

Id. at 31.

Pl. Mem. at 55 (quoting Daniel, 428 F.3d at 451 (Katzmann, J., dissenting in part)).

Serpa Corp. v. McWane, Inc., 199 F.3d 6, 10 (1st Cir.1999) (emphasis added).

See Laumann Compl. ¶ 10; Garber Compl. ¶ 13; see also MSG Br. at 27 (noting that fans "are deprived of alternatives that could be offered by individual clubs—such as the ability to purchase single games or the games of a single team —and of the lower prices that would result from such competition with the Center Ice package"). Furthermore, aside from the fact that television purchasers of out-of-market packages purchased from MVPDs rather than directly from the League, as in the case of Internet purchasers, their positions within the alleged antitrust scheme are largely analogous. As I have already declined to dismiss plaintiffs based on their indirect purchaser status, and defendants do not argue...
that Internet plaintiffs lack standing, it follows logically that purchasers of out-of-market television packages should be permitted to remain in the suit.

104  See Garber Compl. ¶ 60. See also Laumann Compl. ¶ 56.

105  The fact that plaintiffs' remoteness from the first level of the alleged conspiracy did not mandate dismissal under Illinois Brick does not mean the Court cannot consider it under the more general antitrust standing inquiry. See Illinois Brick, 431 U.S. at 728 n. 7, 97 S.Ct. 2061 ("[T]he question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4."). (emphasis added).

106  Kloth v. Microsoft Corp., 444 F.3d 312, 324 (4th Cir.2006) (dismissing plaintiffs claims where "it is merely coincidental that they purchased Microsoft products at all" and "[i]t would be even more speculative to determine the relevant benefits and detriments that non-Microsoft products would have brought to the market and the relative monetary value ... to a diffuse population of end users").

107  It is worth noting that the remaining Television plaintiffs are just as capable of raising any meritorious arguments that general Comcast and DirecTV subscribers would have raised because, as a prerequisite to purchasing out-of-market packages, they must subscribe to the general television package.

108  See Garber Compl. ¶ 19. Because Silver is a former purchaser of NHL Center Ice, he may proceed with the Laumann suit.

109  See American Needle, 130 S.Ct. at 2206.

110  Id. at 2212–14.

111  Id.

112  See Pittsburgh Athletic Co. v. KQV Broad. Co., 24 F.Supp. 490, 492 (W.D.Pa.1938) (holding that the Pittsburgh Athletic Company, owner of the Pittsburgh Pirates, could grant “the exclusive right to broadcast, play-by-play, descriptions or accounts of the games played by the ‘Pirates’ at this and other fields”).

113  See Laumann Compl. ¶ 71; Garber Compl. ¶ 75.

114  See LITIGATION UPDATE 000181

115  Defendants cite Washington v. National Football League in support of their argument that “a ‘league’ game is necessarily a ‘league’ product.” Def. Mem. at 47. But that case is involved “historical football game footage, something that the individual teams do not separately own, and have never separately owned.” Washington, 880 F.Supp.2d 1004, 1006 (D.Minn.2012).

116  See Pl. Mem. at 43.

117  See id. Plaintiffs note that “[t]he conspiracies are ... to divide the consumer markets for live sports programming.” Id. at 42 (emphasis in original).

118  Id. at 44–45.

119  Id. at 45.

120  Brantley, 675 F.3d at 1198 (citing Leegin, 551 U.S. at 893, 127 S.Ct. 2705). Accord Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) (vertical agreements between a manufacturer and distributors restricting retail locations are analyzed under the rule of reason).

121  See, e.g., Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226, 59 S.Ct. 467, 83 L.Ed. 610 (1939) (inferring agreement among film exhibitors where a movie distributor sent letters to each film exhibitor placing limitations on exhibition and advising that others were participating and that cooperation was essential); Toys “R” Us, Inc. v. Federal Trade Comm’n, 221 F.3d 928, 930 (7th Cir.2000) (finding that a manufacturer coordinated a horizontal agreement in restraint of trade through signing identical vertical agreements with a number of toy manufacturers whereby manufacturer agreed to restrict the distribution of its products to low-priced warehouse club stores on the condition that the other manufacturers would do the same). Cf. Leegin, 551 U.S. at 893, 127 S.Ct. 2705 (holding the possibility that “a group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement” to be a “legitimate [antitrust] concern”).

122  See Interstate Circuit, 306 U.S. at 227, 59 S.Ct. 467 (“Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.”); Howard Hess Dental Labs., Inc. v. Dentsply Intern., Inc., 602 F.3d 237, 255 (3d Cir.2010) (suggesting that plaintiffs may plead a hub-and-spoke conspiracy by
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making “factual allegations to plausibly suggest” that the distributor defendants—the spokes—“had knowledge” of the
conspiracy).
To be clear, plaintiffs do not contend that the RSNs' liability arises out of their exclusive agreements to telecast the
games of the clubs with which they contract. See Pl. Mem. at 45 (conceding that clubs “are entitled to enter into an
exclusive relationship with [an RSN]” to produce telecasts, and even to “limit [the RSN's] distribution geographically so
long as that decision is unilateral”). Rather, the RSNs' role arises out of their alleged participation in agreements to
geographically divide the market for baseball and hockey programming. Defendants' argument that the Supreme Court
“has approved precisely such restrictions because they ‘often promote interbrand competition,’ ” does not render the RSN
defendants' vertical agreements automatically lawful—it merely means that they are subject to rule of reason analysis.
See Consolidated Reply Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaints (“Def. Rep.”)
at 7 (citing Continental T.V., 433 U.S. at 53, 97 S.Ct. 2549).
Pl. Mem. at 46.
Id.
See also In the Matter of Applications of Comcast Corp., General Elec. Co., and NBC Univ., Co., 26 F.C.C.R. 4252, 4293
(2011) (noting that “vertical integration of certain video program networks [including RSNs] with a particular MVPD [c]ould
harm MVPD competition and enhance the integrated MVPD's market power”).
“a § 1 agreement may be found when the conspirators had a unity of purpose or a common design and understanding,
or a meeting of minds in an unlawful arrangement”) (internal quotation omitted).
See Pl. Mem. at 48 (“The market division is not complete until Comcast and DirecTV prevent viewers from watching
telecasts.”).
See id. at 24 (“If this case involved anything other than sports, it would present a clear per se violation of Section 1 of the
Sherman Act.”) id. at 34 n. 43 (acknowledging that “per se treatment is not appropriate” in considering sports leagues'
restraints). Accord Salvino, 542 F.3d at 316, 334.
Leegin, 551 U.S. at 886, 127 S.Ct. 2705.
Brantley, 675 F.3d at 1198 (quoting Twombly, 550 U.S. at 556, 127 S.Ct. 1955).
See Def. Mem. at 5.
Id. at 47.
See NCAA, 468 U.S. at 99, 104 S.Ct. 2948 (holding that “[b]y participating in an association which prevents member
institutions from competing against each other on the basis of price or kind of television rights that can be offered to
broadcasters, the NCAA member institutions have created a horizontal restraint—an agreement among competitors on
the way in which they will compete with one another” that is subject to scrutiny under the rule of reason); United States
NFL that no team would permit stations to telecast its games into the home territory of another team on a day when that
team was not playing at home and was televising its game into its home territory, violated Section 1 of the Sherman Act).
NCAA, 468 U.S. at 114, 104 S.Ct. 2948 (internal quotation omitted) (rejecting this very argument with respect to an
agreement by the NCAA restricting broadcast of college football games).
(MSG's allegations that it “ ‘has been and will continue to be unable to distribute Rangers games ... through cable,
satellite, Internet and otherwise in ways that it believes are best suited to reaching the Rangers fan base’ ... plead harm
to competition as a whole ... [b]ecause it is plausible that the ... prohibition on independent websites constitutes a form
of output reduction.”).
Pl. Mem. at 24–25 (quoting MSG Compl. ¶ 37). See also id. at 1 (“ ‘[T]he serious harm to competition from a sports
league's division of broadcasting territories has long been established as an antitrust violation.’ ”) (quoting MSG Br. at 27).
Brantley, 675 F.3d at 1198 (internal quotation and citation omitted).
See Laumann Compl. ¶¶ 112–113, 117–118; Garber Compl. ¶ ¶ 119–120, 125–126 (alleging antitrust violations based
on agreements granting Leagues exclusive rights to distribute out-of-market games).
Under the Sports Broadcasting Act (“SBA”), the antitrust laws “shall not apply to any joint agreement [involving]
professional team sports of football, baseball, basketball, or hockey, by which any league of clubs ... sells or otherwise
transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football,
baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.” 15 U.S.C. § 1291 (emphasis
added). However, the term “ ‘[s]ponsored telecasting’ under the SBA pertains only to network broadcast television and

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does not apply to non-exempt channels of distribution such as cable television, pay-per-view, and satellite television networks.” *Kingray, Inc. v. NBA, Inc.*, 188 F.Supp.2d 1177, 1183 (S.D.Cal.2002).

The allegations in *Brantley* were that “each programmer defendant, because of its full or partial ownership of a broadcast channel and its ownership or control of multiple important cable channels” exploited its market power by requiring distributors as a condition to purchasing “must have” channels, to also acquire and resell all the rest of the programmer’s less popular cable channels. 675 F.3d at 1195. Plaintiffs here do not allege unlawful tying.

*See Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321, 323 (5th Cir.1974) (rejecting a claim that the Dallas Cowboys had unlawfully tied the sale of undesirable preseason tickets to the sale of season ticket packages because the Cowboys had a lawful monopoly in the market for the tied product—i.e. preseason tickets).

542 F.3d at 309.

Id. at 297. The court rejected the claim that the agreement reduced output because the “Clubs’ agreement to make [a wholly owned-subsidiary of MLB] their exclusive licensor does not by its express terms restrict or necessarily reduce the number of licenses to be issued; it merely alters the identity of the licenses’ issuer.” Id. at 318.

*Accord Broadcast Music v. Columbia Broadcasting System*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) (“Not all arrangements among actual or potential competitors that have an impact on price are ... unreasonable restraints.”) (discussing blanket licensing agreement).

*Brantley*, 675 F.3d at 1201.

*Salvino*, 542 F.3d at 323, 327 (discussing possible justification for agreements in restraint of trade based on *Broadcast Music* and *NCAA*). To be sure defendants may have little trouble justifying their agreements regarding distribution of out-of-market games. *See NCAA*, 468 U.S. at 117, 104 S.Ct. 2948 (noting that the need to promote competitive balance among the teams may justify horizontal restraints on competition); *Madison Square Garden, L.P. v. National Hockey League*, 270 Fed.Appx. 56, 58 (2d Cir.2008) (agreeing that “[i]t is far from obvious that [the NHL’s ban on independent websites] has no redeeming value”). However, the reasonableness of the agreements alleged is not so apparent that the claims warrant dismissal without further inquiry.


There is no question that Internet plaintiffs adequately alleged reduced choice resulting from the allegedly anti-competitive *League* agreements, insofar as “in-market” games are not available from any seller over the Internet. And *Television* plaintiffs have alleged that they pay higher costs and have fewer choices as a result of the same types of agreements for television programming. *See also* MSG Compl. at 26 (alleging that preventing competition among teams in television and Internet marketing harms consumers); MSG Br. at 27 (same).

*Laumann* Compl. ¶ 123; *Garber* Compl. ¶ 130.

*See Def. Mem. at 6. Defendants argue “failure to allege any anticompetitive effect [and] failure to allege any plausible conspiracy among the leagues, the clubs and the RSN’s and distributors.” Id.*


*See Board. of Regents of Univ. of Okla. v. National Collegiate Athl. Ass’n*, 546 F.Supp. 1276, 1323 (W.D.Okla.1982) (holding “that the relevant market for testing whether the NCAA exercises monopoly power is live college football television”).


*See supra* Part V.B.2 (discussing harm to competition).
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Interim Class Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

IN RE: NATIONAL FOOTBALL LEAGUE SUNDAY TICKET
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

Case No. ML 15-02668-BRO (JEMx)
CLASS ACTION
CONSOLIDATED AMENDED COMPLAINT FOR DAMAGES AND DECLARATORY AND INJUNCTIVE RELIEF PURSUANT TO SECTIONS 1 AND 2 OF THE SHERMAN ACT
Plaintiffs Ninth Inning Inc. dba The Mucky Duck, 1465 Third Avenue
Restaurant Corp. dba Gael Pub, Robert Gary Lippincott, Jr., and Michael Holinko, by and through their attorneys, complain and allege as follows. All allegations herein, except for those relating to the Plaintiffs themselves, are based on information and belief.

INTRODUCTION

1. The 32 professional football teams ("Teams") that compete in the National Football League ("NFL") have agreed among themselves, and with DirecTV, and in concert with others, to eliminate all competition in the broadcasting and sale of live video presentations of professional football games, including specifically for purposes of this complaint, the broadcasting and sale of DirecTV’s NFL Sunday Ticket service to residential and commercial subscribers as described below.1 As the Supreme Court has observed, each team “is a substantial, independently owned, and independently managed business,” competing with its rivals “not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel,” as well as “in the market for intellectual property.” American Needle, Inc. v. NFL, 560 U.S. 183, 196-97 (2009) ("American Needle"). Yet rather than compete in the multibillion-dollar football broadcasting market, they have joined forces to restrict supply and raise prices.

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1 Within this overall market is a submarket of “out-of-market” NFL games played on Sunday afternoon and not broadcast on CBS, Fox, or formerly on NBC within the viewer’s local television market. This distinct product, called the “NFL Sunday Ticket” or “Sunday Ticket”, has been trademarked by Defendants and is recognized by them as a separate product from NFL games broadcast on Fox, CBS, NBC, ESPN, and the NFL Network.
2. It has been clear for more than half a century that such agreements unreasonably restrain trade. In 1953, the United States Department of Justice ("DOJ") sued the NFL and its teams, alleging among other things that a far more limited agreement—an agreement merely prohibiting teams from broadcasting within 75 miles of another team’s city when that team was playing a televised game away from home—was illegal under the Sherman Act. See *United States v. NFL, 116 F. Supp. 319 (E.D. Pa. 1953)* ("NFL I"). The United States District Court for the Eastern District of Pennsylvania readily agreed that that agreement was an unjustified attempt to “enable the clubs . . . to sell monopoly rights” and “an unreasonable and illegal restraint of trade.” *Id.* at 326-27.

3. In 1961, the court applied this ruling to prevent the joint selling of broadcast rights. *United States v. NFL, 196 F. Supp. 445 (E.D. Pa. 1961)* ("NFL II"). In response to this ruling, the NFL lobbied for and obtained a carefully limited antitrust exemption that allows a league of professional football clubs to jointly sell or transfer sponsored telecasting rights. This bill, known as the Sports Broadcasting Act of 1961 ("SBA") (15 U.S.C. § 1291), exempted only “the free telecasting of professional sports contests,” as former NFL Commissioner Pete Rozelle ("Rozelle") “[a]bsolutely” recognized. Congress expressly left the holdings of *NFL I* in place (15 U.S.C. § 1292), and provided no exemption for pay, cable and satellite television distribution.

4. For some time after the SBA’s passage, the NFL and its Teams were content to abide by its limits and jointly produce only free sponsored telecasts, available to anyone with a television and a set of rabbit ears (or the modern equivalent, a digital antenna). As cable and satellite television began to present
lucrative opportunities, however, the Teams chose not to compete in this new sphere. Instead, they agreed to forgo all competition and sell their valuable products only jointly, throttling the supply of professional football telecasts in violation of the holdings of NFL I and II, and outside the carefully limited exemption of the SBA.

5. No other major sports league in America has such a drastic, total elimination of competition in the broadcasting of its games. While Major League Baseball (“MLB”), the National Hockey League (“NHL”), and the National Basketball Association (“NBA”) have each allocated markets geographically and pooled so-called out-of-market rights, none has agreed to centralize control and sale of all broadcast rights.\(^2\)

6. The anticompetitive effects of this agreement are clear and significant. The agreement has restricted the availability of live video presentations of regular season NFL games. The Teams have agreed not to avail themselves of cable, satellite, or Internet distribution channels individually. In the absence of an agreement, each team would have an incentive to distribute its games nationally in these channels. Given the relatively low cost of internet streaming and satellite and cable television carriage, each team acting independently would offer their games at a competitive price to anybody in the country who wanted to watch that particular team.

7. Instead, however, the Teams have all forgone this option in favor of creating a more lucrative monopoly. The Teams have agreed to make an offering

\(^2\) Although not at issue here, these agreements are themselves anticompetitive and illegal under the antitrust laws. See generally Laumann v. NHL, 56 F. Supp. 3d 280, 297-302 (S.D.N.Y. 2014).
called “NFL Sunday Ticket” (also referred to herein as “Sunday Ticket”) the only way to view games other than the limited selection of games broadcast through sponsored telecasts (or, as discussed below, the cable channels ESPN and NFL Network) in any given area. Sunday Ticket bundles all other games into one package, sold jointly by the NFL to DirecTV and then by DirecTV to commercial and residential subscribers.

8. The NFL Sunday Ticket is an out-of-market sports package that carries all NFL Sunday afternoon games produced by Fox and CBS (except those broadcast on local CBS and Fox affiliates). Sunday Ticket appeals to NFL fans with loyalties to teams located throughout the United States and fans who want to watch more than the six games that the NFL allows to be broadcast by television networks each week. Additionally, commercial subscribers—primarily bars and restaurants—generate a substantial share of their overall revenue by having the capability to televise multiple professional football games simultaneously in order to attract a diverse range of fans to their establishments on Sunday afternoons during the fall NFL football season. Indeed, DirecTV specifically markets the NFL Sunday Ticket to restaurants and bars, including, for example, through advertising such as: “Turn your business into the neighborhood’s go-to spot with the undisputed leader in sports” and “[o]nly DIRECTV has the sports packages you need to attract fans of every stripe with NFL SUNDAY TICKET 2015 . . . .”

9. This scheme restricts competition and harms Sunday Ticket purchasers. First, the total elimination of competition allows the NFL, its Teams, and DirecTV to charge supracompetitive monopoly prices, rather than the prices that would exist if the 32 teams were competing for interest and distribution in a
free market. Second, Class members must pay for access to all 32 teams’ out-of-
market games, even if they are only interested in viewing one or two teams’ games.

10. This exclusive deal, along with other contractual arrangements
between the NFL, its member teams, and DirecTV, as well as Fox, ESPN, CBS, and
NBC (collectively, the “Networks”), results in the blackout or unavailability of out-
of-market games, except through the bundled NFL/DirecTV Sunday Ticket. These
arrangements result in substantial injury to competition, including through
eliminating distribution of out-of-market games through competing Multichannel
Video Programing Distributor (“MVPD”) platforms, such as the Dish Network,
Comcast Corporation (“Comcast”), and Spectrum Cable (formerly Time Warner
Cable); reducing game offerings and package mixes; and imposing
supracompetitive pricing for consumers. The supracompetitive price for NFL
Sunday Ticket now exceeds $120,000.00 per year for the largest commercial
subscribers. As DirecTV says on its own website: “Only DIRECTV brings you
every play of every out-of-market game, every Sunday. Get the action on your TV
with NFL SUNDAY TICKET.”

11. Thus, DirecTV’s arrangement with the NFL allows the Defendants to
restrict the output of, and raise the prices for, the live broadcast of NFL Sunday
afternoon out-of-market games. Each NFL member team owns the initial rights to
the broadcast of its own games. However, the teams have collusively agreed to
grant the NFL the exclusive right to market games outside of each team’s respective
home market. But for the NFL teams’ agreements in which DirecTV and others
have joined, teams would compete against each other in the market for NFL football
programming, which would induce more competitive pricing and content.
12. In addition to allowing Defendants to charge supracompetitive prices for Sunday Ticket, this scheme increases the market share and value of NFL regular season games broadcast by the Networks and the NFL Network. By limiting the availability of competing products, this scheme drives up the market share and value of the broadcasts by the Networks, the NFL Network, and DirecTV. This allows these broadcasters to increase revenues of all parties to the scheme.

13. DirecTV has willfully joined, encouraged, and entrenched the Teams’ conspiracy. It contracted with the NFL to make Sunday Ticket exclusive to DirecTV, so that no other cable or satellite distributor could sell it. In doing so, it required that the NFL and its Teams preserve their anticompetitive agreement not to compete with one another. DirecTV’s agreement to carry Sunday Ticket and not to deal individually with NFL teams is premised upon the continued existence of the anticompetitive agreement not to create and distribute individual team telecasts. As explained below, the Teams, in affirming the NFL’s successive agreements with DirecTV, have mandated that nothing in the NFL’s contracts with the Networks shall in any way impede the exclusive deal between the DirecTV and the NFL.

14. This exclusive distribution arrangement is unique among American sports. Of the four major professional sports in this country—baseball, basketball, hockey, and football—the only one with an exclusive out-of-market broadcasting arrangement is the NFL/DirecTV Sunday Ticket. Major League Baseball (“MLB”), the National Basketball Association (“NBA”), and the National Hockey League (“NHL”) all distribute live out-of-market games through multiple MVPDs, including, for example, DirecTV, the Dish Network, and InDemand (which originated as a consortium of Comcast, Cox Communications and Time Warner
Cable). As a result, DirecTV does not charge nearly as much for access to MLB Extra Innings, NBA League Pass, and NHL Center Ice, which provide access to more games per week over a longer season than the NFL.

15. Similarly, outside the United States, the NFL distributes Sunday Ticket through numerous distributors, or even offers the games online without tying them to an MVPD subscription. In Canada, the NFL Sunday Ticket is distributed on a non-exclusive basis through the following MVPDs: Shaw Cable; Shaw Direct; TELUS; Optik TV; TELUS Satellite TV; Bell TV; Access Communications; Cogeco Cable; EastLink Cable; Rogers Cable; Vidéotron; Westman Communications; MTS; and SaskTel.

16. A bar or restaurant with a fire code occupancy between 51-100 paid $2,314.00 for Sunday Ticket in 2015 (in addition to television package subscription charges, high-definition access fees, and other charges). And the price for Sunday Ticket is higher the larger the establishment’s Fire Code Occupancy (“FCO”) (also known as “EVO”—Estimated Viewing Occupancy). The largest establishments—like Nevada hotels—are charged more than $120,000 per year for Sunday Ticket, as reflected in the following pricing chart from DirecTV (which also shows the pricing differential between the exclusive NFL Sunday Ticket and the non-exclusive MLB Extra Innings package):
17. Sunday Ticket prices for residential subscribers are also far higher than they would be in a competitive market. The exclusive distribution arrangement agreed upon by the NFL and DirecTV has resulted in Sunday Ticket prices to residential consumers that substantially exceed the price for Sunday Ticket prices in Canada, where no exclusivity exists. As an example, for 2015, Sunday Ticket pricing in the United States was fixed at $251.94 for the basic package and $353.94 for the “Max” package. By contrast, in Canada, where there is no exclusivity MVPDs offered Sunday Ticket for approximately $199.00 in Canadian dollars.
($155.22 in U.S. dollars) or less. And certain other Canadian cable providers bundle the out-of-market games of the NBA, NHL, MLB and the NFL and in 2015 charged a C$35.95 (U.S. $28.04) monthly fee for access to all of them.

18. DirecTV’s ability to offer NFL Sunday Ticket on an exclusive basis is material to its operations. Indeed, DirecTV’s merger with AT&T, which was consummated in July of 2015, depended, in substantial part, on continued exclusivity of this service. As DirecTV noted in a filing with the Securities and Exchange Commission (“SEC”) on December 3, 2014, “[p]ursuant to the Merger Agreement, AT&T had the right to terminate the Merger Agreement or not consummate the Merger if we failed to enter into a contract with the NFL providing for exclusive distribution rights for the NFL Sunday Ticket service.”

19. Given these three sources of supracompetitive pricing and unlawfully protected market power—the agreement not to compete; the agreement to allow only purchases of a bundle of all 32 teams; and the agreement to sell certain games exclusively through DirecTV—it is no surprise that Defendants are able to charge exorbitant prices to Plaintiffs and other class members.

20. The agreements challenged in this complaint drastically curb output, reduce choice, and increase price. They unreasonably restrain trade in violation of Section One of the Sherman Act (15 U.S.C. § 1), and allow the NFL to unlawfully monopolize the market for live video presentation of professional football games in violation of Section Two of the Sherman Act (15 U.S.C. § 2). Accordingly, Plaintiffs, on behalf of themselves and others similarly situated, seek injunctive

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3 This calculation is based on the assumption of an exchange ratio of a Canadian Dollar to U.S. Dollar conversion ratio of .78, the reported average by U.S. Forex for the period from January 1, 2015 – December 31, 2015. See www.usforex.com.
relief putting an end to this anticompetitive scheme and damages to compensate the
Classes for the supracompetitive overcharges they have paid.

JURISDICTION AND VENUE

21. Plaintiffs bring this action pursuant to Section 16 of the Clayton Act
§§ 1-2). This Court has subject matter jurisdiction over those claims pursuant to 28

Defendants transact business in this District, and are subject to personal jurisdiction
here.

23. Members of the Classes were injured in this District and DirecTV is
headquartered in this District.

PARTIES

A. Plaintiffs

24. Plaintiff Ninth Inning Inc. dba The Mucky Duck (“Mucky Duck”) is a
pub located in San Francisco, California. Mucky Duck has purchased the Sunday
Ticket from DirecTV in order to attract patrons to its establishment on Sunday
afternoons during the NFL’s professional football season.

25. Plaintiff 1465 Third Avenue Restaurant Corp. dba Gael Pub (“Gael
Pub”) is a pub located in New York, New York. Gael Pub has purchased the
Sunday Ticket from DirecTV in order to attract patrons to its establishment on
Sunday afternoons during the NFL’s professional football season.

27. Plaintiff Michael Holinko (“Holinko”) is a resident of Belle Mead, New Jersey. Holinko signed up for Sunday Ticket in order to watch out-of-market Sunday afternoon NFL games.

B. Defendants

28. Until 2015, the NFL was an unincorporated association of 32 American professional football teams in the United States. Each of the 32 NFL member teams, headquartered in various cities across the country, is separately owned and operated, acting in its own economic self-interest and competing in most respects with one another.

29. The 32 Teams are owned and operated by the following entities, each of which is a defendant in this action:

<table>
<thead>
<tr>
<th>NFL Defendant Team Owner</th>
<th>State of Organization</th>
<th>Team Name (City)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona Cardinals, Inc.</td>
<td>Arizona</td>
<td>Arizona Cardinals</td>
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<tr>
<td>Atlanta Falcons Football Club LLC</td>
<td>Georgia</td>
<td>Atlanta Falcons</td>
</tr>
<tr>
<td>Baltimore Ravens Limited Partnership</td>
<td>Maryland</td>
<td>Baltimore Ravens</td>
</tr>
<tr>
<td>Buffalo Bills, Inc.</td>
<td>New York</td>
<td>Buffalo Bills</td>
</tr>
<tr>
<td>Panthers Football LLC</td>
<td>North Carolina</td>
<td>Carolina Panthers</td>
</tr>
<tr>
<td>Chicago Bears Football Club, Inc.</td>
<td>Delaware</td>
<td>Chicago Bears</td>
</tr>
<tr>
<td>Cincinnati Bengals, Inc.</td>
<td>Ohio</td>
<td>Cincinnati Bengals</td>
</tr>
<tr>
<td>Cleveland Browns LLC</td>
<td>Delaware</td>
<td>Cleveland Browns</td>
</tr>
<tr>
<td>Team Name</td>
<td>State</td>
<td>Team Name</td>
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<tr>
<td>-----------------------------------------------</td>
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</tr>
<tr>
<td>Dallas Cowboys Football Club, Ltd.</td>
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</tr>
<tr>
<td>Denver Broncos Football Club</td>
<td>Colorado</td>
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<tr>
<td>Detroit Lions, Inc.</td>
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<tr>
<td>Green Bay Packers, Inc.</td>
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<td>Houston NFL Holdings LP</td>
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<td>Houston Texans</td>
</tr>
<tr>
<td>Indianapolis Colts, Inc.</td>
<td>Delaware</td>
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</tr>
<tr>
<td>Jacksonville Jaguars Ltd.</td>
<td>Florida</td>
<td>Jacksonville Jaguars</td>
</tr>
<tr>
<td>Kansas City Chiefs Football Club, Inc.</td>
<td>Texas</td>
<td>Kansas City Chiefs</td>
</tr>
<tr>
<td>Miami Dolphins, Ltd.</td>
<td>Florida</td>
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<tr>
<td>Minnesota Vikings Football Club LLC</td>
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<td>Minnesota Vikings</td>
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<tr>
<td>New England Patriots, LP</td>
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<td>New England Patriots</td>
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<tr>
<td>New Orleans Louisiana Saints LLC</td>
<td>Texas</td>
<td>New Orleans Saints</td>
</tr>
<tr>
<td>Oakland Raiders LP</td>
<td>California</td>
<td>Oakland Raiders</td>
</tr>
<tr>
<td>Philadelphia Eagles Football Club, Inc.</td>
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<tr>
<td>Pittsburgh Steelers Sports, Inc.</td>
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<tr>
<td>San Diego Chargers Football Co.</td>
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<td>San Francisco Forty Niners Ltd.</td>
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<td>Football Northwest LLC</td>
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<tr>
<td>The Rams Football Company LLC</td>
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<td>St. Louis Rams</td>
</tr>
<tr>
<td>Buccaneers Limited Partnership</td>
<td>Delaware</td>
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</tr>
<tr>
<td>Tennessee Football, Inc.</td>
<td>Delaware</td>
<td>Tennessee Titans</td>
</tr>
</tbody>
</table>
30. In or about 2015, the NFL incorporated as the National Football League, Inc., and has its headquarters at 345 Park Avenue, 7th Floor, New York, NY 10154. On information and belief, NFL Enterprises LLC was organized to hold the broadcast rights of the 32 NFL Teams and license them to MVPDs and other broadcasters, including DirecTV. NFL Enterprises LLC is also located at 345 Park Avenue, 7th Floor, New York, NY 10154.

31. Through the NFL, the 32 Teams do cooperate in some respects, including by setting game rules and a game schedule, and dividing their member teams into geographic territories. The teams have also agreed to allow the NFL to negotiate on their behalf television contracts with national broadcasters, including for the broadcast of each Team’s games outside its home territory. These include the Sunday Ticket package sold only through DirecTV.

32. In *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010) (“*American Needle*”), the United States Supreme Court unanimously rejected the NFL's claim that an agreement regarding the joint marketing of club-owned intellectual property was the decision of a “single entity”—the league—not subject to section 1 of the Sherman Act (15 U.S.C. §1). The Court reaffirmed lower court decisions that sports leagues are subject to the antitrust laws and that league owners must refrain from agreements that unreasonably restrain trade. The Court also reaffirmed its own decision in *National Collegiate Athletic Ass’n v. Board of Regents*, 468 U.S. 85 (1984), which held that the hallmark of an unreasonable
restraint is one that raises price, lowers output, or renders output unresponsive to consumer preference.

33. This complaint uses the term “NFL” to refer collectively (unless otherwise indicated) to the 32 Teams, National Football League, Inc., and NFL Enterprises, LLC.

34. Defendant DirecTV Holdings LLC is a Delaware Limited Liability Company and has its principal place of business at 2230 East Imperial Highway, El Segundo, California. It is the U.S. operating arm of DirecTV, Inc. and describes itself as “a leading provider of digital television entertainment in the United States.” It claims that “[a]s of December 31, 2014, [it] had approximately 20.4 million subscribers.”

35. DirecTV, LLC is a California Limited Liability Company that has its principal place of business at 2230 East Imperial Highway, El Segundo, California. DirecTV, LLC issues bills to its subscribers.

36. This Complaint uses the term “DirecTV” to refer collectively to these two DirecTV entities.

TRADE AND COMMERCE

37. The NFL is by far the most significant provider of professional football in the United States. The three most recent Super Bowls have been the three most-watched programs in U.S. history. The 2015 Super Bowl was the most-watched program ever, with 114.4 million viewers.

38. In a July 2015 analysis, Bloomberg estimated that the NFL receives about $6 billion annually in total television revenue from all sources. In 2011, the NFL negotiated nine-year extensions of its existing broadcast deals with Fox, CBS
and NBC, running through the 2022 season. According to an August 27, 2014 Bloomberg report, ESPN, Fox, CBS and NBC pay $1.9 billion, $1.1 billion, $1 billion and $950 million per year, respectively, for the right to broadcast NFL games. The Wall Street Journal reported in September of 2014 that CBS paid $300 million for the right to telecast NFL “Thursday Night Football” for one year.

39. The commerce between the NFL and DirecTV is equally lucrative. In October of 2014, it was announced that DirecTV and the NFL entered into a new telecasting deal reportedly worth $1.5 billion annually for the next eight years, a deal that will bring $8 billion more to the NFL (extending over four additional years) than its last deal with DirecTV. Through these and other contractual deals, the NFL, its member teams and DirecTV engage in interstate commerce and in activities substantially affecting interstate commerce, and the conduct alleged herein substantially affects interstate commerce.

CLASS ACTION ALLEGATIONS

40. Plaintiffs bring this action on behalf of themselves and as a class action under Fed. R. Civ. P. 23(b)(2) (for injunctive relief) and (b)(3) (for damages) on behalf of all persons who fall within the definition of either of the following two Classes (collectively, the “Classes”):

All DirecTV commercial subscribers that purchased the NFL Sunday Ticket from DirecTV, or its subsidiaries, at any time between June 17, 2011 and the present (“Commercial Class”). The Commercial Class excludes the Defendants and any of their current or former parents, subsidiaries or affiliates. The Commercial Class also excludes all judicial officers presiding over this action and their immediate family members and staff, and any juror assigned to this action.

All DirecTV residential subscribers that purchased the NFL Sunday Ticket from DirecTV, or its subsidiaries, at any time between June 17, 2011 and the present (“Residential Class”). The Residential Class
excludes the Defendants and any of their current or former parents, subsidiaries or affiliates. The Residential Class also excludes all judicial officers presiding over this action and their immediate family members and staff, and any juror assigned to this action.

41. The Commercial Class is represented by Plaintiffs Mucky Duck and Gael Pub.

42. The Residential Class is represented by Plaintiffs Lippincott and Holinko.

43. DirecTV has sold its Sunday Ticket service to members of the Classes across the nation during the relevant period. Defendants have charged supra-competitive prices for that service.

44. Due to the nature of the trade and commerce involved, the Classes consist of many thousands of members. The exact number and their identities are known to DirecTV.

45. The Classes are so numerous that joinder of all members is impracticable.

46. There are questions of law and fact common to the Classes, including:
   a. Whether the NFL and its Teams engaged in a contract, combination, or conspiracy to reduce output and/or fix, raise, maintain or stabilize prices of live video presentations of regular season NFL games by agreeing that all video presentations would be licensed exclusively by the NFL;
   b. Whether Defendants have engaged in and are continuing to engage in a contract, combination, or conspiracy among themselves to fix, raise, maintain or stabilize prices of video
presentations of live Sunday NFL games by eliminating competition among presenters of out-of-market NFL games;

c. Whether Defendants have engaged in and are continuing to engage in a contract, combination, or conspiracy among themselves to fix, raise, maintain or stabilize prices of the Sunday Ticket by preventing any competitor from offering competing products;

d. The effect of Defendants’ agreements on the prices of Sunday Ticket in the United States during the class period;

e. The effect of Defendants’ agreements on the retransmission consent and affiliate fees for the carriage of NFL games to MVPDs;

f. The effect of Defendants’ agreements on the subscription fees charged by MVPDs that carry the Networks that air NFL games;

g. The identities of the participants in the conspiracy;

h. The duration of the conspiracy and the acts performed by Defendants in furtherance of it;

i. Whether the alleged conspiracy violated Section 1 of the Sherman Act, 15 U.S.C. § 1;

j. Whether the alleged conspiracy violated Section 2 of the Sherman Act, 15 U.S.C. § 2;

k. Whether the conduct of Defendants caused injury to the Plaintiffs and the other members of the Classes; and

l. The appropriate measure of damages.
47. Plaintiffs and the Classes were, during the Class period, commercial or residential subscribers to DirecTV who also purchased the Sunday Ticket package. Their respective claims are typical of the particular Class that they seek to represent, and the named Plaintiffs will fairly and adequately protect the interests of the particular Class that they seek to represent.

48. Plaintiffs are represented by counsel who are competent and experienced in the prosecution of antitrust and class action litigation.

49. Given the high cost of establishing that Defendants’ agreements violated the antitrust laws (including, but not limited to, substantial expert witness costs and attorneys’ fees), a class action is the only economically feasible means for any Plaintiff to enforce their statutory rights.

50. The prosecution of separate actions by individual members of the Classes would also create a risk of inconsistent or varying adjudications, establishing incompatible standards of conduct for Defendants.

51. The questions of law and fact common to the members of the Classes predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages.

52. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The Classes are readily ascertainable and are ones for which records exist. Prosecution as a class action will eliminate the possibility of duplicative litigation. Treatment as a class action will permit a large number of similarly situated persons to adjudicate their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense.
that numerous individual actions would engender. This class action presents no
difficulties in management that would preclude maintenance as a class action.

FACTUAL ALLEGATIONS

A. Relevant Market

53. The relevant geographic market for both Classes is the United States. The relevant product market for both Classes is the live video presentations of regular season NFL games that includes a distinct submarket for “out-of-market” games as described above. The national broadcast rights to select packages of games are negotiated by the NFL with networks CBS, NBC, ESPN and Fox. In addition to broadcasts of these games, the market includes broadcast rights for out-of-market games, such as those carried in the NFL Sunday Ticket package. Broadcasts of other sports or other content do not compete with broadcasts of NFL games. Moreover, NFL games broadcast locally on CBS and Fox on Sunday afternoons are distinct from the multi-game offering provided by Sunday Ticket specifically because the local games are different from the multi-game offering provided by Sunday Ticket, which caters to fans that are not located within the geographical confines of their favorite teams’ home territories.

54. New entrants that would dilute the market power over NFL video broadcasts created by the collusive agreements at issue here are extremely unlikely. New entry would require the creation of a new professional league playing American football. Such an undertaking would be enormously expensive, and—based on history—very unlikely to succeed. Even if a new entrant did appear, and even if it were sufficiently successful to sustain itself, it is unlikely that the resulting
video product would compete sufficiently with the NFL’s broadcasts to dissipated the NFL’s monopoly power.

55. In the 95 years since the NFL’s formation in 1920, there have only been a few noteworthy attempts at entry into the market for American football games. Three times, once each in the 1920s, 1930s, and 1940s, an entity calling itself the American Football League was formed, briefly operated and then failed. In 1960 another entry attempt, also under the name of the American Football League, operated independently for nine years before merging with the NFL in 1970.

56. The United States Football League (“USFL”) was founded in 1982 but disbanded in 1986. It sued the NFL for monopolization and won a jury verdict. USFL v. NFL, 842 F.2d 1335 (2d Cir. 1988). There have also been failed attempts to start and sustain a women’s football league and various minor leagues or talent development leagues. The closest thing to a successful entry is the Arena Football League, which plays a substantially different type of football—indoor football. The Arena Football League (“AFL”) began play in 1987 and continued through the 2008 season. The league was reorganized in 2010 and continues today. However, the games of the AFL are played in spring and summer to avoid competition with NFL football broadcasts. In addition, AFL produces an altogether different sport, with a different fan base, that does not compete substantially with the NFL for a broadcast audience.

57. By contrast, NFL Teams are well established and immensely popular, with 32 regionally diverse teams in or near almost every major population center in the United States. NFL Teams reside within 18 of the 25 most populous metropolitan areas, dramatically limiting the locations and audiences available to
new teams or leagues. During the NFL’s long history not one of the few sporadic attempted entries has been successful at competing for NFL football broadcast audiences. It is virtually impossible that a new league will form to compete away the NFL’s monopoly power.

58. The NFL’s monopoly power will only be tempered if the underlying collusive agreement, which created the monopoly power, is broken up through antitrust authority, or if the exclusive deals that propagate that monopoly power are replaced by non-exclusive licenses.

59. The value of the monopoly power that DirecTV exercises as a result of its exclusive deal with the NFL is illustrated by the recent contract extension with the NFL and the recent acquisition of DirecTV by AT&T. As Forbes noted in an October 1, 2014 article:

DirecTV has renewed its agreement with the National Football League for another 8 years. However, this time around, the price is increased by 50% to around $1.5 billion a year. This is very expensive and far more than $1 billion that CBS, NBC and Fox pay for their respective NFL coverage. The satellite company offers to its subscribers the popular NFL Sunday Ticket, a sports package that broadcasts NFL regular season games that are not available on local affiliates. Aided by the NFL, DirecTV has managed to attract customers even at times when other pay-TV operators were losing subscribers. The extended deal with the NFL will aid to the overall subscriber growth for the company. Moreover, the agreement was of key importance for DirecTV, as its proposed merger with AT&T to some extent was dependent on this deal.

Indeed, AT&T’s $48.5 billion offer to purchase DirecTV contained a clause allowing AT&T to cancel the deal if DirecTV loses its exclusive contract for Sunday Ticket. That clause provided: “[t]he parties also have agreed that in the event that DirecTV’s agreement for the ‘NFL Sunday Ticket’ service is not renewed...
substantially on the terms discussed between the parties, the Company [AT&T] may elect not to consummate the Merger.” Of course, DirecTV renewed its contract with the NFL for Sunday Ticket and the merger with AT&T was consummated in June of 2015.

B. Relevant History of NFL Broadcasting Agreements

60. Television coverage of NFL games began in 1939, with regular broadcasting beginning after World War II. By 1950, Teams in Los Angeles and Washington, D.C. had negotiated contracts for all of their games to be televised, with many other teams following suit over the course of the 1950s.

61. As these early clubs worked to get their nascent broadcasting contracts in place, they jointly agreed to restrict broadcasting competition. As of 1953, Article X of the NFL’s by-laws prohibited any Team from broadcasting its games within 75 miles of another team’s home city if that second team was either playing a game at home or playing a game on the road and broadcasting it back home. These restrictions “effectively prevent[ed] ‘live’ broadcasts or telecasts of practically all outside games in all the home territories.” NFL I, 116 F. Supp. at 321.4

62. The DOJ sued to enjoin enforcement of Article X, contending that it was illegal under 15 U.S.C. §1.

63. The United States District Court for the Eastern District of Pennsylvania considered the competitive effects of the restriction. After noting that, at that time, “less than half the clubs over a period of years are likely to be

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4 “Outside games” were defined as games “played outside the home territory of a particular home club and in which that home club [was] not a participant.” Id.
financially successful” and some teams were “close to financial failure,” it found that “[r]easonable protection of home game attendance [was] essential to the very existence of the individual clubs” and that prohibiting broadcasting of outside games while a team was playing a home game was reasonable. Id. at 323-25.

64. At the same time, the court in NFL I rejected the argument that Teams could legally agree not to broadcast in each other’s territories when the local team was not playing a home game, which “obvious[ly] . . . cannot serve to protect game attendance.” Id. at 326. Rather, it found that “the testimony of defendants’ witnesses consistently indicates that the primary reason for the restrictions in this situation actually is to enable the clubs in the home territories to sell monopoly rights to purchasers of television rights to [their] away games.” Id. (footnote omitted). It therefore held this restriction to be illegal. Id. at 327. It similarly condemned a provision prohibiting radio broadcasts of outside games, finding that even when teams were playing at home there was no evidence of “any significant adverse effect on gate attendance” but only an enhancement of “the value of such rights to purchasers.” Id.

65. In the years following this ruling, NFL Teams expanded their broadcasting output. By 1960—just a decade after the first clubs obtained distribution for all of their games—most NFL teams were broadcasting their entire seasons, and Sunday games were available on every national network.

66. Despite this growing success, the NFL and the Teams were not satisfied with competitive results. Instead, they determined that they could make significantly more money by pooling and thus monopolizing their rights, allowing them both to demand higher rights fees from networks and offer networks the
ability to be the sole source of NFL games. The Teams therefore transferred their
rights to the NFL, which then sold to CBS “the sole and exclusive right to televise
all League games.” NFL II, 196 F. Supp. at 446.

67. The United States District Court for the Eastern District of
Pennsylvania again had no trouble finding that “the member clubs of the League
have eliminated competition among themselves in the sale of television rights to
their games.” Id. at 447. It therefore found the CBS contract to violate its judgment
in NFL I and prohibited the enforcement of the contract. Id.

68. The NFL next turned to Congress, lobbying for an antitrust exemption
that would overturn NFL II and allow them to pool their rights for the purpose of
selling games to over-the-air networks that were available to all viewers for free.
This lobbying resulted in the passage of the SBA, which exempted from the
Sherman Act

any agreement by or among persons engaging in or conducting the organized
professional team sport[] of football . . . , by which any league of clubs
participating in professional football . . . contests sells or otherwise transfers
all or any part of the rights of such league’s member clubs in the sponsored
telecasting of the game[] of football . . . engaged in or conducted by such
clubs.

15 U.S.C. § 1291. As discussed in greater detail below, the exemption provided by
the SBA does not extend to cable, satellite or pay-per-view telecasts.

69. The NFL and its Teams were content to abide by this limitation for
some 25 years, broadcasting on as many as three free, over-the-air networks
simultaneously. Once again, however, the lure of increased revenues proved
irresistible. With the growth of cable television—which, unlike the sponsored
telecasts envisioned by the SBA, are available only to paying subscribers—and its
lucrative subscriber base, the NFL and its Teams chose to ignore the limitations on
the exemption they had received in the SBA and instead to sell their horizontally-
pooled rights to cable networks.

70. In 1987, ESPN became the first cable broadcaster of NFL games—
games that were subject to the same restrictive horizontal agreement that had
previously been used only to arrange the publicly available sponsored telecasts.

71. As a result of the NFL and its Teams’ output restrictions, consumers in
any given area had no authorized means of watching most regular season NFL
games, despite the increasing capacity to distribute the games and the decreasing
cost of doing so. Instead, they were artificially limited to those few games, usually
no more than four or five per week (and no more than two at any given time), that
the Networks and the NFL chose to broadcast in their area. This artificially
constrained output created a large, unserved demand for the inaccessible games,
leading to a surge in piracy of distant feeds in the 1980s.

72. The NFL wanted to cut down on this piracy (which, though it fueled
interest in football, did not directly profit the NFL or its Teams) and capitalize on
the pent-up demand created by the horizontal supply restriction, but without
forgoing its monopoly control of all broadcast rights. In 1987, it developed a plan
that prefigured the modern Sunday Ticket package: market an encrypted package of
all games that could be viewed by consumers who purchased a decoder.

73. According to sports journalist Gregg Easterbrook, CBS opposed the
idea, fearing that the dilution of their ratings would decrease their advertising
revenue, and this plan was not implemented as originally conceived.
74. In December of 1993, however, Fox outbid CBS for broadcast rights, removing an important obstacle to the planned package. At the same time, the advent of direct-broadcast satellite television service (“DBS”) made distribution of all games easy and inexpensive. Those early DBS providers could carry a larger number of channels than contemporaneous cable providers without running into capacity constraints. (Capacity constraints are no longer a significant factor for either DBS or cable providers.)

75. For the 1994 season, the NFL bundled together a package of games that could be sold nationwide, allowing the NFL and its Teams to offer a single, monopolized product containing the various products they would otherwise sell individually. This package would become the product known today as Sunday Ticket.

76. DirecTV, the second commercial DBS provider in America, also launched in 1994, just a few months before the NFL season began. It contracted with the NFL to license Sunday Ticket exclusively, making it the only source for the vast majority of regular season NFL games in any part of the country. Since then, DirecTV has successfully convinced the NFL to continue licensing Sunday Ticket exclusively, even though the technological impediments to carriage by cable providers or on the Internet have long since faded away.

77. Even with CBS temporarily out of the picture, the NFL still encountered resistance from its other broadcast networks. Moreover, it could not create Sunday Ticket without the Networks’ agreement to provide their feeds of games to DirecTV. Some of the networks demanded concessions and limitations on

Sunday Ticket in exchange. In 2003, News Corporation, the parent of Fox, acquired 34% of DirecTV that it then transferred to the Fox Entertainment Group. According to Gregg Easterbrook ("Easterbrook"), a reporter at ESPN, Fox insisted that Sunday Ticket subscribers be capped at one million annually. Easterbrook also reported that, while this cap has increased over the years, it remained an express or implied obligation.

78. The NFL’s own resolutions attached to its 2006 Constitution and By-Laws underscore the significance of these agreements. NFL 2003 Resolution BC-1 contains this clause:

It is hereby Resolved that the League concurs in the Broadcasting Committee’s approval of the DirecTV Agreement, with the Broadcasting Committee to ensure that, during the term of the DirecTV Agreement, no network television agreement containing provisions that would interfere with or preclude NFL Enterprises’ performance of the DirecTV Agreement shall be executed.

79. Similarly, NFL Resolution 2004 BC-3 contains this clause:

Be it Resolved that the League concurs in the Broadcasting Committee’s approval of the DirecTV Agreement and directs the Broadcasting Committee to ensure that, during the term of the DirecTV Agreement, no network television agreement containing provisions that would interfere with or preclude NFL Enterprises’ performance of the DirecTV Agreement [sic].

80. It is fundamental to carrying out the exclusive deal between the NFL and DirecTV that the latter has access to the feeds of Sunday afternoon NFL games televised by CBS and Fox.
C. The NFL’s Current Broadcast Rights Agreements

81. As noted above, the NFL’s 32 member Teams have given the league authority to negotiate pooled rights television deals on their behalf, in exchange for an equal share of the resulting revenues.

82. Regular season NFL games are currently broadcast in two principal ways.

i. Over-the-Air and Cable Broadcasts

83. First, as they have done since 1987, the NFL and its Teams sell their pooled rights to over-the-air and cable networks. Currently, they contract with five networks: the over-the-air networks NBC, Fox, and CBS; the subscription network ESPN; and the NFL’s own subscription network, NFL Network. When the NFL most recently negotiated these contracts, in 2011, it was reported that the deals lasted at least eight years and until 2022 in some cases, and totaled some $27 billion in licensing fees.

84. During the regular season, most games take place on Sunday afternoons at approximately 1 p.m. or 4:25 p.m. Eastern time. These games are split between CBS and Fox, with CBS holding the exclusive rights to broadcast American Football Conference (“AFC”) games and Fox the exclusive rights to broadcast National Football Conference (“NFC”) games. In most weeks, there are between eleven and thirteen Sunday afternoon games. In addition, the NFL typically schedules one game on Sunday, Monday, and Thursday nights. These night games are licensed exclusively to NBC, ESPN, and the NFL Network, respectively, for national distribution. For the Sunday afternoon games, CBS and Fox, in consultation with the NFL, determine which games will be broadcast in
which locations. Typically, each network makes only one game available in any given location at a time. Each week, one network has the rights to air one game in each timeslot, while the other network may air a game only in one timeslot. For example, in a given week, CBS would choose one AFC game to make available in a given location at 1 p.m. and one to make available at 4:25 p.m. Fox would have the right to air NFC games in only one timeslot in a week that CBS was permitted to show two games. On another week, CBS’s and Fox’s roles would be reversed, with Fox broadcasting two games and CBS broadcasting one. League rules further limit the games available in a market in which a team is playing a Sunday afternoon game, such that under certain circumstances only one other game will be available.

85. Thus, in any location in America, there are no more than two regular-season games available on television at any given time—even though there may be as many as seven games being played simultaneously, by fourteen teams. In total, no more than three NFL Sunday afternoon games are typically shown in a given location, despite as many as thirteen games being played on Sunday afternoon.

86. This ensures that no more than six games will be broadcast on television in any given week, thereby lessening the competition that each broadcaster would face from fourteen or fifteen games to five. A primary purpose of the restrictions is to make the rights to the games more valuable to broadcasters, which allows them to earn more money from the telecasting of NFL games. Broadcasters are able to charge more to advertisers and more to MVPDs (in the form of affiliation fees or retransmission consent fees).

87. This effect is particularly pronounced for the Sunday afternoon games broadcasted by CBS and Fox. In a competitive market, up to seven games would be
broadcast simultaneously (which would still be significantly less than the number of
college football games that are typically broadcast at the same time). This would
represent a massive increase in consumer choice—but would give CBS and Fox
direct competitors that would reduce their ratings and revenue. Keeping those
games off regular television and restricting them only to DirecTV subscribers who
are willing to pay for the supracompetitively priced Sunday Ticket increases
consumer costs and limits consumer choice.

88. The participation of cable networks ESPN and NFL Network
exacerbates the anticompetitive harms wrought by the agreements. Because of the
reduced competition in the broadcasting and sale of live video presentations of
professional football games, ESPN and NFL Network are able to charge
inordinately large subscription fees to MVPDs, which are then passed on to
consumers. In part due to the exclusivity it has purchased from the NFL and its
members, ESPN is the single most expensive cable channel in the United States.
Indeed, according to a 2014 Wall Street Journal analysis, ESPN cost $6.04 a month
on average, more than four times as much as the second-most expensive national
channel, TNT, which cost just $1.48 a month. MVPDs’ robust profit margins
confirm that this exorbitant price is passed on to consumers.

ii. DirecTV and NFL Sunday Ticket

89. Beginning in 1994, pursuant to its exclusive agreement with the NFL,
DirecTV offered its subscribers access to the Sunday afternoon games that were not
otherwise available in their market via national broadcasts. These subscribers could
purchase NFL Sunday Ticket, a premium subscription-based package that provides
access to all Sunday afternoon games broadcast on Fox and CBS, or their predecessors.

90. Through its exclusive agreement with the NFL, DirecTV today takes the live game telecast feeds produced by CBS and Fox and redistributes them without alteration to NFL Sunday Ticket subscribers via DirecTV channels. NFL Sunday Ticket subscribers can thus access all Fox or CBS games.

91. Defendants have colluded to sell the out-of-market NFL Sunday afternoon games only through DirecTV. Such an arrangement eliminates competition in the distribution of out-of-market Sunday afternoon games and requires anyone wishing to view these games to subscribe to DirecTV and purchase NFL Sunday Ticket (or, in limited circumstances, purchase from DirecTV a Sunday Ticket live streaming package) at a supracompetitive price created by the exclusive NFL/DirecTV distribution agreement.

92. The contracts between the NFL and DirecTV are negotiated on behalf of the league and then ratified by vote of the members of the league. For example, in the 2003 Resolution BC-1, attached as an addendum to the 2006 version of the NFL’s Constitution and Bylaws, the league members ratified the proposed agreement between NFL Enterprises LLC and DirecTV whereby the latter could telecast out-of-market NFL regular season games during the 2003-08 football seasons. Similarly, in 2004 Resolution BC-3, also attached as an addendum to the 2006 version of the NFL’s Constitution and Bylaws, the members of the league ratified the “NFL Sunday Ticket rights agreement” between NFL Enterprises and DirecTV for the 2006-10 football seasons. Subsequent extensions or renewals of the agreements between the NFL and DirecTV have been similarly ratified.
93. The exclusive nature of the NFL’s contractual and other arrangements with DirecTV prevents other MVPDs or, indeed, the individual clubs in the league, from offering broadcasts of out-of-market games in competition with each other and with DirecTV. This anticompetitive effect implicates blackouts of out-of-market games, both broadly and as discussed in the NFL’s Constitution and Bylaws. For example, NFL Bylaw 10.2(a) imposes the following blackout restriction on televised games: “[n]o club shall cause or permit a game in which it is engaged to be telecast into any area included within the home territory of any other club on the day that such other club is engaged in playing a game at home….?” As a result of bylaws of this type, out-of-market games—as defined in the deal between the NFL and DirecTV—are unavailable to commercial and residential subscribers except pursuant to the anticompetitive conditions imposed upon them by Defendants. But for these conditions, commercial and residential subscribers would have more choices to access out-of-market games at lower prices.

94. As explained previously, DirecTV’s exclusive arrangement with the NFL results in NFL Sunday Ticket subscribers paying a higher price for NFL Sunday Ticket (and other access charges) than they otherwise would pay if the agreements were negotiated competitively.

95. For example, on December 11, 2002, when the NFL’s first contract with DirecTV for NFL Sunday Ticket expired, the cable MVPD consortium InDemand presented a letter proposal to former NFL Commissioner Paul Tagliabue offering $400 million to $500 million annually for the nonexclusive rights to carry Sunday Ticket. “We’re prepared to accept a license fee around those levels for a three- to five-year term,” wrote Stephen A. Brenner, the president of InDemand, at
the time. However, within hours of receiving the proposal, the NFL announced a
five-year exclusive renewal with DirecTV.

96. In October of 2014, DirecTV renewed its exclusive agreement with the
NFL. The renewal requires DirecTV to pay the NFL an average of $1.5 billion per
year for eight years in return for the exclusive right to rebroadcast NFL Sunday
afternoon games on Defendants’ NFL Sunday Ticket service.

97. The NFL directly promotes Sunday Ticket as a special product on its
website. It states:

Get in the game with NFL SUNDAY TICKET.

Only on DIRECTV.

Only DIRECTV brings you every out-of-market game live, every
Sunday. Get the 2015 season at no extra charge when you subscribe
today! Or up your game to NFL SUNDAY TICKET MAX and get live
games anywhere you go, real-time highlights, the RED ZONE
CHANNEL®, DIRECTV FANTASY ZONE CHANNEL™, and
NFL.com fantasy, all on your laptop, tablet, phone, or game console.

98. The NFL’s webpage then advertises the full-season rates for Sunday
Ticket, states that “[b]lackout rules and other conditions apply,” and provides a link
to DirecTV’s website for additional information.

D. The Challenged Agreements Harm Competition

99. The NFL and its Teams’ agreement to pool broadcasts is a classic
horizontal supply restriction. Bedrock economic principles teach that a horizontal
agreement by 32 market participants not to compete, but rather to sell their products
collectively, will reduce output, raise prices, and harm consumers.

100. This harm is evident in many forms. First, the availability of football
broadcasts on standard over-the-air and cable channels is vastly lower than it would
otherwise be. NFL football has the highest ratings of all sports programs. Yet only two or three Sunday afternoon games are available to fans. By contrast, NCAA football, whose similar restraints were found to violate the antitrust laws by the Supreme Court, is now available on dozens of different networks on Saturday afternoons, with no limit on the number of games aired at the same time.

101. **Second**, the output of NFL broadcasts, considered on a per-game basis, is half the output of the other major American sports leagues.⁶ In the NHL, NBA, and MLB, where teams are allowed to negotiate with broadcasters, teams typically produce two broadcasts per game, each with distinct characteristics appealing to different consumers. In the NFL, by contrast, the NFL and the Networks that carry NFL games create just one broadcast for each game.

102. Unsurprisingly, these supply restrictions come with correspondingly astronomic prices. For the 2015 season, DirecTV and the NFL charged as much as $359 for a full season of Sunday Ticket to individual subscribers, and anywhere from $1,458 to more than $120,000 for commercial subscribers. Sunday Ticket prices increase nearly every year; for example, between the 2014 and 2015 seasons, DirecTV and the NFL increased prices roughly 11.5%.

103. But for the anticompetitive agreements, each Team would create its own broadcasts and sell those broadcasts in a competitive marketplace. This would naturally force prices down at the same time it increased output. A bundle of games, whether sold as Sunday Ticket or in another form, would continue to be profitable enough that the Teams would have an incentive to continue offering it—but its

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⁶ On an absolute basis, the disparity is even greater, but this is because the NFL season has roughly 10-20% as many games as the other leagues.
prices would necessarily decrease in the face of nationwide competition from individual Teams.

104. The contrast between NFL radio broadcasting and NFL television broadcasting illustrates this harm. NFL Teams negotiate individual radio broadcasting contracts, rather than consolidating all broadcasting in the NFL itself. Each Team produces (or contracts with a third party to produce) its own radio broadcast of its games, so that a fan of each Team in a game can consume a broadcast catering to that fan base. As a result, there are at least twice as many NFL radio broadcasts as there are television broadcasts. The Team or its radio partner licenses those broadcasts to multiple radio stations—many of which broadcast the game free on the Internet nationwide. Thus, despite there being less demand for radio broadcasts, the NFL and its Teams produce more output and make it more broadly available—a disparity that can only be explained by the anticompetitive effect of the horizontal restraint on television broadcasting.

105. The NFL and its Teams’ agreement to sell the bundled games through an exclusive distributor significantly exacerbates the anticompetitive effect of the agreements. By licensing their artificial, highly valuable monopoly to DirecTV exclusively—rather than offering it through multiple distributors as they do outside the United States and as all other sports leagues do—the NFL and its Teams not only increase prices and restrict availability for Sunday Ticket, but they distort competition among MVPDs and between MVPDs and the Internet. Indeed, in service to this agreement to distribute exclusively, which is unique among major American sports leagues, the NFL does not provide any means of online availability for many consumers, drastically limiting output compared to the other leagues.
106. The exclusive deal between DirecTV and the NFL for the broadcast rights of NFL Sunday Ticket is necessary to preserve the exercise of market power created by the teams’ anticompetitive agreement to monopolize the sales of broadcast rights. Without the exclusive deal, some of the monopoly rents created by the collusion among NFL teams would be dissipated by price competition between DirecTV and one or more MVPDs.

107. The exclusive distribution agreement is not needed to assure a quality broadcast of the games offered on Sunday Ticket or to allow the NFL sufficient oversight of games offered on Sunday Ticket or any other reasonable objective. Instead, the agreement was created to artificially raise the price of Sunday Ticket.

108. Indeed, the exclusive content enjoyed by DirecTV is rare. Rob Stecklow, general manager of sports products and marketing for DirecTV, admitted as much: “[i]n this time and era where there’s less and less content that’s exclusive, the NFL still reigns as some of the best content out there.” The only way Plaintiffs and members of the Classes can view Sunday afternoon out-of-market NFL football games is by purchasing NFL Sunday Ticket from DirecTV.

109. Nonetheless, this is not what has happened with the telecasting of out-of-market games for other professional sports leagues in the United States. For example, in March of 2007, MLB was negotiating with DirecTV for a seven-year, $700 million deal for an exclusive contract to carry the Extra Innings package. At that time, InDemand made a $70 million per year ($490 million over seven years) bid for non-exclusive rights to carry Extra Innings, but MLB declined this offer. While MLB and DirecTV were finalizing their exclusive contract, public outcry and Congressional pressure forced cancellation of the deal before the season began.
With the prospect of exclusivity eliminated, both DirecTV and InDemand carried Extra Innings, thereby offering greater consumer choice in broadcasting than would have been possible under an exclusive contract.

110. Subscribers to DirecTV have been concerned about the market leverage it has been able to obtain as a result of its deal with the NFL for Sunday Ticket. The following interchange between a subscriber and business columnist Steven Pearlstein was reported in a *Washington Post* article:

[Subscriber] What do you make of the current exclusivity arrangement the NFL has with DirecTV to broadcast games? I find that DirecTV will not sell its 'Sunday Ticket' package unless one also purchases a base programming package. I don't feel receiving NFL games on cable is a God-given right, but do feel the NFL is employing monopolistic practices by not opening up the Sunday Ticket to other cable/satellite carriers. When might that arrangement end? Thanks.

*Steven Pearlstein:* Right now they are using DirecTV as the instrument for extending their football monopoly to the distribution of games on video. They have made it clear, however, that they want to own the distribution channel themselves and now share their monopoly profits with DirecTV. That is their ultimate game plan, which by the way won't include a free, over-the-air broadcast of local team games on local television, unless they are forced to do so.

111. Another columnist made a similar point in a May 2014 article on the website of the *Atlantic Monthly*:

*AT&T’s bid to acquire DirecTV includes acquisition of the Sunday Ticket exclusive. The Los Angeles Times reports that snapping up Sunday Ticket is a key goal of AT&T's. Professional football is among the most valuable brands on the entertainment landscape. What communications corporation wouldn’t want a monopoly over a major NFL product?*

*But the Sunday Ticket cartel arrangement assures that only a small share of the American population can enjoy viewer choice on Sunday afternoons. The same voters who are taxed to subsidize the NFL, to the tune around $1 billion annually, are denied a choice about what games to watch.*
Adding insult to injury, anyone in Canada and Mexico can sign up for NFL Sunday Ticket, without cable-carrier restrictions. In those nations, telecommunication law forbids sole-carrier contracts. Inside the United States, the NFL’s antitrust waiver allows it to screw consumers with impunity. And screwing consumers with impunity is a prerogative AT&T wants too!

When the NFL made its first deal with DirecTV, satellite-relayed signals were exotic and broadband cable did not exist: Initially, Sunday Ticket was seen as a niche product for technophiles. A ratings calculation was at work as well. Sunday Ticket is an annualized pay-per-view, and pay-channel viewership does not count in Nielsen ratings. If large numbers of viewers switched from NFL games aired on local affiliates to football shown on Sunday Ticket, the NFL’s Nielsen numbers would decline, even if actual viewership was rising.

But as football has surged in popularity in the last two decades and broadband has become available to nearly all the country, observers have repeatedly expected that Sunday Ticket would become available to everyone. After all, no one now could think the NFL is losing popularity, while Nielsen’s scoring of new-viewership habits such as next-day DVR of drama and comedy shows is taken into account in their advertising rates. Today the NBA and MLB both market their extra-price watch-any-game services via cable.

But DirecTV has repeatedly offered the NFL a king’s ransom to renew its monopoly. For the 2014 season, DirecTV will pay the league $1 billion for about two million Sunday Ticket subscribers: more than to be paid by NBC, whose NFL games average 10 times as many viewers. DirecTV offers the king’s ransom because Sunday Ticket is the loss leader that put the company on the map. And the NFL loves a customer that pays too much!

DirecTV has done the league important favors to sustain its sweetheart relationship. As the 2011 season approached, with the NFL’s labor deal expiring and a lockout possible, DirecTV agreed to pay $1 billion even if no games were played that season. CBS, ESPN, Fox, and NBC would have owed nothing for no games. The $1 billion promise from DirecTV afforded the NFL a plush strike fund, ensuring owners and league executives could live in luxury that year even if the season were cancelled.

AT&T badly wants the same sweetheart relationship with the NFL, and has insisted DirecTV renew its monopoly deal before the takeover closes. If so AT&T will acquire something CBS, Comcast, ESPN, Fox, NBC, and Verizon don’t have—the sole means to watch the NFL game of your choice.
The Justice Department should insist, as part of any approval it may offer for the AT&T merger bid, that DirecTV divest itself of the Sunday Ticket exclusive. Such a requirement may cause AT&T to back out of the deal, or demand that DirecTV accept a lower price: but that’s why there is antitrust law, to provide a cross-check against behavior that harms consumers. The NFL’s viewer-choice service should be offered by all cable carriers, as nearly all other entertainment products are available across the cable universe.

Not only is it absurd that Americans subsidize a sports league so Canadian and Mexican viewers can have more choice than Americans do. If Sunday Ticket were available on all cable carriers, more buyers would allow for a lower price, as happened with cell phones. Rather than a tiny number who have good luck with geography paying $200 a year to pick their own NFL game, many millions could pay, say, $50 a year for the same freedom.

Allowing AT&T to acquire DirecTV’s Sunday Ticket monopoly would be strongly anti-consumer. Using this moment to divest the monopoly and bring Sunday Ticket to all telecommunications platforms would be strongly pro-consumer. Please don’t tell us the Justice Department and the White House will mess this opportunity up.

112. For years, DirecTV has hypocritically fought with its cable industry competitors to ensure that vital access to sports programming on so-called “regional sports networks” (“RSNs”) is available to it on a non-exclusive basis. For example, on August 31, 2012, DirecTV wrote to the Federal Communications Commission in support of a proposed rule extending a ban on vertically integrated cable companies from withholding access to RSNs from other MVPDs, including DirecTV:

Six years ago, the Commission used a regression analysis to evaluate and quantify the potential harm to competition that results when a cable-affiliated programmer withholds content from rival MVPDs. Among other things, the Commission found that, as a result of the decision by the Cox-affiliated regional sports network ("RSN") in San Diego to deny its programming (including games of the San Diego Padres) to MVPD rivals, DBS penetration in the San Diego market was 40.5% lower than it would have been if that programming had not been withheld. The attached economic analysis of San Diego subscribership is qualitatively
consistent with the Commission's finding about the damage done when
cable-affiliated programmers withhold content from competitors.

This updated analysis takes advantage of the fact that the Cox RSN
recently lost the rights to telecast Padres games. This season, those
games are available to all MVPDs through Fox Sports San Diego
("FSSD"). DIRECTV carries FSSD, as does Cox. These recent
developments in San Diego offer a natural experiment through which to
evaluate the effects of gaining access to valuable content. Accordingly,
DIRECTV asked Professor Kevin Murphy to augment his prior
economic analysis in this proceeding with an analysis of subscribership
in San Diego in light of this new RSN arrangement.

As more fully detailed in Professor Murphy's attached report, the data
from 2012 are consistent with the Commission's finding in 2006. In
order to evaluate the effect on DIRECTV's subscribership from gaining
access to Padres games, Professor Murphy first calculated the difference
in the growth rate in the number of DIRECTV subscribers in San Diego
before and after these RSN changes. He then calculated this difference
for a set of control markets, and compared the before-and-after
difference in DIRECTV's growth rates in San Diego to the before-and-
after difference in DIRECTV's growth rates in the control markets. The
results of this analysis indicate that DIRECTV has gained substantially
more subscribers in San Diego since it gained access to Padres games
through FSSD than would have been expected based on its
subscribership trends in comparable markets. These gains were achieved
in only the first five months of DIRECTV’s FSSD carriage; the long run
effects likely will be larger, as additional San Diego households revisit
their MVPD choice. These conclusions are further supported by
customer surveys, which evidence an increase in the number of new
subscribers citing “access to sports channels” as the reason for
subscribing to DIRECTV since it began carriage of FSSD.

113. Thus, as DirecTV’s own data demonstrates, consumers benefit from
the non-exclusive distribution of live sports content by way of enhanced
competition amongst MVPDs.

E. DirecTV Has Participated in and Facilitates This Anticompetitive
Scheme

114. DirecTV has participated in and facilitates the horizontal agreements
among the Teams.
115. DirecTV requires the NFL and its Teams to maintain their anticompetitive agreement, and has paid handsomely to ensure compliance. Indeed, DirecTV has significantly expanded the agreement, preventing online distribution of live games until recent years, and even today limiting online distribution primarily to individuals unable to install DirecTV in their households. Because of DirecTV’s participation in the scheme, the United States is one of the only countries in the world where NFL games are not offered online to all consumers. Similarly, the NFL and its teams have licensed Sunday Ticket to more than a dozen satellite and cable providers in Canada, which they would have done in the United States as well but for DirecTV’s inducements and demands.

116. The NFL has described itself as being in a “partnership” with DirecTV. In announcing the 2014 contract renewal, the NFL issued a press release that stated as follows:

“We are pleased to continue our partnership with DirecTV,” said NFL Commissioner Roger Goodell [“Goodell”] “DirecTV and NFL Sunday Ticket have served our fans well for 20 years and continue to complement our broadcast television packages. We also appreciate DirecTV’s commitment to NFL Network, which it has carried since the channel launched in 2003.”

“This new agreement is a testament to the terrific long-term relationship we have with the NFL and its millions of fans across the country,” said Mike White, chairman, president and CEO of DirecTV. “NFL Sunday Ticket has always been the centerpiece of DirecTV’s sports leadership and we're pleased to continue our relationship with the NFL and be a part of the league's future growth and success.”

117. Similar statements were made by Goodell in NFL press releases announcing the contract extensions with DirecTV for Sunday Ticket in 2009 and 2012. As noted earlier in this Complaint, the NFL directly markets the Sunday Ticket service and its price on the NFL’s website.
118. There are no procompetitive benefits to the exclusive distribution arrangement. Exclusive distribution can sometimes promote inter-brand competition, but because the NFL is the only provider of major-league professional football telecasts in the United States, there is no relevant inter-brand competition.

F. There Are No Procompetitive Benefits, and Any That Might Exist Could Be Achieved through Less Restrictive Means

119. These output restrictions have no procompetitive benefits—and even if they did, any such benefits could be achieved through less restrictive means. Even though other major sports leagues engage in anticompetitive horizontal restrictions of their own, none has sought to completely eliminate individual teams’ output—and yet none of them have any problems broadcasting all or nearly all of their games. Indeed, as discussed above, the other leagues have more per-game output.

120. Moreover, NFL broadcasting rights—even without the scheme to monopolize and restrict them—are an extraordinarily valuable commodity. The Nielsen Company estimated that the 2014 regular season alone reached 202.3 million unique viewers, representing 80 percent of all television homes and 68 percent of all potential viewers in the United States. Viewership for NFL games regularly eclipses that of any other program on television. During the 2014 regular season, every one of the 20 most-watched programs in America was an NFL game, as were 25 of the next 30. Indeed, for the past three years, an NFL game was the most-watched program on television for each week of the NFL season. This trend shows no signs of abating. For example, a preseason game between the Minnesota

7 On information and belief, the statistics in this paragraph do not include viewership through Sunday Ticket—meaning that even these impressive statistics underestimate the demand for football broadcasts.
Vikings and the Pittsburgh Steelers on August 11, 2015 was the most-watched program in America for the entire week, according to the Nielsen ratings service—despite being a preseason game, rather than a regular season game, and between two relatively small-market teams. As Nielsen summarized earlier this year, “NFL fans make every game a Super Bowl.”

121. Given this tremendous viewership, there can be no serious argument that NFL Teams would have trouble obtaining distribution without their horizontal restraint. The supply restriction has the effect and purpose of concentrating viewership in a limited number of broadcasts, and allowing for the charging of higher fees for advertising,. But even though revenues—and prices to advertisers and consumers—would be lower without the restraint, they would still be more than sufficient to incentivize Teams to broadcast their individual games as broadly as possible, particularly given the relatively low costs of distribution.

122. Similarly, restrictions are not necessary to preserve attendance at games, as they were thought to have been in the 1950s. Industry observers and participants widely believe the notion that video broadcasts hurt attendance to be antiquated and wrong; rather, the consensus is that they are complementary products that increase interest and thus increase attendance, merchandise purchases, and other valuable forms of fan engagement. Indeed, many less popular leagues, such as the AFL, give their broadcasts away for free on the Internet in the hopes of generating interest. The NFL itself has now abandoned all blackouts of non-sold-out local games, having been the last major sports league to limit broadcasts to encourage ticket sales.
123. Even if the restrictions did protect game attendance, that protection is no longer justified as it may have been in the 1950s. The NFL I court relied heavily on its findings that “less than half the clubs over a period of years are likely to be financially successful” and that “the very existence of the individual clubs” required “protection of home game attendance.” NFL I, 116 F. Supp. at 323, 325. Today, the average NFL Team is worth $2 billion, according to Forbes, with even the least valuable team valued at $1.4 billion. There is no plausible risk that any Teams would be driven out of business if required to license its lucrative broadcast rights individually.

124. Nor are the restrictions necessary to foster competitive balance. Whatever measures may be acceptable in pursuing the goal of competitive balance, they cannot justify eliminating all broadcasting competition and thereby restricting supply, raising prices and revenues. The NFL and its Teams engage in a variety of other measures intended to ensure competitive balance, such as salary caps that are exempt from antitrust scrutiny under labor exemptions; there is no need to monopolize the broadcasting market as well. If the NFL and its Teams were simply interested in competitive balance, they could generate revenues through ordinary competitive means and then engage in some permissible form of revenue sharing, or otherwise participate in less restrictive agreements.

125. Likewise, Defendants could achieve any legitimate, pro-competitive goals without an exclusive arrangement. As noted earlier in the Complaint, Sunday Ticket is offered in Canada on a non-exclusive basis through more than a dozen satellite and cable providers. And in the United States, other football products such
as the NFL’s “Red Zone” package (which offers views of selected in-game highlights) are offered on a non-exclusive basis as well.

126. Defendants’ exclusive agreement has a clear negative impact on competition, and serves no pro-competitive purpose. There is no evidence that this agreement was created to assure the quality of Sunday Ticket or to allow the NFL sufficient oversight, or any other permissible objective. Instead, DirecTV and the NFL entered into the agreement with the intent of maintaining a monopoly price for Sunday Ticket. And, because all the NFL teams have colluded to offer the package, they have also prevented individual competition by teams selling their own games to broadcasters.

127. There are several less restrictive alternatives which would achieve any legitimate, procompetitive goals. Those include letting teams contract individually with DirecTV and allowing other distributors to purchase and exhibit the Sunday Ticket package.

128. Noll made a similar point in testimony before the United States Senate Judiciary Committee at a November 14, 2006 hearing on “Competition In Sports Programming And Distribution: Are Consumers Winning?”:

The relevant benchmark for whether an action is pro- or anti-competitive is the circumstance that would prevail in a competitive world. The argument that NFL Sunday Ticket increased output is correct, but it increased output in a monopolized market. The issue is what is the alternative in the absence of monopolization, and in the absence of monopolization, the market for televised NFL games would be like other pro sports were or like college sports are today. For example, if all broadcasting of college football games were put together into a single package priced at $150 a month and shown exclusively through DirecTV, the effort would be a profit-enhancing reduction in output. From my perspective, if one adopts the right counterfactual, the right but-for world in the competitive environment, it is obvious that NFL Sunday Ticket is a palliative compared to the output and prices that would exist in a competitive environment.
G. Examples from Other Leagues Confirm That Comparable Agreements Harm Competition

129. Both empirical evidence and the opinions of sports teams themselves confirm that restrictions such as these harm competition—and that eliminating them produces an explosion in output.

130. The example of Division I college football is an instructive comparison. Before 1984, the National Collegiate Athletic Association (“NCAA”) limited the total number of televised intercollegiate football games and the number of games that any one college could televise. It also prohibited colleges from broadcasting through sources other than ABC and CBS.

131. Two universities sued the NCAA, leading the United States Supreme Court to find that the NCAA’s plan violated 15 U.S.C. §1. After a full trial, the United States District Court for the Western District of Oklahoma found that the NCAA was a “classic cartel” that had “sought and achieved a price for their product which is, in most instances, artificially high.” *NCAA v. Board. of Regents of Univ. of Okla.*, 468 U.S. 85, 96 (1984) (quoting *Board of Regents of Univ. of Okla.*, 546 F. Supp. 1276, 1300-01 (W.D. Okla. 1982)). The district court found the plan to constitute price-fixing, a group boycott, and artificial limit on production. It rejected the NCAA’s proffered justifications that competition would adversely affect gate attendance or harm competitive balance.

132. The United States Court of Appeals for the Tenth Circuit affirmed, as did the Supreme Court. The Supreme Court found the NCAA’s plan to be “a horizontal restraint” that both “create[d] a limitation on output” and “constitut[ed]
horizontal price fixing.” *Id.* at 99-100. This created “a significant potential for anticompetitive effects”—a potential that “ha[d] been realized.” *Id.* at 104-05. As the district court had found, “if member institutions were free to sell television rights, many more games would be shown on television”; prices were not only inflated but “unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market.” *Id.* at 105-06. The “anticompetitive consequences of this arrangement,” the Supreme Court said, were “apparent.” *Id.* at 106. Nor were there “any procompetitive efficiencies which enhanced the competitiveness of college football television rights; to the contrary . . . NCAA football could be marketed just as effectively without the television plan.” *Id.* at 114.

133. After the NCAA’s plan was abolished, the Supreme Court’s prediction that “many more games would be shown on television” proved true. Today, Division I college football and basketball are among the most heavily televised sports in the country. All four major broadcast networks nationally televise college football games, as do at least three ESPN channels (ESPN, ESPN 2, and ESPNU), Fox Sports 1, CBS Sports Network, and NBC Sports Network. Most regional sports networks (“RSNs”) also carry college football, as do three regional Fox College Sports Networks and various NCAA conference-created channels. Similarly, at least 10 networks carry college basketball nationally, along with many RSNs and the Fox College Sports Networks.

134. This example confirms that agreements to monopolize and restrict the availability of sports broadcasts raise the prices of those broadcasts and reduce their output, exactly as intended. It strongly suggests that, in the absence of the agreements challenged here, teams would have no difficulty finding national
distributors for their currently untelevised games. Indeed, given the far higher popularity of professional football and the far lower number of games, the most likely outcome would be that every team would find a national distributor for every one of its games.

135. Sports teams themselves have acknowledged these facts, when they have become dissatisfied with the terms under which their league’s monopoly rents were shared. In addition to collegiate litigation, professional hockey and basketball teams have sued their leagues, alleging that their broadcasting restrictions unlawfully restrained trade.

136. Madison Square Garden Company (“MSG”), the owner of the New York Rangers professional ice hockey club and two RSNs, sued the NHL in 2007, alleging that its television and Internet restrictions—which, as noted above, do not eliminate all club broadcasts as the NFL does—were anticompetitive and unlawful. See Madison Square Garden, L.P. v. Nat’l Hockey League, No. 07-8455, 2008 WL 4547518 (S.D.N.Y. Oct. 10, 2008). MSG alleged in its complaint that the NHL’s restraints “reduced output, diminished product quality, diminished choice and suppressed price competition,” and that “[t]here are no legitimate, procompetitive justifications for these ‘exclusive’ agreements and other competitive restraints, which have harmed consumers in various ways.” After the district court denied the NHL’s motion to dismiss, MSG and the NHL settled their lawsuit on a confidential basis, allowing the anticompetitive restraint to stay in place (and, presumably, giving MSG a greater share of the bounty).

137. Similarly, in a bankruptcy adversary action brought by the Phoenix Coyotes hockey club (“Coyotes”) against the NHL, the Coyotes alleged that “[t]he
NHL and its members have conspired to create exclusive television and radio broadcast rights . . . thereby maintaining monopoly power.” Coyotes Hockey LLC v. NHL, Av. No. 09-494 (Bankr. D. Ariz. June 5, 2009). This claim was similarly resolved without upsetting the anticompetitive scheme, as the NHL obtained ownership of the Coyotes through the bankruptcy.

138. In basketball, too, at least one team has acknowledged the anticompetitive effect of broadcasting restraints. The Chicago Bulls challenged NBA limitations on distribution on so-called “superstations,” reducing the number of games shown nationwide. The Bulls took the NBA to trial twice and proved the restraints’ unlawfulness both times.9 As the United States District Court for the Eastern District of Illinois found, the restraints “reduce availability and competition in the hope of raising the price of the product in the future. Such a restraint is unreasonable and therefore unlawful.” Chicago Prof’l Sports L.P. v. NBA, 754 F. Supp. 1336, 1364 (E.D. Ill. 1991), aff’d, 961 F.2d 667 (7th Cir. 1992).

139. Thus, a natural experiment in college football, the views of multiple sports teams, and the verdicts from multiple bench trials all support the same conclusion: sports leagues that restrict their teams’ broadcasting rights unlawfully restrain trade.

H. Plaintiffs and The Classes Have Suffered Antitrust Injury

140. Plaintiffs have been overcharged for live video presentations of regular season NFL games. The agreements described above have restrained horizontal competition between and among the distributors of NFL games, including

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9 Ultimately the NBA defeated the second suit, but on the basis of a “single entity” defense that the Supreme Court definitively rejected in American Needle.
competition in the commercial exploitation of televised presentations of live games. The agreements described above have adversely affected and substantially lessened competition in the relevant markets. As a result, prices are higher than they would be in the absence of the agreements to restrict competition.

141. As subscribers to NFL Sunday Ticket, Plaintiffs have been charged supracompetitive prices for live video presentations of regular season NFL games because of the horizontal output restrictions and the participation of DirecTV in limiting availability and increasing the price of the Sunday Ticket package. In addition, without the exclusive licenses and other restraints, DirecTV, broadcasters, and other MVPDs would compete with each other in the distribution of NFL games to a much greater extent than the limited opportunities now available.

142. As purchasers of MVPD services that includes NFL programming, Plaintiffs have been charged supracompetitive prices for live video presentations of regular season NFL games because of the horizontal output restrictions in limiting competition among and availability of such presentations.

143. Plaintiffs have been injured by the unavailability of live video presentations of regular season NFL games over the Internet, which would be competitive substitutes if they were made available by NFL Teams or the NFL. The horizontal output restrictions and the participation of DirecTV in limiting competition among and availability of such presentations have prevented such Internet distribution.

144. Plaintiffs have been injured by the Teams’ joint refusal to offer the vast majority of live video presentations of regular season NFL games over the Internet,
on free over-the-air networks, or as part of any pay television service other than DirecTV.

145. A similar issue was dealt with in the case of Laumann v. National Hockey League, Nos. 12–cv–1817 (SAS), 12–cv–3704 (SAS), 2014 WL 3900566 (S.D.N.Y. Aug. 8, 2014). There, Judge Shira Scheindlin was dealing with agreements by MLB and the NHL with DirecTV that involved the telecasting of games outside of a member team’s home territory. Judge Scheindlin denied summary judgment, finding triable issues as to antitrust injury:

Plaintiffs have carried their initial burden of showing an actual impact on competition. The clubs in each League have entered an express agreement to limit competition between the clubs—and their broadcaster affiliates—based on geographic territories. There is also evidence of a negative impact on the output, price, and perhaps even quality of sports programming. Plaintiffs’ expert, Dr. Roger G. Noll [“Noll”], attests that consumers pay higher prices for live game telecasts, and have less choice among the telecasts available to them, than they would in the absence of the territorial restrictions. *Id.* at *8. She went on to rule that there were jury issues as to whether telecasters like DirecTV were participants in the conspiracy between MLB, the NHL and their member clubs. *Id.* at *12-13.

146. The expert evidence by Noll provided in that case and cited by Judge Scheindlin was as follows:

The ability to extract more revenues from an exclusive contract arises because out-of market telecasts are a subscription driver for MVPDs. The benefits of exclusivity to the licensee then can be captured by MLB through higher rights fees by auctioning the exclusive rights to the highest bidder. If live telecasts of other sports, or other types of programming, were close competitive substitutes for MLB Extra Innings, DirecTV would not be able to obtain greater revenue from subscribers by obtaining exclusive rights, and so MLB would not be able to extract additional revenue by selling Extra Innings on an exclusive basis.

I. The Sports Broadcasting Act Does Not Shield Defendants’ Anticompetitive Acts

147. Congress enacted the Sports Broadcasting Act of 1961 (“SBA”) to facilitate the sale of packaged broadcast rights for pro sports leagues. It states:

The antitrust laws, as defined in section I of the Act of October 15, 1914 [Section One of the Sherman Act] ... shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.


148. In essence, the SBA granted all the major sports leagues an exemption from antitrust liability when entering into pooled-rights contracts. The exemption is expressly limited to agreements among the teams in the league.

149. The SBA is also expressly limited to “sponsored telecasting,” which courts have construed to mean that the SBA only applies to broadcast television and not to cable or satellite. In fact, when the SBA was being passed through Congress, former NFL Commissioner Pete Rozelle (“Rozelle”) was asked by the House of Representatives, “[y]ou understand . . . that this Bill covers only the free telecasting of professional sports contests, and does not cover pay T.V.?” to which Rozelle responded under oath, “[a]bsolutely.” Another former NFL commissioner, Paul Tagliabue, has conceded before a Senate Committee that the term “sponsored telecasts” does not include “pay and cable . . . . This is clear from the legislative history and from the committee reports.”
150. Thus, the SBA offers Defendants no protection for their anti-
competitive acts.


152. The NFL argued, in moving to dismiss, that Sunday Ticket was exempt from antitrust scrutiny under the SBA because Sunday Ticket “is simply a sale of the [teams’] residual rights in the games which were broadcast on ‘sponsored telecasts,’ and, so, the package is a sale of ‘part of the rights’ to the ‘sponsored telecasts.’” *1998 WL 419765, at *2.*

153. The court in *Shaw* rejected the NFL’s argument, finding that the NFL’s sale of Sunday Ticket fell outside the SBA’s protections. *Id. at *3.*

154. Likewise, in *Laumann v. NHL*, 907 F.Supp.2d 465 (S.D.N. Y. 2012), Judge Scheindlin also held that the term “‘[s]ponsored telecasting’ under the SBA pertains only to network broadcast television and does not apply to non-exempt channels of distribution such as cable television, pay-per-view, and satellite television networks.” *Id. at 489 n. 141* (quoting *Kingray v. NBA, Inc.*, 188 F. Supp. 2d 1177, 1183 (S.D. Cal. 2002)).
CLAIMS FOR RELIEF

COUNT ONE

Violation of Section 1 of the Sherman Act

155. Plaintiffs, on behalf of themselves and the Classes that they represent, incorporate and re-allege the preceding paragraphs of the Complaint.

156. Defendants, by and through their officers, directors, employees, agents, or other representatives, and others acting in concert with them, have entered into an unlawful agreement, combination, and conspiracy in restraint of trade, in violation of 15 U.S.C. § 1. Specifically, Defendants agreed to restrain competition in the licensing and distribution of live video presentations of NFL games in the relevant geographic and product market and submarket described above, with the purpose, intent, and effect of restraining trade and commerce and increasing prices paid by consumers and advertisers to distributors of live video presentations of regular season NFL games.

157. Defendants’ anticompetitive conduct injured Class members by decreasing the availability of live video presentations of regular season NFL games, decreasing choice among game broadcasts and among distributors, and increasing the cost of accessing live video presentations of NFL games, including, but not limited to, increasing the price charged by DirecTV for Sunday Ticket.

158. Defendants’ anticompetitive conduct harms competition and lacks any procompetitive benefits; if any procompetitive benefits do exist, they can be achieved by less restrictive means and do not outweigh the harm to competition. Plaintiffs and other commercial and residential subscribers will continue to suffer
antitrust injury and other damage unless Defendants are enjoined from continuing to engage in the foregoing violations of law.

**COUNT TWO**

**Violation of Section 2 of the Sherman Act**

159. Plaintiffs, on behalf of themselves and the Classes that they represent, incorporate and re-allege the preceding paragraphs of the Complaint.

160. The NFL and its Teams, by and through their officers, directors, employees, agents, or other representatives, and others acting in concert with them, have unlawfully monopolized the relevant market identified above in violation of 15 U.S.C. § 2. All Defendants have unlawfully monopolized the relevant submarket identified above in violation of 15 U.S.C. § 2.

161. Specifically, the NFL and its Teams agreed to consolidate all licensing rights for live video presentations of regular season NFL games into a single entity, with the purpose, intent, and effect of monopolizing the relevant market and submarket described above. These activities have gone beyond those which could be considered “legitimate business activities” and are an abuse of market power. DirecTV has obtained an unlawful monopoly with respect to the out-of-market Sunday afternoon games available through its agreements with the NFL and its Teams.

162. Defendants, by and through their officers, directors, employees, agents, or other representatives, and those acting in concert with them, have conspired to give DirecTV a monopoly in the relevant submarket described above, making it the only source for the vast majority of NFL games in any given location, including as
many as ten (of eleven to thirteen) Sunday afternoon games. This has allowed the anticompetitive effects described herein to flourish.

163. Defendants’ anticompetitive conduct injured class members by decreasing the availability of live video presentations of regular season NFL games, decreasing choice among game broadcasts and among distributors, and increasing the cost of accessing live video presentations, including, but not limited to, increasing the price charged by DirecTV for Sunday Ticket.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray as follows:

1. That the Court determines that litigation may be maintained as a class action under Fed. R. Civ. P. 23, and that Plaintiffs be named representatives of the commercial and residential Classes in which they are members.

2. That the contract, combination or conspiracy, and the acts done in furtherance thereof by Defendants as alleged in this Complaint, be adjudged to have been a violation of Section 1 of the Sherman Act.

3. That Defendants’ actions to illegally acquire and maintain monopoly power in the relevant product market, be adjudged to have been in violation of Section 2 of the Sherman Act.

4. That judgment be entered for Plaintiffs and members of the Classes against Defendants for three times the amount of damages sustained by Plaintiffs and the members of the Classes as allowed by law, together with the costs of this action, including reasonable attorneys’ fees, pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26).
5. That Plaintiffs and the Classes be awarded pre-judgment and post-judgment interest at the highest legal rate from and after the date of service of this Complaint to the extent provided by law;

6. That Defendants be enjoined from further violations of the antitrust laws; and

7. That Plaintiffs and members of the Classes have such other, further or different relief, as the case may require and the Court may deem just and proper under the circumstances.

DEMAND FOR JURY TRIAL

Plaintiffs request a jury trial on all matters so triable.

Dated: June 24, 2016

Respectfully submitted,

SUSMAN GODFREY L.L.P.

By: /s/ Marc M. Seltzer

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Scott Martin
In this appeal involving a certified question, we must determine, as a matter of first impression, whether an agreement among members of the National Football League, Appellants

United States Court of Appeals for the Third Circuit

172 F.3d 299; 1999 U.S. App. LEXIS 6374; 1999-1 Trade Cas. (CCH) P72,491

March 11, 1999, Argued


OPINION BY: MANSMANN

OPINION

[**299] OPINION OF THE COURT

MANSMANN, Circuit Judge.

In this appeal involving a certified question, we must determine, as a matter of first impression, whether an agreement [**300] among members of the National
Football League to sell broadcast rights jointly to satellite distributors is exempt from scrutiny under the Sherman Act, 15 U.S.C. §§ 1 et seq. Citing the Sports Broadcasting Act (the "SBA"), 15 U.S.C. § 1291, the NFL sought dismissal of a class action antitrust suit brought by Charles Shaw, Bret D. Schwartz, and Steven Promislo ("Shaw"). The NFL asserted that the rights being sold were "residual" rights in a "sponsored telecasting" and therefore within the SBA's exemption to the antitrust laws. The District Court rejected this characterization, holding that the statutory exemption turns on the nature of the broadcast in question and that the phrase "sponsored telecasting" exempts only a commercially sponsored free broadcast. The District Court further observed that the SBA's legislative history contradicts the NFL's interpretation and that exceptions to the antitrust laws must be narrowly construed.

The NFL and its member teams own all rights to make and distribute images of football performances (the "games") between the teams. By agreement, they permit the broadcasting of approximately a dozen NFL games each week on free television networks, such as NBC or Fox. Because different games are broadcast within different local markets, however, any television viewer has free access to only two or three NFL games. This leaves an unserviced market for those NFL games outside a viewer's local broadcast area (e.g., the Pittsburgh Steelers fan who lives in Los Angeles). With the development and expansion of satellite distribution, that market can now be tapped. The NFL and member teams entered into a pooled agreement to sell jointly their rights in all football games broadcast nationwide to a satellite broadcast distributor (DIRECTV) which in turn offers those games as an all-or nothing package (the "NFL Sunday Ticket") to individual viewer-subscribers at a fixed cost per season.


The NFL's joint agreement with the satellite distributor violates Section 1 of the Sherman Act and seeking declaratory and injunctive relief. Specifically, Shaw alleges that the combined agreement causes artificially high and noncompetitive prices for NFL satellite broadcasts and restricts the options available to NFL fans.

II.

Congress passed the Sports Broadcasting Act in 1961 in response to a federal court ruling that the NFL's package sale of games to a commercial television network (CBS) violated the Sherman Antitrust Act, 15
U.S.C. § 1. Its purpose was to preserve the availability of NFL games on free broadcast television. The SBA therefore exempts from the antitrust laws:

any agreement by or among persons engaging in or conducting the organized professional team sports of football, . . ., by which any league of clubs participating in professional football . . . contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, . . ., engaged in or conducted by such clubs.

15 U.S.C. § 1291 (emphasis added). Our first task is to consider the plain meaning of the statute, heeding the Supreme Court's direction that exceptions to the antitrust laws must be narrowly construed. 8

8 See, e.g., Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 126, 73 L. Ed. 2d 647, 102 S. Ct. 3002 (1991) (holding that exceptions to the antitrust laws are narrowly construed, as they circumvent Congress's commitment to open competition).

[**8] As the District Court explained and as the NFL does not dispute, the phrase "sponsored telecasting" refers to broadcasts which are financed by business enterprises (the "sponsors") in return for advertising time and are therefore provided free to the general public. Shaw, 1998 WL 419765, *3. Although the NFL concedes that a package of satellite broadcasts sold to individual subscribers is not a "sponsored telecasting", it asserts that its pooled sale to the satellite distributor is nonetheless within the SBA's antitrust law exemption because it constitutes a sale of residual or retained rights in the sponsored telecasts, i.e., that it is "part of [those] rights."

The NFL correctly asserts that it "still owns a partial right to the games broadcast by the free networks." Id. at *2. It errs when it characterizes its remaining rights as rights in the sponsored telecasts. The NFL's underlying rights are in the games themselves and, more specifically, they include the right to sell the images of those games for broadcast through various media. The broadcast rights sold to sponsored telecasters do not subsume the separate broadcast rights sold to a non-sponsored medium. [**9] Each transaction is a sale [^302] of a part of the NFL's underlying right in the images of the games, but only the former is exempt from antitrust scrutiny. We agree with the District Court that one looks to the nature of "the broadcast which goes to these particular plaintiffs." Id. at *3. As that court observed, to hold otherwise - to adopt the construction urged by the NFL - would allow the exception to swallow the rule: a sponsored telecast to a limited geographic area would secure an antitrust law exemption for nationwide sales. 10

9 The NFL attaches great significance to the fact that the satellite broadcasts utilize the same images as the sponsored telecasts, fed from the same network television cameras. The use of the same signal for broadcast over two media, however, does not render the rights in one broadcast derivative of rights in the other. One could just as readily conclude that the network television broadcast rights are derivative, and constitute part of the NFL's rights in the non-sponsored satellite broadcast. The network's provision of cameras and commentary does not remove the arbitrariness of calling one broadcast derivative of the other. Exemption from the antitrust laws cannot be predicated on the simple expedient of assigning ownership of cameras or payment of camera crews and commentators to a television network. Rather, it is predicated on the "sponsored telecast" of the image, i.e., its transmission in a form freely receivable by the public.

[**10] 10 See id. ("Were the rule otherwise, the NFL could circumvent the statutory confines, nullify the statutory scheme, simply by always using
earlier broadcasts with commercials. . . . To construe the statute that way would cause [it] to self-destruct -- an absurd result.

III.

In light of the NFL’s contentions regarding the meaning of the statutory provisions, the District Court considered the SBA's legislative history and concluded that it demonstrated that the Act did not exempt the challenged sale. See id. at *4. Although we need not turn to the Act's legislative history, we do so because the District Court examined it in detail.

Our review of the Act's legislative history also leads us to conclude that it clearly reflects Congress's intent, and the NFL's express contemporaneous concurrence, that the Act address only the sale of games to a sponsored television network. See Telecasting of Professional Sports Contests: Hearing before the Antitrust Committee of the House Committee on the Judiciary on H.R. 8757, 87th Cong. 1st Sess. at 4 (Sept. 13, 1961) (stating that the bill applies to "sponsored telecasting" and "does not apply to closed circuit or subscription television"); Id. at 36 (Aug. 28, 1961) (wherein the NFL Commissioner acknowledged "absolutely" under oath his understanding that the bill "covers only the free telecasting of professional sports contests, and does not cover pay T.V."). 12 As the District Court observed in its well-reasoned opinion, the NFL obtained in the 1961 Act an expressly limited exception to "the normal prohibition on monopolistic behavior"; one which permitted it to sell pooled rights to sponsored telecasters and which expressly did not apply to subscription television. The NFL got what it lobbied for; it cannot now expect the federal courts to transform "narrow, discrete, special-interest" legislation into a far broader exemption. Shaw, 1998 WL 419765, *5. 13 This is particularly so, once again, because the Act must be narrowly applied. 14

11 Subsequent congressional hearings characterized subscription television as a "program to be received by members of the public only upon the payment by such members of a charge, fee, or other form of direct compensation." See Subscription Television, Hearings Before the Subcommittee on Communications and Power of The Committee on Interstate and Foreign Commerce, House of Representatives, 90th Cong., 1st Sess. at 2-3 (1967) (quoting H.R. 12435, 90th Cong., 1st Sess., para. (hh)).

12 See also Chicago Pro. Sports Ltd. Partnership v. NBA, 808 F. Supp. 646, 649-50 (N.D. Ill. 1992) (reviewing legislative history and concluding that the SBA's legislative history showed that sponsored telecasting was limited to free commercial television); Letter from Charles F. Rule, Asst. Atty. Gen., Antitrust Division, U.S. Department of Justice, to the Hon. Howard M. Metzenbaum, Chairman, Senate Subcommittee on Antitrust, Monopolies, and Business Rights, March 30, 1988, reprinted in Antitrust Implications of the Recent NFL Television Contract: Hearing Before the Subcommittee on Antitrust, Monopolies, and Business Rights of the Commission on the Judiciary, 100th Cong., 1st Sess. 67 (1987) (citing legislative history and concluding - as did the FTC - that the SBA provides no antitrust immunity to the NFL for its contract with ESPN, a cable operator, as that programming is not within the "sponsored telecasting" exemption).

The NFL argues on appeal that references in the House records to sales to networks and "other potential purchasers" of television rights conflicts with a finding that the exemption was not intended to extend to broadcasts requiring payment by viewers. This is not so. In the context of the 1961 Act, the "other potential purchasers" were quite probably other sponsored (but non-network) purchasers, such as local and regional television stations.

13 See also Chicago Pro. Sports Ltd. Partnership v. NBA, 961 F.2d 667, 671 (7th Cir. 1992), cert. denied, 506 U.S. 954, 121 L. Ed. 2d 334, 113 S. Ct. 409 (1992) (holding that it is "inappropriate to extend [special interest laws] to achieve more of the objective the lobbyists wanted") (citations omitted). The Court of Appeals observed that "When special interests claim they have obtained favors from Congress, a court should ask to see the bill of sale." Id.

14 See supra note 8; see also Chicago Pro. Sports, 961 F.2d at 672 (noting that "courts read exceptions to the antitrust laws narrowly, with beady eyes and green eyeshades") (citations
omitted).

IV.

Because we find that the subscription satellite broadcast of NFL games is not a part of the NFL’s rights to the sponsored telecasting of those games and therefore not within the Sports Broadcasting Act’s exemption to the antitrust laws, we will affirm the District Court’s decision.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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SHOWTIME NETWORKS INC.,

Plaintiff,

v.

CHARTER COMMUNICATIONS, INC., CHARTER
COMMUNICATIONS HOLDING COMPANY, LLC,
TIME WARNER CABLE ENTERPRISES LLC,

Defendants.

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Index No. __________

Jury Trial Requested

COMPLAINT

Plaintiff Showtime Networks Inc. ("SNI"), by its attorneys, complains and alleges against
Defendants Charter Communications, Inc. ("New Charter"), Charter Communications Holding
Company, LLC ("Charter Operator"), and together with New Charter and its affiliates and
subsidiaries "Charter"), and Time Warner Cable Enterprises LLC ("TWCE" or "TWC
Operator") (collectively, "Defendants"), as follows:

STATEMENT OF THE CASE

1. SNI is an entertainment company that owns and operates the commercial-free
premium television program services Showtime, The Movie Channel and Flix, among other
services. Showtime features critically acclaimed original series, hit movies, documentaries,
comedy specials and other programming. Its original series include Homeland, Ray Donovan,
Billions, Penny Dreadful, Shameless and Episodes, among others. Showtime also features
various sports-related programs, including Showtime Championship Boxing, Inside the NFL,
and 60 Minutes Sports. SNI’s television program services are accessible on a monthly subscription basis through cable, satellite and telco providers across the United States pursuant to agreements with those providers, which pay license fees to SNI in exchange for the right to sell Showtime, The Movie Channel and Flix subscriptions to consumers. These agreements are intricate, detailed documents that address monthly license fees, content obligations, packaging, pricing, positioning and other marketing obligations, and technical requirements, among many other provisions. These agreements are heavily negotiated over many months, between large companies such as the parties to this lawsuit, and typically have terms of three years or longer.

2. Two kinds of provisions in such agreements that are relevant to this dispute are (1) what cable systems must (or may) be added to an agreement after the agreement takes effect as the result of an acquisition of cable systems or of an entire other distributor (the “Acquisition Language”), and (2) the formula to modify the monthly license fees in the event of an acquisition of systems or of an entire other distributor (the “Acquisition Formula”). Similar provisions address the sale of systems by the distributor.

3. SNI’s license fee structures vary by distributor. This is largely due to how SNI’s television program services are offered to consumers. As commercial-free premium services, they may not be offered in the distributor’s “basic” package (for example, where broadcast television stations such as WCBS, WNBC, and WABC are offered in New York City systems), or the distributor’s “expanded basic” package (where popular advertiser-supported services like ESPN, CNN and Fox News Channel tend to be offered). Because consumers must elect to subscribe to SNI’s television program services, the number of subscribers to SNI’s services varies by month as subscribers choose to add or drop one or more of the SNI services. Accordingly, different distributors have negotiated with SNI for different license fee structures
over the years depending on how those distributors intend to price, package and otherwise market SNI’s services and how they want to allocate risk with SNI for good or poor subscriber performance in their systems. For example, Charter negotiated a license fee structure with SNI under which 

4. It is because of the different license fee structures in these various agreements that the Acquisition Formula is such an important part of SNI’s negotiations with its distributors. Each party negotiates a formula that it believes will yield the best result in the event of an acquisition of individual systems from another cable operator or the acquisition of another distributor. Because these negotiations differ from deal to deal based on the business objectives and interests of the companies involved, SNI’s Acquisition Formulas also vary greatly by distributor.

5. On or around May 18, 2016 (the “Closing Date”), one of SNI’s largest distributors, Charter, entered into an agreement (the “Acquisition”) to acquire another of SNI’s largest distributors, Time Warner Cable Inc. and its related entities (collectively, “TWC”), as well as Bright House Networks, LLC (“BH”), creating the second-largest cable television distributor in the United States. Charter is now attempting to exploit that Acquisition to pay lower license fees to SNI than Charter is obligated to pay as a result of the Acquisition Formula in the Showtime Networks Service Agreement between SNI and Charter Operator, dated July 1, 2007, as amended (the “Charter Agreement”) and simultaneously 

under the Showtime Networks Service Agreement between SNI
and TWCE, dated December 16, 2004, as amended (the “Terminated SNI-TWCE Agreement”) – both positions in direct contravention of Charter’s contractual obligations. In particular, Charter points to a series of corporate machinations in connection with the Acquisition to argue that it is TWC, rather than Charter, that acquired, owns and manages both the TWC cable systems (the “TWC Systems”) and BH cable systems (the “BH Systems” and together with the TWC Systems, the “TWC/BH Systems”). This argument is demonstrably false. Indeed, Charter has made numerous public statements that it acquired the TWC/BH Systems. As stated in its public filings, it is the longstanding CEO and the senior executive team of Charter, as well as its pre-existing board of directors, that manages the TWC/BH Systems.

6. SNI licenses its television program services to Charter pursuant to the Charter Agreement. That agreement makes plain that

7. When the Acquisition closed, however, Charter refused to add the TWC/BH Systems, which it had acquired, to the Charter Agreement. Rather, Charter notified SNI that it

1 Charter Agreement § 3.02.
intended to carry SNI’s television program services in the legacy Charter systems (the “Legacy Charter Systems”) under the Charter Agreement and in the TWC/BH Systems under the Terminated SNI-TWC Agreement. This was in breach of the clear language of the Charter Agreement.

8. Further, in July and August 2016, in blatant disregard of the Charter Agreement, Charter

9. To justify its position, Charter has claimed that a company called Spectrum Management Holding Company, LLC (“Spectrum”), acquired the Legacy Charter Systems and that Spectrum owns and manages the Charter and TWC/BH Systems. But Charter’s argument is in direct conflict with Charter’s own public characterizations of the Acquisition and of the ongoing management and operations of the business. Indeed, a Charter spokesperson stated that “[w]e purchased all of Time Warner Cable and Bright House Networks. With this transaction we acquired everything.” Charter made similar statements in securities and regulatory filings, including most recently on August 9, 2016, in which Charter disclosed that “Charter acquired Bright House.” Charter’s untenable position is also contradicted by dozens of Charter’s public

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3 See Charter Communications, Inc., Quarterly Report (Form 10-Q), at 7 (Aug. 9, 2016) (hereinafter “2016 10-Q”); see also Charter Communications, Inc. & CCO Holdings, LLC’s, Amendment No. 1 to May 18, 2016 Current Report (Form 8-K/A), at Ex. 99.1 (July 29, 2016) (hereinafter “Amendment No. 1 to Form 8-K”).
statements that Charter's pre-Acquisition leadership and management team would manage all of the systems under the auspices of New Charter following the Acquisition. Tellingly, even the term "Spectrum" is a reference to the brand name of products that Charter and not TWC provided to customers before the Acquisition.

10. Charter purports to base its position on an inapplicable provision in the September 1, 2013 amendment to the Terminated SNI-TWCE Agreement (the "2013 TWCE Amendment"). But not only was the 2013 TWCE Amendment terminated after Charter acquired the TWC/BH Systems as described above, but the provision only applies if [redacted]. Moreover, [redacted] [redacted]. The provision is therefore inapplicable on its face.

11. Charter's position is nothing more than an attempt to leverage the fact that the Acquisition was a complicated and secretive transaction [redacted]. SNI and Charter Operator, however, specifically negotiated that [redacted].

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4 2013 TWCE Amendment at Attachment A-2013 §1 (e).
6 Terminated SNI-TWCE Agreement § 3.02.
7 On July 18, 2016, SNI requested from Charter "Exhibit E" to the Charter Communications Holdings, LLC's Amended and Restated LLC Agreement, which, according to Charter's May 19, 2016 Form 8-K, outlines "in more detail . . . the structure plan" of the Acquisition. See Charter Communications, Inc., Current Report (Form 8-K), at Ex. 10.1 (May 19, 2016) ("May 2016 8-K"). Charter refused.
Charter cannot avoid its contractual obligations or the facts through attempted corporate machinations.

12. Accordingly, SNI is seeking a judgment against Charter Operator for breach of the Charter Agreement, the exact amount of which to be determined at trial, with contractual and/or statutory interest; a determination and order declaring that: (i) the Charter Agreement governs the TWC/BH Systems commencing on or about May 18, 2016, when the Acquisition closed; and (ii) the Terminated SNI-TWCE Agreement and all amendments thereto terminated on or about May 18, 2016, when the Acquisition closed; and for additional and further relief as the Court may deem just and proper.

**JURISDICTION AND VENUE**

13. This Court has jurisdiction over Defendants pursuant to CPLR §§ 301 and 302 because each Defendant transacts business in the State of New York and because a substantial portion of the acts and omissions giving rise to this action occurred in New York.

14. This Court has jurisdiction over this action pursuant to CPLR § 3001 because an actual, present, and justiciable controversy exists between the parties.

15. The Commercial Division has jurisdiction under N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70 because the breach of contract claim arises out of business dealings and SNI’s monetary damages exceed $500,000.

16. Venue is proper in this Court pursuant to CPLR § 503 because at least one of the parties resides in this County at the time this action was commenced, and the Defendants are all subject to personal jurisdiction here.

**PARTIES**

17. SNI is a Delaware corporation with offices in New York, New York. SNI is a wholly-owned indirect subsidiary of CBS Corporation.
18. Defendant New Charter is a publicly held corporation that is incorporated in Delaware and headquartered in Stamford, Connecticut. New Charter provides broadband Internet, video, voice and business services to approximately 25.6 million customers across 41 states, including in New York. It owns and manages cable systems serving approximately 17.3 million video customers, making it the second-largest cable operator in the United States.

19. Defendant Charter Operator, a party to the Charter Agreement, is a Delaware limited liability company, and a direct or indirect subsidiary of New Charter.

20. Defendant TWCE is a Delaware limited liability company, and is the successor-in-interest to each of Time Warner Cable LLC and Time Warner Cable Inc. with respect to the Terminated SNI-TWCE Agreement. Prior to the Acquisition, TWCE was a wholly owned subsidiary of Time Warner Cable Inc., a cable operator that provided broadband Internet, video and voice services to over 15.9 million customers across 29 states, and cable services to approximately 10.8 million residential customers, including in New York. TWCE is a direct or indirect subsidiary of New Charter.

FACTS

I. The Charter Agreement

21. On July 1, 2007, SNI and Charter Operator entered into the Charter Agreement pursuant to which SNI granted Charter Operator the right to market, transmit and sell subscriptions to SNI’s television program services over the Legacy Charter Systems to certain subscribers in exchange for the payment of monthly license fees by Charter Operator, among other consideration.

22. Section 3.02 of the Charter Agreement provides that [ Redacted ]
Section 3.02 also provides that upon completion of the transactions by and among Charter, TWC and BH on the Closing Date, the TWC/BH Systems were added to the Charter Agreement, and TWC and BH’s respective agreements with SNI were terminated.

Indeed, prior to the Acquisition, 

8 Charter Agreement at § 1.02(ff).
9 Id. at § 3.02 (emphasis added).

27. SNI has fully performed all of its obligations under the Charter Agreement.

II. The TWC Agreement

28. On or around December 16, 2004, SNI and TWC entered into the Terminated SNI-TWCE Agreement. That agreement permitted TWC, as the “Operator,” to market, transmit and sell subscriptions to SNI’s television program services over the TWC and BH Systems to
certain subscribers in exchange for the payment of monthly license fees, among other consideration.

29. On or around December 31, 2007, pursuant to an amendment to the Terminated SNI-TWCE Agreement ("2007 TWCE Amendment"), Time Warner Cable LLC, as successor-in-interest to TWC, became the "Operator" under the Terminated SNI-TWCE Agreement. In this amendment, [censored]

30. Subsequently, pursuant to the 2013 TWCE Amendment, TWCE, as successor-in-interest to Time Warner Cable LLC, became the TWC Operator under the Terminated SNI-TWCE Agreement. This amendment added provision 1(c), which provided [censored]

31. On or around February 13, 2015, SNI and TWCE entered into another amendment to the Terminated SNI-TWCE Agreement (the "2015 TWCE Amendment") pursuant to which SNI agreed [censored]

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11 2013 TWCE Amendment at Attachment A-2013 § 1(c).
On the same day, SNI and BH entered into an amendment that supplemented the Terminated SNI-TWCE Agreement solely with respect to the BH Systems.\(^\text{13}\)

32. Under the Terminated SNI-TWCE Agreement, Charter Acquired the TWC Systems

33. In or around May 2015, Charter announced its plan to acquire TWC for an estimated $55 billion. Under the proposed acquisition, Charter was to acquire all of TWC’s cable systems, adding over 10 million video subscribers to its existing subscriber base.

34. The vehicles for the proposed transaction included three subsidiaries created by Charter for purposes of the Acquisition, and a pre-existing Charter subsidiary, CCH I, LLC. The entity formerly known as Charter Communications, Inc. (i.e., “old” Charter), in its capacity as sole manager of the merger subsidiary that acquired TWC, signed the certificate of merger and upon information and belief, otherwise controlled that merger subsidiary during the Acquisition. TWC merged into what is now Spectrum, with Spectrum surviving.

35. As a result of the Acquisition—which closed on or around May 18, 2016—Charter acquired, and now controls and manages all of the TWC Systems. New Charter became the ultimate corporate parent of all surviving Charter and TWC entities.

36. Upon information and belief, Defendants went to great lengths to create a vehicle for the Acquisition that would allow for Charter and its executive leadership and board of

\(^\text{12}\) 2015 TWCE Amendment § 3.

\(^\text{13}\) Feb. 13, 2015 SNI and BH Amendment to the Terminated SNI-TWCE Agreement.
directors—to the exclusion of the TWC executive leadership team and board members, who were immediately displaced—to manage the combined entity’s cable video business upon completion of the Acquisition.

37. Following the close of the Acquisition, New Charter was renamed “Charter Communications, Inc.” and trades under the same ticker symbol on NASDAQ (“CHTR”) as did Charter prior to the Acquisition.

IV. Charter Acquired the BH Systems

38. Until the Acquisition, the Terminated SNI-TWCE Agreement governed carriage of SNI’s television program services not only in the TWC Systems, but also in the BH Systems.

39. Before the Acquisition, Comcast Corporation (“Comcast”) was negotiating to acquire TWC. While Comcast agreed to acquire TWC, it had not sought to acquire BH. On or around March 31, 2015, Charter agreed to acquire the BH Systems. Specifically, “old” Charter Communications, Inc., CCH I, LLC (i.e., New Charter), Charter Communications Holdings, LLC, Advance/Newhouse Partnership (“A/N”), and A/NPC Holdings LLC, entered into a Contribution Agreement (the “Contribution Agreement”) pursuant to which A/N conveyed to Charter all of the membership interests in the BH Systems.

40. On or around April 24, 2015, the proposed Comcast/TWC transaction was terminated. Nevertheless, within a few weeks, on May 23, 2015, the parties to the Contribution Agreement—including the same three Charter entities that agreed to buy the BH Systems two months earlier—entered into an amendment (the “Contribution Amendment”) reaffirming that

14 For clarification, “New Charter” refers to the entity formerly known as CCH I LLC, a pre-merger subsidiary of Charter, which is now the top-level parent company in post-Acquisition Charter, and has been renamed Charter Communications, Inc., one of the Defendants. This entity existed before the Acquisition, and as described below, it was a party to certain pre-Acquisition agreements relating to the BH Systems. See infra ¶¶ 39-40.

15 Contribution Agreement § 2.2(a).
Charter would acquire the BH Systems “in connection with the combination of Time Warner Cable, Inc. (‘TWC’) [and Charter] or, in certain circumstances, without TWC.” This is indeed what happened. Charter acquired the BH Systems, and, subject only to certain circumstances not applicable here, it would have done so regardless of whether Charter bought TWC. Therefore, like the TWC Systems, Charter was required to add the BH Systems to the Charter Agreement on the Closing Date.

V. Charter, Not Spectrum, Acquired, Owns and Manages the TWC/BH Systems

41. Charter now claims that Section 3.02 of the Charter Agreement is inapplicable, asserting that Charter did not acquire the TWC/BH Systems, but rather, that Spectrum acquired the Legacy Charter Systems. Charter’s position is contrary to its own public statements that Charter acquired, owns and manages the TWC/BH Systems.

A. Charter Publicly Stated that it Acquired the TWC/BH Systems

42. Charter has repeatedly stated that Charter acquired the TWC/BH Systems. On Charter’s 2016 first quarter earnings call, Charter’s CEO Tom Rutledge cited the “relatively better starting condition of the assets we’re acquiring” after referring to TWC and BH and what Charter believes it can do with them. Additionally, Charter spokesperson Justin Venech told the Orange County Register, “We purchased all of Time Warner Cable and Bright House Networks. With this transaction we acquired everything.” Indeed, Charter issued press releases that it and Advance/Newhouse Partnership “had completed their previously announced

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16 Contribution Amendment at 1.


18 Madans, Are you a Time Warner Cable customer? Here’s what to expect after mega-merger, Orange County Register, July 6, 2016 (emphasis added).
transaction in which Charter acquired Bright House Networks," and that “significant work lies ahead as we integrate the recently acquired Time Warner Cable and Bright House Networks.”

43. Former TWC CEO Robert Marcus agreed: in October 2015, he referred to “Charter, as the acquirer” and said he would let Mr. Rutledge “and his team” answer questions about New Charter. Likewise, in TWC’s April 28, 2016 Form 10-K/A (Amendment No. 1), it acknowledged that “TWC and Charter entered into the Charter merger agreement pursuant to which the Company would be acquired by Charter and a new public company [New Charter] would be created that would include the operations of TWC and Charter.” Charter similarly disclosed to the Securities and Exchange Commission (“SEC”) in July and August 2016 that “[CCH I, LLC] became the new public parent company that holds the operations of the combined companies and was renamed Charter Communications, Inc.” In those same filings, Charter also disclosed that “[t]he Transactions were accounted for using the acquisition method of accounting with Charter as the accounting acquirer,” and that “Charter acquired Bright House.” Until recently, BH’s website announced that “Charter Communications has acquired Bright House Networks.”

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19 Press Release, Charter Communications, Time Warner Cable and Bright House Networks Complete Transactions (May 18, 2016); Press Release, Charter Communications, What’s Next for Charter Communications Customers (June 10, 2016) (emphasis added).


22 2016 10-Q at 6 (emphasis added); Amendment No. 1 to Form 8-K, Ex. 99.1 at 1 (emphasis added).

23 Amendment No. 1 to Form 8-K, Ex. 99.1 at 1-2; 2016 10-Q at 7 (emphasis added); see also 2016 10-Q at 64 (“On May 18, 2016, we acquired Legacy TWC and Legacy Bright House.” (emphasis added)).
B. Charter Publicly Stated that it Owns and Manages the TWC/BH Systems

44. Charter’s management team remains in charge of New Charter. As made clear in a Form 8-K filed after the merger, “[e]ach of the directors of Legacy Charter immediately prior to the Mergers, except Michael P. Huseby, who resigned pursuant to the terms of the Stockholders Agreement, was appointed as a director of New Charter.”24 In addition, Tom Rutledge, John Hargis, Allan Singer, John Bickham, Chris Winfrey, Kathleen Mayo, Rich Digeronimo, David Kline, Tom Adams, Scott Weber, Paul Marchand, and Richard Dykhouse have been managing New Charter since the Closing Date just as they managed pre-transaction Charter, and have replaced the members of TWC’s management team prior to the Acquisition.

45. Indeed, in one regulatory filing, Charter and TWC admitted that “[t]he management of New Charter, including Charter’s current operating subsidiaries, is expected to remain unchanged” and the transaction “leaves Charter’s existing assets and customers in New York subject to operational decision-making by the same management team and essentially the same board structure—with two seats added.”25 “This intra-company transfer . . . among Charter subsidiaries will have no impact upon the provision of service to subscribers, and the franchises will remain subject to operational decision-making by the same management team.”26

46. Charter also stated that “Charter is a financially strong, publicly traded corporation well positioned to effectively manage the TWC Subsidiaries in New York.”27

24 May 2016 8-K at Item 5.02.
26 Id. at 19 (emphasis added).
27 Id. at 20 (emphasis added). Charter made similar statements to the California Commission in seeking approval of the Acquisition in California, conveying the distinct message that Charter’s management team would direct the new entity. See Joint Application of Charter Comm’ns, et al., Cal. Pub. Util. Comm’n Proceeding A1507009, at 3 (July 2, 2015) (hereinafter “Cal. Joint
Recently, on Charter’s 2016 second quarter earnings call on August 9, 2016, Mr. Rutledge referenced “[o]ur track record at Charter over the last several years,” which “shows our operating model produces excellent economic value, and we’ll make the right investments as quickly as possible to apply our operating practices on the new assets,” thus again demonstrating that Charter was continuing to manage its legacy assets as well as the acquired assets. In addition, Mr. Rutledge, in response to a question about “the higher churn [Charter] saw [in the second quarter of 2016] in the Time Warner Cable footprint,” explained that “we weren’t managing those assets through . . . most of the quarter,” thus admitting that Charter was in fact “managing those assets” following the Closing Date.

47. Charter represented, in regulatory filings across the country, that “New Charter will own and/or manage systems serving approximately 19.4 million broadband customers, 17.3 million video customers, and 9.4 million voice customers across 41 states.” The FCC even

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29 Id.

30 See, e.g., Cal. Joint Pet. at 18 (emphasis added); N.Y. Joint Pet. at 13-14 (emphasis added); see also Ex. 9 to FCC Form 394 attached as Ex. 1 to N.Y. Joint Pet. (“Time Warner Cable [is] one of the cable operators that today owns systems that Charter is acquiring.”).
specifically relied on a similar assurance in its decision when it conducted its public interest analysis.\textsuperscript{31}

48. In addition, the FCC focused its “public interest inquiry” on “the question of whether the track record and outlook of Charter’s current management would be carried over to New Charter’s expanded footprint to the benefit of consumers.”\textsuperscript{32} And, in voicing its concerns that New Charter would take actions to inhibit competition in the online video market, the FCC noted that while “Charter’s current management team has not implemented” such actions, “[p]ost-transaction, however, the management team will be operating a substantially different company with a far greater footprint and subject to significantly different incentives.”\textsuperscript{33}

49. Similar representations assuring continued Charter management were made to investors. For example, in the Charter-TWC-BH Transaction Update, found on Charter’s online Resource Center, Charter advertises that “Charter’s management will bring the same incentives, perspectives and products to New Charter.”\textsuperscript{34} On a May 26, 2015 “M&A Call”, Tom Rutledge stated that in New Charter, “Charter will bring [its] products, pricing, and practices to Time Warner Cable and Bright House customers.”\textsuperscript{35}

50. Further, Charter repeatedly touted the expertise and continuity of its management team in government filings. For example, in its opening brief before the California Public

\begin{itemize}
\item \textsuperscript{32} Id. ¶ 6 (emphasis added).
\item \textsuperscript{33} Id. ¶ 83 (emphasis added).
\item \textsuperscript{35} Time Warner Cable Inc., Time Warner Cable Inc. & Charter Communications Merger Call Transcript (Form 425), at 8 (May 26, 2015).
\end{itemize}
Utilities Commission, Charter claimed that the public utilities “will be managed by New Charter after the Transaction is approved,”\(^{36}\) and that “New Charter will be led by one of the best management teams in the industry.”\(^{37}\) Charter was clearly talking about its own management team: “Charter’s leadership team is considered one of the best in the industry and, following the transaction, will remain focused on innovation, competition, customer service, and service quality.”\(^{38}\) Charter’s application to the Hawaii Department of Commerce and Consumer Affairs similarly said, “The management of New Charter, including Charter’s current operating subsidiaries, is expected to remain unchanged.”\(^{39}\)

51. Charter has also stated that it will make Charter pricing and packaging available to TWC and BH customers: “We will transition our new customers … in a manner that enables our newly acquired customers to fully enjoy the benefits of . . . Charter’s advanced products and services.”\(^{40}\) A Charter spokesman has been quoted as saying Charter would “begin rolling out its current suite of products and services” to TWC and BH customers, including Charter’s Spectrum brand “pricing and packaging.”\(^{41}\)

52. In addition, the former Charter leadership team has quickly taken steps that demonstrate that it remains in charge of decision-making across the combined entity post-


\(^{37}\) Id. at 1.

\(^{38}\) Id. at 6 (emphasis added).


Acquisition. For instance, the brand name that Charter used in its Legacy Charter Systems before the Closing Date, “Spectrum,” for its television and other services (such as telephone service and high speed internet access), as well as Charter’s packaging and pricing of television program services, are replacing TWC brands, packaging and pricing, and in a letter to millions of former TWC customers post-Acquisition, Charter CEO Mr. Rutledge informed them that “soon you will get to know us by our new name, Spectrum.” Indeed, recently, Mr. Rutledge affirmed that “we will begin to rebrand Time Warner Cable and Bright House and launch our Spectrum pricing and packaging . . .” TWC also is vacating its corporate headquarters at the Time Warner Center in New York City at the end of 2016, and will “relocate to Stamford, Conn., where Charter is headquartered.” Rutledge further commented, in response to questions from an analyst concerning other litigation brought challenging Charter’s positions concerning the Acquisition, that “the nature of programming relationships hasn’t fundamentally changed, and it’s still a contentious contractual environment . . . I think the litigation is part of the negotiation process in general. And it’s going about what we thought it would go,” indicating that Charter understood its corporate maneuvers were hardly unassailable, and would be challenged.

42 The term “Spectrum” as it is used here is as a reference to the brand name of products that Charter provided to customers before the Acquisition, as noted above, and is not to be confused with the shell company Spectrum that Charter claims is owner and manager of the Legacy Charter Systems and the TWC/BH Systems.

43 Q2 2016 Earnings Call.

44 See Steve Cuozzo, Charter Plans to Leave Time Warner Center, New York Post, June 27, 2016 (“Charter Communications, which recently bought Time Warner Cable for $55.1 billion, not only plans to dump the company’s name — it’s dumping Manhattan, too.”).

45 Q2 2016 Earnings Call.
VI. Additional Facts Demonstrate that Charter Acquired the BH Systems

53. While the above allegations apply to both the TWC and BH Systems, additional facts regarding BH further highlight the sophistication of what Charter is trying to accomplish in attempting to avoid Section 3.02 of the Charter Agreement.

54. As of March 31, 2015, while TWC, the cable industry, and the financial community still believed TWC was being acquired by Comcast – and before Charter and TWC were even in discussions regarding the Acquisition – Charter announced it was acquiring BH, and three Charter entities entered into the Contribution Agreement.

55. A few weeks after the Comcast–TWC transaction was called off, Charter announced it was going to acquire TWC instead and within a few days reaffirmed it would still be acquiring BH. The same parties that entered the Contribution Agreement entered into an amendment in which Charter affirmed its commitment to acquire the BH Systems “in connection with the combination of Time Warner Cable, Inc. (“TWC”) or, in certain circumstances, without TWC . . .”46 This short seven page amendment did not change the crux of the pre-amendment 78-page Contribution Agreement: in exchange for cash and stock, the owners of BH contributed membership interests to Charter. Charter even provided that it still would have acquired the BH Systems even if it did not buy TWC, subject only to certain circumstances not applicable here.47 Therefore, Charter’s contention that Spectrum somehow acquired the BH Systems is baseless, because Spectrum was not even a party to the Contribution Agreement. No amount of corporate machinations can take systems that would have been added to the Charter Agreement one day and decree that they would no longer be added under the very same agreements on the next day.

46 Contribution Amendment at 1.
47 See id.
56. Indeed, TWC had the opportunity to acquire the BH Systems and declined to do so. Under the Contribution Agreement, A/N agreed to acquire the issued and outstanding BH membership interests “immediately prior to the Closing.”48 Under a separate contract, however, TWCE had a right of first offer on the BH membership interests. A/N represented and warranted to Charter that it had notified TWCE pursuant to its contractual right of first offer, and TWCE failed to accept it.49

57. Further, a simple review of Exhibit F to the FCC Public Interest Statement jointly filed by New Charter, TWC, and A/N, which diagrams certain TWC and Charter pre- and post-Acquisition corporate structures, shows that every entity that Charter and TWC chose to tell the public would be in the chain of ownership for BH was a Charter entity.50 All of the companies sitting above BH on that structure chart are Charter entities; not a single TWC entity is included. Therefore, there is simply no question that Charter, not Spectrum, acquired the BH Systems.

58. Because Charter’s position is that the Charter Agreement survives, but only for the Legacy Charter Systems,51 even under the flawed Charter view, the BH contribution is simply a classic acquisition by a series of Charter entities, which

52 The parties’ course of dealing in adding such systems is

48 Contribution Agreement § 3.1(c).
49 Contribution Amendment at 1; see also Contribution Agreement § 3.2 (A/N pledged that it had taken the necessary steps to sell the BH membership interests to a party other than TWCE).
51 See supra ¶ 7, infra ¶ 59.
52 See supra ¶ 24.
further support that the BH Systems (as well as the TWC Systems) must be added to the Charter Agreement.

VII. **There Was No Election to Be Made Pursuant to the Terminated SNI-TWCE Agreement**

59. Charter contends that the 2013 TWCE Amendment permits it to elect to maintain both the Terminated SNI-TWCE Agreement and the Charter Agreement. This clause provides that Charter contends that Spectrum is the acquiring Time Warner Company, and that it was Spectrum that acquired the Legacy Charter Systems.

60. In a document that Charter provided to SNI on July 18, 2016, Charter stated:"

61. However, this election provision in the Terminated SNI-TWCE Agreement does not apply, for at least three independent reasons. First, Section 3.02 of the Charter Agreement mandates that

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53 2013 TWCE Amendment at Attachment A-2013 § 1(e).
Thus, the 2013 TWCE Amendment has been terminated and there is no election to be made.

62. Second, the election provision requires that Charter contends that therefore there is no right to an election.

63. Even if Spectrum acquired the Legacy Charter Systems, which is contrary to Charter’s own public statements, then Spectrum must have done so as a Charter entity for the reasons described below, and so Section 3.02 of the Charter Agreement still requires SNI and Charter to add the TWC/BH Systems to the Charter Agreement. Spectrum (f/k/a Nina Company II, LLC) is nothing other than an intermediary shell actually controlled and managed by New Charter and its officers (almost all of whom managed Legacy Charter Systems before the Closing Date), as revealed by the Amended and Restated Limited Liability Company Agreement, dated as of May 20, 2016, and filed with the SEC on May 24, 2016 (the “Spectrum Agreement”). As stated in the Spectrum Agreement, the sole member of Spectrum is Charter Communications

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54 Charter Agreement § 3.02.
55 2013 TWCE Amendment at Attachment A-2013 § 1(c).
56 2007 TWCE Amendment § 6; 2013 TWCE Amendment at 1.
Holdings, LLC.\(^{57}\) As the sole member, Charter Communications Holdings, LLC has designated New Charter to be the Manager of Spectrum.\(^{58}\) Charter Communications Holdings, LLC also designated numerous Charter officers, who are now New Charter officers, to be Spectrum officers\(^{59}\) – indeed, the Spectrum Agreement was signed by Daniel J. Bollinger – the Vice President, Associate General Counsel, and Assistant Corporate Secretary of New Charter, Charter Communications Holdings, LLC, and Spectrum.\(^{60}\)

64. Third, Spectrum does not meet the other conditions of the election provision. Among other things, this provision requires that \(\text{[redacted]}\)\(^{61}\) However, as detailed above, \(\text{[redacted]}\)\(^{62}\)

For example, in July 2016, SNI reached

\(^{57}\) Spectrum Agreement at 1.

\(^{58}\) Id. at § 4(a)(i).

\(^{59}\) Id. at Exhibit A.

\(^{60}\) Id. at 12. Tellingly, as explained above, even the term “Spectrum” is a reference to the brand name of services that Charter and not TWC offered to customers before the Acquisition. The name “Spectrum” is a continuation of the Charter brand. In a recent filing, Charter acknowledged that Spectrum was a Charter brand: “Starting in the fall of 2016, Charter will begin to introduce Charter Spectrum, in certain Legacy TWC and Legacy Bright House markets, with remaining markets to follow in 2017.” Charter Communications, Inc., CCO Holdings, LLC, CCO Holdings Capital Corp., Current Report (Form 8-K), Ex. 99.1 at 4 (Aug. 9, 2016).

\(^{61}\) 2013 TWCE Amendment at Attachment A-2013 § 1(c).

\(^{62}\) Terminated SNI-TWCE Agreement § 3.02.
out to its former accounting contact at TWC regarding unpaid license fees under the Terminated SNI-TWCE Agreement, and SNI was forwarded to SNI’s long time contact at Charter for all future interactions with respect to the TWC/BH Systems. Clearly, Therefore, the provision in the 2013 TWCE Amendment is inapplicable.

63 – something clearly underway at Charter as indicated above.

65. The management construct in the Charter Agreement –

66. Accordingly, for multiple independent reasons, provision 1(c) of the 2013 TWCE Amendment is wholly inapplicable.

VIII. Charter Paid Rates and Charged Fees Under the Terminated SNI-TWCE Agreement.

67. 

63 Charter Agreement §1.02(ff).
Amounts due to SNI post-Closing Date remain outstanding.

68. On July 21, 2016, SNI sent a letter to New Charter following up on earlier calls and explaining that the Charter Agreement governs the TWC/BH Systems. SNI urged New Charter to honor the negotiated terms in the Charter Agreement.

69. Nevertheless, on or about July 25, 2016, Charter sent SNI a quarterly invoice pursuant to provisions in the 2015 TWCE Amendment, which invoice contains a demand for payment for the period after the Closing Date even though the 2015 TWCE Amendment was terminated on the Closing Date.

70. The same day, Charter sent a letter to SNI’s counsel flatly rejecting that the Charter Agreement applies to the TWC/BH Systems. Charter stated that SNI’s “interpretation of the relevant agreements is incorrect” without any further explanation.

71. On August 15, 2016, Charter once again shorted SNI by

72. Accordingly, there is an actual, justiciable controversy regarding the parties’ contractual rights and obligations that is ripe for judicial determination.

**FIRST CAUSE OF ACTION**

*(Breach of the Contract)*

73. SNI repeats and realleges the allegations in paragraphs 1 through [72] above as if fully set forth herein.

74. SNI and Charter are in a contractual relationship under the Charter Agreement. SNI has satisfied all of its duties and obligations pursuant to the terms of the Charter Agreement.
75. Charter refused to add the TWC/BH Systems to the Charter Agreement in breach of that agreement.

76. Instead, in July and August 2016, Charter paid to SNI license fees

77. As a result SNI has suffered damages resulting from this breach because Charter is improperly underpaying license fees due to SNI for Charter’s use of SNI’s premium television program services.

78. The difference of these license fees constitutes damages to SNI, the exact amount of which will be determined at trial, but which are at least in the millions of dollars.

SECOND CAUSE OF ACTION
(Declaratory Judgment)

79. SNI repeats and realleges the allegations in paragraphs 1 through [78] above as if fully set forth herein.

80. There is an actual and justiciable controversy between SNI, on the one hand, and Defendants, on the other, as to whether the Charter Agreement or the Terminated SNI-TWCE Agreement governs the carriage of SNI’s television program services on the TWC/BH Systems after the Closing Date.

81. The Charter Agreement governs the TWC/BH Systems after the Closing Date pursuant to Section 3.02, which explicitly requires
82. Charter refused to add the TWC/BH Systems to the Charter Agreement, claiming instead that the Terminated SNI-TWCE Agreement remains in effect and governs the TWC/BH Systems.

83. To resolve this justiciable controversy, SNI seeks a declaration pursuant to CPLR § 3001 that (i) the Charter Agreement governs the TWC/BH Systems after the Closing Date; and (ii) the Terminated SNI-TWCE Agreement and all amendments thereto terminated on or about May 18, 2016, when the Acquisition closed.

**PRAYER FOR RELIEF**

WHEREFORE, SNI respectfully prays for relief as follows:

1. Judgment against Charter Communications Holding Company, LLC for breach of the Charter Agreement, the exact amount of which to be determined at trial, with contractual and/or statutory interest;

2. A determination and order declaring that: (i) the Charter Agreement governs the TWC/BH Systems commencing on or about May 18, 2016, when the Acquisition closed; and (ii) the Terminated SNI-TWCE Agreement and all amendments thereto terminated on or about May 18, 2016, when the Acquisition closed; and
3. For additional and further relief as the Court may deem just and proper.

Dated: New York, New York
August 17, 2016

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

UNIVISION COMMUNICATIONS INC.,
UNIVISION NETWORKS AND STUDIOS, INC.,
UNIVISION LOCAL MEDIA INC.,

Plaintiffs,

v.

CHARTER COMMUNICATIONS, INC., CHARTER
COMMUNICATIONS HOLDING COMPANY, LLC,
TIME WARNER CABLE ENTERPRISES LLC,

Defendants.

Index No. __________

Jury Trial Requested

COMPLAINT

Plaintiffs Univision Communications Inc. ("UCI"), Univision Networks and Studios, Inc. ("UNS") (as successor-in-interest to UCI, Univision Network Limited Partnership, Teleutura, Inc. and Galavision, Inc.), and Univision Local Media Inc. ("ULM," and collectively with UCI and UNS, "Plaintiffs" or "Univision"), by their attorneys, complain and allege against Defendants Charter Communications, Inc. ("New Charter"), Charter Communications Holding Company, LLC ("Charter Holding," individually or together with its affiliates, "Charter"), and Time Warner Cable Enterprises LLC (as successor-in-interest to Time Warner Cable, LLC) ("TWCE") (collectively, "Defendants"), as follows:

STATEMENT OF THE CASE

1. Univision is the leading Hispanic media company in the United States, serving as a vital source of Spanish- and English-language news, sports, and entertainment for the U.S.
Hispanic community through 17 broadcast, cable and digital networks, and strategic partnerships, as well as 59 local television stations. It provides its highly-valued programming content to cable, satellite, telecom, and online video distributors throughout the United States pursuant to distribution agreements that require that such distributors compensate Univision for its content with license fees.

2. On May 18, 2016, one of Univision’s largest distributors, Charter, acquired another of Univision’s largest distributors, Time Warner Cable, Inc. and related entities (collectively, “TWC”), in a $71.4 billion dollar deal that created the second-largest cable distributor in the U.S. (the “Acquisition”). New Charter—the resulting company—is now flagrantly breaching Univision’s contract with Charter by using the Acquisition as a pretext to unilaterally impose license fees that are dramatically below current market license fees for Univision’s valuable content. In particular, New Charter points to corporate machinations that occurred on the day the Acquisition closed to argue that it is TWC, rather than Charter, that is managing all of the legacy Charter and TWC cable systems. But everyone knows that is simply not true: the longstanding CEO and the senior executive team of Charter, as well as its pre-existing board of directors, now in fact manage and control all such cable systems, and virtually the entire TWC leadership team has departed.

3. Prior to the Acquisition, Univision licensed its programming to Charter pursuant to a 2014 distribution agreement that was due to expire on June 30, 2016 (the “Charter Agreement”). That agreement contained a heavily-negotiated provision concerning corporate acquisitions that governs the precise situation here: if Charter or any of its Affiliated Companies acquired the distribution systems of another distributor, the purchased distributor would remain subject to the operative agreement between Univision and that other distributor, but only until
the end of the calendar year in which the acquisition occurred. After that time, the Charter Agreement would govern the acquired systems.

4. The Acquisition clearly triggered this provision. When the Acquisition closed on May 18, 2016, the legacy Charter systems (the “Legacy Charter Systems”) continued to be governed by the Charter Agreement and, pursuant to this negotiated provision, the legacy TWC systems (the “Legacy TWC Systems”) were to be governed by the prior TWC agreement, but only until December 31, 2016.

5. Disregarding its clear contractual commitments, New Charter now implausibly asserts that through June 2022, the prior TWC agreement not only governs the Legacy TWC Systems, but also grants it the right to distribute Univision’s programming on the Legacy Charter Systems over the same period. New Charter rests these unbelievable claims on a clause in the prior 2009 distribution agreement between Univision and TWC (the “TWC Agreement”) that defines “Systems” governed by that agreement. New Charter points to the definition of “System” as defined, in relevant part, as one “that is managed with respect to programming matters by a Time Warner Company . . .” (emphasis added). By its own plain terms, however, the TWC Agreement cannot apply because, following the Acquisition, TWC clearly does not manage any of the cable systems at issue, as Defendants themselves have repeatedly stated and as they have demonstrated incontrovertibly through their actions.

6. Charter’s untenable position that TWC now manages all of the Legacy Charter Systems and Legacy TWC Systems contradicts dozens of Charter’s public statements, Securities and Exchange Commission filings made pursuant to the federal securities laws, and other regulatory filings. These statements and filings were made to sell Wall Street investors, shareholders, and regulators on the core argument that Charter’s pre-Acquisition leadership and
management team would manage all of the systems—i.e., the Legacy Charter Systems and the Legacy TWC Systems—under the auspices of New Charter following the Acquisition, and that New Charter would run the combined entity with improved technology, customer service, and general user experience. To give but a few examples:

- “Under the leadership of Charter’s management team, the merged company will have both the incentives and resources to double down on Charter’s existing pro-customer and pro-broadband model and extend it to Time Warner Cable and Bright House Networks’ significantly larger footprint.”¹ (Exhibit (“Ex.”) 1)

- “New Charter will own and/or manage systems serving approximately 19.4 million broadband customers, 17.3 million video customers, and 9.4 million voice customers across 41 states.” (Ex. 2)

- “Charter’s leadership team is considered one of the best in the industry and, following the transaction, will remain focused on innovation, competition, customer service, and service quality.” (Ex. 3)

Expressly relying on the above statements and other similar statements regarding New Charter’s corporate structure and management, the Federal Communications Commission, the U.S. Department of Justice, the New York State Public Service Commission, and the California Public Utilities Commission each approved the Acquisition.

7. Charter’s pre-Acquisition promises are all entirely consistent with the actual actions taken by New Charter after the closing of the Acquisition, whereby Charter’s pre-Acquisition management team and board of directors assumed complete control and management over all of the cable systems. As noted above, the CEO, senior corporate officers, senior programming executives, and board of directors of Charter have virtually all continued in their same roles at New Charter. Conversely, virtually all of TWC’s senior leadership team—

¹ As part of the transaction, New Charter also acquired Bright House Networks (“Bright House”) for an additional $10.4 billion, adding Bright House cable systems and its over two million video subscribers to its footprint. Bright House, too, is a part of the TWC Agreement, and its cable systems are included herein as part of the Legacy TWC Systems.
including its former CEO—has departed, and not a single TWC director joined the board of directors of New Charter.

8. Before the close of the Acquisition on May 18, 2016, Univision attempted to engage in renewal negotiations with Charter. Charter responded with stalling, obfuscation, and refusal. Shortly after the close of the Acquisition, and with the expiration of the Charter Agreement on June 30 still more than a month away, Univision reached out to Charter again in order to negotiate a long-term extension. Specifically, Univision contacted Allan Singer, Charter’s Senior Vice President of Programming, on multiple occasions in late May and early June, 2016. Mr. Singer, who retained his same position at New Charter following the Acquisition, first delayed even speaking to Univision. On June 10, 2016, in yet another effort to engage New Charter in negotiations, Univision made a detailed renewal proposal relating to numerous terms and conditions, such as digital rights and license fees. Mr. Singer responded by flatly refusing to negotiate a renewal with Univision. Instead, he purported to unilaterally “elect” to distribute Univision programming across hundreds of Charter and TWC cable systems pursuant to the terms of the TWC Agreement until June 2022. Mr. Singer rested his claim upon the blatant fiction that TWC—and not the pre-Acquisition Charter team running New Charter—now “manages” all of those cable systems.

9. With the expiration of the Charter Agreement looming on June 30, 2016, Univision faced the prospect that subscribers to the Legacy Charter Systems would lose access to Univision’s valuable news, sports, and entertainment programming, which was of particular concern in an election year, when Univision’s in-language and in-culture news and information is especially important to Hispanic America. Although it would have been within its rights to withhold its programming from distribution on Legacy Charter Systems as of June 30, Univision
offered a six-month extension of the Charter Agreement that same day in the hope of providing
the parties with additional time to engage in good-faith renewal negotiations without any
disruption of service.\(^2\)

10. Univision’s good-faith effort to create time for negotiations proved futile. Just a few hours after Univision issued its extension, Mr. Singer pronounced, despite the plain and unambiguous terms of the Charter Agreement, that New Charter’s “distribution of the Univision services shall be pursuant to the terms of the TWC Agreement.” Univision was thus compelled to bring this action for a declaratory judgment as to the rights and obligations of the parties under the Charter and TWC Agreements.

11. It is apparent that New Charter is resorting to transparently constructed, pretextual arguments concerning the purported structure of the Acquisition to shoehorn the Legacy Charter Systems and Legacy TWC Systems as “Systems” under the TWC Agreement, and thus evade its contractual obligations to Univision. In this Complaint, Univision therefore requests clarity regarding the parties’ rights and obligations, and brings this action for a declaratory judgment that (i) the Charter Agreement governed the Legacy Charter Systems until its expiration on June 30, 2016; (ii) the license fees provided in the TWC Agreement apply to only the Legacy TWC Systems and only through December 31, 2016; (iii) the TWC Agreement will terminate as of December 31, 2016; and (iv) New Charter is not a Time Warner Company, as defined in the TWC Agreement, and it manages both the Legacy Charter Systems and the Legacy TWC Systems.

\(^2\) No extension was necessary for the Legacy TWC Systems because under the terms of the Charter Agreement, the TWC Agreement would remain in effect for the Legacy TWC Systems until December 31, 2016.
12. As further alleged below, Charter and/or New Charter have also breached the Charter Agreement through a purported “election” to apply the clearly inapplicable TWC Agreement, including its inapplicable TWC license fees, to the Legacy Charter Systems and Legacy TWC Systems after, respectively, June 30, 2016, and December 31, 2016. Such conduct has damaged Univision, as Charter and/or New Charter’s refusal to fairly negotiate a renewal, including current market license fees and other key terms, has resulted in Univision receiving below current market license fees for the Legacy Charter Systems rather than its currently prevailing market license fees and terms, which it could obtain in a good-faith renewal negotiation.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to CPLR § 3001 because an actual, present, and justiciable controversy exists between the parties, and pursuant to 22 N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70, because the breach of contract claim arises out of business dealings and the monetary threshold of $500,000 is satisfied.

14. This Court has jurisdiction over defendants pursuant to CPLR §§ 301 and 302 because each defendant transacts business in the State of New York and because a substantial portion of the acts and omissions giving rise to this action occurred in New York.

15. Venue is proper in this Court pursuant to CPLR § 503 because at least one of the parties resides in this County at the time this action was commenced, and the Defendants are all subject to personal jurisdiction here. Venue is also proper in this Court pursuant to CPLR § 501.

PARTIES

16. UCI is a Delaware corporation with its principal place of business at 605 Third Avenue, 12th Floor, New York, New York 10158. The leading Hispanic media company in the United States, UCI traces its roots back to KWEX-TV in San Antonio, Texas— the first full-time
Spanish-language television station in America. From that modest beginning, UCI has established itself as a multi-faceted media company and the leading provider of high quality Spanish-language content in the United States. The Univision broadcast television network is the most-watched Spanish-language broadcast television network in the country. Through its Spanish- and English-language content, UCI offers vital news, sports, and entertainment programming, and is an indispensable media outlet for Hispanic America. The Univision broadcast network is one of the largest in the United States, reaching 96 percent of U.S. Hispanic television households, and regularly outperforms the national English-language broadcast networks in key demographics and regardless of language.

17. UNS is a California corporation with its principal place of business at 9405 N.W. 41st Street, Miami, Florida. UNS is a party to the relevant agreements.

18. ULM is a Delaware corporation, wholly owned by UCI, with its principal place of business at 605 Third Avenue, 12th Floor, New York, New York 10158. ULM is a party to the relevant agreements.

19. Defendant New Charter is a publicly held corporation, incorporated in Delaware and headquartered in Stamford, Connecticut. New Charter provides broadband Internet, video, voice, and business services to approximately 23.9 million customers across 41 states, including in New York. It owns and manages cable systems serving approximately 17.3 million video customers, making it the second-largest cable operator in the United States.

20. Defendant Charter Holding, a party to the Charter Agreement, is a Delaware limited liability company, and a direct or indirect subsidiary of Charter Communications, Inc.

21. Defendant TWCE is a Delaware limited liability company, and is the successor-in-interest to Time Warner Cable LLC (TWC LLC) with respect to the TWC Agreement. Prior
to the Acquisition, TWCE was a wholly owned subsidiary of TWC, a cable operator that provided broadband Internet, video, and voice services to over 15 million customers across 30 states, and cable services to approximately 10.8 million residential customers, including in New York. Following the Acquisition, New Charter is the parent company of the surviving TWCE entity.

FACTS

I. The Charter Agreement

22. In 2014, Univision and Charter Holding entered into the Charter Agreement, with an effective date of January 1, 2014. Charter's Senior Vice President of Programming, Allan Singer, negotiated, authorized, and signed the Charter Agreement, and Charter thereby agreed to be bound to its terms.

23. The Charter Agreement grants Charter Holding the right to distribute Univision local broadcast stations and cable networks (the "Univision Services") on certain "Affiliate Systems" owned and operated by Charter during the term of the Agreement in exchange for, \textit{inter alia}, the payment of monthly license fees.

24. Univision fully performed all of its obligations under the Charter Agreement.

25. The Charter Agreement expired on June 30, 2016, but Univision unilaterally offered to extend it for a six-month period, as noted above.

II. Charter Acquires TWC

26. In or around May 2015—a little over a year after the execution of the Charter Agreement—Charter announced its plan to acquire TWC for an estimated $55 billion. Under the proposed acquisition, Charter was to acquire all of TWC's cable systems, adding over 10 million video subscribers to its video footprint, in order to compete more effectively with larger multichannel video programming distributors ("MVPDs") like Comcast and AT&T.
27. The vehicles for the proposed transaction included three subsidiaries created for purposes of the Acquisition (Amazon Corporation I, Inc., Amazon Company II, LLC, and Amazon Company III, LLC), and a pre-existing subsidiary of Charter (and affiliate of Charter Holding), CCH I, LLC (referred to in the acquisition agreement and subsequent regulatory filings as "New Charter"). Charter, in its capacity as sole manager of the merger subsidiary that acquired TWC, Inc., signed the certificates of merger and otherwise controlled that merger subsidiary during the Acquisition.

28. As a result of the Acquisition—which closed on or around May 18, 2016—Charter acquired, and now controls and manages all of the Legacy TWC Systems and TWC ceased to exist. New Charter became the ultimate corporate parent of all surviving Charter and TWC entities.

29. Following the close of the Acquisition, New Charter was renamed "Charter Communications, Inc." (the same entity name that Charter employed prior to the Acquisition), and trades under the same ticker symbol on NASDAQ ("CHTR") as did Charter prior to the Acquisition.

30. Prior to completion of the Acquisition, Charter was the sole stockholder of New Charter.

31. Upon information and belief, the Acquisition was specifically designed to retain Charter control over the Legacy Charter Systems and to bring Legacy TWC Systems under Charter's management and control. And this is what, in fact, occurred. Indeed, Defendants went to great lengths to create a vehicle for the Acquisition that would allow for Charter and its executive leadership and board of directors—to the exclusion of the TWC executive leadership
team and board members, who were immediately displaced—to manage and control the
combined entity’s cable video business upon completion of the Acquisition.

III. The Charter Agreement Governs This Precise Scenario

32. The Charter Agreement includes specific and express terms governing the exact
situation presented here, whereby Charter or an affiliated company of Charter acquired or
otherwise combined with another distributor. Univision negotiated these terms directly and
extensively with Mr. Singer, Charter’s Senior Vice President of Programming. These terms
provide, in essence, that if Charter or an affiliated company of Charter acquires the systems of
another distributor, the Charter Agreement will govern the acquired systems as well.

33. Specifically, Section A.1(d) of the Charter Agreement ("Affiliate’s System(s)")
provides that an “Affiliate System” can be either pre-existing or “hereafter added pursuant to
Section I.3."

34. In turn, Section I.3(e) of the Charter Agreement expressly provides for the
addition of systems acquired as a result of an “MSO Acquisition” (i.e., an acquisition of another
distributor such as TWC) by “Affiliate [i.e., Charter Holding] or an Affiliated Company of
Affiliate.”

35. Section I.3(e) of the Charter Agreement provides as follows:

In the event that Affiliate [i.e., Charter Holding] or an Affiliated Company of
Affiliate (i) acquires all or substantially all of the video distribution systems of an
Other Distributor, whether through the purchase, assumption or any other
acquisition of assets, stock or other equity interests, or (ii) combines with an Other
Distributor, whether by merger, consolidation, recapitalization or any other
combination (including, without limitation, pursuant to a transaction that results in
the formation of a successor entity or an Affiliated Company) such that Affiliate or
an Affiliated Company of Affiliate is the surviving and governing entity . . . (each of
the transactions described in the foregoing clauses (i) and (ii) of this Section I.3(e), an
“MSO Acquisition,” and each such acquired video distribution system, an “MSO
Acquired System”), then (A) effective as of the closing of the MSO Acquisition (each, an
“MSO Acquisition Closing”), such MSO Acquired System(s) will (1) remain subject to
the terms of the Other Applicable Agreement(s) (and Affiliate shall assume the
obligations with respect to such MSO Acquired System(s) pursuant to such Other Applicable Agreement(s)) from the date of the MSO Acquisition Closing through the last day of the calendar year in which such MSO Acquisition Closing occurs . . . and (2) become subject to the terms of this Agreement effective as of the first day of the calendar year immediately following the MSO Acquisition Closing (the "MSO Acquisition Transition Date"), and (B) such Other Applicable Agreement(s) shall terminate and cease to be of any further force or effect with respect to such Acquired System(s) as of the MSO Acquisition Transition Date (emphasis added).

36. Section A.1(b) of the Charter Agreement defines an "Affiliated Company" as including any other person or entity that is "directly or indirectly controlling, controlled by, or under common control with" Charter Holding.

37. Section A.1(x) of the Charter Agreement defines an "Other Distributor" as including any "entity other than Affiliate or an Affiliated Company of Affiliate" that distributes "one or more of the [Univision Services]."

38. TWCE is an "Other Distributor" as defined in the Charter Agreement.

39. Section I.3(e) of the Charter Agreement therefore operates as follows:

- Each "video distribution system" acquired as a result of an "MSO Acquisition" constitutes an "MSO Acquired System";

- An "MSO Acquired System[]" remains subject to an Other Applicable Agreement through the last day of the calendar year in which the MSO Acquisition Closing occurs;

- After the last day of the calendar year in which the acquisition occurred, the Other Applicable Agreement "shall terminate and cease to be of any further force or effect"; and

- The MSO Acquired Systems are then subject to the Charter Agreement on the first day of the calendar year immediately after the year the MSO Acquisition.

40. Additionally, Section I.3 of the Charter Agreement specifies that the above terms "shall apply" "[n]otwithstanding anything to the contrary included in any . . . Other Applicable Agreement."
41. The Acquisition falls squarely within the ambit of the Charter Agreement’s “MSO Acquisition” provision. Specifically, an “Affiliated Company”—i.e., Charter—“acquire[d] all or substantially all” of the cable systems of TWC or otherwise “combine[d]” with TWC, as part of a transaction in which New Charter was the “surviving and governing” entity as the ultimate corporate parent. The Charter Agreement therefore controls both the Legacy Charter Systems and the Legacy TWC Systems after the closing of the Acquisition. As a result, on May 18, 2016, New Charter’s rights to distribute Univision programming on Legacy Charter Systems were set to expire on June 30, 2016, and its rights to distribute Univision programming on Legacy TWC Systems were set to expire on December 31, 2016.

IV. Univision Seeks To Engage In Renewal Negotiations; Charter’s Head of Programming Refuses to Negotiate

42. Recognizing that the Acquisition plainly triggered the MSO Acquisition provision of the Charter Agreement, and in anticipation of the expiration of the Charter Agreement on June 30, 2016, Univision reached out repeatedly to Charter executives in an effort to engage in renewal discussions, including with respect to license fees and other key terms (e.g., digital distribution).

43. Specifically, on March 15, 2016, Univision first conducted a call with Mr. Singer, the Charter executive who, as noted above, negotiated, authorized, and signed the Charter Agreement. During that call, Mr. Singer stated that he would not begin any discussions about the extension until after the Acquisition closed. He never remotely suggested that TWC would be managing the Legacy Charter Systems in the future. Indeed, it would have been absurd for him to do so, given that he was then Charter’s lead programming negotiator, and would continue to be after the Acquisition, as the pre-Acquisition Charter senior management team prepared to take control of the entire combined entity.
44. Univision again met with Mr. Singer at an industry conference in Boston on May 17, 2016, one day before the completion of the Acquisition on May 18, 2016. Again, Mr. Singer refused to negotiate prior to the closing of the Acquisition.

45. With the expiration of the Charter Agreement now only a little more than a month away, Univision again reached out to Charter in order to expedite the renewal negotiation (having followed Mr. Singer’s request to wait to engage until after the Acquisition). Univision sent emails to Mr. Singer on May 24, May 26, and June 2, 2016, each time asking to discuss the renewal. Mr. Singer rebuffed each of these inquiries.

46. Following a short and unproductive discussion between the parties in early June, Univision sent a proposal to Mr. Singer on June 10, 2016, which offered to renew the parties’ contractual relationship for both the Legacy Charter Systems and the Legacy TWC Systems, and proposed various new distribution opportunities (e.g., TV Everywhere distribution rights and set-top box video-on-demand content rights). Seeking to engage Charter in negotiations, Univision also requested a meeting to walk through the terms of its proposal.

47. Mr. Singer’s sarcastic email reply to Univision’s renewal proposal, sent the same afternoon, speaks for itself:

Setting aside the obnoxious miscategorization [sic] that ‘we have been unwilling to engage,’ which we will just accept as you have never had this job previously and probably do not know what you are doing . . . as you are very well aware there is no need to negotiate a new agreement for any portion of our footprint at this time but are willing to meet on Tuesday to hear why you appear to think otherwise, even given the nature of this proposal.

48. That same day, Mr. Singer also sent Univision a letter on Charter letterhead (the “June 10 Letter”), stating that—notwithstanding the MSO Acquisition provision of the Charter Agreement that is directly on point—the Legacy Charter Systems now qualify as “Systems” under the TWC Agreement, and purporting to elect to have the Legacy Charter Systems (as well
as the Legacy TWC Systems) "governed by the TWC Agreement." Ex. 4. Yet again, Mr. Singer outright refused to engage in any substantive discussions with Univision.

49. On June 13, 2016, Univision responded to Mr. Singer's June 10 Letter by explaining that the Acquisition plainly triggered the Charter Agreement's MSO Acquisition provision (the "June 13 Letter"). Univision further explained that, given the abundantly evident control by New Charter over the Legacy Charter and Legacy TWC Systems, New Charter cannot rely on the purported acquisition terms contained in the TWC Agreement, as neither the Legacy Charter Systems nor the Legacy TWC Systems qualify as "Systems" under the TWC Agreement. Ex. 5.

50. Finally, Mr. Singer agreed to have several Univision executives travel to Stamford, Connecticut on June 14, 2016, to meet with New Charter—at Charter's corporate headquarters. In a meeting that lasted barely twenty minutes, Mr. Singer and his team again refused to engage in substantive negotiations, and instead merely reiterated the untenable position that the TWC Agreement survived the Acquisition and governed the Legacy TWC Systems until June 2022. Moreover, Mr. Singer went even further and argued that the TWC Agreement also governed the *Legacy Charter Systems* through the purported "expiration date" in 2022 of the TWC Agreement.

51. On June 16, 2016, Mr. Singer again sent a letter (the "June 16 Letter"), which merely repeated in wholly conclusory fashion that "the terms of the TWC Agreement would govern in the event that Charter and TWC were combined into a single entity," and summarily asserted that there was "no obligation . . . that we negotiate with [Univision] at this time." Ex. 6.

52. On June 17, 2016, Univision responded in writing (the "June 17 Letter"), further explaining its position that the Charter Agreement governs, and that neither the Legacy Charter
Systems nor the Legacy TWC Systems qualify as “Systems” under the TWC Agreement because, as Charter itself has repeatedly stated to the public and to regulators over the last year, all post-Acquisition cable systems are now managed by New Charter, thus rendering the TWC Agreement inapplicable on its face. Ex. 7. Univision urged New Charter to reconsider its decision not to engage in good-faith negotiations for the distribution of Univision’s programming content. Id.

53. On June 24, 2016, New Charter, through Mr. Singer, replied in writing (the “June 24 Letter”), stating for the first time to Univision that the Legacy Charter Systems are “now managed” by a new and heretofore unidentified entity, “Spectrum Management Holding Company, LLC” (“Spectrum Holding”). Mr. Singer further claimed that Spectrum Holding qualifies as a “Time Warner Company.” Ex. 8. As detailed below, the statements made in the June 24 Letter regarding the management of the Legacy Charter Systems are flatly contrary to what Charter has reported to the public and to the regulatory agencies in seeking approval for the Acquisition.

54. Even as New Charter flatly refused to engage in such negotiations, Univision remained open at all times to good-faith, substantive discussions about the terms of a renewal agreement. To facilitate those negotiations, on June 30, 2016, Univision unilaterally offered a six-month extension of the Charter Agreement until December 31, 2016. Ex. 9. By offering this extension, Univision once again demonstrated its willingness to engage in negotiations with New Charter.

55. Yet Mr. Singer again made clear that Univision’s efforts to engage him in negotiations were pointless. The same day, June 30, Mr. Singer categorically rejected any further negotiations or extensions of the Charter Agreement, and instead simply sought to dictate
that New Charter’s “distribution of the Univision services shall be pursuant to the terms of the TWC Agreement.” Ex. 10 (emphasis added). This June 30 Letter from Mr. Singer (together with his June 10 Letter, June 16 Letter and June 24 Letter, the “June 2016 Letters”), make plain that New Charter will not deviate from its non-negotiable, and entirely unsupportable, position that the TWC Agreement will govern all Legacy Charter Systems and Legacy TWC Systems through June 2022.

56. Accordingly, there is an actual, justiciable controversy regarding the parties’ contractual rights and obligations that is ripe for judicial determination.

V. The TWC Agreement Does Not Apply Beyond December 31, 2016 Because None Of The Systems Qualifies As “Systems” Under Its Terms

57. New Charter’s purported “election” of the TWC Agreement fails on its face. Univision entered into the TWC Agreement on or around April 1, 2009, with an effective date of January 1, 2009. In or around October 2013, Univision and TWCE entered into a “First Amendment” to the TWC Agreement that extended the agreement until June 2022 (the “TWC 2013 Amendment”).

58. Section 4(u) of the TWC 2013 Amendment, replacing Section G.3(a) of the TWC Agreement, includes certain provisions by which TWC could “elect” carriage terms and license fees for “Subsequently Acquired Systems” acquired via an “MSO Acquisition,” but such terms are not applicable to the Acquisition at issue here. See id. § G.3(a)(ii)(C). This is because the “MSO Acquisition” provision of the TWC 2013 Amendment applies only to those systems that “first become Systems” under the TWC Agreement. See id. § G.3(a)(ii)(G)(D) (emphasis added).

59. The TWC Agreement imposes a two-part test for any cable system to qualify as a “System.” Specifically, Section B.1(ggg) of the TWC Agreement expressly sets forth a two-part
definition for a “System” as a cable system (i) “of which a Time Warner Company, directly or indirectly, owns at least twenty-five percent (25%) of the equity”; and (ii) “that is managed with respect to programming matters by a Time Warner Company.”

60. In turn, the TWC Agreement defines a “Time Warner Company” as TWC LLC [n/k/a TWCE], TWC, Time Warner Entertainment Company, L.P., Time Warner NY Cable LLC, Time Warner Entertainment-Advance/Newhouse Partnership, “or any other person or entity Controlled, either directly or indirectly, by” those entities. See TWC Agreement at § B.1(nnn).

61. Defendants have made no showing to Univision regarding the first prong of the two-part test for a “System” (i.e., 25% ownership). But even if New Charter can satisfy this ownership prong, there is no basis whatsoever—other than New Charter’s say-so—for New Charter’s claim that a “Time Warner Company” actually “manages” New Charter’s cable systems “with respect to programming matters” (i.e., the second prong of the two-part test).

62. New Charter’s position that a “Time Warner Company” manages the Legacy Charter Systems and Legacy TWC Systems cannot possibly be correct, for a variety of reasons. First, if its position was in fact correct, numerous public and regulatory filings made by Charter since 2015—as alleged extensively below—would be rendered materially false and deceptive. See § VI. Second, it collides with personnel and management actions taken by Charter following the Acquisition, all of which confirm the common-sense marketplace reality that the pre-Acquisition leadership team at Charter is the one pulling all the strings at New Charter, including with respect to programming decisions. See § VII. Third, the position fails on its face, as the legal entity that New Charter recently identified to Univision for the first time as the managing “Time Warner Company”—Spectrum Holding—is nothing more than a shell company that was
pretextually created, controlled, and managed by New Charter. See § VIII.

VI. Charter Repeatedly Told Federal and State Agencies, Wall Street Investors and Shareholders, and Its Subscribers, That New Charter—Not TWC—Will Manage the Systems

63. For the better part of the past year, in an aggressive effort to win regulatory approval for the Acquisition, Charter made numerous statements—to the SEC, the FCC, and state regulators across the country—that conveyed a consistent message: Charter and its management team would be managing all of the cable systems of the newly combined entity following the close of the Acquisition.

A. Charter’s Statements to the SEC

64. In connection with the Acquisition, Charter made various statements to the SEC that, under the federal securities laws, could not have included an untrue statement of material fact or omitted a material fact necessary to make the statement not misleading. See Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (the “Exchange Act”), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5.

65. In particular, Charter told the SEC in June 2015 that “[u]nder the leadership of Charter’s management team, the merged company will have both the incentives and resources to advance Charter’s industry-leading pro-customer and pro-broadband model and extend it to Time Warner Cable and Bright House Networks’ customers.” Ex. 11 (Charter Commc’ns, Inc., Rule 425 Prospectus (June 29, 2015)) (emphasis added)).

66. In a subsequent filing with the SEC, Charter cautioned that one risk of the Acquisition for Charter would be “managing a significantly larger company than before.” Ex. 12 (Charter Commc’ns, Inc., Current Report (Form 8-K) (April 7, 2016)).

67. Pursuant to Rule 425 of the Exchange Act, Charter also filed with the SEC certain other statements that it made regarding the Acquisition, including that “Charter’s management
will bring the same incentives, perspectives and products to New Charter.” See Ex. 13

B. **Statements to the FCC**

68. Charter characterized the nature of the Acquisition to the FCC—the United
States’ primary authority for communications laws and regulations, charged by Congress with
the review and approval of transfers of licenses and authorizations in connection with media
mergers—in no uncertain terms: “Charter seeks to extend its suite of services to millions of
Americans now served by Time Warner Cable and Bright House Networks . . . .” Ex. 1
(Relevant excerpts of Public Interest Statement, FCC, MB Docket No. 15-149, at 1 (filed June
25, 2015) (the “FCC App.”)).

69. Charter explained to the FCC that then-Charter CEO Tom Rutledge will be “New
Charter’s President and CEO, will hold a board seat and will be offered the position of Chairman
and CEO of New Charter.” *Id.* at 16.

70. Noting that New Charter will be the third-largest MVPD post-Acquisition,
Charter stated that “[w]e will own and/or manage systems serving approximately 19.4 million
broadband customers, 17.3 million video customers, and 9.4 million voice customers across 41
states.” *Id.* (emphasis added).

71. Charter further told the FCC exactly what it told the SEC: “**Under the leadership
of Charter’s management team,** the merged company will have both the incentives and
resources to double down on Charter’s existing pro-customer and pro-broadband model and
extend it to Time Warner Cable and Bright House Networks’ significantly larger footprint.” *Id.*
at 1-2 (emphasis added).
C. The FCC Relied on Charter’s Depiction of the Acquisition

72. Through these and other statements regarding its own proposed management of the newly combined entity, Charter secured the necessary approvals it sought from the FCC. For example, in its May 10, 2016, Memorandum Opinion and Order approving the Acquisition, the FCC repeated what Charter had stated: “[f]ollowing the transaction, New Charter would own and/or manage systems serving approximately 23.9 million customers—19.4 million broadband customers, 17.3 million video customers, and 9.4 million voice customers—across 41 states.” See Ex. 14 (Relevant excerpts of FCC 16-59 Order, MB Docket No. 15-149, ¶ 23 (May 10, 2016) (the “FCC Order”)) (emphasis added)).

73. In addition, the FCC focused its “public interest inquiry” on “the question of whether the track record and outlook of Charter’s current management would be carried over to New Charter’s expanded footprint to the benefit of consumers.” Id. ¶ 6 (emphasis added).

74. And, in voicing its concerns that New Charter would take actions to inhibit competition in the online video market, the FCC noted that while “Charter’s current management team has not implemented” such actions, “[p]ost-transaction, however, the management team will be operating a substantially different company with a far greater footprint and subject to significantly different incentives.” Id. ¶ 83 (emphasis added).

3 Notably, the DOJ, in approving the Acquisition, imposed certain conditions to ensure that New Charter not attempt to use its newly substantial size and leverage to discriminate against online video competitors or impede the online video marketplace, to which both Charter and TWC consented in order to obtain the necessary permissions to close the Acquisition. See United States v. Charter Communications, Inc. et al., 1:16-cv-00759 (D.D.C.) (the “Final Judgment”). These conditions further underscore the need for a renewal agreement that omits any terms and conditions that violate the Final Judgment.
D. Statements to State Regulatory Agencies

75. Charter also needed to secure regulatory approval of the transfer of control to New Charter from state public service agencies, including in New York and California. To that end, it made the following unequivocal statements to the New York State Public Service Commission (the “NY Commission”):

- “Charter is a financially strong, publicly traded corporation well positioned to effectively manage the TWC Subsidiaries in New York.” Ex. 2 (Joint Petition, NY Commission, Case 15-M-0388, at 20 (July 2, 2015) (‘N.Y. Petition’) (emphasis added)).

- “The Transaction leaves Charter’s existing assets and customers in New York subject to operational decision-making by the same management team and essentially the same board structure—with two seats added.” Id. at 19 (emphasis added).

- “This intra-company transfer of the 16 franchises among Charter subsidiaries will have no impact upon the provision of service to subscribers, and the franchises will remain subject to operational decision-making by the same management team.” Id. (emphasis added).

- “The management of New Charter, including Charter’s current operating subsidiaries, is expected to remain unchanged.” Id. at 13.

- “New Charter will be managed by a team of experienced officers, all of whom will be intensely focused on innovation, competition, customer service and service quality. Charter’s management team is considered among the best in the industry.” Id. at 20 (emphasis added).

76. Repeating its assertions to the FCC, Charter told both the NY Commission and the California Public Utilities Commission (the “CA Commission”) that following the Acquisition, “New Charter will own and/or manage systems serving approximately 19.4 million broadband customers, 17.3 million video customers, and 9.4 million voice customers across 41 states.” See Ex. 15 (Joint Application, CA Commission, Proceeding: A1507009, at 18 (July 2, 2015) (the “CA App.”)); Ex. 2 (N.Y. Petition at 13–14) (emphasis added).
77. Charter also made the following statements to the CA Commission in seeking approval of the Acquisition in California, each conveying the distinct message that Charter’s “management team” would direct the new entity:

- “Under the leadership of Charter’s management team that currently provides service to portions of California, New Charter will have both the incentives and resources to reinforce Charter’s existing pro-customer model and extend it throughout TWC’s and [Bright House’s] footprints.” See Ex. 15 (CA App. at 3) (emphasis added).

- “New Charter will have the requisite financial, technical, and managerial qualifications to provide reliable service throughout its increased footprint, as Charter has done in its current service area in the State.” Id. (emphasis added).

- “New Charter will be managed by a team of experienced officers, all of whom will be intensely focused on innovation, competition, customer service, and service quality . . . Charter’s management team is considered among the best in the industry.” Id. at 28 (emphasis added).

78. Defendants also jointly told the CA Commission that the “regulated public utilities, TWCIS [Time Warner Cable Information Services] and Bright House California . . . will be managed by New Charter after the Transaction is approved.” See Ex. 3 (Opening Brief, CA Commission, Proceeding: A1507009, at 62 (March 1, 2016) (emphasis added)).

79. Charter made many of these same statements to multiple other state regulatory agencies throughout the country in order to obtain state-by-state approvals for the Acquisition, including to the Public Service Commission of West Virginia, the Hawaii Department of Commerce and Consumer Affairs, and the Nebraska Public Service Commission.

E. State Regulatory Authorities Relied on Charter’s Depiction of the Acquisition

80. Charter’s statements in this regard did not fall on deaf ears. In approving the Acquisition in New York, the NY Commission expressly found, as Charter had stated, that “New Charter will own and/or manage systems serving approximately 19.4 million broadband
customers, 17.3 million video customers, and 9.4 million voice customers across 41 states.” Ex. 16 (Order Granting Petition, NY Commission, Case 15-M-0388, at 7 (Jan. 8, 2016)).

81. Similarly, in approving the Acquisition in California, the CA Commission relied in part on Defendants’ position that “all regulated public utilities will be managed by New Charter and its management team.” Ex. 17 (Proposed Decision, CA Commission, Proceeding: A1507009, at 37 (April 12, 2016)).

F. Statements to the Public, Industry Groups, and Wall Street

82. Charter made like-minded statements to its own customers and the viewing public at large. For example, in the “Charter-TWC-BHN Transaction Update,” available on Charter’s online “Resource Center,” Charter advertised that “Charter’s management will bring the same incentives, perspectives and products to New Charter.” See Ex. 13 (emphasis added).

83. Charter told Wall Street and potential investors the same thing: on a May 26, 2015 “M&A Call” with investors, Mr. Rutledge, formerly CEO of Charter and now CEO of New Charter, stated that Charter will “bring Charter’s products, pricing and practices to Time Warner Cable and Bright House customers.” See Ex. 18 (emphasis added).

84. Mr. Rutledge then publicly confirmed his plan for a seamless transition of management, to “make the Time Warner and Bright House assets that we’re acquiring work like Charter’s working right now . . .” See Ex. 19 (Charter Commc’ns, Inc., Rule 425 Prospectus (Oct. 26, 2015) (emphasis added)).

85. Mr. Rutledge made numerous other statements on Charter’s quarterly earnings calls over the past year, each confirming that TWC’s management influence would be eviscerated post-Acquisition:

- “Following the closing, we will continue to take both the Time Warner Cable and Bright House footprints all-digital in order to rollout our Spectrum product suite, which has been fundamental to our growth and success at Charter. As we
complete all-digital and roll out Spectrum, Time Warner Cable and Bright House customers will also get access to our most advanced and latest hardware and applications.” See Ex. 20 (Q2 2015 Earnings Call, at 2 (Aug. 4, 2015) (emphasis added)).

- “[O]ur plan is to move Time Warner and Bright House customers into our model.” See Ex. 21 (Q4 2015 Earnings Call, at 13 (February 4, 2016) (emphasis added)).

- Charter’s forecasts reflected “an indication of what we believe we can do at Time Warner Cable and Bright House. That will require time and investment just as it did at Charter, but I believe it can happen faster because of the relatively better starting condition of the assets we’re acquiring.” See Ex. 22 (Q1 2016 Earnings Call, at 2 (April 28, 2016) (emphasis added)).

- “Managing the all-digital transition at Time Warner Cable and Bright House will also be a key priority.” Id. at 3 (emphasis added).

- Charter will “roll out new pricing and packaging across Time Warner and Bright House.” Id. (emphasis added).

86. Additionally, in January, 2016—even before the Acquisition closed—Mr. Rutledge signed a “Memorandum of Understanding” with certain multicultural leadership organizations (the “Multicultural MOU”), in which Charter made—on behalf of itself and TWC—several commitments to diversity upon the closing of the Acquisition. Notably, one of the five “focus areas” that the Multicultural MOU centered upon was “programming.”

87. The former CEO of TWC, Robert Marcus, openly admitted the reality of the Acquisition on an October 29, 2015, earnings call, referring to “Charter, as the acquirer,” and deferring questions about the future management of New Charter to “[Mr. Rutledge] and his team.” See Ex. 23 at 12 (emphasis added).

88. Likewise, a Charter spokesman made clear that former TWC customers “will start seeing [Charter’s] Spectrum brand, new product enhancements and new packages.”

4 Charter had a pre-existing Spectrum brand that it offered to consumers pre-Acquisition.
Faran, *Spectrum Name To Replace Time Warner As Cable Provider’s Sale Is Complete*, The Columbus Dispatch, May 19, 2016.

89. Mr. Rutledge himself emphasized that point on the day the Acquisition closed: “. . . in the coming months [former TWC customers] will begin to hear more from us about the Spectrum brand, and the product improvements and consumer-friendly policies that come with it.” See Ex. 24 (May 18, 2016 Press Release).

90. News organizations covering the Acquisition consistently reported that New Charter would manage the company going forward. For example, the Wall Street Journal stated on March 20, 2016, that “Charter’s management team has shown that it can deliver.” See Miriam Gottfried, *Why Charter’s Cable Deal Sends a Strong Signal*, Wall Street Journal, Mar. 20, 2016.

91. A March 5, 2016, Milwaukee, Wisconsin Journal Sentinel article looked at the potential effects of the Acquisition on Wisconsin consumers, noting that if the deal was approved, “Time Warner Cable customers would become Charter Communications customers,” without changing subscription plans. See Rick Barrett, *Charter Has Big Plans For Time Warner Cable in Wisconsin*, Milwaukee-Wisconsin Journal Sentinel, Mar. 5, 2016 (emphasis added).

92. A March 22, 2016, LA Times article about TWC’s regional sports network noted that “Charter Chief Executive Tom Rutledge had pledged to try to make the Dodgers channel more widely available should his company win approval to take over Time Warner Cable’s operations.” See Meg James, *Time Warner Cable Lowers Price of Dodgers Channel, Hoping to End Stalemate*, L.A. Times, Mar. 22, 2016 (emphasis added).
93. A May 18, 2016, article in Variety observed that the “post-merger Charter team” has a number of big carriage agreements to sort through on the near-term horizon.” See Cynthia Littleton, What’s Next Now That Charter-Time Warner Cable Merger Is Complete, Variety, May 18, 2016 (emphasis added).

94. Perhaps CNN’s Senior Media Correspondent, Brian Stelter, summed the Acquisition up best in a May 18, 2016, article headlined: “Bye, bye Time Warner Cable. Hello Charter.”

VII. The Corporate Reality Confirms Charter’s Public Statements

95. All of the above statements are further reflected by the realities of New Charter’s management team and other personnel decisions, which leave no doubt that New Charter—and not any Time Warner Company—is managing the cable systems of the new entity. As alleged below, New Charter’s senior management is virtually identical to Charter’s senior management.

96. Starting at the top, Charter CEO Tom Rutledge is now President and CEO of New Charter.

97. New Charter’s programming group is headed by Charter’s Senior Vice President of Programming, Mr. Singer. Indeed, Mr. Singer’s own public biography confirms that he is responsible for “managing” programming content across all of the New Charter cable systems:

Allan Singer joined Charter Communications, Inc. as Senior Vice President, Programming, in April 2011. In this role, Mr. Singer leads Charter’s content acquisition team and is responsible for acquiring, developing and managing linear and non-linear content for the company.

See https://newsroom.charter.com/leaders/allan-singer/ (emphasis added). Underscoring Charter’s continuing control over management, Mr. Singer sent each of his June 2016 letters to Univision on Charter’s letterhead, complete with Charter’s corporate logo.
98. With regard to senior executives, New Charter has simply continued the tenure of Charter's executives: the senior officer positions of Chief Financial Officer, Chief Operating Officer, Secretary, Executive Vice President and Chief Marketing Officer, and Chief Accounting Officer at Charter have all remained the same. Moreover, each of the directors of Charter, with one exception, was appointed a director of New Charter.

99. On the other hand, key TWC senior officers—including, most notably, its former CEO Robert Marcus, and its former head of programming Melinda C. Witmer—departed in the immediate wake of the Acquisition. As alleged above, not a single former TWC director is represented on New Charter's Board of Directors.

100. In addition to management changes, the former Charter leadership team has quickly taken steps that demonstrate that it is in charge of decision-making across the combined entity post-Acquisition. For instance:

- Charter's "Spectrum" branded cable products are replacing TWC products.

- In a letter to millions of former TWC customers post-Acquisition, New Charter CEO Mr. Rutledge informed them that "soon you will get to know us by our new name, Spectrum."

- TWC is vacating its corporate headquarters at the Time Warner Center in New York City at the end of 2016, and will "relocate to Stamford, Conn., where Charter is headquartered." See Steve Cuozzo, Charter Plans to Leave Time Warner Center, The New York Post (June 27, 2016) ("Charter Communications, which recently bought Time Warner Cable for $55.1 billion, not only plans to dump the company's name — it's dumping Manhattan, too.")

VIII. **Spectrum Holding Is Nothing Other Than A Charter Vehicle**

102. New Charter’s fig-leaf position that Spectrum Holding manages the Legacy Charter Systems—and its insistence that this newly created Charter subsidiary is a “Time Warner Company” under the TWC Agreement—is unsupportable.

103. Spectrum Holding—f/k/a Nina Company II, LLC—is nothing other than an intermediary shell actually controlled and managed by New Charter, as revealed by the Amended and Restated Limited Liability Company Agreement, dated as of May 20, 2016, and filed with the SEC on May 24, 2016 (the “Spectrum Holding Agreement”). See Ex. 25.

104. As stated in the Spectrum Holding Agreement, the sole member of Spectrum Holding is Charter Holding. Id.

105. As the sole member, Charter Holding has designated New Charter to be the Manager of Spectrum Holding. Charter Holding also designated numerous Charter officers, who are now New Charter officers, to be Spectrum Holding officers. Id.

106. For the avoidance of any doubt, the Spectrum Holding Agreement was signed by Daniel J. Bollinger—the Vice President, Associate General Counsel, and Assistant Corporate Secretary of New Charter, Charter Holding, and Spectrum Holding. Id. (Tellingly, even the term “Spectrum” is a reference to Charter’s pre-Acquisition product branding.)

107. In sum, as the corporate documents demonstrate, Spectrum Holding is merely a newly-created shell company that is controlled and managed by New Charter and its officers, rather than by the ghost of TWC.

**FIRST CAUSE OF ACTION**
(Declaratory Judgment)

108. Univision repeats and realleges the allegations in paragraphs 1 through 107 above as if fully set forth herein.
109. There is an actual and justiciable controversy between Univision, on the one hand, and Defendants, on the other, as to whether the Charter Agreement or the TWC Agreement governs the carriage of Univision programming on Legacy Charter Systems and Legacy TWC Systems following June 30, 2016.

110. Univision believes that the Charter Agreement governed the Legacy Charter Systems until its expiration on June 30, 2016, as well as the Legacy TWC Systems pursuant to its MSO Acquisition provision. By operation of the MSO Acquisition provision of the Charter Agreement, the TWC Agreement shall continue to govern the Legacy TWC Systems until the end of calendar year 2016, at which time it will “cease to be of any further force or effect.”

111. New Charter has stated unequivocally, including in the June 30 Letter, that the TWC Agreement applies to the Legacy Charter Systems and the Legacy TWC Systems following June 30, 2016, and will continue to apply through June 30, 2022.

112. To resolve this justiciable controversy, Univision seeks a declaration pursuant to CPLR § 3001 that (i) the Charter Agreement governed the Legacy Charter Systems until its expiration on June 30, 2016; (ii) the license fees provided in the TWC Agreement apply to only the Legacy TWC Systems and only through December 31, 2016, pursuant to the MSO Acquisition provision of the Charter Agreement; and (iii) the TWC Agreement will terminate as of December 31, 2016, pursuant to the MSO Acquisition provision of the Charter Agreement. Univision seeks a further declaration pursuant to CPLR § 3001 that New Charter is not a Time Warner Company, as defined in the TWC Agreement, and it manages the Legacy Charter Systems and Legacy TWC Systems.
SECOND CAUSE OF ACTION
(Breach of the Charter Agreement)

113. Univision repeats and realleges the allegations in paragraphs 1 through 112 above as if fully set forth herein.

114. Univision and Charter were in a contractual relationship under the Charter Agreement. Univision has satisfied its obligations pursuant to the terms of the Charter Agreement.

115. By their words and actions in June 2016, including through the June 2016 Letters and a purported “election”—conveyed unilaterally and unequivocally in the June 30 Letter—to have the terms of the TWC Agreement control the Legacy Charter Systems following June 30, 2016, Defendants Charter and/or New Charter have breached the Charter Agreement.

116. Defendants Charter and/or New Charter have refused to negotiate any renewal terms, including new license fees, upon the expiration of the Charter Agreement. They also have refused to acknowledge that the TWC license fees apply, via the MSO Acquisition provision of the Charter Agreement, to only the Legacy TWC Systems and only through the end of calendar year 2016. As New Charter stated in its June 30 Letter, “there is no need for us to engage with you concerning distribution of Univision,” and “there is no need for any extension of any agreement.”

117. Univision has suffered damages resulting from this breach because, instead of having the opportunity to fairly negotiate license fees and other key terms for both the Legacy Charter Systems and the Legacy Time Warner Systems, New Charter is improperly attempting to apply the TWC Agreement, with below current market license fees and other out-of-date terms, to all of its cable systems rather than Univision's currently prevailing market license fees and other key terms, which Univision could obtain in a good-faith renewal negotiation.
118. The difference in these license fees constitutes damages to Univision, the exact amount of which will be determined at trial.

THIRD CAUSE OF ACTION
(Breach of the Covenant of Good Faith and Fair Dealing)

119. Univision repeats and realleges the allegations in paragraphs 1 through 118 above as if fully set forth herein.

120. The relevant agreements, the relationship between the parties, and common law imply a covenant of good faith and fair dealing between Univision and Defendants.

121. For over a year, Charter has stated on numerous occasions in numerous settings that New Charter would “manage” both the Legacy Charter Systems and the Legacy TWC Systems following the close of the Acquisition.

122. New Charter’s repeated statements and express intentions demonstrate that following the close of the Acquisition, the Charter Agreement, and not the TWC Agreement, governs all of the cable systems.

123. Charter’s public statements, and New Charter’s evident management of the new company, conflict with the statements that Charter and/or New Charter have made to Univision in the June 2016 Letters.

124. New Charter and/or Charter have breached their duties of good faith to Univision by fundamentally mischaracterizing the nature of the Acquisition, including by representing that Spectrum Holding is a “Time Warner Company” “managing” the various cable systems, when the corporate reality is to the contrary. New Charter manages and controls the various cable systems. These Defendants also continue to breach their duty of good faith by pressing positions designed to deprive Univision of the fundamental benefits of its contracts. Defendants have taken the position that they have the right to Univision’s programming until June 2022. They do
not: the only rights that Defendants have to Univision’s programming is pursuant to the Charter Agreement. Rather than act in a good-faith manner to abide by their contractual obligations, Defendants have employed various corporate machinations in furtherance of their scheme to maximize their profits at the expense of their contractual obligations.

125. Defendants have in fact designed the Acquisition in such a manner as to deliberately and willfully destroy or injure Univision’s right to receive the fruits of the Charter Agreement.

126. Defendants have thus breached the implied covenant of good faith and fair dealing, resulting in damages to Univision, the exact amount of which will be determined at trial.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully pray for relief as follows:

1. For a determination and order declaring that: (i) the Charter Agreement governed the Legacy Charter Systems until its expiration on June 30, 2016; (ii) the license fees provided in the TWC Agreement apply to only the Legacy TWC Systems and only through December 31, 2016, pursuant to the MSO Acquisition provision of the Charter Agreement; (iii) the TWC Agreement will terminate as of December 31, 2016, pursuant to the MSO Acquisition provision of the Charter Agreement; and (iv) New Charter is not a Time Warner Company, as defined in the TWC Agreement, and it manages both the Legacy Charter Systems and the Legacy TWC Systems.

2. For damages for breach of the Charter Agreement and for breach of the covenant of good faith and fair dealing, the exact amount of which to be determined at trial.

3. For such additional and further relief as the Court may deem just and proper.
Dated: New York, New York
July 8, 2016

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The United States of America brought action against the National Football League and football teams to enjoin enforcement of by-laws of the National Football League restraining televising and radio broadcasting of professional football games. The District Court, Grim, J., held that restriction preventing telecasting of outside games into home territories of other teams on days when other teams were playing at home was not illegal under the Sherman Act, but that restrictions on telecasting outside games in home territories when home teams were playing games away from home and telecasting them in their home territories, and restricting radio broadcasting of outside games in home territories on days when home teams were playing games away from home and were either televising or broadcasting them in their home territories were illegal, and that enforcement of by-law giving Football Commission power to prevent all television and radio broadcasts would be enjoined to prohibit Football Commissioner from exercising his power to disapprove contracts for purpose of effecting and maintaining illegal territorial restrictions.

Decree in accordance with opinion.

West Headnotes (15)

[1] Antitrust and Trade Regulation
   ➔ Sports

   Where by-laws of the National Football League had been agreed to by all league members and were binding on all of them, the by-laws constituted a “contract” within meaning of provision of the Sherman Act that every “contract”, combination, or conspiracy in restraint of trade or commerce among the several states is declared to be illegal. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

3 Cases that cite this headnote

[2] Antitrust and Trade Regulation
   ➔ Territorial Agreements

   An allocation of marketing territories for purpose of restricting competition is not always illegal under the Sherman Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

1 Cases that cite this headnote

[3] Antitrust and Trade Regulation
   ➔ Construction

   The Sherman Act calls for vigilance in detection and frustration of all efforts unduly to restrain free course of interstate commerce, but does not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition on a sound basis. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[4] Antitrust and Trade Regulation
   ➔ Cartels, Combinations, Contracts, and Conspiracies in General

   Mere fact that parties to an agreement eliminate competition between themselves is not enough to condemn it under the Sherman Act. Sherman Anti-Trust Act, 1 et seq., 15 U.S.C.A. 1 et seq.

Cases that cite this headnote
Antitrust and Trade Regulation

Illegal Restraints or Other Misconduct

The true test of legality under the Sherman Act of an agreement or regulation of trade is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Cases that cite this headnote

Cartels, Combinations, Contracts, and Conspiracies in General

In order to determine legality of agreement or regulation of trade under the Sherman Act, court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable. Sherman Anti-Trust Act, 1 et seq., 15 U.S.C.A. 1 et seq.

1 Cases that cite this headnote

Antitrust and Trade Regulation

Rule of reason

An agreement may constitute a restraint of trade, without being illegal under the Sherman Act, and, for a contract to be illegal, it must cause both a restraint of trade and an unreasonable restraint of trade. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Cases that cite this headnote

Federal Courts

Antitrust, unfair competition, and consumer protection

In determining whether restraints of trade are illegal under the Sherman Act, federal rather than state decisions are controlling. Sherman Anti-Trust Act, 1 et seq., 15 U.S.C.A. 1 et seq.

Cases that cite this headnote

Antitrust and Trade Regulation

Television and radio

Provision of by-laws of the National Football League preventing telecasting of outside football games into home territories of other teams on days when other teams are playing at home provides for a legal restraint of trade not in violation of the Sherman Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

16 Cases that cite this headnote

Television and radio

Provision of by-law of the National Football League restricting telecasting of outside football games in home territories of teams when home teams are playing games away from home and telecasting them in their home territories, provides for an unreasonable and

10 Cases that cite this headnote

[13] Antitrust and Trade Regulation

Television and radio

Provision of, by-law of National Football League restricting the broadcasting by radio of outside games in home-territories on days when home teams are playing at home and on days when home teams are playing games away from home and are either televising or broadcasting them in their home territories, provides for an illegal restraint under the Sherman Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

6 Cases that cite this headnote

[14] Antitrust and Trade Regulation

Injunction

Enforcement of provision of by-law of National Football League giving Football Commissioner power to prevent all television and radio broadcasts of football games, would be enjoined to prohibit Commissioner from exercising his power to disapprove contracts for televising and radio broadcasting of football games for purpose of effecting and maintaining territorial restrictions which are illegal under the Sherman Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[15] Antitrust and Trade Regulation

Injunction

Action by the United States of America under the Sherman Act against the National Football League and football teams to enjoin enforcement of provisions of by-laws of the National Football League limiting televising and radio broadcasting of football games was not required to be dismissed because professional football is allegedly not commerce or interstate commerce, since radio and television clearly are in interstate commerce and it is immaterial whether professional football is or is not commerce or interstate commerce. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Cases that cite this headnote

Attorneys and Law Firms


Opinion

GRIM, District Judge.

Article X of the by-laws of the National Football League provides that no club shall cause or permit a game in which it is engaged to be telecast or broadcast by a station within 75 miles of another League City on the day that the home club of the other city is either playing a game in its home city or is playing away from home and broadcasting or televising its game by use of a station within 75 miles of its home city, unless permission for such broadcast or telecast is obtained from the home club. 1 The evidence is uncontradicted that it is the general policy of the clubs to refuse to permit the broadcasting or televising of ‘outside games’ 2 in their home territories and that such permission has seldom been granted. Most League games, particularly regular season games, are played on Sundays, and since the teams, when they are not playing at home, almost always either broadcast or televise their ‘away games’ 3 in their home territories, the restrictions of Article X effectively prevent ‘live’ broadcasts or telecasts 4 of practically all outside games in all the home territories.

The government has filed this action seeking an injunction against the enforcement of the provisions of Article X,
contending that they are illegal under the Sherman Act. 15 U.S.C.A. § 1 et seq., which provides:

§ 1. Every contract, combination * * * or conspiracy in restraint of trade or commerce among the several states * * is declared to be illegal * * *.

[I] The by-laws have been agreed to by all the League members and are binding upon all of them. They clearly constitute a contract within the meaning of the word as it is used in the Sherman Act. Associated Press v. United States, 326 U.S. 1, 8, 65 S.Ct. 1416, 89 L.Ed. 2013.

An analysis of the provisions of Article X and of the evidence pertaining thereto shows that Article X contains four basic provisions material to this anti-trust suit. (1) It prevents the telecasting of outside games into the home territories of other teams on days when the other teams are playing at home. (2) It prevents the telecasting of outside games into the home territories of other teams on days when the other teams are playing away from home and permitting the telecast of their games into their home territories. (3) It prevents the broadcasting by radio of outside games into the home territories of other teams both on days when the other teams are playing at home and on days when the other teams are playing away from home and are permitting the games to be broadcast or televised into their home territories. (4) It gives the Football Commissioner an unlimited power *322 to prevent any and all clubs from televising or broadcasting any or all of its or their games. Since the facts in reference to each of these provisions present somewhat different anti-trust law problems, they will be considered separately.

I.

Is the provision which prevents the telecasting of outside games into the home territories of other teams on days when the other teams are playing at home illegal?

There can be little doubt that this provision constitutes a contract in restraint of trade. The market for the public exhibition of football no longer is limited to the spectators who attend the games. Since the advent of television and radio, the visual and aural projections of football games can be marketed anywhere in the world where there are television or radio facilities to transmit and receive them. When a football team agrees to restrict the projection of its games in the home areas of other teams it thereby cuts itself off from this part of its potential market. Since the clubs of the National Football League have agreed at certain times not to project their games into the home territories of other clubs they have given that part of their market at those certain times exclusively to other teams. In return, each of them has been given the right to market its own games without competition in its own home area under the same circumstances. The purpose and effect of this is to restrict outside competition on the part of other teams in the home area of each club. This, therefore, is a clear case of allocating marketing territories among competitors, which is a practice generally held illegal under the anti-trust laws. United States v. Addyston Pipe & Steel Co., 6 Cir., 85 F. 271, affirmed 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136; United States v. Aluminum Co. of America, 2 Cir., 148 F.2d 416, 427.

[2] [3] [4] [5] [6] [7] An allocation of marketing territories for the purpose of restricting competition, however, is not always illegal. There is no simple formula ‘to displace the rule of reason by which breaches of the Sherman Law are determined. Nor is ‘division of territory’ so self-operating a category of Sherman Law violations as to dispense with analysis of the practical consequences of what on paper is a geographic division of territory.’ Timken Roller Bearing Co. v. United States, 341 U.S. 593, 605, 71 S.Ct. 971, 978, 95 L.Ed. 1199 (dissenting opinion of Justice Frankfurter).

‘The restrictions the act imposes are not mechanical or artificial. Its general phrases * * * call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis. * * * Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it.’ Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360, 53 S.Ct. 471, 474, 77 L.Ed. 825.

‘The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is
such as may suppress or even destroy competition. To
determine that question the court must ordinarily consider
the facts peculiar to the business to which the restraint is
applied; its condition before and after the restraint was
imposed; the nature of the restraint and its effect, *323
actual or probable. The history of the restraint, the evil
believed to exist, the reason for adopting the particular
remedy, the purpose or end sought to be attained, are all
relevant facts. This is not because a good intention will
save an otherwise objectionable regulation or the reverse;
but because knowledge of intent may help the court
to interpret facts and to predict consequences.’ Chicago
Board of Trade v. United States, 246 U.S. 231, 38 S.Ct.
242, 244, 62 L.Ed. 683.

[8] [9] [10] An agreement may constitute a restraint of
trade, but that does not necessarily mean that it is illegal.
To be illegal a contract must cause both a restraint of trade
and an unreasonable restraint of trade. Standard Oil Co.
of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502,
55 L.Ed. 619; United States v. American Tobacco Co., 221
U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663; Appalachian Coal,
825; United States v. Columbia Steel Co., 334 U.S. 495,
68 S.Ct. 1107, 92 L.Ed. 1533. 5

The principal question in the present case is whether the
particular restraints imposed by Article X are reasonable
or unreasonable.

Professional football is a unique type of business. Like
other professional sports which are organized on a league
basis it has problems which no other business has. The
ordinary business makes every effort to sell as much of its
product or services as it can. In the course of doing this
it may and often does put many of its competitors out of
business. The ordinary businessman is not troubled by the
knowledge that he is doing so well that his competitors are
being driven out of business.

Professional teams in a league, however, must not compete
too well with each other, in a business way. On the playing
field, of course, they must compete as hard as they can all
the time. But it is not necessary and indeed it is unwise
for all the teams to compete as hard as they can against
each other in a business way. If all the teams should
compete as hard as they can in a business way, the stronger
teams would be likely to drive the weaker ones into
financial failure. If this should happen not only would the
weaker teams fail, but eventually the whole league, both
the weaker and the stronger teams, would fail, because
without a league no team can operate profitably.

It is particularly true in the National Football League
that the teams should not compete too strongly with each
other in a business way. The evidence shows that in the
National Football League less than half the clubs over
a period of years are likely to be financially successful.
There are always teams in the League which are close to
financial failure. Under these circumstances it is both wise
and essential that rules be passed to help the weaker clubs
in their competition with the stronger ones and to keep the
League in fairly even balance.

The winning teams usually are the wealthier ones and
unless restricted by artificial rules the rich get richer and
the poor get poorer (as Commissioner *324 Bell put it). Winning teams draw larger numbers of spectators to
their games than do losing teams and from the larger gate
receipts they make greater profits than do losing teams.
With this greater wealth they can spend more money to
obtain new players, they can pay higher salaries, and
they can have better spirit among their players than can
the weaker teams. With these better and happier players
they will continue to win most of their games while the
weaker teams will continue to lose most of their games.
The weaker teams share in the prosperity of the stronger
to a certain extent, since as visiting teams they
share in the gate receipts of the stronger teams. But
in time even the most enthusiastic fans of strong home
teams will cease to be attracted to home games with
increasingly weaker visiting teams. Thus, the net effects
of allowing unrestricted business competition among the
clubs are likely to be, first, the creation of greater and
greater, inequalities in the strength of the teams; second,
the weaker teams being driven out of business; and, third,
the destruction of the entire League.

In order to try to keep its teams at approximately equal
strength and to protect weaker teams from stronger teams,
a league theoretically might use a number of devices. It
might (1) limit the bonus price which could be paid to
new players, (2) give the weaker teams a prior right over
stronger teams to draft new players, (3) prohibit the sale
of players after a certain day in the playing season, (4)
limit the number of players on each team, (5) limit the
total amount of salaries which a team can pay, (6) give
the lowest team in the league the right to draft a player
from the highest team, when and if the highest team has
won a certain number (three for instance) of consecutive
championships, and (7) reasonably restrict the projection of games by radio or television into the home territories of other teams.  

It is easy to see that the first six devices would make it easier for weaker teams to compete with stronger ones.  

The usefulness of the seventh device, however, in the protection of the weaker teams may not be so obvious, particularly since it prevents the weaker teams from televising into the home territories of the stronger teams as much as it prevents the stronger teams from telecasting into the home territories of the weaker ones. The evidence indicates that television audiences and sponsors have so little interest in games between weak teams that it is very difficult to obtain sponsors for outside telecasts of such games. Consequently, the weaker teams lose practically nothing by this television restriction. But that benefit *325 greatly from it in that the restriction adds to their home game attendance by preventing potential spectators from staying at home to watch on television exciting outside head-on games between strong teams. The competitive position of the weaker teams is improved by this increase in home attendance, while the competitive position of the stronger teams is weakened somewhat by their inability to sell to sponsors the right to televise their desirable head-on games into the home territories of the weaker teams when the weaker teams are playing at home.

A large part of defendants' evidence was directed to the question of whether the televising of a team's own home games 8 in that team's home territory has an adverse effect on attendance at these home games. The evidence on this point, particularly the evidence relating to the great decrease in home attendance of the Los Angeles Rams during the 1950 season when all its home games were televised at home, shows quite clearly that the telecasting of a home game into a home territory while the home game is being played has an adverse effect on the attendance at the game. This clearly indicates by implication that the telecast of an outside game, particularly a head-on game, also adversely affects attendance at a home game.

That the telecast of outside games into home territories adversely affects the attendance at home games is shown also by the experience of college football teams. Telecasts of games on the day they are played drastically and adversely affect gate receipts in the home area of the club where the television spectacle is shown. This is true whether the game being televised is an outside game or a home game as is shown by the National Opinion Research Center's studies. These studies are based solely upon data relating to the experience of college football with television, and because the testimony reveals some deficiencies in the methods pursued by the N.O.R.C. in making its studies and interpreting its data, its conclusions cannot be taken at full face value. However, the conclusions in these reports concerning the adverse effect of telecasts of college outside games on attendance at college home games do indicate that the telecasting of outside professional football games would have a similar adverse effect upon attendance at home games of the professional teams.

The greatest part of the defendant clubs' income is derived from the sale of tickets to games. Reasonable protection of home game attendance is essential to the very existence of the individual clubs, without which there can be no League and no professional football as we know it today.

This is not a case of one industry fighting the competition of another, as for instance coal fighting the competition of oil, or railroads fighting the competition of trucks, or moving pictures fighting the competition of television. Football provides a magnificent spectacle for television programs and television provides an excellent outlet and market for football. They both can use and indeed need each other. By working together intelligently each will be an important adjunct to the other. The objective of the clubs in agreeing to a television blackout of the home territory (except for the remote possibility of a home game telecast) during the day a home game is played is not to restrain competition among the individual clubs in the sale of television rights or competition among television stations and networks and advertisers and advertising agencies in the purchase of such rights. This particular restriction promotes competition more than it restrains it in that its immediate effect is to protect the weak teams and its ultimate effect is to preserve the League itself. By thus preserving professional football this restriction makes possible competition in the sale and purchase of television rights in *326 situations in which the restriction does not apply.

[11] The purposes of the Sherman Act certainly will not be served by prohibiting the defendant clubs, particularly the weaker clubs, from protecting their home gate receipts from the disastrous financial effects of invading telecasts of outside games. The member clubs of the National Football League, like those of any professional athletic league, can exist only as long as the league exists. The
League is truly a unique business enterprise, which is entitled to protect its very existency by agreeing to reasonable restrictions on its member clubs. The first type of restriction imposed by Article X is a reasonable one and a legal restraint of trade.

Is the restriction on telecasting outside games in home territories when the home teams are playing away games and telecasting them in their home territories illegal?

The reasonableness of this particular restriction must also be tested by its effect on the attendance and gate receipts of a team's home games. It is obvious that on a day when the home team is playing an away game there is no gate attendance to be harmed back in its home area and the prohibition of outside telecasts within its home area cannot serve to protect gate attendance at the away game, which is played in the opponent's home territory.

Several of defendants' witnesses attempted to justify the restriction with the opinion that it is necessary in this situation to protect the home team's 'good will' by which they meant that the restriction is necessary to protect the home team from loss in gate receipts at subsequent home games. However, there is not one shred of evidence, not one specific example based on actual experience, to support this opinion which, more accurately stated, is nothing more than conjecture.

It is probably true, though not proved by the evidence, that the simultaneous telecasting of an outside game and an away game in the home area of the team playing away would result in a division of the television audience between the two games. Obviously the existence or the prospect of such competition would make the television rights to the home club's away games less attractive to sponsors and consequently less profitable to the club. But this does not concern attendance at football games. Indeed, the testimony of defendants' witnesses consistently indicates that the primary reason for the restrictions in this situation actually is to enable the clubs in the home territories to sell monopoly rights to purchasers of television rights to away games.

III.

Is the restriction of the broadcasting by radio of outside games in home territories on days when the home teams are playing at home and on days when the home teams are playing away games and are either televising or broadcasting them in their home territories illegal?

There is no evidence whatsoever indicating any adverse effect of radio broadcasts of outside games in the home territory of another club. Since each of the defendant clubs permits the broadcasting in its home area of all of its own games (both away games and home games), it is apparent that none of them feels that such broadcasts have any significant adverse effect on gate attendance at their own games. Indeed, the evidence indicates that broadcasts of outside games when there is no home game have a stimulating effect on attendance at home games because of the interest thereby created in professional football generally. Granting monopoly rights to broadcasts of away games (that is, the right to broadcast away games in the home territory coupled with the suppression of competition from ‘outside’ broadcasts or telecasts) enhances the value of such rights to purchasers, but has no significant effect on attendance at football games. There is no factual justification for Article X's territorial restrictions on the sale of radio broadcasting rights. Therefore, they are illegal under the Sherman Act.

IV.

Is the power of the Football Commissioner to prevent all television and radio broadcasts of games illegal?

The fourth type of restriction imposed by Article X appears in the section which provides as follows:

Section 1. Any contract entered into by any club for telecasting or broadcasting its games shall be subject to the conditions that:

(a) The sponsor, the contract itself and the broadcasters who telecast or broadcast such games must have the
written approval of the Commissioner of the National Football League.’

[14] The decision of the Commissioner in approving or disapproving contracts for the sale of radio and television rights is final, binding, conclusive and unappealable. Thus this section gives the League Commissioner, an employee of the League, unlimited and arbitrary power to prevent the broadcasting and televising of any and every game. He need assign no reason for his action. By virtue of his power to disapprove any and all contracts for the sale of radio and television rights he has the power to set up and enforce the very same restrictions hereinbefore held to be illegal. Therefore, it is apparent that the Commissioner must be prohibited from exercising his veto power over contracts for the purpose of maintaining and enforcing these illegal territorial restrictions. Unless his power is limited in this manner, it would be a futile act for the Court to enjoin these illegal restraints. Accordingly, the enforcement of Section 1(a) of Article X will be enjoined in such a way that the Commissioner will be prohibited from exercising his power to disapprove contracts for the purpose of effecting and maintaining the territorial restrictions hereinbefore held to be illegal.

[15] Defendants contend that the action against them must be dismissed because professional football is not commerce or interstate commerce. This contention must be rejected. Radio and television clearly are in interstate commerce. Lorain Journal Co. v. United States, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162; Allen B. Dumont Laboratories v. Carroll, 3 Cir., 184 F.2d 153. The restrictions by professional football on the sale of radio and television rights impose substantial restraints on the television and radio industry. Since the *328 League by-laws restrict substantially something which is in interstate commerce it is immaterial whether professional football by itself is commerce or interstate commerce. Mandeville Island Farms v. Crystal Sugar Co., 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328; United States v. Frankfort Distilleries, 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951; United States v. Crescent Amusement Co., 323 U.S. 173, 183, 65 S.Ct. 254, 89 L.Ed. 160. On this problem the Supreme Court has said in United States v. Women's Sportswear Ass'n, 336 U.S. 460, at page 464, 69 S.Ct. 714, at page 716,93 L.Ed. 805:

‘The trial court appears to have dismissed the case chiefly on the ground that the accused Association and its members were not themselves engaged in interstate commerce. This may or may not be the nature of their operation considered alone, but it does not matter. Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.’

I am not unmindful of the decisions of the Supreme Court in Federal Base Ball Club v. National League, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898, and in the very recent cases, decided November 9, 1953, of Toolson v. New York Yankees, Inc., (Kowalski v. Chandler, and Corbett v. Chandler,) 73 S.Ct. 78. In those baseball ‘reserve clause’ cases the Court dismissed anti-trust suits against the major professional baseball leagues on the theory that big-league baseball is a sport, local in its nature, and not interstate commerce. The only restriction alleged in the baseball cases was in the internal operation of professional baseball itself. The only question involved in those cases was whether professional baseball itself is interstate commerce. No question of restrictions on the sale of radio and television rights was involved in those cases. The present case, on the other hand, primarily concerns restrictions imposed by the National Football League on the sale of radio and television rights. Therefore, the present case basically concerns the League's restraint of interstate commerce in the radio and television industries. It is obvious that whether professional football itself is or is not engaged in interstate commerce is immaterial in the present case and that the decisions in the baseball cases referred to do not control the present case.

V.

Findings of Fact.

Article X of the by-laws of the National Football League (as in force since 1951) provides:

‘Section 1. Any contract entered into by any club for telecasting or broadcasting its games shall be subject to the conditions that:

‘(a) The sponsor, the contract itself and the broadcasters who telecast or broadcast such games must have the written approval of the Commissioner of the National Football League;
(b) Any broadcaster may be removed by the Commissioner for conduct considered by the Commissioner as detrimental to the National Football League or professional football;

(c) The Constitution and By-Laws of the National Football League as the same may be from time to time amended, shall be a part of said contract.

Section 2.

(a) Subject to the limitations herein set forth, teams participating in any game, are authorized to telecast and broadcast the same;

(b) No club shall cause or permit a game in which it is engaged, to be telecast or broadcast into any area included within the home territory of any other club, without the consent of such other club, on the day that such other club is:

(i) Engaged in playing a game at home or

(ii) Engaged in playing a game away from home, and causing or permitting telecast or broadcast of that game within its home territory.

(iii) No club shall telecast in territory in which said game is played without the consent of the home club, the visiting club, and the Commissioner of the National Football League.

(c) Notwithstanding the foregoing restriction:

(i) Either club in Chicago may in Chicago permit or cause broadcasting (but not telecasting) of its own games without limitation;

(ii) Either club in New York may in New York permit or cause broadcasting (but not telecasting) of its own games without limitation.

(d) No club shall accept or receive compensation of any kind whatever as consideration for a grant of the consent referred to in subsection (b) hereof.

Section 3. Each League club hereby grants to each other League club, when such other club is the visiting club, the right to telecast and broadcast games in which the visiting club participates, from a station or stations within the home territory of such visiting club.

Section 4. The sale of radio and television and film rights for the World Championship Game between the winners of the American Conference and the National Conference shall be under the sole jurisdiction of the Commissioner except that:

(a) The home club may broadcast on a non-exclusive basis by radio locally only, within the home territory of said club, provided said club pays into the player pool a sum equal to one-twelfth (1/12) of the total amount paid for the radio and television rights of that club for that season and the Commissioner approves the sponsor, and broadcasters;

(b) The visiting club may telecast and broadcast on a nonexclusive basis within the home territory of said club, provided said club pays into the player pool a sum equal to one-twelfth (1/12) of the total amount paid for the radio and television rights of said club for that season and the Commissioner approves the sponsor and broadcasters.

Section 5. Each club when playing at home shall provide adequate space for use of the visiting club in telecasting or broadcasting each game, if the visiting club shall so request.

Section 6. The player grants to the club controlling his contract and to the National Football League severally and jointly the privilege and authority to use his name and/or picture for publicity and/or advertising purposes in newspapers, magazines, motion pictures, game programs and annual roster manuals, radio material, television telecast, and all other publicity and/or advertising mediums providing such publicity and/or advertising does not in itself constitute an endorsement by that individual player of a commercial product.’

The statements of fact contained in the opinion will constitute the Court's findings of fact in the case.

The following of plaintiff's requests for findings of fact are affirmed and adopted as the Court's additional findings of fact in the case: Nos. 1 to 5, inclusive; No. 6, except for the first sentence; Nos. 7 to 17, inclusive; No. 18, except for that part of the first sentence following ‘In 1951’; No. 19, except for the first sentence which is ambiguous; Nos. 20 to 25, inclusive, Nos. 27 to 35, inclusive.

*330 All the other requests by plaintiff for findings of fact are denied.
The following of defendants' requests for findings of fact are affirmed and adopted as the Court's additional findings of fact in the case: No. 1; Nos. 3 to 9, inclusive; Nos. 13 and 14; No. 21, but with 'appropriate' underlined; No. 46, with the reservation that it does not state all the purposes of Article X, Nos. 47 to 50, inclusive; No. 53, except for the last sentence; and No. 55.

All the other requests by defendants for findings of fact are denied.

VI.

Conclusions of Law.

The statements of law contained in the Opinion will constitute the Court's conclusions of law in the case.

The following of plaintiff's requests for conclusions of law are affirmed and adopted as the Court's additional conclusions of law in the case: Nos. 1 and 5. The others are denied.

The following of defendants' requests for conclusions of law are affirmed and adopted as the Court's additional conclusions of law in the case: Nos. 1, 4, 10, 14 and 18.

All the other requests by defendants for conclusions of law are denied (No. 13 for being ambiguous).

If there are any inconsistencies between the requests which have been affirmed and adopted and the findings of fact and conclusions of law appearing in the Opinion, those contained in the Opinion shall govern.

VII.

Accordingly, a decree may be entered dismissing plaintiff's claim for injunctive relief with respect to Article X's restriction on the telecast of outside games into a club's home territory when that club is playing at home, and enjoining the following illegal activities authorized by Article X:

1. The restriction of the sale of rights for the telecasting of outside games in club's home territory on a day when the home club is permitting the telecast of its away game in its home territory; (2) All territorial restrictions on the sale of radio broadcasting rights; and (3) The exercise of the Commissioner's power under Article X to disapprove contracts for the purpose of effecting the same two types of illegal restrictions mentioned in this paragraph.

Each side will submit a proposed decree within thirty days of the filing of this Opinion.

All Citations

116 F.Supp. 319

Footnotes

1 The following special provisions create exceptions to the general 75-mile rule: In the case of the Green Bay Packers the home territory includes all of Milwaukee County, which covers an area more than 75 miles from Green Bay. When League cities are within 100 miles of each other the territorial right of each extends to half the distance between the cities (e.g., New York and Philadelphia; Washington and Baltimore). Either club in Chicago (Cardinals or Bears) may permit broadcasting (but not telecasting) of its own games in Chicago without limitation.

2 An 'outside game' is a game which is played outside the home territory of a particular home club and in which that home club is not a participant.

3 An 'away game' is a game played by a particular home club outside of its own home territory.

4 'Live' telecasts are telecasts made simultaneously with the playing of the game as contrasted with movies of the game telecast subsequent to the playing of the game. 'Live' broadcasts are radio broadcasts made simultaneously with the playing of the game as contrasted with sound recordings or transcriptions broadcast after the game has been played.

5 At this late date in anti-trust law history it is not necessary to discuss the reason why a restraint of trade is illegal only if it is unreasonable. It is sufficient to say that if restraints are reasonable by common law standards they are legal under the Sherman Act. Justice Stone put it this way in Apex Hosiery Co. v. Leader, 310 U.S. 469, at page 498, 60 S.Ct. 982, at page 995, 84 L.Ed. 1311: 'This Court has * * * repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms, are only those which are comparable to restraints deemed illegal at common law'. Although there is much state common law on the subject of which restraints of trade are reasonable, (See Restatement, Contracts, Secs. 513 to 519) under the federal anti-trust statutes federal rather than state decisions are controlling. Compare Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, with Sola Electric Co. v. Jefferson Co., 317 U.S. 173, 176, 63 S.Ct. 172, 87 L.Ed. 165.
These devices may be necessary to protect teams in comparatively small cities in their competition with teams in larger cities, because of the advantage which the larger population areas give to teams in the larger cities. The history of professional football does not show this, but its history on a sound basis is so short (the ruinous competition with the All-America Conference ended only in 1951) that it is not very illuminating. The experience of professional baseball, however, is illuminating on this point. The professional baseball team which has the only American League franchise in the New York area, the New York Yankees, has dominated professional baseball so much in the last thirty years that most of the other teams no longer have any real hope of winning a championship. This is harmful to professional baseball generally. Certainly it is not merely a coincidence that the professional baseball team which draws from a population area twice as large as its nearest competitor wins almost all the championships.

It should be made clear that the discussion relating to the first six protective devices and the note thereto is not based on evidence in the case and does not concern matters about which judicial notice can be taken. It is included for the purpose of pointing up professional football's very serious problem of maintaining a league of teams fairly equal in player strength and with a reasonable chance of operating at a profit. It provides a theoretical basis for an analysis of the seventh device, which, of course, is the subject matter of this case.

There is no restriction on the right of each club to permit the telecast or broadcast of its own home games into its home territory.

This restriction, like the first and third restrictions, constitutes an allocation of marketing territories.

It is undoubtedly true, though again not proved by the evidence, that the telecasting of an outside game in a home territory would attract listeners from the broadcast of the home club's away game and thus make the broadcast rights to the away game less valuable to sponsors and the club.

‘Monopoly rights’ in this context may be defined as the right granted to a purchaser to be not only the exclusive telecaster of away game in the home team's territory, but also the right to be the only telecaster of any League game, regardless of the participants, on days when the away games are being played and televised back into the home territory.

The Government contends that an agreement which allocates marketing territories is a violation per se of the Sherman Act. With this contention I disagree. However, such an agreement, in my opinion, is prima facie a violation of the Act and it puts upon the defendants the burden of sustaining by evidence the reasonableness of the restraint of trade.
Defendants have filed a petition seeking a construction of the final judgment entered in this case on December 28, 1953, to the effect that a contract dated April 24, 1961, between the National Football League and the Columbia Broadcasting System does not violate the final judgment. The government contends that the contract does violate the judgment. The 1961 contract grants to CBS for a period of two years the sole and exclusive right to televise all league games, with certain exceptions, and which gave broadcasting system the sole right to determine which games shall be telecast and where televised, violated judgment.

Order accordingly.

West Headnotes (1)

[1] Antitrust and Trade Regulation  
Damages and Other Relief

Contract between professional football league and broadcasting system which gave broadcasting system sole right to televise all league games, with certain exceptions, and which gave system sole right to determine which games shall be telecast and where such games shall be televised, violated final judgment which prohibited defendant league and clubs from making any agreement with league or member club having purpose or effect of restricting areas within which broadcasts or telecasts of games may be made. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

12 Cases that cite this headnote

Attorneys and Law Firms


Opinion

GRIM, District Judge.

The government originally commenced this action by filing a complaint on October 9, 1951, charging that the defendant clubs of the National Football League, and the League itself, combined and conspired to violate the Sherman Anti-Trust Act, 15 U.S.C.A. § 1 et seq. After trial, the court filed an opinion dated November 12, 1953, D.C., 116 F.Supp. 319, finding that certain League by-laws did and certain by-laws did not violate the
Sherman Act. A judgment was entered accordingly. It is this judgment that defendants seek to have construed.

Defendants concede that the 1961 NFL-CBS contract marks a basic change in National Football League television policy. Prior to this contract each member club individually negotiated and sold the television rights to its games to sponsors or telecasters with whom it could make satisfactory contracts. The NFL-CBS contract sharply departs from this practice. It is implicit in the 1961 *447 contract that the member clubs have agreed among themselves and with the League that each club will not sell its television rights separate and apart from those of the other clubs, but that each club will pool its television rights with those of all of the other clubs, and that only the resulting package of pooled television rights will be sold to a purchaser. The clubs authorized the Commissioner of the League to sell this package of pooled television rights, and under the provisions of the 1961 contract with CBS he sold it. Thus, by agreement, the member clubs of the League have eliminated competition among themselves in the sale of television rights to their games.

Section V of the Final Judgment enjoins 3 the defendants from making any agreement with the League or any member club.

‘* * * having the purpose or effect of restricting the areas within which broadcasts or telecasts of games * * * may be made * * *’

As defendants state in their petition for construction: 4

‘Said contract provides that the network (CBS) shall have the right to determine, entirely within its own discretion without consulting the Commissioner or any club of the League which games shall be telecast and where such games be televised * * *’

Clearly this provision restricts the individual clubs from determining ‘the areas within which * * * telecasts of games * * * may be made * * *,’ since defendants have by their contract given to CBS the power to determine which games shall be telecast and where the games shall be televised. I am therefore obliged to construe the Final Judgment as prohibiting the execution and performance of the contract dated April 24, 1961, between the National Football League and the Columbia Broadcasting System.

The government may submit an order in accordance with this opinion construing the final judgment and/or ruling on the petition to restore the status quo ante.

All Citations

196 F.Supp. 445

Footnotes

1 In accordance with Section XIII of the Final Judgment, retaining jurisdiction to enable parties to apply ‘for such further orders and directions as may be necessary or appropriate for the construction * * * of any of the provisions of this Final Judgment * * *’

2 Not included are (1) the rights to televise the World’s Championship Professional Football Game between the winners of the championship of each division of the League and (2) a small number of certain other post-season and pre-season games, the net proceeds of which are allocated to the participating players, the League’s Player Pension Fund or to charity. Generally speaking, the contract permits CBS to decide which games shall be telecast.

3 With provisos not pertinent here.

4 While the contract does not appear in the record, this part of the contract and this construction of it is not disputed by the parties. Nor is there a dispute as to the other provisions of the contract mentioned in this opinion.

5 There were certain limiting restrictions, not pertinent here, such as that no games should be telecast in the home territory of a club without the consent of such clubs, when such clubs were playing at home.

Defendant’s Motion in Limine to Exclude Taurus Audio Recordings
Case No. 2:15-cv-03462 RGK-AGR

Michael Skidmore, etc.,
Plaintiff,
vs.
LED Zeppelin, et al.,
Defendants.

Defendants’ Notice of Motion and Motion in Limine No. 3 to Exclude Taurus Audio Recordings; Memorandum of Points and Authorities in Support

Date: May 10, 2016
Time: 9:00 a.m.

Courtroom of the Honorable R. Gary Klausner
United States District Judge
TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 10, 2016, at 9:00 a.m. or as soon thereafter as the matter may be heard in Courtroom 850 of the above-entitled District Court, located at 255 East Temple Street, Los Angeles, California, defendants James Patrick Page, Robert Anthony Plant, John Paul Jones, Warner/Chappell Music, Inc., Super Hype Publishing, Inc., Atlantic Recording Corporation, Rhino Entertainment Company and Warner Music Group Inc., will move the above-entitled Court, the Honorable R. Gary Klausner, United States District Judge presiding, for an Order excluding all evidence and argument as to audio recordings of Spirit performing the musical composition Taurus and all other audio recordings of that musical composition other than audio recordings strictly limited to the performance of the 1967 Taurus transcription deposited with the Copyright Office in the 1967 registration of the copyright on which plaintiff sues.

This Motion is brought on the grounds that, as stated more fully in the accompanying Memorandum of Points and Authorities, plaintiff sues upon a copyright in the 1967 transcription of the musical composition Taurus and, as a result, recordings of Taurus performed differently than, or with additional music beyond, the 1967 transcription are irrelevant and are likely to unfairly prejudice defendants, confuse the issues, mislead the jury, delay the trial and waste trial time.

This Motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities filed with this Notice of Motion and Motion, the pleadings and papers on file in this action, the matters of which this Court may take judicial notice, and such additional matters and oral argument as may be offered in support of the Motion.

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The Motions are made following the conference with plaintiff's counsel pursuant to Local Rule 7-3, which took place on March 22, 2016.

Dated: March 25, 2016

/s/ Peter J. Anderson
Peter J. Anderson, Esq.
LAW OFFICES OF PETER J. ANDERSON
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JAMES PATRICK PAGE, ROBERT
ANTHONY PLANT, JOHN PAUL JONES,
WARNER/CHAPPELL MUSIC, INC.,
SUPER HYPE PUBLISHING, INC.,
ATLANTIC RECORDING CORP., RHINO
ENTERTAINMENT COMPANY and
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Helene M. Freeman, Esq.
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Attorney for Defendants
JAMES PATRICK PAGE,
ROBERT ANTHONY PLANT and
JOHN PAUL JONES
MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

Plaintiff sues for the alleged infringement of a copyright that protects only the musical composition *Taurus* as embodied in the 1967 transcription that was deposited with the Copyright Office when the copyright was registered forty-nine years ago. Plaintiff, however, has never produced that 1967 transcription. Defendants did obtain from the Library of Congress a page of sheet music that might be the 1967 *Taurus* transcription — although it does not bear the official stamp appearing on other deposit copies — and provided recordings of a piano and a guitar playing *Taurus* as it appears on the 1967 transcription.

Plaintiff, however, intends to present at trial recordings of Spirit’s performances of *Taurus* and new recordings prepared by plaintiff or his claimed experts, and which recordings plaintiff concedes include material and elements that are not in the 1967 transcription and, as a result, are not protected by the only copyright on which plaintiff sues. Plaintiff intends to do so even though it is established law that those additional materials and elements must be disregarded in comparing *Taurus* and *Stairway to Heaven*.

The recordings of *Taurus* are not relevant and would unfairly prejudice defendants, confuse the issues, mislead the jury, delay the trial and waste trial time. *Taurus* recordings other than recordings strictly limited to the 1967 *Taurus* transcription, should be excluded.

2. RECORDINGS OF *TAURUS* ARE PROPERLY EXCLUDED

(a) Recordings of *Taurus* Are Irrelevant in this Action for Alleged Infringement of a Copyright in the 1967 Transcription of *Taurus*

Plaintiff sues on the copyright in the musical composition *Taurus* registered by Hollenbeck Music ("Hollenbeck") in 1967 under the Copyright Act of 1909. Under the 1909 Act, copyright could arise in only two ways. First, copyright arose if copies were publicly distributed with the required copyright notice. *Twin Books*
Corp. v. Walt Disney Co., 83 F.3d 1162, 1165 (9th Cir. 1996). Second, a copyright could be registered with the Copyright Office along with the mandatory “deposit, with claim of copyright, of one complete copy of such work if it be a . . . musical, or dramatico-musical composition; . . .” 17 U.S.C. §§ 11-12 (repealed).

However, a recording of the performance of a musical composition was not a “copy” of the musical composition. ABKCO Music, Inc. v. LaVere, 217 F.3d 684, 688-89 (9th Cir. 2000), cert. denied 531 U.S. 1051 (2000); Rosette v. Rainbo Record Mfg. Corp., 354 F. Supp. 1183, 1192 n. 8 (S.D.N.Y. 1973) (under the 1909 Act “[a] phonograph record is not a copy of the musical composition itself”), aff’d, 546 F.2d 461 (2d Cir. 1976); 17 U.S.C § 303(b). “Because, under the 1909 Act, copyright protection required . . . the deposit of copies . . . , to claim copyright in a musical work under the 1909 Act, the work had to be reduced to sheet music or other manuscript form.” 2 M. Nimmer & D. Nimmer, Nimmer on Copyright § 2.05[A] (emphasis in original).

Further, musical compositions and recordings are separate works. Newton v. Diamond, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002), aff’d 388 F.3d 1189, cert. denied 545 U.S. 1114 (2005). “A musical composition consists of rhythm, harmony, and melody, and . . . [a] musical composition’s copyright protects the generic sound that would necessarily result from any performance of the piece.” Id. In contrast, “the sound recording is the sound produced by the performer’s rendition of the musical work.” Id. at 1249-50. Unless they appear in the musical composition’s transcription, performance elements are not protected by the composition copyright. Id. at 1250-51. Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004) (in considering claim of copying of musical composition, one “may consider only . . . appropriation of the song’s compositional elements and must remove from consideration all the elements unique to [the recorded] performance”), cert. denied 545 U.S. 1114 (2005).

Anything beyond the copyrighted 1967 *Taurus* transcription, including in recordings of *Taurus*, is irrelevant to what is protected by the copyright that plaintiff sues upon. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994) ("only those elements of a work that are protectable and used without the author’s permission can be compared when it comes to the ultimate question of illicit copying, ....") , cert. denied 513 U.S. 1184 (1995).

Accordingly, recordings of Spirit performing *Taurus*, as well as any other recordings that are not strictly limited to the 1967 transcription, are irrelevant and should be excluded.
(b) **Taurus Recordings that Are Different from the Copyrighted 1967 Transcription Would Confuse Issues, Mislead the Jury, Unfairly Prejudice Defendants, Delay the Trial and Waste Trial Time**

Recordings of *Taurus* that are different from the 1967 *Taurus* transcription also are properly excluded because any “probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, . . . .” Fed. R. Evid. 403; *United States v. McFall*, 558 F.3d 951, 963-64 (9th Cir. 2009) (Rule 403 balancing test requires the assessment of probative value in order to weigh it against the danger of undue prejudice).

Recordings of *Taurus* that are different from the 1967 *Taurus* transcription have no probative value because they are not copies of the 1967 musical composition and do not evidence the scope of the musical composition that plaintiff sues upon. *See, above* at 3-4. Further, the use of those *Taurus* recordings would be substantially prejudicial.

Plaintiff concedes that the recordings of Spirit’s performances of *Taurus* contain additional material and elements that are not on the 1967 *Taurus* transcription that defendants obtained. *See, e.g., Pltf’s Oppn. (Doc. 126)* at 18:13-15 (“The deposit copy of Taurus does not reflect the entirety of the musical composition in a work, which is instead reflected by the composition of Taurus embodied in the 49-year old sound recording”). Plaintiff also intends to offer new recordings of its claimed experts’ performances of *Taurus* replicating Spirit’s

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1 As a matter of established law, plaintiff is flatly wrong that the copyrighted *Taurus* musical composition is established by the 1967 Spirit recording. The 1967 recording of Spirit’s performance is neither a “copy” of the musical composition (*see, above* at 4) nor even a copyrighted work. *Dowling*, 473 U.S. at 211. Plaintiff sues only on the copyright in the 1967 *Taurus* transcription, which is limited to that transcription. *Williams*, 2014 WL 7877773, at *9-10 (“the lead sheets are deemed to define the scope of [the 1909 Act] copyrighted compositions”).
performances, rather than the 1967 *Taurus* transcription. But, in comparing *Taurus* and *Stairway to Heaven* the jury must disregard the additional material and elements appearing in those recordings and consider only the copyrighted musical composition as memorialized in the 1967 *Taurus* transcription. That they can do by resort to the recordings defendants provided of *Taurus* as it appears on the 1967 transcription.

To instead allow plaintiff to use recordings that differ from the 1967 *Taurus* transcription would require that the jury identify the material and elements that are not in the 1967 transcription and – while listening to the Spirit recording or plaintiff’s new recordings based on the Spirit recording – disregard those materials and elements. That alone is either impossible or rife with risk the jury will be confused as to the issues or misled as to what is protected and what is not. And it is even worse: the jury would then be required – again while listening to those recordings – to determine whether, without the recordings’ materials and elements, there is substantial similarity between the 1967 transcription and *Stairway to Heaven*. It is no wonder that Courts have refused to allow the use of recordings where, as here, the only copyrighted work is a transcribed musical composition. *Fahmy*, 2015 WL 5680299, at *14 (given that plaintiff’s copyright limited to transcription and he does not own copyright in sound recordings, “[p]resenting the sound recordings at trial carries a significant risk of confusing and misleading the jury”; motion in limine granted).

Accordingly, recordings of Spirit’s performances of *Taurus* are also properly excluded under Rule 403.

3. **CONCLUSION**

Plaintiff sues on the copyright in a 1967 musical composition and that copyright is limited to the 1967 *Taurus* transcription which is different from the recordings of *Taurus* that plaintiff seeks to use at trial. Those recordings do not

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increase, change or establish the scope of protection accorded the copyright in the 1967 *Taurus* transcription and, as a result, are irrelevant.

Also, their use at trial would unfairly prejudice defendants, confuse the issues and scope of the allegedly-infringed copyright, mislead the jury as to what is protected by the claimed copyright in the 1967 *Taurus* musical composition, unduly delay the trial and waste trial time. Evidence and argument as to recordings of Spirit performing *Taurus* or plaintiff's experts performing *Taurus* as Spirit performed it, should be excluded.

Dated: March 25, 2016

/s/ Peter J. Anderson
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Defendants' Reply Memorandum in Support of Motion to Exclude Taurus Sound Recordings
LITIGATION UPDATE 000336

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHAEL SKIDMORE, etc.,
Plaintiff,

vs.

LED ZEPPELIN, et al.,
Defendants.

Case No. 2:15-cv-03462 RGK (AGRx)
DEFENDANTS’ REPLY IN SUPPORT OF MOTION IN LIMINE NO. 3 TO EXCLUDE TAURUS AUDIO RECORDINGS

Date: May 10, 2016
Time: 9:00 a.m.

Courtroom of the Honorable
R. Gary Klausner
United States District Judge

LITIGATION UPDATE 000336
REPLY MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

Plaintiff, realizing his copyrighted work simply does not sound like *Stairway to Heaven*, seeks to confuse the jury by playing sound recordings he thinks are similar even though he has no copyright in those sound recordings, they are not the works in issue and they are very different from the copyrighted 1967 transcription of *Taurus*. As discussed more fully below, each of his arguments fails.

Plaintiff’s argument that sound recordings of a 1909 Act composition are properly used for the substantial similarity analysis directly conflicts with the Court’s ruling on defendants’ summary judgment motion and misstates the ruling in the *Blurred Lines* case that plaintiff relies upon. His argument that pre-Hollenbeck Music recordings are relevant to prove the *Taurus* composition is not a work for hire is mooted by defendants’ decision – which plaintiff ignores – not to pursue the work-for-hire issue. And, plaintiff’s argument that *Taurus* recordings are relevant to access and other issues merely substitutes a euphemism – “sonic landscape” – for the unprotectable performance elements that do not appear in the 1967 transcription but which he desperately wants the jury to hear.

The *Taurus* recordings plaintiff seeks to play – pre-Hollenbeck recordings, the Ode Records release, bootleg recordings and new recordings plaintiff created to highlight the claimed similarities in performance elements – are very different from the copyrighted 1967 composition, are not relevant and would confuse the issues, gravely mislead the jury and present them with the impossible task of ignoring the elements that the law mandates be disregarded. The only *Taurus* recordings properly presented to the jury are those that are strictly limited to the *Taurus* musical composition as transcribed in the copyrighted 1967 transcription.\(^1\)

\(^1\) On February 25, 2016, defendants submitted a piano and a guitar recording of the *Taurus* composition as transcribed and copyrighted (L. Ferrara Audio Exh. 2, track 1, & Mathis Audio Exh. 3 (Doc. 97-15) and plaintiff concedes they are correct recordings of *Taurus* as transcribed and copyrighted in 1967.
2. **RECORDINGS OF TAUROS ARE PROPERLY EXCLUDED**

(a) **The Only Relevant Copyrighted Work Is the Taurus Composition as Transcribed in the 1967 Transcription**

1. The *Taurus* Recordings Are Not Relevant to the Substantial Similarity Comparison

1. Plaintiff Ignores the Court’s Ruling that His Only Copyright Claim Lies in the 1967 Transcription, Not the Sound Recordings

Plaintiff is flatly wrong when he argues that the *Taurus* recordings he seeks to play are properly compared to *Stairway to Heaven* in determining whether there is substantial similarity. Pltf’s Oppn. (Doc. 169) at 1-4.

Before plaintiff filed his opposition, the Court confirmed that “Plaintiff’s only copyright lies in the musical composition of *Taurus*, not the sound recording” and that, “[b]y analyzing performance elements in the sound recording of *Taurus*, Plaintiff’s experts improperly considered features beyond the scope of the musical composition . . . .” Order (159) at 17. Yet, plaintiff’s opposition treats those rulings as if they do not exist.

Plaintiff asserts defendants have cited no cases establishing that it is improper to compare recordings of a 1909 Act composition with the defendant’s work to prove substantial similarity. Pltf’s Oppn. at 2:18-22. That, however, is the inexorable conclusion from unassailable precedent defendants cited, that a 1909 Act composition copyright is limited to the deposit copy transcription. Defs’ Mtn. in Limine No. 3 (Doc. 136) at 3-5.

The Court has confirmed that plaintiff has no rights in the *Taurus* sound recordings and sues on a copyright limited to the 1967 transcription of the *Taurus* musical composition. Order (159) at 16-17. It is well-established that “only those elements of a work that are protectable and used without the author’s permission can be compared when it comes to the ultimate question of illicit copying, . . . .” Apple
Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1443 (9th Cir. 1994), cert. denied 513 U.S. 1184 (1995). Since any elements of the copyrighted Taurus musical composition protected by copyright are only those set forth in the 1967 Taurus transcription, only that transcription – or an audio recording strictly limited to it – is lawfully compared to Stairway to Heaven.

**ii. Plaintiff Misstates the Blurred Lines Ruling, Which Granted a Motion in Limine to Exclude Sound Recordings**

Plaintiff advises the Court that in the Blurred Lines case, Pharell Williams v. Bridgeport Music, the District Judge denied a motion in limine to exclude sound recordings of performances of the 1909 Act composition. Pltf’s Oppn. at 2:23 to 3:2. Plaintiff confuses different motions in that case and is incorrect: the District Judge granted the motion in limine to exclude the sound recordings, limiting the parties to approved recordings strictly limited to the deposit copy. The post-trial issue that plaintiff refers to was whether the expert had nevertheless gone beyond the compositional elements.

Accordingly, the District Judge’s exclusion of recordings of the 1909 Act composition, beyond recordings prepared for trial and limited to the transcription of that composition, supports defendants’ motion here.

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2 In that action for declaratory relief of no infringement with a counterclaim for infringement, the parties are inverted from the normal case. Order 2:13-cv-06004-JAK-AGR (Doc. 226) (January 26, 2015) at 1:

“No. 1: to Exclude Evidence of Marvin Gaye Sound Recordings (Dkt. 165): GRANTED; provided, however, Defendants [effectively the plaintiffs] may present modified versions of the sound recordings to Plaintiffs [effectively defendants] for their review and consideration with any remaining dispute to be determined by the Court, and provided, further, that this ruling does not preclude Defendants’ experts [effectively plaintiff’s experts] from relying on such recordings as a basis for elements of their opinions, as appropriate, with the Court to address such issues upon a proffer by Defendants [effectively plaintiffs] as to such opinion testimony.”
iii. Plaintiff’s Experts Did Not In Fact Opine as to the 1967 Transcription of Taurus

Remarkably, plaintiff advises the Court – and submits two of his experts’ declarations stating – that his experts analyzed the 1967 Taurus transcription and opined as to it. Pltf’s Oppn. at 3:7-8 (“Plaintiff’s experts do indeed opine that all pertinent elements of Taurus are represented on the deposit copy and that those protected elements appear in the Taurus sound recording”); Johnson Decl. (Exh. 175) at 1:17-19; Stewart Decl. (169-1) at 1, ¶ 8. That is patently false.³

None of plaintiff’s February 10, 2016 initial Rule 26(a)(2) reports even mention the deposit copies. Anderson Decl. at 10, ¶¶ 3-4, & Defs’ Mtn. in Limine No. 4 (Doc. 137) at Exh. 1-4; Fed. C. Civ. P. 26(a)(2)(B) (expert disclosures must state what was relied upon). Instead, they purported to analyze and compare only recordings of Taurus to Stairway to Heaven. Plaintiff has the burden of proving substantial similarity in protected expression between the copyrighted 1967 Taurus transcription and Stairway to Heaven. Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996). Yet, plaintiff’s initial reports ignored the 1967 transcription.

While it would have been improper for plaintiff to use rebuttal reports to disclose expert reports on an issue he bears the burden of proving, he did not even do that: plaintiff served no rebuttal reports at all. Anderson Decl. at 10, ¶ 5. And while it also would have been improper for plaintiff, in the guise of correcting or supplementing reports under Federal Rule of Civil Procedure 26(e)(2), to provide the reports he should have provided on February 10, 2016, he also did not do that. Anderson Decl. at 10, ¶ 6.

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³ Further, that elements of the copyrighted 1967 Taurus transcription “appear in the Taurus sound recording” does not change that the sound recordings are very different from the copyrighted transcription and contain material that is not protected and which the law requires be separated out and disregarded, a task a jury is, to put it mildly, ill-equipped to do.
As a result, plaintiff has never provided any expert reports purporting to analyze substantial similarity in protected expression between the copyrighted 1967 Taurus transcription and Stairway to Heaven.

Plaintiff did file declarations of his experts in opposition to defendants’ motion for summary judgment, but his experts’ declarations also were limited to the Taurus sound recordings. See, e.g., Order (Doc. 159) at 3 (Stewart compared “recordings of Taurus” with Stairway to Heaven), at 4 (“Johnson transcribed the song Taurus from the sound recording”), & at 4 (Bricklin “compared audio files of Taurus and Stairway to Heaven”).

Indeed, in their declarations in opposition to defendants’ motion for summary judgment, plaintiff’s experts ridiculed the idea that the 1967 copyright is limited to the 1967 Taurus transcription. See, e.g., Stewart Decl. (Doc. 118-8) at 12, ¶ 29 (ridiculing Ferrara for not relying on the Taurus recording), at 13, ¶ 33 (analyzing the 1967 Taurus transcription is “an evasive approach to this case”), at 14, ¶ 38 (Ferrara, by analyzing the 1967 Taurus transcription, is guilty of “garbage in – garbage out”); Johnson Decl. (Doc. 118-9) at 8, ¶ 21 (comparing the 1967 Taurus transcription to Stairway to Heaven “is a simple ‘apples to oranges’ fallacy of comparison”), at 22, ¶ 31 (Ferrara disingenuous in comparing 1967 Taurus transcription to Stairway to Heaven transcriptions and recordings).

Now, after the Court has confirmed that the Taurus copyright is limited to the 1967 Taurus transcription, plaintiff’s opposition to the Motion in Limine makes it plain that plaintiff merely seeks to evade that ruling. Their argument is quite simply that notwithstanding that this Court has ruled that the copyright is limited to what is contained in the written deposit copy, their experts disagree. See, e.g., Johnson Decl. (Doc. 175) at 1, ¶ 5 (Ferrara takes “a narrow – fishbowl approach – of solely considering the deposit copy of Taurus” while Johnson and the other experts take “a holistic approach” in considering the Taurus recordings), at 3-4, ¶¶ 11-12, 16-17 (the protected composition is not the transcription, but “that part of the song that remains
constant from performance to performance” as evidence in sound recordings over the years; Stewart Decl. (Doc. 169-1) at 1, ¶ 6 (relying on the 1967 Taurus transcription “is artificial and unduly limiting”), at 2, ¶ 14 (Ferrara “artificially narrowed his comparison between Taurus and Stairway to Heaven to just the notes of Taurus on the deposit transcription”), at 3, ¶ 21 (analysis of the 1967 Taurus transcription is “an improper overly limited analysis”), at 3, ¶ 22 (the protected compositional elements of Taurus are the elements “that in every recording and every performance of Taurus . . . remains unchanged from performance to performance”).

The Court has ruled that the copyright on which plaintiff sues is limited to the 1967 Taurus transcription. That is the relevant work to be compared to Stairway to Heaven. Only recordings strictly limited to that transcription should be admissible in evidence and played for the jury. See above at 1 n.1.

(2) Since Defendants Are Not Pursuing their Work for Hire Argument, Pre-Hollenbeck Recordings of Taurus Are Not Needed to Disprove that Argument

Plaintiff argues that bootleg recordings of Taurus before Randy Wolfe entered into the August 29, 1967 Exclusive Songwriter’s Agreement with Hollenbeck Music are relevant to prove that the composition predates that Agreement and is not a work for hire. Pltf’s Oppn. at 4-5. Plaintiff omits, however, that in light of the Court’s ruling defendants are not pursuing the work for hire argument. Anderson Decl. at 10-11, ¶ 7. As a result, this argument for relevance also fails.

(3) Taurus Recordings Also Are Not Relevant to Access, Independent Creation or Innocence

Plaintiff states that he plans to play the recording of Taurus from Spirit’s first album and ask defendants – presumably the individuals – whether they heard it prior to writing Stairway to Heaven. Plt’s Oppn. at 5:15-17. Of course, he did that in deposition and they denied having heard it until this claim was asserted. He does not
need to play the recording at trial to ask if they heard it because he can establish they
are now familiar with it and then ask if they heard it before writing Stairway to
Heaven. Neither does this argument support what plaintiff actually plans to do:
repeatedly play Taurus recordings before the jury, including in questioning his and
defendants’ experts.

Plaintiff next argues that “the sonic landscape” of the Taurus recordings is
relevant to access because they are supposedly similar. But, “sonic landscape” is
merely plaintiff’s euphemism for the unprotected performance elements in the
Taurus sound recordings. Pltf’s Oppn. at 5:22-27. Neither is there substance to the
argument: that, for example, recordings of the two compositions include
“fingerpicking,” either a flute or a harpsichord or “reverb” – common in recordings
of that era – do not demonstrate access. That, presumably, is why plaintiff did not
make that argument in opposing defendants’ motion for summary judgment.

Plaintiff seeks, by hook or crook, to play Taurus recordings that are different
from the relevant copyrighted work, namely the 1967 Taurus transcription. Those
recordings are properly excluded.

(b) Playing Recordings of Taurus that Are Very Different from the
Copyrighted 1967 Transcription Is Certain to Confuse the Issues
and Mislead the Jury

Even if Taurus recordings did have some probative value, it is
overwhelmingly counterbalanced by the unfair prejudice and the certainty of
confusing the issues, misleading the jury and giving them the impossible task of
ignoring what they hear and disregarding the performance elements. Fed. R. Evid.
403.

As a matter of law, Taurus recordings are not relevant to substantial similarity
between the copyrighted 1967 Taurus transcription and Stairway to Heaven, and
plaintiff also fails to establish another basis for relevance of those recordings.
On the other hand, playing the Taurus recordings, which are very different from the copyrighted composition, is certain to cause confusion and mislead the jury, which would be required to identify the sounds and elements that are not in the 1967 transcription and – while listening to the recordings plaintiff seeks to play – disregard those materials and elements. And, the jury would then also be required, while listening to those recordings, to determine whether, without the recordings' materials and elements, there is substantial similarity between the 1967 transcription and Stairway to Heaven. As defendants previously raised, and plaintiff ignores, Courts have refused to allow the use of such recordings where the only copyrighted work is a transcribed musical composition. Fahmy v. Jay Z, No. 07CV05715-CAS-PJWx, 2015 WL 5680299, at *14 (C.D. Cal. Sept. 24, 2015) (“Presenting the sound recordings at trial carries a significant risk of confusing and misleading the jury”; motion in limine granted); see, above at 3 n. 2.

Playing Taurus recordings will effectively preclude the jury from doing what the law requires: compare only the copyrighted 1967 Taurus transcription (as performed strictly limited to the transcribed composition (see above at 1 n. 1)) with Stairway to Heaven. Allowing plaintiff to play other Taurus recordings, which he admits are very different from the copyrighted work, would ensure the actual copyrighted work would be obscured or lost and substantially prejudice defendants.

Accordingly, the Taurus recordings are also properly excluded under Rule 403.

3. CONCLUSION

The Court has confirmed that the copyright plaintiff sues upon is limited to the copyrighted 1967 Taurus transcription. The Taurus recordings plaintiff seeks to play at trial are irrelevant. And, to the extent they have any relevance, the probative ///
///
///
value is plainly outweighed by the certainty that playing the Taurus recordings will
confuse the issues, mislead the jury and substantially prejudice defendants.

Dated: April 21, 2016

/s/ Peter J. Anderson
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Excerpts from Copyright Office Compendium
III 313.4 and 802.5
313.4(A) Mere Copies

A work that is a mere copy of another work of authorship is not copyrightable. The Office cannot register a work that has been merely copied from another work of authorship without any additional original authorship, See L. Batlin & Son, 536 F.2d at 490 ("one who has slavishly or mechanically copied from others may not claim to be an author"); Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191, 195 (S.D.N.Y. 1999) ("exact photographic copies of public domain works of art would not be copyrightable under United States law because they are not original").

As a general rule, the registration specialist will not search the Office's records or conduct independent research to determine whether the work was created by the author(s) named in the application because the existence of similar or identical works will not preclude a claim in a work that was independently created. However, if the applicant asserts a claim in a work that is unusually similar to another work of authorship that is known to the specialist, he or she may communicate with the applicant. If the specialist determines that the author copied or incorporated another work of authorship, he or she may ask the applicant to exclude the preexisting work from the claim or may refuse registration if the author did not contribute a sufficient amount of additional original authorship to the work.

Examples:

- An exact reproduction of the Mona Lisa that cannot be distinguished from the original.
- A photocopy or scan of a photograph.
- Photocopying, scanning, or digitizing a literary work.
- Dubbing a sound recording from a preexisting recording.
- A toy model that is an exact replica of an automobile, airplane, train, or other useful article where no creative expression has been added to the original design.

313.4(B) De Minimis Authorship

The term "de minimis" comes from the legal principle "de minimis non curat lex," which means "the law does not take notice of very small or trifling matters." As the Supreme Court stated, "copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity." Feist, 499 U.S. at 363. Works that contain no expression or only a de minimis amount of original expression are not copyrightable and cannot be registered with the U.S. Copyright Office.
Examples:

Literary Works:

- Substituting the pronouns "she" and "her" for "he" and "his" in a preexisting work of authorship.
- Combining a coined term with a few short phrases that define the term.
- A Venn diagram consisting of three overlapping circles containing the names of various personality disorders and a few words and short phrases that describe the symptoms of each condition.
- A standard form contract for a real estate transaction requesting factual information from the buyer and containing standard legal language for the release of the seller's interest in the property.
- Editing that merely consists of spelling and grammatical corrections.

Works of the Performing Arts:

- A synopsis consisting of a single sentence.
- A musical phrase consisting of three notes.
- A sound recording consisting of a single tone.

Works of the Visual Arts:

- Solitaire rings, simple diamond stud earrings, simple hoop earrings, and other jewelry designs that contain only a trivial amount of authorship.
- Touching-up an aged or damaged photograph in order to restore it to its original condition, without adding an appreciable amount of authorship to the original image.
- A public domain photograph of Winston Churchill combined with the word "Commitment" and the quotation "Never, never, never give up."
- An outline map of South Carolina with a blue heart in the center of the design featuring the white crescent moon and white palmetto tree from the state flag.

Specific categories of literary works, works of the performing arts, and works of the visual arts that contain a de minimis amount of authorship are discussed in Chapters 700, 800, and 900.
313.4(C) Words and Short Phrases

Words and short phrases, such as names, titles, and slogans, are not copyrightable because they contain a de minimis amount of authorship. See 37 C.F.R. § 202.1(a). The U.S. Copyright Office cannot register individual words or brief combinations of words, even if the word or short phrase is novel or distinctive or lends itself to a play on words. See Kitchens of Sara Lee, Inc. v. Nifty Foods Corp., 266 F.2d 541, 544 (2d Cir. 1959) (concluding that the Office’s regulation barring the registration of short phrases is “a fair summary of the law”).

Examples:

- The name of an individual (including pseudonyms, pen names, or stage names).
- The name of a business or organization.
- The name of a band or performing group.
- The name of a product or service.
- A domain name or URL (e.g., www.copyright.gov).
- The title or subtitle of a work of authorship.
- The name of a character.
- Catchwords, catchphrases, mottoes, slogans, or other short expressions.

For the same reasons, short musical phrases consisting of only a few musical notes standing alone are not copyrightable and cannot be registered with the U.S. Copyright Office, even if the phrase is novel or distinctive. See 37 C.F.R. § 202.1(a).

Examples:

- Clock chimes.
- “Mi do re sol, sol re mi do.”
- A trademark consisting of three musical notes.

Similarly, individual numbers, letters, sounds, and short phrases consisting of such elements are not copyrightable, because they do not contain sufficient creative authorship. Id.

The Office maintains various databases, indexes, catalogs, and other records that contain titles of works that have been registered with the Office. These titles are part of the public record, but the titles themselves are not subject to copyright protection.
313.4(D) Works Consisting Entirely of Information That Is Common Property

The U.S. Copyright Office cannot register works consisting entirely of information that is common property because such works contain no original authorship. 37 C.F.R. § 202.1(d). Examples of common property include, without limitation, standard calendars, schedules of sporting events, and lists or tables taken from public documents or other common sources. Id. For the same reasons, the Office cannot register a claim in common sayings, diatonic and chromatic musical scales, or common chord progressions that merely consist of standard harmonies or common musical phrases.

313.4(E) Measuring and Computing Devices

The U.S. Copyright Office cannot register devices and other useful articles that are designed for computing or measuring. See 37 C.F.R. § 202.1(d). Examples of such devices include, without limitation, height and weight charts, tape measures and rulers, calculators, and thermometers.

Although measuring and computing devices are not copyrightable, the Office may register pictorial, graphic, or sculptural features that have been applied to a device, but only if those features are physically or conceptually separable from its utilitarian function. For example, a drawing that appears on the surface of a height and weight chart or a fanciful graphic that appears on the surface of a thermometer may be registered if these pictorial or graphic features contain a sufficient amount of creative expression.

For a general discussion of useful articles, see Chapter 900, Section 924.

313.4(F) Mere Listing of Ingredients or Contents

A mere listing of ingredients or contents is not copyrightable and cannot be registered with the U.S. Copyright Office. 37 C.F.R. § 202.1(a).

Examples:

- A list of ingredients for a recipe.
- A list of components for a formula, compound, prescription, or the like.
- A list of musical tracks contained in a compact disc.
- A product label that merely lists the ingredients for the product, merely describes the product, or merely describes the contents of the product packaging.

The Office may register a work that explains how to perform a particular activity, such as a cookbook or user manual, provided that the work contains a sufficient amount of text, photographs, artwork, or other copyrightable expression. However, the registration does not extend to any list of ingredients or contents that may be included in the work. See Publications International v. Meredith Corp., 88 F.3d 473, 480 (7th Cir.).
• Non-audio digital files, including text files (e.g., .pdf or Microsoft Word) or files created by music notation software embodied in compact discs, flash drives, hard drives, and other digital file storage devices.

• Music accompanying a motion picture or other audiovisual work (as fixed in the audiovisual work).

• A non-audio digital file (e.g., digital notation) that is uploaded to the Office’s server in support of an online application.

For the deposit requirements for musical works published in copies, see Chapter 1500, Section 1509.2(A)(2). For unpublished musical works, see Chapter 1500, Section 1509.2(A)(1).

802.4(B) Phonorecords
Phonorecords of musical works include the following:

• Hard copy formats embodying recorded sound, including but not limited to compact discs, vinyl records, and tapes.

• Digital audio files embodying recorded sound, including .wav, .mp3, .wma (uploaded or embodied in compact discs, flash drives, and other digital file storage devices). A digital audio file that is uploaded to the Office’s server in support of an electronic registration application is a phonorecord for registration purposes.

For the deposit requirements for musical works published in phonorecords, see Chapter 1500, Section 1509.2(A)(3). For unpublished musical works, see Chapter 1500, Section 1509.2(A)(1).

802.4(C) Motion Pictures
Where music is first published in a motion picture soundtrack, the motion picture is considered a copy of the musical work.

For the deposit requirements for musical works published in motion pictures, see Chapter 1500, Section 1509.2(A)(5). For unpublished musical works, see Chapter 1500, Section 1509.2(A)(1).

802.5 Copyrightable Authorship in Musical Works

802.5(A) Independent Creation
A musical work must originate from the author of that work to be protected by copyright. A musical work that is merely copied from another source is not copyrightable. For instance, a musical work consisting entirely of common property material would not constitute original authorship. Some examples of common property musical material include:
- Diatonic or chromatic scales.

- Arpeggios.

- Chord symbols based on standard chord progressions.

See 37 C.F.R. § 202.1(d); see also Chapter 300, Section 313.4(D).

802.5(B) Creative Expression

To be copyrightable, a musical work must contain a sufficient amount of creative musical expression. Generally, the musical and lyrical elements of the work are considered separately in determining whether there is sufficient creative expression. There is no predetermined number of notes, measures, or words that automatically constitutes de minimis authorship or automatically qualifies a work for copyright registration. However, short musical phrases are not copyrightable because they lack a sufficient amount of authorship (just as words and short textual phrases are not copyrightable). See 37 C.F.R. § 202.1(a); see also Chapter 300, Section 313.4(C). For example, the phrase, "I love you so much it hurts" is both too short and too lacking in creative spark to be registrable. Similarly, a short phrase of only a few musical notes, such as clock chimes or "mi do re sol, sol, re mi do" would be considered too short and too lacking in creative expression to be registrable.

802.5(C) Human Authorship

To be copyrightable, musical works, like all works of authorship, must be of human origin. A musical work created by solely by an animal would not be registrable, such as a bird song or whale song. Likewise, music generated entirely by a mechanical or an automated process is not copyrightable. For example, the automated transposition of a musical work from one key to another is not registrable. Nor could a musical composition created solely by a computer algorithm be registered.

For more information on works created by non-human authors and mechanical processes, see Chapter 300, Section 306.

802.6 Derivative Musical Works

A derivative musical work is one that is based on one or more preexisting, copyrightable work(s) of any nature. The new music authorship may be registered if it is represents sufficient new original authorship. The applicant should identify any preexisting work or works that the derivative work is based on or incorporates, and should provide a brief general statement identifying the additional material covered by the copyright claim being registered. Descriptions of new material might include:

- New or revised lyrics.

- New or revised arrangements.
Excerpts from Jury Instructions
Instruction No. 15

Anyone who copies original elements of a copyrighted work during the term of the copyright without the owner’s permission infringes the copyright.

On the plaintiff’s copyright infringement claim, the plaintiff has the burden of proving by a preponderance of the evidence that:

1. the plaintiff is the owner of a valid copyright; and
2. the defendant copied original elements from the copyrighted work.

If you find that the plaintiff has proved both of these elements, your verdict should be for the plaintiff. If, on the other hand, you find that the plaintiff has failed to prove either of these elements, your verdict should be for the defendant.
Plaintiff has filed a claim against Defendants for violation of the United States Copyright Act, which governs this case. In order for you to undertake your responsibility, you must know what a copyright is, what it protects, and what it does not protect.

Copyright confers certain exclusive rights to the owner of a work including the rights to:

1. Reproduce or authorize the reproduction of the copyrighted work;
2. Prepare derivative works based upon the copyrighted work.
3. Distribute the copyrighted work to the public; and
4. Perform publicly a copyrighted musical work.

Copyright only protects the author’s original expression in a work and does not protect ideas, themes or common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes.

Also, there can be no copyright infringement without actual copying. If two people independently create two works, no matter how similar, there is no copyright infringement unless the second person copied the first.
Plaintiff contends that the copyright in the musical composition Taurus is infringed by the song Stairway to Heaven.

It is important that you understand what the copyright in the musical composition Taurus protects and does not protect.

A musical composition consists of rhythm, harmony and melody as transcribed in written form. The performance of a musical composition can be recorded, but under the law musical compositions and sound recordings are different works with different potential copyrights.

In this case, plaintiff has no rights in any sound recording of Taurus, and claims rights only in the musical composition Taurus as transcribed in the deposit copy. As a result, plaintiff must base his claim only on original expression contained in the deposit copy of Taurus.

That is, plaintiff must prove that Stairway to Heaven copies original expression in the deposit copy of Taurus. Plaintiff cannot rely on any claimed similarities between recordings of Taurus and Stairway to Heaven.
Instruction No. 1

The plaintiff must prove by a preponderance of the evidence that the creators of Stairway to Heaven had access to the musical composition Taurus. You may find that the creators of Stairway to Heaven had access to the musical composition Taurus if the creators of Stairway to Heaven had a reasonable opportunity to hear and/or copy the musical composition Taurus before Stairway to Heaven was created.
Instruction No. 2.0

An original work may include or incorporate elements taken from prior works or works from the public domain. However, any elements from prior works or the public domain are not considered original parts and not protected by copyright. Instead, the original part of the plaintiff's work is limited to the part created:

1. independently by the work's author, that is, the author did not copy it from another work; and
2. by use of at least some minimal creativity.
Instruction No. 21

For an unauthorized use of a copyrighted work to constitute copyright infringement, the unauthorized use must copy original material protected by the copyright and must be significant enough to constitute infringement. This means that even if the fact of copying is proven, no legal consequences will follow from that fact unless original material is copied and the copying is substantial.

The copyright that plaintiff sues upon protects only the musical composition Taurus as it was transcribed in the deposit copy that accompanied the registration of the copyright with the United States Copyright Office. That is the work that you must compare to Stairway to Heaven.

To prove substantial similarity between the musical composition Taurus as transcribed and Stairway to Heaven, plaintiff must prove that there is both substantial extrinsic similarity and substantial intrinsic similarity between the two works.

Extrinsic similarity is an objective test and requires that you determine whether the two works are similar in original expression. To do that, you must break the works down into their specific musical elements. You must then disregard all musical elements that are not original to Taurus. Once you have disregarded all musical elements that are not original to Taurus, you must decide whether there are any remaining musical elements that are original to Taurus and also appear in Stairway to Heaven and, if so, whether they are substantial similarities or insubstantial similarities.

If plaintiff does not prove that, applying this first test, Stairway to Heaven is substantially similar to original expression in the musical composition Taurus, your verdict must be for defendants.
If plaintiff does prove that, applying this first test, Stairway to Heaven is substantially similar to original expression in the musical composition Taurus, then you must proceed to a second test for subjective intrinsic similarity.

For that second test, you must decide whether the ordinary, reasonable person would find that the musical composition Taurus as transcribed in the deposit copy, and Stairway to Heaven, are substantially similar in their original expression. In this second test, you must also disregard all musical elements that are not original to Taurus.

If plaintiff does not prove that, applying this second test, the musical composition Taurus as transcribed in the deposit copy, and Stairway to Heaven, are substantially similar in their original expression, your verdict must be for defendants.

If plaintiff does prove both the first test and second test, then he has proven substantial similarity.
Instruction No. 22

If Plaintiff shows Defendants had access to Plaintiff's work and that there is a substantial similarity between the infringed and infringing works, a presumption of copying arises, that shifts the burden to Defendants to rebut or to show that the alleged infringing work was independently created.

In determining whether Defendants' song was independently created, you may consider evidence presented by Defendants regarding the manner in which the composers created Defendants' song and any other evidence of the circumstances surrounding the creation of Defendants' song.
Instruction No. 13

To prevail on a copyright claim, the plaintiff must prove substantial copying of original expression in the copyrighted work. That also means that trivial or minimal copying of original expression is not an infringement.

A use is trivial or de minimis if:

1. The allegedly-copied original expression is quantitatively a small portion of the plaintiff’s copyrighted work; and

2. The allegedly-copied original expression is not qualitatively important to plaintiff’s copyrighted work.
Plaintiff's Opposition to Motion in Limine to Exclude Taurus Sound Recordings
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MICHAEL SKIDMORE, as Trustee for the RANDY CRAIG WOLFE TRUST,

Plaintiff,

v.

LED ZEPPELIN; JAMES PATRICK PAGE; ROBERT ANTHONY PLANT; JOHN PAUL JONES; SUPER HYPE PUBLISHING, INC.; WARNER MUSIC GROUP CORP., Parent of WARNER/CHAPPELL MUSIC, INC.; ATLANTIC RECORDING CORPORATION; RHINO ENTERTAINMENT COMPANY,

Defendants.

Case No. 15-cv-03462 RGK (AGRx)

Hon. R. Gary Klausner

RESPONSE OPPOSING DEFENDANTS’ MOTION IN LIMINE NO. 3 RE TAURUS SOUND RECORDINGS; MEMORANDUM OF POINTS AND AUTHORITIES

Date: May 10, 2016
Time: 9:00 a.m.
Courtroom: 850

PLAINTIFF’S RESPONSE OPPOSING DEFS. Mjl NO. 3
I. RELIEF SOUGHT

 Plaintiff Michael Skidmore, Trustee for the Randy Craig Wolfe Trust ("Skidmore" and "Trust"), seeks the Court's entry of an Order denying Defendants' motion in limine no. 3 to preclude Taurus audio recordings.

 Defendants' request to limit any and all audio recordings of Taurus when comparing Taurus and Stairway to Heaven is unsupported by the law and is a deliberate attempt to present the jury with a false and artificial comparison of the two works. The audio recordings of Taurus are admissible to prove substantial similarity. Moreover, the audio recordings of Taurus are also critical to proving several other issues, including ownership of the Taurus copyright by Randy Wolfe and his successor the Randy Craig Wolfe Trust as well as access.

III. ARGUMENT – THE TAURUS AUDIO RECORDINGS ARE ADMISSIBLE AT TRIAL

 a. THE TAURUS AUDIO RECORDINGS ARE ADMISSIBLE FOR THE SUBSTANTIAL SIMILARITY COMPARISON

 Defendants seriously misconstrue the law with respect to whether a sound recording may be played and used at trial in a Copyright case under the 1909 Act. Defendants claim that a sound recording cannot be admitted under the 1909 Act to prove substantial similarity because the "sound recording" itself not copyrighted. **Defendants do not cite a single case for this proposition.**

 A recent court, Pharrell Williams v. Bridgeport Music, considered this identical issue—whether sound recordings could be considered by experts and played at trial—and sided with Plaintiff's position. In that case Defendants complained in post-trial motions that the sound recording was irrelevant to the expert analysis and also that it should not have been played to the jury. The Court noted that it had previously denied motions in

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1 The only cases cited by Defendants state that the composition of the song is embodied in the deposit copy. That the composition of a song is based on the deposit copy in no way precludes a sound recording which uses that composition.
limine on these precise issues. See Order Denying Post-Trial Motions, 13-cv-6004 (Doc. No. 423), at p7. (7/14/2015). That court held at the motion in limine hearing: “I think [the Gaye Parties’ expert] testimony is going to have to be based on the deposit copy. It's not to say they can't have listened to the sound recording as part of their analysis. They simply can't present to the jury an opinion that says, '[b]ecause I listened to the sound recording, I've reached this conclusion.” See Order Denying Post-Trial Motions, 13-cv-6004 (Doc. No. 423), at p7. (7/14/2015) (alternations in original). Plaintiff’s experts do indeed opine that all pertinent elements of Taurus are represented on the deposit copy and that those protected elements appear in the Taurus sound recording. See Declaration of Alexander Stewart, at ¶8-14. Indeed, even Defendants’ experts admit that the deposit copy contains and represents much of the expression at issue.

**Paragraph 14:** Moreover, approximately half of the notes in the iterations of the guitar melody in the recordings of “Taurus” in Dr. Stewart’s Visual Exhibit C are not in the Taurus Transcription. Id. (quoting defense expert Ferrara’s report).

The Court in Williams further elaborated that as long as the claimant’s experts opined that the expression in the sound recording was represented in the deposit copy in some way, that reference to sound recordings by the experts was appropriate. Id. at p.9. It also held that playing the sound recordings to the jury as part of expert testimony was admissible, as long as the expert opined that the composition in the sound recording was based on the deposit copy. See Order, at p.9. Any disputes about the content of the sound recording itself were questions of fact and weight for the jury, and did not go to admissibility under Fed. RE 702(d). Id.

The fact of the matter is that sound recordings can be played to extent the composition they contain is represented in the deposit copy of the song, according to the experts. Here, both Plaintiff’s experts and Defendants’ experts agree that the Taurus composition is represented in the deposit copy. Thus, for substantial similarity purposes the audio recordings of Taurus are admissible. Defendants are free to present their case to the jury and explain their case to the jury. Moreover, if necessary, appropriate limiting
instructions should be sufficient to cure any alleged prejudice to Defendants—although the competing expert testimony and cross examination should be sufficient.

Defendants want to constrict this dispute to a level that is simply not justified by the law. Their insistence that the jury be given an artificial, severely limited comparison of the two songs in question is simply not warranted by fact or law.

b. THE TAUROUS AUDIO RECORDINGS ARE ADMISSIBLE FOR OWNERSHIP AND TO ESTABLISH THAT TAUROUS IS NOT A WORK FOR HIRE

Defendants are advancing the argument that Taurus is a work for hire. They claim that the composition in question was actually composed after the August 29, 1967, contract was signed and reduced to writing. The Court’s Summary Judgment order held that there was a triable issue of fact on this issue and that Defendants were not entitled to summary judgment. See Order Denying Summary Judgment, Doc. No. 159, at p.9-11.

Plaintiff thus intends to present evidence to the jury that Taurus was composed in 1966, and even played live in 1967, before the work made for hire contract. As such it is preexisting material, accorded common law copyright, that cannot be retroactively deemed made for hire by a later writing. See Order Denying Summary Judgment, Doc. No. 159, at p.9-11. Plaintiff, as the Court observed, is entitled to prove he has a beneficial ownership interest in Taurus by virtue of receiving royalties and having been transferred the Wolfe copyrights after a 2002 California Superior Court order authorizing the transfer.

To prove that Plaintiff owns the copyright, Plaintiff will produce testimony of several witnesses that the song was composed for Randy Wolfe’s girlfriend, Robin, based on her astrological sign, including Janet Wolfe and Andrea Wolfe. The Wolfe sisters, as well as Mark Andes (bassist), Jay Ferguson (vocals, percussionist), and Barry Hansen (manager), will testify that Spirit often played at clubs in Los Angeles in early to mid-1967, and that Taurus was played at these clubs—before the work for hire contract.
Plaintiff also has sound recordings of several of those 1967 shows. As Defendants allege that Taurus was composed after August 29, 1967, Plaintiff will first play the sound recordings of the 1967 shows pre-dating the August 29, 1967 contract. He will then play the audio of the Taurus sound recording on the Spirit album which was made post-August 29, 1967. The jury will thus be shown that the composition of Taurus that Defendants’ claim was written after August 1967 was in fact composed well beforehand. Furthermore, Plaintiff’s experts also opine that the composition of Taurus in the pre August 1967 sound recordings, and the sound recording post August 1967 contain the same composition. See Stewart Decl., at ¶22.

Thus, the Taurus sound recording is admissible to prove authorship, ownership, and rebut Defendants’ work made for hire argument.

c. THE TAURUS RECORDING IS ADMISSIBLE TO PROVE ACCESS, AND REBUT AFFIRMATIVE DEFENSES OF INDEPENDENT CREATION AND INNOCENCE

First, when Defendants take the stand, Plaintiff plans on playing Taurus, as distributed on Spirit’s debut eponymous album Spirit, and asking them if they heard that song prior to writing Stairway to Heaven. This is a perfectly acceptable question and there is no valid basis on which to prevent the playing of the song and the asking of the question.

Second, the sonic landscape in the sound recording of Taurus and its similarity to Stairway to Heaven, although not copyrightable under the 1909 Act, is evidence that Defendants had access to Taurus. Even though the Court discounted striking similarity in the summary judgment opinion based on the compositions of the song, the fact that the sound recordings of the songs use a nearly identical sonic landscape and techniques—as attested to by Brian Bricklin, Stewart, and Erik Johnson—are admissible to raise the question of fact of whether the similarities between two songs are the result of coincidence or not.

The fact is that Stairway to Heaven and Taurus share extraordinarily similar sonic
landscapes—as confirmed by Plaintiff's experts—something that simply cannot be the result of coincidence. The testimony of Bricklin, Johnson, and Stewart—master musicians, composers, producers, and musicologists—is admissible under Fed. RE 702 as they are applying accepted musical analysis techniques. Such expert testimony is also proper and necessary to rebut Defendants' affirmative defenses of independent creation and innocence. There is simply no bar under the 1909 Act to using sound recordings when they are being used to prove access and rebut the defense of independent creation.

IV. CONCLUSION

Plaintiff respectfully requests the Court deny this motion.

DATED: April 15, 2016

FRANCIS ALEXANDER LLC

By /s/ Francis Alexander
Francis Malofiy
Attorneys for Plaintiff
Taurus Composition Deposited for Copyright Registration