No. 08-661

In the Supreme Court of the United States

AMERICAN NEEDLE, INC.,

Petitioner,

V.

NATIONAL FOOTBALL LEAGUE, et al.,

Respondents.

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

BRIEF OF RESPONDENT REEBOK INTERNATIONAL LTD.

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RULE 29.6 STATEMENT

Reebok International Ltd., a Massachusetts corporation, is owned by adidas North America, Inc., which is owned by adidas AG, a German publicly-traded corporation.

TABLE OF CONTENTS

Page
TABLE OF CONTENTSii
TABLE OF AUTHORITIESiii
SUMMARY OF ARGUMENT1
ARGUMENT2
A RULING THAT THE NFL FUNCTIONS AS A SINGLE ENTITY IN LICENSING ITS INTELLECTUAL PROPERTY WOULD DISPOSE OF ANI'S CLAIMS AGAINST REEBOK
A. As The Intellectual Property License Of A Single Entity, The NFL Properties' License Of NFL Trademarks And Logos To Reebok Is Procompetitive
B. The Antitrust Laws Are Designed To Promote Competition, Not To Protect A Competitor That Failed To Win Renewal Of An Intellectual Property License
CONCLUSION11

TABLE OF AUTHORITIES

Page(s) CASES
Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)9
Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979)
Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)9
Brown Shoe Co. v. United States, 370 U.S. 294 (1962)9
Cook Inc. v. Boston Scientific Corp., 333 F.3d 737 (7th Cir. 2003)6
Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)2
Digene Corp. v. Third Wave Technologies, Inc., 323 Fed. Appx. 902 (Fed. Cir. 2009)10
Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139 (3d Cir. 1981), cert. denied, 455 U.S. 1019 (1982)6
Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007)8

TABLE OF AUTHORITIES—Continued

Page(s) Menasha Corp. v. News America Marketing In-Store, Inc., 354 F.3d 661 (7th Cir. 2004)......10 Paddock Publications, Inc. v. Chicago Tribune Co., 103 F.3d 42 (7th Cir. 1996)......10 Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186 (2d Cir. 1992)......7 United States v. E.I. du Pont de Nemours & 118 F. Supp. 41 (D. Del. 1953), aff'd, 351 U.S. 377 (1956)...... Virtue v. Creamery Package Manufacturing Co., 227 U.S. 8 (1913) **STATUTES**

TABLE OF AUTHORITIES—Continued Page(s)

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2000)
1 Herbert Hovenkamp et al., IP and Antitrust:
Analysis of Antitrust Principles Applied to
Intellectual Property Law (Supp. 2009)6
1111ettectual 1 10perty Law (Supp. 2003)
Gregory J. Werden, Symposium: Antitrust
Analysis of Joint Ventures: An Overview,
66 Antitrust L.J. 701 (1998)6
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BRIEF OF RESPONDENT REEBOK INTERNATIONAL LTD.

Reebok International Ltd. ("Reebok") adopts in full the brief of the NFL Respondents and submits this separate brief in order to address issues specific to Reebok.

SUMMARY OF ARGUMENT

For all the reasons articulated by the NFL Respondents, this Court should affirm the judgment of the Seventh Circuit and hold that the NFL functions as a single economic enterprise in licensing its trademarks and other intellectual property. Such a ruling would necessarily dispose of Petitioner American Needle, Inc.'s ("ANI") claims against Reebok.

For more than two decades, ANI profited from a license by NFL Properties that collectively covered the trademarks and logos of all NFL clubs. ANI filed this lawsuit claiming that Respondents violated the antitrust laws only after NFL Properties allowed ANI's license covering all NFL clubs to expire and instead granted a license covering all NFL clubs to Reebok, one of ANI's competitors.

Licensing, including exclusive licensing, of intellectual property is efficient and procompetitive. A single entity generally is free to license its intellectual property as it sees fit, except in limited circumstances where the licensing arrangement itself involves horizontal competitors. ANI concedes that the NFL and Reebok are not competitors.

ANI's purported antitrust claim against its competitor, Reebok, is fundamentally flawed for a separate reason as well. The antitrust laws are designed to protect competition—not individual

competitors. Having failed to win its license renewal in the marketplace, ANI cannot now use the antitrust laws to compel a different result.

ARGUMENT

A RULING THAT THE NFL FUNCTIONS AS A SINGLE ENTITY IN LICENSING ITS INTELLECTUAL PROPERTY WOULD DISPOSE OF ANI'S CLAIMS AGAINST REEBOK

ANI conceded below that "the creation of an exclusive license to a single marketer of apparel and headwear ... is the only conduct alleged to have been unlawful." Pet. Opp. to S.J. at 25 (N.D. Ill. Dkt. No. 93),1 Moreover, ANI challenges the Respondents' decision to issue a single license only under Section 1 of the Sherman Act, 15 U.S.C. § 1. That section prohibits a "contract, combination ... or conspiracy' between separate entities" unreasonably restrains trade. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984) (citation omitted) (emphasis added) (alteration in

¹ As the United States correctly observed, ANI does not challenge the formation of NFL Properties, the entity that granted Reebok an integrated trademark license on behalf of all NFL clubs in 2001 and the same entity that granted ANI an integrated trademark license on behalf of all NFL clubs for more than two decades. See Invitation Br. of United States at 20 (May 28, 2009) ("[P]etitioner repeatedly disclaimed [below] any challenge to the teams' longstanding practice of licensing their marks and logos collectively—the only aspect of the challenged licensing agreement that involves joint action among potential competitors."); see also JA 62 ¶7.

original).² If this Court affirms (as it should) the court of appeals' ruling that the NFL Respondents act as a single entity in licensing the trademarks and logos of all NFL clubs, ANI's claims against Reebok must fail.

A. As The Intellectual Property License Of A Single Entity, The NFL Properties' License Of NFL Trademarks And Logos To Reebok Is Procompetitive

The Antitrust Guidelines for the Licensing of Intellectual Property issued jointly by the federal antitrust enforcement agencies recognize that licensing generally is efficient and procompetitive:

Licensing ... intellectual property ... can lead to more efficient exploitation of the intellectual property, benefiting consumers through the reduction of costs and the introduction of new products. Such arrangements increase the value of intellectual property to consumers and to the developers of the technology. By potentially increasing the expected returns from intellectual property, licensing also can increase the incentive for its creation and thus promote greater investment in research and development.

1995 Department of Justice and Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property §2.3 (1995) (hereinafter "Intellectual Property Guidelines"), reprinted in II

² ANI has abandoned its previously rejected claims under Section 2 of the Sherman Act, 15 U.S.C. § 2. See Pet. App. 18a-19a; NFL Br. at 13-14 n.3, 45-46 n.17.

ABA Section of Antitrust Law, Antitrust Law Developments app. E (6th ed. 2007).

From Reebok's perspective, the ability to transact with the NFL Respondents as a single entity rather than having to deal separately with 32 teams provided significant efficiencies and procompetitive benefits. See Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 21 (1979) (observing that "ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for") (footnotes omitted); see also Pet. App. 27a (recognizing "obvious advantages of one-stop exploitation of the intellectual properties of the 32 teams and those common to the league in a national market").

In fact, Reebok is able to manufacture many of the NFL products that consumers demand, such as playoff championship caps and t-shirts, only because Reebok has an integrated license covering all NFL clubs. If NFL Properties were not authorized to offer a license on behalf of all NFL clubs, the only apparel manufacturers authorized to manufacture championship wear would be those lucky enough to have been licensed by the winning teams. While tight contests and uncertain outcomes on the field help to make the NFL an exciting and popular spectator sport, it makes no economic sense to tie the manufacture and sale of NFL consumer goods to unpredictable athletic contests.

ANI shared Reebok's perspective regarding the significant efficiencies and procompetitive benefits inherent in an integrated license on behalf of all NFL clubs prior to bringing this lawsuit. Indeed, ANI

profited from an integrated license from NFL Properties for more than two decades pursuant to which ANI manufactured headwear incorporating the trademarks and logos of all NFL clubs. See JA 62 ¶7; see also JA 256 ("For over twenty years NFL Properties granted licenses to plaintiff American Needle, Inc. to use trademarks of the NFL and the (now) 32 teams on headware [sic] it manufactured."). It was only after NFL Properties decided to grant an "exclusive" license to Reebok in 2001 (and to permit ANI's license to expire without renewal) (JA 63 ¶¶ 12-14) that ANI at last decided that one-stop shopping was actually anticompetitive. See JA 256.3

From a consumer welfare perspective, too, integrated licensing by NFL Properties on behalf of all NFL clubs, including exclusive licensing to a single apparel manufacturer, is efficient and procompetitive. As Professor Hovenkamp has explained:

Economic theory encourages licensing because it allows the market to transfer the intellectual property right to the most productive user of that right. But efficient licenses will often be exclusive in nature If an intellectual property owner who once licenses a right is thereafter compelled to make licenses available to all comers on substantially equal terms, the likely effect will be to discourage licensing altogether. ... [E]xclusive licensing ... is often the most efficient means of extracting value from an intellectual property right.

³ For purposes of this appeal only, Reebok does not contest the claim that Reebok has "an exclusive license." *See, e.g.*, JA 85 n.4.

1 Herbert Hovenkamp et al., IP and Antitrust: Analysis of Antitrust Principles Applied to Intellectual Property Law §13.2c (Supp. 2009). Further, where the access sought is to a brand, such as the NFL Respondents' trademarks and logos, "[o]pen access is particularly likely to impede rather than promote competition" because "[t]he value of the brand can be significantly reduced" by the conduct of licensees. Gregory J. Werden, Symposium: Antitrust Analysis of Joint Ventures: An Overview, 66 Antitrust L.J. 701, 730 (1998).

Antitrust law thus generally permits intellectual property licensors to license intellectual property (or not) as they see fit. See III Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: Analysis of Antitrust Principles and Their Application ¶711b (3d ed. 2008) ("All forms of intellectual property have in common that the holder, even a monopolist, is ordinarily free either to license the property right to others or to use it exclusively. Antitrust compels licensing of copyrights, trademarks, or trade secrets even less often than it compels the licensing of patents."). Thus, "[a]n antitrust claim based solely on a single firm's denial of a license to a trademark would readily be dismissed." Werden, 66 Antitrust L.J. at 730-31.

Indeed, an entity's decision to grant an exclusive license does not itself implicate the antitrust laws. See, e.g., Cook Inc. v. Boston Scientific Corp., 333 F.3d 737, 740 (7th Cir. 2003) ("[T]here is no argument that [the licensor] would have violated antitrust law ... had it granted an exclusive, nonassignable license."); Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 140, 150-54 (3d Cir. 1981) ("series of interlocking exclusive

licensing contracts" relating to trademarks did not violate the Sherman Act; "as a licensor, the [Major League Baseball Players Association] is free to grant licenses to any competitor, or none at all"), cert. denied, 455 U.S. 1019 (1982); cf. Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186 (2d Cir. 1992) (affirming dismissal of a section 2 challenge involving exclusive licensing of trademarks by the NFL and other professional sports leagues); Intellectual Property Guidelines §3.1 ("The Agencies will not require the owner of intellectual property to create competition in its own technology.").

In the face of such well-founded economic analysis and authority, ANI tries to raise the specter of anticompetitive consequences by citing a magazine article, which in turn purports to quote a Reebok employee commenting on allegedly higher-than-historical headwear pricing by Reebok. See Pet. Br. at 7, 58 (citing JA 471). Even assuming the alleged quotation were accurate and admissible, however, it suggests neither anticompetitive nor anti-consumer conduct. As this Court recently recognized:

Many decisions a manufacturer makes ... can lead to higher prices. A manufacturer might, for example, contract with different suppliers to obtain better inputs that improve product quality. Or it might hire an advertising agency to promote awareness of its goods. Yet no one would think these actions violate the Sherman Act because they lead to higher prices. The antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want. The manufacturer

strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices.

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 896-97 (2007).

In choosing to license Reebok and not ANI, NFL Properties may have been guided by similar legitimate business concerns. See JA 86 ("The NFL may have as great an interest as McDonald's in protecting the good will inherent in their marks by selectively choosing who may use them. It is a rather dramatic assertion that the antitrust laws prohibit the NFL from determining who may use its trademarks and logos and, therefore, its good will.") (citation omitted)). Indeed, the uncited portion of the inadmissible statement attributed to a Reebok employee observes that customers are willing to pay allegedly higher prices because the Reebok headwear is a better quality product. See JA 471 ("Now the focus is on style, design, fashion and fit.").

Finally, the grant of an exclusive license may implicate the antitrust laws only if the licensor and the licensee "would be actual or potential competitors absent the license, and the exclusive license serves to create or enhance the exercise of market power." Antitrust Law Developments \$12B[3][b]; see also Intellectual Property Guidelines \$\$2.3, 3.1; Virtue v. Creamery Package Mfg. Co., 227 U.S. 8, 36-37 (1913); United States v. E.I. du Pont de Nemours & Co., 118 F. Supp. 41, 224 (D. Del. 1953), aff'd, 351 U.S. 377 (1956). ANI concedes, however, that Reebok and the NFL Respondents are neither actual nor potential competitors. JA 61 ¶¶2-4. Like ANI, Reebok is a

manufacturer and marketer of apparel. Id.By NFLRespondents—the the National Football League, NFL Properties, and the individual teams—produce NFL Football and are the owners of the trademarks and logos associated with the teams. Id. ANI's claims against Reebok cannot survive these admissions. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007) (complaint must "possess enough heft to 'sho[w] that the pleader is entitled to relief"; a "naked assertion of conspiracy in a \{\}1 complaint ... gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and [the] plausibility" Rule 8(a)(2) requires) (citation omitted) (alteration in original).

B. The Antitrust Laws Are Designed To Promote Competition, Not To Protect A Competitor That Failed To Win Renewal Of An Intellectual Property License

The essence of ANI's purported section 1 claim is that the NFL Respondents permitted ANI's decadesold license to expire and, instead, chose to license ANI's competitor, Reebok. This grievance does not amount to a cognizable claim.

The antitrust laws are designed to encourage competition, not to protect a single competitor. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224-25 (1993) ("It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'") (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)). ANI's claims against Reebok run afoul of this basic rule of antitrust law.

As Judge Easterbrook explained in *Paddock Publications*, *Inc. v. Chicago Tribune Co.* 103 F.3d 42, 45 (7th Cir. 1996), *cert. denied*, 520 U.S. 1265 (1997):

Competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe, and it is common. [A] market in which the creators of intellectual property (such as the New York Times) could not decide how best to market it for maximum profit would be a market with less (or less interesting) intellectual property created in the first ...[L]egal rulings that diminish incentive to find and explicate the news (by reducing the return from that business) have little to commend them.

See also Menasha Corp. v. News Am. Mktg. In-Store, Inc., 354 F.3d 661, 663 (7th Cir. 2004) (Easterbrook, J.) ("[C]ompetition for the contract is a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress."); Digene Corp. v. Third Wave Techs., Inc., 323 Fed. Appx. 902, 911-12 (Fed. Cir. 2009) ("The existence of competition for the contract, even though [crossappellant] lost that competition, demonstrates a lack of anticompetitive effect."). Having failed "to outbid [Reebok] in the marketplace," ANI's attempt to "outmaneuver [it] in court" must fail. Paddock, 103 F.3d at 47.

11

CONCLUSION

For the foregoing reasons and those explained in the NFL Respondents' brief, the judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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