

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMERICAN NEEDLE, INC.,)	PUBLIC REDACTED
)	VERSION
Plaintiff,)	
)	
v.)	Civil Action No. 04-CV-7806
)	
NEW ORLEANS LOUISIANA SAINTS, <i>et al.</i> ,)	Judge Sharon Johnson Coleman
)	
Defendants.)	Argument Date: August 27, 2013
)	

**DEFENDANTS' OPPOSITION TO AMERICAN NEEDLE'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
ARGUMENT	2
I. THE REEBOK LICENSE AGREEMENT MAY NOT BE DEEMED ANTICOMPETITIVE ON A TRUNCATED REVIEW.....	2
A. The Quick Look Doctrine Is Inapplicable.	4
1. Guidance From the Supreme Court and Other Authorities Precludes “Quick Look” Review.....	4
2. The Record In This Case Makes “Quick Look” Review Especially Inappropriate.....	7
B. The Ancillary Restraints Doctrine Does Not Support Summary Judgment For American Needle.....	12
II. AMERICAN NEEDLE HAS NOT MET (AND CANNOT MEET) ITS SUMMARY JUDGMENT BURDEN UNDER THE RULE OF REASON.....	17
CONCLUSION.....	18

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
<i>42nd Parallel N. v. E St. Denim Co.,</i> 286 F.3d 401 (7th Cir. 2002)	17
<i>Agnew v. Nat'l Collegiate Athletic Ass'n,</i> 683 F.3d 328 (7th Cir. 2012)	3
<i>Am. Needle, Inc. v. NFL,</i> 130 S. Ct. 2201 (2010).....	4, 5, 18
<i>AMEC E & C Servs., Inc. v. Nu-West Indus., Inc.,</i> 395 F. Supp. 2d 957 (D. Idaho 2005)	17
<i>Baxter Int'l, Inc. v. Abbott Labs.,</i> 315 F.3d 829 (7th Cir. 2003)	17
<i>Blackburn v. Sweeney,</i> 53 F.3d 825 (7th Cir. 1995)	16
<i>Cal. Dental Ass'n v. F.T.C.,</i> 526 U.S. 756 (1999).....	6
<i>Carter v. Variflex, Inc.,</i> 101 F. Supp. 2d 1261 (C.D. Cal. 2000)	7
<i>Cont'l T.V., Inc. v. GTE Sylvania Inc.,</i> 433 U.S. 36 (1977).....	3
<i>Cook Inc. v. Boston Scientific Corp.,</i> 333 F.3d 737 (7th Cir. 2003)	6
<i>Deutscher Tennis Bund v. ATP Tour, Inc.,</i> 610 F.3d 820 (3d Cir. 2010).....	5, 10
<i>Fleer Corp. v. Topps Chewing Gum,</i> 658 F.2d 139 (3d Cir. 1981).....	7
<i>Generac Corp. v. Caterpillar Inc.,</i> 172 F.3d 971 (7th Cir. 1999)	3, 4
<i>Home Box Office, Inc. v. F.C.C.,</i> 587 F.2d 1248 (D.C. Cir. 1978)	6
<i>Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,</i> 551 U.S. 877 (2007).....	<i>passim</i>

<i>Madison Square Garden, L.P. v. Nat'l Hockey League,</i> 2007 WL 3254421 (S.D.N.Y. Nov. 2, 2007).....	7, 11
<i>Madison Square Garden, L.P. v. Nat'l Hockey League,</i> 270 F. App'x 56 (2d Cir. 2008)	6, 7, 10
<i>Major League Baseball Props., Inc. v. Salvino, Inc.,</i> 542 F.3d 290 (2d Cir. 2008).....	<i>passim</i>
<i>Nat'l Collegiate Athletic Ass'n v. Bd. of Regents,</i> 468 U.S. 85 (1984).....	5, 16
<i>Orson, Inc. v. Miramax Film Corp.,</i> 79 F.3d 1358 (3d Cir. 1996).....	3
<i>Polk Bros. v. Forest City Enters., Inc.,</i> 776 F.2d 185 (7th Cir. 1985)	5, 7, 13, 14
<i>Princo Corp. v. Int'l Trade Comm'n,</i> 616 F.3d 1318 (Fed. Cir. 2010).....	5
<i>Republic Tobacco Co. v. N. Atl. Trading Co.,</i> 381 F.3d 717 (7th Cir. 2004)	3
<i>Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,</i> 792 F.2d 210 (D.C. Cir. 1986)	8, 16
<i>State Oil Co. v. Khan,</i> 522 U.S. 3 (1997).....	17
<i>Texaco Inc. v. Dagher,</i> 547 U.S. 1 (2006).....	5, 12, 13
<i>Trans Sport, Inc. v. Starter Sportswear, Inc.,</i> 964 F.2d 186 (2d Cir. 1992).....	7
<i>United States v. Topco Assocs., Inc.,</i> 405 U.S. 596 (1972).....	3
<i>Wis. Interscholastic Athletic Ass'n v. Gannet Co.,</i> 658 F.3d 614 (7th Cir. 2011)	6, 7

INTRODUCTION

To prevail on its antitrust claim, American Needle must prove that the NFL’s license agreement with Reebok (1) restrained trade in a relevant antitrust market, (2) caused American Needle to suffer antitrust injury, and (3) was unreasonable. American Needle does not, and cannot, carry its burden on any one of these three elements.

American Needle’s motion for summary judgment focuses on the final element, the reasonableness of the challenged license agreement, and invites this Court to deem the agreement unreasonable based on only a cursory review. But such truncated condemnation—whether based on a “quick look” or the ancillary restraints doctrine—would be plain error, as the Supreme Court has already recognized *in this case*, and as other appellate authorities confirm.

That conclusion is reinforced by overwhelming (and undisputed) evidence that the NFL’s license with Reebok served legitimate, procompetitive purposes, including enhancing the quality, design, and consumer appeal of NFL-licensed headwear and other apparel; improving the marketing and distribution of these products; and strengthening their ability to compete against similar products offered by their competitors.

Because American Needle cannot meet its burden to disprove with undisputed facts the reasonableness of the license agreement, its motion for summary judgment should be denied.

Finally, as we demonstrated in our opening summary judgment briefs (Dkt. 242, 244), undisputed facts also make it impossible for American Needle to establish the other two contested elements of its claim: restraint of a plausible relevant market and antitrust injury. A grant of either of these motions—or even a finding of disputed facts as to these elements of American Needle’s claims—would be an independent basis on which to deny summary

judgment to American Needle. As in *Major League Baseball Properties, Inc. v. Salvino, Inc.*, the decision on which American Needle most heavily relies, summary judgment is warranted for the defendants, not the plaintiff.

ARGUMENT

For decades, the NFL and its member clubs have jointly licensed their marks and logos for use on consumer products, creating efficiencies that benefit licensees and consumers. American Needle disclaims any challenge to the *horizontal* arrangement by which the clubs employ NFL Properties (“NFLP”) as a centralized licensing agent; indeed, American Needle acknowledges that arrangement’s many efficiencies, from which American Needle benefitted for decades. (ANI SJ Mem. at 19-20.)

Instead, American Needle challenges only the *vertical* agreement by which the NFL granted Reebok exclusive rights to market headwear bearing NFL marks and logos. (*Id.*; *see also* American Needle’s Response to the Motion of the NFL Defendants for Summary Judgment, Dkt. 93, at 25 (Mar. 5, 2007) (the exclusivity of the Reebok headwear license is “the only conduct alleged to have been unlawful”).)

We demonstrate in Part I, below, that the competitive effects of the Reebok license agreement cannot be deemed unreasonable on the basis of a “quick look” or any scrutiny less rigorous than a full Rule of Reason analysis. In Part II, we demonstrate that American Needle could not establish, even if it attempted to do so, that it is entitled to summary judgment under the Rule of Reason.

I. THE REEBOK LICENSE AGREEMENT MAY NOT BE DEEMED ANTICOMPETITIVE ON A TRUNCATED REVIEW.

The Rule of Reason applies to all but the most exceptional antitrust cases. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007) (“The rule of reason is

the accepted standard for testing whether a practice restrains trade in violation of § 1. . . . Resort to per se rules is confined to restraints, like [horizontal price fixing and market allocation], that would always or almost always tend to restrict competition and decrease output.” (internal quotation marks omitted)); *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 335 (7th Cir. 2012) (“The standard framework for analyzing an action’s anticompetitive effects on a market is the Rule of Reason.”).

That is especially true of vertical agreements, including exclusive licensing arrangements.¹ Such agreements often have procompetitive benefits of the kind that the antitrust laws seek to promote, and the Supreme Court and the Courts of Appeals have cautioned against hasty application of the antitrust laws to condemn them. *E.g., Leegin Creative Leather Prods., Inc.*, 551 U.S. at 881-82, 907 (vertical restraints subject to the rule of reason because such “restraints can have procompetitive effects”); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57-59 (1977) (vertical nonprice restraints subject to the rule of reason); *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 736-37 (7th Cir. 2004) (“[W]e must be cautious about importing relaxed standards of proof from horizontal agreement cases into vertical agreement cases. To do so might harm competition and frustrate the very goals that antitrust law seeks to achieve.”). Accordingly, “[v]ertical non-price restraints . . . are evaluated under the rule of reason,” and “to prevail, [plaintiff] must demonstrate, at a minimum, that [the] agreement . . . has an anticompetitive, welfare-reducing effect that is not overcome by any pro-competitive,

¹ The challenged Reebok license agreement is a vertical agreement. *See generally, e.g., United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) (“combinations of persons at different levels of the market structure . . . are termed ‘vertical’ restraints”); *Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 977 (7th Cir. 1999); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1362, 1368, 1371 (3d Cir. 1996) (“[a]greements between entities at different market levels are termed ‘vertical restraints’”; film clearances, which frequently involve exclusive licenses, are “vertical, nonprice restraints of trade”).

welfare-enhancing consequences of the agreement.” *Generac Corp.*, 172 F.3d at 977 (citation omitted).

Notwithstanding these principles and its own recognition that the challenged license “must be analyzed under the rule of reason” (ANI SJ Mem. at 14), American Needle urges this Court to grant partial summary judgment based on a truncated review. But it fails to cite a single antitrust case in which, based on a “quick look,” the *plaintiff* prevailed on summary judgment. And the principal case on which American Needle relies reached exactly the opposite conclusion: it held that the full Rule of Reason analysis, *and not a “quick look” or per se standard*, applied to an antitrust challenge brought by a disappointed former licensee of Major League Baseball. *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 334 (2d Cir. 2008).

Indeed, in *Salvino* the Second Circuit affirmed the district court’s grant of summary judgment to the *defendants*, not to the former licensee. *Id.* The concurring opinion in that case reached the same conclusion—affirming summary judgment for *defendants*—based on the ancillary restraints doctrine. *Id.* at 334 *et seq.* (Sotomayor, J., concurring). The same result is warranted here.

A. The Quick Look Doctrine Is Inapplicable.

1. Guidance From the Supreme Court and Other Authorities Precludes “Quick Look” Review.

The Supreme Court has already recognized *in this case* that the challenged Reebok license may not be deemed anticompetitive without a Rule of Reason review: “When ‘restraints on competition are essential if the product is to be available at all,’ *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.” *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2216 (2010) (citation omitted); *see also*

id. at 2216 n.10 (referring to “classic formulation of the Rule of Reason”); *id.* at 2207 (“The legality of [the NFL’s] concerted action must be judged under the Rule of Reason.”).

The Supreme Court added, moreover, that “[i]n such instances, the agreement is *likely to survive* the Rule of Reason.” *Id.* at 2216 (emphasis added). For example, the Court recognized that the “interest in maintaining a competitive balance” among the League’s clubs is “*unquestionably* an interest that may well justify a variety of collective decisions made by the teams,” and that “[w]hat role [this interest] properly plays *in applying the Rule of Reason* to the allegations in this case is a matter to be considered on remand.” *Id.* at 2217 (emphases added) (internal quotation marks omitted) (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 117 (1984)).²

The Supreme Court’s guidance in this case reflects long-established law. Application of the quick-look standard is limited to situations in which the restraint “facially appears to be one that would always or almost always tend to restrict competition and decrease output.” *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (internal quotation marks and citation omitted); *see also Texaco Inc. v. Dagher*, 547 U.S. 1, 7 n.3 (2006); *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1339 (Fed. Cir. 2010) (“Quick-look analysis applies to ‘naked restraint[s] on price and output’” (citation omitted)); *Deutscher Tennis*

² A league with competitive balance is one in which each team has a roughly equal opportunity to win games—and ultimately the championship—so that fan interest is maximized over the long term. (Defs.’ Ex. 101, Elzinga Rep. 11.) Many of the League’s collective activities, including making collective decisions about how best to deploy intellectual property for the benefit of the League and sharing licensing revenues equally among all clubs, are undertaken to promote competitive balance. (Defs.’ Ex. 1, Gertzog 2005 Decl. ¶¶ 5-8; Defs.’ Ex. 101, Elzinga Rep. 11-14.) Citations to Defs.’ Exs. 1 to 101 are to the sequentially numbered exhibits attached to the declarations of Gary M. Gertzog, John T. Warren, Leah E. Pogoriler, and Kenneth G. Elzinga, contained in the Volume of Exhibits filed on April 1, 2013 with defendants’ motions for summary judgment (Dkt. 245-50). Citations to Defs.’ Exs. 102 to 117 are to the sequentially numbered exhibits attached to the declarations of John T. Warren and Leah E. Pogoriler filed concurrently with this memorandum.

Bund v. ATP Tour, Inc., 610 F.3d 820, 832 (3d Cir. 2010) (“‘quick look’ condemnation is proper only after assessing and rejecting the logic of proffered procompetitive justifications”).

If a restraint “might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition,” a full Rule of Reason inquiry is required. *Cal. Dental Ass’n v. F.T.C.*, 526 U.S. 756, 771 (1999). Put differently, a court “must abandon ‘quick look’ and proceed to a full-blown rule of reasons analysis . . . once the defendant has shown a procompetitive justification for the conduct.” *Madison Square Garden, L.P. v. Nat'l Hockey League*, 270 F. App’x 56, 58 (2d Cir. 2008) (internal quotation marks and citation omitted).

There has been an ample, if not overwhelming, showing of procompetitive justifications for the Reebok licensing agreement, as we demonstrate in detail at pages 7-10, below. That should come as no surprise. Exclusive licenses of intellectual property are ubiquitous in U.S. commerce.³ Their procompetitive benefits are well-established in the caselaw; among other things, as the Seventh Circuit has repeatedly recognized, they “encourage the licensee to invest in the further development” of the licensed property. *Cook Inc. v. Boston Scientific Corp.*, 333 F.3d 737, 740 (7th Cir. 2003); *Wis. Interscholastic Athletic Ass’n v. Gannet Co.*, 658 F.3d 614, 627 (7th Cir. 2011) (“exclusive contracts are common because they ‘reasonably serve to maintain or enhance the value of an artistic or intellectual product’” (quoting *Home Box Office, Inc. v. F.C.C.*, 587 F.2d 1248, 1253 (D.C. Cir. 1978))).⁴

³ For example, headwear and apparel companies, *including American Needle*, regularly obtain exclusive licenses to market products bearing certain trademarks. (Defs.’ Ex. 74 at 1 (identifying American Needle’s exclusive licenses from Coogi Partners, LLC, Ernie Banks LLC, One G Limited Partnership, and BI Manufacturing, LLC); Defs.’ Ex. 106 at AN9685 ([REDACTED] [REDACTED]).)

⁴ The procompetitive benefits of exclusive license arrangements are also well recognized in the antitrust economics literature and the decisions of other courts. *E.g.*, H. Hovenkamp *et al.*, IP AND ANTITRUST § 13.2, at 13-8 (2010) (exclusive license “is often the most efficient means (continued...)”

Accordingly, courts have consistently refused to apply the quick look standard to licenses of the kind at issue here. Application of the quick look standard was *rejected* in *Salvino*, the most heavily cited case in American Needle’s papers. 542 F.3d at 334 (Rule of Reason analysis applicable to challenge to MLB licensing practice). It was *rejected* in *Polk Bros.*, upon which American Needle also relies. 776 F.2d at 190-91 (“cooperation . . . was at least potentially beneficial to consumers”). And it was *rejected* in *Madison Square Garden*, which involved a challenge to the National Hockey League’s website strategy. 270 F. App’x at 58; *see also, e.g.*, *Carter v. Variflex, Inc.*, 101 F. Supp. 2d 1261, 1266 (C.D. Cal. 2000) (declining to apply quick look standard to conduct involving, among other things, the grant of an exclusive license).

2. The Record In This Case Makes “Quick Look” Review Especially Inappropriate.

In light of the record developed on remand, a quick look approach would be especially inappropriate here.

First, there is ample, undisputed evidence that the NFL decided to grant an exclusive license in certain apparel categories in order to enhance its ability to compete against other licensors in the broad apparel market. *See Madison Square Garden, L.P. v. Nat'l Hockey League*, 2007 WL 3254421, at *7 (S.D.N.Y. Nov. 2, 2007) (“intrabrand restraints . . . foster interbrand competition”; quick look doctrine inapplicable to NHL website strategy), *aff’d* 270 F.

of extracting value from an intellectual property right”); *Gannet Co.*, 658 F.3d at 627 (recognizing “wide body of economic literature demonstrating the substantial value of exclusive licensing agreements” (internal citation omitted)); *see also Fleer Corp. v. Topps Chewing Gum*, 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 [MLB Players Association] is free to grant licenses to any competitor, or none at all”); *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186 (2d Cir. 1992) (affirming dismissal of a section 2 challenge to exclusive licensing of trademarks by the NFL and other professional sports leagues).

App’x 56 (2d Cir. 2008); *see also Leegin Creative Leather Prods., Inc.*, 551 U.S. at 895 (“the antitrust laws are designed primarily to protect interbrand competition”).⁵

Second, there is ample, undisputed evidence that the exclusive license arrangement responded to free-rider problems, present in the NFL’s prior business model, that “had driven innovation from the market and reduced product quality, variety, and channel options” (Defs.’ Ex. 101, Elzinga Rep. 8).⁶ *See Leegin Creative Leather Prods., Inc.*, 551 U.S. at 890 (elimination of free rider problem is a procompetitive benefit that justifies vertical restraints); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 228 (D.C. Cir.

⁵ Resp. to ANI SOF 33 (“The central tenet of each model under consideration was to . . . enable the NFL to better compete against athletic companies and fashion brands as well as traditional competitors, including other sports leagues”); Defs.’ Ex. 110, Deposition of Gary Gertzog, Sept. 13, 2012 at 31:16-33:3 (problems in licensed product business included “increased competition . . . from sports branded companies” and designers, including Ralph Lauren, Tommy Hilfiger, Nike, and Adidas); Defs.’ Ex. 111, Deposition of Roger Goodell, Sept. 14, 2012 at 12:18-13:14 (NFL “compete[s] in a broad environment . . . against not just other sports but other licensing products”); Defs.’ Ex. 112, Deposition of Mark Holtzman, Sept. 13. 2012 at 88:4-89:1 (“NFL[] needed to . . . have more of a brand presence and needed to be able to compete more against some of the big brands out there”); Defs.’ Ex. 34 at NFLP8386 (“increased competition from fashion sportswear companies such as Abercrombie & Fitch, FUBU, and Tommy Hilfiger”); Defs.’ Ex. 42 at NFLP6536 (“Fashion brands eroding licensed business”); Dkt. 244-2, Relevant Market SOF 16-20.

⁶ Resp. to ANI SOF 30 (“market inefficiencies, including free riding, . . . caused NFL-licensed apparel to be less attractive to consumers and retailers than competing apparel”); Defs.’ Statement of Additional Undisputed Facts Requiring Denial of Summary Judgment (“ASF”) 1 (Reebok license agreement was entered into, among other things, to respond to free-rider problems); Defs.’ Ex. 110, Gertzog 2012 Dep. 119:10-13, 143:10-15 (“we wanted a licensed model that was based on licensees[’] investing in the products, investing in fixturing in stores, investing in advertising and promotion, [and] investing in creativity [and] understanding market trends”); Defs.’ Ex. 111, Goodell Dep. 27:22-28:5 (“We had to make sure we had partners who could invest in the business, that could come up with innovative new products that would be attractive to our consumers. . . . [W]e needed to make sure we had a business model that would allow everyone to be successful.”); Defs.’ Ex. 13 at NFLP9605 (“revitalize overall business” by “support[ing] licensees who invest in our business”); Defs.’ Ex. 28 at NFLP2407 (“Over supply of producers . . . has led to a variety of quality and design issues”); Defs.’ Ex. 38 at NFLP3109; Defs.’ Ex. 101, Elzinga Rep. 7-8 (“[The] Reebok contract . . . allowed the NFL to protect from free riders”); Defs.’ Ex. 114, Deposition of Robert Kronenberger, Aug. 28, 2012 at 89:13-22 (discussing “knockoff[s]” that free rode on investments of other producers).

1986) (“elimination of the free ride is an efficiency justification available to horizontal restraints that are ancillary to a contract integration”).

Third, and more broadly, Professor Kenneth Elzinga, a leading antitrust economist, evaluated the license and concluded that it had “procompetitive rather than anticompetitive effects, both in the upstream market for licenses and in the downstream market for headwear. This means that the NFL and Reebok did not exercise market power of antitrust concern . . . and that their course of conduct aided . . . consumer welfare.” (Defs.’ ASF 4; Defs.’ Ex. 101, Elzinga Rep. 129; *id.* at 128-48 (analyzing the procompetitive effects of the license agreement).)

Professor Elzinga’s conclusion was based on undisputed evidence confirming that the new licensing agreement enabled Reebok, among other things, to: introduce a “new high quality tier” of NFL apparel, as well as “higher quality products within each tier”; invest \$30 million per year in marketing NFL-licensed products; develop a “retail presence to showcase . . . NFL product[s]”; and “improve . . . distribution.”⁷ That conclusion also was based on undisputed evidence that the Reebok license was carefully tailored to “ensure[] that Reebok would make *substantial investment in developing and promoting the NFL brand and satisfying consumer demand*,” including a provision that [REDACTED]

⁷ Defs.’ ASF 3-4 (procompetitive effects of Reebok license, including new and improved headwear and apparel products); Defs.’ Ex. 101, Elzinga Rep. 134-41, 135 (“Reebok invested in the quality of the manufacturing, including the stitching and fabrication of NFL-licensed products.”), 138-141 (identifying other procompetitive benefits of the Reebok license), 138-39 (“Reebok’s headwear innovations included better embellishments (*e.g.*, screenprint, embroidery), improved fabrications (including tactile), and improvements of the brim on its snapback styles”), 140 (“Reebok introduced ‘the draft cap,’ a headwear concept based on the NFL Draft, and second-season headwear, which . . . turned headwear into a year-round business” (citation omitted)), 150.

[REDACTED].
(Defs.’ ASF 5; Defs.’ Ex. 101, Elzinga Rep. 58 (emphasis added); Defs.’ Ex. 48 at NFLP1578.)⁸

Any one of the foregoing procompetitive benefits is sufficient to require the Court to “abandon” any notion of truncated or quick-look review. *Madison Square Garden, L.P.*, 270 F. App’x at 58. But it also bears mention that American Needle failed to provide any *evidence*, let alone undisputed evidence, to meet its threshold burden of demonstrating obvious anticompetitive effects. *See Deutscher Tennis Bund*, 610 F.3d at 832; *Salvino*, 542 F.3d at 334. American Needle’s mere assertions cannot support summary judgment:

- American Needle’s assertion that “prices went up and output went down” (at 20) is not supported by the record. (Resp. to ANI’s SOF 39.) American Needle cites no evidence that prices *of the same goods* went up, and its own economist denied that his analysis supported such an assertion.⁹ Moreover, notwithstanding American Needle’s claims of “naked price fixing,” the Reebok license did not set prices or cap output for NFL-licensed apparel (Defs.’ Ex. 48 (no such provisions)); indeed, output was higher than it would have been but for the agreement. (Defs.’ ASF 4; Defs.’ Ex. 101, Elzinga Rep. 142-48 & Figs. 12-15 (analyzing increase in unit sales performance), 148 (“actual benchmarked volume is more than three times the extrapolated trend value from the pre-Reebok years”)).

⁸ The procompetitive nature of the Reebok license is not surprising. The agreement resulted from a competition among many apparel companies for licenses from the NFL and, as Professor Elzinga explained, this competition for the contract “provided procompetitive effects to consumers.” (Defs.’ Ex. 101, Elzinga Rep. 129; *id.* at 129-32; Defs.’ Ex. 38 at NFLP3131 (identifying 40 companies that received requests for proposals and 28 that submitted bids); Dkt. 244-2, Defs.’ Causation SOF 12-14, 17-25.) “[W]hen a negotiated license is exclusive . . . , the exclusivity does not reduce or eliminate competition,” but “merely pushes the competition back to the bidding process when the license is being negotiated.” (Defs.’ Ex. 101, Elzinga Rep. 129.)

⁹ Defs.’ Ex. 115, Deposition of Dr. Stephan Levy, Nov. 8, 2012 at 87:24-88:11; Defs.’ Ex. 116, Deposition of Dr. Stephan Levy, Jan. 18, 2013 at 132:20-24 (Dr. Levy did not study and could not rule out “the possibility that improved marketing, improved product quality or other brand enhancements shifted” demand), 154:20-155:4, 208:20-23 (“Q. You didn’t control for improvements in product quality or appeal to consumers, did you? [Objection] [A.] No.”), 213:12-17 (“Q. And you didn’t control for any improvements in product quality in these exhibits, did you? [Objection] [A.] No. There is no adjustment for changes in quality here.”), 225:16-18, 227:1-23, 250:10-24.

- Contrary to American Needle’s assertions, the record shows that the price of the intellectual property licensed by the NFL—that is, the effective royalty rate—went down, not up. (Defs.’ ASF 4; Defs.’ Ex. 101, Elzinga Rep. 132-33 & Fig. 11.) “It would be a remarkable (and irrational) monopolist who monopolized a market in order to reduce the price in that market, especially in this context where the plaintiff alleges that there is a relevant market limited just to NFL licenses.” (*Id.* at 133.)
- American Needle’s assertion (at 20) that the Reebok license “was not accompanied by new NFL Team Cap production or products” is not even supported by its own Statement of Facts. And that assertion is refuted by undisputed evidence establishing that Reebok developed new product lines, such as an NFL Draft Cap to commemorate the annual player draft; new products, including new brim and embellishment designs and other aesthetic improvements; and new fabrications, including tactile material. (Defs.’ ASF 3; Defs.’ Ex. 117, Deposition of John Warren, Sept. 21, 2012 at 106:18-107:9, 108:20-109:13, 112:6-22, 112:23-113:1 (“We introduced a lot of different products into the marketplace over the course of our relationship.”), 113:7-10 (“[W]e improved the product offering to the consumer in the marketplace by offering different—better design, better products in the marketplace.”).)

Even if there were evidence of a price increase or output reduction (and there is not), such evidence, standing alone, would not establish *anticompetitive* effects. A product’s price may have increased because of improvements to its quality and value to consumers; and “output does not simply refer to the number of units produced, it also involves a qualitative judgment.” *Madison Square Garden, L.P.*, 2007 WL 3254421, at *8. As plaintiff’s economist, Dr. Levy, conceded, “increase in price is one of the possible outcomes you would expect to see with an increase in quality.” (Defs. Ex. 115, Levy 2013 Dep. 128:16-18.) *See Leegin Creative Leather Prods., Inc.*, 551 U.S. at 896-97 (“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.”). American Needle’s economist conceded that his price and output analyses did not take into account—or rule out—any improvements in the quality of NFL-licensed headwear, nor did Dr. Levy’s analysis address the

effects of a conceded shift in consumer purchasing toward a higher-end product mix. (Resp. to ANI SOF 39; *see also* n.9, *supra*.)

B. The Ancillary Restraints Doctrine Does Not Support Summary Judgment For American Needle.

American Needle’s resort to the ancillary restraints doctrine directly contradicts both *Dagher* and the primary case on which American Needle relies, *Salvino*. 542 F.3d at 318-320, 332-33. That is because “the ancillary restraints doctrine has no application . . . where the business practice being challenged involves the core activity of the joint venture itself.” *Dagher*, 547 U.S. at 7-8.

American Needle does not challenge the NFL clubs’ decision to enter into a joint venture to license their intellectual property through NFLP. Nor does American Needle dispute that the fundamental purpose of licensing the marks and logos of NFL clubs is to promote, in the literal sense, the principal product of the National Football League: attendance at, and viewership of, NFL games, and to enhance the NFL’s ability to compete against other participants in a broad entertainment market. (Resp. to ANI SOF 8; Defs.’ Ex. 1, Gertzog 2005 Decl. ¶ 5.) The licensing of rights to Reebok plainly involved the core activity of that licensing joint venture; it was intended to and did correct for market failures, increase the quality and variety of NFL-licensed products, strengthen the NFL brand in interbrand competition, and provide higher-value products to consumers. (Defs.’ ASF 2, 4.) Accordingly, the ancillary restraints doctrine is simply inapplicable. *Dagher*, 547 U.S. at 7-8.

American Needle relies heavily on *Salvino*, but the *Salvino* majority did not apply the ancillary restraints doctrine. Indeed, in a majority opinion that spanned more than 40 pages, the Second Circuit did not even mention the word “ancillary.” 542 F.3d at 293-334. The Second Circuit opinion did, however, observe that the alleged anticompetitive effects of MLB’s licensing

conduct were not “at all apparent, much less so obvious that that agreement should have been held illegal per se or upon a quick look.” *Id.* at 334. The same result should follow here.

Even if the ancillary restraints doctrine did apply, the only result would be a reaffirmation that the Reebok license must be judged under the Rule of Reason. *See Dagher*, 547 U.S. at 8. In *Salvino*, then-Judge Sotomayor, who concurred in the result, concluded that the challenged licensing practices were “reasonably necessary to achieve [MLB Properties’] efficiency-enhancing objectives” (*i.e.*, were ancillary) and thus “should be analyzed as part of the joint venture using a rule-of-reason analysis.” *Salvino*, 542 F.3d at 338. In so concluding, she noted that the challenged practices “eliminate several potential externalities,” most notably the “free-rider problem,” that could “limit the potential efficiency gains of MLBP.” *Id.* at 340.

Judge Sotomayor’s conclusion is equally applicable to American Needle’s arguments. As the Seventh Circuit has explained, the ancillary restraints doctrine distinguishes between agreements that establish a “naked” restraint on competition and those that are “ancillary” to a “larger endeavor whose success they promote.” *Polk Bros.*, 776 F.2d at 188-91 (challenged agreement was ancillary to larger joint venture and subject to full Rule of Reason analysis). “If the restraint, viewed at the time it was adopted, may promote the success of [a] more extensive [cooperative venture], then the court must scrutinize things carefully under the Rule of Reason.” *Id.* at 189; *see also id.* (if the agreement “arguably” “promoted enterprise and productivity at the time it was adopted . . . then the court must apply the Rule of Reason to make a more discriminating assessment”).

The restraint at issue here is the polar opposite of a “naked” restraint. Undisputed evidence confirms that the fundamental purpose of joint licensing of NFL marks is to strengthen the NFL brand and thereby enhance NFL Football’s ability to compete in the broad

entertainment market, and that the Reebok license mitigated free-rider problems and promoted efficiencies in these licensing activities. (Defs.’ Response to ANI SOF 8, 31, 33; Defs.’ ASF 1-4.) It is thus a textbook example of a restraint that serves a “larger endeavor whose success [it] promote[s].” *Polk Bros.*, 776 F.2d at 188-89. Tellingly, the Second Circuit *rejected*—in both the majority and concurring opinions—the plaintiff’s efforts to characterize various MLB licensing practices as “naked” restraints of trade. *Salvino*, 542 F.3d at 318-320, 332-34.

American Needle contends that the Reebok license was not ancillary to any larger endeavor: It asserts that “[i]n the nearly 10 years that this case has been pending, defendants have not offered a single legitimate efficiency enhancing purpose” for the agreement. (ANI SJ Mem. at 19.) This claim exhibits a puzzling disregard for the record, which is replete with ample—indeed, undisputed—evidence demonstrating the procompetitive purposes and effects of the Reebok Agreement, a small sample of which are discussed and cited at pages 7-10, above. (Defs.’ ASF 1-4.)

American Needle’s assertion even ignores the very documents upon which it relies in its supporting memorandum; those contemporaneous documents describe numerous procompetitive purposes, including:

- “[E]nhanc[ing] the product design, quality, attractiveness to consumers and marketing of NFL apparel products” (Pl.’s Ex. 8 at NFLP499-500);
- “Provid[ing] advanced technical fabrics and athletic treatments for on-field and sideline apparel” (Pl.’s Ex. 14 at NFLP5961-62);
- “Upgrad[ing] quality and design of NFL product” (*id.*);
- “Develop[ing] and execut[ing] clear consistent marketing plans” (*id.*);
- “Enhanc[ing] retail development for in-store presence and display” (*id.*);
- “Maximiz[ing] retail supply chain including hot market ‘chase’ business” (*id.*); and

- “Build[ing] differentiated product in multiple trade channels” (*id.*).¹⁰

American Needle also disregards the host of other contemporaneous documents and deposition testimony relevant to these issues.¹¹ And most egregiously, it ignores verified explanations of the procompetitive purposes and effects that were provided to American Needle in response to interrogatories on these very issues. (Defs.’ Ex. 108, Second Supp. Resp. to Pl.’s First Interrog. to the NFL Defs. 4-6; Defs.’ Ex. 109, Fifth Supp. Resp. to Pl.’s First Interrog. to the NFL Defs. 2.)

Nor does American Needle respond to, or even mention, the extensive analysis by expert economist Professor Kenneth Elzinga, described above, confirming the procompetitive

¹⁰ Other documents excerpted by American Needle confirm the procompetitive purposes of the parties. (Pl.’s Ex. 10 at NFLP2544 (“Marketing - Clear consistent message”; “Product - Relevant product created for target market”); Pl.’s Ex. 11 at NFLP6006 (same); Pl.’s Ex. 13 at NFLP5978 (“Build brand through technical fabrics and athletic treatments”; “Provide uniform service”); Pl.’s Ex. 16 at NFLP4496 (draft memorandum, the final version of which is Exhibit 34 to the March 29, 2013 declaration of Gary Gertzog, describing goal to “better define our market segmentation strategy [and] restore strength in the NFL and Club brands”).)

¹¹ Defs.’ Ex. 110, Gertzog 2012 Dep. 119:9-13 (NFL found “compelling” Reebok’s “vision for the business,” including “the new products that they would create”), 143:10-15 (“we wanted a licensed model that was based on licensees investing in the products, investing in fixturing in stores, investing in advertising and promotion, [and] investing in creativity [and] understanding market trends”); Defs.’ Ex. 111, Goodell Dep. 27:2-28:5 (“We had to make sure we had partners who could invest in the business, that could come up with innovative new products that would be attractive to our consumers.”); Defs.’ Ex. 117, Warren Dep. 53:22-54:24 (marketing and design developments), 66:6-10 (\$30 million per year marketing investment), 95:9-96:22 (investment in quality), 106:18-107:9 (Reebok introduced different products; made changes to some of the fabrications, including tactile material; changed headwear design, including brim and embellishments; and improved product aesthetics), 107:19-108:5 (headwear design team), 108:20-109:13 (headwear innovations), 113:7-10 (“we improved the product offering to the consumer in the marketplace by offering different—better design, better products in the marketplace”), 113:20-23 (new products); Defs.’ Ex. 116, Levy 2013 Dep. 151:23-152:10 (improving product quality and investment in innovation and efficiency of distribution are procompetitive); Defs.’ Ex. 34 at NFLP8386 (“better define our marketing strategy, bolster the NFL and Club brands, better respond to competitive products”); Defs.’ Ex. 39 at TEN94 (“improving the attractiveness of NFL licensed product in a highly competitive marketplace”); Defs.’ Ex. 57 at REEBOK103001, 04, 10-11 (technology and marketing innovations); Defs.’ Ex. 102 at REEBOK102777-78 (identifying “key [Reebok] innovations”); Defs.’ Ex. 103 at REEBOK102979 (Reebok “innovation & investment”).

purposes and effects of the Reebok license.¹² (Defs.’ ASF 1-4.) *See Leegin Creative Leather Prods., Inc.*, 551 U.S. at 890 (Vertical restraints “can stimulate interbrand competition—the competition among manufacturers selling different brands of the same type of product—by reducing intrabrand competition—the competition among retailers selling the same brand. . . . [I]nterbrand competition is important because ‘the primary purpose of the antitrust laws is to protect [this type of] competition.’” (last alteration in original) (citation omitted)).

Even a far more modest record would have been sufficient to undermine conclusively American Needle’s reliance on cases addressing naked or non-ancillary restraints. The challenged agreement in *NCAA*, for example, imposed explicit limits on output (the number of games that could be broadcast) and “essentially fixed prices[s].” 468 U.S. at 92-94. The Reebok license, by contrast, neither limited output nor set prices. (Defs.’ Ex. 48.) Nor did it allocate territories. (*Id.*). *Cf. Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995) (agreement to allocate territories not ancillary to court-ordered dissolution of partnership).

Just as in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, a case repeatedly cited by plaintiff, “the challenged agreement[] [is] ancillary in that [it] enhance[s] the efficiency of [the venture] by eliminating the problem of the free ride.” 792 F.2d at 224 (“The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction

¹² Defs.’ Ex. 101, Elzinga Rep.; *id.* at 7-8 (Reebok license addressed free-rider problems), 36-51 (discussing free-rider problems resulting in diminished quality and investment and retailer and manufacturer liquidations and bankruptcies), 57-68 (Reebok license, among other things, “ensured that Reebok would make substantial investment in developing and promoting the NFL brand and satisfying consumer demand”), 69-71 (“[t]he contract with Reebok is procompetitive in part because it corrected for the market failure of free riding”), 128-150 (detailing the procompetitive effects of the Reebok license), 134 (“The exclusivity granted to Reebok dealt with free riding and also resulted in an increase in the quality of the merchandise”), 141 (“Increased inter-brand competition was the consequence of the NFL’s agreement with Reebok. The result of the contract was offering consumers a greater variety of high-quality NFL-licensed apparel marketed through more clearly differentiated distribution channels.”).

more effective in accomplishing its purpose.”); *Baxter Int’l, Inc. v. Abbott Labs.*, 315 F.3d 829, 833 (7th Cir. 2003) (exclusive license “was a lawful ancillary agreement designed to induce [licensee] and its sublicensees to make the investments needed”). Accordingly, American Needle’s reliance on the ancillary restraints doctrine in an effort to secure partial summary judgment is futile.

II. AMERICAN NEEDLE HAS NOT MET (AND CANNOT MEET) ITS SUMMARY JUDGMENT BURDEN UNDER THE RULE OF REASON.

American Needle has not demonstrated—and could not demonstrate—undisputed facts showing that the exclusive aspect of the NFL’s license to Reebok was anticompetitive under a full Rule of Reason analysis.

To make such a showing, American Needle would have to prove with undisputed facts that the legitimate, procompetitive objectives and effects of the Reebok license were outweighed by its asserted anticompetitive effects. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (when applying the Rule of Reason, “the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature, and effect”); *42nd Parallel N. v. E St. Denim Co.*, 286 F.3d 401, 404 (7th Cir. 2002). In part because this standard requires a careful weighing of many factors, it is exceedingly rare for antitrust plaintiffs to obtain summary judgment under the Rule of Reason. *E.g., AMEC E & C Servs., Inc. v. Nu-West Indus., Inc.*, 395 F. Supp. 2d 957, 960 (D. Idaho 2005) (denying plaintiff’s motion for summary judgment; “[b]ecause of the fact- and intent-sensitive nature of [the Rule of Reason], [t]he law clearly envisions that the balancing test is normally reserved for the jury” (citation and internal quotation omitted)).

American Needle makes no effort to meet this standard; instead, it relies solely on the notion that a truncated standard of review should apply.¹³ In light of the extensive record evidence of the Reebok license agreement's procompetitive purposes and effects (Defs.' ASF 1-4), however, it should not take long—perhaps only “the twinkling of an eye”—to uphold the challenged licensing arrangement under the Rule of Reason. *Am. Needle, Inc.*, 130 S. Ct. at 2216-17 (internal quotation marks and citation omitted).

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court deny American Needle's motion for partial summary judgment.

¹³ Dr. Levy conducted *no* affirmative analysis of the competitive effects of the license agreement. No such analysis appears in his principal report; in his reply report, he simply attempted to critique Professor Elzinga's analysis. (Defs. Ex. 115, Levy 2012 Dep. 23:9-24; Defs. Ex. 116, Levy 2013 Dep. 143:22-145:20; Defs.' Exs. 98-99.)

Respectfully submitted,

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June 17, 2013

CERTIFICATE OF SERVICE

I, Derek Ludwin, an attorney, do hereby certify that I caused a copy of the foregoing to be electronically filed with the Court and to be served on all parties on June 17, 2013 using the Court's electronic case filing system.

By: /s/ *Derek Ludwin*
Derek Ludwin