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, *et al.*,	)	Judge Sharon Johnson Coleman
Defendants.	)	Argument Date: August 27, 2013

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (RELEVANT MARKET)

Timothy B. Hardwicke
Michael J. Nelson
LATHAM & WATKINS LLP
233 South Wacker Drive, Suite 5800
Chicago, IL 60606
(312) 876-7700/*fax* (312) 993-9767
tim.hardwicke@lw.com/
michael.nelson@lw.com

Counsel for Reebok International Ltd.

Gregg H. Levy (*pro hac vice*)
Derek Ludwin (*pro hac vice*)
Leah E. Pogoriler (*pro hac vice*)
John S. Playforth (*pro hac vice pending*)
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 662-6000/*fax* (202) 662-6291
glevy@cov.com/dludwin@cov.com/
lpogoriler@cov.com/jplayforth@cov.com

Richard Del Giudice
GOZDECKI, DEL GIUDICE, AMERICUS & FARKAS LLP
One East Wacker Drive, Suite 1700
Chicago, IL 60601
(312) 782-5010/*fax* (312) 782-4324

Counsel for the NFL Defendants

April 1, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

American Needle's remaining claims in this antitrust case depend on the premise that NFL-branded hats, and licenses to produce those hats, are isolated in their own respective "relevant markets," *i.e.*, that they face no meaningful competition from other hats and apparel licenses.

That premise defies common sense. It is conclusively disproved by overwhelming and undisputed evidence of the actual economics of the apparel and licensing markets, and it is flatly inconsistent with every factor that the Supreme Court has prescribed for determining relevant markets. It also defies well-established precedent from across the country that such single-brand markets are improperly narrow, including the Second Circuit's indistinguishable recent decision in *Major League Baseball v. Salvino* rejecting a proposed relevant market limited to Major League Baseball licenses for use on consumer products.

For many years, American Needle was one of many licensees authorized by the National Football League to produce and distribute headwear bearing the marks and logos of the League and its member clubs. More than a decade ago, however, the NFL significantly reduced the number of its licensees; in the headwear category, the NFL issued a license to a single manufacturer, defendant Reebok International Ltd. American Needle's headwear licenses, like those of many other licensees, expired. Years later, American Needle, unlike the other former licensees, brought this lawsuit, alleging that by entering into a license exclusive as to headwear, the NFL and Reebok unreasonably restrained trade and violated the antitrust laws.

To succeed in its claims, American Needle must show that the challenged license unreasonably restrained trade *in a relevant market*. American Needle cannot meet this burden if the relevant market includes hats other than those bearing NFL logos (or licenses to use those other logos). The law is clear that an exclusive license cannot unreasonably restrain in a market with numerous competitors; American Needle's own expert concedes this point.

After extensive discovery, it is now clear that American Needle cannot meet this burden. Undisputed evidence confirms beyond doubt that NFL hats and licenses are in the same markets as the hats and licenses of other sports leagues and organizations (*e.g.*, MLB, the NBA, NASCAR, the Olympics), colleges (*e.g.*, Northwestern, Notre Dame), athletic brands (*e.g.*, Nike, Adidas), fashion brands (*e.g.*, Nautica, Tommy Hilfiger), entertainment entities (*e.g.*, Disney, Warner Brothers), and others. That evidence is reflected in the contemporaneous business records of the NFL, of Reebok, and of American Needle itself, and it is supported by a detailed and thorough analysis from a nationally recognized antitrust economist.

In the absence of any material factual dispute, and in light of American Needle's inability to meet its relevant market burden, summary judgment is warranted.

BACKGROUND

To promote its entertainment product, for a half century the NFL has licensed the logos of the League and its member clubs for use on consumer merchandise such as hats, jerseys, t-shirts, trading cards, and video games.[1]

The NFL's licensing business grew from the late 1980s through the mid-1990s.[2] In the late 1990s, however, there was a dramatic decline in sales of sports-licensed merchandise.[3]

---

[1] Ex. 1, Declaration of Gary M. Gertzog, December 21, 2005, (hereinafter "Gertzog 2005 Decl."), ¶¶ 2-5, 12, 24; Ex. 2 at NFLP8083; *see* Ex. 24 at NFLP9230; Ex. 39 at TEN94. All exhibit citations 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 concurrently with this memorandum. For material facts as to which there is no genuine dispute, this memorandum cites both the Statement of Undisputed Material Facts ("SOF") and the associated record support. For facts included principally as background, this memorandum cites directly to the record.

[2] Ex. 4 at NFLP9158.

Several major sports apparel companies, as well as several sports apparel retailers, went bankrupt.[4] Retailers that survived cut back substantially on shelf space devoted to sports-licensed merchandise.[5]

In the wake of these developments, NFL executives conducted an extensive review of their licensing business. They concluded that the NFL was losing business not only to licensors traditionally viewed as its primary competitors—the other major sports leagues and colleges—but also to Seventh Avenue (fashion) brands such as Tommy Hilfiger and Ralph Lauren, "urban" brands such as FUBU, and sportswear brands such as Nike.[6]

The principal recommendation of the NFL executives was to reduce substantially the number of NFL apparel licensees, affording each an enhanced incentive to invest in product improvement, innovation, and marketing.[7] After a competitive bidding process, the NFL granted Reebok a license that included exclusive rights for headwear and jerseys (as well as other

[3] Ex. 88, Deposition of Gary M. Gertzog, Sept. 13, 2012 at 24:10-25:5, 31:16-34:10, 37:10-38:8; Ex. 89, Deposition of Roger Goodell, Sept. 14, 2012 at 11:3-15; Ex. 97, Deposition of John Warren, Sept. 21, 2012 at 143:9-17; Ex. 24 at NFLP9226-28; Ex. 55 at REEBOK102548-50.

[4] Ex. 88, Gertzog Dep. 33:20-34:5, 119:3-120:1; [redacted] Ex. 13 at NFLP9606; Ex. 24 at NFLP9227; Ex. 56 at REEBOK102463.

[5] Ex. 8 at NFLP8750; Ex. 53 at REEBOK102428; Ex. 83, *The Licensing Letter*, "Licensing Business Drops 1% As Music, Martha and Trademarks Nearly Offset Softness Elsewhere," Jan. 1, 2001, Vol. XXV, No. 1, p. 4.

[6] *See, e.g.*, Ex. 5 at NFLP9153 (NFL competes in the "sports licensed industry, that is the sales of merchandise that carrie[s] marks of the teams of the NFL, NBA, MLB, NHL and colleges"); Ex. 41 at NFLP2869 (competition includes "other leagues and sports licensed companies"); Ex. 14 at NFLP9410-11 ("Fashion Sportswear companies" such as Nautica put marketplace pressure on sports apparel licensees); Ex. 34 at NFLP8386 (licensed sports apparel faces "increased competition from fashion sportswear companies such as Abercrombie & Fitch, FUBU, and Tommy Hilfiger"); Ex. 7 at NFLP10610 ("Nike and Adidas . . . compete in the marketplace" and fashion brands "have successfully entered the 'sport' market"); *accord* Ex. 4 at NFLP9167; Ex. 13 at NFLP9608; Ex. 14 at NFLP9410; Ex. 41 at NFLP 2868-69.

[7] Ex. 88, Gertzog Dep. 31:16-34:10, 200:16-24; Ex. 89, Goodell Dep. 77:5-8; Ex. 8 at NFLP8739; Ex. 34 at NFLP8386. By 1998, the NFL had over 50 licensees for apparel and hundreds more for non-apparel items such as mugs and key chains. (Ex. 17 at NFLP9212.)

exclusive and non-exclusive rights); it also granted licenses, with varying degrees of exclusivity, to VF Corporation for t-shirts, fleece, knits, and bottoms, to G-III for outerwear, and to others.[8] [redacted] Several years later, American Needle filed this lawsuit.

American Needle's complaint alleged that the Reebok license (which has since expired) restrained competition in six relevant markets, each limited to and defined solely by the marks and logos of the NFL and its member clubs. (Compl. ¶¶ 15-20, 31.) [redacted][10]

Under basic principles of economics and criteria endorsed by the Supreme Court, undisputed evidence, which we address and document in detail below, precludes a finding that the markets alleged by American Needle are properly defined relevant markets. In terms of *industry recognition*, for example, undisputed evidence confirms that the industry viewed sports leagues, colleges, athletic brands, and fashion brands, among others, as competitors of the NFL in terms of both branded hats and licenses.

---

[8] Ex. 88, Gertzog Dep. 111:23-113:13, 188:5-12; Ex. 89, Goodell Dep. 31:20-33:8; Ex. 97, Warren Dep. 129:16-130:1; Ex. 34 at NFLP8386-87; Ex. 38 at NFLP3131; Ex. 45 at NFLP4411-12; Ex. 48, NFLP1550; Ex. 49 at NFLP8504; Ex. 51 at NFLP6839.

[redacted]

[10] The alleged relevant geographic market is the United States. (Compl. ¶¶ 15-20[redacted].)

Similarly, undisputed evidence confirms that NFL-branded hats and licenses do not have *peculiar characteristics or uses* that would warrant treating them as if they were in separate markets by themselves. [redacted]

There is no dispute that even those who purchase hats to show affiliation with a particular team, their alma mater, or an icon of a different sort have multiple affiliations; a consumer interested in a hat showing support for the Chicago Bears, for example, may also be interested in a hat showing support for the Chicago Bulls, Northwestern, Nike, Harley-Davidson, or a Disney character. And consumers determined to demonstrate their affiliation with an NFL club also have many options from which to choose: instead of a branded hat, they can choose a branded t-shirt, jersey, fleece, or pennant, to name just a few.

NFL-branded hats also do not require *unique production facilities or specialized vendor*s warranting their segregation in their own relevant market. Nor do they have *distinct prices* [redacted].

Such undisputed, simple, and straightforward facts demonstrate that NFL-branded hats and NFL licenses are not isolated in their own product markets. That conclusion is confirmed by the expert opinion of Professor Kenneth Elzinga, a leading antitrust economist who conducted an extensive market analysis.

Judge Moran was reluctant to reach that conclusion on the basis of the pleadings alone. *Am. Needle, Inc. v. New Orleans La. Saints*, 385 F. Supp. 2d 687, 696 (N.D. Ill. 2005).

Since that ruling, the parties have compiled an extensive discovery record, a record that contains not a scintilla of *admissible*, *relevant evidence* undermining the common sense conclusion and overwhelming evidence establishing that NFL-branded hats, like NFL apparel licenses, face vigorous competition in a broad apparel market. This issue is ripe for summary judgment.[11]

ARGUMENT

"The first step in an antitrust analysis is defining the relevant market or markets" allegedly affected by the challenged conduct. *Am. Needle, Inc.*, 385 F. Supp. 2d at 692 (quoting *Adidas Am., Inc. v. NCAA*, 64 F. Supp. 2d 1097, 1101 (D. Kan. 1999)). Properly defining the relevant market is of critical importance; without a proper market definition, there is no way to determine whether defendants had a sufficiently large share of the market to exercise market power. *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 673 (7th Cir. 1992); *Cnty. Materials Corp. v. Allan Block Corp.*, 502 F.3d 730, 736 (7th Cir. 2007) ("[A]t the summary judgment stage, some evidence tending to show an adverse effect in an economically sound relevant market is essential for any claim governed by the rule of reason."). The burden is on the plaintiff to identify an appropriate relevant market. *Spectrum Sports v. McQuillan*, 506 U.S. 447, 455 (1993).

The Seventh Circuit has emphasized the importance of applying market definition requirements strictly in cases, such as this one, challenging "vertical" agreements between partners at different levels of the distribution chain. *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 736-37 (7th Cir. 2004). Because such agreements often have "procompetitive

[11] In a separate summary judgment motion filed today, defendants demonstrate that they are also entitled to summary judgment on causation grounds, *i.e.*, that even if the NFL had granted multiple non-exclusive licenses in the headwear category, American Needle, whose bid and prior performance were not competitive, would not have received one. Each summary judgment motion provides an independent basis upon which to dispose of the entire case.

benefits," allowing challenges to proceed on the basis of markets defined too narrowly "might harm competition and frustrate the very goals that antitrust law seeks to achieve." *Id.*; *Ind. Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1412 (7th Cir. 1989) ("[S]ummary judgment may be especially appropriate in an antitrust case because of the chill antitrust litigation can have on legitimate price competition." (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594-95 (1986))); *Collins v. Associated Pathologists*, 844 F.2d 473 (7th Cir. 1988) ("[U]se of summary judgment is not only permitted but encouraged in . . . antitrust cases."). As Professor Elzinga, who analyzed the relevant markets in this case on behalf of defendants, explained, "[i]f a firm does not have substantial market power over the sale of some good or service, its use of exclusive dealing or licensing is considered to be economically benign and not anticompetitive; indeed, it may well be procompetitive."[12] (Ex. 101, Economic Expert Report of Professor Kenneth G. Elzinga, December 14, 2012 (hereinafter "Elzinga Rep."), 76.)

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 320 (7th Cir. 2006). "[T]he boundaries of the relevant market must be drawn with sufficient breadth to include . . . competing products and to recognize competition where, in fact, competition exists." *Brown Shoe Co.*, 370 U.S. at 326.

[12] Professor Elzinga is the Robert C. Taylor Professor of Economics at the University of Virginia. He has written dozens of scholarly publications, including on market definition, and he served in the Antitrust Division of the Department of Justice as economic advisor to the Assistant Attorney General. Professor Elzinga has also served as an expert in three prominent cases before the United States Supreme Court, including most recently in *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877 (2007). (Ex. 101, Elzinga Rep. 2-3.)

Relying on that principle, the Seventh Circuit has "explicitly rejected the proposition that a firm can be said to have monopoly power in its own product, absent proof that the product itself has no economic substitutes." *Elliott v. United Ctr.*, 126 F.3d 1003, 1005 (7th Cir. 1997); *e.g.*, *Digital Equip. Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756, 763 (7th Cir. 1996) (refusing to accept product market limited to one company's products). That stance reflects a broad, nationwide consensus—courts have "embraced a sweeping prohibition against analyzing alleged anticompetitive activity by focusing on single-brand relevant markets." *Metzler v. Bear Auto. Serv. Equip. Co.*, 19 F. Supp. 2d 1345, 1355 (S.D. Fla. 1998) (collecting cases).

Of particular relevance here, in an antitrust challenge brought against Major League Baseball by one of its former licensees, the Second Circuit rejected a proposed relevant market limited to licenses for MLB trademarks and logos, and on that basis it affirmed summary judgment dismissing the case. *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 328-31 (2d Cir. 2008).[13]

The Supreme Court has stated that in determining whether products are in a single market (or submarket), courts should be guided by "practical indicia" that include:

---

[13] In 2005, Judge Moran denied defendants' motion to dismiss on relevant market grounds. That ruling was reached under the lax pleading standards in place prior to the Supreme Court's decision in *Twombly*. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561-63 (2007) (rejecting standard of *Conley v. Gibson*, 355 U.S. 41 (1957), that dismissal is warranted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). There is no inconsistency between Judge Moran's 2005 ruling on the pleadings and the *Salvino* decision on summary judgment. Judge Moran found "only that the law does not preclude an antitrust claim based on" the markets alleged in the complaint; he emphasized that "we have not determined whether the markets plaintiff alleges *do in fact exist*." *Am. Needle, Inc.*, 385 F. Supp. 2d at 696 (emphasis added), *reconsideration denied*, 385 F. Supp. 2d 727 (N.D. Ill. 2005), *and motion to certify denied*, 2005 WL 2483367 (N.D. Ill. Oct. 5, 2005). As in *Salvino*, the evidence now answers that question.

1. "industry or public recognition of the submarket as a separate economic entity";
2. "the product's peculiar characteristics and uses" and "distinct customers";
3. "unique production facilities" and "specialized vendors"; and
4. "distinct prices [and] sensitivity to price changes."

Brown Shoe Co., 370 U.S. at 325; *see Reifert*, 450 F.3d at 320 (satisfying *Brown Shoe* factors "important," but not sufficient, to meet plaintiff's burden in terms of relevant market analysis).

Undisputed evidence precludes a finding that NFL-branded hats and NFL licenses have "no economic substitutes." *Elliott*, 126 F.3d at 1005. Indeed, here, as in other cases granting defendants summary judgment on relevant market grounds, there is no "economic evidence" whatsoever to support such limited relevant markets, just the self-serving *ipse dixit* of American Needle's president. *Reifert*, 450 F.3d at 318; *Green Country Food Mkt., Inc. v. Bottling Grp., LLC*, 371 F.3d 1275, 1283 (10th Cir. 2004) (rejecting proposed narrow relevant market where plaintiffs presented no evidence of *Brown Shoe* factors); *Lantec, Inc. v. Novell, Inc.*, 146 F. Supp. 2d 1140, 1148-49 (D. Utah 2001) (same), *aff'd*, 306 F.3d 1003 (10th Cir. 2002); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 106-07, 109 (2d Cir. 2002) (summary judgment appropriate where all *Brown Shoe* factors favored broader market than plaintiff proposed).

To the contrary, undisputed facts, set forth in detail below, demonstrate that:

- the industry recognized that NFL-branded headwear and NFL licenses compete in broad markets that include other sports leagues, colleges, athletic brands, and fashion brands;
- NFL-branded headwear and NFL licenses have no "peculiar uses" or "distinct customers" that isolate them in a separate market;
- NFL-branded headwear and NFL licenses do not have unique production facilities or specialized vendors; and

- NFL-branded headwear and NFL licenses do not have prices distinct from those of many other competitors.

[redacted]

I. NFL-BRANDED HEADWEAR COMPETES IN A BROAD RELEVANT MARKET WITH PRODUCTS LICENSED BY OTHER BRANDS (OR NO BRAND AT ALL).

Undisputed facts demonstrate that American Needle's first alleged "market"—a market limited to NFL-branded headwear—is not a relevant market for antitrust purposes. *See Salvino*, 542 F.3d at 328-31 (plaintiff and its expert could not overcome evidence that NFL-licensed products and MLB-licensed products are in same market).

A. The Industry Recognizes That NFL-Branded Headwear Competes In A Broad Relevant Product Market.

Industry recognition confirms a market far broader than the single-product market alleged by American Needle. *Brown Shoe Co.*, 370 U.S. at 325 (looking for "industry or public recognition of the submarket as a separate economic entity"). On this issue, the Court need look no further than the files of the NFL, Reebok, and American Needle. *Commercial Data Servers, Inc. v. IBM Corp.*, 262 F. Supp. 2d 50, 64 (S.D.N.Y. 2003) (sellers' internal business documents relevant to market analysis).

The NFL's contemporaneous business records—documents that were created long before this litigation arose—are replete with references to the fact that NFL-branded apparel competes with numerous alternatives. (SOF 17.) For example, in a 1990s "Background Paper" on the "NFL Consumer Products Business," the NFL identified numerous competitors in the markets in which NFL-branded headwear and apparel were sold:

- "*Athletic Footwear Companies*: Companies such as Nike, Reebok, Fila, and Adidas have capitalized on the youth market, supplementing their footwear with *headwear* and apparel. This target consumer has been a stronghold for the licensed industry."
- "*Seventh Avenue Brands*: Lifestyle brands such as Tommy Hilfiger, Polo Sport, and Nautica have made inroads among the fashion-conscious, especially the department store shoppers."
- "*Highly Targeted Niche Companies*: 'Up and coming' brands exemplified by brands like Fubu, Pelle Pelle, and NaNa have been successful in targeting the young urban customer."
- "*Stores Private Label Brands*: Department stores have become very sophisticated in branding their own product. . . . As these brands gain strength, open-to-buy dollars are being diverted from licensed product."

(SOF 17; Ex. 4 at NFLP9161, 67 (emphasis added).) The NFL concluded not only that such companies—along with other leagues, colleges, and universities—were competitors, but that their competition had been a major factor in the decline in sales of NFL-licensed apparel. (SOF 16; Ex. 4 at NFLP9167-68.) The NFL staff succinctly informed the NFL club owners: "Fashion brands are eroding [our] licensed business." (SOF 16; Ex. 24 at NFLP9228.)

That analysis was confirmed in the NFL's "Game Plan 1999," a comprehensive strategic planning document that highlighted, as a "key" problem, "[r]educed consumer interest in team licensed apparel vs. a preference for branded, fashionable sports apparel (FUBU, Tommy Hilfiger, Polo)." (SOF 16-18; Ex. 8 at NFLP8732.) The 1999 Game Plan emphasized that the NFL's "[l]icensed sports apparel is *losing retail floor space* to other sports/fashion/private labels." (SOF 16-18; Ex. 8 at NFLP8750 (emphasis added).) The 1998 Game Plan reflects similar conclusions, as do numerous other contemporaneous NFL documents. (SOF 16-17; Ex. 6

at NFLP8675-76, 719; *e.g.*, Ex. 16 at NFLP9220 ("The decline in sports licensed apparel can be attributed to increased demand for branded apparel like Polo Ralph Lauren, Tommy Hilfiger, Nautica, and other Seventh Avenue designers."); Ex. 17 at NFLP9211 (decline in NFL apparel sales caused in part by "[f]ashion shift and competition" from "urban lines" such as FUBU and "[c]asual lines" such as Tommy Hilfiger); Ex. 23 at NFLP9851 (licensed apparel faces "[i]ncreased competition from Seventh Avenue vendors"); Ex. 40 at NFLP3158 ("Other apparel companies have taken apparel business from NFL," citing "Abercrombie & Fitch" and "Fubu" as examples).)[14]

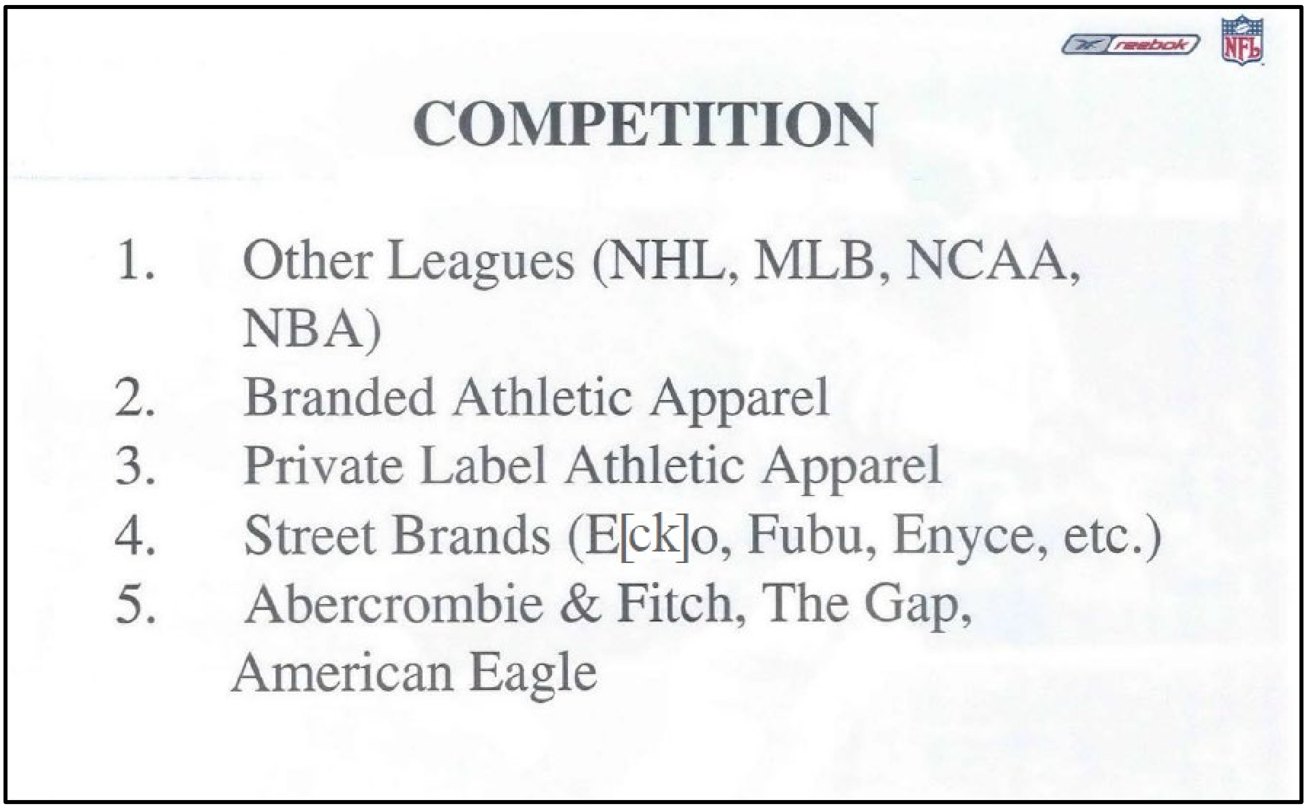
These conclusions are confirmed by extensive deposition testimony of NFL executives. For example, Gary Gertzog, then Senior Vice President—Business Affairs, testified that "designers were moving into the sports space, whether it be Ralph Lauren, Tommy Hilfiger or others, so we were finding that consumers who had previously been very loyal to sports licensed products were . . . getting their fill, so to speak, of sports products from not the leagues but from the designers." (SOF 19; Ex. 88, Gertzog Dep. 32:10-21.)[15] Similarly, Roger Goodell, formerly the Chief Operating Officer of the NFL and now its Commissioner, testified in reference to the NFL's licensed apparel business: "We compete in a broad environment. We compete against not just other sports but other sports licensing products. . . . We compete against the Disneys of the world." (SOF 19; Ex. 89, Goodell Dep. 13:2-14.)

[14] *See also, e.g.*, Ex. 34 at NFLP8386 (licensed sports apparel faces "increased competition from fashion sportswear companies such as Abercrombie & Fitch, FUBU, and Tommy Hilfiger"); Ex. 39 at TEN94 (NFL-licensed apparel competes in "a highly competitive marketplace"); Ex. 42 at NFLP6536; Ex. 46 at NFLP3093; Ex. 47 at NFLP6494; Ex. 49 at NFLP8519.

[15] *See also* Ex. 88, Gertzog Dep. 29:24-33:3 ("We had increased competition from what we called the sports branded companies, whether it be Nike or Adidas or other companies in that space."); Ex. 90, Deposition of Mark Holtzman, Sept. 13, 2012 at 88:20-22 (the NFL "needed to be able to compete more against some of the big brands").

This evidence is no different from the evidence on which the Second Circuit relied in affirming Judge Casey's rejection, on summary judgment, of a proposed relevant market asserted by one of Major League Baseball's former licensees that was limited to MLB-licensed products. *Salvino*, 542 F.3d at 299 (citing record evidence establishing that MLB viewed its licensed-product competitors as including the NFL and other sports leagues, branded apparel manufacturers such as Reebok, collegiate groups, and entertainment properties such as Disney).

Contemporaneous business records from Reebok reflect the same conclusion. For example, a 2001 Reebok presentation highlighted five separate *categories* of competitors of NFL-branded apparel:



(SOF 20; Ex. 52 at REEBOK103269; *see also* Ex. 57 at REEBOK103006 (identifying Nike, Under Armour, and others as "competitive product[s]" for apparel bearing NFL trademarks);

Ex. 53 at REEBOK102428 ("Can we earn back retail floor space from street brands, athletic apparel, private label?").) Contemporaneous documents prepared by Nike reflect the same conclusion: "Fashion brands [are] eroding licensed business." (Ex. 15 at NFLP8784, 90.)

[redacted]

The parties' contemporaneous views were consistent with the general industry perspective as reflected in trade press of the kind upon which courts routinely rely in evaluating proposed relevant markets.[17] One leading trade journal, the Sporting Goods Manufacturers

---

[redacted]

[17] *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 613 n.31 (1953) ("Useful to [the market definition] determination is, among other things, the trade's own characterization of the (continued…)

Association's *Sports Licensing White Paper*, repeatedly addressed "intense competition" between NFL-licensed apparel and other licensed apparel, including headwear, and the fact that such competition was coming from both established brands and "creative newcomers"; the same journal documented the "erosion of licensed brand business due to the growth of the large athletic footwear brands, the shirt and *cap* niche brands that appeal to the youth, and the Seventh Avenue lifestyle brands." (SOF 21; Ex. 79, SGMA 2001 White Paper at 5; Ex. 77, SGMA 1999 White Paper at 2 (emphasis added).)[18]

Similarly, *The Licensing Letter*'s 2001 "Annual Survey" reported that "[t]he most pressing issue in sports licensing" for sports leagues was "to recapture retail apparel floor space that's been ceded to branded goods." (SOF 22; *The Licensing Letter*, "Licensing Business Drops 1% As Music, Martha and Trademarks Nearly Offset Softness Elsewhere," Jan. 1, 2001, Vol. XXV, No. 1, p. 4.) And publications like the *Sports Business Journal* reflected similar recognition: "The mission [of the NFL] is to better compete with the likes of Nike and Under Armour . . . ." (SOF 22; Ex. 85, *Sports Business Journal*, "NFL Pushes Brand to Next Level,"

---

products involved"; relying on trade publications); *Moore Corp. v. Wallace Computer Servs., Inc.*, 907 F. Supp. 1545, 1576 (D. Del. 1995) ("Recognized sources of evidence of industry or public recognition include . . . [i]ndustry or trade association publications"); *see also A. G. Spalding & Bros., Inc. v. FTC*, 301 F.2d 585 (3d Cir. 1962) (citing reports of the AGMA, the predecessor of the Sporting Goods Manufacturers Association, cited in the text, in evaluating market definition).

[18] *See also* Ex. 70 at AN12738 (2001 SGMA statement that "[s]ports teams have lost retail space to brand merchandise, such as Nike, [A]didas and outdoor brands"); Ex. 71 at AN12747 (2002 SGMA statement that professional leagues and college marketers "want to take business away from Ralph Lauren, DKNY, The Gap and Old Navy"); Ex. 54 at REEBOK102513 (same); Ex. 77, SGMA 1999 White Paper at 1 (a "shift of fashion towards the lifestyle and urban niche brands contributed to the market downturn" for sports licensed products), 2 ("a fashion shift away from sports licensed goods"; "the growing influence of 'power' athletic brands competing with the licensed properties"), 8 (sports licensed products face "continued product competition from branded sportswear and streetwear lines"); Ex. 81, SGMA 2006 White Paper at 5 ("All the major licensors are . . . hoping to woo their fans from national brands and stores such as The Gap and Abercrombie & Fitch.").

May 26, 2003.) In short, undisputed evidence confirms that the industry recognized NFL-branded headwear as part of a much larger market, not in a separate market unto itself.

B. NFL-Licensed Headwear Has No "Peculiar Characteristics or Uses" Or "Distinct Customers" That Would Isolate It In Its Own Relevant Market.

Undisputed evidence confirms that NFL-licensed headwear has no "peculiar characteristics and uses" or "distinct customers" that would warrant its treatment as a separate market. *Brown Shoe*, 370 U.S. at 325; *S.E. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 614-17 (8th Cir. 2011) (rejecting market limited to product with no peculiar characteristics or uses); *HDC Med., Inc. v. Minntech Corp.*, 474 F.3d 543, 547-49 (8th Cir. 2007) (same).

Common sense dictates [redacted] that consumers buy hats for many reasons. [redacted]

Hats bearing logos of entities other than the NFL—or no logo at all—serve these purposes just as well as NFL-branded hats. (SOF 7.) Judge Moran made this point at the outset of the case: "Certainly some people purchase a shirt or hat with an NFL team's logo simply because they need a shirt or a hat. As defendants argue, apparel with a different logo or with no logo would serve as a reasonable substitute for these consumers." *Am. Needle, Inc.*, 385 F. Supp. 2d at 694. The history of NFL-branded headwear's losing sales to fashion, sportswear, and other brands in the late 1990s demonstrates that substitutability. (SOF 16.)

A cap with a White Sox, Cubs, Bulls, or Blackhawks logo allows the wearer to identify with the city of Chicago, to stay shaded from the sun, to stay warm, or to present a casual look just as well as a cap with a Chicago Bears logo. [redacted][19] Such consumers at the "margin" demonstrate, at least for some uses, the substitutability of NFL-branded and other hats, and thereby establish the contours of a broad relevant market. *DSM Desotech, Inc.*, 2013 WL 389003, at *11 (rejecting proposed market limited to stereolithography machines where plaintiffs' "own expert . . . conceded that other technologies are alternatives to stereolithography at least for some uses").

[redacted]

[19] *See also* Ex. 55 at REEBOK102549 ("Many buyers tended to base their purchasing decisions on color and design and how the garments suited their wardrobe. They had little interest in the team or player whose jersey they wore."); Ex. 80, SGMA 2005 White Paper at 4 ("Suddenly, young people with scant interest in sports were buying replicas of jerseys that had been worn in the past by players many of them had never heard of; it was the color and design that mattered.").

[redacted]

In any event, brand loyalty is not sufficient to establish a relevant market. *Global Discount Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 705 (S.D.N.Y. 1997) (Sotomayor, J.) (rejecting notion that a consumer is "locked into" Pepsi because she prefers the taste, or NBC because she prefers "Friends," "Seinfeld," and "E.R."; "A consumer might choose to purchase a certain product because the manufacturer has spent time and energy differentiating his or her creation from the panoply of products in the market, but at base, Pepsi is one of many sodas, and NBC is just another television network."). *Accord Green Country Food Mkt., Inc.*, 371 F.3d at 1283 ("Brand loyalty of consumers to particular soft drinks is an insufficient basis for concluding that Pepsi constitutes a relevant product market."); *Disenos Artisticos E Industriales, S.A. v. Work*, 714 F. Supp. 46, 47-48 (E.D.N.Y. 1989) (despite "intense brand loyalty" among some customers for certain brand of porcelain figurine, defining relevant product market more broadly to encompass all high quality decorative giftware).

Finally, for some consumers—those determined to affiliate with an NFL team and only that team—the purpose of buying a branded product may be to display "the team logo." *Am. Needle, Inc.*, 385 F. Supp. 2d at 694. But even that subset of customers is not limited to NFL-branded *headwear*; as Judge Moran noted, "if the true product in this case is NFL teams' logos, not the items that carry them, then there may be no justification for limiting the relevant market to headwear and apparel that carry these logos. Perhaps, the market would more properly include all merchandise carrying NFL logos," including "mug[s] or key chain[s]." *Id.* at 694, 696.[20] There is simply no evidence in the record to sustain any conclusion other than that NFL-branded mugs, key chains, t-shirts, and fleeces are substitutes or alternatives for such customers. [redacted]

A court "need not find that *all* buyers will substitute one commodity for another" to conclude that those commodities are in the same product market. *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 121-22 (D.D.C. 2004) (emphasis added); *id.* (product market not limited to particular Btu coal even though some customers could not switch to other Btu coal). A court need find only that *some* buyers would do so to reach that conclusion. *E.g.*, *DSM Desotech, Inc.*, 2013 WL 389003, at *11. There is overwhelming, undisputed evidence satisfying that requirement here.

C. NFL-Licensed Headwear Does Not Require Unique Production Facilities or Specialized Vendors.

Undisputed evidence also establishes that there are no unique production facilities or specialized vendors for NFL-licensed headwear. *Brown Shoe Co.*, 370 U.S. at 325; *see also*, *e.g.*, *IGT v. Alliance Gaming Corp.*, 702 F.3d 1338, 1347-48 (Fed. Cir. 2012) (lack of unique production facilities weighed against separate market); *S.E. Mo. Hosp.*, 642 F.3d at 614-17 (same).

[redacted]

[20] There is no dispute that numerous companies in addition to Reebok market such products. (SOF 11; Ex. 50 at NFLP9448, 9454 (identifying other apparel licensees); Ex. 51 at NFLP6839 (same).)

[redacted]

[redacted]

[redacted]

As Professor Elzinga concluded, the evidence that headwear, including NFL-branded headwear, can easily be manufactured and distributed to retail stores confirms that "there is high elasticity of supply and consequently a relevant market that is broader than NFL-branded headwear." (Ex. 101, Elzinga Rep. 112.)

D. Pricing of NFL-Licensed Headwear Is Commensurate With Pricing of Other Headwear.

Finally, undisputed evidence confirms that neither "distinct prices" nor lack of "sensitivity to price changes" provide economic evidence of a separate market for NFL-licensed headwear. *Brown Shoe Co.*, 370 U.S. at 325.

[redacted]

[redacted], headwear bearing NFL logos sold for the same price as comparable headwear bearing other logos. For example, a detailed study of monthly prices for comparable NFL and MLB hats sold by Lids from 2004 to 2007 confirms that these hats were sold at the same prices, and that when prices changed for these hats, the changes occurred in tandem. (SOF 26; Ex. 101, Elzinga Rep. 96-98 & Figs. 4-8.)

Professor Elzinga analyzed pricing data at both the wholesale and retail levels of the distribution chain and concluded that the data supported a broad market not limited to NFL hats. (Ex. 101, Elzinga Rep. 94-99 & Figs. 6-9.) That is consistent with the *absence* of any relevant and admissible evidence that NFL headwear lacked price sensitivity [redacted] ([redacted] *see also* Ex. 57 at REEBOK103007 (Reebok presentation reflecting "competitive price comparison[s]" between retail prices for NFL trademarked products and retail prices for Under Armour and Nike).)[21]

---

21 [redacted] There may be some buyers whose purchasing preferences *cannot* be satisfied by anything other than NFL-branded headwear, including headwear branded by other licensors (or other apparel products branded by the NFL). But that does not matter for purposes of relevant market analysis.

The test is whether there are some buyers whose purchasing preferences *can* be satisfied by such alternatives. [redacted]

Indeed, it defies common sense to suggest that "if the price of NFL team caps goes up," Walmart or Macy's or any other major retailer would be unable to substitute MLB caps—or one of many dozens of alternative caps or apparel choices—to serve those consumers. Accordingly, Mr. Kronenberger's unsupported assertions cannot create a genuine issue of material fact. *Scaife* (continued…)

*   *   *

The undisputed evidence permits only one conclusion about the relevant product market: it cannot be limited to NFL-branded headwear alone. As summarized by Professor Elzinga:

> The market in which NFL-branded headwear competes includes, at a minimum, headwear and apparel bearing the trademarks of other sports licensors such as the NBA, fashion brands such as Polo, sports apparel companies such as Nike, and other entertainment providers such as Disney.

(SOF 37; Ex. 101, Elzinga Rep. 7.)

That should come as no surprise given indistinguishable precedent rejecting, on summary judgment, a proposed relevant market limited to MLB-licensed products, *Salvino*, 542 F.3d at 328-31, as well as similar holdings in other industries, *e.g.*, *Carter v. Variflex, Inc.*, 101 F. Supp. 2d 1261, 1266-67 (C.D. Cal. 2000) (narrow relevant market rejected where it was "undisputed that all portable shades serve the same function of providing shade and shelter, are sold through the same distribution channels at similar prices, and compete with one another for consumer preference and awareness, as well as space in retail outlets"); *DSM Desotech, Inc.*, 2013 WL 389003, at *11-12 (narrow relevant market rejected where "there is no genuine dispute that there are reasonably interchangeable substitutes").

---

v. Cook Cnty., 446 F.3d 735, 740 (7th Cir. 2006) ("broad-brushed, conclusory allegations" in plaintiff's affidavit insufficient to survive summary judgment); *JPMorgan Chase Bank, N.A. v. PT Indah Kiat Pulp & Paper Corp.*, 2009 WL 3367388, at *9 (N.D. Ill. Oct. 14, 2009) ("conclusory assertions, however, are insufficient to defeat a motion for summary judgment"). *See also* pp. 33-34, *infra* (discussing economics principles and case law holding that preferences of a subset of buyers cannot limit the scope of a properly defined relevant market).

II. LICENSES TO USE NFL MARKS COMPETE IN A BROAD RELEVANT MARKET AGAINST LICENSES TO USE MARKS OF OTHER BRANDS.

American Needle also alleges a separate market for licenses to distribute NFL-branded headwear. In other words, American Needle contends that the NFL faces no competition from other professional sports leagues, colleges, athletic brands, entertainment companies, fashion labels, or other brands when it offers licenses to use its marks and logos on headwear (or other) products. That claim is inconsistent with undisputed evidence, including evidence cited throughout pages 2-4, above, that intense competition from precisely these sources drove the NFL to adopt the very license challenged here.

That claim is also inconsistent with basic legal principles of market definition. *See Salvino*, 542 F.3d at 328-31 (rejecting market limited to licenses for MLB intellectual property while excluding NFL and other competing licensors, such as those representing "baseball, football, boxing, basketball, ice skating, hockey, and NASCAR"); *cf. Adidas Am., Inc.*, 64 F. Supp. 2d at 1099-1103 (dismissing alleged relevant market for "NCAA promotional rights" given plaintiff's failure to explain why agreements with "teams or individuals competing in the *National Football League*, the National Basketball Association, the Women's National Basketball Association, Major League Baseball, Major League Soccer, or the Olympics" would not be "reasonably interchangeable" (emphasis added)).

From an economic—and common sense—perspective, it is impossible to decouple the license market from the headwear market: Licenses for NFL marks compete with licenses for other marks *because* NFL-branded caps compete with caps bearing the marks of other licensors. (Ex. 101, Elzinga Rep. 117.) The competing "buyers" of NFL licenses are prospective licensees that seek to use the NFL brand and logos to sell their products to consumers. It is *the consumers'* demand and the alternatives *available to consumers* that determine the boundaries of the relevant market for licenses; put differently, demand for NFL and other licenses is *derived* from downstream demand for products manufactured under those licenses. *Id.* at 83; *Salvino*, 542 F.3d at 330 ("the market level that is at issue in this case is the licensing level, with demand at that level being influenced by demand at the consumer level"); *see also id.* at 301 (describing expert testimony about the licensing market).

Because consumers have the ability to substitute away from a cap with an NFL mark to a product without one, the relevant market for NFL licenses is as broad as the relevant market for products bearing NFL marks. (SOF 33, 38; Ex. 101, Elzinga Rep. 83-84 & n.253, 102-03.) As the district court concluded in rejecting a proposed relevant market limited to *licenses* of "*Cats*-related intellectual property," "[c]ustomers can freely choose to purchase or not to purchase *Cats products* as opposed to those of, for example, other shows." *Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236, 264-65 (S.D.N.Y. 2000) (emphases added); *see also Coca-Cola Co.*, 117 F.T.C. 795, 892-93 (1994) (initial decision) (evidence of competition in downstream soft drink product market demonstrates that there is competition in upstream branded concentrate market because "the demand for concentrate is derived from the demand for the finished product"). A relevant market limited to NFL licenses simply defies economic sense.

It also bears emphasis that undisputed evidence independently confirms the breadth of the licensing market under every one of the *Brown Shoe* factors.

First, industry trade publications confirm that "[s]ports licensing doesn't exist in a vacuum"; it is instead part of a broad relevant market for licenses to use on consumer products the intellectual property of numerous licensors. (SOF 29; Ex. 70 at AN12738 (citing Martin Brochstein, the Executive Editor of *The Licensing Letter*); Ex. 72 at AN12499 (*License!*).) The SGMA's *Sports Licensing White Paper*, for example, recognized that the NFL, as a licensing "brand," competed with numerous other brands in licensing and related markets. (SOF 30; Ex. 78, SGMA 2000 White Paper at 5 (comparing NFL's licensing success against that of Disney, Warner Bros., Calvin Klein, and Polo Ralph Lauren).)

As a powerful example of such industry recognition, we invite the Court's attention to the April 2001 issue of *License!*, a monthly magazine to which American Needle subscribed and that reports on the market for intellectual property licensing. (SOF 31; Ex. 84, *License!*, "the License! Nifty Fifty," Apr. 1, 2001, Vol. 4, No. 3, p. 25.) That issue includes the magazine's annual "Nifty Fifty," a list "of the leading licensed merchandising partners." (*Id.*) The NFL is ranked seventh on the list, ahead of MLB (8th), Collegiate Licensing Co. (9th), NASCAR (14th), the NBA (18th), and the NHL (22nd), and behind Disney, Warner Bros., Calvin Klein, and Ralph Lauren Polo, among others. (*Id.* at 26-27.) Of particular interest is the reference to Collegiate Licensing Co., the licensing agent for most of the major colleges, for which "headwear was a hit with licensees including Zephyr Graphx (Loveland, Colo.) and Twins Enterprises (Boston)," two of American Needle's principal headwear competitors. (*Id.* at 26; *see also* Ex. 72 at AN12502 (*License!*, July 2002) (NASCAR seeking to attract apparel licensees to "put the power of the NASCAR obsession to work for you").)

That view of a broad market was not limited to trade publications. In 1996, for example, in a "comprehensive analysis" of its licensing royalty structure, the NFL focused on some of the same categories of competitors—lifestyle brands such as Tommy Hilfiger, Polo Sport, and Nautica, newer brands such as Fubu, and others—that were seen as competitors with NFL apparel at the retail level. (SOF 28; Ex. 4 at NFLP9157, 9167.) And in the *Salvino* decision, the court described extensive evidence submitted by Major League Baseball showing that its intellectual property competed against that associated with a "wide range of leisure and entertainment options that vary with target group and lifestyle"; that evidence included a 1996 business plan that identified MLB's principal licensing competitors as "branded apparel manufacturers such as Nike, Reebok, Russell, Champion, Big Dog, and No Fear; other sports entities such as the NBA, the NFL, the NHL, NASCAR, collegiate groups, and the 1996 Summer Olympics; and entities, such as Warner Brothers and Disney, that offered licenses to use intellectual property relating to, *e.g.*, Looney Tunes, Power Rangers, Peanuts, Nickelodeon, Batman, SpaceJam, and Goosebumps." 542 F.3d at 299.

Second, far from having "peculiar characteristics and uses" or "distinct customers," licenses to market NFL-branded headwear serve the same purpose as licenses to market products bearing any number of other marks and logos, *i.e.*, authorization to make and sell branded merchandise. Selling licensed merchandise (indeed, selling licensed hats) is, of course, a goal that can be achieved with dozens of licenses other than those granted by the NFL; *Licensing Letter* reported that in 1999, for example, licensees held an average of 21.6 licenses, and American Needle is still in the business of producing licensed headwear and selling it to retailers, notwithstanding the fact that its NFL licenses expired.[22] (SOF 34[redacted].) The Second Circuit was unequivocal on this general point: "there are available substitutes for MLB Intellectual

[22] Ex. 82, *The Licensing Letter*, "Entertainment, Trademark/Brand Sectors Drive 4% Increase to Record $74.15 Billion," Jan. 3, 2000, Vol. XXIV, No. 1, p. 9.

Property." *Salvino*, 542 F.3d at 330. Undisputed evidence confirms that the same is true with respect to NFL intellectual property.

Third, [redacted]

Finally, [redacted] This fact alone strongly suggests that the licenses are all in the same relevant market. *Beatrice Foods Co. v. FTC*, 540 F.2d 303, 310 (7th Cir. 1976) (rejecting challenge to relevant market that combined "do-it-yourself" and professional paintbrushes and rollers when prices for the former were in the same general range as prices for the latter); *Carter*, 101 F. Supp. 2d at 1266-67 (market limited to "instant" canopies improper where, among other things, all portable shades sold "at similar prices").

[redacted]

Moreover, there is no evidence that royalty rates for NFL licenses "varie[d] while others stay[ed] the same," which could suggest that the licenses were in different relevant markets. *Menasha Corp v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 664 (7th Cir. 2004). American Needle's economic expert was presumably "well situated to provide such evidence if any existed (and were favorable to [American Needle])." *Id.* (affirming summary judgment for defendant on relevant market grounds). He did not.

III. AMERICAN NEEDLE CANNOT CREATE A GENUINE ISSUE OF MATERIAL FACT THROUGH THE OPINION OF ITS EXPERT.

As the Seventh Circuit has emphasized, even a plaintiff that *satisfies* the *Brown Shoe* criteria still must show "economic evidence" of its proposed relevant markets. *Reifert*, 450 F.3d at 318, 320. Nonetheless, in the face of an overwhelming and undisputed record *undermining* its proposed relevant markets, American Needle has offered only conclusory opinions from an economist, Dr. Stephan Levy, [redacted]. [redacted] Expert testimony has "little probative value"—and cannot generate a disputed issue of fact—when it is "implausible" and inconsistent with ample evidence of facts in the record. *Matsushita*, 475 U.S. at 594 n.19; *Salvino*, 542 F.3d at 330 (rejecting expert opinion asserting narrow market that was contrary to the "ample evidence in the record" supporting a broader market). Those are only two of the flaws that undermine Dr. Levy's conclusions.

A. The Relevant Product Market Cannot Be Properly Defined Without Taking Into Account Retail Sales.

[redacted]

[redacted]

As a matter of economic theory, that effort is nonsensical. It is the equivalent of arguing that that even though Coke and Pepsi are substitutes for consumers, they are not substitutes for grocery stores; the argument ignores the economic reality that if consumers shift more of their purchasing to Pepsi, grocery stores would shift more of their orders to Pepsi as well. "Upstream" demand for a consumer product (here, headwear sold by wholesalers like American Needle) is wholly derived from the ultimate, "downstream" demand for that product among retail consumers. (SOF 33; Ex. 101, Elzinga Rep. 83-84 & n.253 (explaining principle and collecting economic sources).) [redacted]

In resolving relevant market issues, courts have consistently rejected the premise that wholesale and retail product markets can be separated in the manner proposed by Dr. Levy. In *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, for example, the Fifth Circuit considered an expert's effort to bifurcate the wholesale and retail markets for luxury consumer goods. 615 F.3d 412, 418 (5th Cir. 2010). The appellate panel rejected a proposed wholesale market for such goods, holding that such a market is "*legally insufficient*" because "the relevant

[redacted]

market definition must focus on the product rather than the distribution level." *Id.* (emphasis added).[25] Dr. Levy's proposed market is equally infirm.

B. Unsubstantiated Opinions Cannot Trump The Undisputed Economic Evidence.

[redacted]

[redacted]

[redacted] But as Professor Elzinga noted, that approach "overlooked the possibility that even if

[25] *See also Ajir v. Exxon Corp.*, 1999 WL 393666, at *4 (9th Cir. May 26, 1999) (rejecting expert opinion that wholesale gasoline market could be divorced from retail gasoline market); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4.1.3 (2010) ("In considering customers' likely responses to higher prices, the Agencies take into account any reasonably available and reliable evidence, including, but not limited to . . . the influence of downstream competition faced by customers in their output markets.").

[redacted] *United States v. Engelhard Corp.*, 126 F.3d 1302, 1306 (11th Cir. 1997) (no support in record that customers interviewed were "representative of the market"); *Menasha Corp.*, 354 F.3d at 664-66 (rejecting similar "armchair economics").

MLB, or the NBA, or the NHL, standing alone, does not substantially constrain the pricing of NFL-branded apparel, the combination of other major sports league apparel and, for example, fashion apparel do constitute such a restraint." (Ex. 101, Elzinga Rep. 123.)

Dr. Levy's analysis is akin to a conclusion—without analysis—that Cheerios cereal is in its own relevant market because not enough consumers would consider Rice Chex as a reasonable substitute. That ignores the fact that Cheerios does not compete in a vacuum against Rice Chex; *it competes simultaneously against the wide range of breakfast cereals available to consumers*. As Professor Elzinga noted, "one cannot assert, without any analysis, that because apparel bearing the trademarks of the three other major sports leagues is not in the relevant market with NFL apparel, nothing else could be. How does [Dr. Levy] know that?" (Ex. 101, Elzinga Rep. 122.) That failure of analysis is fatal to Dr. Levy's conclusion.

The Second Circuit rejected a similar expert opinion in *Salvino*. 542 F.3d at 290. In that case, plaintiff's expert economist contended that Major League Baseball had market power in a relevant market limited to certain MLB-licensed products. *Id.* at 294-95, 301. The Second Circuit refused to credit this opinion because, as here, the expert's conclusion was unsupported by reliable "empirical studies" and it was contrary to the "ample evidence in the record" supporting a broader market. *Id.* at 330. The court need not credit "opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).[27]

[redacted]

C. The Preferences Of A Subset Of Consumers Cannot Define The Relevant Product Market.

The fundamental underpinning of Dr. Levy's narrow product markets—a market limited to NFL licenses or NFL-branded headwear—is that even if NFL headwear and other headwear are reasonably interchangeable for some consumers, a subset of consumers is intensely loyal to their NFL team and would not purchase a product with a different brand name or logo. (That is akin to an argument that there must be a separate relevant market for Cheerios because *some* consumers are unwilling to eat other cereals for breakfast.)

As discussed above, that opinion is fundamentally flawed based on principles recognized by both economists and the courts. As Professor Elzinga explained, Dr. Levy's focus on a subset of intensely loyal consumers reflects an "inframarginal consumer fallacy": "It is the presence of a non-trivial supply of *marginal customers*—not the existence of *inframarginal customers*—that is relevant in the demarcation of market boundaries." (Ex. 101, Elzinga Rep. 118-19.) *See Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 489 (3d Cir. 1992) (the "marginal consumer . . . not the inframarginal or even the average consumer" dictates elasticity of demand); Ex. 86, Deposition of Professor Kenneth G. Elzinga, Dec. 21, 2012 at 227:17-228:6 (even though some consumers might purchase only a Ford or only a Chevrolet, "that does not mean there is a separate market for Fords and Chevrolets, so long as there is . . . some nontrivial fraction of customers who consider the purchase of a Ford to be reasonably interchangeable with that of a Chevrolet"); *accord id.* at 197:4-18.

Without identifying it by name, the Seventh Circuit recently cited the same inframarginal fallacy in rejecting an implausible relevant market based on a narrow subset of

---

[redacted]

customers with specific attributes. *Menasha Corp.*, 354 F.3d at 664-66 (buyers "locked in" to a particular product do not define a relevant market if there are buyers for whom competing products are reasonable substitutes); *see also DSM Desotech, Inc.*, 2013 WL 389003, at *12 (plaintiff could not "show that a significant number of users would not switch to alternative methods of part making" (citation and internal quotation marks omitted)). Here, as in *Menasha*, there is no evidence or reason to believe that suppliers can discriminate against inframarginal consumers (those interested in purchasing only NFL-branded headwear) by charging them higher prices while keeping prices low to marginal consumers (those willing to consider other products). *Menasha*, 354 F.3d at 665 [redacted]. It followed in *Menasha*—and follows again here—that the marginal consumers, not the inframarginal consumers, define the boundaries of the relevant market. *Menasha*, 354 F.3d at 665 (citing *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1284 (7th Cir. 1990)).

There can be no dispute, for the reasons discussed earlier, that there are many consumers for whom NFL-branded hats and other hats are reasonable substitutes for at least some purposes, as well as other consumers who would view other NFL-branded apparel, such as t-shirts and jerseys, as reasonable alternatives. *Am. Needle, Inc.*, 385 F. Supp. 2d at 694, 696 (suggesting that for consumers seeking the NFL team logo itself, "all merchandise carrying NFL logos," including "mug[s] or key chain[s]," are in the same market); Ex. 101, Elzinga Rep. 83-90. These undisputed facts preclude relevant markets limited to NFL-branded headwear or NFL licenses.[28]

[redacted]

D. An Economist's "Legal" Analysis of the Reebok License Agreement Cannot Create A Genuine Issue of Fact.

[redacted]

In any event, the Reebok agreement itself provided the NFL ample protection against such displacement or diminution through contract terms requiring Reebok to invest in and vigorously to promote NFL-licensed apparel, including minimum sales and royalty guarantees, mandatory product and marketing investment, and the risk of losing its exclusive rights if performance standards were not met. (Ex. 48, Omnibus License Agreement, May 24, 2001, §§ 5.3, 6.2, 6.12, 21.4, NFLP1578 at 1578, 80, 84, 620.) [redacted]

[redacted]

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion for summary judgment on relevant market grounds.

Respectfully submitted,

<table>
<tr>
<td>
/s/ Timothy Hardwicke
Timothy B. Hardwicke
Michael J. Nelson
LATHAM & WATKINS LLP
233 South Wacker Drive, Suite 5800
Chicago, IL 60606
(312) 876-7700/ fax (312)993-9767
tim.hardwicke@lw.com/
michael.nelson@lw.com

Counsel for Reebok International Ltd.
</td>
<td>
/s/ Derek Ludwin
Gregg H. Levy (pro hac vice)
Derek Ludwin (pro hac vice)
Leah E. Pogoriler (pro hac vice)
John S. Playforth (pro hac vice pending)
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 662-6000/fax (202) 662-6291
glevy@cov.com/dludwin@cov.com/
lpogoriler@cov.com/jplayforth@cov.com

Richard Del Giudice
GOZDECKI, DEL GIUDICE, AMERICUS & FARKAS LLP
One East Wacker Drive, Suite 1700
Chicago, IL 60601
(312) 782-5010/fax (312) 782-4324

Counsel for the NFL Defendants
</td>
</tr>
</table>

April 1, 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 April 1, 2013 using the Court's electronic case filing system.

By: *<u>/s/ Derek Ludwin</u>*
Derek Ludwin