

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMERICAN NEEDLE, INC.,)	
)	PUBLIC REDACTED
Plaintiff,)	VERSION
)	
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

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

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INTRODUCTION

In *DSM Desotech, Inc. v. 3D Systems Corp.*, this Court identified the proper question for defining a relevant market: Are there reasonable alternatives to the product at issue *for at least some uses*? If so, such alternatives will constrain the product's pricing, and the boundaries of the relevant market must include them.

American Needle's Opposition asks a very different question: Are there reasonable alternatives to the product at issue *for a particular use*? American Needle answers that question in the negative, but it ignores undisputed evidence demonstrating both reasonable alternatives *for that particular use* and reasonable alternatives for the product's *other uses*. That undisputed evidence requires summary judgment for defendants.

The particular use cited by American Needle is reflected in this core premise of its Opposition: "*the* reason someone buys (and wears) a particular team hat is to show the person's affinity for and association with the team." (Opp. at 14 (emphasis added).) American Needle concludes that no other *hat* "can be substituted for that purpose." (*Id.* at 15.) For relevant market purposes, that conclusion, even if correct, is irrelevant.

American Needle assumes that the *only* reason someone buys and wears a particular team hat—the only use for which the person would buy a hat—is to show affinity for a particular team. In other words, American Needle has turned the relevant market analysis on its head. American Needle looks for alternatives to NFL-branded hats *for a particular use*; by narrowly defining the use, it purports to find none. Relevant market analysis, in contrast, asks whether there are alternatives to NFL-branded hats *for at least some uses*.

Undisputed evidence, confirmed by common sense, establishes that there are such alternatives. It is undisputed, for example, that many consumers have multiple affinities and

choose among alternative hats in deciding which affinity to express. For other consumers, affinity is *not* the reason for purchasing a particular hat; they buy a hat for protection from the elements or because they like its colors or fashion appeal. Such alternative uses are established in American Needle's own product catalogue, the testimony of its executives, and even the testimony of its economist. Indeed, American Needle admits that "[c]onsumers buy hats for many reasons" (Dkt. 309, Pl.'s Response to Defs.' SOF 6; Dkt. 244-2, Defs.' SOF 6), and its economist admitted that some consumers "view NFL headwear and other headwear as close substitutes at the retail level" (Defs.' Ex. 99, Levy Reply ¶ 5). Because other hats are reasonable substitutes for these consumers and their uses, they must be included in defining the boundaries of the relevant market.

In addition, American Needle further assumes that affinity for a particular NFL team cannot be expressed through products other than a hat, such as a t-shirt or a pennant. But undisputed evidence establishes that for a consumer whose *only* purpose is to show affinity for a particular team, there are numerous alternatives to a hat. American Needle itself recognizes (Opp. at 14) some such alternatives—"shot glasses, mugs, pennants, t-shirts or other kinds of fan paraphernalia." That fact is fatal to American Needle's putative market definition: If the *only* thing that matters to a purchaser of an NFL-branded hat is showing affinity for a particular team, the fact that other affinity-showing products (t-shirts or pennants) are "physically distinct" (*id.*) cannot exclude them from the universe of reasonable substitutes for that singular use.

We turn now to the legal principles and undisputed evidence, including internal strategy documents and industry analyses of the kind upon which this Court relied in *DSM Desotech*, that require summary judgment for defendants on relevant market grounds.

ARGUMENT

American Needle must prove an economically sound relevant market.

American Needle argues that it is somehow relieved of the obligation to show “a precisely defined relevant market” and instead need only show the “rough contours of a relevant market.” (Opp. at 2-3, citing *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 737 (7th Cir. 2004).) Even if that were true, it would be irrelevant. American Needle’s proposed relevant markets fail not for lack of precision, but rather because they are fundamentally unsound.

As the Seventh Circuit observed, “[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.” *Cty. Materials Corp. v. Allan Block Corp.*, 502 F.3d 730, 736 (7th Cir. 2007) (emphasis added). And despite American Needle’s insistence that the NFL club defendants stand in a horizontal relationship (*see* Opp. at 1-2), there can be no dispute that this case, which challenges the exclusivity provision of the vertical licensing agreement with Reebok, is governed by the rule of reason. *See Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2207, 2216 (2010).

Moreover, *County Materials* and *Republic Tobacco* confirm that, as a matter of law, American Needle cannot escape the relevant market requirement through mere assertions regarding price and output. Nor can it do so through claims of price discrimination. *See Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 44-45 (2006) (“[W]hile price discrimination may provide evidence of market power, . . . it is generally recognized that it also occurs in fully competitive markets.” (internal citation omitted)). In any event, American Needle’s factual assertions on these points are entirely unsupported and, in certain respects, contrary to the *undisputed* record evidence.

There is no *evidence*—none—that, during the term of the Reebok license, prices for any NFL-logoed hat increased; American Needle’s unsupported assertions to the contrary do not account for undisputed improvements in the quality of NFL-logoed headwear or changes in the mix of products sold. (Dkt. 277, Defs.’ Opp. to American Needle’s Mot. for Partial Sum. J., at 10-12 [“Defs.’ Opp.”]; Dkt. 277-2, Defs.’ Response to ANI SOF 39.)

There is no *evidence*—none—of price discrimination by any seller of NFL-logoed hats at any point in the distribution chain; American Needle’s economist admitted that [REDACTED]

[REDACTED]

(Defs.’ Ex. 124, Levy 2013 Dep. 238:5-240:5).¹

And there is no *evidence*—none—that there was a sustained decrease in output as a result of the Reebok license; undisputed evidence confirms that output increased and was higher than it would have been but for the Reebok agreement. (Defs.’ Ex. 101, Elzinga Rep. 146-48 & associated figures (analyzing sales numbers and concluding that “[t]here is no evidence of sustained output restriction as a consequence of the NFL-Reebok exclusive license”); Defs.’ Opp. at 10; Dkt. 277-2, Defs.’ Response to ANI SOF 39.)

Nor can American Needle avoid the requirement of market definition by characterizing an NFL apparel license as an “essential facility.” (Opp. at 12.) That effort is futile; it implies that every brand—indeed, every patent and every trademark—is its own market,

¹ American Needle is simply wrong in asserting (Opp. at 12) that Professor Elzinga “admitted” that Reebok was able to price discriminate. Moreover, that assertion makes no sense. Although some inframarginal (dedicated) consumers might be willing to absorb price increases for NFL-licensed headwear, consumers on the margin, *i.e.*, those who view competing goods as substitutes, would not be willing to pay a higher amount. The inability to identify in advance which consumers are which would preclude discriminatory pricing. (Defs.’ Ex. 101, Elzinga Rep. 100.) (Citations to Defs.’ Exs. 118 to 124 are to the sequentially numbered exhibits attached to the declaration of Leah E. Pogoriler filed concurrently with this reply.)

a circular proposition contrary to basic market definition principles (*see* Dkt. 244 at 8). In any event, American Needle's fanciful theory is not supported by a single record citation or a single relevant authority on essential facilities, nor could it be, given the undisputed plethora of competing headwear licenses in the market. *See Paddock Publ'ns v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996) (“[T]he existence of three competing facilities not only means that none is an ‘essential facility’ but also means that each of the three is entitled to sign an exclusive contract with a favored user.”).

American Needle cannot show an economically sound relevant market. We cited in our initial memorandum ample case law rejecting relevant markets limited to products bearing a single brand. Attempting to dismiss those authorities, American Needle argues (Opp. at 3) that its proposed markets include products bearing multiple brands, *i.e.*, those of the NFL member clubs. But this argument misses the point: what matters is not whether the proposed market *includes* products bearing one or more brands, but rather whether the proposed market *excludes* other products that are reasonable alternatives for *some* uses. (A proposed relevant market may include Diet Coke and Cherry Coke in addition to Coke, but if it excludes Pepsi, it cannot be sustained.) American Needle's failure to address this fundamental point, which we emphasized in our opening memorandum (at 16-19), is telling.

For similar reasons, the suggestion that NFL-branded headwear is “highly differentiated” (Opp. at 14) is of no moment. If the use at issue is showing affinity for a particular NFL team, NFL hats are not differentiated from t-shirts, pennants, or other products

showing affinity for the same team. For other uses (*e.g.*, providing protection from the elements), NFL hats would not be differentiated from any other hat.²

Finally, Dr. Levy's *opinions* do not create any genuine dispute of material fact about the scope of the relevant markets. As we explained at length in our opening brief, Dr. Levy's conclusory opinion about relevant markets is implausible, conflicts with the ample factual record, and fails to create any genuine issue of material fact. (Dkt. 244 at 29-35.) In its Opposition, American Needle makes no effort to explain the relevance of Dr. Levy's opinions in light of these critiques. American Needle is simply wrong in asserting (Opp. at 4) that "[a]ny disputes that defendants may have with the substance of Dr. Levy's opinions are for the jury to resolve": this case cannot go to a jury because, on the issue of market definition, there is no genuine dispute of any material *fact*.

The ironic, central flaw of American Needle's position—its argument that NFL branded apparel is in its own relevant market, isolated from meaningful competition with any other product—is reflected in overwhelming, undisputed evidence, discussed at pages 2-4 and 10-16 of our initial memorandum, that the NFL changed its apparel licensing model *because of intense competition* from other apparel licensors. (*See* Dkt. 244.) American Needle's rhetoric and argument do not address, and cannot trump, that undisputed evidence.

* * *

² Citing the possibility of asymmetry in substitution, American Needle asserts that "[t]he issue in this case is not whether NFL Team Caps are reasonable substitutes for other hats, but whether other types of hats are reasonable substitutes for NFL Team Caps." (Opp. at 4.) But American Needle does not—and cannot—explain why one would expect such an asymmetry and, as Professor Elzinga testified in a passage that American Needle omits from its deposition excerpt, "I don't know of any example of such an asymmetry in this case." (Defs.' Ex. 120, Elzinga Dep. 194:17-18.)

Three quarters of the way through its brief, American Needle finally turns to the “practical indicia” prescribed by the Supreme Court for assessing relevant markets, *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Each of these factors establishes, with undisputed evidence, that American Needle’s proposed market definitions are fundamentally flawed. (Dkt. 244 at 10-23, 25-29; Dkt. 244-2, SOF 6-38.)³ American Needle makes no serious effort to contest this evidence, which we set out in detail in our opening brief (*see id.*), and its arguments warrant only a brief response.⁴

With respect to the “industry recognition” factor, American Needle does not dispute that a broad swath of industry participants—including the NFL itself, Reebok, and industry analysts—viewed NFL-branded headwear as competing with other branded apparel, including apparel licensed by other sports organizations, colleges, athletic brands, and fashion brands. Instead, it simply argues that the expression of these views does not “support any inference” that the views were actually correct. (Dkt. 309, Pl.’s Response to Defs.’ SOF 16; Dkt. 244-2, Defs.’ SOF 16-22.) That argument is misconceived; “industry or public recognition” is itself a significant factor in determining the boundaries of a relevant market. *Brown Shoe Co.*, 370 U.S. at 325.

³ Throughout its response to our statement of undisputed material facts, American Needle purports to deny facts by splitting hairs and by disagreeing with inferences that are logically compelled by the evidence, without offering any *evidence* to establish a genuine dispute. As the Seventh Circuit has held, “characteriz[ing] facts as disputed without citing evidence that directly contradicts [defendant’s] assertions” is “insufficient to demonstrate a genuine fact dispute.” *Senske v. Sybase, Inc.*, 588 F.3d 501, 504 n.1 (7th Cir. 2009); *see also Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir. 1994) (plaintiff must “point the court to the evidence in the record that supports [its] position on the disputed issues [it] has identified”).

⁴ We discuss above (at 1-2, 5-6) why American Needle is simply wrong in asserting that an NFL-logged hat has unique characteristics and customers, except perhaps with respect to a subset of *inframarginal* customers that do not define the relevant antitrust market.

Similarly, American Needle's only objection (Opp. at 16) to our showing that NFL-logoed headwear shares production facilities, vendors, and retail outlets with numerous competing products is that one needs an NFL license to produce an NFL hat. That objection fundamentally misconstrues the *Brown Shoe* factor, which is designed to test whether products that appear to be different in some respects (e.g., because of distinct branding) should in fact be grouped together for purposes of determining relevant markets. See *Brown Shoe Co.*, 370 U.S. at 326 ("the boundaries of the relevant market must be drawn with sufficient breadth . . . to recognize competition where, in fact, competition exists"); see also, e.g., *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117-18 (3d Cir. 1980) (rejecting claim that Texaco trademark established separate market; noting that plaintiff "offered no . . . evidence" as to unique production facilities or specialized vendors). Here, there is no dispute that manufacturers, including American Needle, produce and sell side-by-side NFL-logoed headwear and competing headwear bearing other logos or no logos at all; nor is there any dispute that retailers, such as Lids and Walmart, sell such products side-by-side to consumers. Both facts confirm that the relevant market here is not limited to hats bearing NFL logos.

Finally, undisputed evidence shows that NFL-licensed headwear is sold at the same price at wholesale and retail as headwear bearing other logos. (Dkt. 244-2, Defs.' SOF 26.) American Needle offers no evidence to the contrary other than an exhibit that vaguely refers to the pricing of "licensed sports" apparel without mentioning either headwear or non-sports licensors like Tommy Hilfiger or FUBU (Pl.'s Ex. 31 at NFLP4184).⁵ And as for American

⁵ American Needle quibbles over the possibility that "list prices" might not have been the same as "actual sale prices" (Dkt. 309, Pl.'s Response to Defs.' SOF 26), but its president testified that [REDACTED] (Def.'s Ex. 123, Kronenberger Dep. 72:19-73:1), and it offered no *evidence* in support of its position.

Needle's unsupported assertion that "NFL Team Caps command a premium price" based on the royalties that licensees pay (Opp. at 16), undisputed evidence shows that the royalty charged by the NFL was in line with those charged by other licensors. (Dkt. 277-2, Defs.' Response to ANI SOF 36.)⁶

* * *

American Needle admits that "[d]emand for NFL licenses and other licenses is derived from consumer demand for products manufactured under those licenses." (Dkt. 309, Pl.'s Response to Defs.' SOF 33; Dkt. 244-2, Defs.' SOF 33.) The evidence establishing a product market broader than NFL-branded hats also establishes a licensing market broader than licenses to manufacture NFL-branded hats. This should come as no surprise; there is extensive undisputed evidence that the NFL viewed (and correctly viewed) other licensors, such as other sports leagues, Tommy Hilfiger, colleges, athletic apparel brands (*e.g.*, Nike), and FUBU, as its competitors in the licensing market just as it viewed their products as competition for NFL-branded apparel at retail. (Dkt. 277-2, Defs.' Response to ANI SOF 28; Dkt. 244 at 25-29 (showing how *Brown Shoe* factors independently establish licensing market broader than just NFL licenses); Dkt. 244-2, Defs.' SOF 16-19.) Just as the Second Circuit concluded that "there are available substitutes for MLB Intellectual Property," *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 330 (2d Cir. 2008), so too are there available substitutes for NFL intellectual property.

⁶ American Needle points to a so-called "seasonal pattern" in the sales and pricing of NFL-licensed caps (Opp. at 17) and to a "correlation" analysis (*id.*). Neither analysis supports a market definition limited to NFL-licensed headwear, as explained in our opening brief. (Dkt. 244 at 32 n.27; Defs.' Ex. 101, Elzinga Rep. 120-21, 126-27.)

CONCLUSION

For the foregoing reasons and those set forth in defendants' motion for summary judgment and supporting materials, defendants respectfully request that the Court grant their motion for summary judgment on relevant market grounds.

Respectfully submitted,

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July 22, 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 July 22, 2013 using the Court's electronic case filing system.

By: /s/ Derek Ludwin
Derek Ludwin