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Pecover v. Electronic Arts, Inc.: Should Exclusive Licensing Agreements Made by Madden NFL's Publisher be Sacked by the Sherman and Cartwright Acts?

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PECOVER V. ELECTRONIC ARTS, INC.: SHOULD EXCLUSVE LICENSING AGREEMENTS MADE BY *MADDEN NFL*'S PUBLISHER BE SACKED BY THE SHERMAN AND CARTWRIGHT ACTS?

I. Introduction

Professional sports, in general, and the National Football League (NFL), in particular, are big business in America.[1] The licensing of team logos and player names for all manner of products constitutes a large part of this business.[2] The recent Supreme Court case *American Needle, Inc. v. NFL*, in which a clothing manufacturer sued the NFL for granting an exclusive license to Reebok to sell NFL branded apparel, drew large attention from academics both before and after the Court's decision.[3] *Pecover v. Electronic Arts, Inc.*, in which a California federal court rejected a video game publisher's motion to dismiss a claim based on the company's exclusive license with the NFL, addresses many of the same issues found in *American Needle* but is instead a class action seeking injunctive relief against the licensee, Electronic Arts, Inc. (EA), rather than the licensor.[4] Judge Vaughn Walker certified the plaintiffs' class, and as EA's licensing contract with the NFL is reportedly worth nine figures, the software company is mounting a vigorous legal defense.[5] Given the hundreds of millions of dollars in sales the sports

1. For a discussion of the NFL's revenue growth, see *infra* notes 14-19 and accompanying text.

2. For a discussion of the NFL's licensing policies, see *infra* notes 19-22 and accompanying text.

3. *See* Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201 (2010). *See, e.g.*, Meir Feder, *Is There Life After Death for Sports League Immunity? American Needle and Beyond*, 18 Vill. Sports & Ent. L.J. 407 (2011) (disputing arguments that "zone of immunity" for sports leagues survived Supreme Court's *American Needle* decision); Gregory J. Werden, American Needle *and the Application of the Sherman Act to Professional Sports Leagues*, 18 Vill. Sports & Ent. L.J. 395 (2011); Constantine J. Avgiris, *Huddle Up: Surveying the Playing Field on the Single Entity Status of the National Football League in Anticipation of American Needle v. NFL*, 17 Vill. Sports & Ent. L.J. 529 (2010) (arguing NFL should be reviewed from "per se" approach under section 1 of Sherman Act).

4. *See* Pecover v. Elec. Arts, Inc., 633 F. Supp. 2d 976 (N.D. Cal. 2009). For a discussion of the Court's *American Needle* opinion, see *infra* notes 96-100. For a discussion of the *Pecover* court's treatment of the Seventh Circuit version of *American Needle*, see *infra* notes 132-134. For an analysis of the *Pecover* court's examination of that case, see *infra* notes 173-175.

5. *See* Brett Molina, *Class Action Suit Over EA Football Games Charges Forward*, USA Today (Apr. 7, 2011, 9:18 AM), http://content.usatoday.com/communities/

video game market generates each year and the prevalence of exclusive licenses between professional sports leagues and video game developers, this case has potentially broad implications going forward.[6]

Section II of this note establishes the relevant facts to *Pecover*, beginning with a summary of the NFL's revenue model in sub-part (A), tracing the history of EA's *Madden NFL* (*Madden*) franchise and its exclusive license with the NFL in sub-part (B), and finally giving a brief synopsis of the plaintiffs' case and claims in sub-part (C).[7] Section III delivers a picture of the law relevant to this case, starting in sub-part (A) with a look at the development of jurisprudence relating to section 2 of the Sherman Act.[8] Sub-part (B) examines related but more specific theories raised by the plaintiffs and by EA, while sub-part (C) covers the pleading standards the plaintiffs must meet.[9] Section IV summarizes the court's reasoning in its findings for the plaintiffs.[10] Section V first discusses the assumptions the court made in determining if the plaintiffs' claims were plausible and the effect the procedural posture of the case had on the court's analysis.[11] It then delves into the tension that can exist between a licensor's intellectual property rights and section 2 of the Sherman Act, the suitability of the "essential facilities" doctrine as a theory of liability, and whether the plaintiffs' claims under California state law are compatible with those made under federal law.[12] Lastly, section VI attempts to forecast the impact the ruling in *Pecover* may

gamehunters/post/2011/04/class-action-suit-over-ea-football-games-charges-forward/1 (detailing email announcing certification sent to potential class members and summarizing basic issues of case). For a summary of EA's deal with the NFL, see *infra* notes 40-43.

6. *See, e.g.*, Jane L. Levere, *Wary of Infringing Rival Games, Take-Two Calls Up Football's Golden Oldies*, N.Y. TIMES, July 23, 2007, at C5, *available at* http://www.nytimes.com/2007/07/23/business/media/23adco.html?ref=electronicartsinc ("According to UBS, for the years 2000, 2001, 2002 and 2004, when NFL 2K was published, Madden NFL generated sales of $686.3 million and NFL 2K had sales of $142.7 million. Today, Madden NFL is the best-selling video game in any category. According to Wedbush Morgan Securities, it had sales of $278 million in 2005 and $339 million in 2006, ranking No. 1 both years."). For a discussion of the current state of the sports video game market, in terms of exclusive licenses, see *infra* notes 198-202 and accompanying text.

7. For a discussion of *Pecover*'s factual background, see *infra* notes 14-49.

8. For a discussion of *Pecover*'s legal background as it relates to the Sherman Act, see *infra* notes 50-91.

9. For a discussion of *Pecover*'s legal background as it relates to additional theories of liability and pleading standards, see *infra* notes 93-122.

10. For a summary of *Pecover*'s legal reasoning, see *infra* notes 123-154.

11. For a critical analysis of *Pecover*'s legal reasoning, see *infra* notes 155-168.

12. For a continued critical analysis of *Pecover*'s legal reasoning, see *infra* notes 169-194.

have on the case's future iterations and the video game industry in general.[13]

II. FACTS: "ONE OF THE GREATEST, MOST INSIDIOUS GUERRILLA-WARFARE MOVES IN THE HISTORY OF VIDEO GAME COMPETITION"

A. The National Football League: "The NFL is a Perfect Portfolio"

Professional football is the most popular of America's major sports and as a business has been handily outperforming its rivals for years.[14] In 2009, the NFL generated approximately $8.5 billion in revenue, and Commissioner Roger Goodell has set a revenue goal of $25 billion by 2027.[15] Even as the NFL attempts to meet this lofty future goal, it is currently the most profitable sports league in America.[16]

Among professional American sports leagues, the NFL is unique in the extent to which it centrally generates and distributes revenue to its thirty-two teams.[17] Centralized cooperation allows

13. For a discussion of the impact of the decision in *Pecover*, see *infra* notes 195-211.

14. *See In a League of Its Own*, THE ECONOMIST (Apr. 27, 2006), http://www.economist.com/node/6859210 ("The success of the NFL syndicate stands in stark contrast to the troubles of America's three other main sports leagues: for baseball, basketball and ice hockey. Whereas the NFL's players have not walked out since 1987 . . . the other three leagues have all faced crippling labour strikes since the mid-1990s . . . . [The NFL] has the highest total revenues of the four, at nearly $6 billion a year. It has the firmest grip on its labour costs, which have grown only 9% a year since 1990, compared with 12-16% growth in the other three leagues. It remains the most popular of the four big American sports on almost every measure, from opinion polls to television ratings."). The NFL has translated these advantages into rising profits. *See id.* ("The average football team has a market value of around 3.9 to 4.4 times revenues, compared with ratios of 2.2 to 3.0 for the other leagues.").

15. *See* Daniel Kaplan, *Goodell Sets Revenue Goal of $25B by 2027 for NFL*, SPORTS BUS. J. DAILY (Apr. 5, 2010), http://www.sportsbusinessdaily.com/Journal/Issues/2010/04/20100405/This-Weeks-News/Goodell-Sets-Revenue-Goal-Of-$25B-By-2027-For-NFL.aspx (stating meeting $25 billion revenue goal by 2027 means adding nearly $1 billion in new revenue each year on average until then). "Tripling revenue in a roughly 17-year time frame is something the NFL has already accomplished, though off a much smaller base. . . . The [salary] cap in 1994 was $34.6 million. After several blockbuster national TV contracts and a surge in NFL popularity, league revenue last year hit $8.5 billion, lifting the cap to $128 million, a more than threefold increase from 1994." *Id.*

16. *See* Jake I. Fisher, *The NFL's Current Business Model and the Potential 2011 Lockout*, HARVARD COLL. SPORTS ANALYSIS COLLECTIVE 3 (May 4, 2010), http://harvardsportsanalysis.files.wordpress.com/2009/09/the-nfl-business-model-and-potential-lockout.pdf (examining sources of NFL's profitability).

17. *See id.* at 3-4 ("The 60-40 split in nationally generated revenue to locally generated revenue . . . is consistent with what NFL executives have cited . . . as the

the NFL to maintain a more consistently competitive balance and add 50-60% more value to its teams due to lowered risk levels.[18]

The NFL's continued success and long popularity allow it to charge high licensing fees for its content.[19] Though the league is an unincorporated association made up of separately owned teams, it recently faced legal challenges for maintaining that it acts as a "single economic entity" for the purposes of antitrust law when it grants third parties the right to use NFL content.[20] An apparel

league-wide distribution."). "The business model of generating and sharing such a large quantity of central revenue is unique to the NFL. Unlike the NFL, the NBA, MLB, and NHL are more oriented on gate receipts and local media. The NFL generated $1.68 billion in local gate receipts in 2008, which is 22 percent of its total revenue. The NBA share of gate receipts to total revenue is 32 percent (2008-09), the MLB share is 37 percent (2008), and the NHL share is 42 percent (2008-09). Other sports leagues and teams differ in their business models, as well. NASCAR, for instance, is built around sponsorship revenue. In 2008, NASCAR collected $1.5 billion of its estimated $3 billion in revenue from corporate sponsorships." *Id.* at 5-6 (footnotes omitted).

18. *See In a League of Its Own*, *supra* note 14 ("By getting the co-operative bits right, the NFL as a whole benefits in two ways. First, its teams are far more evenly matched competitively than those in other leagues. Several teams rise and fall in the league tables from one year to the next, and every season provides many fresh examples of how any team can win on 'any given Sunday'. That keeps supporters coming back, and ensures that the bulk of the games remain interesting, even in the final weeks of the season. Second, the system lowers risk. 'The NFL is a perfect portfolio,' says John Vrooman, a sports economist at Vanderbilt University, because one team's losing season and sagging revenues are offset by another team's banner year. The co-operative arrangements also make costs stable and predictable. Mr Vrooman reckons that even if another American sports league, or a big European football league, were to have similar cashflows to the NFL, the American league's teams would still be 50-60% more valuable because their business is so much less risky."). Art Modell, former owner of the Cleveland Browns and Baltimore Ravens, once referred to NFL team owners as "thirty-two fat-cat Republicans who vote socialist" on football, but the twin policies of revenue sharing and enforcing a strict salary cap have done wonders for profits. *See id.* (describing important internal incentives that have allowed all teams to remain both financially viable and athletically competitive).

19. *See generally* Fisher, *supra* note 16, at 4-5 ("[T]he NFL's national media revenue is the backbone of the business. . . . NBC, FOX, CBS, ESPN, DirecTV, Sirius, EA Sports, and Verizon all pay significant rights fees for NFL content. The deals with FOX and CBS, which run through 2011, are reported to be worth $8 billion combined. It is estimated that ESPN's deal is worth $8.8 billion and NBC's is valued at $3.6 billion. The DirecTV deal, extended for four years in 2009, is valued at $4 billion. Altogether, the NFL brought in around $3.74 billion in television revenue in 2007. This figure alone is larger than the $2.8 billion the NHL made total in 2009 and is comparable to the $3.8 billion the NBA made in 2009 total revenue. The rights fees for NFL content are substantial because of the success of NFL broadcasts. A regular season NFL game in 2009 drew an average of 16.6 million viewers, while other primetime shows on NBC, CBS, ABC, and FOX averaged just 8.8 million viewers. Moreover, the 12 highest rated broadcasts of the past decade have been NFL games.") (footnotes omitted).

20. *See* Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2206-07 (2010) (describing facts of case and general holding on question of Sherman Act violation).

manufacturer filed suit against the NFL after National Football League Properties (NFLP), an entity set up to market the league's intellectual property, granted exclusive licenses to certain manufacturers.[21]

B. Electronic Arts, Inc. and *Madden NFL*: "We Wanted to Crush Them"

Media licensing is a pillar of the NFL's business, and this income stream is not limited solely to television and radio rights.[22] Since EA acquired the rights to use real NFL teams and players, the company's *Madden* franchise has grown along with the now $20 billion-a-year video game industry.[23] Almost 100 million copies of the game have been sold, with two million copies occasionally moving in a single week, generating more than $3 billion in total revenue.[24] The NFL takes *Madden* very seriously, with some who work for the league referring to it as the "thirty-third franchise."[25]

Madden was born out of a meeting between Trip Hawkins – founder of EA and Apple employee number sixty-eight – and the game's namesake.[26] Due to John Madden's insistence that the game he helped develop be "real football" with eleven players on

21. *See id.* at 2207 (noting purpose of NFLP and arrangements that lead to American Needle filing suit).

22. For a further discussion of the NFL's extensive and lucrative media contracts, including those with Electronic Arts, Inc. and Verizon, see *supra* note 19 and accompanying text.

23. *See* Patrick Hruby, *The Franchise: The Inside Story of How "Madden NFL" Became a Video Game Dynasty*, ESPN, http://sports.espn.go.com/espn/eticket/story?page=100805/madden (last visited Feb. 1, 2012) ("You can chart the game's ascent, shoulder to shoulder, alongside the $20 billion-a-year video game industry . . . .").

24. *See id.* (listing sales figures for *Madden*).

25. Tom Bissell, *Kickoff:* Madden NFL *and the Future of Video Game Sports*, GRANTLAND (Jan. 17, 2012), http://www.grantland.com/story/_/id/7473139/tom-bissell-making-madden-nfl ("The game has become a way for the league to hold back encroaching hordes of young, shaggy, soccer-loving misfits and hook yet another generation on pigskin. . . . Several people told me that the *Madden* franchise is regarded by the NFL as the league's '33rd franchise.' This derives from the fact that, at the end of every week, EA Tiburon, along with every NFL team's coaching staff, is sent a massive searchable database of film in which every play of every game is broken down by its situational peculiarities . . . . This NFL 'black box' is how opposing teams scout one another, and it's how *Madden* game-design dev[eloper]s identify and develop team and player tendencies.").

26. *See* Hruby, *supra* note 23 ("On a cloudy morning in 1984, three men met in an Amtrak dining car winding through the Rocky Mountains, en route from Denver to Oakland, Calif. The first was Trip Hawkins . . . founder of video game maker Electronic Arts . . . . The second was Joe Ybarra, Hawkins' lieutenant, a high school chess champ turned pigskin fanatic. The third was John Madden, the former Super Bowl-winning coach, hardware store pitchman, televised NFL evangelist and poet laureate of interior line play."). One year after Hawkins founded

each side, it took over three years to program a game that could run smoothly on the technology then available.[27] While the game enjoyed some modest success when it was originally released (without an NFL license) on the Apple II computer, it wasn't until EA developed *Madden* for Sega Corporation's new Genesis game console that it became an "industry game-changer, spawning yearly sequels and creating a lucrative revenue model that still persists."[28] Believing that Sega's hardware represented the future for sports games, Hawkins assembled a team in early 1990 to reverse engineer the console in order to avoid paying Sega the licensing fees it normally demanded from game developers.[29] Sega, fearing that EA would sell the knowledge it gained by reverse engineering the console to other software companies, agreed to charge EA a fraction of its normal per-unit licensing fee.[30] Interestingly, before that year had ended, Sega enlisted EA's help when it realized that it would not be able to complete a planned *Joe Montana Football* title in time for the lucrative holiday season.[31] EA had been tasked with devel-

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EA, the company released the first video game to feature licensed sports celebrities. *See id.* (tracing rise of Electronic Arts from start-up to software giant).

27. *See* Bissell, *supra* note 25 ("In 1984, the computing power that would make a tactically interesting, 11-on-11 football game was barely feasible, which is why Hawkins was lobbying for a simpler game. 'I wouldn't do it,' Coach said, 'unless we had 11 guys on defense and 11 guys on offense.'"); Hruby, *supra* note 23 ("We were trying to model NFL football . . . on a computer with less horsepower than your watch.").

28. *See* Hruby, *supra* note 23 (describing transition from initial version of game to new way of thinking and resulting success on new platform). EA picked up an NFL license to use real teams for *Madden NFL '94* and secured a Players Association license to use actual player names for *Madden NFL '95*. *See* Travis Fahs, *IGN Presents the History of Madden*, IGN (Aug. 8, 2008), http://retro.ign.com/articles/896/896893p1.html (detailing competition between EA and other developers to publish NFL titles in early 1990s).

29. *See* Hruby, *supra* note 23 ("Secretly, Hawkins assembled a team to reverse engineer the console – that is, figure out a way to make EA's games run on Sega's hardware without its technology or approval as a way to avoid licensing fees altogether. Publicly, he began negotiations with Sega, once meeting with the company's executives while the reverse-engineering project went on in a nearby room.").

30. *See id.* ("Meanwhile, Hawkins revealed his reverse-engineering project to Sega and offered a deal. Let's team up against Nintendo. Share the glory. You can sue, but we did the tech fair and square and have great lawyers. So make us an official licensee. And give us a reduced rate. Sega normally charged an $8 to $10 fee per game cartridge. Hawkins asked for $2 per game and a $2 million cap. Negotiations stalled. . . . Sega relented, afraid EA would sell its reverse-engineering knowledge to other software companies and torpedo the Genesis' entire business model."). Within three years, the deal had saved EA $35 million. *See id.* (explaining license-related intrigue during early years of home game console market).

31. *See id.* (describing proposition from Sega's president that EA "give" *Madden* to them).

oping a competitor to its own game and, unsurprisingly, the title it created for Sega was "totally inferior."[32] Nevertheless, both games became hits and helped trigger a gaming boom that pushed EA's market cap from about $60 million in 1990 to $2 billion three years later.[33]

Between the early 1990s and 2005, the *Madden* franchise faced competition from several game-developers seeking to capitalize on new technology and the demand for NFL football games.[34] Sony Corporation (Sony) offered *NFL GameDay* exclusively with its recently released PlayStation console, and the title became the most popular sports game on the market when EA's development efforts failed to produce a game for Sony's console in time for the 1996 season.[35] EA, facing a threat to its market dominance for the first time, partnered with Tiburon Entertainment (which EA acquired in 1998) as a fierce rivalry developed between it and Sony.[36] Similarly, Sega launched its *NFL 2K* series to near universal acclaim in 1999 after EA decided not to publish *Madden* for Sega's new Dreamcast console.[37] Competition between the two titles led Sega to partner with ESPN for the 2003 version of its game and to price 2004's

32. *See id.* (quoting EA's then-President and detailing steps EA took to ensure game for Sega did not contain cutting-edge features). "It's not difficult to see how the arrangement with SEGA could create a conflict of interest, and the result was about what you'd expect. John Madden Football's 16-bit debut shipped in late 1990, in time for football season, while Joe Montana Football slipped several months. The SEGA offering featured a shallow playbook and less realistic gameplay, as well as a lineup of only 16 teams. Madden somehow managed to pack 28 teams, better gameplay, and a pseudo-3D perspective that would become its hallmark." *See* Fahs, *supra* note 28.

33. *See* Hruby, *supra* note 23 (noting EA's growth following *Madden* debut). "[B]oth series managed to crack the top five best-seller list for the system, and helped to raise the bar for video game football, leaving the rest of the industry scrambling to catch up. BlueSky Software took the reins of the Joe Montana franchise, which would remain a rival for seasons to come. Meanwhile, EA got to work bringing their newly revamped Madden to as many systems as possible." *See* Fahs, *supra* note 28.

34. *See* Bissell, *supra* note 25 ("The *Madden* franchise has seen a lot of competition over the years: *Joe Montana Football* . . . which was released in 1991; the NFL 2K series, which ran from 1999 to 2005; *NFL Gameday*, which ran from 1994 to 2005.").

35. *See* Fahs, *supra* note 28 (discussing problems EA had adjusting to new generation of consoles). "Every game has its champions, and not a few video game football fans regard *Gameday* as having consistently made a better product than *Madden* . . . . 'We were always nervous about *Gameday*. We wanted to crush them' . . . ." *See* Bissell, *supra* note 25.

36. *See* Fahs, *supra* note 28 ("In 1998, Sony's Kelly Flock (the former captain of 989 Studios) chided EA when he told Next Generation, 'If you want to play next year's Madden early, buy this year's GameDay.'").

37. *See id.* ("[I]t was clear that they [EA and *Madden*] had been upstaged.").

ESPN NFL 2K5 at $19.99, thirty dollars less than *Madden* at the time.[38]

Initially, EA lowered the price of *Madden* to $29.95.[39] In late 2004, however, EA secured an exclusive licensing deal with the NFL, ending the ability of any other game publishers to feature current teams and players in football games.[40] Within the next six months, EA signed similar agreements with both the Arena Football League (AFL) and the NCAA.[41] EA extended its deal with the NFL in 2008, and again in 2011, cementing its place as sole publisher of officially licensed NFL videogames until at least 2013.[42] The 2008 agreement is believed to have been worth well into nine figures over the original five-year term, making it one of the most lucrative non-television licensing contracts that the NFL enjoys.[43]

C. *Pecover v. Electronic Arts, Inc.*

EA's lock on NFL gaming finally faced a challenge in 2008 when plaintiffs filed a class action suit in the Northern District of

38. *See* Bissell, *supra* note 25 ("The *NFL 2K* series pulled off one of the greatest, most insidious guerrilla-warfare moves in the history of video game competition when, in 2004, it released *ESPN NFL 2K5* at the ridiculously enticing price of $19.99 and carved a serious gouge in *Madden*'s domination of the football space. One of the Madden dev[eloper]s I spoke to still remembers *2K5*'s day of sneak-attack infamy: 'It scared the hell out of us.'"). The title sold nearly three million copies. *See* Fahs, *supra* note 28. *But see In Pictures: American's All-Time Top Videogames*, FORBES (June 3, 2008), http://www.forbes.com/2008/06/03/top-video-games-tech-personal-cx_bc_0603video_slide_11.html (showing that *Madden NFL 2005* sold 6.1 million copies).

39. *See* First Amended Complaint and Demand for Jury Trial at 3, Pecover v. Elec. Arts, Inc., 633 F. Supp. 2d 976 (N.D. Cal. 2009) (No. 08-2820), 2011 WL 2609621 ("Three months after the entry of NFL 2K5 into the market, in November 2004, Electronic Arts lowered the price of Madden NFL from $49.95 to $29.95).

40. *See* Levere, *supra* note 6 ("[T]he dynamics changed late in 2004, when Electronic Arts entered into an exclusive, five-year agreement with the National Football League and Players Inc., the licensing and marketing subsidiary of the N.F.L. Players Association, to develop, publish and distribute football video games. The pact ended the ability of Take-Two to feature current N.F.L. players in its games.").

41. *See* First Amended Complaint and Demand for Jury Trial, *supra* note 39, at 3 (noting timing of EA deals with AFL and NCAA).

42. Daniel Kaplan, *NFL Gives EA a Break*, SPORTS BUS. J. DAILY (Feb. 14, 2011), http://www.sportsbusinessdaily.com/Journal/Issues/2011/02/20110214/Leagues-and-Governing-Bodies/NFL-EA.aspx ("'Madden NFL 11' last year was EA Sports' second-biggest selling title on a global basis, with more than 5 million units shipped, trailing only its soccer title, 'FIFA 11.'").

43. *See id.* (speculating on terms of 2008 exclusive license). "Another year of an exclusive NFL license is significant for EA. The company's first deal in 2005 gave the publisher sole rights to league and player marks and intellectual property, eliminating vibrant competition from 2K Sports' 'NFL 2K' series. That ushered in a wave of full- and semi-exclusive deals in sports video game licensing." *See id.*

California seeking to represent all *Madden* purchasers from January 1, 2005 until the present.[44] As described by the lawsuit's website, which is addressed to potential class members, plaintiffs

> claim that Defendant Electronic Arts entered into a series of exclusive licenses with the National Football League (NFL), National Football League Players' Association (NFLPA), National Collegiate Athletics Association (NCAA), and Arena Football League (AFL), which plaintiffs claim foreclosed competition in an alleged football video game market. Plaintiffs allege that this series of exclusive licenses caused customers who purchased certain football video games to be overcharged. Defendant Electronic Arts has denied any liability and all allegations of misconduct.[45]

The plaintiffs alleged six causes of action: (1) violation of the Sherman Act; (2) violation of California's Cartwright Act; (3) violation of California's Unfair Competition Act; (4) unjust enrichment; (5) violation of various other state antitrust laws; and (6) violation of other state consumer protection laws.[46] EA moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss the plaintiffs' complaint.[47] The court granted EA's motion to dismiss claims five and six to the extent that those claims relied on the laws of states other than California and the District of Columbia, as the named plaintiffs did not purchase *Madden* in any states other than those.[48] The Court denied EA's motion to dismiss plaintiffs' claims under the Sherman Act, Cartwright Act, and others sections of California and

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44. *See id.* (noting plaintiffs purchased game in Washington, D.C. and California and describing eligible members of class); *Hagens Berman Sobol Shapiro LLP & The Paynter Law Firm, PLLC Announce Notice of Class Certification in Pecover v. Electronic Arts, Inc. Lawsuit*, Pecover v Electronic Arts, Inc., HAGENS BERMAN LLP (Apr. 6, 2011) ("The certified class includes all persons who, during the period January 1, 2005 to the present, purchased the Madden NFL, NCAA Football, or Arena Football League brand video games published by Electronic Arts with a release date of January 1, 2005 to the present. Purchasers of software for mobile devices, persons purchasing directly from Electronic Arts, persons purchasing used copies of the relevant football video games, and Electronic Arts' employees, officers, directors, legal representatives, and wholly or partly owned subsidiaries or affiliated companies are excluded from the class.").

45. *Id.* (articulating basic claims of plaintiff class).

46. *See* Pecover v. Elec. Arts, Inc., 633 F. Supp. 2d 976, 979 (N.D. Cal. 2009) (listing claims made by plaintiffs).

47. *See id.* (explaining defendant's motion).

48. *See id.* at 984-85 (granting motion to dismiss based on lack of standing).

District of Columbia law, finding that the plaintiffs had alleged sufficient facts to state a claim that was plausible on its face.[49]

III. LEGAL BACKGROUND: "AGREEMENTS THAT UNREASONABLY RESTRAIN TRADE"

A. Evolving Interpretations of Section 2 of the Sherman Act: "The Concerted-Unilateral Distinction"

Alleged antitrust violations are subject to the Sherman Anti-Trust Act ("Sherman Act"), which was passed during a time of rapid industrialization and the emergence of heavy manufacturing in America.[50] The law's originator, Senator John Sherman, declared that its purpose is to "prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase profits of the producer at the cost of the consumer."[51] The Sherman Act is concerned with two broadly defined categories of activity.[52] Section 1 deals with concerted action, involving some sort of an agreement between multiple parties: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . ." shall be illegal.[53] Unilateral actions by a single

49. *See id.* at 985 (denying motion to dismiss because complaint was well-pleaded); *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007) (articulating "plausibility standard" required for complaints to survive motion to dismiss).

50. *See* JAMES T. HALVERSON & BRIAN J. TELPNER, STEPTOE & JOHNSON LLP, MAKING SENSE OF SHERMAN ACT SECTION 2 IN THE HIGH-TECH ECONOMY 1 (2000), http://www.steptoe.com/assets/attachments/25.pdf (giving context to origin of Sherman Act); 2 ROGER M. MILGRIM & ERIC E. BENSEN, MILGRIM ON LICENSING § 7.01 (2011) ("In an earlier age of plentiful resources, owner management, slow long-distance transportation (and slower communications) and innocence, Congress enacted 'antitrust' provisions intended to stimulate commerce by prohibiting conduct deemed to have a pernicious effect. That legislation, generally known as the antitrust laws, primarily consists of the Sherman Anti-Trust Act (1890) and the Clayton Act (1914). These Acts were Congress' response to the industrial, commercial, utility and transportation enterprises that were frequently dominated by individuals or groups whose methods of operating did not always withstand public scrutiny.").

51. *See* Brandon L. Grusd, *The Antitrust Implications of Professional Sports' League-Wide Licensing and Merchandising Arrangements*, 1 VA. J. SPORTS & L. 1, 16 (1999) (quoting Senator Sherman from Congressional Record).

52. *See id.* ("The antitrust laws are primarily concerned with two types of activities. The first type involves interactions between two or more parties, while the second type concerns the actions of a single party.").

53. *See* 15 U.S.C. § 1 (2006). "The Sherman Act prohibits agreements that unreasonably restrain trade, but does not reach all agreements. For example, section 1 does not apply to an agreement between two managers of General Motors, but it does apply to an agreement between a manager of General Motors and a manager of Volvo." *See* Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues: American Needle and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835, 842 n.34 (2009) (clarifying reach of Sherman Act) (citation omitted).

entity are covered solely by section 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be punished."[54]

The text of the statute has not changed since it was enacted in 1890.[55] This is in keeping with Senator Sherman's belief that his legislation essentially codified common law with the sole addition of new remedial sanctions.[56] The Supreme Court has treated the Sherman Act as such.[57] While this characteristic has allowed the law to survive unaltered for almost a century and a quarter, it may also be why the Supreme Court has recently expressed concern with the arguably capricious nature of antitrust litigation:

> [A]ntitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many different courts to reach consistent results. And, given the fact-related nature of many such evaluations, it will also prove difficult to assure that the different courts evaluate different fact patterns consistently. The result is an unusually high risk that dif-

54. *See* 15 U.S.C. § 2 (2006). "The concerted-unilateral distinction between Section 1 and Section 2 is critical, because it can be significantly easier to prove a violation of Section 1 than a violation of Section 2." *See* Feldman, *supra* note 53 at 842.

55. *See* Halverson & Telpner, *supra* note 50, at 1 (contrasting origins of Sherman Act with today's service, technology, and information dominated economy).

56. *See* Milgrim & Bensen, *supra* note 50, at n.3 (stating Senator Sherman's interpretation of Sherman Act). "[T]he Court concluded that overruling [established] precedent can be done where the Court is in a Common-Law, rather than statutory context, the Court observing that the Sherman Act is simply a codification of the Common Law. In such a context, where the Court achieves greater experience in the subject matter than it had at the time of its earlier ruling and where other, subsequent, opinions of the Court make the initial ruling and these subsequent opinions incoherent, precedent, even venerable precedent, is not a bar to the Court's ruling correctly." *See id.* at n.7.1.

57. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 887, 899 (2007) ("From the beginning, the Court has treated the Sherman Act as a common-law statute."). "Section 2 does not define the elements of the offense of attempted monopolization. Nor is there much guidance to be had in the scant legislative history of that provision, which was added late in the legislative process." *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 454 (1993) (tracing origins and initial interpretations of section 2 of Sherman Act).

ferent courts will evaluate similar fact patterns differently.[58]

During the decades immediately following World War II, the courts aggressively enforced the provisions of section 2 against firms whose dominance the courts saw as creating structural barriers to competition.[59] In *United States v. Grinnell Corp.*, for example, the Supreme Court examined a section 2 claim brought by the government against Grinnell Corporation ("Grinnell").[60] At the time, Grinnell manufactured plumbing supplies and fire sprinkler systems while also possessing 87% of the "central station service" market through its controlling stakes in American District Telegraph Co. ("ADT"), Holmes Electric Protective Co. ("Holmes"), and Automatic Fire Alarm Co. of Delaware ("AFA").[61] Beginning in 1907, Grinnell entered into a series of agreements with the other companies granting exclusive rights to each to operate alarm, sprinkler, and security services in various regions of the country.[62] The district court found that the defendants violated section 2 of the Sherman Act by monopolizing the protective services market.[63]

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58. *See* Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 281-82 (2007) (citation omitted); *see also* John DeQ. Briggs & Daniel J. Matheson, *The Supreme Court's 21st Century Section 2 Jurisprudence: Penelope or Thermopylae*, 11 SEDONA CONF. J. 137, 141 (2010) ("This remarkable distaste for antitrust is a very far cry from antitrust as the Magna Carta of free enterprise.").

59. *See* Briggs & Matheson, *supra* note 58, at 138 ("During this post-World War II period of aggressive enforcement, the Supreme Court and lower courts suggested that the Sherman Act condemned the use of monopoly power 'to gain a competitive advantage;' even where the firm's power was primarily attributable to 'superior skill, industry, and foresight,' and the dominant firm neither sacrificed profits to gain its advantage nor intended to use the advantage to maintain or further increase its monopoly power.") (citations omitted).

60. *See* United States v. Grinnell Corp., 384 U.S. 563, 566 (1966) ("This case presents an important question under s 2 of the Sherman Act, which makes it an offense for any person to 'monopolize . . . any part of the trade or commerce among the several States.' This is a civil suit brought by the United States . . . .") (citation omitted).

61. *See id.* at 566-67 ("[Grinnell] also owns 76% of the stock of ADT, 89% of the stock of AFA, and 100% of the stock of Holmes. ADT provides both burglary and fire protection services; Holmes provides burglary services alone; AFA supplies only fire protection service. Each offers a central station service under which hazard-detecting devices installed on the protected premises automatically transmit an electric signal to a central station. The central station is manned 24 hours a day . . . . [T]he record shows that subscribers to accredited central station service (i.e., that approved by the insurance underwriters) receive reductions in their insurance premiums that are substantially greater than the reduction received by the users of other kinds of protection service.").

62. *See id.* at 567-70 (detailing long series of agreements dividing up different segments of central station security services market).

63. *See id.* at 570 (noting district court found per se section 1 violations and section 2 violations).

In affirming the lower court's decision, the Supreme Court described the elements needed to show a breach of section 2 as: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[64] The Court defined "monopoly power" as "the power to control prices or exclude competition."[65] The Court elaborated on this by noting that such power can be inferred from the possession of a predominant share of the market, leaving only the corresponding task of determining what constitutes the "relevant market" in question.[66]

The Court next cited a previously articulated standard, stating that "commodities reasonably interchangeable make up that 'part' of trade or commerce which [section 2] protects against monopoly power."[67] A fact-intensive analysis of the given product market is warranted, taking into account how the product or service is used, consumer preferences, the geographic scope of the product or service, and other characteristics that may indicate a degree of differentiation sufficient to make products non-substitutable.[68] Applying the first prong in *Grinnell*, for example, the Court found that while the defendant companies offered a variety of services, in commer-

64. *Id.* at 570-71 (delineating separate elements necessary to prove section 2 violation).

65. United States v. E.I. du Pont De Nemours & Co., 351 U.S. 377, 391 (1956); *see also* Milgrim & Bensen, *supra* note 50 at n. 9 ("Technically, a 'monopoly' bars others from competing in an activity previously open to all (e.g., the 17th Century salt, tea and tobacco Crown monopolies).").

66. *See Grinnell*, 384 U.S. at 571 ("In the present case, 87% of the accredited central station service business leaves no doubt that the congeries of these defendants have monopoly power – power which, as our discussion of the record indicates, they did not hesitate to wield – if that business is the relevant market."); *see also* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) ("Without a definition of that market there is no way to measure [the defendant's] ability to lesson or destroy competition.").

67. *See Grinnell*, 384 U.S. at 571 (citing *du Pont*, 351 U.S. at 395).

68. *See id.* at 572-76 ("Central station companies recognize that to compete effectively, they must offer all or nearly all types of service . . . [A]lternate services and devices differ, we are told, in utility, efficiency, reliability, responsiveness, and continuity, and the record sustains that position . . . What defendants overlook is that the high degree of differentiation between central station protection and the other forms means that for many customers, only central station protection will do. Though some customers may be willing to accept higher insurance rates in favor of cheaper forms of protection, others will not be willing or able to risk serious interruption to their businesses, even though covered by insurance, and will thus be unwilling to consider anything but central station protection . . . [T]he relevant market for determining whether the defendants have monopoly power is . . . the broader national market that reflects the reality of the way in which they built and conduct their business.").

cial reality the entire accredited central station service business was a single market.[69] The Court acknowledged that while substitutes for "accredited central station service" existed, such as watchmen services, audible on site alarms, and non-accredited service providers, consumer and insurance provider behaviors demonstrated that these alternatives did not have the low level of differentiation required to be independently part of the monopolized market.[70]

The *Grinnell* Court addressed the second prong of section 2 more succinctly, relying on the factual findings of the district court.[71] As evidence of a "willful acquisition and maintenance" of illegal monopoly power, the Court described restrictive agreements to carve out certain market areas where the companies would be free from competition, various unfair pricing practices, and Grinnell's separate acquisitions of the three large central station service providers.[72] The Court stated: "[Grinnell's] control of the three other defendants eliminated any possibility of an outbreak of competition that might have occurred . . . . By those acquisitions it perfected the monopoly power to exclude competitors and fix prices."[73]

This vigorous style of section 2 enforcement faded in the late 1970s and early 1980s, especially as adherents to "Chicago School" jurisprudential theory gained power in the Department of Justice.[74] The enforcement of section 2 shifted from a focus on structural

69. *See id.* at 571 (agreeing with district court's treatment and definition of "relevant market").

70. *See id.* at 572-73 ("There are, to be sure, substitutes for the accredited central station service. But none of them appears to operate on the same level as the central station service so as to meet the interchangeability test . . . .").

71. *See id.* at 576 ("We have said enough about the great hold that the defendants have on this market. The percentage was so high as to justify the finding of monopoly. And, as the facts already indicate, this monopoly was achieved large part by unlawful and exclusionary practices.").

72. *See id.* ("The restrictive agreements that pre-empted for each company a segment of the market where it was free of competition of the others were one device. Pricing practices that contained competitors were another. The acquisitions by Grinnell of ADT, AFA, and Holmes were still another. Grinnell long faced a problem of competing with ADT. That was one reason it acquired AFA and Holmes. Prior to settlement of its dispute and controversy with ADT, Grinnell prepared to go into the central station service business. By acquiring ADT in 1953, Grinnell eliminated that alternative.").

73. *Id.* (noting ability of company to consolidate monopoly power through acquisition of control of competing enterprises).

74. *See* Briggs & Matheson, *supra* note 58, at 139 ("[T]he greatest changes in doctrine began with the appointment of William Baxter as the head of DOJ. He introduced to the broader antitrust community, and the bench: the Chicago School; efficiencies; empiricism; economics-based guidelines; amicus briefs to lower courts in an effort to shape the law at the bottom of the judicial pyramid, and more.").

dominance to delineating the boundaries of specific business practices.[75] In *Copperweld Corp. v. Independence Tube Corp.*, a jury found that a parent company and its subsidiary had conspired to violate the Sherman Act, but that a third-party company was not part of the conspiracy.[76] The Supreme Court repudiated the justifications for allowing an alleged intra-enterprise conspiracy to create liability under section 1 of the Sherman Act.[77] To do so, the Court gave guidance on the distinction between concerted and unilateral action, and when violations can be found under section 2:

> The conduct of a single firm is governed by Section 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. . . . This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster.[78]

In short, the Court increasingly sought to emphasize that the Sherman Act was passed to protect "competition, not competitors."[79]

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75. *See id.* ("The 1980s began with a bang. Four of the largest antitrust cases in history were concluded – three of them just abandoned . . . The end of these cases could be regarded as the end of the era of antitrust challenges to structural dominance. Henceforth, § 2 enforcement and doctrine would primarily focus on delineating the boundaries of specific competitive (or anticompetitive) practices, in particular below-cost pricing, bundled pricing, exclusive dealing, and the use of intellectual property. And the approach to these specific practices has been consistent with the Supreme Court's post-1980 distrust of antitrust law's role in governing aggressive competition by single firms.").

76. *See* Copperweld Corp v. Indep. Tube Corp., 467 U.S. 752, 757-59 (1984) (articulating holding of district court and Seventh Circuit's affirmation).

77. *See id.* at 766-67 ("Petitioners, joined by the United States as *amicus curiae*, urge us to repudiate the intra-enterprise conspiracy doctrine. The central criticism is that the doctrine gives undue significance to the fact that a subsidiary is separately incorporated and thereby treats as the concerted activity of two entities what is really unilateral behavior flowing from decisions of a single enterprise. We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.").

78. *See id.* at 767 (citations omitted). The Court further noted that, "In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *See id.* (describing purpose of section 2 of Sherman Act).

79. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

This general interpretive trend is evident in *Spectrum Sports, Inc. v. McQuillan*, which provides some final guidance for evaluating a Sherman Act section 2 claim (though it involved allegations of attempted monopolization).[80] In *Spectrum Sports*, the Supreme Court faced an appeal based on the proper definition of a section 2 offense and a split in the circuit courts.[81] The Ninth Circuit had held that if sufficient evidence existed from which a jury could conclude that a company had engaged in unfair or predatory conduct, then both a specific intent to monopolize and a dangerous probability of success in doing so could be inferred without proof of a relevant market or a defendant's market power.[82] Citing to an array of Supreme Court precedent dating back to a 1905 opinion by Justice Oliver Wendell Holmes, the Court rejected the Ninth Circuit's holding.[83] Consistent with the approach of the other circuit courts and its own case law, the Court stated that:

> [I]t is generally required that to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.[84]

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80. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 448-49 (1993) ("The District Court entered a judgment ruling that petitioners had violated § 2, and the Court of Appeals affirmed on the ground that petitioners had attempted to monopolize. The issue we have before us is whether the District Court and the Court of Appeals correctly defined the elements of that offense.").

81. *See id.* at 453 ("Every other Court of Appeals has indicated that proving an attempt to monopolize requires proof of a dangerous probability of monopolization of a relevant market.").

82. *See id.* at 452-53 (citing Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964)).

83. *See id.* at 454-58 (tracing developing role of intent, relevant market, and actual monopolization in section 2 jurisprudence since 1905).

84. *See id.* at 456 (citation omitted). To further clarify what it saw as an error in the Ninth Circuit's reasoning, the Court went on to say that:

> The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in "unfair" or "predatory" tactics. Such conduct may be sufficient to prove the necessary intent to monopolize, which is something more than an intent to compete vigorously, but demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant's economic power in that market.

By this point in the 1990s the Court had repudiated, without overruling, past case law that suggested section 2 could be violated by a monopolist who merely acted to seize business opportunities from rivals.[85] Between 1992 and 2010, the Supreme Court issued eighteen antitrust decisions and ruled for the plaintiff in only one.[86] The Justice Department under the George W. Bush administration brought only three section 2 cases.[87] This is not to say, however, that these trends are fixed or preclude plaintiffs from bringing future section 2 claims.[88] A Bush administration-era report on section 2 enforcement was withdrawn as one of the first major competition policy acts of the Obama administration's Antitrust Division.[89] The old report has been described as being "ex-

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See id. at 459 (explaining type of conduct needed to show intent to monopolize and accompanying factors needed to dangerous probability of success).

85. *See* Briggs & Matheson, *supra* note 58, at 139 (discussing Court's decision not to continue to endorse *Alcoa* line of cases). "The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. Thus, this Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it. It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects . . . ." *See Spectrum Sports, Inc.*, 506 U.S. at 458-59 (citations omitted).

86. *See* Briggs & Matheson, *supra* note 58, at 141 (citing Brooke Group Ltd. v. Brown &Williamson Tobacco Corp., 509 U.S. 209 (1993); Spectrum Sports Inc. v. McQuillan, 506 U.S. 447 (1993); Brown v. Pro Football, Inc., 518 U.S. 231 (1996); State Oil Co. v. Khan, 522 U.S. 3 (1997); NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998); California Dental Ass'n v. F.T.C., 526 U.S. 756 (1999); Verizon Commc'ns v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004); U.S. Postal Serv. v. Flamingo Indus. (U.S.A.) Ltd., 540 U.S. 736 (2004); F. Hoffman-la Roche Ltd. V. Empagran S.A., 542 U.S. 155 (2004); Volvo Trucks North Am., Inc. v. Reeder Simco GMC, Inc., 546 U.S. 164 (2006); Texaco, Inc. v. Dagher, 547 U.S. 1 (2006); Illinois ToolWorks Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber, 549 U.S. 312 (2007); Bell Atl. v. Twombly, 127 S. Ct. 1955 (2007); Credit Suisse Secs. v. Billing, 551 U.S. 264 (2007); Pac. Bell Tel. Co. v. linkLine Commc'ns., Inc., 555 U.S. 438 (2009)). The Court found for the plaintiffs in Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992). *See id.* at 141 (listing antitrust case where Supreme Court found for plaintiff).

87. *See* Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act*, 90 B.U. L. REV. 1611, 1612 (2010) (describing recent past enforcement by Antitrust Division). "Under the administration of George W. Bush, the Antitrust Division . . . was not enthusiastic about using Section 2 of the Sherman Act to pursue anticompetitive single-firm conduct." *See id.* (contrasting administrations' approaches to section 2 enforcement).

88. *See* Briggs & Matheson, *supra* note 58 (listing recent lower court cases, Department of Justice statements, and Federal Trade Commission enforcement actions that exhibit resistance to Supreme Court's broadly exculpatory mood).

89. *See* Hovenkamp, *supra* note 87, at 1612 ("As soon as President Obama was elected, withdrawal of the Section 2 Report was virtually a foregone conclusion.");

tremely tolerant of single-form conduct, making it extraordinarily difficult to prove a violation in many areas . . . ."[90] While the administration withdrew the report so that its official policy would mirror the president's campaign positions, the Supreme Court recently found for a plaintiff on at least a threshold issue in an antitrust case.[91]

B. Doctrines and Theories of Liability Raised by Electronic Arts in its Motions to Dismiss: "Antitrust Laws Protect Competition as a Whole"

EA fought back against the plaintiffs' claim by making the following specific legal arguments in support of its motion to dismiss, each of which the court considered before ultimately rejecting.[92]

1. *The Indirect Purchaser Doctrine*

Since 1977, courts have generally refused to allow "indirect purchasers" to bring actions for damages under federal antitrust laws.[93] "Indirect purchasers" are defined as "those who brought an illegally monopolized or cartelized product or service through the agency of a dealer, distributor, or some other independent reseller who was not a participant in the antitrust violation."[94] The Su-

see also Justice Department Withdraw Report On Antitrust Monopoly Law, U.S. DEPT. OF JUSTICE (May 11, 2009), http://www.justice.gov/atr/public/press_releases/2009/245710.htm (announcing withdrawal of report and shift in enforcement philosophy).

90. *See* Hovenkamp, *supra* note 87, at 1613 (explaining why Obama administration chose to withdraw report). "Bitter experience with an earlier version of the Justice Department's Merger Guidelines demonstrated that business firms are entitled to rely on antitrust guidelines. As a result, the Division could not state a position declaring one standard and later bring an action seeking to establish a standard that is harsher on defendants." *See id.* (citation omitted). *But see* Ashby Jones, *Sherman Stirs: U.S. Revives Section 2 of the Antitrust Act*, WALL ST. J., July 7, 2009, at A7, *available at* http://online.wsj.com/article/SB124693452204503961.html ("Toward the end of [President Bush's] second term, the administration issued a report which codified its views on Section 2. It took the position that the marketplace, not government regulators or courts, provides the ideal check on anticompetitive business practices.").

91. *See* Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201 (2010). For a further discussion of *American Needle*, see *infra* notes 96-100 and accompanying text. *See* Hovenkamp, *supra* note 87, at 1613 n.7 ("'As president, I will direct my administration to reinvigorate antitrust enforcement'").

92. *See* Pecover v. Electronic Arts, Inc., 633 F. Supp. 2d 976, 979-85 (N.D. Cal. 2009) (analyzing EA's arguments for dismissal of plaintiffs' claim).

93. *See* Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717, 1717 (1990) (explaining origins of indirect purchaser rule).

94. *See id.* (defining subject of indirect purchaser rule). This rule flows from an earlier Supreme Court decision, Hanover Shoe, Inc. v. United Shoe Mach. Corp, 392 U.S. 481 (1968), which held that a monopolist could not use the defense

preme Court has given two rationales for maintaining this rule: (1) apportioning damages along a chain of purchasers is very challenging and (2) allowing indirect purchasers to recover in this manner potentially could provide for much more than the treble damages authorized under federal law.[95]

2. *The Single Entity Theory and Professional Sports Licensing*

In 2010, the Supreme Court addressed arguments in *American Needle, Inc. v. National Football League* that the NFL acted as a single entity for antitrust purposes when it licensed intellectual property, thus making it immune from scrutiny under section 1 of the Sherman Act.[96] Sports leagues have long viewed this defense as an antitrust "holy grail", allowing them to avoid costly section 1 litigation.[97] Courts, in turn, have analogized section 1 analysis to the "antitrust equivalent . . . of water torture."[98] The Supreme Court has stated that the concerted activity covered by section 1 is judged more harshly than unilateral activity under section 2 because of the former's potential to "deprive[ ] the marketplace of independent centers of decision making that competition assumes and demands."[99] In the end, the Court found that NFL teams do "compete in the market for intellectual property" and "possess [neither] the unitary decisionmaking quality [nor] the single aggregation of economic power characteristic of independent action."[100]

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that a plaintiff, able to pass higher prices on to consumers, had not been injured by the monopolist's overcharge. *See id.* (citing to origins of indirect purchaser rule).

95. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 730-31, 737-44 (1977) (providing reasons for adhering to indirect purchaser rule).

96. *See* Feldman, *supra* note 53, at 835 (2009) (arguing "that a single-entity classification for sports leagues divorces antitrust immunity from the fundamental purpose of the antitrust laws and is theoretically unsupportable.").

97. *See id.* at 837 ("The leagues claim that this protection is necessary because Section 1 litigation can be abusive and burdensome and deters them from engaging in procompetitive behavior.").

98. *See* In re Detroit Auto Dealers Ass'n, 955 F.2d 457, 475-76 (6th Cir. 1992) (quoting In re Mass. Bd. of Registration in Optometry, 110 F.T.C. 549, 603 (1988)).

99. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 762, 768-69 (1984) (distinguishing between Sherman Act section 1 and section 2 standards and difficulties of showing each). "For these reasons, § 1 prohibits any concerted action 'in restraint of trade or commerce,' even if the action does not 'threate[n] monopolization.'" *See* Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2209 (2010) (quoting *Copperweld*, 467 U.S. at 768).

100. *See Am. Needle, Inc.*, 130 S. Ct. at 2212-13 (explaining when NFL should not be considered single-entity for sake of antitrust analysis). The Court ultimately reversed the Court of Appeals and remanded the case for further proceedings, with the NFL's conduct to be evaluated under the flexible Rule of Reason. *See id.* at 2216 ("When restraints on competition are essential if the product is to be avail-

3. *The Essential Facilities Doctrine*

This theory "imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first."[101] Thus, a monopolist that unilaterally refuses to deal faces potential liability under section 2 of the Sherman Act.[102] The Seventh Circuit has articulated four factors needed to prove a claim based on this theory: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors."[103]

Essential facilities claims exist as an exception to the general principle that a business has no obligation to deal with its competitors.[104] Due to this, a plaintiff must show that control of the facility carries with it the power to actually eliminate competition.[105] Next, the plaintiff must prove that the benefit derived from access to the asset cannot be obtained from other sources.[106] Additionally, the plaintiff must demonstrate that sharing the facility would not be impractical or inhibit the defendant's ability to serve customers adequately.[107] Finally, and perhaps most importantly, the plaintiff must be a competitor of the defendant.[108]

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able at all, *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason. And depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it can sometimes be applied in the twinkling of an eye.") (citations omitted) (internal quotation marks omitted).

101. *See* Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 542 (9th Cir. 1991) (defining essential facilities doctrine).

102. *See* Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433 (1987) (outlining basic liability under this type of monopolization claim).

103. *See* MCI Commc'ns v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983) (listing factors needed to pass essential facilities liability test).

104. *See* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985) ("The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.").

105. *See Alaska Airlines, Inc.*, 948 F.2d at 544 (finding that essential nature of facility must compliment maintenance of monopoly).

106. *See* Apartment Source of Penn., L.O., v. Phila. Newspapers, Civ. A. No. 98-5472, 1999 WL 191649, at *7 (E.D. Pa. Apr. 1, 1999) (noting how alternative to facility must not be feasible).

107. *See* Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977) (describing standard for evaluating feasibility of access to competitors).

108. *See* Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1356 (Fed. Cir. 1999) (finding competitive relationship must exist between parties for essential facilities claim to be permissible).

4. *The Cartwright Act and the Rule of Reason*

The Cartwright Act, codified at California Business and Professions Code sections 16700 to 16770, is California's primary antitrust statute and was enacted in 1907 with the purpose of protecting and fostering business competition.[109] The language of this statute is very similar to that of section 1 of the Sherman Act, though it phrases its prohibitions in narrower terms by listing several specific forms of illegal combinations of business entities.[110] Notably, "[t]he Cartwright Act . . . has no [section 2] equivalent. Monopolization, attempts to monopolize, or combinations or conspiracies to monopolize are not practices specifically prohibited by the Act. Thus, read literally, concerted activity between two or more persons is required for a Cartwright Act violation to exist."[111] As applied to specific practices, the law presumes that manifestly anticompetitive restraints of trade are illegal *per se*, but evaluates other potential restraints under the rule of reason.[112]

A determination of illegality under the rule of reason requires knowledge and analysis of the line of commerce, the market area, and the affected share of the relevant market.[113] Federal courts have looked at similar factors, starting first with the market power of the business and defining that as "the ability to raise prices above those that would prevail in a competitive market."[114] Next, a plaintiff has the burden of showing that the net anticompetitive effects outweigh the procompetitive benefits, which then shifts the burden to the defendant to provide a justification that the fact-finder must consider when determining the overall reasonableness of the trade

109. *See* Kevin E. Stern, *The High Cost of Convenience: Antitrust Law Violations in the Computerized Ticketing Services Industry*, 16 HASTINGS COMM. & ENT. L.J. 349, 359 (1994) (stating origins of Cartwright Act). For a further discussion of the Cartwright Act's terms and how it has been interpreted, see *infra* notes 141-145 and accompanying text.

110. *See* Stern, *supra* note 109, at 361 ("A comparison of the Cartwright Act (sections 1670 and 16726 in particular) with the Sherman Act reveals that the California antitrust statute is very similar, but not identical, to section 1 of the Sherman Act . . . [T]he effect of the two statutes has been substantially the same.").

111. *See id.* at 361 n.80 (distinguishing coverage of Cartwright Act from section 2 of Sherman Act).

112. *See* Chavez v. Whirlpool Corp., 93 Cal. Rptr. 2d 175, 179-80 (Ct. App. 2001) (noting that California and federal antitrust law generally distinguish between conduct that is per se unlawful and conduct that is evaluated under rule of reason).

113. *See* Fisherman's Wharf Bay Cruise Corp. v. Super. Ct., 7 Cal. Rptr. 3d 628, 649 (Ct. App. 2004) (listing factors to be taken into consideration during rule of reason analysis).

114. *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) (defining concept of market power).

restraint.[115] Finally, an antitrust injury entailing actual consumer harm in the form of higher prices or decreased quality or output must be shown.[116]

C. Pleading Standards: "Plausible on its Face"

Finally, the relatively recent changes in what standards a "well pleaded" complaint must meet are especially relevant to *Pecover*.[117] *Bell Atlantic Corp. v. Twombly* left commentators wondering whether notice pleading was dead after the Supreme Court held that the complaint in an antitrust case had to state a claim that is plausible on its face.[118] The Court further explained its *Twombly* decision in *Ashcroft v. Iqbal*.[119] There, it noted that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[120] If a complaint makes merely conclusory statements, *Iqbal* holds that the petitioner may not be entitled to an assumption of veracity.[121] Finally, it made clear that the *Twombly*

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115. *See* Marc Edelman, *Upon Further Review: Will the NFL's Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of American Needle v. Nat'l Football League*, 16 STAN. J. L. BUS. & FIN. 183, 210-11 (2011) (stating criteria and procedural process for finding net anticompetitive effects).

116. *See* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 317 (2d Cir. 2008) ("Under the rule of reason, the plaintiffs bear an initial burden to demonstrate the defendants' challenged behavior had an *actual* adverse effect. . . . Because the antitrust laws protect competition as a whole, evidence that plaintiffs have been harmed as individual competitors will not suffice.") (citations omitted); *see also* Edelman, *supra* note 115, at 210-11 (summarizing what is needed to find antitrust injury in rule of reason analysis).

117. For a further discussion of the procedural posture in *Pecover*, see *infra* notes 123-125 and accompanying text.

118. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) ("Here . . . we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431, 431 (2008) (opining that age of notice pleading has ended).

119. *See* Ashcroft v. Iqbal, 556 U.S. 662, 662-63 (2009) (summarizing application of *Twombly* to *Iqbal* facts).

120. *See id.* at 1949 (articulating pleading standard) (citations omitted). The Court goes on to state that: "[a]lthough for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation." *See id.* at 1949-50 (internal quotation marks omitted).

121. *See id.* at 1951 ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.").

decision is generally applicable, as it was based on the Court's interpretation of the Federal Rules of Civil Procedure.[122]

IV. NARRATIVE ANALYSIS: *PECOVER* CLAIMS SUCCEED PRELIMINARILY, "WHETHER PLAINTIFFS WILL BE ABLE TO BACK THIS UP WITH EVIDENCE IS A MATTER LEFT FOR ANOTHER DAY"

Judge Vaughn Walker first addressed the procedural posture of the case, as EA's motion to dismiss guided how he evaluated the plaintiffs' claims.[123] Importantly, he noted that "[a]llegations of material fact are taken as true and construed in the light most favorable to the nonmoving party."[124] Moreover, "all inferences reasonably drawn from these facts must be construed in favor of the responding party."[125]

A. Motion to Dismiss Plaintiffs' Sherman Act Claim

The court quickly set aside EA's attack based on the "indirect purchaser doctrine," noting that this line of cases only prevents indirect purchasers from seeking damages under section 2 of the Sherman Act rather than, as here, seeking injunctive relief.[126]

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122. *See id.* at 1953 ("Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard in all civil actions and proceedings in the United States district courts.") (citations omitted) (internal quotation marks omitted).

123. *See* Pecover v. Elec. Arts, Inc., 633 F. Supp. 2d 976, 979 (N.D. Cal. 2009) ("A motion to dismiss . . . for failure to state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.' Because [FED. R. CIV. P. 12(b) (6)] on the sufficiency of a claim – and not the claim's substantive merits –'[o]rdinarily[ ] a court may look only at the face of the complaint to decide a motion to dismiss.'") (citations omitted).

124. *See id.* (citing Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1989)).

125. *See id.* (citing Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989)).

126. *See id.* at 979-80 ("EA's first attack – that the *Illinois Brick* indirect purchaser doctrine bars plaintiffs' section 2 claim – fails because the *Illinois Brick* indirect purchaser bar only bars antitrust claims for damages by indirect purchasers, whereas plaintiffs' section 2 claim seeks only injunctive relief."). The court explained that:

> In *Illinois Brick*, the Supreme Court reasoned that such suits would force courts to allocate illegal overcharges between middlemen and the ultimate consumers and thus add 'whole new dimensions of complexity to treble damages suits and seriously undermine their effectiveness.' The Court further reasoned that allowing damages suits by indirect purchasers would open the door to duplicative recovery from both direct and indirect purchasers. Apportionment challenges and duplicative recovery simply do not come into play in suits seeking injunctive relief and thus *Illinois Brick* does not apply.

The court next addressed EA's contention that the plaintiffs had not adequately alleged that "interactive video football software" is a recognizable product market for the purposes of the Sherman Act.[127] After considering the points made by the plaintiffs in their complaint, the court made clear that it must accept as true that "there are no substitutes for interactive football software without the markers of actual teams and players."[128] The court drew a distinction between plaintiffs' argument and one alleging that there are in fact no substitutes for football video games before it turned its attention to the question of whether "interactive football software is sufficiently distinct or appealing to consumers to constitute a recognizable product market."[129] The plaintiffs defined a

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See id. at 980 (citations omitted). *But see* Chris Sagers, *Why* Copperweld *Was Actually Kind of Dumb: Sound, Fury and the Once and Still Missing Antitrust Theory of the Firm*, 18 VILL. SPORTS & ENT. L.J. 377, 378 n.7 (2011) ("Additionally indirect-purchase plaintiffs can never sue in federal antitrust . . . .") (citation omitted).

127. *See Pecover*, 633 F. Supp. 2d at 980 (disagreeing with EA's argument that interactive video football software is not recognizable product market). Here, the court relies on the market allegations contained in the plaintiffs' complaint:

> As Electronic Arts well knew, consumers demand that the teams and players in interactive football software be identified with actual teams and players. This is only achievable through a license with a sports league and associated players associations. There is essentially no demand and therefore no market for interactive football software that is not based on real life teams and/or players. Electronic Arts recognizes this fact in its annual report to investors where it notes that if it were "unable to maintain" licenses with "major sports leagues and players associations" its "revenue and profitability will decline significantly."
>
> By signing the exclusive agreement with the NFL, Electronic Arts immediately killed off Take Two's NFL 2K5 software, the only competing interactive football product of comparable quality to its Madden NFL franchise. Through its agreements with the NCAA and AFL, Electronic Arts prevented Take Two and others from re-entering the market with non-NFL branded interactive football software. Once again without a competitor, Electronic Arts raised its prices dramatically. Specifically, Electronic Arts raised the price of the Madden 2006 videogame (released in August of 2005) nearly seventy percent to $49.95. Electronic Arts currently sells interactive football software for up to $59.95.

See First Amended Complaint and Demand for Jury Trial, *supra* note 39, at 4-5.

128. *See Pecover*, 633 F. Supp. 2d at 980 ("As the court understands these allegations, interactive football software will not sell if it does not use the names, logos and other markers of teams that actually compete in the NFL; there is, in effect, no market for interactive football software in a virtual or fictitious setting.").

129. *See id.* at 980-81 ("Plaintiffs do not, however, allege that there are no substitutes for interactive football software. One does not need to be a devotee of video games to recognize that any such claim would be implausible and possibly subject to dismissal under the instructions of the Supreme Court in *Bell Atlantic Corp v. Twombly* to allege antitrust claims with a measure of plausibility."). The court acknowledges that *Ashcroft v. Iqbal* appears to have extended the applicability of the plausibility requirement, but that here it must "presume that other forms of interactive video game software would substitute for interactive video football software." *See id.* at 981.

distinct product market through a test outlined by the Department of Justice and Federal Trade Commission, which asks whether a potential monopolist could profitably impose a "small but significant and nontransitory increase" in price.[130] The court found that the plaintiffs' claims that EA's agreement effectively "killed off" the only competitive software and allowed EA to significantly raise its prices sufficed, at the pleadings stage, to allege a distinct product market.[131]

The opinion then examined the main cases that EA relied on in its motion to dismiss, starting with *American Needle, Inc. v. NFL* (which had not yet been appealed to the Supreme Court).[132] Though the court suggested that it did not totally agree with the reasoning of the Seventh Circuit on the issue of the NFL's "single-entity" theory, it found *American Needle* to be inapposite in this case for two main reasons: (1) the defendants there were licensors of intellectual property rather than the licensees; and (2) the exclusive licensing contract there involved only one "provider of football entertainment," while *Pecover* involved the NFL, AFL, and NCAA.[133]

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130. *See id.* at 981 ("A positive response suggests very limited functional interchangeability for the product in question and, for antitrust purposes, a distinct product market."); *see also* U.S. DEP'T OF JUSTICE, HORIZONTAL MERGER GUIDELINES 4 (Apr. 8, 1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf (articulating product market definition).

131. *See Pecover*, 633 F. Supp. 2d at 981 (accepting allegations for purposes of pleading claims at bar).

132. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736 (7th Cir. 2008). *See Pecover*, 633 F. Supp. 2d at 981 ("EA devotes much of its attention to [*American Needle*], which held that an exclusive licensing contract between the NFL and Reebok, which manufactures football headwear, did not constitute an unreasonable restraint of trade in violation of section 1 [of the Sherman Act]. The plaintiff had contended that the individual teams in the NFL were separate entities, so that the league's agreement with Reebok was unlawful horizontal or coordinated conduct."). "Without definitively resolving the single-entity question for all purposes, the court of appeals focused on whether the agreement before it 'deprived the market of independent sources of economic power' and, affirming, concluded that the agreement did not do so. The court reached this conclusion because it viewed the joint licensing of NFL intellectual property as intended to promote NFL football as against other forms of entertainment." *See id.* (quoting *Am. Needle, Inc.*, 538 F.3d at 743-44) (citations omitted). The appellate court also found that the failure of American Needle's Sherman Act section 1 claim doomed its section 2 claim, as a "single entity" NFL is free "to license their intellectual property on an exclusive basis even if the teams opt to reduce the number of companies to whom they grant licenses." *See Am. Needle, Inc.*, 538 F.3d at 744 (citations omitted).

133. *See Pecover*, 633 F. Supp. 2d at 981-82 (explaining why *American Needle* does not provide persuasive support for EA's argument). The court evaluated the Seventh Circuit's holding by stating that:

> The single-entity rationale is, of course, persuasive in the context of NFL's role as a competitor in the entertainment business. An individual team can offer no entertainment value without the other teams in the league. Although this single-entity theory is somewhat less persuasive (to

Following this analysis, the court turned its attention to a line of cases cited by EA in support of what amounts to an "essential facilities" claim.[134] The court first discussed *Paddock Publications, Inc. v. Chicago Tribune Co.*[135] In this Seventh Circuit case, Judge Easterbrook dismissed a complaint based on the section 1 of the Sherman Act for being fundamentally about "essential facilities" but lacking in "any essential facility."[136] Unlike in *Paddock Publications*, however, the plaintiffs' complaint in *Pecover* "alleges that the names and logos of actual teams and players are essential to market interactive football software."[137] The court also rejected EA's attempt to draw parallels between *Pecover* and *Fleer Corp. v. Topps Chewing Gum, Inc.*, in which the Third Circuit rejected another "essential facilities" claim for failing to show the requisite "bottleneck" restricting competition.[138] The court believed it was important that the Third

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> the undersigned, at least) when it comes to licensing NFL team logos on headwear (after all, individual teams could make their own license agreements), nonetheless the court of appeals viewed licensing headwear as simply an extension of the NFL's competition in promoting the entertainment it provides.

See id. at 982.

134. *See id.* (citing appellate level cases discussing essential facilities doctrine). For a discussion of the essential facilities doctrine, see *supra* notes 101-108 and accompanying text.

135. *See* Paddock Publications, Inc. v. Chicago Tribune Co., 103 F.3d 42 (7th Cir. 1996).

136. *See Pecover*, 633 F. Supp. 2d at 982 ("In *Paddock*, a suburban daily newspaper in the Chicago metropolitan area, the *Daily Herald*, asserted claims under section 1 against the two major dailies in Chicago, the *Tribune* and the *Sun-Times*, that they had "locked up" the most popular or best supplemental services or features through exclusive agreements with the *New York Times* and *Los Angeles Times/Washington Post* news and features syndicates. The *Herald* did not contend that the *Tribune* and *Sun-Times* had conspired nor that the news and features syndicates had coordinated their conduct.") (citation omitted).

137. *See id.* (citing First Amended Complaint and Demand for Jury Trial at 4, Pecover v. Elec. Arts, Inc., 633 F. Supp. 2d 976 (N.D. Cal. 2009) (No. 08-2820), 2011 WL 2609621). The court does qualify this holding, stating that "whether plaintiffs will be able to back this up with evidence is a matter left for another day." *See id.* (acknowledging impact of pleading standards applicable to this stage of proceedings).

138. *See* Fleer Corp. v. Topps Chewing Gum, Inc., 658 F. 2d 139 (3d Cir. 1981). *See Pecover*, 633 F. Supp. 2d at 982-83 ("The court then opined that because 'Fleer or any other trading card manufacturer [ ] may compete with Topps for minor league players or even persuade the present major league players not to renew their Topps' contracts' the accumulation of exclusive licenses in that case failed to restrict competition sufficiently to violate section 1.") (citations omitted). The court found the *Fleer* case to be more factually analogous to *Pecover* than *Paddock Publications*, summarizing the case as such:

> The parties, Fleer Corporation and Topps Chewing Gum, produced bubble gum and similar products. Topps had acquired exclusive licenses to the photographs and statistics of baseball players for use in producing baseball trading cards and, at the time of the case, Topps was the only

Circuit decided *Fleer* on a motion for summary judgment, as it also received *Pecover* at an early procedural stage where the plaintiffs' allegations had to be taken as true.[139]

Based on this series of analyses, the court denied EA's motion to dismiss the plaintiffs' claim for violation of the Sherman Act section 2.[140]

B. Motion to Dismiss Plaintiffs' Cartwright Act Claim

Next, the court rejected EA's arguments that the plaintiffs' Cartwright Act claim should be dismissed.[141] EA contended that (1) the signing of multiple exclusive licensing deals does not create a restraint of trade; and (2) if those agreements are not the "conspiracy" alleged in the plaintiffs' complaint, then enough factual details have not been alleged to survive the motion to dismiss.[142] The court explained its understanding of California's Cartwright Act, noting that it generally codifies common law prohibitions on the restraint of trade and evaluates such restraints using a "rule of reason" analysis.[143] Before it addressed the case law EA cited in

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> seller of baseball trading cards sold in connection with bubble gum. The district court found the relevant product market to be "pocket-size pictures of active major league baseball players, sold alone or in combination with a low cost premium, at a price of 15 to 50 cents." Although the court of appeals assumed without deciding that this market definition was correct, the court noted (and perhaps was influenced by the fact) that baseball trading cards accompany "a variety of other non-confectionary products." The court also pointed out that Fleer had left the baseball trading card business nine years before the suit was filed by selling its existing baseball player licenses to Topps.

See id. at 982 (citations omitted).

139. *See id.* at 983 ("The court noted that the determination whether the defendant's conduct excluded all meaningful competition was a mixed question of law and fact. Here, on EA's motion to dismiss, the court must take as true plaintiff's factual allegations . . . . These allegations distinguish this case from *Fleer*.") (citation omitted).

140. *See id.* (concluding discussion of EA's motion to dismiss plaintiffs' Sherman Act section 2 claim).

141. *See id.* at 983-84 (reviewing Cartwright Act case law as applied to EA's arguments).

142. *See id.* at 983 ("EA next moves to dismiss plaintiffs' Cartwright Act claim. EA argues, consistent with its argument against the section 2 claim, that signing multiple exclusive agreements cannot constitute a restraint of trade. EA continues that if the exclusive agreements are not the 'conspiracy' alleged in the complaint, then the complaint lacks the requisite factual details of the alleged Cartwright Act violation.") (citation omitted).

143. *See id.* (summarizing interpretations and application of Cartwright Act). Generally, "The Cartwright Act makes unlawful a 'trust,' defined as 'a combination of capital, skill, or acts by two or more persons' for the purposes of restraining commerce and preventing market competition in the variety of ways listed in the statute." *See id.* (quoting CAL. BUS. & PROF. CODE § 16720 (2012)).

support of its argument, the court stated that California courts have found that vertical restraints of trade (such as exclusive dealing arrangements) are not illegal per se but can violate the Act.[144] The court found that the exclusive agreements, as described in the plaintiffs' complaint, could plausibly be found to violate the Cartwright Act's "rule of reason" test, thus ensuring the claim survived EA's motion to dismiss.[145]

The court then compared the facts alleged in *Pecover* to those in *Levi Case Co. v. ATS Products*, which involved a patent holder granting an exclusive license to a sublicensee.[146] EA relied on *Levi Case* for the "proposition that parties to an exclusive license who are not competitors are legally incapable of conspiring in violation of the antitrust laws."[147] The court distinguished *Pecover* from the facts of *Levi Case* by first pointing out that the *Pecover* complaint "alleges the aggregation of multiple exclusive agreements to choke off competition in a way that is not legally sanctioned, unlike the exclusive agreement involving a single patent."[148] Second, the court ac-

144. *See id.* (citing Fisherman's Wharf Bay Cruise Corp. v. Super. Ct., 7 Cal. Rptr. 3d 628, 649 (Ct. App. 2004)) ("California courts have determined that vertical restraints of trade, such as exclusive dealing arrangements, can violate the Cartwright Act, though they are not illegal per se. 'The law conclusively presumes manifestly anticompetitive restraints of trade to be unreasonable and unlawful, and evaluates other restraints under the rule of reason.' Vertical restraints, including exclusive dealing arrangements, are proscribed when it is probable that performance of the arrangements will foreclose competition in a substantial share of the affected line of commerce. The rule of reason analysis requires a factual analysis of the line of commerce, the market area and the affected share of the relevant market."). The court states, however, that "[s]uch a factual inquiry is inappropriate at this stage in the proceedings." *See id.* (deferring fact-finding to separate stage of legal process).

145. *See id.* ("Accordingly, the exclusive licenses themselves, described adequately in the complaint, constitute the conduct giving rise to the Cartwright Act claim.").

146. *See* Levi Case Co., Inc. v. ATS Products, Inc., 788 F. Supp. 428 (N.D. Cal. 1992). *See Pecover*, 633 F. Supp. 2d at 984 (summarizing basic facts of case).

147. *See Pecover*, 633 F. Supp. 2d at 983-84 (discussing EA's interpretation of *Levi Case*). While *Levi Case* involved the Sherman Act, EA could make this analogy because the Cartwright Act and the federal law are interpreted in harmony with one another. *See id.* at 984 (citing Redwood Theatres, Inc. v. Festival Enters., Inc., 908 F.2d 477, 481 (9th Cir. 1990)). The court noted that *Levi Case*, in turn, appropriated the Supreme Court's holding in *Copperweld Corp. v. Independence Tube Co.*, which said that a corporation and its subsidiaries are incapable of conspiring for purposes of section 1 of the Sherman Act. *See id.* at 984 (citing Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984)). "*Copperweld* reasoned that coordinated activity by parties who lack independent sources of economic power and separate interests does not warrant antitrust scrutiny." *Id.* (citing *Copperweld*, 467 U.S. at 771).

148. *See id.* (describing facts and reasoning of *Levi Case* and distinguishing opinion from *Pecover*). In *Levi Case*, "the patent holder's only rights relating to the patent after the exclusive license were to receive royalties and approve sublicenses.

cepted the argument that, as the NFL, AFL, and NCAA are in a sense competitors with each other, a series of agreements between "each of [those] entities and EA could plausibly deprive the marketplace of independent sources of economic power."[149] As with the Sherman Act claim, the court denied EA's motion to dismiss the plaintiffs' Cartwright Act cause of action.[150]

C. The Remaining State Law Claims

In the opinion's final section, the court addressed EA's motion to dismiss various claims made under District of Columbia, California, and eighteen other states' laws.[151] The court refused to reject the unfair competition and unjust enrichment claims made under California law, as EA urged them to be dismissed based on its argument that the Cartwright Act claims should also not survive.[152] The court also denied EA's motion to dismiss the claim made under the consumer protection laws of Washington, D.C.[153]

Ultimately, the court did grant EA's motions to dismiss the plaintiffs' claims for the violation of various other states' antitrust, restraint of trade, consumer protection, and unfair competition laws.[154]

The patent holder, by virtue of the exclusive license, could not compete in the market covered by the patent and neither could anyone else because a patent is a legally-sanctioned restraint on trade." *See id.* (citation omitted).

149. *See id.* (hypothesizing impact of EA's exclusive licensing deals on market).

150. *See id.* (finding facts alleged by plaintiffs to plausibly amount to Cartwright Act violation).

151. *See id.* ("EA moves to dismiss plaintiff's claims for unfair competition and unjust enrichment under California law, violation of the District of Columbia Consumer Protection Procedures Act and violation of the antitrust and consumer protection laws of eighteen states in which plaintiffs did not purchase the Madden NFL video game.") (citation omitted).

152. *See id.* ("Because the court finds that the Cartwright Act survives EA's motion to dismiss, the court will not dismiss plaintiffs' other California law claims on that basis.").

153. *See id.* (allowing claim made under District of Columbia Consumer Protection Procedures Act to survive).

154. *See id.* at 979, 984-85 (granting EA's motion to dismiss plaintiffs' fifth and sixth claims for violation of laws of states other than where plaintiffs purchased *Madden*). Not only did the court find that the plaintiffs, having purchased *Madden* only in California and the District of Columbia, did not have standing to bring such claims, it noted that the plaintiffs conceded this point by not addressing the issue in their response to EA's motion to dismiss. *See id.* at 984 ("[P]laintiffs have effectively conceded, by failing to address the issue in their opposition memorandum, that their claims under the laws of states in which plaintiffs did not purchase the Madden NFL video game should be dismissed. The named plaintiffs in this action purchased the video game at issue in California and the District of Columbia and have alleged no basis for standing to bring claims under the laws of other states.") (citation omitted).

V. CRITICAL ANALYSIS: "THE LICENSORS HAVE THE WHIP'S HAND WHEN IT COMES TO CONTROLLING OUTPUT"

As the court decided *Pecover* on a motion to dismiss for failure to state a claim, it is appropriate to first consider the opinion's treatment of the then-new *Twombly/Iqbal* standards for evaluating pleadings.[155] The court's ultimate holding relies heavily on its obligation to take allegations of material fact as true and to construe these allegations in a light most favorable to the non-moving party, in this case the plaintiffs.[156] However, as the *Pecover* court notes, the complaint alleging a section 1 violation in *Twombly* failed because the Supreme Court found that sufficient plausible facts needed to bring the conduct in question into the realm of illegality had not been pleaded.[157] Extending this reasoning to the case at hand, it

155. *See, e.g.*, Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261, 262 (2009) ("Since the early nineteenth century, the interpretation of the Seventh Amendment preservation of the right to a civil trial by jury has remained static and become increasingly anachronistic. Over the same period of time, the evolution of modern civil procedure pleading standards has been on a collision course with that interpretation. The penultimate 2007 Supreme Court opinion in this field, Bell Atlantic Corp. v. Twombly, raised the specter of an impending impasse between pleading standards and the Seventh Amendment. The 2009 opinion in Ashcroft v. Iqbal is the point of impact."); Douglas G. Smith, *The Evolution of a New Pleading Standard: Ashcroft v. Iqbal*, 88 OR. L. REV. 1053, 1053-55 (2009) (describing cases as watershed events destined to bring on radical changes to ability of plaintiffs to plead claims, therefore potentially revolutionizing federal civil practice).

156. *See* Pecover v. Elec. Arts, Inc., 633 F. Supp. 2d 976, 980 (N.D. Cal. 2009) ("If true – as the court must at this point accept – this adequately alleges that there are no substitutes for interactive football software without the markers of actual teams and players."); *id.* at 981 ("[T]he court presumes that other forms of interactive video game software would substitute for interactive video football software."); *id.* ("Plaintiffs allege that EA's exclusive agreement with the NFL 'killed off' the only other allegedly competitive interactive software and allowed EA to raise its prices 'dramatically.' For purposes of pleading the claims at bar, these allegations suffice to allege a product market."); *id.* at 983 ("Here, on EA's motion to dismiss, the court must take as true plaintiff[s'] factual allegations . . . ."). *See also* Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation . . . . [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss") (citations omitted) (internal quotation marks omitted).

157. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) ("In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.") (citation omitted) (internal quotation marks omitted). In *Twombly*, for example, the court was unwilling to make this "leap" from the

follows that the court has made the jump (or, "reasonable inference" under *Iqbal*) that the facts alleged by the plaintiffs are not just true, but also in violation of the law.[158] The *Pecover* court's opinion systematically rejected EA's line of cases, and in so doing first addressed the legality of EA's actions without engaging in a traditional analysis under section 2 of the Sherman Act.[159]

The court focuses on two main allegations from the plaintiffs' brief.[160] First, the court assumes that "interactive video football software" featuring the names, logos, and other intellectual property of real life professional teams constitutes a distinct product market for Sherman Act purposes, and that there is essentially no market for football software lacking the required licenses.[161] Second, the court takes as true that once EA acquired its exclusive license, it was able to corner this distinct product market by eliminating its competition and then raising prices from where they had been prior to this grant.[162] In doing so, the court indirectly addresses the two prongs identified in *Grinnell* as necessary to a successful section 2 claim: (1) the possession of monopoly power in a relevant market and (2) the willful acquisition or maintenance of that power due to something other than a superior product, business prowess, or historical accident.[163]

Though *Grinnell* involved a company coordinating nationally how services would be provided at a local level, compared to one firm distributing a product across the country after acquiring sepa-

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possible to the plausible because they had "the benefit of the prior rulings and considered views of leading commentators . . . that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *See id.* (explaining why facts as pleaded and nature of legal theory did not meet pleading standard).

158. For a further discussion of the pleading standards articulated in *Twombly* and *Iqbal*, see *supra* notes 117-122 and accompanying text.

159. *See Pecover*, 633 F. Supp. 2d at 979 ("The theories advanced by EA for dismissal of plaintiffs' claim under section 2 of the Sherman Act miss their mark."). For a history of tests courts have developed for analyzing potential violations of section 2, see *supra* notes 59-91 and accompanying text.

160. For a general summary of the plaintiffs' primary allegations, see *supra* notes 127-131 and accompanying text.

161. *See Pecover*, 633 F. Supp. 2d at 980, 982 (deferring to factual allegations contained in plaintiffs' brief); *see also* First Amended Complaint and Demand for Jury Trial, *supra* note 39, at 4 (discussing consumer demand for fully licensed football video games).

162. *See Pecover*, 633 F. Supp. 2d at 981, 983 (citing plaintiffs' brief for argument that EA's license and resulting lack of competition allowed it to raise price of game from $49.95 to $59.95).

163. For a discussion of the facts of *Grinnell* and the Court's reasoning there, see *supra* notes 60-73 and accompanying text.

rate licenses, the parallels between its facts and those in *Pecover* suggest that Judge Walker properly applied the main tenets of section 2 law.[164] As of 2003, *Madden* took in approximately sixty-five to eighty-five percent of what was then a $400 million market for sports console games.[165] In *Grinnell*, the court inferred monopoly power from a market share just slightly more than that.[166] Since the NFL granted its exclusive license to EA, football games featuring former or fictional players have failed to gain popularity with consumers.[167] Similarly, the court in *Grinnell* found that central se-

164. *Compare* United States v. Grinnell Corp., 384 U.S. 563, 576 (1966) ("The restrictive agreements that pre-empted for each company a segment of the market where it was free of competition of the others were one device. Pricing practices that contained competitors were another. The acquisitions by Grinnell of ADT, AFA, and Holmes were still another. Grinnell long faced a problem of competing with ADT . . . . By acquiring ADT in 1953, Grinnell eliminated that alternative. Its control of the three other defendants eliminated any possibility of an outbreak of competition that might have occurred . . . ."), *with* Pecover v. Elec. Arts, Inc., 633 F. Supp. 2d at 984 ("*Levi Case* is distinguishable from the instant complaint, which alleges the aggregation of multiple exclusive agreements to choke off competition in a way that is not legally sanctioned, unlike the exclusive agreement involving a single patent. Moreover, the NFL, AFL and NCAA may each have exclusive agreements with EA, but they are competitors with each other. A series of agreements between EA and each of these entities could plausibly deprive the marketplace of independent sources of economic power."). While the opinion in *Pecover* does not methodically scrutinize the prongs of a prior test, this is not entirely out of line with the way antitrust analyses have developed. *See* David M. Rievman, *The* Grinnell *Test of Monopolization Sounds a False Alarm: Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 28 B.C. L. REV. 415, 415 (1987) ("Yet while sections 1 and 2 of the Act catalog in broad terms the various illegal practices at which the Act's enforcement provisions are directed, the text of the Act itself provides no clear criteria or tests to define and identify the proscribed anticompetitive conduct. Thus, it has largely been left to the courts to formalize the elements required to make out a prima facie case for a section 1 or section 2 Sherman Act violation.").

165. *See* Chris Suellentrop, *Madden Sports' New Arbiter of Cool*, SLATE (Aug. 14, 2003, 6:53 PM), http://www.slate.com/articles/news_and_politics/assessment/2003/08/madden.html ("Last year . . . nearly 20 percent of console games sold were non-racing sports games. That's $1 billion in sales, of which football games reaped the biggest share, as much as 40 percent. And Madden takes in anywhere from 65 percent to 85 percent of the football game market, depending on whom you ask."). "Last year, the NFL made more money from licensing *Madden* to EA Sports than from any other licensed product, except for apparel." *Id.* In the two years after the exclusive license was signed, *Madden* was the best-selling game in any category. *See* Levere, *supra* note 6 (detailing *Madden* and *NFL 2K* sales prior to and after grant of license).

166. For a discussion of the *Grinnell* Court's use of market share to define monopoly power, see *supra* note 66 and accompanying text.

167. *See, e.g.*, Nat Ives, *Coming for Gamers: Football Unfettered*, N.Y. TIMES, Dec. 20, 2004, at C8, *available at* http://www.nytimes.com/2004/12/20/business/media/20nfl.html?ref=electronicartsinc (describing developers' attempts to creatively attract consumers to games without NFL license); Lefevre, *supra* note 6 (detailing Take Two's efforts to market a niche football game featuring retired NFL players); Seth Schiesel, *With Famed Players, Game Takes on Madden's Turf*, N.Y. TIMES, Sep. 17, 2007, at C3, *available at http*://www.nytimes.com/2007/09/17/technology/

curity stations constituted a distinct product market because consumers considered the service to be the only acceptable option, not an interchangeable commodity.[168]

Regarding EA's alleged willful acquisition of monopoly power, it is clear that the company did not stumble into its agreements with the NFL, AFL, and NCAA.[169] However, the defendants in *Grinnell* spent over fifty years consolidating control over the industry through agreements to divide up the market, severely discourage competition, set prices, and acquire potential rivals before there could be any "outbreak of competition."[170] EA may have exhibited a certain level of intent to monopolize the market when it secured the exclusive licenses in question, but its conduct is less explicitly anticompetitive than that in *Grinnell* and may fall under the "superior product [or] business prowess" exceptions listed in that case.[171]

As EA's attorneys argued, the company bid on offers by the NFL, AFL and NCAA, and those leagues have the prerogative to determine to whom and under what terms they will grant licenses.[172] Though this argument is not without some merit, EA's concurrent reliance on the Seventh Circuit's *American Needle* opin-

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17game.html?ref=electronicartsinc ("Of course, in the video game business, as in football, it is never easy to knock off a champion, in this case the Madden franchise. In a conference call last month, Take-Two's chief executive, Ben Feder, said, 'We're not terribly pleased and not disappointed' by sales of All-Pro Football, which was released in July.").

168. For a further discussion of the "interchangeability" component of *Grinnell*'s distinct market prong, see *supra* notes 67-70 and accompanying text.

169. For a discussion of the competitors EA faced prior to the license agreements, EA's feelings about the competition, and the licensing deals struck, see *supra* notes 34-43 and accompanying text.

170. For a further discussion of the defendant's illegal practices in *Grinnell*, see *supra* notes 71-73 and accompanying text.

171. *See* Rievman, *supra* note 164, at 416 ("It is clear from both the legislative history surrounding passage of the Sherman Act and from the judicial decisions interpreting the Act that section 2 does not prohibit monopoly *per se*. The Senate debates on the Sherman Act reflect the intention of the drafters that the Act only prohibit monopolies acquired through abuse of the competitive process, not those legitimately obtained through lawful competitive conduct.").

172. *See* Transcript of Hearing on Motion to Dismiss at 19, Pecover v. Elec. Arts, Inc., 633 F. Supp. 2d 976 (N.D. Cal. 2009) (No. 08-2820) ("By definition, the licensors have the whip's hand when it comes to controlling output. They're the ones who make the profit-maximizing decision as to whether they are going to license exclusively or non-exclusively. And competition for the contract, as Judge Easterbrook put it in the *Paddock* case, becomes part of the arena of competition of the industry which the antitrust laws not only permit but promote and protect, because that's the way that these markets work . . . . [A]fter the National Football League went exclusive, the Arena Football League and the NCAA followed suit . . . . they said, [']We will take bids for exclusive licenses['], and we bid on them.").

ion was misguided and properly disregarded in *Pecover*.[173] The *Pecover* court foreshadowed the eventual Supreme Court holding in *American Needle*, noting its skepticism regarding the applicability of the "single-entity" theory to the licensing of NFL team logos to hats, and the Seventh Circuit's careful avoidance of discussing the liability of the licensees.[174] The court singled out as "the most notable distinction" between the two cases the fact that *American Needle* involved only the NFL while *Pecover*'s allegations concern three separate licensors.[175]

The court's cognizance of the case's procedural posture suggests that there may be merit to EA's attempt to draw parallels between *Pecover* and the essential facilities cases.[176]The court made clear that whether the plaintiffs will be able to prove that the names and logos of actual teams are essential to market football video games is an open question, and it differentiated *Pecover* from *Fleer* based upon EA's multiple licensing agreements.[177] In doing so, the court glossed over a point that is discussed with some depth in both cases: "[c]ompetition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe, and it is common."[178]

173. *See* Transcript of Hearing on Motion to Dismiss, *supra* note 172, at 17 (contrasting EA's argument that Seventh Circuit *American Needle* decision applies to *Pecover* with court's initial feeling that it does not, as *American Needle* did not involve licenses from all various football organizations). For a further discussion of the Seventh Circuit's handling of the *American Needle* case, see *supra* notes 132-133 and accompanying text.

174. *See* Pecover v. Elec. Arts, Inc., 633 F. Supp. 2d 976, 982 ("Although the single-entity theory is somewhat less persuasive (to the undersigned, at least) when it comes to licensing NFL team logos on headwear . . . ."); *see also* Transcript of Hearing on Motion to Dismiss, *supra* note 172, at 27 ("The Seventh Circuit itself . . . never discusses the liability of the licensee. It is very careful to talk about only the liability of the NFL defendants. And the relevancy of that . . . is that a holder of intellectual property does not need an exclusivity provision in order to exclude people from its intellectual property. So even if . . . there is a completely unfettered right on behalf of an intellectual property holder to exclude from its intellectual property, Electronic Arts still loses because it is not the holder of the intellectual property.").

175. *See Pecover*, 633 F. Supp. 2d at 982 (distinguishing facts of *American Needle* from those of case at hand).

176. *See id.* at 983 ("Importantly, the Third Circuit decided *Fleer* on a motion for summary judgment rather than on a motion to dismiss. The court noted that the determination whether the defendant's conduct excluded all meaningful competition was a mixed question of law and fact.").

177. For a summary of the court's handling of EA's attempt to analogize *Pecover* to *Paddock*, see *supra* notes 134-137 and accompanying text.

178. *See* Paddock Publ'ns, Inc. v. Chicago Tribune Co., 103 F.3d 42, 45 (7th Cir. 1996) (extolling virtues of competition as enshrined by antitrust law); Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 154 (3d Cir. 1981) (discussing ability of plaintiff to compete for contracts at different level of market in order to reenter MLB card market).

While the exclusive license leaves little incentive for a competing game developer to invest significant resources in both trying to develop a game capable of competing with *Madden* and convincing the NFL to sign a new licensing agreement, the barriers to entry for this market are arguably due to the structures of the video game and athletic industries.[179] The license has not been granted in perpetuity, and the NFL could decide to market its intellectual property through another company in the future.[180] Further, in addition to violating the NFL's right to dictate the terms of its license, sharing the "essential facility" here is neither practical nor feasible.[181]

Despite any validity that EA's or the plaintiffs' essential facilities-based arguments may have, the court also overlooks jurisprudence suggesting that such claims must arise from the distortion of "a market in which plaintiff and defendant compete, such that a monopolist extends its monopoly to the downstream market by refusing access to the facility it controls."[182] The Supreme Court has found a competitive relationship between two parties to be fundamental if one party seeks to invoke the Sherman Act in order to force access to the property of another.[183] Though this point does

179. *See Fleer*, 658 F.2d at 150-51 ("After careful examination, Topps' exclusive licensing agreements cannot be said to restrain trade unreasonably. A rival manufacturer could compete head to head with Topps by seeking licenses with minor league players. The lag time required to enter the market with a competitive series of trading cards is due in significant measure to the structure of organized baseball."). For a further discussion of the current state of the sports video game market and possible disincentives to compete, see *infra* notes 198-202 and accompanying text.

180. *See Paddock*, 103 F.3d at 45 ("[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. Other firms that want to enter the market can do so by competing at intervals for these contracts.") (citing Flip Side Prods., Inc. v. JAM Prods., Ltd., 843 F.2d 1024, 1032-34 (7th Cir. 1988)).

181. *See* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (holding that sharing of facilities may not be imposed when doing so would impair owner's ability to render adequate service to customers); MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1133 (7th Cir. 1983) (examining whether access to essential facility could feasibly been provided from company holding monopoly to competitor).

182. *See* Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1357 (Fed. Cir. 1999) (citing TV Commc'ns Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1025 (10th Cir. 1992)); Consul, Ltd. v. Transco Energy Co., 805 F.2d 490, 494 (4th Cir. 1986) ("Proof of a relevant market is the threshold for a Sherman Act § 2 claim. The plaintiff must establish the geographic and product market that was monopolized.").

183. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("[The Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the high-

not completely undermine the plaintiffs' argument, it does serve as a reminder that the plaintiffs are seeking relief as a class of consumers and that, at least for their section 2 claims, the indirect purchaser doctrine dictates that any such relief be injunctive in nature.[184]

Finally, the court's discussion of California's Cartwright Act appropriately distinguishes the situation in *Pecover* from that of *Levi Case*, as the latter involved a legally sanctioned monopoly rather than an alleged aggregation of exclusive licenses.[185] Although the court's analysis is driven in part by its obligation to address the arguments raised by EA in its motion to dismiss, the focus of its Cartwright section is somewhat inconsistent with that of the rest of the opinion.[186] The court stresses that the Sherman Act and the Cartwright Act are interpreted in concert with one another, and that the text of the California statute makes "combination[s] of capital, skill, or acts by two or more persons" illegal.[187] This language, however, more closely mirrors section 1 of the Sherman Act than section 2, under which the plaintiffs' brought their federal law claim.[188] The court references the Cartwright Act's treatment of exclusive dealing arrangements, in which "a seller agrees to sell all or a substantial portion of its products or services to a particular

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est quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.").

184. For a further discussion of the indirect purchaser doctrine, see *supra* notes 93-95 and accompanying text.

185. For a further discussion of *Levi Case* and the court's reasoning in distinguishing it from *Pecover*, see *supra* notes 146-150 and accompanying text. *See also* Ramon A. Klitzke, *Patents and Monopolization: The Role of Patents Under Section 2 of the Sherman Act*, 68 MARQ. L. REV. 557, 568 (1985) ("The grant of an exclusive license, standing alone, is not a violation of the antitrust laws because such licenses are clearly within the contemplation of the patent statutes.").

186. *See generally* Transcript of Hearing on Motion to Dismiss, *supra* note 172, at 38 ("There is no possibility of a Cartwright Act claim because there is no concerted action for the same reason that there is no Section 1 claim in the antitrust case . . . . They can't say that there is concerted action for the Cartwright Act based upon just the existence of the exclusive licenses because that runs squarely into your decision in the *Levi* case 15 years ago."). However, given the clear legal and factual differences between a case involving a patent holder and a sublicensee compared to *Pecover*, EA may have raised the *Levi* analogy partly because the decision had been authored by the judge hearing *Pecover* (Hon. Vaughn R. Walker). *See* Levi Case Co., Inc. v. ATS Products, Inc., 788 F. Supp. 428, 431 (N.D. Cal. 1992) (listing author as Judge Walker).

187. *See* Pecover v. Elec. Arts, Inc., 633 F. Supp. 2d 976, 983-84 (N.D. Cal. 2009) (quoting Cartwright Act and stating principle of interpretation for it).

188. For a comparison of the texts of section 1 and section 2 of the Sherman Act, see *supra* notes 53-54 and accompanying text.

buyer, or when a buyer similarly agrees to purchase all or a portion of its requirements of a product or service from a particular seller."[189] While a rule of reason analysis would be used to evaluate the legality of such an arrangement, it is less clear whether such an inquiry is appropriate in *Pecover*.[190]

For example, *Fisherman's Wharf Bay Cruise Court v. Superior Court*, cited by the court to support the application of the rule of reason test to exclusive dealing violations under the Cartwright Act, analogizes section 1 to the California law when evaluating a claim that one company sought to expand its monopoly power by using below-cost pricing to induce tour operators to purchase tickets exclusively from it.[191] *Pecover* is different from such a situation because each of EA's contracts can be viewed as a unilateral action.[192] One scholar has argued that the language of the Cartwright Act, compared to the combined wording of sections 1 and 2 of the Sherman Act, creates a loophole for illegal activity accomplished by single firms:

> The single-firm problem . . . is unique to conduct involving monopoly power. This is because most illegal activities which are comparable in section one violations require concerted activity to create illegality whereas a deliberate monopoly can be maintained by individual efforts. Furthermore, those section one activities which are capable of arising from single-firm activity are condemned by additional [California] statutory provisions. This is generally not the case with violations comparable to section two. As a result, the Cartwright Act does not provide for enforce-

189. *See* LEGAL INFO. INST., *Exclusive Dealing Arrangement*, CORNELL UNIV. L. SCH., http://www.law.cornell.edu/wex/exclusive_dealing_arrangement (last visited Mar. 19, 2012) (giving overview of illegality of certain types of exclusive dealing under Sherman Act).

190. *See* Gordon M. Cowan, *California's Single-Firm Monopoly Loophole*, 18 CAL. W. L. REV. 240, 250 (1982) ("Under the Cartwright Act, such arrangements are proscribed when it is probable that a substantial share of the particular line of commerce would be foreclosed from competition. Under section one, only 'unreasonable' exclusive contracts are illegal.") (citations omitted). "This area of business practice is governed by section one of the Sherman Act." *See also id.* at 250 n.67 (describing coverage of exclusive dealing by Sherman Act).

191. *See* Fisherman's Wharf Bay Cruise Corp. v. Super. Ct., 7 Cal. Rptr. 3d 628, 648-49 (Ct. App. 2004) (framing plaintiff's cause of action and proper legal analysis to be used).

192. *See* Transcript of Hearing on Motion to Dismiss, *supra* note 172, at 43-44 ("[Y]ou can't count the license itself as the concerted action. . . . [T]here is no allegation that [EA] conspired with Take-Two. There is no allegation that the NFL conspire[d] with the AFL of the NCAA. The only action is that, on three separate occasions, Electronic Arts showed up and bid for what was offered, and it won.").

> ment against deliberate monopolies which are created and maintained by a single firm.[193]

This is not to say that that the court's introduction of some section 1 concepts into its Cartwright Act analysis, after primarily examining the plaintiffs' section 2 claims, is fatal to the opinion; rather, this shift may simply reflect the reality of plaintiffs litigating antitrust claims under three statutes with overlapping scopes.[194]

VI. IMPACT: "IF A GAME LIKE *MADDEN* HAS A PROBLEM DISTINGUISHING ITSELF AGAINST NO COMPETITION, HOW IS IT ANY EASIER FOR A CONTENDER SPORTS PRODUCT TO BREAK OUT?"

On December 21, 2010, Judge Walker certified the plaintiffs' class.[195] In *Pecover*, Judge Walker evaluated the plaintiffs' claims under the relatively permissive plausibility standard.[196] His discussion of each side's arguments, however, did seem to indicate a degree of openness to a wide range of potential theories of liability.[197] Any future victories for the plaintiffs may not have a large effect on similar licenses that exist between other professional sports leagues and game publishers, such as the one between Take Two Interac-

193. *See* Cowan, *supra* note 190, at 252 (arguing that much activity illegal under antitrust law accomplished by single firms is non-actionable under Cartwright Act) (citations omitted).

194. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 ("But the crime under [section 1] is legally distinct from that under [section 2] though the two sections overlap in the sense that a monopoly under [section 2] is a species of restraint of trade under [section 1].") (citations omitted); *see also* Cowan, *supra* note 190, at 247 ("It is arguable that a monopoly is a form of trade restraint. It follows that monopolies in general are not only covered under section two but section one as well.") (citations omitted). For a comparison of the origins and wording of section 1 and 2 of the Sherman Act with the Cartwright Act, see *supra* notes 50-57 and notes 109-116.

195. *See* Order Granting Class Certification at 1, Pecover v. Elec. Arts, Inc., 633 F. Supp. 2d 976 (N.D. Cal. 2009) (No. 08-2820); *see* Molina, *supra* note 5 (announcing certification of class); *see* Amended Order Concerning Duties and Instructions for Court-Appointed Technical Advisor and Modifying Case Schedule, Pecover v. Elec. Arts, Inc., 633 F. Supp. 2d 976 (N.D. Cal. 2009) (No. 08-2820), 2012 WL 1029531, at *4 (modifying case schedule to allow Technical Advisor to review documents filed by parties, file report on motions, and leave adequate time between motion hearing and trial date)

196. *See* Pecover v. Elec. Arts, Inc., 633 F. Supp. 2d 976, 979 (N.D. Cal. 2009) (summarizing motion to dismiss standard of review). For a further discussion of this standard of review, see *supra* notes 117-122 and accompanying text.

197. For a summary of Judge Walker's opinion in *Pecover*, see *supra* notes 123-154 and accompanying text. For a critical analysis of that opinion, see *supra* notes 155-194 and accompanying text.

tive, Inc. (Take Two) and Major League Baseball (MLB).[198] With that exclusive license expiring this year, MLB has stated that it will open up the contract to multiple developers.[199] In fact, Take Two has lost tens of millions of dollars on the exclusive MLB license due to poor reviews and sales.[200] Presently, the markets for sports-based video games generally do not feature directly competing titles, despite the fact that only the NFL, MLB, and the International Federation of Association Football (FIFA) have entered into (nearly) exclusive licenses with publishers.[201]

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198. *See* Tor Thorsen, *Take-Two Inks Agreement With MLB Players Association*, GAMESPOT (Jan. 24, 2005, 10:20 AM), http://www.gamespot.com/news/take-two-inks-agreement-with-mlb-players-association-6116946 (announcing preliminary details of exclusive licensing agreement similar to one struck by EA and NFL); *see also* Jon Robinson, *EA Sports Jumping Back Into Baseball?*, ESPN (Mar. 22, 2011, 3:21 PM), http://espn.go.com/espn/thelife/videogames/blog/_/name/thegamer/id/6247274 ("When gamers talk with disgust about exclusive licenses, the first title always brought up is 'NFL 2K5.' But in my opinion, it's the ridiculous exclusive Major League Baseball signed with 2K Sports that still leaves me outraged, especially considering that the deal killed off one of the most beloved sports gaming franchises of all time, EA Sports' 'MVP Baseball.'"). In a somewhat ironic reversal of the situation at issue in *Pecover*, Take-Two's exclusive license meant that EA had to stop publishing its game once the new licensing deal came into effect. *See* Thorsen, *supra* (commenting on effect of agreement). Interestingly, as this deal was struck only a short time after the EA/NFL agreement, an EA spokesperson generally praises these types of deals: "We will launch [our game] this spring, and we're exploring our long term options. This proves that there's plenty of competition in sports games." *See id.* (discussing future of EA's baseball games).

199. *See MLB 2K May Just Be Playing Out The String*, PASTAPADRE (Dec. 3, 2010, 2:30 PM), http://www.pastapadre.com/2010/12/03/mlb-2k-may-just-be-playing-out-the-string ("The MLB has already stated they will not renew a third party deal and instead have opted to open up the contract to multiple parties after 2012.").

200. *See id.* ("Take Two/2K Sports has taken a bath with the third party MLB license they signed in 2005. Just in 2010 alone they estimated a loss of $30-40 million due to the license."); *see also MLB 2K9 Blamed for Take Two Losses*, PASTAPADRE (Dec. 3, 2009, 2:14 PM), http://www.pastapadre.com/2009/12/03/mlb-2k9-blamed-for-take-two-losses ("MLB 2K9 was one of only two . . . major yearly sports titles that dropped in sales compared to the previous year. It was poorly received by both reviewers and gamers and that clearly affected sales after years of subpar offerings.").

201. *See* Owen Good, *You Can Have Any Sports Video Game You Want, But There's Only One*, KOTAKU (May 28, 2011, 8:00 PM), http://kotaku.com/5806547/you-can-have-any-sports-video-game-you-want-but-theres-only-one ("Today, in video gaming, there is only one fully licensed simulation available for all consoles in each team sport. Madden's notorious exclusive license with the NFL gets the most attention, but FIFA's deal with its titular authority, and exclusive pacts with other international football leagues, have also helped to relegate Pro Evolution Soccer to its also-ran status."). "Still, there is only one college football game. There's only one NASCAR game. There's only one golf simulation, only one boxing simulation, only one pro wrestling "simulation," and when 2012 rolls around, we'll probably have just one mixed martial arts sim[ulation]. . . . If there's any major sport with directly competing video games, it's tennis . . . ." *See id.* (describing state of video game market for sports simulations playable on home consoles).

The recent trend of game publishers seeking and acquiring the equivalent of exclusive deals suggests that "the free market has swung the axe on its own".[202] The emergence of these league-specific consolidated markets (mostly divided between EA and Take Two, one of the developers of the *NFL 2K* series) may lend credence to the *Pecover* plaintiffs' arguments that (1) the market for "interactive video football software" is a recognizable one for Sherman Act purposes and (2) there is almost no demand for these games if they lack the license required to portray actual teams and players.[203] The plaintiffs may also point, more generally, to these other sports titles as evidence that consumers of football games deserve to benefit from competition between developers.[204] At the same time, EA could cite these developments to support an argument it made in its motion to dismiss: obtaining multiple exclusive licenses "cannot violate antitrust laws as a matter of law because such a rule would deny licensors the benefit of bidding competition."[205] Under this theory, *Pecover* is ultimately about the right of

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202. *See id.* ("That's the idea . . . [g]et an exclusive deal without paying for it."). The author theorizes that these organically created monopolies have come about for a variety of reasons:

> Development costs have plenty to do with it, especially in a poorer economy. I'd argue, however, that after a decade of refining the games, with visual capabilities ever approaching photorealism, the creative difficulty of differentiating these titles is an especially big reason, too. These are games based on sports with rule sets that are, in many cases, more than 100 years old. The guts of how the game is played isn't changing much at all. Established annual sports titles struggle every year against the perception it's the same as the previous edition. If a game like Madden has a problem distinguishing itself against no competition, how is it any easier for a contender sports product to break out?

See id.

203. For a summary of the plaintiff's arguments regarding the existence of a distinct product market, see *supra* notes 127-130 and accompanying text. For a further discussion of the plaintiffs' Sherman Act section 2 claims and the court's handling of those claims, see *supra* notes 159-171 and accompanying text.

204. For a brief summary of the facts that underlie plaintiffs' argument that EA's accumulation of licenses deprived consumers of the benefits of market competition, see *supra* notes 34-43 and accompanying text.

205. *See* Pecover v. Elec. Arts, Inc., 633 F. Supp. 2d 976, 979 (N.D. Cal. 2009) (explaining EA's attacks on plaintiffs' arguments in its motion to dismiss). As EA's attorney argued during oral argument for the motion to dismiss:

> [I]f there are monopoly rents, it's only because the output decision that was inherently in the hands of the licensor was exercised in a particular way by the licensor. The output decision is theirs.To the extent the case is based upon the notion that the key asset for producing output is the licenses, then the output decision is the licensor's. This is the fundamental nature of intellectual property. And the licensor can make a decision to divide that and have nonexclusive licenses, or it can make a decision to essentially reduce intra-brand competition for the benefit of other interests.

the leagues to control the use of their intellectual property by, for example, incentivizing game developers to continue to innovate and drive sales in order to retain the license granted to them.[206]

In the end, the plaintiffs' arguments, while often convincing, may not be enough to overcome the judicial inertia of recent decades.[207] Courts have been extremely hesitant to impose antitrust liability for a unilateral refusal to license a copyright, so it is possible that respect for licensors' decisions may extend to the licensees who receive the intellectual property in question.[208] Recently, however, the Ninth Circuit (where *Pecover* could hypothetically be argued on appeal) has shown that it is not afraid of pursuing its own interpretation of antitrust law.[209] Some commentators have called section 2 of the Sherman Act an "antitrust flashpoint," noting a "profound difference of views . . . concerning the core principles that ought to guide Section 2[ ]" cases.[210] This sentiment, combined with the costly, fact-intensive nature of antitrust litigation and *Pecover*'s incor-

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See Transcript of Hearing on Motion to Dismiss, *supra* note 172, at 41-42.

206. *See Antitrust Guidelines for the Licensing of Intellectual Property*, U.S. DEPT. OF JUSTICE 5 (Apr. 6, 1995), http://www.justice.gov/atr/public/guidelines/0558.pdf ("This integration can lead to more efficient exploitation of the intellectual property, benefiting consumers through the reduction of costs and the introduction of new products. Such arrangements increase the value of intellectual property to consumers and to the developers of the technology. By potentially increasing the expected returns from intellectual property, licensing also can increase the incentive for its creation and thus promote greater investment in research and development.").

207. *See* Briggs & Matheson, *supra* note 58, at 137 ("In recent decades, the Supreme Court has been in an affectionate embrace with unilateral conduct by a dominant firm. The Court has lauded the stimulating effect of efforts to achieve monopoly and generally has been reluctant to declare unlawful conduct except where particular practices are overwhelmingly likely not to represent competition on the merits."). For a further discussion of the Court's developing stance on antitrust law, see *supra* notes 74-91 and accompanying text.

208. *See* Halverson & Telpner, *supra* note 50, at 15 ("Virtually all cases examining this question have refused to attach section 2 liability to a refusal to license intellectual property, provided that there is no attempt to extend the scope of the intellectual property protection beyond the limits of the statutory grant.").

209. *See, e.g.*, Spectrum Sports, Inc. v. McQuillian, 506 U.S. 447, 456-57 (1993) (articulating elements of attempted monopoly followed by all circuits except Ninth Circuit and reversing its decision in light of array of contrary authority).

210. *See* Mark S. Popofsky, *The Section 2 Debate: Should Lenity Play a Role?*, 7 RUTGERS BUS. L.J. 1, 7-8 (2010) (describing recent controversy over scope and application of section 2). "Moreover, although the substantive legal tests that govern certain categories of conduct are settled, there is perhaps more about Section 2 that is undecided than decided." *See id.*

poration of state law antitrust claims, suggests that the eventual resolution of *Pecover* may depend on a lengthy battle of experts.[211]

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211. *See* Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come*, 61 TUL. L. REV. 777, 809 (1987) ("Antitrust suits are frequently lengthy, complicated and costly both in terms of monetary costs, including legal fees related to discovery expenses, and nonmonetary costs, including dislocation of employees, decline in firm morale and negative publicity."); s*ee* Feldman, *supra* note 42, at 911 ("[T]he discovery process can still be burdensome and expensive even in nonfrivolous cases . . . ."); *see also* Chad Lakkis, *EA Exclusive License Undone? Sports Antitrust Law Professor Explains American Needle Impact*, RIP TEN (May 28, 2010, 6:36 PM), http://www.ripten.com/2010/05/28/sports-antitrust-law-professor-explains-american-needle-verdict-impact-on-eas-exclusive-nfl-licensing-agreement/ (stating that in hypothetical antitrust suit between NFL and video game manufacturers, expert economic testimony rather than consumer impressions will determine court's decision).

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