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Sunday Ticket: The Ninth Circuit's Expansion of the Quick Look Test Could Incidentally Help Fans Watch More Football for Less Money

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SUNDAY TICKET: THE NINTH CIRCUIT'S EXPANSION OF
THE QUICK LOOK TEST COULD INCIDENTALLY
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FOR LESS MONEY

I. INTRODUCTION

Before the expansion of the National Football League's ("NFL") regular season, roughly twenty million people tuned in to watch a NFL game on any given Sunday.¹ The addition of an eighteenth week to the 2021 regular season will only increase revenue generated from viewership.² With thirty-three of these games being within the top fifty highest rated telecasts of 2020, these Sunday traditions generate incredible revenue for the NFL and its teams.³ These millions of fans are either watching the games through their local television network or a subscription to the NFL and DirectTV's Sunday Ticket Package ("Sunday Ticket").⁴ Sunday Ticket is a satellite broadcasting deal between the NFL and DirectTV, where DirectTV has the exclusive right to broadcast the individual telecasts of all NFL games being played on Sunday ("NFL-DirectTV Agreement").⁵ Fox, CBS, and NBC produce the

1. See Brad Adgate, *In 2020 the Audience of NFL Regular Season Games Dropped*, FORBES (Jan. 8, 2021), <https://www.forbes.com/sites/bradadgate/2021/01/08/in-2020-the-audience-of-nfl-regular-season-games-dropped/?sh=1d90d5ac7482> [https://web.archive.org/web/20211221184852/https://www.forbes.com/sites/bradadgate/2021/01/08/in-2020-the-audience-of-nfl-regular-season-games-dropped/?sh=1d90d5ac7482] (noting early afternoon games averaged 18.1 million viewers while later afternoon games averaged 23.2 million viewers).

2. See Jacob Camenker, *NFL Expanded Schedule, Explained: How a 17-game Season Will Work with Byes, Playoffs & More*, SPORTINGNEWS (Sept. 7, 2021), <https://www.sportingnews.com/us/nfl/news/nfl-schedule-explained-17-game-season/Iru5blwza8uak1n8voezy9gl7> [https://perma.cc/LM5X-PZC3] (discussing why NFL expanded its regular season, plus impact it will have on teams, viewers).

3. See Adgate, *supra* note 1 (noting NFL can expand on dominating fifty highest rated telecasts because NFL announced 2021 regular season will be eighteen weeks).

4. See Matt Johnson, *Report: NFL to Begin Negotiating New Media Deals, Could Be Finalized by End of Year*, SPORTSNAUT (Mar. 24, 2020), <https://sportsnaut.com/2020/03/report-nfl-to-begin-negotiating-new-media-deals-could-be-finalized-by-end-of-year/#:~:text=doesn't%20expire%20until%20the,deals%20before%20the%20year%20ends> [https://perma.cc/MD4X-64RX] (discussing there could be more options to watch Sunday afternoon games after current round of media contracts).

5. See Babette Boliek, *Antitrust, Regulation, and the "New" Rules of Sports Telecasts*, 65 HASTINGS L.J. 501, 537-38 (2014) (advocating DirectTV's exclusive deal with NFL makes it better option than cable television).

individual NFL game telecasts for cable broadcasting pursuant to an exclusive network agreement (“NFL-Network Agreement”).⁶ The NFL may enter into agreements on behalf of the NFL teams because the thirty-two independent teams agreed to pool their licensing rights, and gave the NFL the authority to exercise those rights (“NFL-Teams Agreement”).⁷

The NFL-Network Agreement and NFL-Teams Agreement work together to limit viewers’ access to two or three local telecasts of games every Sunday.⁸ For example, a San Francisco 49ers fan who lives in Philadelphia, Pennsylvania, would be unable to watch the 49ers play on free cable television unless the game was played within the fan’s geographic location, or if it was the nationally televised Sunday Night Football game.⁹ Free games provided over cable television are limited to local games in a given geographic area.¹⁰ If fans want to watch an out-of-market game, they have to purchase Sunday Ticket for about \$359 per year to view those games via satellite broadcasts.¹¹ Commercial subscribers pay between \$1458 and over \$120,000 for a full season of Sunday Ticket.¹²

The \$1.5 billion contract for Sunday Ticket is set to expire in 2022.¹³ With new deals on the line, the NFL has the potential to double its annual revenue from media rights from about \$7.5 billion to \$15 billion.¹⁴ The new TV rights agreements are set to last

6. See Johnson, *supra* note 4 (observing exclusive deal with Fox, CBS, NBC is set to expire after 2022 NFL football season).

7. See Nat’l Football League’s Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136, 1148 (9th Cir. 2019) [hereinafter *Sunday Ticket II*] (explaining by giving NFL authority to exercise pooled licensing rights, individual teams cannot enter contracts “with networks, satellite TV providers, or internet streaming services”).

8. See *id.* (discussing how fans are prevented from watching seven to ten additional games on Sunday without Sunday Ticket).

9. See *id.* (noting how fan in Los Angeles would be able to watch three games on Sundays at most).

10. See *id.* (detailing how fans cannot subscribe to individual team’s telecast, fans must purchase entire package).

11. See *In re NFL Sunday Ticket Antitrust Litig.*, No. ML-15-02668-BRO (JEMx), 2017 U.S. Dist. LEXIS 121354, at *9 (C.D. Cal. 2017) [hereinafter *Sunday Ticket I*] (stating amount of \$359 was price for 2015), *rev’d*, 933 F.3d 1136 (9th Cir. 2019).

12. See *id.* (noting prices increased about 11.5% from 2014 season for individuals, commercial subscribers).

13. See John Ourand, *NFL Presses Toward Massive New Media Deals, with Formal Negotiations Near*, SPORTS BUS. DAILY (Mar. 23, 2020), <https://www.sportsbusinessdaily.com/Journal/Issues/2020/03/23/Sports-and-Society/NFL-mediaCV.aspx> [https://perma.cc/ZGM4-LPR5] (stating even amongst uncertainty with coronavirus, NFL plans to finalize new deals with TV networks by end of 2020).

14. See Alex Sherman, *Here’s How NFL TV Rights Are Expected to Shake Out for the Rest of the Decade, According to Sources*, CNBC (Feb. 23, 2020), <https://>

ten years, securing the NFL a steady stream of revenue.¹⁵ While the NFL has not found a host for Sunday Ticket, the NFL signed yearly deals of \$1 billion with Amazon, \$2.1 billion with CBS, \$2.7 billion with ESPN, \$2.2 billion with Fox and \$2 billion with NBC.¹⁶ Through all of its new long term media deals, the NFL is estimated to receive \$105 billion in revenue over the next 10 years.¹⁷

DirectTV has been clear it does not intend to renew the contract for exclusive rights to Sunday Ticket.¹⁸ While DirectTV identified underperformance of the exclusive package as justification for not wanting to renew Sunday Ticket, one can only wonder if a recent class action suit has deterred, or at least helped discourage, DirectTV from renewing its deal with the NFL.¹⁹ In *National Football League's Sunday Ticket Antitrust Litigation v. DirecTV, LLC*,²⁰ the Ninth Circuit Court of Appeals overturned dismissal of the lawsuit where bars, restaurants, and other retail establishments claimed the NFL, the NFL teams, and DirectTV violated antitrust laws through their exclusive Sunday Ticket agreement.²¹ Shortly after the Ninth Circuit remanded the case back to the district court, the NFL and

www.cnbc.com/2020/02/22/nfl-tv-rights-up-for-renewal-in-2022-and-big-media-will-pay-more.html [<https://perma.cc/27MF-DFZ4>] (describing how tech giants like Amazon or Apple will be competing against traditional media companies, giving NFL leverage in negotiations over prices for broadcast rights).

15. See Andrew Marchand, *NFL's Monster TV Deals with Networks, Amazon Will Surpass \$100B*, N.Y. POST (Dec. 16, 2020), <https://nypost.com/2020/12/16/nfls-monster-tv-deals-with-networks-amazon-will-surpass-100b/> [<https://perma.cc/4F7B-FAYC>] (reporting NFL currently generates \$10 billion per year in broadcast revenue).

16. See Jimmy Traina, *NFL Inks Massive TV Deals, Promptly Undergoes Rounds of Layoffs: TRAINA THOUGHTS*, SPORTS ILLUSTRATED (Jul. 15, 2021), <https://www.si.com/extra-mustard/2021/07/15/nfl-media-undergoes-massive-layoffs> [<https://perma.cc/PF52-MDG8>] (observing NFL closed on these media contracts in late March 2021).

17. See Christopher Palmeri, *NFL Signs \$105 Billion TV Deal, With Amazon Taking Thursdays*, BLOOMBERG (Mar. 18, 2021), <https://www.bloomberg.com/news/articles/2021-03-18/nfl-signs-historic-tv-deal-with-amazon-taking-thursday-rights#:~:text=NFL%20Signs%20%24105%20Billion%20TV%20Deal%2C%20With%20Amazon%20Taking%20Thursdays%20%2D%20Bloomberg> [<https://perma.cc/9YA9-ZSB8>] (describing new deals NFL entered into, allowing NFL to essentially double its revenue).

18. See Tom Bassam, *Report: NFL Sunday Ticket Likely to be Primarily a Streaming Offer in Next Cycle*, SPORTS PRO MEDIA (Nov. 25, 2020), <https://www.sportspromedia.com/news/nfl-sunday-ticket-tv-rights-streaming-directv-amazon-espn-peacock-dazn> [<https://perma.cc/Y8G2-2L3W>] (suggesting NFL has not engaged in official negotiations with anyone else for Sunday Ticket).

19. See *id.* (stating NFL viewership is up 17% from last year).

20. *Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC*, 933 F.3d 1136 (9th Cir. 2019).

21. For further discussion of the Ninth Circuit's decision, see *infra* notes 165-200 and accompanying text.

DirectTV put a pause on litigation and petitioned the Supreme Court to take the issue.²²

As the NFL pushed forward with new media deals, the Supreme Court decided to not entertain the NFL's petition regarding the ongoing class action suit against the NFL and DirectTV for conspiring to restrain trade under Section 1 of the Sherman Act.²³ Justice Kavanaugh issued a detached opinion explaining the Court's denial of certiorari should not be viewed as an endorsement of the Ninth Circuit's rationale.²⁴ Rather, Justice Kavanaugh explained the Supreme Court denied taking the case because the case is at the motion to dismiss stage, before discovery and further factual development needs to occur.²⁵ Accordingly, the case is now back to the District Court for the Central District of California, where the parties have agreed to a trial date of February 20, 2024.²⁶ Notably, DirectTV will not be a party to the trial because its agreements with Sunday Ticket customers included an operative arbitration clause that was upheld by the district court.²⁷

In *Sunday Ticket II*, while the Ninth Circuit did not find that the NFL's exclusive agreement with DirecTV violated antitrust law, the court held that Plaintiffs' claims had survived the motion to dismiss stage and could proceed through further litigation.²⁸ The court held that Plaintiffs sufficiently alleged market control and harm to competition primarily because of the naked restriction on the out-

22. For further discussion of *Sunday Ticket II*'s procedural background, see *infra* notes 37–61 and accompanying text.

23. See Philip Babler & James McKeown, *Supreme Court Takes a Pass on Early Review of Antitrust Challenge to NFL Sunday Ticket*, JD SUPRA (Nov. 19, 2020), <https://www.jdsupra.com/legalnews/supreme-court-takes-a-pass-on-early-60222/> [<https://perma.cc/3AEN-P7CY>] (discussing why Supreme Court's rejection does not mark victory for consumers).

24. See *Nat'l Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (Kavanaugh, J., statement respecting denial of certiorari) ("I write separately simply to explain that the denial of certiorari should not necessarily be viewed as agreement with the legal analysis of the Court of Appeals.").

25. See *id.* at 56 ("Ordinarily, a decision of such legal and economic significance might warrant this Court's review.").

26. See Eriq Gardner, *NFL's TV Future May Be Decided by 2024 Jury Trial*, HOLLYWOOD REP. (Feb. 3, 2021), <https://www.hollywoodreporter.com/thr-esq/nfls-tv-future-may-be-decided-by-2024-jury-trial> [<https://perma.cc/4YV6-9XPC>] (reasoning settlement could happen before trial because parties will have plenty of time for discovery).

27. See Eriq Gardner, *DirectTV Forces "Sunday Ticket" Dispute Into Arbitration*, HOLLYWOOD REP. (Apr. 20, 2021), <https://www.hollywoodreporter.com/business/business-news/directv-forces-sunday-ticket-dispute-into-arbitration-4169904/> [<https://perma.cc/9HNX-QLA4>] (noting any legal actions against DirectTV will be separately arbitrated before trial against NFL).

28. See Babler & McKeown, *supra* note 23 (suggesting NFL could prevail at summary judgment or trial after discovery).

put of football game telecasts.²⁹ While consumers hope the decision will lead to cheaper access to out-of-market games, the Chamber of Commerce for the United States, expert antitrust economists, and antitrust lawyers disagree with the Ninth Circuit's application of the quick look test to an integrated joint venture whose core activity was the marketing of licensed media.³⁰

This Casenote asserts the Ninth Circuit erroneously lowered the applicable standard of review for antitrust claim—making the Ninth Circuit the most sympathetic jurisdiction to hear antitrust claims—because the court extended the quick look test to include integrated joint ventures.³¹ Section II provides the factual and procedural framework surrounding the Ninth Circuit's decision.³² Section III provides legal background with a discussion of the history of antitrust law and the NFL, the Sherman Act, and the different standards of review.³³ Section IV analyzes the Ninth Circuit's decision and assesses its reasoning for the quick look test's expanded applications.³⁴ Section V discusses the quick look test's inapplicability to joint ventures.³⁵ Lastly, Section VI discusses the potential impacts the Ninth Circuit's decision will have on the NFL's ongoing negotiations for Sunday Ticket and future litigants bringing antitrust claims.³⁶

II. FACTS

In *Sunday Ticket I*, the District Court for the Central District of California determined whether Plaintiffs' Section 1 claims under

29. See *Sunday Ticket II*, 933 F.3d 1136, 1152 (9th Cir. 2019) (acknowledging restrictions alleged in complaint are similar to restrictions Supreme Court has found to be injury to competition).

30. See Mike Leonard, *NFL Gets Allies in Bid to Have SCOTUS Stop Sunday Ticket Suit*, BLOOMBERG L. (Apr. 9, 2020), https://www.bloomberglaw.com/document/X2104Q9S000000?bna_news_filter=mergers-and-antitrust&jcsearch=BNA%2520000001716025d954aff5ebb5a1880001#jcite [<https://perma.cc/6KTN-TBDF>] (reporting United States Chamber of Commerce, expert antitrust economists, antitrust lawyers all filed amicus briefs in support of NFL).

31. For further discussion of how the Ninth Circuit expanded the quick look test, see *infra* notes 201-215 and accompanying text.

32. For further discussion of the factual and procedural background, see *infra* notes 36-61 and accompanying text.

33. For further discussion of the legal background, see *infra* notes 62-164 and accompanying text.

34. For further discussion of a narrative analysis of the decision, see *infra* notes 165-200 and accompanying text.

35. For further discussion of a critical analysis of the decision, see *infra* notes 201-223 and accompanying text.

36. For further discussion of the impact of the decision, see *infra* notes 224-243 and accompanying text.

the Sherman Act were sufficient to survive Defendants' motion to dismiss.³⁷ Furthermore, the district court considered and denied Plaintiff's motion for leave to amend their complaint.³⁸ Plaintiffs alleged Defendants violated Section 1 by agreeing to restrict competition in the licensing and distribution of live broadcasts of NFL games to increase consumer prices.³⁹ Additionally, Plaintiffs alleged Defendants violated Section 2 of the Sherman Act "by monopolizing the live video presentation of regular season NFL games and making DirecTV the only source for the majority of NFL games."⁴⁰

With the NFL-DirecTV Agreement in dispute, the district court underwent a factual inquiry to determine the nature of how the agreement operates.⁴¹ The court found that under the NFL Teams Agreement, the thirty-two NFL teams agreed to pool licensing rights and grant the NFL the right to negotiate broadcasting and network deals.⁴² Furthermore, the court held that the NFL can enter into network contracts on behalf of the NFL teams only if the teams ratify the contracts by vote.⁴³

Under the NFL-Network Agreement, the NFL, the teams, CBS, and Fox team together to produce one telecast for every Sunday

37. *See Sunday Ticket I*, No. ML-15-02668-BRO (JEMx), 2017 U.S. Dist. LEXIS 121354, at *18 (C.D. Cal. 2017) (noting in deciding motion to dismiss, court should discount conclusory statements; where court grants motion to dismiss, court should allow leave to amend unless complaint cannot clearly be saved by amendment). *See id.* at *1 (reporting Plaintiffs in this action are Ninth Inning Inc., Third Avenue Restaurant Corp., Robert Gary Lippincott, Jr., Michael Holinko (collectively "Plaintiffs"). The Defendants in this action are the thirty-two individual NFL teams, the NFL, various DirecTV entities, CBS Corporation ("CBS"), Fox Broadcasting Company ("Fox"), NBCUniversal Media, LLC ("NBC"), and ESPN, Inc. ("ESPN") (collectively "Defendants"). *See id.* at *1 (detailing parties to class action lawsuit).

38. *See id.* at *65 (discussing "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint" as factors courts consider in deciding whether to grant leave to amend).

39. *See id.* at *11–12 (noting NFL, NFL teams do not have similar restrictive licensing agreements for satellite or cable providers in Canada).

40. *Id.* at *12 (detailing Plaintiffs' allegations surrounding Defendants' monopolization of live broadcasts).

41. For further discussion of how the NFL agreements work together, see *infra* notes 42–48 and accompanying text.

42. *See Sunday Ticket I*, 2017 U.S. Dist. LEXIS 121354, at *6 (acknowledging NFL exercised those rights by entering into contracts with five networks).

43. *See id.* at *8 (observing individual NFL teams are not passive actors in networks negotiations).

football game.⁴⁴ Additionally, the NFL-Network Agreement stipulates the NFL owns the copyright of the telecasts.⁴⁵ The NFL works with the networks to determine where games are broadcasted, usually limiting the telecasts of games to one game “at a time in any given location or market.”⁴⁶ Since 1994, the NFL and DirectTV have had an exclusive agreement, where DirectTV provides subscribers of Sunday Ticket access to telecasts of Sunday football games, both in-market and out-of-market.⁴⁷ The NFL-DirectTV Agreement grants DirectTV access to all of Fox’s and CBS’s football game telecasts and allows it to redistribute the live telecasts via satellite broadcasting to Sunday Ticket subscribers.⁴⁸

Ultimately, the district court granted Defendants’ motion to dismiss on both Sherman Act claims.⁴⁹ For the Section 1 claim, the court held that Plaintiffs failed to plead facts showing anticompetitive harm, did not have antitrust standing to challenge the horizontal agreement, and did not plead a viable market in which Defendants have power to restrain.⁵⁰ For the Section 2 claim, the

44. See *Sunday Ticket II*, 933 F.3d 1136, 1148 (9th Cir. 2019) (detailing CBS, Fox are permitted to broadcast some games “through free, over-the-air television”).

45. See *id.* (indicating sole ownership allows NFL to sell bundled telecast feeds).

46. See *Sunday Ticket I*, 2017 U.S. Dist. LEXIS 121354, at *7 (summarizing there are designated time slots for games on Sundays, so networks alternate every week to have to right to air game for given time slot).

47. See *id.* at *8 (acknowledging DirectTV receives feeds directly from CBS or Fox).

48. See *id.* at *7–8 (explaining without subscribing to Sunday Ticket, viewers have access to at most six games “in any given week in any one market”).

49. For further discussion of the district court decision, see *infra* notes 50–52 and accompanying text.

50. See *Sunday Ticket I*, 2017 U.S. Dist. LEXIS 121354, at *39–40, 54–55, 60 (reasoning Plaintiffs failed to show how inflated prices from exclusive distribution deal harms competition, Plaintiffs did not have standing because they did not purchase directly from NFL, Plaintiffs did not sufficiently allege existence of market that Defendants have control to restrict competition). The district court engaged in a different analysis than the Ninth Circuit Court of Appeals. Compare *id.* at *20–25 (utilizing rule of reason test to analyze separate components of agreement), with *Sunday Ticket II*, 933 F.3d at 1152 (rejecting Defendants’ argument court must analyze both (horizontal, vertical) components of agreement). The district court analyzed the horizontal and vertical agreements separately, as opposed to the Ninth Circuit’s holistic approach. Compare *Sunday Ticket I*, 2017 U.S. Dist. LEXIS 121354, at *25 (analyzing vertical component before separately analyzing horizontal component), with *Sunday Ticket II*, 933 F.3d at 1152 (“Contrary to the defendants’ argument, we are required to take a holistic look at how the interlocking agreements actually impact competition.”). In analyzing the potential for anti-competitive harm stemming from the vertical agreement, the court held that the agreement did not appear to reduce output. See *Sunday Ticket I*, 2017 U.S. Dist. LEXIS 121354, at *32–37 (distinguishing *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma* by stating “there is not a similar blanket

lower court held that Plaintiffs both failed to allege and establish a cognizable antitrust injury and failed to sufficiently support their claims by facts bearing on Defendants' intent.⁵¹ Additionally, the district court denied Plaintiff's motion for leave to amend.⁵²

Accordingly, Plaintiffs appealed, and the Ninth Circuit examined the lower court's dismissal of Plaintiffs' the Section 1 and Section 2 claims under the Sherman Act.⁵³ The Ninth Circuit reversed the district court's dismissals and concluded Plaintiffs' cause of action survived Defendants' motion to dismiss.⁵⁴ Following the Ninth Circuit's decision, Defendants filed a Motion to Stay Issuance of the Mandate Pending a Petition for Writ of Certiorari.⁵⁵ The court granted Defendant's motion and Defendants filed their

rule or policy that altogether prevents the television broadcast of certain games"). In analyzing the horizontal agreement, the court dismissed any potential for anti-competitive harm because the horizontal agreement required cooperation to sell collectively owned intellectual property. *See id.* at *41, 48 (finding "NFL's conduct in collectively working with its constituent teams to enter into exclusive broadcast agreements of game footage collectively owned by the NFL and its teams . . . is not an unreasonable restraint on trade"). While the district court found the plaintiffs have standing to challenge the vertical agreement because they purchased directly from DirectTV, the court notes how the plaintiffs do not have standing to challenge the horizontal agreement because they are an indirect purchaser. *See id.* at *49–55 (holding Plaintiffs lacked standing since they are not direct purchasers of Sunday Ticket); *see also* Kingray, Inc. v. Nat'l Basketball Ass'n, Inc., 188 F. Supp. 2d 1177, 1199 (S.D. Cal. 2002) ("The [Supreme] Court held than an indirect or remote purchaser lacks standing to seek damages against the manufacturer for alleged violations of federal antitrust laws."). Last, the district court explained that since the NFL offers free broadcasts of local games, they lack the control to artificially raise prices. *See Sunday Ticket I*, 2017 U.S. Dist. LEXIS 121354, at *59 ("Accordingly, . . . Plaintiffs have not adequately alleged the existence of a market in which Defendants have the power to control pricing or in which selling the rights on the open market would prevent artificially inflated pricing.").

51. *See Sunday Ticket I*, 2017 U.S. Dist. LEXIS 121354, at *62–65 (stating Plaintiffs conceded Section 1 claim is dependent upon Section 2 claim's success). The district court stated that Plaintiffs cannot allege injury to competition because the horizontal agreement requires cooperation. *See id.* at *63 (holding Plaintiffs "failed to adequately plead antitrust injury"). Furthermore, the district court reasoned the plaintiffs failed to establish intent because they did not allege any facts indicating "predatory conduct." *See id.* at *64 (stating having "practical monopoly" is insufficient for alleging conspiracy to monopolize); *see also* Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 541 (7th Cir. 1986) ("[T]he mere intention to exclude competition and to expand one's business is not sufficient to show a specific intent to monopolize.").

52. *See Sunday Ticket I*, 2017 U.S. Dist. LEXIS 121354, at *65–67 (determining Plaintiff's pleadings are legally insufficient, so any attempt to amend them would contradict current allegations).

53. For further discussion of the Ninth Circuit's review of the lower court's judgment, *see infra* notes 165–201 and accompanying text.

54. *See Sunday Ticket II*, 933 F.3d at 1144 (concluding Plaintiffs have stated cause of action under Sherman Act).

55. *See Sunday Ticket II*, 933 F.3d 1136 (9th Cir. 2019), *stay granted*, In re NFL Antitrust Litig., 2019 U.S. App. LEXIS 30822, at *3 (9th Cir. Oct. 16, 2019) (No.

Petition for Writ of Certiorari in the Supreme Court.⁵⁶ The Chamber of Commerce, Antitrust Law and Business School Professors, Economists, and Expert Antitrust Economist filed brief amici curiae in support of petitioners NFL and DirectTV.⁵⁷

The Supreme Court denied certiorari, but not because the Supreme Court agreed with the Ninth Circuit's legal analysis.⁵⁸ In his detached opinion, Justice Kavanaugh explained the Supreme Court denied certiorari because it was "at the motion-to-dismiss stage, and the interlocutory posture is a factor counseling against this Court's review at this time."⁵⁹ The Supreme Court is reluctant to take on a case where the factual record has not been established through discovery.⁶⁰ Consequently, the case is now back in the Central District of California where the parties have agreed to a trial date of February 20, 2024, subject to the district court's approval.⁶¹

III. BACKGROUND

In order to fully understand the potential implications of this case, it is necessary to understand the relevant historical and legal backdrop.⁶² While the NFL fought legal battles and engaged in extensive lobbying efforts to enjoy exemptions from the Sherman Antitrust Act, Sunday Ticket is still generally subject to antitrust law.⁶³ Accordingly, it is also necessary to analyze and assess each of the

17-56119) ("[T]he case is stayed until January 8, 2020, to permit appellees to file a petition for writ of certiorari in the Supreme Court.").

56. See Leonard, *supra* note 30 (acknowledging NFL's petition to Supreme Court has gained popularity amongst economists).

57. See *id.* (observing brief amici curiae all agree Ninth Circuit should have used full rule of reason test rather than quick look test).

58. See Babler & McKeown, *supra* note 23 (noting Supreme Court is less likely to accept cases decided at motion to dismiss stage, before discovery or further factual development).

59. See Nat'l Football League v. Ninth Inning, Inc., 141 S. Ct. 56, 57 (2020) (Kavanaugh, J., statement respecting denial of certiorari) (noting Court may have granted certiorari if factual record had been established since Court must assume plaintiff's factual allegations are true).

60. See Abbott v. Veasey, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., statement respecting denial of certiorari) (emphasizing importance of establishing factual records before granting certiorari).

61. See Gardner, *supra* note 26 (stating while trial is approximately three years away, it may affect league's negotiations with TV networks, streamers).

62. For further discussion of the relationship between the NFL and the Sherman Antitrust Act, see *infra* notes 63-165 and accompanying text.

63. For further discussion of the NFL's interaction with antitrust law, see *infra* notes 65-88 and accompanying text.

tests under applicable antitrust law to understand the import of the Ninth Circuit's decision.⁶⁴

A. NFL's Turbulent History with Antitrust Laws

For most of its existence, the NFL and its teams have enjoyed a federal exemption from antitrust laws through the Sports Broadcasting Act of 1961 ("SBA").⁶⁵ Prior to the SBA's enactment, the federal government sought an injunction against the NFL and its teams.⁶⁶ The predicate for this action was an agreement between the NFL and its constituent teams to cooperate in producing telecasts of games as well as share the broadcast revenues.⁶⁷

In *United States v. National Football League*, the government argued the agreement violated Section 1 of the Sherman Act.⁶⁸ Section 1 states "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."⁶⁹ Judge Grim of the District Court for the Eastern District of Pennsylvania found the media agreement limited out-of-market games and the NFL's ability to veto contracts had the illegal effect of territorial restraints amounting to a Section 1 violation.⁷⁰ While

64. For further discussion of applicable antitrust law tests under the Sherman Act, see *infra* notes 89–164 and accompanying text.

65. See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 n.28 (1984) [hereinafter *NCAA*] ("[E]xemption demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act.").

66. See *United States v. Nat'l Football League*, 116 F. Supp. 319, 321 (E.D. Pa. 1953) [hereinafter *NFL I*] (explaining government's institution of suit against NFL for alleged violations of Sherman Antitrust Act), *superseded by statute*, Sports Broadcasting Act of 1961, Pub. L. No. 87-331, § 1, 75 Stat. 732, *as recognized in Shaw v. Dall. Cowboys Football Club, Ltd.*, 172 F.3d 299, 301 (3d Cir. 1999).

67. See *NFL I*, 116 F. Supp. at 330 (arguing Article X of by-laws violated Sherman Act because it restricts game output).

68. See *id.* at 321–22 (advocating Article X violates Sherman Act because "(1) It prevents the telecasting of outside games into the home territories of other teams on days when the other teams are playing at home. (2) It prevents the telecasting of outside games into the home territories of other teams on days when the other teams are playing away from home and permitting the telecast of their games into their home territories. (3) It prevents the broadcasting by radio of outside games into the home territories of other teams [sic] both on days when the other teams are playing at home and on days when the other teams are playing away from home and are permitting the games to be broadcast or televised into their home territories. (4) It gives the Football Commissioner an unlimited power to prevent any and all clubs from televising or broadcasting any or all of its or their games. Since the facts in reference to each of these provisions present somewhat different anti-trust law problems, they will be considered separately.>").

69. See Sherman Act, 15 U.S.C.S. § 1 (LexisNexis 2021).

70. See *NFL I*, 116 F. Supp. at 326–27 (finding prohibition on selling broadcast rights into another team's home market when other team was playing at home was

the decision did not mark the end for the NFL's push for antitrust exemptions, it was certainly a significant blow.⁷¹ Concern grew amongst NFL officials that by allowing unrestricted business competition among the teams for telecast rights, the financial inequalities between the losing and winning teams would greatly increase and therefore weaker teams would struggle to stay in business.⁷² This concern could potentially culminate in the NFL's collapse.⁷³ Such a scenario was possible because the losing teams would keep losing without the ability to pay for talented players.⁷⁴

Rather than appealing Judge Grim's decision, the NFL took a political route, lobbying Congress to carve out an exception for the NFL within the Sherman Act.⁷⁵ At the time, NFL Commissioner Pete Rozelle was disgruntled by the American Football League and its ability to package and sell its eight teams' telecast rights to ABC in 1960.⁷⁶ Commissioner Rozelle lobbied to New York Congressman Emanuel Celler to propose a bill allowing the NFL to market its broadcast rights as a league package, evenly spreading the broadcasting revenues among the teams.⁷⁷ Congressman Celler, Chair-

reasonable restraint on broadcast rights). However, the court did not agree with the NFL's justifications to restrict the sale of rights into another market when there was not another team physically playing within that market. *See id.* at 326 (“[T]he testimony of defendants’ witnesses consistently indicates that the primary reason for the restrictions in this situation actually is to enable the clubs in the home territories to sell monopoly rights to purchasers of television rights to away games.”).

71. *See Sunday Ticket II*, 933 F.3d 1136, 1154 (9th Cir. 2019) (observing NFL had to abandon its exclusive joint agreement with CBS to allow teams to engage in individual contracts).

72. *See NFL I*, 116 F. Supp. at 323–24 (summarizing when it comes to earning profit from business transactions, teams in professional sports league must not “compete too well with each other”).

73. *See id.* (suggesting losing teams would never be able to compete, so eventually league would shrink to only winning teams).

74. *See id.* (“If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure There are always teams in the League which are close to financial failure. Under these circumstances it is both wise and essential that rules be passed to help the weaker clubs in their competition with the stronger ones and to keep the League in fairly even balance.”).

75. *See* Evan Weiner, *Sports Should Celebrate Emanuel Celler Day*, SPORTS TALK FLA. (Sept. 29, 2020), <https://sportstalkflorida.com/mlb/sports-should-celebrate-emanuel-cellar-day/> [https://perma.cc/9Z2Q-58VJ] (acknowledging Rozelle lobbied team owners to convince them they can make more money through joint agreement).

76. *See id.* (stating Rozelle also wanted to make NFL like MLB, which did not have to abide by antitrust laws—instead could package its eighteen teams' telecast rights to sell them to cable network).

77. *See* Evan Weiner, *NFL 100: Kennedy and Celler Helped Create the Modern NFL*, SPORTS TALK FLA. (July 17, 2019), <http://sportstalkflorida.com/nfl/https-wp-me>

man of the House Judiciary Committee's Subcommittee on Anti-Trust and Monopoly, played an essential role in getting the bill through the House.⁷⁸ On September 30, 1961, President Kennedy signed the Sports Broadcasting Act of 1961 into law.⁷⁹

Under the SBA, antitrust law “shall not apply to any joint agreement [involving] organized professional team sports of football, baseball, basketball or hockey . . . in the sponsored telecasting of the games of football, baseball, basketball or hockey.”⁸⁰ The SBA effectively overruled Judge Grim's decision and exempted the NFL and the teams' agreement from the Sherman Act, allowing them to pool their telecast rights into a single package and share broadcast revenues.⁸¹ While the SBA exempted the NFL from restrictions against joint agreements for sponsored telecasting, it did not affect other antitrust laws' applicability to other activities like satellite broadcasting.⁸² More recently—with the advancement of technology and different ways for fans to watch their favorite teams play—the SBA's exemption demonstrated controversy surrounding the purpose and effect of the act.⁸³ The availability of the games and the price the league charged cable companies garnered attention among fans and politicians.⁸⁴

In 2006, Senator Arlen Specter spearheaded Senate Judiciary Committee hearings to determine if the NFL Network and Sunday Ticket violated antitrust laws.⁸⁵ Without making any conclusions or

p81oan-1n3o/ [https://perma.cc/HXN5-87W7] (discussing \$9.1 million deal with CBS motivated Rozelle to lobby Congressman Cellar to get bill through House).

78. *See id.* (reporting Senator Estes Kefauver introduced similar bill, helped get it passed through Senate).

79. *See id.* (describing SBA's significant impact on granting each team substantial revenues).

80. *See* Sports Broadcasting Act, 15 U.S.C.S. § 1291 (LexisNexis 2021).

81. *See* Mid-South Grizzlies v. Nat'l Football League, 720 F.2d 772, 775 (3d Cir. 1983) (finding exemption is only applicable to joint sale of telecast rights).

82. *See* 15 U.S.C.S. § 1294 (LexisNexis 2021) (stating SBA does not “otherwise affect the applicability or non-applicability of the antitrust laws” outside scope of telecast rights).

83. *See* Len Pasquarelli, *Sen. Specter Taking Aim at NFL Antitrust Exemption*, ESPN (Dec. 7, 2006), <https://www.espn.com/nfl/news/story?id=2690171> [https://perma.cc/BV4M-T5NM] (advocating exemption should not give NFL ability to enter into exclusive deals that could harm consumers).

84. *See* Steven Malanga, *Bench the NFL: The League Enjoys an Antitrust Exemption from Washington That Should Have Been Revoked Years Ago*, CITY J. (Sept. 28, 2017), <https://www.city-journal.org/html/bench-nfl-15465.html> [https://perma.cc/2BJV-PAR9] (arguing as NFL became more prosperous, it used its exemption privileges to enter into exclusive contracts less favorable for consumers).

85. *See* *Competition in Sports Programming and Distribution: Are Consumers Winning: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 109-762 (2006) (statement of Hon. Arlen Specter, Chairman, S. Comm. on Judiciary) (acknowledging

taking formal actions, Chairman Specter stated the NFL Network and Sunday Ticket “implicates” antitrust laws and that there should be more hearings to determine if there are any violations.⁸⁶ However, there were no further hearings for Sunday Ticket.⁸⁷ Even though bipartisan calls to revoke or modify the SBA never gained significant traction, the NFL’s satellite broadcasting deal with DirectTV to produce Sunday Ticket is not exempt under the Sherman Antitrust Act and is therefore subject to its provisions.⁸⁸

B. The Sherman Antitrust Act and Antitrust Standards of Review

Section 1 of the Sherman Antitrust Act of 1890 prohibits “every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States.”⁸⁹ Since a literal reading of the act effectively makes every agreement between producers or buyers illegal, because all agreements restrain trade in some way, the Supreme Court clarified that the Sherman Act’s prohibitions apply only to those contracts or combinations which “unreasonably” restrain competition.⁹⁰ Congress designed the Act “to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”⁹¹ The policy behind the Act was that competition within an activity’s economic market should be unrestrained.⁹² Thus, Section 1 of the Sherman

real purpose of hearings was to analyze NFL Network but added in review of Sunday Ticket because Comcast claimed it was excluded from bidding for Sunday Ticket).

86. *See* S. REP. NO. 109-369 at 63 (2006) (noting both NFL Network, Sunday Ticket appear to give NFL excessive market control).

87. *See id.* at 62 (observing some cable providers did not offer NFL Network in their basic packages, causing some consumers to pay a premium while other cable companies provided it in their basic package).

88. *See* *Shaw v. Dall. Cowboys Football Club, Ltd.*, 172 F.3d 299, 303 (3d Cir. 1999) (“The subscription satellite broadcast of games is not a part of the NFL’s rights to the sponsored telecasting of those games and therefore not within the Sports Broadcasting Act’s exemption to the antitrust laws.”).

89. Sherman Act, 15 U.S.C. § 1 (2020).

90. *See* *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (advancing Section 1 “is literally all-encompassing”); *see also* *Standard Oil Co. v. United States*, 221 U.S. 1, 88 (1911) (reviewing Congressional intent; determining Congress intended Sherman Act to prohibit “only such contracts as were in unreasonable restraint of trade”).

91. *See* *N. Pac. Ry. Co.*, 356 U.S. at 4 (suggesting Sherman Act was enacted to promote healthy competition, provide free market for consumer).

92. *See id.* (“[T] unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.”).

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Act purported to maintain healthy competition in a free market to benefit and protect consumers.⁹³

In order to state a Section 1 claim under the Sherman Antitrust Act, plaintiffs must plead four separate elements.⁹⁴ First, the plaintiff must show the existence of some conspiracy among multiple parties.⁹⁵ Second, the plaintiff must show the defendant or defendants entered into an agreement with the specific intent to harm interstate commerce.⁹⁶ Third, the plaintiff must show the agreement between defendants “actually injures competition.”⁹⁷ Lastly, plaintiffs must have antitrust standing by showing the defendants’ anti-competitive behavior caused plaintiffs harm.⁹⁸

While the Sherman Act forbids only unreasonable restraints of trade, the Supreme Court extended the Act’s prohibitions to include presumptively unreasonable restraints if its effect on competition is “pernicious” or otherwise unjustified by “any redeeming virtue.”⁹⁹ Accordingly, the Supreme Court acknowledged two standards of review for Section 1 claims, the “per se rule” and the “rule of reason” test.¹⁰⁰ However, there is a third standard of review that sometimes does not garner distinction for being its own standard because it is an abbreviated form of the rule of reason test called the “quick look” test.¹⁰¹

93. For further discussion of the Sherman Act, see *supra* notes 89–91 and accompanying text.

94. See *generally* *Sunday Ticket II*, 933 F.3d 1136, 1150 (9th Cir. 2019) (stating pleading standard for Section One claim under Sherman Act).

95. See *id.* (finding Section 1 is limited to unreasonable contracts despite its facially broad applicability to all contracts).

96. See *Brantley v. NBC Universal*, 675 F.3d 1192, 1197 (9th Cir. 2012) (requiring plaintiffs to show intent “to harm or restrain trade or commerce among the several States, or with foreign nations”).

97. See *Oltz v. St. Peter’s Cmty. Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988) (acknowledging this element requires defined product plus geographic market).

98. See *Sunday Ticket II*, 933 F.3d at 1150 (requiring plaintiffs to show they “are the proper parties to bring the antitrust action because they were harmed by the defendants’ contract, combination, or conspiracy, and the harm they suffered was caused by the anti-competitive aspect of the defendants’ conduct”).

99. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (“[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”).

100. For further discussion of the per se rule, see *infra* notes 119–127 and accompanying text. For further discussion of the rule of reason test, see *infra* notes 102–118 and accompanying text.

101. For further discussion of the quick look test, see *infra* notes 128–164 and accompanying text.

1. *The Rule of Reason Test*

The Supreme Court gave life to the rule of reason test in *Chicago Board of Trade v. United States*.¹⁰² There, the plaintiff, a commodities trader, claimed that the defendant, the Board of Trade, imposed a business policy that restrained trading certain commodities by requiring buyers to freeze their bids from the close of day until the beginning of the next.¹⁰³ Ruling in favor of the defendant, the Supreme Court held that restraints that simply regulate and promote competition are lawful, while suppression of competition was unlawful.¹⁰⁴ The Court stated that courts must consider the nature of the particular business in question and how a given restraint has affected that business.¹⁰⁵ Ruling in favor of the defendant, the Supreme Court held the policy was a reasonable restraint of business.¹⁰⁶

The post-*Chicago Board of Trade* landscape left lower courts with little guidance in balancing factors to determine if a restraint on trade is unreasonable.¹⁰⁷ While the balancing tests complicate courts' analysis, the basic pleading elements of the rule of reason test are quite simple.¹⁰⁸ In essence, the plaintiff must plead a prima

102. See *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (“The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition.”).

103. See *id.* at 237–38 (summarizing purpose of call rule was “to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago”).

104. See *id.* at 238 (“The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”); see also *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010) (“When ‘restraints on competition are essential if the product is to be available at all,’ *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.”).

105. See *Chi. Bd. of Trade*, 246 U.S. at 238 (“[A] court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.”).

106. See *id.* at 239–41 (discussing how call rule is reasonable because restraints relating to business hours are common—they actually promote competition effects in this case by increasing amount paid to farmers without raising price for consumers).

107. See Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 11–12 (1984) (discussing factors Supreme Court gave lower courts in *Chicago Bd. of Trade* are too rigid, so they cannot adequately consider myriad of competing interests coupled with mass amounts of evidence).

108. See *Sunday Ticket II*, 933 F.3d 1136, 1150 (9th Cir. 2019) (discussing four elements plaintiff must plead in order to state claim under Section 1 of Sherman Act).

facie case, adducing sufficient evidence to satisfy all four elements of a Section 1 claim.¹⁰⁹ The element of anticompetitive harm is the hardest element to plead.¹¹⁰ In order to sufficiently plead anticompetitive harm, plaintiffs must show a relevant market, defendant's control of that market, and that the restraint is likely to have an anticompetitive effect in that market.¹¹¹ Plaintiffs often struggle to prove a relevant market or they define the market too narrowly.¹¹²

Once the plaintiff pleads a prima facie violation of Section 1, the defendant bears the burden of offering procompetitive justifications for the restraint under review, and if the defendant fails to plead any procompetitive justifications, the analysis stops there in favor of plaintiff.¹¹³ Recent studies show that 97% of such Section 1 claims fail because plaintiffs cannot establish the element of harm.¹¹⁴ Furthermore, when plaintiffs sufficiently plead harm and defendants sufficiently offer procompetitive justifications, plaintiffs have only prevailed in about 1% of full-blown rule of reason cases.¹¹⁵

To promote efficiency and avoid complex and costly legal analysis, courts typically eschew complete rule of reason analyses in favor of alternative methods.¹¹⁶ Courts have employed the per se rule and the quick look test in an attempt to deter anticompetitive behavior while simultaneously making it easier for plaintiffs to state

109. For further discussion of the requirements of alleging a prima facie Sherman Antitrust Act violation, see *supra* notes 95–98 and accompanying text.

110. For further discussion of the element of anticompetitive harm, see *infra* notes 112–115 and accompanying text.

111. See *Sunday Ticket II*, 933 F.3d at 1151 (ruling market control is essential for proving defendant's ability to implement restraints that would not be possible in competitive market).

112. See James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After American Needle*, 21 MARQ. SPORTS L. REV. 517, 530 (2011) (describing reasoning commonly used by defendants—when plaintiff narrowly defines market, defendant market power is overstated, therefore insufficient to prove anticompetitive harm).

113. See *Sunday Ticket II*, 933 F.3d at 1150–52 (explaining procedure of pleading Section 1 claim).

114. See Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009) (discussing results of study on all rule of reason cases decided 1999 through mid-2009).

115. See *id.* (acknowledging results from same study; emphasizing how defendants won 221 out of 222 full-blown rule of reason cases).

116. See Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 836 (2016) (considering development of alternative standards of review, how they have potential to give less accurate determinations which increase litigation costs).

a Section 1 claim.¹¹⁷ However, this good-faith effort to engage in alternative cost-saving methods has resulted in additional costs in applying the ambiguous quick look test and overruling previous activities deemed to be per se illegal.¹¹⁸

2. *The Per Se Rule*

The Supreme Court declared some types of agreements per se illegal, meaning the court need not engage in a detailed analysis of market conditions and can condemn the activity in question as automatically illegal under the Sherman Act.¹¹⁹ In other words, the Supreme Court applies the per se rule when “the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.”¹²⁰ Nonetheless, the plaintiff still has to plead the four elements of a Section 1 claim before a court will apply the per se rule.¹²¹ When pleading the anticompetitive effect element, the plaintiff must satisfy their burden by showing evidence of an agreement to restrict output or fix a price.¹²²

After a court finds the arrangement at issue per se illegal, that arrangement is presumptively unreasonable without inquiry into the market in which the arrangement is found.¹²³ However, the Supreme Court carved out an exception by holding the per se rule inapplicable to horizontal restraints on competition where the horizontal restraints are vital to a product’s availability.¹²⁴ Thus, when a Section 1 claim is brought against a joint venture or other pro-com-

117. *See id.* (noting efficiency that is supposed to come from alternative methods of review is diminished by lack of Supreme Court guidance on how to apply quick look, per se rules).

118. For further discussion of the per se rule, see *infra* notes 119–127 and accompanying text. For further discussion of the quick look test, see *infra* notes 128–164 and accompanying text.

119. *See Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (“[A]greements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.”).

120. *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979) (declining to apply per se rule to blanket licensing agreement necessary to avoid engaging in “thousands of individual negotiations”).

121. For further discussion of the four elements of a Section 1 claim, see *supra* notes 94–98 and accompanying text.

122. *See NCAA*, 468 U.S. 85, 104 n.28 (1984) (dismissing plaintiff’s attempt to show anticompetitive harm by alleging agreement to restrict output is illegal per se).

123. *See N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (summarizing how per se rule avoids “complicated and prolonged investigation into entire history of industry involved”).

124. *See NCAA*, 468 U.S. at 101–02 (noting restraints can widen consumer choice by allowing marketing of materials that would be difficult to produce without cooperation).

petitive arrangement where restraints are necessary to the existence of that arrangement, a court should apply the rule of reason test.¹²⁵ Furthermore, the Supreme Court found league sports like the NFL are activities that can only be carried out jointly and, therefore, the per se rule is inapplicable to a sports league policy or restraint.¹²⁶ Accordingly, league sports must be evaluated under the rule of reason test or the quick look test.¹²⁷

3. *The Quick Look Test*

While there is no universally accepted definition of the quick look test, the Supreme Court equated it more closely to a sliding scale where “there is generally no categorical line . . . between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment.”¹²⁸ The quick look test is the Supreme Court’s attempt to strike a balance between conduct that is not per se illegal and conduct that “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”¹²⁹ The Supreme Court appeared to blend the per se rule with the rule of reason test by requiring the defendant to offer pro-competitive justifications if a court finds the defendant’s conduct to have anticompetitive effects.¹³⁰ If the defendant succeeds, the court then determines whether the defendant could achieve its asserted pro-competitive justifications through less restrictive means.¹³¹

The Supreme Court developed the quick look test in *National Collegiate Athletic Association v. Board of Regents*¹³² where the Supreme Court rejected the use of the per se rule.¹³³ In that case, the

125. *See id.* (“[Some] activities can only be carried out jointly.”).

126. *See id.* at 103 (describing why unfairness would exist if courts applied per se rule to sports leagues).

127. *See id.* at 101 (describing sports broadcasting as industry where “horizontal restraints on competition are essential if the product is to be available at all”).

128. *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 780–81 (1999) (noting quick look test can lead to misleading results).

129. *See id.* at 770 (observing quick look test is applicable where there is great likelihood of anticompetitive effects).

130. *See id.* at 769–70 (citing *NCAA*, 468 U.S. at 110) (requiring defendants to offer procompetitive justification when their conduct has great likelihood of anticompetitive effects).

131. *See Meese, supra* note 116, at 838 (discussing procedural burden shifting, subsequent analysis of quick look test).

132. *NCAA*, 468 U.S. 85 (1984).

133. *See NCAA*, 468 U.S. at 101 (holding per se rule is inapplicable where “horizontal restraints on competition are essential if the product is to be available at all”).

NCAA imposed three restrictions on its conferences and its eighty-two teams.¹³⁴ The first restriction was that the conferences and its teams were required to have television exposure.¹³⁵ The second restriction was that the conferences and its teams were limited in the number of times they would appear on television.¹³⁶ The third restriction was that the individual schools had to negotiate their television deals, but the aggregate payment to all schools had to be at least \$131.75 million.¹³⁷

The Supreme Court reasoned the NCAA's justification that the restrictions preserved a competitive balance was meritless because the restrictions are "not related to any neutral standard or to any readily identifiable group of competitors."¹³⁸ Notably in *NCAA*, Plaintiffs failed to allege a properly defined market in which defendants have market power.¹³⁹ By holding the "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis," the Supreme Court set the foundation for a standard of review that attempts to balance the approaches taken under the *per se* rule and the rule of reason test.¹⁴⁰ Additionally, in its effort to strike a balance, the *NCAA* Court discussed joint selling agreements and how they make "a new product by reaping otherwise unattainable efficiencies."¹⁴¹ The *NCAA*, however, was not engaged in a joint selling arrangement

134. *See id.* at 94 (summarizing restrictions NCAA places on member institutions).

135. *See id.* (noting how restriction would last two years).

136. *See id.* (recounting teams were limited to appear on television no more than six times per year).

137. *See id.* at 92–94 (dismissing NCAA statement explaining television policy restrictions as intended to reduce adverse effects of live television upon football game attendance); *see also* Bd. of Regents of Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1293 (W.D. Okla. 1982) ("Thus, NCAA creates a single eligible buyer for the product of all but the two schools selected by the network having first choice. Free market competition is thus destroyed under the new plan.").

138. *See, e.g.*, *Blubaugh v. Am. Cont. Bridge League*, 2004 U.S. Dist. LEXIS 3178, at *48–49 (S.D. Ind. Feb. 18, 2004) ("Facially neutral rules that prohibit cheating are essential to promote fair competition and to preserve the integrity of the game."); *see NCAA*, 468 U.S. at 118 (reasoning there is no evidence to show restrictions produced any greater measure of equality).

139. *See NCAA*, 468 U.S. at 109 ("[T]he absence of proof of market power does not justify a naked restriction on price or output."); *see also* *Nat'l Soc. of Pro. Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (holding plaintiffs do not have to show market power when restraint is illegal *per se*).

140. *See NCAA*, 468 U.S. at 110 (disregarding petitioner's argument stating restrictions cannot have anticompetitive effect because petitioner has no market power).

141. *See id.* at 113 (observing joint selling agreements eliminate individual sales by members of joint selling arrangement).

because it did not act as a selling agent for any of the college teams.¹⁴² The Court noted the hallmarks of a joint selling arrangement consist of a packaged product that no individual could offer.¹⁴³ Accordingly, the Supreme Court reasoned the NCAA's broadcast plan did not qualify as a joint selling arrangement because there is no pooling of rights and only a restriction on minimum price.¹⁴⁴

In *Federal Trade Commission v. Indiana Federation of Dentists*,¹⁴⁵ the Supreme Court underwent a similar analysis by requiring pro-competitive justifications in the absence of the market control requirement.¹⁴⁶ In that case, a dental practice refused to provide patient records to insurance companies who were attempting to approve coverage for its clients.¹⁴⁷ The Court found the dental practice's conduct had an anticompetitive effect because it impaired "the ordinary give and take of the marketplace."¹⁴⁸ The Court held the anticompetitive effect was "legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis."¹⁴⁹

The decisions in *NCAA* and *International Federation of Dentists* culminated in the Supreme Court's acknowledgement of the quick look test in *California Dental Association v. Federal Trade Commission*.¹⁵⁰ There, the California Dental Association ("CDA") banned any advertisement of discounts and any advertisements of quality of ser-

142. *See id.* (acknowledging sale of individual games plus terms of particular agreements are left to individual schools to negotiate subject to some limitations imposed by NCAA); *see also* *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) (noting individual teams remained free to enter into agreements without any restrictions imposed).

143. *See NCAA*, 468 U.S. at 114 (suggesting under NCAA plan, individuals are responsible for selling their own rights to produce televised game).

144. *See id.* at 113 (speculating if NCAA sold blanket license covering all of teams broadcasting rights, outcome on its joint selling arrangement argument might have come out differently).

145. *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986).

146. *See id.* at 460–61 (rejecting defendants' contention that proof of market power was necessary satisfy pleading requirements).

147. *See id.* at 452 (rejecting petitioner's argument they were allowed to withhold records under Indiana law).

148. *See id.* at 459 (finding petitioner's conduct limited consumer choice); *see also* *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (acknowledging ordinary market fluctuation is essential for consumers to compare prices).

149. *See Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. at 461 (emphasizing anticompetitive effect was factual finding, not presumed fact, on motion to dismiss).

150. *See Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 770 (1999) (summarizing "what has come to be called abbreviated or 'quick-look' analysis under the rule of reason" analysis).

vices amongst its 19,000 members.¹⁵¹ Before getting to the Supreme Court, the Ninth Circuit applied the quick look test to both restrictions and concluded they were naked restraints on output.¹⁵² The Supreme Court reversed, finding the CDA's restrictions may have pro-competitive effects by protecting the consumer.¹⁵³ Furthermore, the Court reasoned the Ninth Circuit failed to consider the defendant's procompetitive justifications, thus eliminating the balanced approach the quick look test provides through burden-shifting.¹⁵⁴ The Supreme Court held that where there is plausibility of competing claims about the effects of a restriction, there cannot be an obvious anticompetitive effect and therefore the quick look test does not apply.¹⁵⁵ By officially endorsing the quick look test, the Supreme Court suggested the lower courts engage in "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint" to determine if a restriction requires a more detailed review or an abbreviated one.¹⁵⁶

In *Texaco Inc. v. Dagher*,¹⁵⁷ the Supreme Court reviewed application of the per se rule and the quick look test to a joint venture.¹⁵⁸ In that case, two oil companies engaged in a joint venture to refine and sell gasoline.¹⁵⁹ Plaintiffs charged the oil companies

151. *See id.* at 759–60 (detailing dentists all agreed to CDA's code of ethics).

152. *See id.* at 764 (announcing Ninth Circuit determined restrictions to be naked restraint output).

153. *See id.* at 773 ("[R]estrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition."); *see also* *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364–65 (1977) (discussing justifications exist for advertising ban).

154. *See Cal Dental Ass'n*, 526 U.S. at 773–74 ("The Court of Appeals might, at this juncture, have recognized that the restrictions at issue here are very far from a total ban on price or discount advertising, and might have considered the possibility that the particular restrictions on professional advertising could have different effects from those 'normally' found in the commercial world, even to the point of promoting competition by reducing the occurrence of unverifiable and misleading across-the-board discount advertising.").

155. *See id.* at 780–81 ("[As the circumstances here demonstrate,] [t]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment.").

156. *See id.* at 780 (reasoning judges who engage in quick look test must "explain the logic of their reasoning").

157. *Texaco v. Dagher*, 547 U.S. 1, 7–8 (2006) (holding quick look test is inapplicable to challenges against joint venture's core activity).

158. *See id.* at 7 n.3 ("[F]or the same reasons that *per se* liability is unwarranted here, we conclude that petitioners cannot be held liable under the quick look doctrine.").

159. *See id.* at 3 (announcing while both companies were able to sell joint venture oil individually, it would not have made difference if they sold it through one entity).

with a price-fixing conspiracy and argued it was *per se* illegal under Section 1 and illegal under the quick look test.¹⁶⁰ A joint venture exists where “persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit.”¹⁶¹

The Supreme Court dismissed the plaintiff’s argument and reversed the Ninth Circuit’s decision to apply the *per se* rule and quick look test to joint ventures.¹⁶² Relying on *NCAA*, the Supreme Court held the *per se* rule and quick look test are inapplicable where the business practice being challenged “involves the core activity of the joint venture itself.”¹⁶³ The Supreme Court reasoned a joint venture’s core activity is to establish restrictions around the goods it produces and sells.¹⁶⁴

IV. NARRATIVE ANALYSIS

Before reviewing Plaintiffs’ Section 1 claim, the Ninth Circuit described the history of television broadcasting of NFL games to assume the SBA did not apply to “non-exempt channels of distribution” like cable television and satellite television.¹⁶⁵ Furthermore, Defendants did not argue that the SBA applies to the NFL-Teams Agreement or the NFL-DirectTV Agreement.¹⁶⁶ After eliminating the argument that the agreements under question could be exempt under the SBA, the Ninth Circuit chose *NCAA* as the governing case.¹⁶⁷

160. *See id.* at 3–4 (discussing procedural history of case, including district court’s holding full blown rule of reason analysis applies to joint ventures, but recognizing Ninth Circuit’s reversal on grounds *per se* rule applies to joint ventures).

161. *See id.* at 6 (advocating joint ventures are procompetitive business structures); *see also* *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979) (“When two partners set the price of their goods or services they are literally ‘price fixing,’ but they are not *per se* in violation of the Sherman Act.”).

162. *See Texaco*, 547 U.S. at 7 (observing plaintiffs did not alternatively argue full blown rule of reason analysis).

163. *See id.* at 7–8 (noting joint ventures are not unlawful where agreement on restriction is necessary to market product).

164. *See id.* (acknowledging fixing price for good or service is essential to any joint venture).

165. *See Sunday Ticket II*, 933 F.3d 1136, 1147–49 (9th Cir. 2019) (“[T]he NFL’s collective sale of telecast rights to free, over-the-air television networks was squarely covered by the SBA.”). For further discussion of the history of the SBA and NFL broadcasting, *see supra* notes 65–84 and accompanying text.

166. *See Sunday Ticket II*, 933 F.3d at 1149 (reporting NFL-Networks Agreement is exempt from Antitrust law under SBA).

167. *See id.* (claiming network plan in *NCAA* is similar to NFL’s agreements). *But see NCAA*, 468 U.S. 85, 92–94 (1984) (declaring network plan is for college sports, whereas individual teams enter into their own television contracts).

A. Section 1 Claim

The Ninth Circuit analyzed the NFL-Teams Agreement and NFL-DirectTV Agreement under the “rule of reason” test to determine if “restraint of trade is unreasonable.”¹⁶⁸ The Ninth Circuit maintained that “[i]n order to state a Section 1 claim under the rule of reason [test], [P]laintiffs must plead four separate elements.”¹⁶⁹ While Defendants did not dispute the first two elements of a Section 1 claim, they argued the Plaintiffs failed to sufficiently allege an injury to competition and antitrust standing.¹⁷⁰

1. *Third Element: Injury to Competition*

In analyzing whether Plaintiffs sufficiently alleged injury to competition element, the Ninth Circuit applied the quick look test where “a restraint injures competition if [it] plausibly allege[s] ‘a naked restriction on price or output,’ such as ‘an agreement not to compete in terms of price or output.’”¹⁷¹ The court concluded the NFL-Teams and NFL-DirectTV Agreements work together to impose a naked restraint on output because “the interlocking agreements in this case involve the same sorts of restrictions that *NCAA* concluded constituted an injury to competition.”¹⁷² The Ninth Circuit emphasized four similarities to *NCAA* that guided the court to its conclusion.¹⁷³

First, the complaint in *NCAA* was similar to Plaintiff’s complaint because they both alleged the restriction of telecasts to one

168. See *Sunday Ticket II*, 933 F.3d at 1150 n.5 (finding per se standard of review is inapplicable to league sports because teams must cooperate to bring about football game).

169. See *id.* at 1150 (“[P]laintiffs must plead facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition.”). The Ninth Circuit stated of the fourth element: “the plaintiffs must plead antitrust standing, meaning they must allege that (4) they are the proper parties to bring the antitrust action because they were harmed by the defendants’ contract, combination, or conspiracy, and the harm they suffered was caused by the anti-competitive aspect of the defendants’ conduct.” *Id.*

170. See *id.* at 1150–51 (acknowledging Plaintiffs’ failure to show market power). For further discussion of the element of injury to competition, see *infra* notes 171-189 and accompanying text. For further discussion of the element of antitrust standing, see *infra* notes 190-200 and accompanying text.

171. See *Sunday Ticket II*, 933 F.3d at 1151 (suggesting complaint alleges analogous restriction to what plaintiffs alleged in *NCAA*). But see *NCAA*, 468 U.S. 85, 92–94 (1984) (rejecting restraints stemming from policy, not joint agreement).

172. See *Sunday Ticket II*, 933 F.3d at 1152 (emphasizing interlocking agreements are not exempt by SBA).

173. See *id.* at 1151–52 (reasoning *NCAA* should govern case). For further discussion of the four points, see *infra* notes 174-177 and accompanying text.

per game.¹⁷⁴ Second, no NFL team was “permitted to sell its telecasting rights independently.”¹⁷⁵ Third, there was a horizontal restraint on competition because the Teams-NFL Agreement required the individual teams to vote on the ratification of licensing deals.¹⁷⁶ Lastly, Plaintiffs’ complaint properly alleged a naked restriction on number of telecasts available, comporting with the Supreme Court’s definition of output in *NCAA*.¹⁷⁷

In response to the court’s use of the quick look test, Defendants argued the agreements should be analyzed separately because horizontal agreements were analyzed under the per se rule and vertical agreements were analyzed under the rule of reason test.¹⁷⁸ The Ninth Circuit disagreed, relying on *NCAA* to hold the rule of reason test applies to horizontal and vertical agreements in league sports cases.¹⁷⁹ Additionally, the Ninth Circuit relied on *National Society. Of Professional Engineers* to hold that courts must take a holistic approach to analyze how interrelated agreements affect competition.¹⁸⁰ Applying the holistic approach, the court concluded “that the complaint adequately pleads that the vertical NFL-DirecTV Agreement works in tandem with the Teams-NFL Agreement to” restrict output and therefore restrain competition.¹⁸¹

Defendants also argued Plaintiffs failed to satisfy the third element of injury to competition because Plaintiffs did not allege “a

174. See *Sunday Ticket II*, 933 F.3d at 1151 (announcing even though *NCAA* involved single agreement, interlocking agreements in this case impose similar limitations). But see *NCAA*, 468 U.S. at 92–94 (discussing restraints come from policy teams are required to follow to compete in *NCAA* divisions).

175. See *Sunday Ticket II*, 933 F.3d at 1151 (summarizing in *NCAA*, individual teams were able to contract their own deals but were subject to limitations).

176. See *id.* at 1152 (arguing since individual teams vote to ratify broadcasting agreement which would limit their ability to independently contract, teams are agreeing not to compete).

177. See *id.* (explaining output means total number of telecasts available for broadcaster or consumers to view or purchase); see also *NCAA*, 468 U.S. 85, 99 (1984) (defining output as “the quantity of television rights available for sale”).

178. See *Sunday Ticket II*, 933 F.3d at 1152 (reasoning Defendants improperly relied on *In re Musical Instruments & Equipment Antitrust Litigation* because case “does not require a court to break down an alleged conspiracy into its constituent parts”).

179. See *id.* (citing *NCAA*, 468 U.S. at 101–03) (holding per se rules are inapplicable to league sports because they require cooperation).

180. See *id.* (advocating holistic approach will reveal whether challenged restraint enhances or restricts competition); see also *Nat’l Soc’y Of Pro. Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (“[A]greements . . . can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.”).

181. See *Sunday Ticket II*, 933 F.3d at 1153 (speculating agreements to pool rights before vertically licensing them can constitute Section 1 violation).

properly defined market in which defendants have market power.”¹⁸² The Ninth Circuit rejected this argument on the grounds the quick look test did not require pleading a properly defined market.¹⁸³ The rejection of Defendants’ argument rested on the notion that a reasonable observer could ascertain and identify a naked restriction on output’s anticompetitive effects.¹⁸⁴

Since Plaintiffs sufficiently alleged injury to competition, the burden shifted onto the Defendants to show pro-competitive benefits.¹⁸⁵ Defendants argued the restrictions were pro-competitive because cooperation and consent between the NFL and opposing teams were required for producing the telecasts.¹⁸⁶ The court rejected Defendants’ cooperation argument because no precedent requires cooperation between the NFL and NFL teams to produce and release telecasts.¹⁸⁷ Moreover, the Ninth Circuit reinforced its rejection of Defendants’ argument for cooperation because before the SBA, individual teams owned its telecast rights and many teams unilaterally licensed telecasts of its own games to different networks.¹⁸⁸ Accordingly, the Ninth Circuit held the Plaintiffs sufficiently stated an injury to competition by plausibly alleging a naked restraint on the output of telecasts per game.¹⁸⁹

182. *See id.* at 1155 (“Defendants argue that the complaint failed to plausibly allege that they have market power in either the market for live video presentations of regular season NFL games or the submarket for out-of-market game broadcasts.”).

183. *See id.* (acknowledging there are no substitute for NFL games, so NFL must have effective control over market including NFL telecasts of games).

184. *See id.* at 1156 (“[A]n observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”). Since plaintiffs plausibly alleged a naked restraint, they satisfied the quick look test and therefore did not need to allege market control. *See id.* at 1156 (holding plaintiffs have “not failed to allege market power”).

185. For further discussion of who has the burden to show anticompetitive harm or pro-competitive benefits, see *supra* notes 109–115 and accompanying text.

186. *See Sunday Ticket II*, 933 F.3d at 1153 (“Each NFL game broadcast is a copyrighted work jointly authored by the NFL, the two competing teams, and the broadcast network, and the agreement of all participants is necessary in order to create the telecasts at all.”). *But see* *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 187 (2010) (explaining each NFL team has its own intellectual property in form of names, colors, and logos).

187. *See Sunday Ticket II*, 933 F.3d at 1153–54 (“In the absence of a legal requirement that the NFL teams, NFL, and broadcasters coordinate in filming and broadcasting live games, the Los Angeles Rams (for instance) could contract for their own telecast of Rams games and then register the telecasts for those games with the Rams (and perhaps the team against whom they are playing.”).

188. *See id.* at 1154 (finding thirteen teams had signed telecast agreements with CBS or NBC prior to SBA’s enactment).

189. *See id.* at 1155 (reasoning Defendants limited amount of telecast available to consumers without regard for consumer demands). Defendant also argued

2. *Fourth Element: Antitrust Standing*

In analyzing whether Plaintiffs lacked antitrust standing to challenge the Teams-NFL Agreement, the Ninth Circuit applied traditional negligence principles of causation to permit injured antitrust plaintiffs to file suit against any co-conspirators.¹⁹⁰ The Ninth Circuit held the plaintiffs had proper antitrust standing by alleging direct injury from the NFL, teams, and DirecTV as co-conspirators.¹⁹¹ In response, the dissent and Defendants argued this co-conspirator exception cannot apply in this case because the Ninth Circuit limited the exception to price-fixing conspiracies in *ATM Antitrust Fee Litigation*.¹⁹²

The dissent argued the Plaintiffs were required to use a pass-through theory to recover damages because, unlike a price-fixing conspiracy where overcharge was not passed on to consumers, a restraint on output conspiracy would require the court to engage in the exact complex calculations the Supreme Court sought to avoid in *Illinois Brick*.¹⁹³ The dissent highlighted that Plaintiffs only alleged that “DirecTV has set an artificially high consumer price.”¹⁹⁴

that “the NFL-DirecTV agreement did not reduce the output of NFL game broadcasts.” *See id.* (rejecting Defendants’ argument output was not reduced since “all NFL Sunday-afternoon games are broadcast somewhere”). However, as the Ninth Circuit already reasoned, that is not the correct definition of output according to the Supreme Court in *NCAA*. *See id.* (“*NCAA* indicated that the relevant output is ‘the total amount of televised intercollegiate football,’ available to consumers.”).

190. *See id.* at 1156 (reporting *Illinois Brick*, 431 U.S. 720 (1977) “established a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers”). The Ninth Circuit illustrated how the principles of proximate cause operate for antitrust standing: “‘manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A.’ However, ‘C may sue B if B is an antitrust violator.’” *See id.* (quoting *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1521 (2019)) (announcing “‘principles of proximate cause’ . . . apply differently when the injury to plaintiff is caused by a multi-level conspiracy to violate antitrust laws”).

191. *See id.* at 1157 (finding these allegations are sufficient to survive motion to dismiss); *see also* *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1521 (2019) (discussing there is no intermediary in distribution because plaintiff purchased apps directly from alleged antitrust violator).

192. *See Sunday Ticket II*, 933 F.3d at 1157 (reasoning Ninth Circuit explicitly limited exception to price-fixing conspiracies).

193. *See id.* at 1159–61 (Smith, J., dissenting) (reasoning pass-on theory involves distributor paying manufacturer overcharged anti-competitive price for distribution rights, then passing on overcharged price to consumers to recoup overpayment to manufacturer). The dissent notes how restraint on output conspiracies would require courts to “determine how much of the consumer price stems from ordinary market forces, and how much of it stems from the distributor’s efforts to recoup its overpayment to the manufacturer.” *See id.* at 1161–62 (considering majority opinion inappropriately invites courts to make calculations “sought to be avoided in *Illinois Brick*”).

194. *See id.* at 1161 (Smith, J., dissenting) (discussing calculating damages would require court to engage in analysis prohibited by *Illinois Brick*).

The dissent noted how this allegation would require a court to engage in a pass-on theory of damages to determine if DirectTV overpaid for the telecast rights, how much DirectTV would have had to pay if not for the NFL-Teams Agreement, and how much overcharge DirectTV passed on to consumers.¹⁹⁵

The court rejected the dissent's and Defendants' arguments because they failed to offer a reason as to why the court should distinguish price-fixing from output conspiracies.¹⁹⁶ In response to the dissent's argument regarding the pass-on theory of damages for output conspiracies, the majority held that courts need only compare current consumer prices to those existing within a competitive market.¹⁹⁷ However, the dissent highlighted the lack of clarity and inherent difficulties in determining differences of prices within and outside competitive markets without simultaneously considering overcharge.¹⁹⁸ In response to Defendants' and the dissent's argument, the Ninth Circuit relied on *Cal. Dental Ass'n* to hold "price-fixing conspiracies are functionally indistinguishable from output-restricting conspiracies" because they have the same anti-competitive effects.¹⁹⁹ Accordingly, the Ninth Circuit held *Illinois Brick* was inapplicable and Plaintiffs have antitrust standing because they "suffered antitrust injury due to this conspiracy to limit output."²⁰⁰

195. *See id.* at 1161–62 (Smith, J., dissenting) (noting courts are prohibited from "creat[ing] a new exception to the *Illinois Brick* rule"); *see also* *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 754 (9th Cir. 2012) ("[U]nder the co-conspirator exception recognized in this circuit, the price paid by a plaintiff must be set by the conspiracy and not merely affected by the setting of another price.").

196. *See Sunday Ticket II*, 933 F.3d at 1158 n.9 (claiming dissent fails to give reasoned basis for distinguishing price-fixing conspiracies from output restriction conspiracies).

197. *See id.* at 1157 n.7 ("A court would not need to determine to what extent the NFL overcharged DirecTV; it would need to consider only the prices consumers paid compared to the prices that would have existed in a competitive market.").

198. *See id.* at 1161 n.4 (Smith, J., dissenting) ("[I]t is unclear how in practice a court could consider what the theoretical consumer price would have been in a competitive market (absent the NFL's horizontal agreement) without considering whether and how much of an overpayment DirecTV made.").

199. *See id.* at 1158 (majority opinion) (arguing conspiracy to fix higher price achieves same result as conspiracy to limit output because price will rise to limit demand of reduced supply). *But see id.* at 1160 n.3 (Smith, J., dissenting) (emphasizing *Cal. Dental* "stands only for the uncontested proposition that a conspiracy to price fix and a conspiracy to restrict output both injure consumers by arbitrarily raising the price they pay for a product" but "says nothing about whether a particular consumer's injury is direct or indirect, or which consumers are authorized to seek judicial redress").

200. *See id.* at 1158 (reporting Defendants failed to provide a reason for distinguishing between price-fixing conspiracies versus output restricting conspiracies).

V. CRITICAL ANALYSIS

In the wake of its decision, the Ninth Circuit erroneously lowered the standard of review for antitrust claims by expanding the quick look test to joint selling arrangements' or joint ventures' core business activity.²⁰¹ The NFL has jointly produced and marketed its telecasts ever since it received antitrust exemption from the SBA sixty years ago.²⁰² As technology advanced and the demand for football grew, the NFL formed a joint venture for satellite broadcasting in the form of the Sunday Ticket to reach a new realm of viewers.²⁰³

Under the Ninth Circuit's new framework in applying the quick look test, the unprecedented and abbreviated standard of review applied to a joint venture's core product and thereby relieved Plaintiffs' burden of pleading anticompetitive harm within a defined market.²⁰⁴ Accordingly, plaintiffs bringing Section 1 claims against joint ventures in the Ninth Circuit need only establish antitrust standing and plead the existence of an agreement that restrains competition without showing anticompetitive harm.²⁰⁵ The court erred in its sweeping decision to vastly reduce antitrust pleading requirements because the quick look test was inapplicable to *Sunday Ticket II*, and because the court's most relied upon case was distinguishable from this case.²⁰⁶ This section discusses the inapplicability of the quick look test to *Sunday Ticket II* and distinguishes this case from *NCAA*, the case the Ninth Circuit relied on to apply the quick look test to joint ventures.²⁰⁷

201. For further discussion of the Ninth Circuit's expansion, see *infra* notes 202-214 and accompanying text.

202. For further discussion of Commissioner Rozelle's lobbying efforts in Congress for exemptive relief, see *supra* notes 75-84 and accompanying text.

203. See Dade Hayes, *AT&T Is Letting Non-Subscribers Stream NFL Sunday Ticket*, DEADLINE (Aug. 14, 2020), <https://deadline.com/2020/08/in-a-first-att-is-letting-non-subscribers-stream-nfl-sunday-ticket-1203013890/> [<https://perma.cc/EJN6-MVT7>] (suggesting there are millions of subscribers for NFL Sunday Ticket, plus AT&T's decision to let non-DirectTV subscribers stream Sunday Ticket will lead to more viewers).

204. For further discussion of how the quick look test relieves plaintiff from completing the pleading requirements, see *supra* notes 128-164 and accompanying text.

205. For further discussion of the Ninth's Circuit's reasoning and holding, see *supra* notes 165-200 and accompanying text.

206. For further discussion of the inapplicability of *NCAA* and the quick look test, see *infra* notes 209-224 and accompanying text.

207. For further discussion of differences between *NCAA* and *Sunday Ticket II*, see *infra* notes 216-224 and accompanying text.

A. Inapplicability of the Quick Look Test to NFL's Sunday Ticket

The quick look test was inapplicable to Sunday Ticket because it was a joint venture consisting of a horizontal agreement to pool intellectual property rights between the NFL and the NFL teams and a vertical agreement to license those packaged rights to DirectTV to create Sunday Ticket.²⁰⁸ Sunday Ticket qualified as a joint venture because it was a packaged product that no individual team could produce by itself.²⁰⁹ The quick look test should not be applied to a joint venture's core activity because an agreement on restriction was necessary to market the product where it would be infeasible to produce or market the product.²¹⁰

In this case, the core activity of the NFL teams, NFL, and DirectTV joint venture was to restrict output by packaging broadcasting rights to create a unique product.²¹¹ The Ninth Circuit improperly expanded the quick look test by deviating from Supreme Court precedent that the per se rule and quick look test were inapplicable where the challenged business practice "involves the core activity of the joint venture itself."²¹² Established antitrust law holds a joint venture's core activity should be reviewed under the full-blown rule of reason analysis.²¹³ Therefore, the Ninth Circuit improperly expanded the scope of the quick look test and, consequently, made the Ninth Circuit the most antitrust plaintiff-friendly jurisdiction.²¹⁴

B. Improper Reliance on *NCAA*

The Ninth Circuit improperly relied on *NCAA* to find an agreement between a professional sports league and its teams about how

208. For further discussion of how the agreements work in tandem to create a core product of a joint venture, see *supra* notes 5–12 and accompanying text.

209. See *NCAA*, 468 U.S. 85, 113 (1984) (explaining joint selling arrangement involves pooling of rights, then selling agent who markets blanket license of those rights).

210. See *Texaco v. Dagher*, 547 U.S. 1, 7–8 (2006) (acknowledging how joint ventures are procompetitive business structures because they provide products that otherwise would not exist).

211. See *id.* (finding restrictions on price or output are an essential element of joint ventures).

212. See *id.* (suggesting per se rule or quick look test could both apply to joint venture's non-core activities).

213. See *id.* (requiring joint ventures' core activities to be reviewed under full rule of reason analysis because legitimate business collaboration requires discretion on how to price, sell products).

214. See *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 780 (1999) (observing legal scholar who developed quick look test cautioned against misleading results).

to market its product was a restriction that may be deemed anticompetitive without an “elaborate industry analysis.”²¹⁵ In its analysis, or lack thereof, the Ninth Circuit’s decision to have *NCAA* control a claim against the core activity of a joint venture case was misplaced because the Supreme Court stated *NCAA* could only be applied to joint ventures when the claim was against a “nonventure activit[y].”²¹⁶ Additionally, the business activity at issue in *NCAA* was strikingly different from the business activity in *Sunday Ticket II*.²¹⁷

Unlike the restraint in *NCAA* involving an agreement to limit the output of telecasts to no more than six appearances per team, the agreement at issue in this case does not set a maximum amount of times a team can appear on television.²¹⁸ The *NCAA*’s network plan established the number of games a conference may televise and set a minimum price without the *NCAA*’s participation or oversight in producing or licensing the games.²¹⁹ In effect, the *NCAA* was not acting as a selling agent, but rather was establishing output and price limitations without any collaboration among teams or increased efficiencies because the individual teams had to negotiate and enter into their own network contracts.²²⁰

In this case, the NFL and its teams restricted output to efficiently collaborate with each other by pooling their intellectual property rights and packaging them to create a unique product for millions of people enjoy.²²¹ Not only was the Ninth Circuit applying non-joint venture analysis to a joint venture case, but the Ninth Circuit was also ignoring the vast differences between the network plans of both cases.²²² Therefore, the Ninth Circuit’s reliance on

215. See *Sunday Ticket II*, 933 F.3d 1136, 1155–56 (2019) (considering use of quick look test without referring to it as quick look test).

216. See *Texaco*, 547 U.S. at 7 (suggesting policies on prices, sales are core activity of any joint venture, so any claim of anticompetitive harm on core activity of joint venture must be done through full-blown rule of reason analysis).

217. For further discussion of how the *NCAA*’s business activity at issue is different than the NFL’s, see *infra* notes 218–223 and accompanying text.

218. See *NCAA*, 468 U.S. 85, 94 (1984) (“Under the appearance limitations no member institution is eligible to appear on television more than a total of six times and more than four times nationally, with the appearances to be divided equally between the two carrying networks.”).

219. See *id.* (“The number of exposures specified in the contracts also sets an absolute maximum on the number of games that can be broadcast.”).

220. See *id.* at 113–14 (“Thus, the effect of the network plan is not to eliminate individual sales of broadcasts, since these still occur, albeit subject to fixed prices and output limitations.”).

221. For further discussion of how the agreements work in tandem to create a core product of a joint venture, see *supra* notes 5–12 and accompanying text.

222. For further discussion of differences, see *supra* notes 215–223 and accompanying text.

NCAA to apply the quick look test to this case is erroneous and the court should have applied a full-blown rule of reason analysis.²²³

VI. IMPACT

The impact of the Ninth Circuit's decision is two-fold.²²⁴ First, the unfavorable ruling and future litigation could put the NFL at a disadvantage for finding a host for Sunday Ticket, unless the new host provides a less exclusive platform than DirecTV.²²⁵ Second, by lowering the pleading standards for antitrust claims, the Ninth Circuit made it easier for plaintiffs to coerce defendants to the settlement table through costly discovery.²²⁶ The following sections will discuss how the Ninth Circuit's decision impacts the NFL and media negotiations, and antitrust defendants engaging in joint ventures generally.²²⁷

A. Impact on Sunday Ticket Negotiations

After the Supreme Court's denial to hear the case, this case is now back to the district court in the Central District of California where the parties have agreed to a trial date of February 20, 2024.²²⁸ While there is plenty of time for the parties to agree to a settlement, the renewal of media contracts continues to loom over the NFL.²²⁹ The NFL has to make a decision to keep the Sunday Ticket exclusive to one provider or sell the package to multiple carriers.²³⁰

Historically, the NFL has had most of the bargaining power over media contract negotiations because they are the highest-rated

223. See *Texaco, Inc. v. Dagher*, 547 U.S. 1, 7 (2006) (stating per se rule, quick look test are both inapplicable where challenged business practice "involves the core activity of the joint venture itself").

224. For further discussion of *Sunday Ticket II's* impact on Sunday Ticket and antitrust litigation, see *infra* notes 226–243 and accompanying text.

225. For further discussion of the impact on media negotiations and potential complications in continuing to provide similar product to consumers, see *infra* notes 229–235 and accompanying text.

226. For further discussion of *Sunday Ticket II's* potential effects on joint ventures, see *infra* notes 236–243 and accompanying text.

227. For further discussion of how the Ninth Circuit's decision may affect NFL-network agreements and joint ventures, see *infra* notes 228–243 and accompanying text.

228. See Gardner, *supra* note 26 (speculating settlement could happen before trial because parties will have plenty of time for discovery).

229. See *id.* (noting trial date is years away because court schedules are backed up from COVID-19).

230. See *id.* (reporting different TV networks, streamers want to get involved in Sunday Ticket deal).

programming in television.²³¹ However, a future trial date that has the potential to find Sunday Ticket in violation of antitrust laws gives bidders like Amazon, ESPN+ and Apple+ leverage in negotiations for streaming Sunday Ticket on their platforms since they are not exclusive like DirectTV.²³² In fact, the NFL is considering innovating the distribution of Sunday Ticket by keeping the satellite portion with DirectTV and selling the streaming rights to online platforms like Amazon Prime or Apple+.²³³ The NFL is even considering allowing viewers to purchase access to all of the out of market games for a single team.²³⁴ Overall, these contract renewal negotiations coupled with the threat of antitrust violations could force the NFL to completely adjust how consumers watch football, potentially giving viewers the options to watch out-of-market games on different platforms like streaming services and television networks.²³⁵

B. Should Joint Ventures be Concerned about the Ninth Circuit's Decision?

Since the Ninth Circuit's decision, Section 1 plaintiffs challenging joint ventures will most likely proceed to discovery.²³⁶ This has far reaching implications for antitrust litigation because antitrust discovery is the most extensive and expensive compared to other

231. See Marchand, *supra* note 15 (acknowledging NFL's bargaining power has allowed it to substantially increase its contracts every renewal period).

232. See Andrew Marchand, *The NFL Sunday Ticket sweepstakes may have a dark horse candidate*, NEW YORK POST (Nov. 22, 2021), <https://nypost.com/2021/11/22/hbo-max-emerges-as-dark-horse-player-for-nfl-sunday-ticket/> [https://perma.cc/QS7B-CQMC] (suggesting NFL is expected to finalize its media rights deal for Sunday Ticket in earlier half of 2022); see also Alex Sherman, *Amazon Likely Front-Runner for Multiyear NFL Sunday Ticket Deal, Sources Say*, CNBC (Sept. 10, 2021), <https://www.cnbc.com/2021/09/10/amazon-likely-front-runner-for-multi-year-nfl-sunday-ticket-deal-sources.html> [https://perma.cc/A2CR-W6H9] (considering digital platform would make Sunday Ticket less exclusive, which would attract more subscribers).

233. See Mike Florio, *DirectTV May Keep Satellite Piece of Sunday Ticket*, NBC SPORTS (Oct. 21, 2021), <https://profootballtalk.nbcsports.com/2021/10/21/directv-may-keep-satellite-piece-of-sunday-ticket/> [https://perma.cc/28J4-JFCJ] (observing NFL's desire to maximize reach of Sunday Ticket).

234. See Mike Florio, *Brian Rolapp: Sunday Ticket is "ripe for innovation"*, NBC SPORTS (Oct. 13, 2021), <https://profootballtalk.nbcsports.com/2021/10/13/brian-rolapp-sunday-ticket-is-ripe-for-innovation/> [https://perma.cc/Z2D6-LUQN] (announcing NFL is considering whether viewers can purchase games by team, week, or single games).

235. See Bassam, *supra* note 18 (speculating possibility of selling Sunday Ticket to multiple carriers).

236. For further discussion of how the Ninth Circuit lowered pleading standards against joint ventures, see *supra* notes 201-223 and accompanying text.

claims.²³⁷ Thus, by lowering the preliminary merit inquiry of a plaintiff's claim, the Ninth Circuit made it easier for plaintiffs to bring Section 1 claims against joint ventures and subject defendants to extraordinary discovery costs.²³⁸ Discovery costs loom over defendants and give plaintiffs leverage in getting the defendant to the settlement table because it would be cheaper to settle than fully litigate antitrust claims.²³⁹ As a result of the coercive nature of discovery costs, it is no surprise that most antitrust cases settle.²⁴⁰

Overall, joint ventures should be concerned about the Ninth Circuit's decision because it makes them more vulnerable to expensive discovery costs that could coerce them into settlement.²⁴¹ While the Ninth Circuit covers the State of California, joint ventures around the country should be concerned because a plaintiff can bring an antitrust claim against a company in any federal district it does business in.²⁴² The Ninth Circuit's decision has altered the national antitrust landscape, making it easier for plaintiffs to bring claims against joint ventures and subsequently leverage them into a settlement without proving the joint venture harmed competition.²⁴³

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237. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (suggesting discovery costs for defendants in antitrust litigation is especially costly because all relevant information is in their possession).

238. See *id.* (advocating courts must be diligent in reviewing dismissal of antitrust claims because they are subject to discovery abuse).

239. See *id.* at 557–58 (noting significance of pleading standards is to prevent plaintiff from taking up defendant's time or resources in effort to coerce settlement).

240. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 285 (3d ed. 2006) (“As would be expected, a large percentage (70–88%) of antitrust cases are settled.”).

241. For further discussion of how joint ventures are more vulnerable to discovery costs and settling antitrust claims, see *supra* notes 236–240 and accompanying text.

242. See 15 U.S.C.S. § 22 (LexisNexis 2021) (“Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.”).

243. For further discussion of how the Ninth Circuit made it easier for plaintiffs to bring Section 1 claims, see *supra* notes 201–214 and accompanying text.

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