

**TESTIMONY OF GARY GERTZOG**  
**SENIOR VICE PRESIDENT, NATIONAL FOOTBALL LEAGUE**  
**BEFORE THE**  
**SUBCOMMITTEE ON COURTS AND COMPETITION POLICY**  
**OF THE**  
**COMMITTEE ON THE JUDICIARY**  
**UNITED STATES HOUSE OF REPRESENTATIVES**  
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Mr. Chairman, Ranking Member Coble, Members of the Subcommittee:

My name is Gary Gertzog. I am Senior Vice President Business Affairs and General Counsel of the National Football League. I appreciate the opportunity to testify before you this afternoon on the “Antitrust Implications of American Needle v. NFL.”

Last week, the nine Justices of the United States Supreme Court heard oral argument in a lawsuit brought in 2004 by a former NFL headwear licensee challenging the NFL’s decision in late 2000 to grant an exclusive license to another company. The question in the case is whether, for purposes of the antitrust laws, the National Football League, NFL Properties and the NFL’s 32 member clubs function as a single business entity when deciding how to promote NFL Football through licensing of League and Club trademarks on headwear. The District Court and the Seventh Circuit Court of Appeals each agreed with our long-held position that the NFL is a single business entity for these purposes. In a previous case, the Seventh Circuit held that the question of whether a professional sports league acts as a single entity should be decided on a league by league, aspect by aspect basis. We believe that approach, which we encouraged the Supreme Court to adopt, is the correct way to analyze the case before us.

The National Football League’s mission is to produce a premier entertainment product that appeals to the broadest possible audience. As part of that effort, we encourage fans and potential fans to identify with the NFL and their favorite team in a variety of ways. Those efforts include ensuring that fans of all teams have access to a broad variety of high quality, appealing consumer products that bear NFL and team marks and logos. Those promotional efforts have been successful: We are America’s most popular sport, with over 180 million fans.

The NFL supported American Needle’s request for Supreme Court review to secure a national, uniform rule of law that a sports league should be treated like every other business in making decisions about how best to promote its product and how best to respond to consumer demand. The result that we seek is one that would enhance the ability of the NFL, as well as the ability of other professional sports leagues, to compete effectively in the broader entertainment market, and thereby better serve the interests of fans and consumers across the country.

## **The National Football League**

The National Football League produces an annual, integrated series of more than 250 football games played by 32 teams, leading to the playoffs and culminating in the Super Bowl championship game. Each of these individual teams is inherently incapable of generating on its own a single NFL game. Every NFL member club is integrally and inherently dependent upon every other member club to create what we know as NFL Football.

The League controls all aspects of the production of NFL Football. It determines when and where the games are played, the rules of the game, the playing schedule, and rules relating to how the NFL entertainment product is produced and presented to its fans. While the NFL clubs compete on the field, they are partners in a business enterprise. They do not jockey among themselves for market share in the production of NFL Football. To the contrary, they engage in extensive revenue and cost sharing. In fact, approximately 80% of all league and club revenues are shared among the member clubs. Revenues from licensing marks and logos are shared equally among the member clubs.

Such economic integration and interdependence has led to competitive balance on the football field and made it possible for small-market teams to compete effectively with those in large markets. This very much serves consumers' interests. The NFL has more clubs that play in more communities than any other major sports league in this country. Those clubs represent markets as large as New York and Chicago and as small as Green Bay and Buffalo. And because of the League's extensive revenue sharing and promotion of all of its members, all clubs have a comparable chance at success on the playing field. For example, of the four teams that remain in the playoffs this year, only one step removed from the Super Bowl, three represent smaller markets. Fans in New Orleans, Indianapolis and Minnesota continue to root for their favorite team this year.

## **The Lawsuit Brought by American Needle**

For nearly 50 years, NFL Properties has promoted NFL Football by serving as the exclusive licensor of League and Club marks for use on headwear and apparel products. For decades, American Needle held – and benefited from – such licenses. In late 2000, the League decided that it could better satisfy consumer demand and better promote its entertainment product if it licensed a single company to produce certain categories of apparel and headwear.

American Needle bid for that license, but Reebok won the license in the marketplace. (The NFL awarded licenses to companies other than Reebok for t-shirts, sweatshirts, outerwear and other apparel products).

After its license expired, American Needle sued the NFL, NFL Properties and 30 of the NFL's member clubs under Section 1 of the Sherman Act, which prohibits "conspiracies" among business competitors in restraint of trade. American Needle argued that NFL Properties' decision to grant an exclusive license to Reebok was such a conspiracy.

The NFL defended the claims on the ground that the League and its member clubs are incapable of "conspiring" in an antitrust sense when the League makes decisions about the production and promotion of its integrated product, NFL Football. The League pointed out that the NFL and its member clubs are not business competitors, but rather generate a joint product. On this basis, under the Supreme Court's governing precedents, our lawyers argued that although the NFL and its member clubs may in some circumstances be subject to other provisions of the antitrust laws, decisions involving the licensing of League and Club trademarks are not subject to scrutiny under the Sherman Act's "conspiracy" provisions.

The United States District Court in Chicago and the United States Court of Appeals for the Seventh Circuit both agreed with the League's position. Both courts recognized that the League goes to market with a single product (NFL Football), that the challenged licensing activities are intended to promote that product, and that the League and its clubs compete as a unit against other entertainment providers. The courts therefore deemed the League and its member clubs a "single entity," rather than separate businesses, under Section 1 of the Sherman Act. In prior cases, other courts in other Circuits had disagreed with the premise underlying the Seventh Circuit's decision, and there was a conflict among the Circuits on that basis.

American Needle petitioned the Supreme Court to review the Seventh Circuit's ruling. The NFL chose to support the petition not because we agreed with American Needle's position on the merits, but rather in an effort to obtain a national and uniform rule confirming that the Seventh Circuit's decision – that the NFL is a single entity for purposes of promoting its unitary product, NFL Football – was correct.

Antitrust lawsuits are complex, time-consuming, and extremely costly, even in circumstances when the defendant ultimately prevails. The NFL and the other major sports

leagues have spent tens of millions of dollars defending suits like the one American Needle brought. Even the threat of such costly suits is anti-competitive and inconsistent with consumer welfare because it chills competitive zeal to the detriment of consumers.

### **The NFL's Structure as a Single Entity Benefits Consumers**

Since its creation in 1963, NFL Properties' mission has been to enhance the image and promote the popularity of NFL Football through licensing of high quality consumer products bearing NFL marks. Prior to the creation of NFL Properties, there was little effort by the NFL clubs to develop or to promote their entertainment product in this way. NFL Properties controls almost every aspect of League and club operations relating to intellectual property.

Licensing of NFL intellectual property is an integral part of the collective efforts of the League and its member clubs to promote their collective entertainment product, NFL Football. Products bearing NFL intellectual property, including apparel, are an important expression of the image of the NFL and its brand. They offer NFL fans an opportunity to demonstrate their interest in NFL Football generally and their allegiance to a particular team, and they serve to promote NFL Football by communicating that interest and allegiance to others. By increasing the visibility of NFL Football, promoting loyalties, and fostering rivalries, these licensing activities enhance the NFL's ability to compete with other entertainment providers. Control over the licensing of NFL intellectual property and the quality of NFL-licensed products is thus integral to the success of NFL Football.

Rather than focusing on the performance of marks associated with a single club in any given year, NFL Properties seeks to enhance the performance of the entire collection of marks identifying the 32 member clubs. To that end, NFL Properties requires each apparel licensee to manufacture, distribute and sell on a national basis product lines bearing, in the aggregate, the marks identifying all member clubs. This ensures that fans of all teams are offered high quality products. And any net royalties resulting from the sale of any product are divided equally among the 32 clubs regardless of which club's mark appears on the product.

Centralizing the promotion, marketing, and licensing of NFL intellectual property provides extensive benefits for licensees and ultimately for consumers. For example, NFL Properties can promote and license a complete package of all NFL intellectual property. One-stop shopping for this package of rights is desirable and highly efficient for licensees, some of

whom might not otherwise be able to justify the expense of acquiring the right to use the marks associated with all NFL clubs. For many years, American Needle availed itself of this benefit, as well as the efficiencies and reduced transaction costs that collective licensing affords, through licenses from NFL Properties.

Consumer product licensees also benefit directly from NFL Properties' extensive marketing efforts and relationships with major retailers. NFL Properties uses its national-level relationships, as well as its promotion and marketing programs, to assist in the introduction of new product lines and to drive sales in smaller markets. Crucial to the success of these programs is NFL Properties' ability to offer retailers and other major market participants centralized support of the complete line of NFL-licensed goods. For example, to meet consumer demand, NFL Properties has entered into an agreement pursuant to which thousands of NFL products are available to fans through the NFLShop.com website and nationally distributed catalogs. The availability of this merchandise and the website are advertised extensively on NFL game broadcasts.

NFL Properties has also used the resources of its major national sponsors to expand, through cross-promotions, the reach and distribution of NFL-licensed products. For example, over many years, many national sponsors have distributed NFL-licensed apparel as part of the sponsor's own nationwide campaigns to market their products.

Through these national-level relationships, NFL Properties ensures that all member clubs benefit from its promotional activities. These efforts help to enhance overall fan interest in NFL Football across the nation. Moreover, NFL Properties-arranged distribution and promotional vehicles facilitate fans' ability to purchase products that they may not be able to find in retail stores in their local markets.

NFL Properties also engages in market research activities to monitor developments, spot trends, and to stay abreast of new products bearing the marks of other sports entities, entertainment companies, and fashion concerns with which NFL Properties competes in marketing NFL intellectual property. Individual clubs would not be able efficiently, if at all, to undertake such activities.

The efficiencies of centralized promotion, marketing, and licensing of NFL intellectual property extend to trademark registration and enforcement, development of new logos, and

quality control, all of which are handled by experienced NFL Properties employees. As one measure of these efficiencies, NFL Properties manages a worldwide trademark portfolio of over 12,000 registrations and applications in over 160 countries.

NFL Properties works with trademark investigators and local and federal law enforcement to assist in their investigation and seizure of counterfeit merchandise. To support these anti-counterfeiting activities, NFL Properties commits significant resources including the development and administration of a hologram-based authentication program for all products bearing NFL intellectual property.

NFL Properties is also responsible for administration of the selection, design and development of new names, marks, logos, uniforms and other identifying indicia for the member clubs. These issues are regulated by the NFL Constitution & Bylaws and related resolutions approved by the member clubs.

In circumstances where the NFL decides to expand the number of its member clubs, as it has several times over the years, it does so by creating the new club from the assets of the existing member clubs. In these circumstances, NFL Properties plays a substantial role. NFL Properties takes the lead in developing an identity and creating unique identifying marks for the new member club, protecting those marks through appropriate registrations and other legal action, and implementing a marketing strategy to ensure the successful promotion of the expanded NFL Football product. When it joins the League, a new member club acquires, along with the right to participate in the production of NFL Football, a pro rata ownership interest in NFL Properties.

NFL Properties also has a separate quality control department that reviews thousands of product submissions to ensure that the NFL intellectual property is used in an appropriate manner on licensed products and to ensure that licensed products reflect the branding goals associated with NFL Football. All licensed products are reviewed not only by NFL Properties licensing managers, who confirm consistency with the license agreement, but also by NFL Properties quality control managers, who review for trademark adherence and consistency with the NFL's quality standards.

NFL Properties' centralized licensing structure – and its efficiencies – create a national brand that includes the full range of marks that identify the NFL and its member clubs; that

structure also facilitates the use and development of NFL intellectual property in connection with, and successful promotion of, broadcasts of NFL games, NFL Network programming, staging of special events (such as the NFL Kickoff), and operation of the “NFL.com” website.

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The centralized licensing and marketing structure of NFL Properties has contributed to the success, popularity, and growth of NFL Football for almost 50 years. Since 1963, when NFL intellectual property was first marketed on a collective basis, NFL Properties has increased exponentially the volume, variety, and quality of NFL-licensed products available to consumers, including a wide array of apparel, fashion accessories, and “hardlines” consumer goods such as trading cards and video games. The equal sharing of revenues from these commercial activities allows executives of NFL Properties to focus on promoting and growing the overall business of NFL Football for the collective benefit of all of the member clubs and our fans.

Thank you, Mr. Chairman. I look forward to your questions.