Statement before the Judiciary Committee

Subcommittee on Courts and Competition Policy

On the Antitrust Implications of *American Needle v. NFL*

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Chairman Johnson, Ranking Member Coble and Members of the Subcommittee:

Thank you for the opportunity to appear before the Subcommittee today to testify on the antitrust implications of *American Needle v. NFL*, which has been argued and submitted to the Supreme Court of the United States. My name is William L. Daly III, and I am the Deputy Commissioner of the National Hockey League ("NHL" or "League"). The NHL filed Amicus Briefs – at the petition stage and on the merits – in support of the NFL Respondents, which more fully address much of what I will discuss today. My testimony will cover three main topics: (1) the nature and scope of the NHL joint venture; (2) the broad entertainment marketplace in which the NHL competes; and (3) the inhibitive effect of scrutiny under Section 1 of the Sherman Act on the ability of professional sports leagues to compete in this market.

While the *American Needle* case involves specifically a dispute between NFL Properties and one of its licensees, the antitrust implications of any decision would affect the NHL and other professional sports leagues, many of which are similar to the NFL in structure, scope and business operation. Like the NFL, the NHL is structured as a legitimate joint venture created by its members to produce, promote and sell the fundamental League product, professional hockey games, and its constituent products, including League and team intellectual property, in competition with other sports leagues and entertainment providers. Significantly, professional sports leagues such as the NHL and NFL compete against a large multitude of "single firm" entertainment providers. However, these leagues often cannot compete with one another and against other entertainment providers as vigorously as they otherwise would because of the threat of litigation under Section 1, which prohibits agreements among competitors that unreasonably restrain trade. While courts have routinely found that the ongoing, internal business decisions of professional sports leagues are procompetitive, these leagues – as well as the federal courts –

have had to endure costly and time-consuming litigation under the rule of reason to reach this obvious conclusion. This should not be the law applicable to legitimate professional sports leagues with respect to the collective decisions of their governing boards, which are comprised of the teams to which the league has granted the right to operate a franchise to play and to vote on the manner in which league products are produced, promoted and sold. All of these decisions are inherently procompetitive because none of the league's output would exist but for the league and the collaboration among the teams.

The Nature and Scope of the NHL Joint Venture

The NHL is an unincorporated association organized as a joint venture among thirty Member Clubs that operates a professional hockey league. Founded in 1917 as a five-team league, the NHL has since expanded (and contracted) to its current membership. Each Club operates a professional hockey team in one of a diverse group of cities throughout the United States and Canada.

Significantly, no Member Club alone can produce NHL hockey or any of its constituent products. The NHL venture collectively creates the games, promotes the League and the sport, and seeks to maximize value for all of the Clubs collectively by marketing and selling constituent venture output such as intellectual property, broadcasting rights, sponsorships, advertising and merchandise.

As with the NFL, the economic value of an individual NHL Member Club as well as its intellectual property derives solely from its joint participation in the League and its role in producing – collectively with the twenty-nine other Clubs – NHL hockey. If a particular Club were not a Member of the NHL venture, its team, as well as its team-related intellectual property and products, would have no meaningful economic value. Consequently, it is not in the interest

of any Member Club for the NHL venture or other Clubs to fail, or to have any Club so financially weakened that it cannot effectively compete on the ice. Because of this economic interdependence, the collective efforts to market and sell NHL hockey and the venture's output are part of the very essence of the NHL enterprise.

Under the NHL Constitution and By-Laws, the affairs of the NHL are governed by the NHL Board of Governors, which is comprised of one representative from each of the thirty Member Clubs. The Board of Governors is charged with upholding and enforcing the NHL Constitution, By-Laws and other NHL rules and procedures. Pursuant to the NHL Constitution, the Board of Governors from time to time passes resolutions addressing various aspects of the League's business, including the licensing of League and team intellectual property and other activities related to League output. Over time, the Board of Governors has made the business judgment that NHL hockey and its constituent output are best promoted and sold through a combination of collective economic activity taken on behalf of all NHL Member Clubs and decentralized, individual economic operation by each Club in its exclusive home territory, which rights are granted under the NHL Constitution. It must be emphasized that every decision regarding the structure and organization of the NHL venture, including the delegation of certain economic operations to the individual Clubs, emanates from the organic documents of the League, the NHL Constitution and By-Laws, which can only be modified by appropriate vote of the NHL Board of Governors.

There can be no dispute that the NHL is a lawful joint venture created to produce NHL hockey. More importantly, the NHL – like the NFL – is also unquestionably a legitimate, all-encompassing venture created to maximize economic value among its members, and not simply for the scheduling, rules-setting and playing of professional hockey games. The legitimate scope

of the NHL joint venture necessarily includes the collective production, (and at times, independent) promotion and sale of NHL hockey and its constituent products – including League and team intellectual property and related merchandise – all of which derive their value from the League venture as a whole. Simply stated, there would be no NHL product – or licensing of NHL team intellectual property – without the ongoing cooperation of the Member Clubs.

The NHL Member Clubs are necessarily and inescapably, economically interdependent, and not independent. The economic significance of each Club derives singularly from its membership in the NHL. This interdependence and the production decisions of the Member Clubs acting through the Board of Governors create a competitively balanced professional sport on the ice, which generates fan, sponsor and intellectual property licensee interest in the NHL and economic value in the Member Clubs. It is impossible to separate the value of the demand for Club merchandise and other products from the NHL brand or from the joint venture among the Member Clubs. Nor, in economic reality, can the League venture itself be viewed as separate from the inherent, requisite coordination among the Member Clubs with respect to the production, promotion and sale of NHL hockey and all of the output encompassed within the venture. Consequently, it defies economic reality for the courts to view an agreement among the teams of a professional sports league such as the NHL as "represent[ing] a sudden joining of two independent sources of economic power previously pursuing separate interests." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

The Broad Entertainment Marketplace

The NHL seeks to promote demand for, and fan interest in, its product – NHL hockey – and to create, market and sell NHL hockey and its constituent products in competition with other producers and marketers of sports and entertainment products – e.g., NFL, NBA, MLB,

NASCAR, PGA Tour, MLS, professional wrestling and mixed martial arts, rodeo, circus, movies, television, etc. Indeed, that competition frames one of the core objectives of the League as set forth in Article 2.1(a) of the NHL Constitution: "To perpetuate hockey as one of the national games of the United States and Canada."

The thirty Member Clubs share a common interest in promoting the NHL, and each Club competes with other local sports teams and entertainment events for ticket sales, broadcast rights, merchandise sales, advertisers and sponsors. In this competitive marketplace, the NHL and its Member Clubs collectively possess very little, if any, market power; consumers, sponsors, advertisers, broadcasters and other suppliers and vendors have many substitute products from which to choose when spending their discretionary dollar across the broad scope of these products. Thus, with respect to internal League decisions regarding the League products, the Member Clubs are not competitors in the antitrust sense, and any allocation of decision-making authority between the League and individual teams poses no economic threat to competition or the consumer. In other words, to effectively compete in the broad entertainment market, the NHL Member Clubs must have the ability to jointly decide how best to market NHL hockey, including when to centralize and when to decentralize their economic activities.

Scrutiny Under Section 1 of the Sherman Act Inhibits the Ability of Professional Sports League Ventures to Compete in the Entertainment Market

The specter of treble damages exposure, significant litigation costs and burdensome discovery from rule of reason scrutiny under Section 1 of the Sherman Act has the potential to create a chilling effect on the structural and innovative decision-making of legitimate professional sports league joint ventures such as the NHL. This risk looms in connection with literally every internal disagreement regarding how best to make, promote and sell the League

venture's products, including its intellectual property. Consequently, rather than serving the marketplace and responding to consumer demand and competition from the vast array of other entertainment providers, as would any single firm entertainment provider, professional sports leagues are forced to calibrate their innovation and competitive vigor to account for the risk of protracted and costly rule of reason litigation.

Indeed, the NHL just spent more than a year in the midst of such litigation. In *Madison Square Garden, L.P. v. National Hockey League*, No. 07 Civ. 8455 (S.D.N.Y.), Madison Square Garden ("MSG"), the owner of the New York Rangers, initiated litigation against the League alleging violations of Section 1 regarding the allocation of certain venture rights collectively shared among the teams, as compared to those reserved to an individual team within its local territory. While MSG admitted that the NHL was a legitimate joint venture, the plaintiff nonetheless sought injunctive relief against a broad array of the NHL's basic business operations – all of which were the result of internal NHL Board of Governors' decisions – including with respect to the licensing of League and team intellectual property, national and local broadcasting arrangements, merchandising and marketing of League and team products, advertising and sponsorship regulations, and all new media activities. In the end, the case was resolved without decision from the court on the NHL's argument that the NHL Member Clubs are incapable of conspiring under Section 1 with respect to the alleged "restraints" at issue.

But, the effects of this case on the NHL's business were significant. The broad-ranging litigation resulted in an enormous expenditure of both monetary and human resources, a disruption to normal business operations, uncertainty for transactions with existing and potential business partners, and adverse effects on the League's relationship with its fans. The litigation sought to have a federal court insert itself into the NHL boardroom in order to review virtually

every one of the Clubs' output-related business decisions, the vast majority of which are decades old. If professional sports leagues are to be treated like the single firms against which they compete in the entertainment market, then Section 1 jurisprudence cannot grant teams that disagree with duly enacted business decisions of the league's governing board (such as MSG), licensees that had the ability to compete for an exclusive license (such as American Needle), or other customers, suppliers or vendors of a professional sports league a license that essentially mandates the intervention of federal courts to oversee and potentially second-guess every one of the league venture's basic business decisions as to how best to market and promote its products.

But, in the absence of clarification by the Supreme Court, federal courts will continue to assess these antitrust challenges to the fundamental business decisions of legitimate professional sports league ventures under the "full" rule of reason, typically resulting in massive and protracted fact discovery and expert testimony prior to summary adjudication or trial. And, while the vast majority of courts and cases have recognized these internal league decisions regarding the production, promotion and sale of the league products to be inevitably procompetitive and efficiency enhancing, so long as the allure of Section 1 treble damages and the potential antitrust hammer of injunctive relief remain available to disgruntled venture members and disappointed third parties, disruptive litigations will persist. In short, these league decisions should be left to the corporate boardroom and the competitive marketplace rather than the federal courts.

Conclusion

Section 1 of the Sherman Act should not be utilized to second-guess the ongoing, internal business decisions of a legitimate professional sports league joint venture whose products, including league and team intellectual property, would not even exist but for the venture's

formation. As legitimate joint ventures, professional sports leagues should be on a level playing field with other single firm entertainment providers when deciding how to produce, promote and sell the output created by and encompassed within the venture.