SOCIAL SCIENCES UNIVERSITY OF ANKARA

COMPETITION AND REGULATION STUDIES

The Concept of Undertakings: US Perspective

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APPLICATION AND RESEARCH CENTER FOR COMPETITION AND REGULATION

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Competition Law Research Papers:
Basic Concepts with Landmark Cases - No.2 Undertakings

The Concept of Undertakings: US Perspective

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1.Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953)

Times-Picayune Publishing Co. v. United States

No. 374

Argued March 11, 1953

Decided May 25, 1953

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

1.1. Syllabus

A publishing company owns and publishes in New Orleans a morning and an evening newspaper. Its sole competitor in the daily newspaper field is an independent evening newspaper. Classified and general display advertisers in the company's publications may purchase only combined insertions appearing in both its morning and evening papers, not in either separately. The United States brought a civil suit against the company under the Sherman Act, challenging the use of these "unit" contracts as an unreasonable restraint of trade in violation of § 1, and as an attempt to monopolize trade in violation of § 2.

1.2. Held

The record in this case does not establish the charged violations of § 1 and § 2 of the Sherman Act.

(a) The challenged activities of the company constitute interstate commerce within the meaning of the Sherman Act.

(b) A "tying" arrangement violates § 1 of the Sherman Act when a seller enjoys a monopolistic position in the market for the "tying" product and a substantial volume of commerce in the "tied" product is restrained. *International Salt Co. v. United States,* 332 U. S. 392.

(c) Since the charge against the company was not of tying sales to its readers, but only to buyers of general and classified space in its papers, dominance in the New Orleans newspaper advertising market, not in the readership, is the decisive factor in determining the legality of the company's unit plan.

(d) Section 2 of the Sherman Act outlaws monopolization of any "appreciable part" of interstate commerce, and § 1 bans unreasonable restraints irrespective of the amount of commerce involved.

(e) The essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand into another. Solely for testing the strength of that lever, the whole, and not part, of a relevant market must be assigned controlling weight.

(f) The company's morning newspaper did not enjoy in the newspaper advertising market in New Orleans that position of "dominance" which, together with a "not insubstantial" volume of trade in the "tied" product, would result in a Sherman Act offense under the rule of *International Salt Co. v. United States,* 332 U. S. 392.

(g) The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant "tying" product, resulting in economic harm to competition in the "tied" market.

(h) In the absence of evidence demonstrating two distinct commodities sold by the publishing company, neither the rationale nor the doctrines of the "tying" cases can dispose of the company's advertising contracts challenged here. They must therefore be tested under the Sherman Act's general prohibition on unreasonable restraints of trade.

(i) The inquiry to determine reasonableness under § 1 in this case must focus on the percentage of business controlled, the strength of the competition, and whether the challenged activity springs from business requirements or from purpose to monopolize.

(j) The factual data in the record in this case do not demonstrate that the company's advertising contracts unduly handicapped the existing competing newspaper.

(k) The Government has proved in this case neither actual unlawful effects nor facts which radiate a potential for future harm.

(l) While even otherwise reasonable trade arrangements must fall if conceived to achieve forbidden ends, the company's adoption of the unit plan in this case was predominantly motivated by legitimate business aims.

(m) Although emulation of a competitor's illegal plan does not justify an unlawful trade practice, that factor is relevant in determining intent, particularly when planned injury to that competitor is the crux of the charge of Sherman Act violation.

(n) Although long tolerated trade arrangements acquire no vested immunity under the Sherman Act, that consideration is relevant when monopolistic purpose, rather than effect, is to be gauged.

(o) The record in this case shows neither unlawful effects nor aims.

(p) The company's refusal to sell advertising space except *en bloc,* viewed alone, in the circumstances of this case, does not constitute a violation of the Sherman Act.

(q) A specific intent to destroy competition or to build monopoly is essential to guilt of an attempt to monopolize in violation of § 2 of the Sherman Act, and such intent is not established by the record in this case 105 F. Supp. 670, reversed.

1.3. Judgment

MR. JUSTICE CLARK delivered the opinion of the Court.

At issue is the legality under the Sherman Act of the Times-Picayune Publishing Company's contracts for the sale of newspaper classified and general display advertising space. The Company in New Orleans owns and publishes the morning Times-Picayune and the evening States. Buyers of space for general display and classified advertising in its publications may purchase only combined insertions appearing in both the morning and evening papers, and not in either separately.[1] The United States filed a civil suit under the Sherman Act, challenging these "unit" or "forced combination" contracts as unreasonable restraints of interstate trade, banned by § 1, and as tools in an attempt to monopolize a segment of interstate commerce, in violation of § 2.[2]After intensive trial of the facts, the District Court found violations of both sections of the law and entered a decree enjoining the Publishing Company's use of these unit contracts and related arrangements for the marketing of advertising space.[3] In No. 374, the Publishing Company appeals the merits of the District Court's holding under the Sherman Act; the Government, in No. 375, seeks relief broader than the District Court's decree. Both appeals come directly here under the Expediting Act.[4]

Testimony in a voluminous record retraces a history of over twenty-five years.[5] Prior to 1933, four daily newspapers served New Orleans. The Item Company, Ltd., published the Morning Tribune and the evening Item. The morning Times-Picayune was published by its present owners, and the Daily States Publishing Company, Ltd., an independent organization, distributed the evening States. In 1933, the Times-Picayune Publishing Company purchased the name, goodwill, circulation, and advertising contracts of the States, and continued to publish it evenings. The Morning Tribune of the Item Co., Ltd., suspended publication in 1941. Today, the Times-Picayune, Item, and States remain the sole significant newspaper media for the dissemination of news and advertising to the residents of New Orleans.

The Times-Picayune Publishing Company distributes the leading newspaper in the area, the Times-Picayune. The 1933 acquisition of the States did not include its plant and other physical assets; since the States' absorption, the Publishing Company has utilized facilities at a single

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[1] On Sundays the Times-Picayune Publishing Company also distributes the Times-Picayune-States. Under the existing unit plan, general display advertisers alternatively may insert in a combination of either daily paper with the Sunday paper. Additionally, the Company's unit plan for classified advertising excludes some advertising, known as "over-the-river" classified, placed from a small local area. As neither the parties nor the District Court attached any significance to these exceptions to the challenged unit rates for general display and classified advertising space in the Publishing Company's daily papers, we mention them solely for completeness.

[2] "Every 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 declared to be illegal. . . ."

15 U.S.C. § 1.

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

15 U.S.C. § 2.

> "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of [this Act], and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . ."

[3] 105 F. Supp. 670 (1952).

[4] 15 U.S.C. (Supp. V) § 29. Probable jurisdiction was noted on November 10, 1952.

[5] The printed record here comprises 1,644 pages of testimony and exhibits of various degrees of pertinence to the issues.

plant for printing and distributing the Times-Picayune and the States. Unified financial, purchasing, and sales administration, in addition to a substantial segment of personnel servicing both publications, results in further joint operation. Although both publications adhere to a single general editorial policy, distinct features and format differentiate the morning Times-Picayune from the evening States. 1950 data reveal a daily average circulation of 188,462 for the Times-Picayune, 114,660 for the Item, and 105,235 for the States. The Times-Picayune thus sold nearly as many copies as the circulation of the Item and States together.

Each of these New Orleans publications sells advertising in various forms. Three principal classes of advertising space are sold: classified, general, and local display. Classified advertising, known as "want ads," includes individual insertions under various headings; general, also called national, advertising typically comprises displays by national manufacturers or wholesale distributors of brand-name goods; local, or retail, display generally publicizes bargains by local merchants selling directly to the public. From 1924 until the Morning Tribune's demise in 1941, the Item Company sold classified advertising space solely on the unit plan by which advertisers paid a single rate for identical insertions appearing in both the morning and evening papers, and could not purchase space in either alone. After the Times-Picayune Publishing Company acquired the States in 1933, it offered general advertisers an optional plan by which space combined in both publications could be bought for less than the sum of the separate rates for each. Two years later, it adopted the unit plan of its competitor, the Item Co., Ltd., in selling space for classified ads. General advertisers in the Publishing Company's newspapers were also availed volume discounts since 1940, but had to combine insertions in both publications in order to qualify for the substantial discounts on purchases of more than 10,000 lines per year. Local display ads as early as 1935 were marketed under a still effective volume discount system, which, for determining the discount bracket in the States, permitted cumulation of linage placed in the Times-Picayune as well. In 1950, however, the Publishing Company eliminated all optional plans for general advertisers and instituted the unit plan theretofore applied solely to classified ads. As a result, since 1950, general and classified advertisers cannot buy space in either the Times-Picayune or the States alone, but must insert identical copy in both or none. Against that practice the Government levels its attack grounded on §§ 1 and 2 of the Sherman Act.

After the District Court at the outset denied the Government's motion for partial summary judgment holding the unit contracts *per se* violations of § 1, the case went to trial and eventuated in comprehensive and detailed findings of fact[6]: The Times-Picayune and the States, though published by a single publisher, were two distinct newspapers with individual format, news and feature content, reaching separate reader groups in New Orleans. The Times- Picayune, the sole local morning daily which for twenty years outdistanced the States and Item in circulation, published pages, and advertising linage, was the "dominant" newspaper in New Orleans; insertions in that paper were deemed essential by advertisers desiring to cover the local market. Although the local publishing field permits entry by additional competitors, the Item today is the sole effective daily competition which the Times-Picayune Publishing Company's two newspapers must meet. On the other hand their quest for advertising linage encounters the competition of other media, such as radio, television, and magazines. Nevertheless, the District Court determined, the adoption of unit selling caused a substantial rise in classified and general advertising linage placed in the States, enabling it to enhance its comparative position toward the Item. The District Court found, moreover, that the defendants had instituted the unit system, economically enforceable against buyers solely because of the Times-Picayune's "dominant" or

[6] *See* R. 1252-1261.

"monopoly position," in order to "restrain general and classified advertisers from making an untrammeled choice between the States and the Item in purchasing advertising space, and also to substantially diminish the competitive vigor of the Item.[7]"

On the basis of these findings, the District Judge held the unit contracts in violation of the Sherman Act. The contracts were viewed as tying arrangements which the Publishing Company, because of the Times-Picayune's "monopoly position," could force upon advertisers.[8] Postulating that contracts foreclosing competitors from a substantial part of the market restrain trade within the meaning of § 1 of the Act, and that effect on competition tests the reasonableness of a restraint, the court deemed a substantial percentage of advertising accounts in the New Orleans papers unlawfully "restrained."[9] Further, a violation of § 2 was found: defendants, by use of the unit plan, "attempted to monopolize that segment of the afternoon newspaper general and classified advertising field which was represented by those advertisers who also required morning newspaper space and who could not, because of budgetary limitations or financial inability, purchase space in both afternoon newspapers.[10]"

Injunctive relief was accordingly decreed. The District Court enjoined the Times-Picayune Publishing Company from (A) selling advertising space in any newspaper published by it "upon the condition, expressed or implied, that the purchaser of such space will contract for or purchase advertising space in any other newspaper published by it;" (B) refusing to sell advertising space separately in each newspaper which it publishes; (C) using its "dominant position" in the morning field "to sell any newspaper advertising at rates lower than those approximating either (1) the cost of producing and selling such advertising or (2) comparable newspaper advertising rates in New Orleans."

Hence these appeals.[11]

The daily newspaper, though essential to the effective functioning of our political system, has in recent years suffered drastic economic decline. A vigorous and dauntless press is a chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society. *Associated Press v. United States,* 326 U. S. 1, 326 U. S. 20 (1945); *cf. Wieman v. Updegraff,* 344 U. S. 183, 344 U. S. 191 (1952); *Joseph Burstyn, Inc. v. Wilson,* 343 U. S. 495, 343 U. S. 501 (1952). By interpreting to the citizen the policies of his government and vigilantly scrutinizing the official conduct of those who administer the state, an independent press stimulates free discussion and focuses public opinion on issues and

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[7] Fdg. 31; *cf.* 105 F. Supp. at 678.

[8] *Ibid.*

[9] *Id.* at 105 F. Supp. at 678-679.

[10] *Id.* at 105 F. Supp. at 681.

[11] In the light of this Court's broad interpretation of those relevant concepts, it is now beyond dispute that the activities challenged in this case are sufficiently "trade or commerce" relating to the interstate economy to fall under the wide sweep of the Sherman Act. *Cf., e.g., Lorain Journal Co. v. United States,*In the light of this Court's broad interpretation of those relevant concepts, it is now beyond dispute that the activities challenged in this case are sufficiently "trade or commerce" relating to the interstate economy to fall under the wide sweep of the Sherman Act. *Cf., e.g., Lorain Journal Co. v. United States,* 342 U. S. 143 (1951); *United States v. National Assn. of Real Estate Boards,* 339 U. S. 485 (1950); *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U. S. 219 (1948); *United States v. Frankfort Distilleries,* 324 U. S. 293 (1945); *United States v. South-Eastern Underwriters Assn.,* 322 U. S. 533 (1944); *Wickard v. Filburn,* 317 U. S. 111 (1942); *Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.,* 293 U. S. 268 (1934).

officials as a potent check on arbitrary action or abuse. *Cf. Grosjean v. American Press Co.,* 297 U. S. 233, 297 U. S. 250 (1936); *Near v. Minnesota ex rel. Olson,* 283 U. S. 697, 283 U. S. 716-718 (1931). The press, in fact, "serves one of the most vital of all general interests: the dissemination of news from as may different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many, this is, and always will be, folly, but we have staked upon it our all.[12]"

Yet today, despite the vital task that in our society the press performs, the number of daily newspapers in the United States is at its lowest point since the century's turn: in 1951, 1,773 daily newspapers served 1,443 American cities, compared with 2,600 dailies published in 1,207 cities in the year 1909.[13] Moreover, while 598 new dailies braved the field between 1929 and 1950, 373 of these suspended publication during that period -- less than half of the new entrants survived.[14] Concurrently, daily newspaper competition within individual cities has grown nearly extinct: in 1951, 81% of all daily newspaper cities had only one daily paper; 11% more had two or more publications, but a single publisher controlled both or all.[15] In that year, therefore, only 8% of daily newspaper cities enjoyed the clash of opinion which competition among publishers of their daily press could provide.

Advertising is the economic mainstay of the newspaper business. Generally, more than two-thirds of a newspaper's total revenues flow from the sale of advertising space. Local display advertising brings in about 44% of revenues; general -- 14%; classified -- 13%; circulation, almost the rest.[16] Obviously, newspapers must sell advertising to survive. And while newspapers in 1929 garnered 79% of total national advertising expenditures, by 1951, other mass media had cut newspapers' share down to 34.7%.[17] When the Times-Picayune Publishing Company, in 1949, announced its forthcoming institution of unit selling to general advertisers, about 180 other publishers of morning-evening newspapers had previously adopted the unit plan.[18] Of the 598 daily newspapers which broke into publication between 1929 and 1950, 38% still published when that period closed. Forty-six of these entering dailies, however, encountered the competition of established dailies which utilized unit rates; significantly, by 1950, of these 46, 41 had collapsed.[19] Thus, a newcomer in the daily newspaper business could

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[12] Learned Hand, J., in *United States v. Associated Press,* 52 F. Supp. 362, 372 (1943), *aff'd,* 326 U. S. 326 U.S. 1 (1945).

[13] Editor & Publisher 1952 International Yearbook Number, p. 17; Comment, Local Monopoly in the Daily Newspaper Industry, 61 Yale L.J. 948, 949 (1952), a comprehensive industry study. *See also* Ray, Economic Forces as Factors in Newspaper Concentration, 29 Journ.Q. 31 (1952); Ray, Competition in the Newspaper Industry, 15 J.Marketing 444 (1951); Nixon, Concentration and Absenteeism in Daily Newspaper Ownership, 22 Journ.Q. 97 (1945).

[14] American Newspaper Publishers Association, Newspaper Mortality Since 1929 (Bulletin No. 5203, July 27, 1950). Demise of individual newspapers occurred mainly through merger with other publications or outright suspension of publication.

[15] 61 Yale L.J. at 950.

[16] *Id.* at 977. Some small dailies also derive income from miscellaneous sources such as job printing. In this case, the District Court found that advertising and circulation accounted for approximately 98% of New Orleans newspapers' total revenues. Fdg. 27.

[17] Mass Communications (Schramm ed.1949), 549; Printers' Ink, August 8, 1952, p. 35. *And see* Borden, Taylor and Hovde, National Advertising in Newspapers, 33 *et seq.* (1946).

[18] Fdg. 26.

[19] Comparison between Bulletin, note 14 *supra,* at tables 2 and 3, and Editor & Publisher International Yearbook Numbers 1929 to 1953.

calculated his chances of survival as 11% in cities where unit plans had taken hold. Viewed against the background of rapidly declining competition in the daily newspaper business, such a trade practice becomes suspect under the Sherman Act.

Tying arrangements, we may readily agree, flout the Sherman Act's policy that competition rule the marts of trade. Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources, and thus direct the course its economic development will take. Yet "[t]ying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California v. United States,* 337 U. S. 293, 337 U. S. 305 (1949).[20] By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the "tied" product's merits and insulates it from the competitive stresses of the open market. But any intrinsic superiority of the "tied" product would convince freely choosing buyers to select it over others, anyway. Thus,"[i]n the usual case, only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one."

Conversely, the effect on competing sellers attempting to rival the "tied" product is drastic: to the extent the enforcer of the tying arrangement enjoys market control, other existing or potential sellers are foreclosed from offering up their goods to a free competitive judgment; they are effectively excluded from the marketplace.

For that reason, tying agreements fare harshly under the laws forbidding restraints of trade. *Federal Trade Commission v. Gratz,* 253 U. S. 421 (1920), decided that a complaint which charged a seller with conditioning his sale of steel ties on purchases of jute bagging did not, because it failed to allege his monopolistic purpose or market control, state an actionable "unfair method of competition" within the meaning of § 5 of the Federal Trade Commission Act.[21] *United Shoe Machinery Corp. v. United States,* 258 U. S. 451 (1922),[22] held, however, that a seller occupying a "dominant position" in the shoe machinery industry, without more, violated § 3 of the Clayton Act by contracts tying to the lease of his machines the purchase of other types of machinery and incidental supplies.[23] Potential lessening of competition, requisite

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[20] *See* Miller, Unfair Competition, 199 *et seq.* (1941); Lockhart and Sacks, The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act, 65 Harv.L.Rev. 913, 942 *et seq.* (1952); Note, 49 Col.L.Rev. 241, 246 (1949); *cf.* Edwards, Maintaining Competition, 175-178 (1949); Watkins, Public Regulation of Competitive Practices in Business Enterprise, 220 *et seq.* (1940).

[21] "Unfair methods of competition in commerce . . . are hereby declared unlawful." 15 U.S.C. § 45. In the *Gratz* case, decided on a point of pleading, the Court observed that the

"complaint contains no intimation that Warren, Jones & Gratz did not properly obtain their ties and bagging as merchants usually do; the amount controlled by them is not stated; nor is it alleged that they held a monopoly of either ties or bagging or had ability, purpose or intent to acquire one."

253 U.S. at 253 U. S. 428. "All question of monopoly or combination," therefore, was "out of the way." *Ibid.*

[22] *United States v. United Shoe Machinery Co.,* 247 U. S. 32 (1918), is not relied on by the parties.

[23] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares,

to illegality under § 3, was automatically inferred from the seller's "dominating position." *Id.* At 258 U. S. 457-458; *Federal Trade Commission v. Sinclair Refining Co.,* 261 U. S. 463 (1923), extended the principles of *Gratz* to the Clayton Act; purchases of gasoline were tied to the lease of pumps at nominal rates, but neither monopolistic purpose or power nor potential harm to competition was shown. And, in any event, the "tie" was voluntary, since buyers could take the gasoline without taking the pumps. *Id.* at 261 U. S. 474-475. Indeed, the arrangement merely prevented lessees from dispensing other types of gasoline through the lessor's brand pumps, and was thus viewed as a means of protecting the goodwill of the lessor's branded gas. *See also Pick Mfg. Co. v. General Motors Corp.,* 299 U. S. 3 (1936).[24] The bounds of that doctrine were drawn by *International Business Machines Corp. v. United States,* 298 U. S. 131 (1936). When competing sellers could meet the specifications of the "tied" product, in that case tabulating cards hitched by contract to the sale of computing machines, § 3 of the Clayton Act outlawed the tying arrangement because the "substantial" amount of commerce in the "tied" product indicated potential lessening of competition as a result. *Id.* at 289 U. S. 136, 139.[25]

With its decision in *International Salt Co. v. United States,* 332 U. S. 392 (1947), this Court wove the strands of past cases into the law's present pattern. There, leases of patented machines for dispensing industrial salt were conditioned on the lessees' purchase of the lessor's salt. A unanimous Court affirmed summary judgment adjudicating the arrangement unlawful under § 3 of the Clayton Act, and § 1 of the Sherman Act as well. The patents, on their face, conferred monopolistic, albeit lawful, market control, and the volume of salt affected by the tying practice was not "insignificant or insubstantial." *Id.* at 322 U. S. 396. Clayton Act violation followed as a matter of course from the doctrines evolved in prior "tying" cases. *See also Standard Oil Co. of California v. United States,* 337 U. S. 293, 337 U. S. 304-306, 337 U. S. 305, notes 7-8. And since the Court deemed it "unreasonable *per se* to foreclose competitors from any substantial market," neither could the tying arrangement survive § 1 of the Sherman Act. 332 U.S. at 332 U. S. 396. That principle underpinned the decisions in the *Movie* cases, holding unlawful the "block-booking" of copyrighted films by lessors, *United States v. Paramount Pictures,* 334 U. S. 131, 334 U. S. 156-159 (1948), as well as a buyer's wielding of lawful monopoly power in one market to coerce concessions that handicapped competition facing him in another. *United States v. Griffith,* 334 U. S. 100, 334 U. S. 106-108 (1948). From the "tying" cases, a perceptible pattern of illegality emerges: when the seller enjoys a monopolistic position in the market for the "tying" product, or if a substantial volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because, for even a lawful monopolist, it is "unreasonable *per se* to foreclose competitors from any

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merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

15 U.S.C. § 14.

That section relates to simple exclusive dealing arrangements, *cf., e.g., Standard Oil Co. of California v. United States,* 337 U. S. 293 (1949), not involved in this case, as well as to tying sales. For purposes of the Clayton Act, the requisite condition not to deal in the goods of another may be inferred from the practical effects of the tying arrangement. *International Business Machines Corp. v. United States,* 298 U. S. 131, 298 U. S. 135 (1936); *Judson L. Thomson Mfg. Co. v. Federal Trade Commission,* 150 F.2d 952, 956 (1945); *Signode Steel Strapping Co. v. Federal Trade Commission,* 132 F.2d 48, 52 (1942); *Lord v. Radio Corp. of America,* 24 F.2d 565, 568 (1928). *Cf. Federal Trade Commission v. Sinclair Refining Co.,* 261 U. S. 463, 261 U. S. 473-474 (1923).

[24] *Aff'g,* per curiam, 80 F.2d 641 (1935).

[25] *Thomson Mfg. Co. v. Federal Trade Commission,* 150 F.2d 952, 958 (1945).

substantial market," a tying arrangement is banned by § 1 of the Sherman Act whenever both conditions are met.[26] In either case, the arrangement transgresses § 5 of the Federal Trade Commission Act, since minimally that section registers violations of the Clayton and Sherman Acts. *Federal Trade Commission v. Motion Picture Advertising Service Co.,* 344 U. S. 392, 344 U. S. 395 (1953); *Federal Trade Commission v. Cement Institute,* 333 U. S. 683, 333 U. S. 690-694 (1948); *Fashion Originators' Guild v. Federal Trade Commission,* 312 U. S. 457, 312 U. S. 463 (1941).

In this case, the rule of *International Salt* can apply only if both its ingredients are met. The Government, at the outset, elected to proceed not under the Clayton, but the Sherman Act.[27] While the Clayton Act's more specific standards illuminate the public policy which the Sherman Act was designed to subserve, *e.g., 334 U. S. S. 610* v. Columbia Steel Co., *334 U. S. 495, 334 U. S. 507, note 7 (1948);* Fashion Originators' Guild v. Federal Trade Commission, *312 U. S. 457, 312 U. S. 463 (1941), the Government here must measure up to the criteria of the more stringent law.* See Standard Oil Co. of California v. United States, *337 U. S. 293, 337 U. S. 297, 311-314 (1949);* United Shoe Machinery Corp. v. United States, 258 U. S. 451, 258 U. S. 459-460 (1922).

Once granted that the volume of commerce affected was not "insignificant or insubstantial,"[28] the Times-Picayune's market position becomes critical to the case. The District Court found that the Times-Picayune occupied a "dominant position" in New Orleans; the sole morning daily in the area, it led its competitors in circulation, number of pages, and advertising linage. But every newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect, that readership is, in turn, sold to the buyers of advertising space. This case concerns solely one of these markets. The Publishing Company stands accused not of tying sales to its readers, but only to buyers of general and classified space in its papers. For this reason, dominance in the advertising market, not in readership, must be decisive in gauging the legality of the Company's unit plan. *Cf. Lorain Journal Co. v. United States,* 342 U. S. 143, 342 U. S. 149-150, 342 U. S. 152-153 (1951); *United States v. Paramount Pictures, supra,* 334 U.S. at 334 U. S. 166-167; *Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.,* 293 U. S. 268, 293 U. S. 278-279 (1934).

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[26] Dealing with a monopolization offense under Sherman Act § 2, a charge not raised or considered here, the Court in *United States v. Griffith,* 334 U. S. 100, 334 U. S. 106-108 (1948), pointedly observed:

> *"Anyone who owns and operates the single theater in a town, or who acquires the exclusive right to exhibit a film, has a monopoly in the popular sense. But he usually does not violate § 2 of the Sherman Act unless he has acquired or maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under § 1. . . . [T]he use of monopoly power, however, lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful. . . . If monopoly power can be used to beget monopoly, the Act becomes a feeble instrument indeed."*

See also Levi, A Two-Level Anti-Monopoly Law, 47 Northwestern U.L.Rev. 567, 580-585 (1952).

[27] On oral argument here, the Government explanatorily referred to an early informal Federal Trade Commission opinion to the effect that advertising space was not a "commodity" within the meaning of § 2 of the Clayton Act (*cf.* note 23 *supra*). 81 Cong.Rec. App. 2336-2337. *Cf. Fleetway, Inc. v. Public Service Interstate Transp. Co.,* 72 F.2d 761 (1934); *United States v. Investors Diversified Services,* 102 F. Supp. 645 (1951). We express no views on that statutory interpretation. *Compare* note 11 *supra.*

[28] The District Court in this case did not find the volume of commerce affected by the restraint, but determined solely that a substantial percentage of advertising accounts in New Orleans papers was restrained by the Publishing Company's unit plan. Fdg. 30; *cf.* Fdg. 22. In view of our disposition of this case, we may assume, though not deciding, that the Sherman Act's substantiality test was met.

The "market," as most concepts in law or economics, cannot be measured by metes and bounds. Nor does the substance of Sherman Act violations typically depend on so flexible a guide. Section 2 outlaws monopolization of any "appreciable part" of interstate commerce, and, by § 1, unreasonable restraints are banned irrespective of the amount of commerce involved. *Lorain Journal Co. v. United States, supra,* at 342 U. S. 151, note 6; *United States v. Paramount Pictures, supra,* at 334 U. S. 173; *United States v. Yellow Cab Co.,* 332 U. S. 218, 332 U. S. 225-226 (1947).[29] But the essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next. Solely for testing the strength of that lever, the whole, and not part, of a relevant market must be assigned controlling weight. *Cf. United States v. Columbia Steel Co., supra,* at 334 U. S. 524.

We do not think that the Times-Picayune occupied a "dominant" position in the newspaper advertising market in New Orleans. Unlike other "tying" cases where patents or copyrights supplied the requisite market control, any equivalent market "dominance" in this case must rest on comparative marketing data.[30] Excluding advertising placed through other communications media and including general and classified linage inserted in all New Orleans dailies, as we must since the record contains no evidence which could circumscribe a broader or narrower "market" defined by buyers' habits or mobility of demand,[31] the Times-Picayune's sales of both general and classified linage over the years hovered around 40%.[32] Obviously no magic inheres in numbers; "The relative effect of percentage command of a market varies with the setting in which that factor is placed." *United States v. Columbia Steel Co., supra,* at 334 U. S. 528; *cf. United States v. National Lead Co.,* 332 U. S. 319, 332 U. S. 352-353 (1947). If each of the New Orleans publications shared equally in the total volume of linage, the Times-Picayune would have sold 33 1/2%; in the absence of patent or copyright control, the small existing increment in the circumstances here disclosed[33] cannot confer that market "dominance" which,

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[29] *See also United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 310 U. S. 224, note 59 (1940); *Gamco, Inc. v. Providence Fruit & Produce Bldg.,* 194 F.2d 484 (1952); *White Bear Theater Corp. v. State Theater Corp.,* 129 F.2d 600 (1942).

[30] "A patent, . . . although in fact, there may be many competing substitutes for the patented article, is at least *prima facie* evidence of [market] control." *Standard Oil Co. of California v. United States,* 337 U. S. 293, 337 U. S. 307 (1949); *cf. id.* at 337 U. S. 303; *Oxford Varnish Corp. v. Ault & Wiborg Corp.,* 83 F.2d 764, 766 (1936); Miller, Unfair Competition, 199 (1941); Lockhart and Sacks, note 20 *supra,* at 943-944; Note, 49 Col.L.Rev. 241, 243 (1949).

[31] For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose "cross-elasticities of demand" are small. Useful to that determination is, among other things, the trade's own characterization of the products involved. The advertising industry and its customers, for example, markedly differentiate between advertising in newspapers and in other mass media. *See, e.g.,* Frey, Advertising (2d ed.1953), cc. 12, 15; Duffy, Advertising Media and Markets (2d ed.1951), cc. 3, 4; Hepner, Effective Advertising, c. 20 (1949); Borden, Taylor and Hovde, National Advertising in Newspapers, *passim* (1946); Sandage, Advertising Theory and Practice (3d ed.1948), cc. XX, XXI.

[32] *See* tables, notes 37 and <="" a="" style="box-sizing: border-box;">| 37 and <="" a="" style="box-sizing: border-box;">S. 594fn39|>39, *infra.*

[33] *Cf., e.g.,* situations where several competitors together controlling a large share of the market acting individually or in concert adopt an identical trade practice. *See Federal Trade Commission v. Motion Picture Advertising Service Co.,* 344 U. S. 392 (1953); *Signode Steel Strapping Co. v. Federal Trade Commission,* 132 F.2d 48, 54 (1942). And obviously, if a producer controlling an even lesser share than here is ringed by numerous smaller satellites together accounting for the rest, his mastery of the market is greater than were he facing fierce rivalry of other large sellers. *Cf. United States v. National Lead*

in conjunction with a "not insubstantial" volume of trade in the "tied" product, would result in a Sherman Act offense under the rule of *International Salt.*

Yet another consideration vitiates the applicability of *International Salt.* The District Court determined that the Times-Picayune and the States were separate and distinct newspapers, though published under single ownership and control. But that readers consciously distinguished between these two publications does not necessarily imply that advertisers bought separate and distinct products when insertions were placed in the Times-Picayune and the States. So to conclude here would involve speculation that advertisers bought space motivated by considerations other than customer coverage; that their media selections, in effect, rested on generic qualities differentiating morning from evening readers in New Orleans. Although advertising space in the Times-Picayune, as the sole morning daily, was doubtless essential to blanket coverage of the local newspaper readership, nothing in the record suggests that advertisers viewed the city's newspaper readers, morning or evening, as other than fungible customer potential.[34] We must assume, therefore, that the readership "bought" by advertisers in the Times-Picayune was the self-same "product" sold by the States and, for that matter, the Item.

The factual departure from the "tying" cases then becomes manifest. The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant "tying" product, resulting in economic harm to competition in the "tied" market. Here, however, two newspapers under single ownership at the same place, time, and terms sell indistinguishable products to advertisers; no dominant "tying" product exists (in fact, since space in neither the Times-Picayune nor the States can be bought alone, one may be viewed as "tying" as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same. *Cf. Standard Oil Co. (Indiana) v. United States,* 283 U. S. 163, 283 U. S. 176-178 (1931); *United States v. Aluminum Co. of America,* 148 F.2d 416, 424 (1945); *compare Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.,* 293 U. S. 268, 293 U. S. 278-280 (1934). In short, neither the rationale nor the doctrines evolved by the "tying" cases can dispose of the Publishing Company's arrangements challenged here.

The Publishing Company's advertising contracts must thus be tested under the Sherman Act's general prohibition on unreasonable restraints of trade. For purposes of § 1,

> *"[a] restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se."*

United States v. Columbia Steel Co., 334 U. S. 495, 334 U. S. 522 (1948). Since the requisite intent is inferred whenever unlawful effects are found, *United States v. Griffith,* 334 U. S. 100, 334 U. S. 105, 334 U. S. 108 (1948); *United States v. Patten,* 226 U. S. 525, 226 U. S. 543 (1913), and the rule of *International Salt* is out of the way, the contracts may yet be banned by § 1 if unreasonable restraint was either their object or effect. Although these unit contracts

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Co., 332 U. S. 319, 332 U. S. 346-348, 332 U. S. 352-353 (1947); *United States v. Columbia Steel Co.,* 334 U. S. 495, 334 U. S. 527-528 (1948). Fewness of sellers, on the other hand, may facilitate concerted action. *See* Fellner, Competition Among the Few, *passim* (1949); Stigler, The Theory of Price, 228 *et seq.* (Rev. ed.1952.)

[34] In fact, a survey (R. 1484) in 1940 disclosed that 27.6% of States home carrier subscribers subscribed to the Times-Picayune by home carrier as well.

do not in express terms preclude buyers from purchasing additional space in competing newspapers, the Act deals with competitive realities, not words. *United States v. Masonite Corp.,* 316 U. S. 265, 316 U. S. 280 (1942). Thus, while we "do not think this concession relieves the contract of being a restraint of trade, albeit a less harsh one" than otherwise, *International Salt Co. v. United States,* 332 U. S. 392, 332 U. S. 397 (1947); *see United States v. Paramount Pictures,* 334 U. S. 131, 334 U. S. 156-158 (1948),[35] the "open end" feature of the contracts here minimizes the restraint. For our inquiry to determine reasonableness under § 1 must focus on "the percentage of business controlled, the strength of the remaining competition, [and] whether the action springs from business requirements or purpose to monopolize." 334 U.S. at 334 U. S. 527; *compare Standard Oil Co. of California v. United States,* 337 U. S. 293, 337 U. S. 312-313 (1949).

The record is replete with relevant statistical data. The volume discounts available to local display buyers were not held unlawful by the District Court, and the Government does not assail the practice here. That segment of advertising linage, by far the largest revenue producer of the three linage classes sold by all New Orleans newspapers,[36] is thus eliminated from consideration.

Consequently, only classified and display linage data can be scrutinized for possible forbidden effects.

Classified. -- The Item Company, then publishing the Morning Tribune and the evening Item, utilized unit rates for classified advertising in its papers in the year the Times-Picayune Company absorbed the evening States. In 1933, the Item Company's classified linage totaled 2.72 million, compared with the Times-Picayune Company's total of 2.12 million.[37] Equalizing the competitive relationship, the Times-Picayune Company, in 1935, countered by adopting the unit-rate system of its rival. In that year, the Times-Picayune sold 2.84 million, to the Item Company's 2.35 million, lines. While thus evenly matched, the Times-Picayune over the years steadily increased its lead. That Company sold 3.52 million lines in 1938, and 3.76 in 1939; the

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[35] In *International Salt,* the lessor's tying arrangement permitted the lessee's purchase of the "tied" product in the open market whenever the lessor declined to match the going market price. That, this Court thought, "does not avoid the stifling effect of the agreement on competition. The [lessor] had at all times a priority on the business at equal prices." 332 U.S. at 332 U. S. 397. And the "block-booking" found unlawful in the *Paramount* case did not, of course, impose any express restrictions on licensees desiring to acquire additional films elsewhere. In fact, by specifying that a particular amount of the "tied" product be taken and that amount covers the buyer's total requirements, a tying arrangement may achieve a result equivalent to total exclusion of other sellers without the formality of expressly saying so. *See also* note 23 *supra.*

[36] *See* 61 Yale L.J. at 977, n. 162; note 43 *infra.*

[37] These and the following classified advertising data are derived from the table below (R. 1448):

Classified Advertising Linage Carried by New Orleans Daily Newspapers, 1933-1950

Times- Picayune States Item Tribune Morning Evening Evening Morning

1933 1,484,740 633,332 1,369,729 1,349,577, 1934 1,344,479 642,347 1,185,832 1,142,753, 1935 1,490,316 1,344,849 1,180,850 1,169,733, 1936 1,789,838 1,786,773 1,308,983 1,298,880, 1937 1,832,728 1,834,845 1,252,840 1,228,357, 1938 1,761,830 1,759,477 1,113,160 1,113,115, 1939 1,881,673 1,882,970 1,097,277 1,086,777, 1940 1,954,535 1,955,117 1,277,140 *1,248,712, 1941 2,085,566 2,083,812 1,231,540, 1942 1,954,870 1,957,057 910,275, 1943 2,849,190 2,843,097 1,241,787, 1944 3,021,616 3,027,236 1,857,741, 1945 3,246,566 3,265,686 1,899,926, 1946 3,930,313 4,083,664 2,181,640, 1947 4,353,943 4,507,427 2,210,193, 1948 4,501,599 4,664,403 2,437,268, 1949 4,271,302 4,420,193 2,232,617, 1950 4,357,713 4,549,238 2,166,518. * Morning Tribune discontinued (January 1941).

Item Company totaled 2.23 and 2.18, respectively. In fact, the Times-Picayune Publishing Company in every year but 1938 advanced its linage total; since 1936, the Item Company's totals declined yearly, solely excepting 1940.

At the end of that year, the Item Company's Morning Tribune suspended publication;[38] a new local competitive structure took form. In that first year, the Item, as sole competitor of the Times-Picayune Company's two dailies, sold 1.23 million lines of classified linage, compared with 2.09 million for the Times-Picayune and 2.08 for the States; the Item's share thus accounted for roughly 23% of the total. Ten years later the Item's share had declined to approximately 20%; in 1950, it sold 2.17 million lines, compared with the Times-Picayune Publishing Company's total linage of 8.91 million, comprising 4.36 million for the Times-Picayune and 4.55 for the States. Measured against the evening States alone, the Item's percentage attrition is comparable. In 1941, it sold 37% of the two evening papers' total linage; by 1950, that share had declined to 32%. Thus, over a period of ten years' competition while facing its morning-evening rival's compulsory unit rate, the New Orleans Item's share of the New Orleans classified linage market declined 3%; viewed solely in relation to its evening competitor, its percentage loss amounted to 5%.

General Display. -- Because the unit rate applicable to general display linage was instituted to become effective 1950, only one year's comparative data are in the record. In 1949, general display linage in all New Orleans dailies totaled 6.84 million, comprising 3.04 million lines in the Times-Picayune, 1.93 million in the States, and 1.87 million in the Item; the Publishing Company ran 73% of the total.[39] One year's experience with the unit rate for general display advertising showed a New Orleans total volume of 7.37 million lines, roughly apportioned as 2.96 million in the Times-Picayune, 2.55 million in the States, and 1.85 million in the Item; the Publishing Company's share had risen to 75%. Compared with the States alone, the Item in 1949 accounted for 49% of the two evening papers' total; in 1950, that had declined to 42%.

In that year, a reallocation of advertising accounts also took place.[40] In 1949, 23.7% of general display advertisers utilized the Times-Picayune Publishing Company's publications exclusively; one year later, that percentage had risen to 41%. Concurrently, however, accounts advertising solely in the Times-Picayune declined from 22.7% to 5.8%, and sole advertisers in the States dropped from 2% to .4%. On the other hand, in 1950, 10.6%, compared with 9.6% the year before, of general display accounts inserted solely in the Item, and the segment of

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[38] This record contains no evidence explaining the Morning Tribune's demise. We must therefore assume that the Times-Picayune Publishing Company's challenged trade practices are in no way linked to the suspension of that competing daily newspaper.

[39] All general display advertising data are derived from the table below (R. 1450):

General Display Advertising Linage Carried by New Orleans Daily Newspapers, 1949-1950

Times-Picayune States Item Morning Evening Evening

1949 -- Monthly Totals: Jan. 190,708 130,761 110,940, Feb. (Unit rate became effective on Feb. 1, 1950.) 231,656 158,252 154,008, March 305,782 205,740 183,383, April 295,603 179,186 164,288, May 282,080 171,509 177,725, June 275,249 162,481 165,681, July 227,896 136,380 133,669, Aug. 180,019 118,031 124,768, Sept. 248,078 154,362 151,187, Oct. 291,072 200,552 181,548, Nov. 281,356 173,898 157,516, Dec. 228,701 143,780 165,741. Total 3,038,200 1,934,932 1,870,454, *1950 -- Monthly Totals:* Jan. 237,517 171,564 176,184, Feb. 229,367 166,536 167,309, March 283,568 210,413 164,734, April 262,997 199,803 162,523, May 276,036 229,662 154,058, June 260,248 222,657 170,420, July 213,550 194,800 121,387, Aug. 181,522 176,400 115,256, Sept. 241,167 221,574 147,051, Oct. 300,757 293,723 158,052, Nov. 265,956 266,869 168,339, Dec. 211,735 196,794 148,630, Total 2,964,420 2,550,795 1,853,943.

[40] Data are derived from tables and graphs at R. 1453-1456.

advertising accounts inserting in all three publications rose from 30.4% in 1949 to 39% in the following year. In fact, while in 1949 only 51.6% of general display accounts utilized the Item either exclusively or in conjunction with other New Orleans dailies, one year later 52.8% of the accounts so patronized the Item.

The record's factual data, in sum, do not demonstrate that the Publishing Company's advertising contracts unduly handicapped its extant competitor, the Item. In the early years, when four-cornered newspaper competition for classified linage prevailed in New Orleans, the ascendancy of the Publishing Company's papers over their morning-evening competitor soon became manifest. With unit plan pitted on even terms against unit plan, over the years the local market pattern steadily evolved from the Times-Picayune Company's rise and the Item Company's decline. With the Morning Tribune's demise in 1940, the market shrank, but the pattern remained. The Item continued its gradually declining share of the market, though, in fact, the Times-Picayune's unit rate for "classified" between 1940 and 1950 coincided with a reversal of the trend marking the Item's absolute volume decline. Even less competitive hurt is discernible from the Publishing Company's unit rate for general display linage. True, in the single recorded year of its existence, the combination plan did diminish by 7% the Item's share of linage if measured solely against the States. Versus the linage sold by the Publishing Company in its two newspapers, however, the Item's share of the total market declined but 2%. That apparent incongruity is simply explained: compared with 1949 monthly volume data, the unit rate in each of the 11 months of its operation in 1950 drew linage away from the Times-Picayune and toward the States.[41] In effect, the Publishing Company's unit plan merely reallocated the linage sold by its two constituent papers. And not only did the unit plan take from the Times-Picayune and give to the States. Apparently it also led more advertisers to insert in the Item, which sold general display space to a proportionately greater number of accounts in 1950 than in 1949.

Meanwhile, the Item flourishes. The ten years preceding this trial marked its more than 75% growth in classified linage. Between 1946 and 1950, its general display volume increased almost 25%. The Item's local display linage is twice the equivalent linage in the States.[42] And 1950, the Item's peak year for total linage comprising all three classes of advertising, marked its greatest circulation in history as well. In fact, since in newspapers of the Item's circulation bracket general display and classified linage typically provide no more than 32% of total revenues, the demonstrated diminution of its New Orleans market shares in these advertising classes might well not have resulted in revenue losses exceeding 1%.[43] Moreover, between 1943 and 1949, the Item earned over.$1.4 million net before taxes, enabling its then publisher in the

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[41] *See* table at note 39 *supra.*

[42] Media Records, 11 (1950).

[43] For the average daily newspaper of greater than 100,000 circulation, a 1951 industry survey revealed the following typical percentage sources of total revenues (Editor & Publisher, April 12, 1952, p. 74):

Local display 37.24%
General display 16.98%
Classified advertising. . . . 14.60%
Circulation 29.47%

A 3% decline in classified advertising, accounting for 14.6% of total revenues, and a 2% loss in general display, responsible for 16.98% of revenues, would amount to a total revenue loss of .78%. *Compare Federal Trade Commission v. Morton Salt Co.,* 334 U. S. 37 (1948), where the composition of a buyer's inventory necessitated protection against competitive harm in the purchasing of even a fractional part of his stock in trade. *Id.* at 334 U. S. 49.

latter year to transfer his equity at a net profit of $600,000. The Item, the alleged victim of the Times-Picayune Company's challenged trade practices, appeared, in short, to be doing well.

The record in this case thus does not disclose evidence from which demonstrably deleterious effects on competition may be inferred. To be sure, economic statistics are easily susceptible to legerdemain, and only the organized context of all relevant factors can validly translate raw data into logical cause and effect. But we must take the record as we find it, and hack through the jungle as best we can. It may well be that any enhancement of the Times-Picayune's market position during the period of the assailed arrangements resulted from better service or lower prices, or was due to superior planning initiative or managerial skills;[44] conversely, it is equally possible that, but for the adoption of the unit contracts, its market position might have turned for the worse. Nor can we be certain that the challenged practice, though not destructive of existing competition, did not abort yet unborn competitors equally within the concern of the Sherman Act. *See United States v. Griffith,* 334 U. S. 100, 334 U. S. 107 (1948); *American Tobacco Co. v. United States,* 1946, 328 U. S. 781, 328 U. S. 814; *Associated Press v. United States,* 326 U. S. 1, 326 U. S. 13 (1945). But this suit was not brought to adjudicate a trade practice as banned by specific statutory prohibitions which by a clearly defined public policy dispense with difficult standards of economic proof. *Compare Standard Oil Co. of California v. United States,* 337 U. S. 293, 337 U. S. 311-313 (1949). And the case has not met the *per se* criteria of Sherman Act § 1 from which proscribed effect automatically must be inferred. *Cf. International Salt Co. v. United States,* 332 U. S. 392 (1947). Under the broad general policy directed by § 1 against unreasonable trade restraints, guilt cannot rest on speculation; the Government here has proved neither actual unlawful effects nor facts which radiate a potential for future harm.

While even otherwise reasonable trade arrangements must fall if conceived to achieve forbidden ends, legitimate business aims predominantly motivated the Publishing Company's adoption of the unit plan. Because the antitrust laws strike equally at nascent and accomplished restraints of trade, monopolistic designs, as well as results, are reached by the prohibitions of the Sherman Act. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 310 U. S. 224, note 59 (1940); *United States v. Trenton Potteries Co.,* 273 U. S. 392, 273 U. S. 402 (1927). The unit rate for classified advertising, however, was adopted in 1935 obviously to counteract the competition of the Item and Morning Tribune which confronted the Times-Picayune Publishing Company with an established unit rate. To be sure, an unlawful trade practice may not be justified as an emulation of another's illegal plan. *Cf. Federal Trade Commission v. A. E. Staley Mfg. Co.,* 324 U. S. 746, 324 U. S. 753-754 (1945). But that factor is certainly relevant to illuminate ambiguous intent, particularly when planned injury to that other competitor is the crux of the charge. In any event, uncontradicted testimony suggests that unit insertions of classified ads substantially reduce the publisher's overhead costs.[45] Approximately thirty separate operations are necessary to translate an advertiser's order into a published line of print. A reasonable price for a classified and is necessarily low. And the Publishing Company

[44] The record does, in fact, contain evidence demonstrating that the Times-Picayune Publishing Company's milline rates (cost to advertisers of one agate line per million circulation) ranged roughly from $2.14 to $1.96, compared to the Item's corresponding rates from $2.96 to $2.58. R. 296, 1115. Moreover, though no inference necessarily flows from that fact, the Item changed ownership at least twice in the past twenty years.

[45] R. 1127-1129. *Cf.* Borden, Taylor and Hovde, National Advertising in Newspapers, 461-462 (1946). Obviously, equivalent economics flow from voluntary unit insertions.

processed about 2,300 classified ads for publication each day. Certainly a publisher's steps to rationalize that operation do not bespeak a purposive quest for monopoly or restraint of trade.

Similarly, competitive business considerations apparently actuated the adoption of the unit rate for general display linage in 1950. At that time, about 180 other publishers, the vast majority of morning-evening owners, had previously instituted similar unit plans. Doubtless, long-tolerated trade arrangements acquire no vested immunity under the Sherman Act; no prescriptive rights accrue by the prosecutor's delay. *Cf. United States v. Socony-Vacuum Oil Co., supra,* at 310 U. S. 225-228. That consideration, however, is not wholly irrelevant when monopolistic purpose, rather than effect remains to be gauged. *Ibid.* By adopting the unit plan for general display linage at the time it did, the Publishing Company devised not a novel restrictive scheme, but aligned itself with the industry's guide, legal or illegal in particular cases as that is found to be. Moreover, the unit rate was viewed as a competitive weapon in the rivalry for national advertising accounts. Lower milline rates visualized as a consequence of unit insertions might attract national linage from advertisers utilizing newspapers in other cities, as well as counteract a national advertisers' trend away from newspapers toward other mass communications media.[46] In summary, neither unlawful effects nor aims are shown by the record.[47]

Consequently, no Sherman Act violation has occurred unless the Publishing Company's refusal to sell advertising space except *en bloc,* viewed alone, constitutes a violation of the Act. Refusals to sell, without more, do not violate the law.[48] Though group boycotts, or concerted refusals to deal, clearly run afoul of § 1, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U. S. 211, 340 U. S. 214 (1951); *Associated Press v. United States,* 326 U. S. 1 (1945); *see United States v. Columbia Steel Co.,* 334 U. S. 495, 334 U. S. 522 (1948), different criteria have long applied to qualify the rights of an individual seller. Beginning with *United States v. Colgate & Co.,* 250 U. S. 300 (1919), this Court's decisions have recognized individual refusals to sell as a general right, though "neither absolute nor exempt from regulation." *Lorain Journal Co. v. United States,* 342 U. S. 143, 342 U. S. 155 (1951). If accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the Act. *Lorain Journal Co. v. United States, supra; United States v. Bausch & Lomb Optical Co.,* 321 U. S. 707, 321 U. S. 721-723 (1944); *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U. S. 359, 273 U. S. 375 (1927); *United States v. A. Schrader's Son, Inc.,* 252 U. S. 85, 252 U. S. 99 (1920); *cf. American Tobacco Co. v.*

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[46] *But cf. id.* at 461-464; Nixon, Concentration and absenteeism in Daily Newspaper Ownership, 22 Journ.Q. 97, 110-113 (1945), for advertisers' reactions to unit rates.

[47] The Government places much emphasis on a memorandum prepared by the Publishing Company's advertising representatives, referring to the Company's adoption of the unit plan as one way

"to eliminate to a great extent the deleterious selling on the part of our evening contemporary, which, in the long run, is not to the best interests of the manufacturer."

As pointed out by the District Court, however, the author of the memorandum explained that,

"in a number of cases . . . , the advertising agencies favored the compulsory or unit rate because, once an agency had made its selection or its recommendation of media to the advertiser, the agency could resist any pressure brought to make a change in media by pointing to the unit rate as making such change impossible."

105 F. Supp. at 675-676. That explanation accords with prevailing agency practices and attitudes. *See* Borden, Taylor and Hovde, National Advertising in Newspapers, 207-212 (1946).

[48] *See generally* Comment, Refusals to Sell and Public Control of Competition, 58 Yale L.J. 1121 (1949).

United States, 328 U. S. 781, 328 U. S. 808 (1946); *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U. S. 441, 257 U. S. 453-455 (1922).[49]

Still, although much hedged about by later cases, *Colgate's* principle protects the Times-Picayune Publishing Company's simple refusal to sell advertising space in the Times-Picayune or States separately unless other factors destroy the limited dispensation which that case confers.

In our view, however, no additional circumstances bring this case within § 1. Though operating two constituent newspapers, the Times-Picayune is a single corporation, and the Government in the District Court abandoned a charge of unlawful concert among the corporate officers.[50] With the advertising contracts in this proceeding viewed as in themselves lawful and no further elements of combination apparent in the case, § 2 criteria must become dispositive here.

An insufficient showing of specific intent vitiates this part of the Government's case. While the completed offense of monopolization under § 2 demands only a general intent to do the act, "for no monopolist monopolizes unconscious of what he is doing," a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged. *United States v. Aluminum Co. of America,* 148 F.2d 416, 431-432 (1945); *United States v. Griffith,* 334 U. S. 100, 334 U. S. 105 (1948); *American Tobacco Co. v. United States,* 328 U. S. 781, 328 U. S. 814 (1946); *Swift & Co. v. United States,* 196 U. S. 375, 196 U. S. 396 (1905). This case does not demonstrate an attempt by a monopolist established in one area to nose into a second market, so that past monopolistic success both enhances the probability of future harm and supplies a motivation for further forays. *Cf. United States v. Griffith, supra; Swift & Co. v. United States, supra.* And unlike *Lorain Journal Co. v. United States,* 342 U. S. 143 (1951), where a single newspaper's refusal to sell space to advertisers unless they forewent advertising over a competing local radio station manifested "bold, relentless, and predatory commercial behavior," *id.* 342 U.S. at 342 U. S. 149, no remotely comparable charge is borne out here. This branch of the Government's case comprised allegations that the Publishing Company's acquisition of the States in 1933 was one element in a cool and calculated quest for monopoly control; that the Company deliberately operated the evening States at a financial loss to the detriment of the competing Item, and that it interfered with the Item's distribution on the streets of New Orleans. The District Court, and much evidence supports its conclusions, determined that the 1933 purchase of the States then seemed a legitimate means of business expansion; assumed that the Company's cost and revenue allocations between its two publications were mere bookkeeping transactions without economic significance, and concluded that the Company, rather than obstruct street sales of the Item, merely sought to assure equal treatment by news vendors of the Item and States.[51] Because these pillars of the Government's § 2 case

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[49] *And see United States v. Klearflax Linen Looms,* 63 F. Supp. 32 (1945).

> *"[I]f all the newspapers in a city, in order to monopolize the dissemination of news and advertising by eliminating a competing radio station, conspired to accept no advertisements from anyone who advertised over that station, they would violate §§ 1 and 2 of the Sherman Act. [Citing cases.] It is consistent with that result to hold here that a single newspaper, already enjoying a substantial monopoly in its area, violates the 'attempt to monopolize' clause of § 2 when it uses its monopoly to destroy threatened competition."*

Lorain Journal Co. v. United States, 342 U. S. 143, 342 U. S. 154 (1951).

[50] *Compare Timken Roller Bearing Co. v. United States,* 341 U. S. 593, 341 U. S. 598, 341 U. S. 606 (1951); *Nelson Radio & Supply Co. v. Motorola, Inc.,* 200 F.2d 911, 914 (1952); *United States v. Lorain Journal Co.,* 92 F. Supp. 794, 799-800 (1950).

[51] 105 F. Supp. at 676-677, 680.

thus collapsed in the District Court, only the adoption of the unit rates remains to support the alleged violation of § 2 of the Sherman Act. Since we have viewed that step as predominantly motivated by legitimate business aims, this record cannot bear out the specific intent essential to sustain an attempt to monopolize under § 2.

1.4. Conclusion

We conclude, therefore, that this record does not establish the charged violations of § 1 and § 2 of the Sherman Act. We do not determine that unit advertising arrangements are lawful in other circumstances or in other proceedings. Our decision adjudicates solely that this record cannot substantiate the Government's view of this case. Accordingly, the District Court's judgment must be reversed.

Reversed.

Together with No. 375, *United States v. Times-Picayune Publishing Co. et al.,* also on appeal from the same court.

1.5. 1.5. Dissenting

MR. JUSTICE BURTON, with whom MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MINTON join, dissenting.

The majority opinion seeks to avoid the effect of *United States v. Griffith,* 334 U. S. 100, and of *International Salt Co. v. United States,* 332 U. S. 392, by taking the position that the Times-Picayune does not enjoy a "dominant position" in the general newspaper advertising market of New Orleans, including all three papers, as a single market. The complaint, however, is not, and need not be, dependent upon the relation of the Times-Picayune to that entire market.

The complaint is that the Times-Picayune enjoys a distinct, conceded, and complete monopoly of access to the morning newspaper readers in the New Orleans area, and that it uses that monopoly to restrain unreasonably the competition between its evening newspaper, the New Orleans States, and the independent New Orleans Item, in the competitive field of evening newspaper advertising. Insistence by the Times-Picayune upon acceptance of its compulsory combination advertising contracts makes payment for, and publication of, classified and general advertising in its own evening paper an inescapable part of the price of access to the all-important columns of the single morning paper. I agree with the District Court that such conduct violates the Sherman Act under the circumstances here presented. *See also* Fed.Rules Civ.Proc., 52(a). "Findings of fact shall not be set aside unless clearly erroneous . . . ," and *Lorain Journal Co. v. United States,* 342 U. S. 143. In view of the disposition made of this case by the majority, it is not necessary to discuss the terms of the decree.

2.United States v. General Dynamics Corp., 415 U.S. 486 (1974)

United States v. General Dynamics Corp.

No. 72-402

Argued December 5, 1973

Decided March 19, 1974

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

2.1. Syllabus

Material Service Corp., a deep mining coal producer, and its successor, appellee General Dynamics Corp., acquired, through stock purchases, control of appellee United Electric Coal Companies, a strip-mining coal producer. The Government brought suit alleging that this acquisition violated § 7 of the Clayton Act. The District Court found no violation on the ground, *inter alia,* that the Government's evidence -- consisting principally of past production statistics showing that, within certain geographic markets, the coal industry was concentrated among a small number of large producers, that this concentration was increasing, and that the acquisition here would materially enlarge the acquiring company's market share and thereby contribute to the concentration trend -- did not support the Government's contention that the acquisition substantially lessened competition in the production and sale of coal in either or both of two specified geographic markets. This conclusion was primarily based on a determination that United Electric's coal reserves were so low that its potential to compete with other producers in the future was far weaker than the aggregate production statistics relied on by the Government might otherwise have indicated, virtually all of United Electric's proved reserves being either depleted or already committed by long-term contracts with large customers, so that its power to affect the price of coal was severely limited and steadily diminishing.

2.2. Held

1. While the Government's statistical showing might have been sufficient to support a finding of "undue concentration" in the absence of other considerations, the District Court was justified in finding that other pertinent factors affecting the coal industry and appellees' business mandated a conclusion that no substantial lessening of competition occurred or was threatened by the acquisition. Ample evidence showed that United Electric does not have sufficient reserves, which are a key factor in measuring a coal producer's market strength, to make it a significant competitive force. Thus, in terms of probable future ability to compete, rather than in terms of past production on which the Government relied, the court was warranted in concluding that the merger did not violate § 7 of the Act.

2. The District Court was justified in considering post-acquisition evidence relating to changes in the patterns and structure of the coal industry and in United Electric's reserve situation, since (unlike evidence showing only that no lessening of competition has yet occurred) the demonstration of weak coal resources necessarily implied that United Electric was not merely disinclined, but unable, to compete effectively for future contracts, such evidence going directly to the question whether future lessening of competition was probable.

3. United Electric's weak reserves position, rather than establishing a "failing company" defense by showing that the company would have gone out of business but for the merger, went to the heart of the Government's statistical *prima facie* case and substantiated the District Court's conclusion that United Electric, even if it remained in the market, did not have sufficient reserves to compete effectively for long-term contracts, and therefore appellees' failure to meet the prerequisites of a failing company defense did not detract from the validity of the District Court's analysis.

4. Under the "clearly erroneous" standard of Fed.Rule Civ.Proc. 52(a), which governs as fully on direct appeal to this Court as on review by a court of appeals, the District Court's findings and conclusions are supported by the evidence, and are not clearly erroneous.

5. The District Court found new strip reserves unavailable, and the mere possibility that United Electric could some day acquire expertise to mine deep reserves does not depreciate the validity of the conclusion that United Electric, at the time of trial, did not have the power to compete effectively for long-term contracts, nor does it give the production statistics relied on by the Government more significance than the District Court ascribed to them.

STEWART, J., delivered the opinion of the Court, in which BURGER, C.J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion in which BRENNAN, WHITE, and MARSHALL, JJ., joined.

2.3. Judgment

MR. JUSTICE STEWART delivered the opinion of the Court.

On September 22, 1967, the Government commenced this suit in the United States District Court for the Northern District of Illinois, challenging as violative of § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 18, the acquisition of the stock of United Electric Coal Companies by Material Service Corp. and its successor, General Dynamics Corp. After lengthy discovery proceedings, a trial was held from March 30 to April 22, 1970, and, on April 13, 1972, the District Court issued an opinion and judgment finding no violation of the Clayton Act. 341 F. Supp. 534. The Government appealed directly to this Court pursuant to the Expediting Act, 15 U.S.C. § 29, and we noted probable jurisdiction.

I

At the time of the acquisition involved here, Material Service Corp. was a large midwest producer and supplier of building materials, concrete, limestone, and coal. All of its coal production was from deep-shaft mines operated by it or its affiliate, appellee Freeman Coal Mining Corp., and production from these operations amounted to 6.9 million tons of coal in 1959 and 8.4 million tons in 1967. In 1954, Material Service began to acquire the stock of United Electric Coal Companies. United Electric at all relevant times operated only strip or

open-pit mines in Illinois and Kentucky; at the time of trial in 1970, a number of its mines had closed, and its operations had been reduced to four mines in Illinois and none in Kentucky.[52] In 1959, it produced 3.6 million tons of coal, and by 1967, it had increased this output to 5.7 million tons. Material Service's purchase of United Electric stock continued until 1959. At this point, Material's holdings amounted to more than 34% of United Electric's outstanding shares, and - all parties are now agreed on this point - Material had effective control of United Electric. The president of Freeman was elected chairman of United Electric's executive committee, and other changes in the corporate structure of United Electric were made at the behest of Material Service.

Some months after this takeover, Material Service was itself acquired by the appellee General Dynamics Corp. General Dynamics is a large diversified corporation, much of its revenues coming from sales of aircraft, communications, and marine products to Government agencies. The trial court found that its purchase of Material Service was part of a broad diversification program aimed at expanding General Dynamics into commercial, nondefense business. As a result of the purchase of Material Service, and through it, of Freeman and United Electric, General Dynamics became the Nation's fifth largest commercial coal producer. During the early 1960's General Dynamics increased its equity in United Electric by direct purchases of United Electric stock, and, by 1966, it held or controlled 66.15% of United Electric's outstanding shares. In September, 1966, the board of directors of General Dynamics authorized a tender offer to holders of the remaining United Electric stock. This offer was successful, and United Electric shortly thereafter became a wholly owned subsidiary of General Dynamics.

The thrust of the Government's complaint was that the acquisition of United Electric by Material Service in 1959 violated § 7 of the Clayton Act[53] because the takeover substantially lessened competition in the production and sale of coal in either or both of two geographic markets. It contended that a relevant "section of the country" within the meaning of § 7 was, alternatively, the State of Illinois or the Eastern Interior Coal Province Sales Area, the latter being one of four major coal distribution areas recognized by the coal industry and comprising Illinois and Indiana, and parts of Kentucky, Tennessee, Iowa, Minnesota, Wisconsin, and Missouri.[54]

At trial, controversy focused on three basic issues: the propriety of coal as a "line of commerce," the definition of Illinois or the Eastern Interior Coal Province Sales Area as a relevant "section of the country," and the probability of a lessening of competition within these or any other

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[52] United Electric also had coal mining operations in Utah and other Western States. The Government has not contended, however, that these holdings are of any relevance in this case.

[53] Section 7 of the Clayton Act reads in pertinent part as follows:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[54] Testimony at trial indicated that the Eastern Interior Coal Province -- the area of coal production upon which the Eastern Coal Province Sales Area was based -- was originally named by United States Geological Survey maps of the coalfields in the United States and described one portion of a sequence of coal-bearing rock formations known geologically as the Pennsylvania System. The Sales Area of the Eastern Interior Coal Province was derived from the assumption, acknowledged in the trial court's opinion, that the high costs of transporting coal -- which may amount to 40% of the price of delivered coal -- will inevitably give producers of coal a clear competitive advantage in sales in the immediate areas of the mines.

product and geographic markets resulting from the acquisition. The District Court decided against the Government on each of these issues.

As to the relevant product market, the court found that coal faced strong and direct competition from other sources of energy such as oil, natural gas, nuclear energy, and geothermal power, which created a cross-elasticity of demand among those various fuels. As a result, it concluded that coal, by itself, was not a permissible product market, and that the "energy market" was the sole "line of commerce" in which anticompetitive effects could properly be canvassed.

Similarly, the District Court rejected the Government's proposed geographic markets on the ground that they were "based essentially on past and present production statistics, and do not relate to actual coal consumption patterns." 341 F. Supp. at 556. The court found that a realistic geographic market should be defined in terms of transportation arteries and freight charges that determined the cost of delivered coal to purchasers, and thus the competitive position of various coal producers. In particular, it found that freight rate districts, designated by the Interstate Commerce Commission for determining rail transportation rates, of which there were four in the area served by the appellee companies, were the prime determinants for the geographic competitive patterns among coal producers. In addition, the court concluded that two large and specialized coal consumption units were sufficiently differentiable in their coal use patterns to be included as relevant geographic areas.[55] In lieu of the State of Illinois or the Eastern Interior Coal Province Sales Area, the court accordingly found the relevant geographic market to be 10 smaller areas, comprising the two unique consumers together with four utility sales areas and four non-utility sales areas based on the ICC freight rate districts.

Finally, and, for purposes of this appeal, most significantly, the District Court found that the evidence did not support the Government's contention that the 1959 acquisition of United Electric substantially lessened competition in any product or geographic market. This conclusion was based on four determinations made in the court's opinion, *id.* at 558-559. First, the court noted that, while the number of coal producers in the Eastern Interior Coal Province declined from 144 to 39 during the period of 1957-1967, this reduction "occurred not because small producers have been acquired by others, but as the inevitable result of the change in the nature of demand for coal."

Consequently, the court found,

> *"this litigation presents a very different situation from that, in such cases as United States v. Philadelphia National Bank, 374 U. S. 321 (1963), and United States v. Von's Grocery Co., 384 U. S. 270 (1966), where the Supreme Court was concerned with 'preventing even slight increases in concentration.' 374 U.S. at 374 U. S. 365, n. 2."*

[55] The trial court found that Commonwealth Edison, a large private electric utility with generation facilities in many parts of Illinois, and the Metropolitan Chicago Interstate Air Quality Control Region constituted separate and unique geographic regions. Commonwealth Edison was found to have unique attributes because of the great size of its coal consumption requirements, its distinctive distribution patterns, and its extensive commitment to air pollution programs and the development of nuclear energy. The Chicago Control Region, a congressionally designated area consisting of six counties in Illinois and two in Indiana, was distinguished from other geographic markets because of the impact of existing and anticipated air pollution regulations which would create special problems in the competition for coal sales contracts. 341 F. Supp. 534, 557.

Second, the court noted that United Electric and Freeman were "predominantly complementary in nature," since

> *"United Electric is a strip mining company with no experience in deep mining nor likelihood of acquiring it, [and] Freeman is a deep mining company with no experience or expertise in strip mining."*

Third, the court found that, if Commonwealth Edison, a large investor-owned public utility, were excluded,

> *"none of the sales by United Electric in the period 1965 to 1967, the years chosen by the Government for analysis, would have or could have been competitive with Freeman, had the two companies been independent,"*

because of relative distances from potential consumers and the resultant impact on relative competitive position.

Finally, the court found that United Electric's coal reserves were so low that its potential to compete with other coal producers in the future was far weaker than the aggregate production statistics relied on by the Government might otherwise have indicated. In particular, the court found that virtually all of United Electric's proved coal reserves were either depleted or already committed by long-term contracts with large customers, and that United Electric's power to affect the price of coal was thus severely limited and steadily diminishing. On the basis of these considerations, the court concluded:

> *"Under these circumstances, continuation of the affiliation between United Electric and Freeman is not adverse to competition, nor would divestiture benefit competition even were this court to accept the Government's unrealistic product and geographic market definitions."*

II

The Government sought to prove a violation of § 7 of the Clayton Act principally through statistics showing that, within certain geographic markets the coal industry was concentrated among a small number of large producers; that this concentration was increasing; and that the acquisition of United Electric would materially enlarge the market share of the acquiring company, and thereby contribute to the trend toward concentration.

The concentration of the coal market in Illinois and, alternatively, in the Eastern Interior Coal Province was demonstrated by a table of the shares of the largest two, four, and 10 coal producing firms in each of these areas for both 1957 and 1967 that revealed the following:[56]

Eastern Interior

Coal Province Illinois

[56] The figures for 1967 reflect the impact on market concentration of the acquisition involved here.

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1957 1967 1957 1967

Top 2 firms. . . . 29.6 48.6 37.8 52.9

Top 4 firms. . . . 43.0 62.9 54.5 75.2

Top 10 firms. . . . 65.5 91.4 84.0 98.0

These statistics, the Government argued, showed not only that the coal industry was concentrated among a small number of leading producers, but that the trend had been toward increasing concentration.[57] Furthermore, the undisputed fact that the number of coal-producing firms in Illinois decreased almost 73% during the period of 1957 to 1967 from 144 to 39 was claimed to be indicative of the same trend. The acquisition of United Electric by Material Service resulted in increased concentration of coal sales among the leading producers in the areas chosen by the Government, as shown by the following table:[58]

1959 1967

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Share of Share of Share of Share of

top 2 top 2 top 2 top 2

but for given Percent but for given Percent

[57] The figures demonstrating the degree of concentration in the two coal markets chosen by the Government were roughly comparable to those in *United States v. Von's Grocery Co.,* 384 U. S. 270, where the top four firms in the market controlled 24.4% of the sales, the top eight 40.9%, and the top 12 48.8%. *See id.* at 384 U. S. 281 (WHITE, J., concurring). *See also United States v. Pabst Brewing Co.,* 384 U. S. 546, 384 U. S. 551, where the top four producers of beer in Wisconsin were found to control 47.74% of the market, and the top 10 in the Nation and the local three-state area to control 45.06% and 58.93%, respectively. The statistics in the present case appear to represent a less advanced state of concentration than those involved in *United States v. Aluminum Co. of America,* 377 U. S. 271, 377 U. S. 279, where the two largest firms held 50% of the market, and the top five and the top nine controlled, respectively, 76% and 95.7%; and in *United States v. Philadelphia National Bank,* 374 U. S. 321, 374 U. S. 365, where the two largest banks controlled 44% of the pre-merger market.

[58] The percentage increase in concentration asserted here was thus analogous to that found in *Von's Grocery, supra,* where the concentration among the top four, eight, and 12 firms was increased, respectively, by 18.0%, 7.6%, and 2.5% as a result of the merger invalidated there. In *Philadelphia Bank, supra,* the 34% increase in concentration in the two largest firms from 44% to 59% was found to be clearly significant. 374 U.S. at 374 U. S. 365.

merger merger increase merger merger increase

Province 33.1 37.9 14.5 45.0 48.6 8.0

Illinois 36.6 44.3 22.4 44.0 52.9 20.2

Finally, the Government's statistics indicated that the acquisition increased the share of the merged company in the Illinois and Eastern Interior Coal Province coal markets by significant degrees:[59]

Province Illinois

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Share Share

Rank (percent) Rank (percent)

1959

Freeman 2 7.6 2 15.1

United Electric. . 6 4.8 5 8.1

Combined. 2 12.4 1 23.2

1967

Freeman 5 6.5 2 12.9

United Electric . . 9 4.4 6 8.9

Combined. 2 10.9 2 21.8

[59] The 1959 Illinois figure of 23.2% was asserted by the Government to be comparable to the 23.94% share of the Wisconsin beer market found to be significant in *Pabst, supra,* and the 25% share controlled by the merged company in *United States v. Continental Can Co.,* 378 U. S. 441, 378 U. S. 461. The Province figure of 12.4% was compared with the shares held by the merged companies in *Von's Grocery* (7.5%), and in the *Pabst* national (4.49%) and three-state (11.32%) markets.

In prior decisions involving horizontal mergers between competitors, this Court has found *prima facie* violations of § 7 of the Clayton Act from aggregate statistics of the sort relied on by the United States in this case. In *Brown Shoe Co. v. United States,* 370 U. S. 294, the Court reviewed the legislative history of the most recent amendments to the Act, and found that

> *"[t]he dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy."*

A year later, in *United States v. Philadelphia National Bank,* 374 U. S. 321, the Court clarified the relevance of a statistical demonstration of concentration in a particular industry and of the effects thereupon of a merger or acquisition with the following language:

> *"This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."*

Id. at 374 U. S. 363. *See also United States v. Continental Can Co.,* 378 U. S. 441, 378 U. S. 458; *United States v. Von's Grocery Co.,* 384 U.S. at 384 U. S. 277; *United States v. Pabst Brewing Co.,* 384 U. S. 546, 384 U. S. 550-552.

The effect of adopting this approach to a determination of a "substantial" lessening of competition is to allow the Government to rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing, since,

> *"if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great."*

United States v. Aluminum Co. of America, 377 U. S. 271, 377 U. S. 279, citing *United States v. Philadelphia National Bank, supra,* at 374 U. S. 365 n. 42.

While the statistical showing proffered by the Government in this case, the accuracy of which was not discredited by the District Court or contested by the appellees, would under this approach have sufficed to support a finding of "undue concentration" in the absence of other considerations, the question before us is whether the District Court was justified in finding that other pertinent factors affecting the coal industry and the business of the appellees mandated a conclusion that no substantial lessening of competition occurred or was threatened by the acquisition of United Electric. We are satisfied that the court's ultimate finding was not in error.

In *Brown Shoe v. United States, supra,* we cautioned that statistics concerning market share and concentration, while of great significance, were not conclusive indicators of anticompetitive effects:

"Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry."

"Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market -- its structure, history and probable future -- can provide the appropriate setting for judging the probable anticompetitive effect of the merger."

Id. at 370 U. S. 322 n. 38. *See also United States v. Continental Can Co., supra,* at 378 U. S. 458. In this case, the District Court assessed the evidence of the "structure, history and probable future" of the coal industry, and, on the basis of this assessment, found no substantial probability of anticompetitive effects from the merger.

Much of the District Court's opinion was devoted to a description of the changes that have affected the coal industry since World War II. On the basis of more than three weeks of testimony and a voluminous record, the court discerned a number of clear and significant developments in the industry. First, it found that coal had become increasingly less able to compete with other sources of energy in many segments of the energy market. Following the War, the industry entirely lost its largest single purchaser of coal -- the railroads -- and faced increasingly stiffer competition from oil and natural gas as sources of energy for industrial and residential uses. Because of these changes in consumption patterns, coal's share of the energy resources consumed in this country fell from 78.4% in 1920 to 21.4% in 1968. The court reviewed evidence attributing this decline not only to the changing relative economies of alternative fuels and to new distribution and consumption patterns, but also to more recent concern with the effect of coal use on the environment and consequent regulation of the extent and means of such coal consumption.

Second, the court found that, to a growing extent since 1954, the electric utility industry has become the mainstay of coal consumption. While electric utilities consumed only 15.76% of the coal produced nationally in 1947, their share of total consumption increased every year thereafter, and, in 1968, amounted to more than 59% of all the coal consumed throughout the Nation.[60]

Third, and most significantly, the court found that, to an increasing degree, nearly all coal sold to utilities is transferred under long-term requirements contracts, under which coal producers promise to meet utilities' coal consumption requirements for a fixed period of time, and at predetermined prices. The court described the mutual benefits accruing to both producers and consumers of coal from such long-term contracts in the following terms:

"This major investment [in electric utility equipment] can be jeopardized by a disruption in the supply of coal. Utilities are, therefore, concerned with assuring the supply of coal to such a plant over its life. In addition, utilities desire to establish in advance, as closely as possible, what fuel costs will be for the life of the plant. For these reasons, utilities

[60] In 1968, electric utilities accounted for 59.09% of United States coal consumption, coke plants 18.20%, cement mills 1.88%, other manufacturing (including steel and rolling mills) 17.70%, and retail and miscellaneous consumers 3.14%.

typically arrange long-term contracts for all or at least a major portion of the total fuel requirements for the life of the plant. . . ."

"The long-term contractual commitments are not only required from the consumer's standpoint, but are also necessary from the viewpoint of the coal supplier. Such commitments may require the development of new mining capacity. . . . Coal producers have been reluctant to invest in new mining capacity in the absence of long-term contractual commitments for the major portion of the mine's capacity. Furthermore, such long-term contractual commitments are often required before financing for the development of new capacity can be obtained by the producer."

341 F. Supp. at 543 (footnote omitted). These developments in the patterns of coal distribution and consumption, the District Court found, have limited the amounts of coal immediately available for "spot" purchases on the open market, since

"[t]he growing practice by coal producers of expanding mine capacity only to meet long-term contractual commitments and the gradual disappearance of the small truck mines has tended to limit the production capacity available for spot sales."

Because of these fundamental changes in the structure of the market for coal, the District Court was justified in viewing the statistics relied on by the Government as insufficient to sustain its case. Evidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete. In most situations, of course, the unstated assumption is that a company that has maintained a certain share of a market in the recent past will be in a position to do so in the immediate future. Thus, companies that have controlled sufficiently large shares of a concentrated market are barred from merger by § 7 not because of their past acts, but because their past performances imply an ability to continue to dominate with at least equal vigor. In markets involving groceries or beer, as in *Von's Grocery, supra,* and *Pabst, supra,* statistics involving annual sales naturally indicate the power of each company to compete in the future. Evidence of the amount of annual sales is relevant as a prediction of future competitive strength, since, in most markets, distribution systems and brand recognition are such significant factors that one may reasonably suppose that a company which has attracted a given number of sales will retain that competitive strength.

In the coal market, as analyzed by the District Court, however, statistical evidence of coal production was of considerably less significance. The bulk of the coal produced is delivered under long-term requirements contracts, and such sales thus do not represent the exercise of competitive power, but rather the obligation to fulfill previously negotiated contracts at a previously fixed price. The focus of competition in a given timeframe is not on the disposition of coal already produced, but on the procurement of new long-term supply contracts. In this situation, a company's past ability. to produce is of limited significance, since it is in a position to offer for sale neither its past production nor the bulk of the coal it is presently capable of producing, which is typically already committed under a long-term supply contract. A more significant indicator of a company's power effectively to compete with other companies lies in the state of a company's uncommitted reserves of recoverable coal. A company with relatively large supplies of coal which are not already under contract to a consumer will have a more important influence upon competition in the contemporaneous negotiation of supply contracts than a firm with small reserves, even though the latter may presently produce a greater tonnage of coal. In a market where the availability and price of coal are set by long-term contracts, rather

than immediate or short-term purchases and sales, reserves, rather than past production are the best measure of a company's ability to compete.

The testimony and exhibits in the District Court revealed that United Electric's coal reserve prospects were "unpromising." 341 F. Supp. at 559. United's relative position of strength in reserves was considerably weaker than its past and current ability to produce. While United ranked fifth among Illinois coal producers in terms of annual production, it was 10th in reserve holdings, and controlled less than 1% of the reserves held by coal producers in Illinois, Indiana, and western Kentucky. *Id.* at 538. Many of the reserves held by United had already been depleted at the time of trial, forcing the closing of some of United's midwest mines.[61]

Even more significantly, the District Court found that, of the 52,033,304 tons of currently mineable reserves in Illinois, Indiana, and Kentucky controlled by United, only four million tons had not already been committed under long-term contracts. United was found to be facing the future with relatively depleted resources at its disposal, and with the vast majority of those resources already committed under contracts allowing no further adjustment in price. In addition, the District Court found that "United Electric has neither the possibility of acquiring more [reserves] nor the ability to develop deep coal reserves," and thus was not in a position to increase its reserves to replace those already depleted or committed. *Id.* at 560.

Viewed in terms of present and future reserve prospects -- and thus in terms of probable future ability to compete -- rather than in terms of past production, the District Court held that United Electric was a far less significant factor in the coal market than the Government contended or the production statistics seemed to indicate. While the company had been and remained a "highly profitable" and efficient producer of relatively large amounts of coal, its current and future power to compete for subsequent long-term contracts was severely limited by its scarce uncommitted resources.[62] Irrespective of the company's size when viewed as a producer, its weakness as a competitor was properly analyzed by the District Court and fully substantiated that court's conclusion that its acquisition by Material Service would not "substantially . . . lessen competition. . . ." The validity of this conclusion is not undermined, we think, by the three-faceted attack made upon it by the Government in this Court -- to which we now turn.

III

First, the Government urges that the court committed legal error by giving undue consideration to facts occurring after the effective acquisition in 1959.[63] In *FTC v. Consolidated Foods*

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[61] The District Court found that, while United Electric held six mines operating in the midwest in 1948, it had opened only three new ones since then, and four had closed because of exhaustion of reserves. The court found that the evidence showed that reserves in two other mines would soon be depleted, and the appellees inform us in their briefs that these events have already occurred.

[62] As an example of the impact of depleted or committed reserves on a company's ability to compete for long-term contracts, the District Court noted that a number of requirements contracts signed by United Electric to supply coal to electric utilities were backed up by reserves belonging to Freeman, and "*could not have been obtained without that guarantee*" because of the utilities' fear that the contract obligation could not otherwise be fulfilled. 341 F. Supp. at 559 (emphasis in original).

[63] The court's reliance on such facts and the absence of specific findings of fact concerning the competitive situation in 1959, at which point both sides now agree the acquisition took place, may have been engendered by the Government's apparent inconsistency in its position concerning the critical date. Certain of the appellees' proposed findings of fact concerning United Electric's resources in 1959 and its attempts to increase its depleted holdings were termed "irrelevant" by the Government at the trial.

Corp., 380 U. S. 592, 380 U. S. 598, this Court stated that post-acquisition evidence tending to diminish the probability or impact of anticompetitive effects might be considered in a § 7 case. *See also United States v. E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 353 U. S. 597 *et seq.,* 353 U. S. 602 *et seq.* But in *Consolidated Foods, supra,* and in *United States v. Continental Can Co.,* 378 U.S. at 378 U. S. 463, the probative value of such evidence was found to be extremely limited, and judgments against the Government were in each instance reversed in part because "too much weight" had been given to post-acquisition events. The need for such a limitation is obvious. If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending.[64]

Furthermore, the fact that no concrete anticompetitive symptoms have occurred does not itself imply that competition has not already been affected,

> *"for once the two companies are united, no one knows what the fate of the acquired company and its competitors would have been but for the merger."*

FTC v. Consolidated Foods, supra, at 380 U. S. 598. And, most significantly, § 7 deals in "probabilities, not certainties," *Brown Shoe v. United States,* 370 U.S. at 370 U. S. 323, and the mere nonoccurrence of a substantial lessening of competition in the interval between acquisition and trial does not mean that no substantial lessening will develop thereafter; the essential question remains whether the probability of such future impact exists at the time of trial. In this case, the District Court relied on evidence relating to changes in the patterns and structure of the coal industry and in United Electric's coal reserve situation after the time of acquisition in 1959. Such evidence could not reflect a positive decision on the part of the merged companies to deliberately but temporarily refrain from anticompetitive actions, nor could it reasonably be thought to reflect less active competition than that which might have occurred had there not been an acquisition in 1959. As the District Court convincingly found, the trend toward increased dependence on utilities as consumers of coal and toward the near-exclusive use of long-term contracts was the product of inevitable pressures on the coal industry in all parts of the country. And, unlike evidence showing only that no lessening of competition has yet occurred, the demonstration of weak coal resources necessarily and logically implied that United Electric was not merely disinclined, but unable, to compete effectively for future

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[64] The mere nonoccurrence of anticompetitive effects from a merger would, of course, merely postpone, rather than preclude, a divestiture suit. This Court indicated in *United States v. E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 353 U. S. 597, that a merger may be attacked *ab initio* long after its culmination if effect on competition not apparent immediately after the merger subsequently appears, since § 7 was designed to arrest the creation of monopolies "*in their incipiency'" and "`incipiency' . . . denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect. . . " See also FTC v. Consolidated Foods Corp., 380 U. S. 592, 380 U. S. 598. The scope this "time of suit" concept gives to the Government in attacking mergers under § 7 is discussed in Orrick, The Clayton Act: Then and Now, 24 ABA Antitrust Section 44 (1964); Subcommittee on Section 7, The Backward Sweep Theory and the Oligopoly Problem, 32 ABA Antitrust L.J. 306 (1966). In the context of the present case, the "time of suit" rule, coupled with the limited weight given to post-merger evidence of no anticompetitive impact, tends to give the Government a "heads-I-win, tails-you-1ose" advantage over a § 7 defendant: post-merger evidence showing a lessening of competition may constitute an "incipiency" on which to base a divestiture suit, but evidence showing that such lessening has not, in fact, occurred cannot be accorded "too much weight."*

contracts. Such evidence went directly to the question of whether future lessening of competition was probable, and the District Court was fully justified in using it.

Second, the Government contends that reliance on depleted and committed resources is essentially a "failing company" defense, which must meet the strict limits placed on that defense by this Court's decisions in *United States v. Third National Bank in Nashville,* 390 U. S. 171; *Citizen Publishing Co. v. United States,* 394 U. S. 131; and *United States v. Greater Buffalo Press,* 402 U. S. 549. The failing company doctrine, recognized as a valid defense to a § 7 suit in *Brown Shoe, supra,* at 370 U. S. 346, was first announced by this Court in *International Shoe Co. v. FTC,* 280 U. S. 291, and was preserved by explicit references in the legislative history of the modern amendments to § 7. H.R.Rep. No. 1191, 81st Cong., 1st Sess., 6 (1949); S.Rep. No. 1775, 81st Cong., 2d Sess., 7 (1950). A company invoking the defense has the burden[65] of showing that its "resources [were] so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure . . . ," *International Shoe, supra,* at 280 U. S. 302, and further that it tried and failed to merge with a company other than the acquiring one, *Citizen Publishing Co., supra,* at 394 U. S. 138; *Greater Buffalo Press, supra,* at 402 U. S. 555.

The Government asserts that United Electric was a healthy and thriving company at the time of the acquisition, and could not be considered on the brink of failure, and also that the appellees have not shown that Material Service was the only available acquiring company. These considerations would be significant if the District Court had found no violation of § 7 by reason of United Electric's being a failing company, but the District Court's conclusion was not, as the Government suggests, identical with or even analogous to such a finding. The failing company defense presupposes that the effect on competition and the "loss to [the company's] stockholders and in, jury to the communities where its plants were operated," *International Shoe, supra,* at 280 U. S. 302, will be less if a company continues to exist even as a party to a merger than if it disappears entirely from the market. It is, in a sense, a "lesser of two evils" approach, in which the possible threat to competition resulting from an acquisition is deemed preferable to the adverse impact on competition and other losses if the company goes out of business.[66]

The appellees' demonstration of United's weak reserves position, however, proved an entirely different point. Rather than showing that United would have gone out of business but for the merger with Material Service, the finding of inadequate reserves went to the heart of the Government's statistical *prima facie* case based on production figures, and substantiated the District Court's conclusion that United Electric, even if it remained in the market, did not have sufficient reserves to compete effectively for long-term contracts. The failing company defense is simply inapposite to this finding, and the failure of the appellees to meet the prerequisites of that doctrine did not detract from the validity of the court's analysis.

Finally, the Government contends that the factual underpinning of the District Court's opinion was not supported by the evidence contained in the record, and should be reevaluated by this Court. The findings and conclusions of the District Court are, of course, governed by the

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[65] In *Citizen Publishing Co. v. United States,* 394 U. S. 131, 394 U. S. 138-139, "[t]he burden of proving that the conditions of the failing company doctrine have been satisfied" was found to be "on those who seek refuge under it." (Footnote omitted.)

[66] Alternative rationales for the failing company defense are discussed in Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv.L.Rev. 226, 339-347 (1960); Comment, "Substantially to Lessen Competition . . .": Current Problems of Horizontal Mergers, 68 Yale L.J. 1627, 1662-1668 (1959).

"clearly erroneous" standard of Fed.Rule Civ.Proc. 52(a) just as fully on direct appeal to this Court as when a civil case is being reviewed by a court of appeals. The record in this case contains thousands of pages of transcript and hundreds of exhibits. Little purpose would be served by discussing in detail each of the Government's specific factual contentions. Suffice it to say that we find the controlling findings and conclusions contained in the District Court's careful and lengthy opinion to be supported by the evidence in the record, and not clearly erroneous.

One factual claim by the Government, however, goes to the heart of the reasoning of the District Court, and thus is worthy of explicit note here. The Government asserts that the paucity of United Electric's coal reserves could not have the significance perceived by the District Court, since all companies engaged in extracting minerals at some point deplete their reserves and then acquire new reserves or the new technology required to extract more minerals from their existing holdings. United Electric, the Government suggests, could at any point either purchase new strip reserves or acquire the expertise to recover currently held deep reserves.

But the District Court specifically found new strip reserves not to be available:

> *"Evidence was presented at trial by experts, by state officials, by industry witnesses, and by the Government itself indicating that economically mineable strip reserves that would permit United Electric to continue operations beyond the life of its present mines are not available. The Government failed to come forward with any evidence that such reserves are presently available."*

341 F. Supp. at 559. In addition, there was considerable testimony at trial, apparently credited by the District Court, indicating that United Electric and others had tried to find additional strip reserves not already held for coal production, and had been largely unable to do so.

Moreover, the hypothetical possibility that United Electric might in the future acquire the expertise to mine deep reserves proves nothing -- or too much. As the Government pointed out in its brief and at oral argument, in recent years, a number of companies with no prior experience in extracting coal have purchased coal reserves and entered the coal production business in order to diversify and complement their current operations. The mere possibility that United Electric, in common with all other companies with the inclination and the corporate treasury to do so, could some day expand into an essentially new line of business does not depreciate the validity of the conclusion that United Electric, at the time, of the trial did not have the power to compete on a significant scale for the procurement of future long-term contracts, nor does it vest in the production statistics relied on by the Government more significance than ascribed to them by the District Court.

IV

In addition to contending that the District Court erred in finding that the acquisition of United Electric would not substantially lessen competition, the Government urges us to review the court's determinations of the proper product and geographic markets. The Government suggests that, while the "energy market" might have been an appropriate "line of commerce," coal also had sufficient "practical indicia" as a separate "line of commerce" to qualify as an independent and consistent submarket. *Cf. United States v. Continental Can Co.,* 378 U.S. at 378 U. S. 456-457. It also suggests that, irrespective of the validity of the criteria adopted by the District Court in selecting its 10 geographic markets, competition between United Electric and Material

Service within the larger alternative geographic markets claimed by the Government established those areas as a permissible "section of the country" within the meaning of § 7.

While, under normal circumstances, a delineation of proper geographic and product markets is a necessary precondition to assessment of the probabilities of a substantial effect on competition within them, in this case we nevertheless affirm the District Court's judgment without reaching these questions. By determining that the amount and availability of usable reserves, and not the past annual production figures relied on by the Government, were the proper indicators of future ability to compete, the District Court wholly rejected the Government's *prima facie* case. Irrespective of the markets within which the acquiring and the acquired company might be viewed as competitors for purposes of this § 7 suit, the Government's statistical presentation simply did not establish that a substantial lessening of competition was likely to occur in any market. By concluding that

> *"divestiture [would not] benefit competition even were this court to accept the Government's unrealistic product and geographic market definitions,"*

341 F. Supp. at 560, the District Court rendered superfluous its further determinations that the Government also erred in its choice of relevant markets. Since we agree with the District Court that the Government's reliance on production statistics in the context of this case was insufficient, it follows that the judgment before us may be affirmed without reaching the issues of geographic and product markets.

The judgment of the District Court is affirmed.

It is so ordered.

2.4. Dissenting

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL concur, dissenting.

In this case, the United States appeals from a District Court decision[67] upholding the acquisition of stock in United Electric Coal Companies by Material Service Corp. and its successor, General Dynamics Corp., against a challenge that the acquisition violated § 7 of the Clayton Act, 15 U.S.C. § 18.[68] The United States instituted this civil antitrust action on the claim that the acquisition may substantially lessen competition in the Illinois and Eastern Interior Coal Province (EICP) sales area coal markets. After trial on the merits, the District Court rejected the Government's proposed product and geographic markets and dismissed the action, concluding that the Government had failed to show a substantial lessening of competition in the markets the court deemed relevant.

[67] 341 F. Supp. 534 (1972).

[68] Title 15 U.S.C. § 18 provides:

> *"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."*

I

The combination here challenged is the union of two major Illinois coal producers -- Freeman Coal Mining Corp. and United Electric Coal Companies -- under the ultimate corporate control of General Dynamics Corp. Material Service Corp. acquired all the stock of Freeman Coal in 1942, and began to acquire United Electric stock in 1954. By 1959, holdings in United reached 34%, and Material Service requested and received representation on United's board of directors. As a result, Freeman's president was elected chairman of United's executive committee. "With the affiliation of Freeman and United Electric thus formalized in 1959, common control of the two coal companies was achieved." 341 F. Supp. 534, 537 (1972).

General Dynamics acquired Material Service Corp. in 1959, and moved to solidify the union of Freeman and United by engaging in continued purchases of United's stock throughout the early 1960's. By 1966, it held nearly two-thirds of United's outstanding shares, and a successful tender offer increased the holdings to over 90%. In early 1967, United became a wholly owned subsidiary of General Dynamics. With the 1959 union of Freeman and United Electric thus completed, the Government filed this action challenging the legality of the combination which produced in General Dynamics the Nation's fifth largest coal producer with total annual production of over 14 million tons.

II

Section 7 of the Clayton Act, the standard against which this combination must be tested, proscribes such combinations "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition. . . ."[69] "Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act. . . ." *United States v. E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 353 U. S. 593 (1957). The court below concluded that "the energy market is the appropriate line of commerce for testing the competitive effect of the United Electric-Freeman combination." 341 F. Supp. at 555. The court rejected the Government's hypothesis of coal as a submarket for antitrust purposes as "untenable," finding that *United States v. Continental Can Co.,* 378 U. S. 441 (1964),

> *"compel[s] this court to conclude that, since coal competes with gas, oil, uranium and other forms of energy, the relevant line of commerce must encompass inter-fuel competition."*

I read *Continental Can* to import no such compulsion. That case involved the acquisition of the Nation's third largest producer of glass containers, Hazel-Atlas Glass Co., by Continental Can, the country's second largest producer of metal containers. The District Court found inter-industry competition an insufficient predicate for finding a § 7 line of commerce embracing both cans and bottles. We reversed, finding that inter-industry competition mandated "treating as *a* relevant product market the combined glass and metal container industries and all end uses for which they compete" 378 U.S. at 378 U. S. 457 (emphasis added). But that inter-industry market was only one of several lines of commerce in that case. Both parties conceded that "the can industry and the glass container industry were relevant lines of commerce." *Id.* at 378 U. S. 447. Since § 7 proscribes acquisitions which may involve a substantial lessening of competition in any line of commerce, the absence of anticompetitive effects in either the bottle or can

[69] *Supra* 415 U.S. 486fn2/2|>n.2.

markets could not sustain the acquisition, since there existed *a* market -- the glass/metal container market given recognition in this Court -- in which the prohibited effect was present.

The District Court here found an energy market in which the combination did not work the prohibited effect. Whatever the correctness of that finding, *Continental Can* teaches us that it is of no help to appellees if there exist other lines of commerce in which the effect is present. Any combination may involve myriad lines of commerce; the existence of an energy market is not inconsistent with, and does not negate, the existence of a narrower coal market for "within this broad market, well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co. v. United States,* 370 U. S. 294, 370 U. S. 325 (1962).

This principle found recognition in *Continental Can,* where we recognized glass and metal containers "to be two separate lines of commerce," despite finding that competition between the lines "necessarily implied one or more *other* lines of commerce embracing both industries." 378 U.S. at 378 U. S. 456-457 (emphasis added). It was also recognized in *United States v. Aluminum Co. of America,* 377 U. S. 271 (1964), which involved the combination of an aluminum conductor manufacturer and a producer of both aluminum and copper conductor. The District Court there refused to treat aluminum conductor as a separate § 7 line of commerce because of the competition between aluminum and copper conductor. Though we found that competition sufficient to justify finding a single aluminum/copper conductor market, we reversed the District Court, holding that the inter-industry competition did not preclude "division [of that market] for purposes of § 7 into separate submarkets." *Id.* at 377 U. S. 275.[70] Coal has both price advantages and operational disadvantages which combine to delineate within the energy market "economically significant submarket[s]."[71] The consumers for whom price is determinative mark out a submarket in which coal is the overwhelming choice; the boundaries of this submarket are strengthened by coal's virtual inability to compete in other significant sectors of the energy market. Energy-use technology in highway and air transportation necessitates the use of liquid fuels. The relative operational ease of dieselized power plants has worked to virtually foreclose coal from the rail transportation market.[72] Despite their higher cost, gas and oil enjoy a competitive edge in the space-heating market because of simple consumer preference for these sources of energy over coal.[73]

The market for coal is therefore effectively limited to large industrial energy consumers such as electric utilities and certain manufacturers with the ability and economic incentive to consider coal as an energy source.[74] The court below noted that the "utility market has become the mainstay of coal production," 341 F. Supp. at 539. Within this sector, coal's economic advantage yields it an overwhelming share of the market. In each year from 1960 to 1967 (the period during which the Freeman-United Electric union solidified), coal accounted for over 90% of the Btu's consumed by steam electric utility plants in the EICP sales area; it also

[70] Similarly, in *United States v. Philadelphia National Bank,* 374 U. S. 321 (1963), we held commercial banking a § 7 line of commerce even though banks compete with other institutions with respect to some services such as the making of small loans.
[71] *See Brown Shoe Co. v. United States,* 370 U. S. 294, 370 U. S. 325 (1962).
[72] 341 F. Supp. at 539.
[73] *Ibid.*
[74] The only other significant use for coal is metallurgical in nature. Metallurgical coal is used as a product in the manufacture of steel. The use of such coal as a product sets it off in a separate market from nonmetallurgical coal, which is used as an energy source.

provided 74% of the Btu's consumed by cement plants in the same area, and 94% of the Btu's consumed by such plants in Illinois.[75]

The coal market is therefore viewed by energy consumers as a separate economic entity confined to those users with the technological capability to allow the use of coal and the incentive for economy to mandate it. Within that market, coal experiences little competition from other fuels, since coal's delivered price per Btu, in the areas served by Freeman and United Electric, is significantly lower than that for any other combustible fuel except interruptible natural gas, which is available only on a seasonal basis.[76] Central Illinois Light Co., for example, purchases coal at 27 cents per million Btu's, firm natural gas at 45 cents, and oil (for ignition purposes) at 70 cents.[77] Since coal consumption facilities are unique and not readily adaptable to alternative energy sources, there is little inter-fuel price sensitivity. As the court in *Kennecott Copper Corp. v. FTC,* 467 F.2d 67, 79 (CA10 1972), stated in finding that "[t]he coal industry is a distinct submarket which has characteristics which are not shared by the other fuel industries," coal prices "are now, and promise to be in the future, subject to the peculiarities of the coal business, [since] other fuels appear to have a limited effect."

The competitive position of coal is thus not unlike that of aluminum conductor in *United States v. Aluminum Co. of America, supra.* Like coal, aluminum conductor had "little consumer acceptance" for many purposes, but its substantial price advantage over other conductors gave it "decisive advantages" in those areas of the market where price was "the single, most important, practical factor." 377 U.S. at 377 U. S. 275-276. Despite the existence of some competition from other forms of conductor, those factors were sufficient to set aluminum conductor apart as an economically significant § 7 submarket. That precedent seems to be indistinguishable; and, thus, whatever the existence of a § 7 energy market, coal constitutes an economically significant submarket for § 7 purposes.[78]

III

In rejecting the Government's proposed geographic markets the court below adopted much narrower markets which, for the most part, followed ICC freight rate districts (FRD's).[79] The

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[75] Although nuclear and geothermal power may draw some utility consumers from the coal market in the future, nuclear fuel is not consumable in existing fossil-fuel plants, nor is nuclear fuel presently an alternative for nonutility coal consumers. Thus, whatever the future inroads of alternative fuels, there remains a significant class of energy consumers which looks only to coal.

[76] Interruptible gas is sold at a lower rate and is available only when it is not required by firm-rate customers which are supplied according to their needs, and which always have priority.

[77] Oil is used by some coal consumers for purposes to which coal is not suited, such as starting up boilers or kilns.

[78] Even the court below gave some recognition to coal as a separate market in its discussion of the relevant geographic markets. The geographic markets were delineated along "the distributive patterns of . . . coal," separating out those "mines to which *coal* consumers can practicably turn for supplies." 341 F. Supp. at 556 (emphasis added).

[79] Freight rate districts are producing areas grouped for ICC ratemaking purposes; all mines within each producing area are accorded the same rates to the same consuming destinations. *See Ayrshire Collieries Corp. v. United States,* 335 U. S. 573, 335 U. S. 576 (1949). The other markets accepted by the District Court are Commonwealth Edison and the Metropolitan Chicago Interstate Air Quality Control Region. Commonwealth Edison was found to be unique in light of its massive coal requirements, its purchasing patterns, which are "quite distinct from [those] followed by other consumers," and its singularly extensive commitment to nuclear energy. The MCIAQC, consisting of six Northeastern Illinois counties

justification was that, since ordinary rail rates are the same for all mines in any particular FRD, and since transportation costs are the principal competitive factor in coal marketing, mines in one FRD cannot effectively compete for the same customers with mines in other FRD's. Since United Electric's mines are located in the Belleville and Fulton-Peoria FRD's and Freeman's mines are located in the Springfield and Southern Illinois FRD's, the combination of the two companies was found to present no risk of anticompetitive effects. The error of the District Court in drawing the § 7 sections of the country "so narrowly as to place appellees in different markets"[80] is amply demonstrated by the overlapping distribution patterns of Freeman and United Electric. Though located in different FRD's and thus supposedly not competitive, they sold one-half their output to the same customers at the same facilities. Lack of competition between FRD's is further refuted by the existence of reciprocal selling patterns. For example, while United's Belleville FRD mine was selling 25% of its output to customers in the Southern Illinois FRD sales area, Freeman was selling 20% of its Southern Illinois FRD coal to Belleville sales area customers.

The inability of the lower court's narrow markets to "*correspond to the commercial realities"[81] of the distribution patterns displayed in the record is explained by the undue weight given ordinary rail rates. While transportation costs are significant, ordinary rail rates are not the single controlling element of transportation costs. First, not all rail shipments are governed by FRD rates; many of the most significant shipments are transported via "unit trains" carrying only coal from a particular producer to a particular customer pursuant to a negotiated rate. Thus, Freeman ships Southern Illinois FRD coal by unit train to a Belleville FRD sales area customer at a cost lower than any Belleville FRD rate to that location. Second, not all coal transportation proceeds by rail. United transports most of its coal by barge, and, in 1967, only one-half of all the coal sold in the five States which receive coal from Illinois was transported by all-rail shipments."*

Normal rail rates are thus not so limiting as to eliminate substantial competition between FRD sales areas. Coal producers may constitute strong competitive factors in areas up to 500 miles from the mine. Thus, in 1967, Freeman's Southern Illinois FRD Orient Mine shipped over 1.5 million tons of coal to customers 300 to 500 miles away. At the same time, United's Fidelity Mine, only 40 miles from the Orient, shipped more than one million tons, over half its total production, to equally distant locations. Both Freeman and United Electric have mines which are capable of supplying any point in the EICP sales area. Further, even assuming the existence of FRD markets, I think the court below erred in rejecting the Government's proposed markets. As with product markets, § 7 does not necessitate an anticompetitive effect in any particular geographic market; its proscription reaches combinations which may substantially lessen competition in any section of the country. Thus, whatever the correctness of the District Court in finding FRD markets, the lack of anticompetitive effect in those markets is of no help to General Dynamics if competition may be lessened substantially in other geographic markets. And, as with product markets, the existence of FRD markets is not inconsistent with the existence of a myriad of other sometimes overlapping markets. Thus, in *United States v. Pabst Brewing Co.,* 384 U. S. 546 (1966), we found Wisconsin, the Wisconsin-Michigan-Illinois tri-state area, and the entire United States all to be relevant § 7 sections of the country in which to assess anticompetitive impact.

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and two Northwestern Indiana counties, was found unique because of its singular access, through water and rail arteries, to almost all FRD's in the Midwest.

[80] *See United States v. Philadelphia National Bank,* 374 U.S. at 374 U. S. 361.

[81] *See Brown Shoe Co. v. United States,* 370 U.S. at 370 U. S. 336.

While existing sales patterns show that transportation costs are not as restrictive as the District Court found, long-range transportation costs and the national distribution of coal deposits serve to divide the country into regionally significant coal markets. Both Freeman and United Electric are located in the EICP, consisting of Central and Southern Illinois, Southwestern Indiana, and Western Kentucky, and parts of other nearby areas. The region overlies a geologically united coal-bearing rock sequence which is estimated to contain 36% of the Nation's total coal resources. Because of the separation of the region from other major producing regions,[82] EICP producers enjoy a substantial competitive edge with respect to sales in an area composed of Illinois, Indiana, Western Kentucky, parts of Tennessee Eastern Iowa, Southeastern Minnesota, Southern Wisconsin, and extreme Eastern Missouri. In 1967, 825 of EICP coal was sold in this area. Freeman sold over 93% of its coal, and United Electric sold over 97% of its coal in this area.

Within the EICP sales area, Illinois stands as an economically significant submarket. In 1967, 82% of the coal consumed in Illinois came from Illinois mines, and 58,% of the coal mined in the State was used there. Freeman sold 42% of its coal and United Electric sold 62% of its coal to Illinois consumers, more than either company sold in any other State. Since Illinois sales are dominated by Illinois producers, and since all relevant Freeman and United Electric Mines are located in Illinois,[83] the State constitutes a relevant and significant market for § 7 purposes. Although economic lines do not fall precisely along political boundaries, the Government is not required to delineate § 7 markets by "metes and bounds." *United States v. Pabst Brewing, supra* at 384 U. S. 549. In holding a four-county group a relevant geographic market in *United States v. Philadelphia National Bank,* 374 U. S. 321 (1963), we noted the artificiality of such political boundaries, but held that "such fuzziness would seem inherent in any attempt to delineate the relevant geographic market." *Id.* at 374 U. S. 360 n. 37. The State of Wisconsin was held a relevant market in *Pabst Brewing, supra,* and, in *United States v. El Paso Gas Co.,* 376 U. S. 651, 376 U. S. 657 (1964), we held that there could be "no doubt that California is a *section of the country' as that phrase is used in § 7."*

IV

While finding no violation of § 7 in the Freeman-United Electric combination, the District Court did not make clear the standard used in reaching that ultimate conclusion. The court did not mention what it thought to be the relevant market shares, nor did it discuss the effect of the combination on industry concentration. The court merely found that Freeman and United Electric do not compete, because they are located in different FRD geographic markets and because they sell different types of coal. As already discussed, nearly all the mines of both companies are located in Southern Illinois, and, as demonstrated by past distribution patterns, with an ability to compete effectively at distances up to 500 miles, their presence in different minute FRD's within Southern Illinois has simply not rendered them noncompetitive. The differences in the types of coal sold, moreover, are irrelevant. It is true, as the court below notes, that United Electric sells strip-mined coal, while Freeman extracts deep reserves, but the fact that the companies sold half their output to common customers demonstrates that at least a

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[82] The Nation's other major coal producing regions are: (1) the Eastern Coal Province of Western Pennsylvania, West Virginia, Eastern Kentucky, and parts of Ohio, Tennessee, and Alabama; (2) the Western Interior Coal Province comprised of Central Iowa, Northern and Western Missouri, and Eastern Oklahoma; and (3) scattered deposits in Montana, Wyoming, Colorado, and Utah. Jurisdictional Statement 5.

[83] United Electric also controls some coal deposits in Colorado and Oklahoma which are not in issue in this case. 341 F. Supp. at 538 n. 8.

significant portion of the consuming public is understandably unconcerned with the details of extraction. While it is also true that only Freeman sells metallurgical coal and a byproduct known as dust, this says nothing more than that the companies do not compete in metallurgical coal or dust; it does not relieve the court of the responsibility for evaluating the anticompetitive effects in nonmetallurgical coal production -- production which accounts for 100% of United's and 92% of Freeman's business.[84]

The court further found that United Electric, standing alone, would not contribute meaningfully to further competition, since virtually all its economically mineable strip reserves were committed under long-term contracts, and it possessed neither the capability to obtain more strip reserves nor the expertise to develop its deep reserves. Although the doctrine was not invoked by name, this appears to be an application of the "failing company" defense. *See Citizen Publishing Co. v. United States,* 394 U. S. 131 (1969). If it is, the court proceeded on an analysis made at the wrong time, and failed to discuss the legal standards employed in finding the defense to be established. The finding that 48 of United's 52 million tons of strip reserves were committed related to the time of trial. But, since the rationale of the failing company defense is the lack of anticompetitive consequence if one of the combining companies was about to disappear from the market at any rate, the viability of the "failing company" must be assessed as of the time of the merger. *United States v. Greater Buffalo Press,* 402 U. S. 549, 402 U. S. 555 (1971); *Citizen Publishing Co. v. United States, supra,* at 138.

The Court urges that United's weak reserve position, rather than establishing a failing company defense, "went to the heart of the Government's statistical *prima facie* case based on production figures." Under this view, United's weak reserve position at the time of trial constitutes post-acquisition evidence which diminishes the possibility of anticompetitive impact, and thus directly affects the strength of time-of-acquisition findings. The problem with this analysis is that the District Court made no time-of-acquisition findings which such post-acquisition evidence could affect. The majority concedes the obvious need for a limitation on the weight given post-acquisition evidence and notes that we have reversed cases where "too much weight" has been given. Here, the post-acquisition events were given all the weight because all the District Court's findings were made as of the time of the trial. While findings made as of the time of the merger could concededly be tempered to a limited degree by post-acquisition events, no such findings were ever made. Many of the commitments here which reduced United's available reserves occurred after the acquisition; 21 million tons, for example, were committed in 1968. Similarly, though the District Court found further mineable strip reserves unavailable at the time of trial, there is no finding that they were unavailable in 1959 or 1967. To the contrary, the record demonstrates that other coal producers did acquire new strip reserves during the 1960's.[85] United's 1959 viability is further supported by the fact that it possessed 27 million tons of deep reserves. While we do not know if all these reserves were economically mineable at the time of the acquisition, there was no finding that they would not become so in the near future with advances in technology or changes in the price structure of the coal market.[86] Further, there was no contention or finding that further deep reserves were not available for

[84] The lack of competition from United for a mere 8% of Freeman's business is simply irrelevant. In *United States v. Aluminum Co. of America,* 377 U. S. 271 (1964), we struck down a combination which affected competition in the aluminum conductor market, and that result was not affected by the irrelevant fact that one of the companies, Rome Cable, also engaged in the production of copper conductor.

[85] *See* Brief for United States 71.

[86] Research into new methods of extraction or a rise in the price of coal could make reserves which are uneconomical to mine at any given time economically mineable in the future.

acquisition.[87] The District Court merely concluded that United had no "ability to develop deep coal reserves."[88]

While it is true that United is a strip-mining company which has not extracted deep reserves since 1954, this does not mean that United would not develop deep mining expertise if deep reserves were all it had left, or that it could not sell the reserves to some company which poses less of a threat to increased concentration in the coal market than does Freeman. United Electric was not, as the Court suggests, merely one of many companies with the possible "inclination and the corporate treasury" to allow expansion into "an essentially new line of business." United was a coal company with a thriving coal marketing structure. At the time of the merger, it had access to at least 27 million tons of deep reserves, and it had operated a deep mine only five years previously. While deep coal mining may have been an essentially new line of business for many, it was for United merely a matter of regaining the expertise it once had to extract reserves it already owned for sale in a market where it already had a good name.

V

Thus, from product and geographic markets to market share and industry concentration analysis to the failing company defense, the findings below are based on legal standards which are either incorrect or not disclosed. While the court did gratuitously state that no § 7 violation would be found "even were this court to accept the Government's unrealistic product and market definitions," this conclusory statement is supported by no analysis sufficient to allow review in this Court. The majority notes that production figures are of limited significance because they include deliveries under long-term contracts entered into in prior years. It is true that uncommitted reserves or sales of previously uncommitted coal would be preferable indicia of competitive strength, but the District Court made *no* findings as to United's or Freeman's respective market shares at the time of the acquisition under either of these standards.[89]

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[87] To the contrary, United Electric acquired substantial new deep reserves after the time of the acquisition, since it now owns about 44 million tons of deep reserves and controls by location another 40 to 50 million tons. Reserves are controlled by location if, in order to be mined at all, they must be mined by those who control, by ownership, lease, or option, the contiguous reserves.

[88] If that conclusion is to lend support to the combination on the ground that United "standing alone, cannot contribute meaningfully to competition," it must be made in light of the stringent standards applicable to the failing company defense. In *Citizen Publishing Co. v. United States,* 394 U. S. 131, 394 U. S. 138 139 (1969), we said that the defense is one of "narrow scope," and that the burden of proving the defense is "on those who seek refuge under it." We also stated that the prospects of continued independent existence must be "dim or nonexistent," and that it must be established that the acquiring company is the only available purchaser. *See also United States v. Greater Buffalo Press,* 402 U. S. 549, 402 U. S. 555-556 (1971), and *United States v. Third National Bank in Nashville,* 390 U. S. 171, 390 U. S. 189 (1968).

[89] The District Court did find that, as of 1968, Freeman controlled 6.5% of the total coal reserves dedicated to existing mines in the EICP. At the same time, United Electric controlled 2.5% of that total, but almost all of this was contractually committed. If market shares are to be determined by percentage of total reserves, what is necessary is a finding as to each company's 1959 share of uncommitted Illinois and EICP reserves -- including reserves which were economically mineable or which might have become so in the reasonably near future, and further including an estimate as to uncontrolled reserves which might have been acquired by either company in the reasonably near future.

The District Court also found that, as of 1968, the two companies together accounted for 10.9% of the EICP coal production, and that this figure represented more than a 10% decrease from the combined production for 1959. Combined 1959 production by the companies was thus at least 12.1% of the EICP

On the basis of a record so devoid of findings based on correct legal standards, the judgment may not be affirmed except on a deep-seated judicial bias against § 7 of the Clayton Act. We should remand the case to the District Court with directions to assess the impact of the Freeman-United Electric combination on the Illinois and EICP sales area coal markets as of 1959.[90] We should direct the court to make findings of respective market shares, and further to evaluate United Electric's viability as an independent producer or as the possible "acquiree" of a company other than General Dynamics as of 1959, in light of the strict standards applicable to the failing company defense. Since we abdicate our duty for responsible review and accept the mere conclusion that no § 7 violation is established on the basis of a record with none of these necessary findings, I dissent from the affirmance of the District Court's judgment.

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total. If market shares are to be determined by percentage of industry sales, this figure is in excess of percentages found illegal in markets with a trend toward concentration (*see, e.g., United States v. Von's Grocery Co.,* 384 U. S. 270 (1966) (7.5%), and *United States v. Pabst Brewing Co.,* 384 U. S. 546 (1966) (4.49%)), and the court below recognized an increase in concentration in the coal market. It might be argued, however, that, if market share is to be determined by sales, the production figures found by the court below are not the relevant ones, for they include production which goes to meet obligations incurred in long-term contracts entered into in prior years. In terms of competition, if sales are the relevant criteria, what is needed is a finding of "new" sales (sales of previously uncommitted coal) as a percentage of total industry new sales in Illinois and the EICP at the time of the acquisition.

[90] Common control of the two companies was achieved in 1959, and the combination was completed in 1967; at oral argument, both parties conceded that the merger "took place" in 1959.

3. Mozart Co. v. Mercedes-Benz of North America, 593 F. Supp. 1506 (N.D. Cal. 1984)

The Mozart Company, A Corporation v. Mercedes-Benz Of North America, Inc., A Corporation.
No. C-81-0531-Mhp.

United States District Court, N.D. California.
September 18, 1984.

3.1. Opinion And Order

PATEL, District Judge.

This is an antitrust action, presently before the court on cross-motions for summary judgment. Plaintiff The Mozart Company, successor in interest to Eurasian Automotive Products, Inc., a wholesale automotive parts distributor, brought suit against defendant Mercedes-Benz of North America ("MBNA") alleging violations of §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act, 15 U.S.C. §§ 1, 2, and 14. Mozart contends that provisions of the Dealer Agreement between MBNA and each Mercedes-Benz franchised dealer constitute a per se tying violation of 15 U.S.C. §§ 1 and 14. Plaintiff alleges additionally that MBNA conspired with the franchised dealers to boycott independent replacement parts distributors, such as Eurasian, in further violation of § 1, and also attempted to monopolize the sale in the United States of replacement parts usable in Mercedes automobiles in violation of § 2. Defendant objects to the use of a per se rule and argues that a rule of reason standard should apply in this case. Since, according to defendant, the evidence Mozart has introduced concerning MBNA's alleged conduct involving threats, coercion and intimidation would be insufficient to permit plaintiff to prevail under a rule of reason standard, defendant's motion for summary judgment should be granted.

This court has had previous occasion to deal with most of the issues raised in this litigation. In *United States v. Mercedes-Benz of North America, Inc.,* 517 F. Supp. 1369 (N.D.Cal.1981) ("*MBNA*"), after detailed consideration of the arguments raised by both parties, the court held that the per se standard applied. It then proceeded to deny both the government's and MBNA's

motions for summary judgment and ordered the case to proceed to trial on "the issue of defendant's economic power and, if that be established, whether defendant can demonstrate sufficient business justification for a tying arrangement." *Id.* at 1373. At the same time, the court held that no factual dispute existed as to whether the Mercedes-Benz automobile and Mercedes replacement parts were two separate products tied together by the MBNA Dealer Agreement, or whether the agreement affected a not insubstantial amount of interstate commerce.

Other courts have also considered tying arrangement claims brought against MBNA. In *IAP, Inc. v. Mercedes-Benz of North America, Inc.,* 571 F. Supp. 262 (D.N.J.1983) ("IAP"), the court went on at some length about the history of automobile production in general and the manufacture of replacement parts in particular. Id. at 265-67. It then cited Pick Mfg. Co. v. General Motors Corp., 80 F.2d 641 (7th Cir.), aff'd per curiam, 299 U.S. 3, 57 S. Ct. 1, 81 L. Ed. 4 (1936), which held that since "[t]he preservation of the good will of the public is directly involved," General Motors did not violate § 3 of the Clayton Act by requiring Chevrolet and Buick dealerships to sell only genuine GM replacement parts or parts authorized by GM. 80 F.2d at 643-44. According to the *IAP* court, *Pick* created an automobile replacement parts "exception" to antitrust law that, in essence, forecloses any tying claim of this sort against any automobile manufacturer. 571 F. Supp. at 167-68.[91]

In another action against Mercedes, *Metrix Warehouse, Inc. v. Daimler-Benz A.G.,* 1982-2 Trade Cas. (CCH) 64,861 (D.Md.1982) ("*Metrix I*"), the court denied both parties' motions for summary judgment for substantially the same reasons as this court did in *MBNA. Id.* at 72,280. Following the decision in *IAP,* however, the *Metrix* court reconsidered its earlier opinion, concluded that *Pick* was controlling precedent, and granted summary judgment in favor of Daimler-Benz and MBNA. *Metrix Warehouse, Inc. v. Daimler-Benz A.G.,* 1984-1 Trade Cas. (CCH) 65,766 (D.Md.1982) ("*Metrix II*"). Then, following the opinion of the Supreme Court in *Jefferson Parish Hospital Dist. No. 2 v. Hyde,* ___ U.S. ___, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984) ("*Hyde*"), the court determined that its second opinion in the case had been "premature," concluded that *Hyde* showed the notion of a *Pick* exception to be untenable, vacated *Metrix II,* and reinstated *Metrix I. Metrix Warehouse, Inc. v. Daimler-Benz A.G.,* No. N 79-2066 (D.Md. June 11, 1984) ("*Metrix III*").

Now this court must decide once again whether summary judgment should be in favor of or against MBNA. After thorough consideration of the extensive documentary evidence, memoranda, and oral argument presented by both parties, the court has concluded that it must deny both motions for summary judgment. The court has found no reason to disturb its previous determination that a per se standard should be used to test the alleged tying violation at issue here. It also remains clear that Mercedes-Benz automobiles and Mercedes replacement parts are two separate products tied together by the MBNA Dealer Agreement, and that this arrangement affects a not insubstantial amount of interstate commerce. Substantial factual disputes exist regarding whether MBNA had sufficient economic power to coerce its dealers

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[91] The specific issue before the *IAP* court was whether plaintiffs, instead of meeting defendant's motion for summary judgment, could dismiss their complaint with prejudice to themselves and without costs, but without prejudice to members of a purported class of plaintiffs which they attempted to have certified. 517 F. Supp. at 263-65. The court determined, *inter alia,* that since defendant had gone to great expense and trouble to prepare its motion for summary judgment, and plaintiffs had never met that motion as required by the Rules of Civil Procedure, defendant's motion for summary judgment would be granted. *Id.* at 269-70. The court's discussion of the nature of plaintiffs' claim and the *Pick* "exception" was therefore unnecessary in deciding the issue before it.

into the tying arrangement and a conspiracy to boycott, and, if that is demonstrated, whether MBNA had sufficient business justification for its conduct. There is also dispute regarding the issue of MBNA's attempt to monopolize the sale of Mercedes replacement parts.

3.1.1. Factual Background[92]

Defendant MBNA, since 1965 the exclusive United States distributor of Mercedes-Benz automobiles, markets its passenger cars and genuine and approved replacement parts through approximately 400 franchised dealerships.[93] Each dealer becomes party to a standard written Dealer Agreement, the second part of which contains numerous "Standard Provisions." Paragraph 9C of that part of the agreement provides:

Dealer shall neither sell or offer to sell for use in connection with MB passenger cars nor use in the repair or servicing of MB passenger cars any parts other than genuine MB parts or parts expressly approved by DBAG if such parts are necessary to the mechanical operation of such MB passenger cars.

Part one of the Dealer Agreement defines "MB parts" as "parts, accessories, components, assemblies, and optional equipment for MB passenger cars supplied by MBNA, DBAG,[94] or DBNA."[95]

Plaintiff rests its claim of a per se illegal tying arrangement on Paragraph 9C quoted above. Mozart contends further that in connection with this arrangement MBNA coerced its dealers into a conspiracy to boycott all independent replacement parts distributors, such as Eurasian Automotive Products, and also attempted to monopolize the sale of Mercedes replacement parts in the United States.

3.1.2. The Applicable Standard

In *MBNA,* defendant's primary arguments in favor of its own motion for summary judgment were that "because of the nature of its franchise [arrangements], per se tying standards are inapplicable and that a rule of reason is the appropriate standard for determining restraint of trade." 517 F. Supp. at 1374. Even though this court determined in that action that a per se tying standard did indeed apply, MBNA repeats the same argument in this proceeding, contending that the cases of *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977) and *Jefferson Parish Hospital Dist. v. Hyde, supra,* plus a series of franchise/trademark cases decided by the Court of Appeals for the Ninth Circuit, compel a different result. According to Mercedes, these cases, taken together, stand for the proposition that tying arrangements are not per se illegal unless they are imposed upon the ultimate consumer. This means, contends defendant, that the law of tying essentially has no application

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[92] For a more detailed discussion of MBNA's operational structure and parts distribution system, see this court's opinion in *United States v. Mercedes-Benz of North America, Inc.,* 517 F. Supp. 1369, 1373-74 (N.D.Cal.1981).

[93] This case deals only with replacement parts. It is not argued nor could it be that parts for original use are separate products. Furthermore plaintiff's claim does not involve warranty parts. (Pl.'s Mem.Supp.Summ.Judgment, at 48; Pl.'s Reply Mem., at 23).

[94] Daimler-Benz A.G., the manufacturer of Mercedes automobiles, trucks, and other vehicles, and their replacement parts.

[95] Daimler-Benz of North America, Inc., the exclusive United States importer of DBAG products.

to exclusive dealing arrangements between franchisors and franchisees. These remarkable conclusions do not find support in the authority MBNA cites. Neither *GTE Sylvania* nor *Hyde* provides a basis for the argument that a per se standard should not apply in this case, and the Ninth Circuit cases relied upon only support the theory that MBNA "may condition the sale of the passenger *car* on use of the Mercedes-Benz trademark." *MBNA,* 517 F. Supp. at 1374 (emphasis in original).[96]

As this court pointed out in *MBNA, GTE Sylvania* essentially overruled *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967) and criticized the *Schwinn* court for departing from a long line of authority treating vertical restrictions as subject to the rule of reason and for adopting the per se rule without performing the analysis required by *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). While some may have believed *GTE Sylvania* argued the Supreme Court's abandonment of the per se rule, *Hyde* certainly has dispelled that notion insofar as tying arrangements are concerned. Unlike its observation in *GTE Sylvania* that some vertical restrictions have an economic benefit, the court in *Hyde,* using a *Northern Pacific* analysis, announced its continuing belief that most tying arrangements are inherently anticompetitive.[97] Furthermore, application of the per se rule to tying arrangements has a thirty-seven year history. By contrast the per se rule was short-lived in vertical restriction cases. Moreover, the reasoning of the *GTE Sylvania* opinion gives no hint that the per se rule "long ... applied to tying arrangements because of `their pernicious effect on competition and lack of any redeeming virtue'" was no longer to be applied to those cases. *MBNA,* 517 F. Supp. at 1377 (quoting *Northern Pacific Ry. Co.,* 356 U.S. at 5, 78 S.Ct. at 518). Defendant's assertion that *GTE Sylvania* somehow upsets established tying law is therefore clearly without foundation.

Mercedes nevertheless contends that *Hyde* all but forecloses the use of a per se standard in tying cases. The case holds, according to defendant, that a per se standard can be used only if the alleged tying arrangement is shown, through market analysis, to impose an actual restraint on the ultimate consumer's freedom of choice.

This argument mischaracterizes the holding and reasoning of the case.[98] In fact the court could not have made it clearer: "It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and are therefore unreasonable `per se.'" 104 S. Ct. at 1556. The essential characteristic of such

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[96] These cases, *California Glazed Products, Inc. v. Burns & Russell Co.,* 708 F.2d 1423 (9th Cir.) *cert. denied,* ___ U.S. ___, 104 S. Ct. 348, 78 L. Ed. 2d 314 (1983); *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau,* 701 F.2d 1276 (9th Cir.) *cert. denied,* ___ U.S. ___, 104 S. Ct. 88, 78 L. Ed. 2d 96 (1983); *Hamro v. Shell Oil Co.,* 674 F.2d 784 (9th Cir.1982); and *Krehl v. Baskin-Robbins Ice Cream Co.,* 664 F.2d 1348 (9th Cir.1982) all consider whether the products involved in the alleged tying arrangements were "separate products," not whether a per se standard applied. These cases are therefore discussed, *infra,* in the "separate products" section.

[97] Justice O'Connor argued forcefully that tie-ins have economic utility. However, she could persuade only three other members of the Court to join her. In her rationale she relied in part on the reasoning of Justice White in *Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969) ("*Fortner I*"). Justice White, however, joined with the *Hyde* majority in upholding the per se rule.

[98] Defendant's reading of the Court's opinion is based largely on the concurring opinion of Justice O'Connor, which, although MBNA disagrees, clearly is at fundamental variance with the opinion of the Court regarding the continued validity of per se analysis. *See,* 104 S. Ct. at 1569, 1576 (O'Connor, J., concurring).

an arrangement, the Court continued, is the seller's power to "force" a purchaser to do what he would not do in a purely competitive market. When it is "probable" that a consumer would be "forced" into the purchase of the tied product because of the seller's "market power" in the tying product market, per se condemnation, which is by definition "condemnation without inquiry into actual market conditions," is warranted with respect to the arrangement. *Id.* at 1558-60. Such market power can be demonstrated, the Court noted, by a showing that the "seller's share of the market is high" or by evidence that he "offers a unique product that competitors are not able to offer...." *Id.* at 1560-61. The alleged tying arrangement at issue in *Hyde* was an exclusive contract between the hospital and a firm of anesthesiologists that provided for all anesthesiological services offered by the hospital to be performed by the firm. *Id.* at 1554-56. Because there was no showing that the hospital had any probable forcing power in the tying product market of hospital services, the per se standard was not applicable in that case. *Id.* at 1561-67.

Hyde thus makes no change in the law concerning the use of a per se standard in tying cases. The three-part test articulated by this court in *MBNA* continues to have validity. *See Digidyne Corp. v. Data General Corp.,* 734 F.2d 1336, 1338 (9th Cir. 1984). There is also no indication in *Hyde* or in any other authority that tying analysis is only relevant when the tie is imposed on the ultimate consumer. The alleged tie-in in *Hyde* was imposed on the consumer of hospital services, and was therefore analyzed from that perspective. Nothing in the case suggests that all tying cases must be analyzed from that point of view, and no other cases impose that criterion. In *Anderson Foreign Motors, Inc. v. New England Toyota Distributor, Inc.,* 475 F. Supp. 973 (D.Mass.1979), plaintiff automobile dealers contended that a requirement by Toyota that they use Toyota delivery services in order to purchase Toyota passenger cars was an illegal tying arrangement. Agreeing that the dealers were the appropriate consumers from whose perspective the tie should be analyzed, the court concluded that the plaintiffs should be allowed to go to trial on their claim, noting that "dealer freedom of choice is an important value protected by tie-in law." *Id.* at 984. *Accord, Grappone, Inc. v. Subaru of New England, Inc.,* 534 F. Supp. 1282, 1289 (D.N.H.1982); *Joe Westbrook, Inc. v. Chrysler Corp.,* 419 F. Supp. 824, 835 (N.D.Ga.1976).

In *Blanton v. Mobil Oil Corp.,* 721 F.2d 1207 (9th Cir.1983), Mobil dealers contended that the parent company had, among other things, coerced them into a tying arrangement that required them to purchase other Mobil products in addition to gasoline in order to retain their dealerships. The court viewed the evidence to indicate that "Mobil dealers were used as captive consumers of Mobil products," and were therefore victims of an illegal tying arrangement. *Id.* at 1211.

Finally, in the recent case of *Digidyne,* the court determined that defendant Data General's refusal to license a software system except to purchasers of its "central processing units" was an illegal tie. 734 F.2d at 1338. Data General sold these materials "primarily to original equipment manufacturers ("OEMs") who combine them with application software ... to create a complete computer system for resale." *Id.* at 1342. The tie was therefore imposed on these OEMs, not on the ultimate consumer of the finished computer product. *Id.* at 1342-44. Thus, defendant's "ultimate consumer" argument is without merit.

Hyde also appears to put to rest any possibility that *Pick* creates an "automobile replacement parts exception" to antitrust tying law. In *MBNA,* this court suggested that "the law of tying has evolved substantially since 1935 and ... the considerations relied on by that court are more properly construed as possible arguments for a business justification defense rather than as reasons mitigating against the application of a per se standard." 517 F. Supp. at 1376. As noted

above, the *IAP* and *Metrix II* decisions have since appeared to give some new vitality to *Pick.* This is not the case, however. The discussion of *Pick* in *IAP* was dictum unnecessary to the result the court reached.[99] What is more, the court relied for this dictum solely upon *Pick* without any discussion of the lengthy history of tying cases after *Pick. Pick* was decided in 1935 and affirmed by the Supreme Court in 1936. Adoption of the per se rule in tying cases did not take place until 1947 when the Supreme Court decided *International Salt Co. v. United States,* 332 U.S. 392, 396, 68 S. Ct. 12, 15, 92 L. Ed. 20 (1947). Since *International Salt* there have been substantial developments in the law of tying and application of the per se rule. All of this was inexplicably ignored by the *IAP* court.

The *Metrix II* court reconsidered its opinion regarding *Pick* after *Hyde* was decided, and issued *Metrix III,* which succinctly states that "*Jefferson Parish [Hyde]* concisely summarizes the state of tie-in law, and leaves no room for the so-called *Pick* `exception.'" *Id.* at 3. *Pick* clearly has no current application other than shedding light on the business justification defense explained below.

3.1.3. Per Se Tying Standard

Given the continued vitality of the per se standard as applied to tying cases, it remains to be determined whether the arrangement at issue in this case is an illegal tie which warrants per se condemnation. As this court noted in *MBNA,* a plaintiff must make three important demonstrations in order to establish a per se illegal tying arrangement:

> *"1. Two separate products with the sale of one conditioned on the purchase of the other;*
>
> *"2. A seller with sufficient economic leverage in the tying market to appreciably restrain competition in the tied product market; and*
>
> *"3. A tie-in affecting a not insubstantial amount of interstate commerce."*

517 F. Supp. at 1378 (citations omitted); *see also Digidyne,* 734 F.2d at 1338. Other cases have suggested an additional requirement: that some "modicum of coercion" be exerted upon the purchaser of the tied product by the seller of the tying product. *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.,* 732 F.2d 1403, 1407 (9th Cir.1984); *Roberts v. Elaine Powers Figure Salons, Inc.,* 708 F.2d 1476, 1479 (9th Cir.1983). If the plaintiff establishes the above elements, defendant may defend itself "by an affirmative showing of business justification." *MBNA,* 517 F. Supp. at 1378; *see also Moore v. James H. Matthews & Co.,* 550 F.2d 1207, 1217 (9th Cir.1977) ("*Moore I*").

The development of the coercion aspect is less than clear. In attempting to characterize it, one court suggested that tying law is "a kind of semantic shell game." *Ungar v. Dunkin' Donuts of America, Inc.,* 531 F.2d 1211, 1223 (3d Cir.), *cert. denied,* 429 U.S. 823, 97 S. Ct. 74, 50 L. Ed. 2d 84 (1976). Some courts have looked at coercion in terms of whether the two products were, in fact, tied together, i.e., whether the purchaser was required to buy the tied product in order to get the tying product. *Id.* at 1224. Other have examined it in terms of market power, concluding that coercion is likely if a seller has a patent, a unique product or a substantial market share. *See Robert's Waikiki,* 732 F.2d at 1407.

[99] *See,* note 1, *supra.*

Under whatever rubric, coercion is a necessary element of an illegal tying arrangement. From the early days of per se application the rule has been that when a buyer is free to purchase the product separately there is no coercion. *Northern Pacific Ry. Co.,* 356 U.S. at 6 n. 4, 78 S. Ct. at 518 n. 4. This year in *Hyde* the Supreme Court emphasized the need for some coercion holding that the per se rule may only be used "if the existence of forcing is probable." 104 S. Ct. at 1560. However, the Court goes on to evaluate it in terms of market power, saying that "the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate." *Id.* at 1561. From all this it is possible to conclude that the likelihood of some coercion must be shown and that ordinarily if the purchaser must purchase the tied product in order to get the tying product and the seller has market power in the tying product coercion may be presumed. For the reasons explained in subparagraph A.2 and subparagraph B below, plaintiffs have clearly established the "modicum of coercion" necessary to invoke the per se standard. Thus the court finds coercion based on the Dealer Agreement and the fact of its acceptance by a large number of dealers who have stated they believe they had no choice. That evidence, while sufficient to show forcing is likely, is not sufficient to meet the more rigorous requirement of market power sufficient to impose significant restraints on competition in the tied product market.[100]

3.1.3.1. Separate Products Tied Together

3.1.3.1.1.. Two Separate Products

In *MBNA,* defendant contended that the Mercedes-Benz passenger car and its replacement parts were not separate products. In making this argument it relied upon a number of authorities, but principally *Principe v. McDonald's Corp.,* 631 F.2d 303 (4th Cir.1980), *cert. denied,* 451 U.S. 970, 101 S. Ct. 2047, 68 L. Ed. 2d 349 (1981), which held that McDonald's franchisees could be required to operate only on premises leased to them by the parent company. This was not an illegal tying arrangement, reasoned the court, because "the challenged aggregation is an essential ingredient of the franchised system's formula for success," making the franchise and the premises lease "a single product." *Id.* at 309. MBNA contended that the Mercedes replacement parts arrangement was like the McDonald's lease requirement, since "the purchase of MBNA replacement parts is an `integral component' of its [MBNA's] franchised business method." *MBNA,* 517 F. Supp. at 1380.

This court rejected that argument, noting that while the McDonald's arrangement was essential to the company's purpose of providing fast food products, the basic purpose of a Mercedes-Benz franchise was the distribution of Mercedes-Benz passenger cars, not Mercedes replacement parts. *Id.* at 1380-81. It was held that "[t]here is nothing inherent in the Mercedes-Benz franchise or trademarked automobile that prevents ... replacement parts from being provided from non-approved sources." *Id.* at 1381. Notwithstanding this reasoning, defendant, citing a number of recent trademark/franchise cases that essentially stand for the same proposition as *Principe,* renews the same contention here. This court must again reject it.

MBNA relies principally on *Krehl v. Baskin-Robbins Ice Cream Co.,* 664 F.2d 1348 (9th Cir.1982). In that case, ice cream store franchisees contend that "Baskin-Robbins ice cream products are unlawfully tied to the sale of the Baskin-Robbins trademark." *Id.* at 1351. The

[100] The court in *Moore I* also noted that the seller of the tying product should have an economic interest in the tied product. 550 F.2d at 1216. MBNA clearly has an economic interest in the allegedly tied replacement parts. *MBNA,* 517 F. Supp. at 1378 n. 10.

court rejected this claim. Distinguishing between a "business format" franchise system and a "distribution" franchise structure, it noted that while a "business format franchise is usually created merely to conduct business under a common trade name," with the distributor franchise "the franchised outlets serve as conduits through which the trademarked goods of the franchisor flow to the ultimate consumer." *Id.* at 1353. Since "the Baskin-Robbins trademark merely served to identify the ice cream products distributed by the franchise system," the ice cream and its trademark were not separate products, and tying law therefore had no application to the case.

None of that is relevant to this case. MBNA vigorously insists that *Krehl* stands for the proposition that "the law of `tying' has no application at all to exclusive dealing arrangements used by manufacturers in the distribution of products to consumers through retail outlets displaying the manufacturer's trademark" (Def.'s Brief Opp. Summ. Judgment at 27), and that MBNA can therefore require its franchised dealers to sell only genuine or approved Mercedes replacement parts. This reasoning mischaracterizes *Krehl.* The court in that case said tying law did not apply to that particular situation because the purpose of the franchise was to distribute the trademarked ice cream; the trademark and the product it identified were therefore not separate. The purpose of a Mercedes-Benz franchise, as this court previously held, is the sale of Mercedes-Benz automobiles. *MBNA,* 517 F. Supp. at 1381. The Mercedes-Benz passenger car and its trademark are therefore not separate products. That reasoning could not be extended to cover any and all other products a franchisor may wish to distribute through a franchisee, however, without swallowing the whole of antitrust tying principles. Indeed, such a state of affairs would make it possible for MBNA or any other franchisor to require its franchisees to distribute "any product it decided to manufacture," whether or not those products were essential to the purpose of the franchise. *Id.* at 1380. *Krehl* cannot be read to support such a result.[101]

The other cases cited by defendant are likewise unavailing. In *Hamro v. Shell Oil Co.,* 674 F.2d 784 (9th Cir.1982), a Shell service station operator alleged that the requirement that he purchase Shell gasoline in order to obtain a Shell franchise was an illegal tying arrangement. *Id.* at 786. In rejecting the claim, the court merely determined that the Shell trademark and the gasoline the franchise had been established to distribute were not separate products.

In *California Glazed Products, Inc. v. Burns & Russell Co.,* 708 F.2d 1423 (9th Cir.), *cert. denied,* ___ U.S. ___, 104 S. Ct. 348, 78 L. Ed. 2d 314 (1983), a trademark licensee who manufactured finished masonry blocks alleged that an agreement requiring it to purchase from the licensor the trademarked ingredients to finish the blocks was an illegal tie. *Id.* at 1426. The court rejected the claim, holding that since the license existed for the purpose of distributing the trademarked ingredients, those ingredients and its trademark were not separate products.

In *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau,* 701 F.2d 1276 (9th Cir.), *cert. denied,* ___ U.S. ___, 104 S. Ct. 88, 78 L. Ed. 2d 96 (1983), the assignee of the claims of a number of individual pharmacies contended that a health insurance provider's policy of dispensing drug benefits only through its own pharmacy was an illegal tying arrangement. *Id.* at 1284. The court held that this arrangement came within the "business of insurance" exception to antitrust law provided by the McCarran-Ferguson Act, and was

[101] Defendant makes much of the argument that since a Mercedes franchise is a "distribution" franchise rather than a "business format" franchise, *Krehl* and the other franchise cases apply to this litigation. As has been clearly demonstrated, Mercedes passenger cars and their replacement parts are separate products; these arguments about the format of the franchise aid MBNA not at all with respect to the sales of replacement parts.

therefore not an illegal tie. *Id.* at 1284-87. Plaintiff alleged further, however, that the requirement that subscribers to the health plan exercise their drug benefits only at the provider's pharmacy also constituted an illegal tying arrangement. *Id.* at 1288-89. The court rejected this claim, holding that since the subscriber's "purchase of drugs in the required manner was the consummation of the pharmacy benefit, not an unwanted and unnecessary product tied to the desired product," the pharmacy benefit and the restriction on the use of pharmacy services were one product.

Some comments the *Klamath* court made are relevant to the present action. Referring to the "function of the aggregate" test articulated in *Siegel v. Chicken Delight, Inc.,* 448 F.2d 43 (9th Cir.1971), *cert. denied,* 405 U.S. 955, 92 S. Ct. 1172, 31 L. Ed. 2d 232 (1972), the court said that "[s]eparateness is determined in part by whether the products are normally sold or used as a unit and whether their joint sale effects savings beyond those of combined marketing. [Citation to *Siegel,* 448 F.2d at 48.] The critical factor is the extent to which a producer's offerings are in response to independently structured consumer demand." 701 F.2d at 1289. The Supreme Court has defined the two-product inquiry as whether there is a "sufficient demand" for the purchase of the tied product separate from the tying product "to identify a distinct product market in which it is efficient to offer" the two separately. *Hyde,* 104 S. Ct. at 1563 (citing approvingly this court's earlier decision in *MBNA* as well as *Siegel*). *See also Digidyne,* 734 F.2d at 1339.[102]

It remains undisputed in this action that "MBNA has separate personnel and price lists for new car and replacement part sales," and that "[m]any replacement (as well as original) parts are manufactured by outside suppliers." *MBNA,* 517 F. Supp. at 1380. It is also clear that there is a demand for Mercedes replacement parts separate from the demand for the Mercedes-Benz passenger car itself. This court therefore finds, for a second time, that the Mercedes-Benz automobile and its replacement parts are separate products.

3.1.3.1.2. Products Tied Together

No tying arrangement exists, however, unless it is also demonstrated that the purchase of the tying product is conditioned on the purchase of the tied product. In *MBNA,* this court determined that the "express wording of the Dealer Agreement" tied the purchase of Mercedes-Benz passenger cars to the purchase of MBNA-supplied replacement parts. 517 F. Supp. at 1381-84. It so concludes again now.

Defendant previously argued that notwithstanding the language of Paragraph 9C of the Dealer Agreement, the understood practice is that "dealers are free to purchase non-Mercedes-Benz parts and that [this] evidence of the parties' understanding should be controlling." *Id.* at 1381. Defendant repeats that argument here, with the additional contention that two other provisions

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[102] Defendant argues that *Siegel* is an "odd-ball" case that is a singular exception to the rule established in the franchise/trademark cases. *Siegel* cannot be dismissed so easily. The Supreme Court saw fit to treat *Siegel* approvingly in *Hyde* when the Court included it in an enumeration of cases consistent with its two-product analysis. 104 S. Ct. at 1563 n. 35. The tied products in that case were clearly not central to the purpose for which the franchise had been established, and thus were part of an illegal tie-in. The replacement parts at issue in this case are also not central to the purpose of the Mercedes franchise. If other elements are demonstrated, they also may be shown to be part of an illegal tie.

of the Dealer Agreement, taken together with Paragraph 9C, demonstrates the lack of a tie between the Mercedes-Benz automobile and its replacement parts.

Paragraph 9D of the Dealer Agreement provides:

Dealer shall not represent as new, genuine MB parts or as parts approved by DBAG any parts used by it in the repair or servicing of MB passenger cars, which are not in fact new, genuine MB parts or parts expressly approved by DBAG or MBNA.

Paragraph 13F of the Agreement provides:[103]

If Dealer sells for use in the repair of any MB Product any parts which are not genuine MB Parts or parts expressly approved by DBAG or MBNA, Dealer will advise the purchaser by appropriate written notice on the Invoice that such parts are not genuine MB Parts supplied by MBNA and are not warranted by MBNA. Dealer will also, by appropriate written notice on the Invoice, advise the purchaser of the source of such parts and of the warranty, if any, given by the supplier of such parts.

According to defendant, since Paragraph 9D provides for disclosure by the dealer of the use or sale of any non-MBNA parts, "[*i]f Paragraph 9C compelled exclusive dealing with MBNA, Paragraph 9D would be to no purpose at all*." (Def.'s Brief Supp.Summ.Judgment, at 14). Moreover, MBNA continues, the basic, "implicit" purpose of Paragraphs 9C and 9D is to provide for "full and conspicuous disclosure"; Paragraph 13F is the "explicit" declaration of that purpose. *See, id.* And, in any event, continues defendant, 9C is, in practice, irrelevant, since "dealers interpret [it] (as well as the other provisions of the Agreement) in various ways, or they simply ignore it. Some do not know of it; others interpret it as going only to `safety related' parts; all feel free to overlook it." *Id.* at 15. In sum, contends MBNA, all 9C does is require dealers to "*buy some MBNA parts as a condition of the privilege to display the trademark."*

None of these arguments is sufficient to convince this court to alter its previous determination of this question. Notwithstanding any other provision of the Agreement, Paragraph 9C clearly forbids the use or sale of non-genuine or unapproved replacement parts "if such parts are necessary to the mechanical operation of such MB passenger cars." That has nothing to do with "full and conspicuous disclosure"; it clearly prohibits dealers from using or selling certain equipment.

It is also clear that these three provisions deal with different types of replacement parts. While Paragraph 9C pertains only to parts "necessary to the mechanical operation" of the car, Paragraphs 9D and 13F, which do not contain this limiting language, clearly pertain only to those non-genuine parts that 9C does not prohibit dealers from using. Thus, Paragraph 9C cannot be read into superfluity or given interpretations its language will not bear, as defendant would wish; if it had no purpose, it would not be in the Agreement.[104]

Defendant's further attempt to scuttle 9C by arguing that the dealers either interpreted it to suit their own purposes or ignored it entirely is also without merit. Even if the dealers did feel free

[103] This provision was added to the Agreement in 1983.
[104] The fact that MBNA earlier considered and then rejected a less restrictive version of Paragraph 9C indicates that the provision was not intended to be without effect. *See,* "Business Justification" section, *supra.*

to ignore the provision and there is substantial evidence to the contrary the fact of the existence of tying language is enough to evidence a tie. As this court previously noted, such language by itself has considerable "coercive potential," and evidence that it was actually enforced is not necessary to show a tie-in unless "the contract itself does not demonstrate a formal tying agreement." *MBNA,* 517 F. Supp. at 1381-82 and n. 17; *see also Northern Pacific Ry. Co., supra,* 356 U.S. at 11-12, 78 S.Ct. at 521-522; *Ungar v. Dunkin' Donuts of America, Inc., supra,* 531 F.2d at 1224. Since Paragraph 9C clearly does contain tying language, the fact that some dealers may have ignored it does not defeat the existence of a tie.

The fact that Paragraph 9C applies only to those parts "necessary to the mechanical operation" of the car also does not defeat the existence of a tie. In *MBNA,* this court noted that this language was ambiguous, rendering it impossible for the dealers to know what parts were covered in the proscription. There was also considerable evidence suggesting that the phrase referred, in practice, to virtually the entire automobile. *Id.* at 1382 and nn. 18-19.[105] These factors led the court to conclude that the limiting language did not alter the explicit tying arrangement the provision imposes, and it sees no reason to change that determination now.

It is true that Paragraph 9C permits the use of outside parts if they have been "expressly approved" by DBAG. As this court has noted, the existence of an illegal tie-in may in fact be defeated if an actual "approved source" clause and approval mechanism exist. *Id.* at 1382-83. The court determined, however, that no such procedures were available to Mercedes dealers, and the hint in 9C at some possible approval mechanism was therefore illusory. *Id.* at 1383-84. The court has been given no reason to find otherwise now.

For the foregoing reasons, the court is constrained to conclude, for a second time, that the Mercedes-Benz automobile and its replacement parts are separate products tied together by Paragraph 9C of the MBNA Dealer Agreement.[106]

3.1.3.2. Sufficient Economic Power

The second factor in determining the existence of a per se illegal tying arrangement is whether "the seller has some special ability usually called `market power' to force a purchaser to do something that he would not do in a competitive market." *Hyde,* 104 S. Ct. at 1559. The use of a per se standard is, indeed, appropriate only if "the existence of forcing is probable," i.e., there exists a "substantial potential for impact on competition" resulting from the economic power of

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[105] MBNA officials still appear to consider parts "necessary to the mechanical operation" of the Mercedes car to include virtually the entire car. *E.g.* (Stoehr Dep. at 249-54, Pl.'s App. II).

[106] Defendant argues that since plaintiff in its damage study admits that BMW imposed no tying arrangement on its dealers, and BMW has in its dealer agreement a provision similar to Paragraph 9C, plaintiff in effect admits that MBNA is not acting in restraint of trade. (Def.'s Brief Supp.Summ.Judgment, at 4, 12, 13, 23, 24, 37). This argument misconstrues the import of the damage study and plaintiff's use of it.

The damage study deals specifically with impact, something that is not at issue in this proceeding. The study took as an assumption the belief of the former officers of Eurasian Automotive Parts that "[w]hereas MBNA was coercing the Mercedes-Benz dealers to eliminate outside purchases, and insisting that the dealers had agreed not to buy except from MBNA and that they honor their agreement `or else,' BMW employees were not coercing the BMW dealers." (Pl.'s Brief Opp.Summ.Judgment, at 30-31). The provision in the BMW agreement is thus of no import in analyzing whether MBNA's products are tied together.

the seller. *Id.* at 1560. This standard can be met if the plaintiff makes one of the following showings:

1. The seller has a "high" share of the tying product market, *id.;*

2. The tying product is a unique product that the seller's competitors are not able to offer, *id.* at 1560-61;

3. A substantial number of consumers have accepted the tie-in and no factor other than the economic power of the seller explains that acceptance. *MBNA,* 517 F. Supp. at 1384; *see also, Hyde,* 104 S. Ct. at 1561 n. 26 (quoting *Northern Pacific Ry.,* 356 U.S. at 7-8, 78 S.Ct. at 519-520).

Plaintiff bases its argument primarily on the second, or "uniqueness" factor, though it does suggest that the third factor is also met here.[107]

As this court held in *MBNA,* a showing of uniqueness is made by the plaintiff if:

... it can show that the alleged tying product, the Mercedes-Benz automobile, is sufficiently unique to give defendant a competitive advantage in the tying product market. If the tying product is sufficiently desirable to consumers or is a product not easily replicated or commonly available, then the producer of the tying product is likely to have sufficient leverage to restrain the tied product market.

517 F. Supp. at 1385-86 (citations omitted). Some courts have held that this demonstration can be made when a seller has economic power by virtue of a patent or a copyright in the tying product. *See, e.g., United States v. Loew's, Inc.,* 371 U.S. 38, 45-46, 83 S. Ct. 97, 102-103, 9 L. Ed. 2d 11 (1962). In *Northern Pacific Ry.,* the Court held that the railroad's vast land holdings gave it a unique bargaining position sufficient to establish the requisite economic power. 356 U.S. at 7-8, 78 S. Ct. at 519-520. Although the ownership of a trademark "is not conclusive of economic power," *MBNA,* 517 F. Supp. at 1386, some courts have held that a franchisor's trademark control over a common product confers sufficient economic power to establish a tie. *E.g., Siegel v. Chicken Delight,* 448 F.2d at 49-50.

Mozart contends that such factors as the special advantages a Mercedes dealer enjoys and the alleged technological superiority and immense prestige of the Mercedes-Benz passenger car make this automobile and the opportunity to distribute it so uniquely valuable that its producer has power to "force" the dealers to purchase the tied product, MBNA replacement parts.[108] Defendant contends that none of this is sufficient to demonstrate uniqueness for the purpose of establishing economic power on the part of MBNA. Relying primarily on *United States Steel Corp. v. Fortner Enterprises, Inc.,* 429 U.S. 610, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977) ("*Fortner II*"), MBNA argues that its product is not unique "in the antitrust sense"

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[107] Plaintiff also attempts to argue that the market dominance test is also met here, since the market for the tying product, the Mercedes-Benz passenger car, consists of the Mercedes dealers. (Pl.'s Reply Brief, at 22-23). This argument misconstrues the nature of the market dominance test. *See, Digidyne,* 734 F.2d at 1336, 1340 (9th Cir.1984).

[108] Plaintiff bases this argument on portions of the extensive deposition and documentary evidence generated by this litigation, mostly on the deposition testimony of MBNA officials. *See,* (Pl.'s Mem.Supp.Summ.Judgment, at 12-24).

because Mozart has not shown that it confers on the manufacturer "something approaching the insulation of a patent or a copyright." (Def.'s Brief Supp. Summ. Judgment, at 40). The proper focus in this inquiry, contends defendant, is not the self-laudatory comments of MBNA officials, or the praises heaped upon the Mercedes-Benz passenger car by satisfied customers or automobile critics, but is rather the capacities of MBNA's competitors. Unless it can be shown that they are somehow prevented from marketing products comparable to those offered by MBNA, continues defendant, Mercedes products are not sufficiently unique to give MBNA economic power over the tying product market.

Defendant appears to read *Fortner II* to require a producer to have something approaching a monopoly in the tying product market in order for its product to be unique. MBNA made this argument in the previous action before this court; it was rejected then, *MBNA,* 517 F. Supp. at 1386, and must be again now. *Fortner II* does contain language indicating that "the question is whether the seller has some advantage not shared by his competitors in the market for the tying product," 429 U.S. at 620, 97 S. Ct. at 867, and that the producer's competitors must be "in some way prevented from offering the distinctive product themselves." *Id.* at 621, 97 S. Ct. at 868 (quoting *Fortner I,* 394 U.S. at 505, 89 S.Ct. at 1259). The Court's opinion made it clear, however, that this reasoning did not impose a monopoly requirement, and that the uniqueness showing could be made "[w]henever there are some buyers who find a seller's product uniquely attractive, and are therefore willing to pay a premium above the price for the nearest substitute...." *Id.* 429 U.S. at 621 n. 14, 97 S. Ct. at 868 n. 14 (quoting Note, *The Logic of Foreclosure: Tie-In Doctrine after Fortner v. U.S. Steel,* 79 Yale L.J. 86, 93-94 (1969)). As the court in *Digidyne* noted:

The concern is not with the restraint on competition in the tying product but on competition in the market for the tied product. What is required is not monopoly power in the tying product market, but only sufficient power to enable the seller to restrict competition in the tied product. If a seller's product is distinctive, not available from other sources, and sufficiently attractive to some buyers to enable the seller by tying arrangements to foreclose a part of the market for a tied product, the adverse impact on competition in the tied product is not diminished by the fact that other sellers may be selling products similar to the tying product.

734 F.2d at 1345. Thus, the plaintiff in that case was able to demonstrate economic power by showing that defendant's software package, arguably the best available and protected by copyright, was sufficiently unique to allow defendant to "force" purchasers of that product to also purchase other materials. *Id.* at 1340-42. This economic power, based on uniqueness, was further enhanced, in the court's view, by the fact that many of the defendant's customers had become, by virtue of their economic investment, "locked in" to the use of the tying product.

Such a strong showing has not been made by plaintiff in this case. This court previously noted that "the Mercedes-Benz passenger car is one of the world's finest automobiles and that the Mercedes-Benz trademark, a three-pointed star in a circle, is recognized worldwide for its representation of automotive luxury, performance and technology." *MBNA,* 517 F. Supp. at 1373. Plaintiff's impressive array of evidence reinforces these impressions, but does little else. A prestigious and desirable trademark can be persuasive evidence of economic power, *id.* at 1387, but this court is unwilling to determine, as a matter of law, that the prestige of the Mercedes-Benz trademark, taken together with the evidence of the product's technological, safety and luxury preeminence, bestows on MBNA sufficient economic power to force its dealers to accept an illegal tie-in. All of this evidence should be heard and evaluated by a fact-finder at trial before a conclusive determination regarding uniqueness is made.

Mozart also argues, however, that MBNA's economic power is demonstrated by the fact that no explanation other than defendant's ability to impose a tie-in could account for the acceptance of the burdensome terms of Paragraph 9C by the Mercedes dealers. Plaintiff contends that the dealers continued to purchase replacement parts from MBNA, despite the fact that independent distributors offered equivalent parts for much less, because they feared that their two-year franchise agreements would not be renewed if they did otherwise. (Pl.'s Mem.Supp.Summ.Judgment, at 24-27).

In order to make such a demonstration of economic power, plaintiff must show that a significant number of customers in the market have accepted the tie-in, and that there are no explanations other than MBNA's economic power for that acceptance. *MBNA,* 517 F. Supp. at 1385. Mozart falls slightly short on both of these counts. As in *MBNA,* plaintiff has defined the universe of potential buyers as all Mercedes-Benz dealers, and alleges that since 100% of them accepted the adverse terms, a significant number of customers accepted the tie-in. *See, id.* Again, "*there is no identified population against which to compare the 400 Mercedes dealers. Plaintiff might argue that 400 represents an appreciable number of buyers from a total population of import car dealers or of import luxury car dealers. Plaintiff has not attempted such a showing.*"

Plaintiff also has not demonstrated that fear of nonrenewal of franchises is the only possible explanation for the dealers' purchase of parts from MBNA. Indeed, some dealers suggest that the "spectre of non-renewal" did not haunt them at all, and that they had other reasons for purchasing parts directly from Mercedes.[109]

At least one court has determined that since an automobile manufacturer was able to impose burdensome terms on "a significant number of buyers, *i.e.,* its dealers," the manufacturer had sufficient economic power to impose an illegal tie. *Grappone, Inc. v. Subaru of New England, Inc.,* 534 F. Supp. at 1282, 1290 and n. 21. This finding was made, however, after a trial enabled the fact-finder to fully hear and evaluate the evidence. The same procedure must occur in this case. This court therefore declines to conclude, as a matter of law, that MBNA had sufficient economic power to impose an illegal tying arrangement on its franchised dealers.

The court makes that conclusion even though there is considerable evidence that dealers were coerced into the purchase of replacement parts from MBNA. The evidence plaintiff uses to demonstrate the fact of coercion consists primarily of letters, deposition testimony, and MBNA Visitor Reports, which were filled out by MBNA field representatives after inspection tours of Mercedes-Benz dealerships. This evidence seems to indicate that at least some Mercedes dealers or their parts employees felt coerced into buying only genuine MBNA parts, if only "safety-related" parts. Parts managers talk of being harassed by MBNA parts representatives regarding the purchase of outside replacement parts, and some evidence points to possible sanctions imposed against one dealer for his failure to abide by the company policy regarding outside purchases. Defendant's evidence essentially consists of eleven volumes of deposition testimony from numerous Mercedes dealers from around the country who say they have never felt threatened or coerced into buying replacement parts solely from MBNA. Although there is surely enough evidence here to satisfy the "modicum of coercion" requirement, this court nevertheless declines to decide the issue of economic power on summary judgment.

[109] *See* (Terian Dep., Def.'s App. IX, at 1313-15).

3.1.4. Effect on Interstate Commerce

In the previous action before this court, it was determined, as a matter of law, that a not insubstantial amount of interstate commerce was affected by the alleged tying arrangement. *MBNA,* 517 F. Supp. at 1387-88. The court has been given no reason to change its previous finding, and therefore concludes, for a second time, that a sufficient amount of commerce was involved in this arrangement to satisfy this element of the per se analysis.

The court has thus far concluded that the per se tying standard applies in this case. It has also been determined, as a matter of law, that (1) the Mercedes-Benz passenger car and its replacement parts are separate parts tied together by Paragraph 9C of the Dealer Agreement, and (2) that the tie affects a not insubstantial amount of interstate commerce. The court has also determined that the issue of economic power must be decided at trial.[110]

3.2. Business Justification

As this court has noted, a defendant can excuse itself from an otherwise per se illegal tying arrangement if it can demonstrate the existence of a business justification. *Id.* at 1388. The defendant bears the burden of proving that justification.

MBNA maintains that the arrangement at issue in this case is necessary to make sure that the customer "will get the real thing" in terms of new cars, service, and repairs, and is essential to protecting the quality of the Mercedes-Benz passenger car and the goodwill of the customer. (Def.'s Brief Supp.Summ.Judgment, at 1-9). Mozart contends that, on the contrary, MBNA is without business justification for the tying arrangement for two reasons: 1) a less restrictive alternative that would maintain the quality of replacement parts is available to Mercedes; and 2) in any event, the quality control argument MBNA makes is without merit, since replacement parts of appropriate design and quality are available from other sources. (Pl.'s Mem. Supp.Summ.Judgment, at 27-35).

Plaintiff's first contention is based on the fact that in drafting Paragraph 9C of the Dealer Agreement MBNA first considered, then rejected, the following version:

Dealer shall not use, sell, or offer to sell parts other than genuine MB parts or parts expressly approved by DBAG or DBNA if such parts are

a. necessary to the mechanical operation of Mercedes-Benz passenger cars; and

b. not equivalent in quality and design to genuine MB parts expressly approved by DBAG or DBNA.

[110] Defendant also makes much of the argument that a private plaintiff, as opposed to the government, is somehow required, even in a per se case, to prove the entire case, including damages, in order to prevail on any point, and cannot therefore move for partial summary judgment. This argument is without substance. Relevant authority makes it clear that the per se standard is not different for private and government suits. *E.g., Hyde,* 104 S.Ct. at 1556-61; *Digidyne,* 734 F.2d at 1338, 1339.

Id. at 29 (quoting Armstrong *TLC* Dep. Exh. P-12, at 18-19, Pl.'s App. IV). This version, alleges Mozart, would have addressed MBNA's concerns regarding quality without conferring on Mercedes an "uncontrolled silent veto" with respect to outside parts.

Moreover, plaintiff contends, MBNA does not, in any event, have a quality control problem. MBNA purchases 80% of its replacement parts from DBAG; of those parts, one-half are manufactured by DBAG, and one-half are purchased by Daimler-Benz from original equipment manufacturers ("OEMs"), who produce the parts according to DBAG manufacturing and quality control specifications. A selection of the OEM parts are subjected to a "second round" of tests by DBAG, even though they have already been tested by their manufacturer. *MBNA,* 517 F. Supp. at 1389. The remaining 20% of the replacement parts purchased by MBNA come directly from OEMs who "have met DBAG's standards for the quality of their parts and inspection procedures." *Id.* at 1389 n. 32. Mozart, citing deposition and declaration evidence, alleges that "almost all" of the replacement parts sold by Eurasian Automotive Products were manufactured by these OEMs, that Mercedes officials knew this, and that independent distributors even offered parts purchased directly from DBAG parts outlets. (Pl.'s Mem.Supp. Summ.Judgment, at 31-33). Moreover, contends plaintiff, MBNA officials had never heard of accidents caused by defective parts sold by independent distributors, and had indeed heard of no defective part sold by those distributors. In fact, according to Mozart, Eurasian had a better record with warranty claims than Mercedes, who has needed to have many "recall campaigns." *Id.* at 33-35. In sum, Mozart asserts that MBNA's quality control justification lacks merit because the parts marketed by Eurasian were, in fact, of the same quality as many of those used, and even marketed, by DBAG and MBNA.

In response, Mercedes claims that its legitimate business objective "is to wed the customer to [the Mercedes-Benz] brand of automobile" and "to keep the car in first class running order." Citing authority used unsuccessfully in its attempt to remove the case from the purview of the per se standard and place it within the parameters of the franchise/trademark cases, MBNA argues that the business of affording the customer "reliable service and quality replacement parts" is an "inseparable aspect of the business of selling new cars" and "vital to good will and competitiveness." (Def.'s Brief Supp.Summ.Judgment, at 1-6). Since, according to defendant, MBNA has no direct control over the quality and design testing of the OEMs and other manufacturers of replacement parts, and indeed could not have such control, it has no assurance that those parts are of the requisite quality and has a legitimate fear of inferior parts coming from those sources. *Id.* at 7-9 and n. 2. Defendant also calls into question Mozart's characterization of MBNA's warranty record and recall campaigns, *id.* at 42-44, and, pointing to the allegedly faulty brake disc marketed by Eurasian in 1976, contends that some parts sold by OEMs (apparently those not intended for DBAG, but solely for the wholesale market) and other manufacturers of "copy parts" are often inferior, and "sometimes dangerously inferior in quality," to genuine DBAG parts. *Id.* at 7-9, 19-20. MBNA does admit that 20% of its parts purchases are from OEMs whose parts have not gone through DBAG's rigorous "second test," but suggests that these OEMs were superior to others, that they had never forced its dealers to buy such parts, and that MBNA "is now in the process of establishing a quality control program in the United States that will duplicate what is done in Germany."

MBNA's argument regarding the distinction between the distribution, servicing and repair of passenger cars and the sale of other consumer goods is not without merit. *See, MBNA,* 517 F. Supp. at 1390. Indeed, this court has noted that MBNA "has an important legitimate interest in protecting its trademarked automobile and public confidence in the quality and safety of the

product." *Id.*[111] The crucial question is whether the alleged tying arrangement imposed on Mercedes dealers is necessary to protect that interest. The inquiry can only be resolved in defendant's favor if MBNA can demonstrate that its quality control procedures are necessary to protect the passenger car's quality, and show that replacement parts of appropriate quality are unavailable elsewhere.

Plaintiff has presented an impressive array of argument and evidence which strongly suggests that defendant will have great difficulty meeting its burden here. Defendant's only substantial response to that showing, beyond asserting that it has a legitimate interest in the quality of its product, is to cite the declaration of DBAG inspection director Albrecht Köster. (Köster Decl., Def.'s App. XII, at 1803-25). Köster alleges that from 1981 to 1983, numerous shipments from OEMs contained defective parts, *id.* at 1815-18, which, according to MBNA, demonstrates the need for DBAG quality control procedures. Köster also asserts that it would be impossible for DBAG to monitor the quality control procedures of the numerous OEMs, thereby rendering it impossible to know for sure whether the outside parts are of the requisite quality. *Id.* at 1823-24. As plaintiff points out, Köster's declaration deals with replacement part difficulties which took place after the time period relevant in this litigation, and his conclusions regarding the possibility of receiving quality parts from elsewhere is also subject to question.[112] MBNA also cites the deposition testimony of parts manager Don Williams, who suggests that, although he does not know "for sure," some OEMs whose parts are rejected by MBNA leave those parts in Mercedes boxes and then sell them to the independent parts distributors, who then sell them to dealers in the same boxes. This, continues Williams, makes it difficult to tell, for warranty and disclosure purposes, whether the part is MBNA-approved or not. (Williams Dep., Def.'s App. I, at 77-78). This testimony is admittedly speculative and is therefore of little probative value.

As the foregoing discussion indicates, defendant has not made a sufficient showing of the need for DBAG quality control procedures or of the unavailability of quality parts from outside sources to prevail on its own motion for summary judgment. The court also declines, however, to grant plaintiff's motion for summary judgment on this issue. There are serious questions of

[111] Plaintiff argues that the Magnusson-Moss Warranty, Federal Trade Commission Act of 1974, 15 U.S.C. §§ 2301 *et seq.,* especially § 2302(c), is "clear demonstration of Congressional intent that tying arrangements cannot be justified on the ground of preserving goodwill." (Pl.'s Reply Brief, at 23). It is not at all clear to the court that this statute, which prohibits a warrantor from conditioning the warranty on the use of a certain product, and is specifically aimed at prohibiting "the implementation of tying arrangements by means of warranties" (Pl.'s Mem.Supp.Summ.Judgment, at 49) (quoting *Harmsco, Inc.,* 41 Fed.Reg. 34,368, 34,369 (1976)), destroys MBNA's interests discussed here. It is true, of course, that a tie cannot be imposed by Mercedes unless it demonstrates that such an arrangement is the only way the safety and quality of its product can be assured. If such an arrangement proves necessary, this statute would not prohibit it. *See, id.,* at 48 (quoting House Report of § 2302(c)).

[112] Köster suggests that it would be economically infeasible to require DBAG to monitor all the OEMs who sell on the open market. *Id.* at 1823-24. This does not mean, however, that there are not other possible means available to insure the quality of the parts used in the Mercedes car. Perhaps some quality control system could be implemented directly at the dealer level. The fact that the requirement of quality control poses some problems does not excuse MBNA from doing it. Additionally, Köster and MBNA both appear to misread the import of *Volkswagenwerk A.G. v. Bundeskartellamt* (the "Federal Cartel Office"), No. KVR 8/80 (September 11, 1981). The German court merely held that under German law, VW could not be required to monitor the quality control processes of the OEMs. (Def.'s App. XIV, at 2123). Again, this does not dispose of the matter, for there could conceivably be other means of insuring the quality of replacement parts coming from OEMs.

fact in dispute on the business justification defense that preclude a grant of summary judgment for either party.

If plaintiff is able to establish the requisite economic power to impose an illegal tying arrangement, MBNA will have the opportunity to "demonstrate the necessity for its quality control procedures and the unavailability of comparable mechanically necessary replacement parts from non-MBNA sources." *MBNA,* 517 F. Supp. at 1390.

3.3. The Conspiracy and Monopoly Claims

In addition to the claim of a per se illegal tying arrangement, Mozart alleges that MBNA also engaged, with its dealers, in a conspiracy to boycott independent distributors, and also attempted to monopolize, through "resale price maintenance," the sale of Mercedes-Benz replacement parts, in violation of 15 U.S.C. §§ 1 and 2. The court does not find it necessary to discuss in detail the parties' arguments regarding these claims. The main focus of argument and dispute has been the tying allegation, and the court need do no more here than state that it declines plaintiff's invitation to grant summary judgment as to the conspiracy claim on its own motion, and also will not grant defendant's motion for summary judgment on both claims. There is sufficient dispute regarding coercion to permit the conspiracy claim to proceed to trial, and neither party has mustered sufficient argument on the monopoly claim to justify summary judgment treatment.

3.4. Conclusion

Based on the foregoing discussion, the court determines that since there are genuine issues of fact regarding the points raised in plaintiff's motion for summary judgment, that motion must be DENIED. Because the per se standard is applicable as to the tying count, and sufficient factual dispute remains as to the conspiracy and monopoly counts, defendant's motion for summary judgment is also DENIED.

As permitted by Fed.R.Civ.P. 54(d), the court finds that there is no substantial controversy as to the following facts:

1. The Mercedes-Benz passenger car and its replacement parts are separate products tied together by the terms of Paragraph 9C of the MBNA Dealer Agreement; and

2. The tying arrangement affects a substantial amount of interstate commerce.

This matter will proceed to trial on the illegal tying arrangement claim on the issues of:

1. Whether MBNA has sufficient economic power to restrain competition in the tied product market; and

2. Whether MBNA has a legitimate business justification for the tying arrangement at issue in this case and on the conspiracy and monopoly claims.

3. On the conspiracy and monopoly claims.

It is so ordered.

4.Image Technical Service, v. Eastman Kodak Co. 903 F.2d 612 (9th Cir. 1990) Decided May 1, 1990

No. 88-2686

Argued and Submitted April 10, 1989.

613 Decided May 1, 1990.

James A. Hennefer, Law Offices of James A. Hennefer, San Francisco, Cal., for plaintiffs-appellants.

Donn P. Pickett, McCutchen, Doyle, Brown Enersen, San Francisco, Cal., for defendant-appellee.

Appeal from the United States District Court for the Northern District of California.

Before CHAMBERS, WALLACE and WIGGINS,
Circuit Judges.

4.1. Judgment

WIGGINS, Circuit Judge:

Appellants are independent service organizations, or ISOs, that service copier and micrographic equipment manufactured by appellee Eastman Kodak Co. They appeal summary judgment dismissing their anti-trust claims against Kodak. We reverse and remand.

At the heart of this case are two of Kodak's business policies: First, Kodak will not sell replacement parts for its equipment to Kodak equipment owners unless they agree not to use ISOs. Second, Kodak will not knowingly sell replacement parts to ISOs. Kodak admits that the purpose of these policies is to prevent ISOs from competing with Kodak's own service organization for the repair of Kodak equipment.

On appeal, appellants argue that they raised triable issues concerning: (1) whether Kodak's refusal to sell parts to equipment owners unless they agree not to use ISOs constitutes a tying arrangement violative of Section 1 of the Sherman Act; and (2) whether Kodak's refusal to sell parts to ISOs is an act of monopolization violative of Section 2 of the Sherman Act.

We have jurisdiction under 28 U.S.C. § 1291 (1982). We review the district court's grant of summary judgment de novo. *Richards v. Neilsen Freight Lines,* 810 F.2d 898, 902 (9th Cir. 1987). We must determine, viewing the evidence in the light most favorable to appellants, whether issues of material fact exist and whether the district court correctly applied the relevant substantive law. *Ashton v. Cory,* 780 F.2d 816, 818 (9th Cir. 1986).

Viewed in the light most favorable to appellants, the facts are as follows: Prior to 1982, Kodak serviced almost all of its micrographic and copier equipment. Kodak would sell replacement parts (at a profit) to any party who intended to use them to repair Kodak equipment. ISOs generally do not manufacture the replacement parts they use in providing equipment service. ISOs do, however, maintain regular inventories of such parts. In reliance on Kodak's practice of freely selling replacement parts, ISOs developed and began to compete significantly with

Kodak in 1984 and 1985. ISOs offered service for as little as half ofKodak's price. To better compete, Kodak in some cases cut its price for service. Some customersfound ISO service superior to Kodak service.

Concerned with ISO competition, Kodak reviewedits replacement parts policies in 1985 and developed its current policies of not sellingreplacement parts to ISOs or to customers who use ISOs. Kodak exempted micrographic equipment manufactured before 1985 from these new policies. Since 1985, Kodak has had difficulty identifying ISOs and customers who use ISOs. Kodak, therefore, unknowingly sold parts to ISOs and customers who use them since it implemented the 1985 policies. Kodak is currently attempting toenforce more effectively its policies.

4.2. The Tying Claim

Section 1 of the Sherman Act declares illegal " [e]very contract, combination . . ., or conspiracy,in restraint of trade or commerce." 15 U.S.C. § 1 (1982). The Supreme Court has consistently interpreted this provision to prohibit onlyunreasonable restraints of trade. *Business Elec. Corp. v. Sharp Elec. Corp.,* 485 U.S. 717, 108 615 S.Ct. 1515, 1519, 99 L.Ed.2d 808 (1988).

Appellants contend that they have presented genuine issues for trial as to whether Kodak's refusal to sell spare parts to equipment ownersunless they agree not to use ISOs constitutes a tying arrangement *per se* unreasonable under this section.[113]

A tying arrangement is "an agreement by a partyto sell one product but only on the condition that the buyer also purchase a different (or tied) product, *or at least agrees that he will not purchase that product from any other supplier." Northern Pac. Ry. Co. v. United States,* 356 U.S. 1,5-6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958) (emphasis added, footnote omitted). A tying arrangement is *per se* unreasonable if the defendant has sufficient economic power in the tying product market to restrain competition appreciably in the tied product market and if the arrangement affects more than an insubstantial volume of interstate commerce in the tied product.[114] *Fortner Enterprises, Inc. v. U.S. Steel Corp.,* 394 U.S. 495, 499, 89 S.Ct. 1252, 1256, 22 L.Ed.2d 495 (1969); *Mozart Co. v. Mercedes-Benzof N. Am., Inc.,* 833 F.2d 1342, 1345 (9th Cir. 1987), *cert. denied,*____ U.S. ____, 109 S.Ct. 179, 102 L.Ed.2d 148 (1988); *General Business Systems v. North American Philips Corp.,* 699 F.2d965, 977 (9th Cir. 1983).

The district court held that appellants failed toshow evidence of a tying arrangement, noting that Kodak does not "condition the sale of one product on the buyer's purchase of another product" sincea "Kodak customer can buy equipment withouthaving to buy parts; and he can buy parts if he simply owns Kodak equipment." *Image Technical Services, Inc. v. Eastman Kodak Co.,* No. C-87- 1686-WWS, at 5, 1988 WL 156332 (N.D.Cal. Apr. 18, 1988) (Memorandum of Opinion and Order Granting Summary Judgment). Appellants argue that the district court misconstrued one of their theories, explicitly presented in their memorandum in opposition to Kodak's motion for summary judgment. This theory is that Kodak has tied parts to service, not equipment to parts orparts to equipment.

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[113] Appellants briefly argue that Kodak's conduct is illegal under a rule of reason analysis. We do not consider this argumentbecause appellants failed to raise it in response to Kodak's motion for summary judgment in the district court. *See Animal Protection Institute of America v. Hodel,* 860 F.2d 920, 927 (9th Cir. 1988) (failure to raise issue below bars consideration on appeal).

[114] Kodak does not dispute that its arrangement affects a substantial volume ofinterstate commerce in the tied product.

Kodak responds that even viewed as appellants suggest, its policy is not a tying arrangement. First, Kodak points out, it does not force owners to buy service in order to receive parts; Kodak only requires owners not to buy ISO service to receive parts. Kodak will sell parts to owners who agree to self-service their machines. Kodak, however, misconceives the nature of tying agreements. As we stated above, a tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, *or at least agrees that he will not purchase that product from any other supplier.*" *Northern,* 356 U.S. at 5-6, 78 S.Ct. at 518 (emphasis added; footnote omitted).

Second, Kodak argues that its policy is not a tying arrangement because parts and service form a single product market, and without two distinct markets there can be no tying arrangement. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 21, 104 S.Ct. 1551, 1562, 80 L.Ed.2d 2 (1984). The critical question in determining whether two distinct product markets exist is whether it is economically efficient to offer two products separately. *Id.* at 21-22, 104 S.Ct. at 1562-63. That, in turn, depends on whether the demand for each can be separated. *Id.* Kodak contends that there is no separate demand for parts and service. Indeed, Kodak contends, they are useless without each other. Consequently they are economically inseparable.

Kodak's argument presents, at best, a disputed issue of fact. That products must be used together 616 does not eliminate the possibility that they form distinct markets. "We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices." *Id.* at 19 n. 30, 104 S.Ct. at 1562 n. 30 (citing cases). Kodak's policy of allowing customers to purchase parts on condition that they agree to service their own machines suggests that the demand for parts can be separated from the demand for service. Kodak does not dispute appellants' claim that some equipment owners have (perhaps surreptitiously) bought service from ISOs and parts from Kodak. Nor does Kodak dispute appellants claim that other equipment owners would have contracted with ISOs for service if they could have obtained parts separately. *Cf. Dimidowich v. Bell Howell,* 803 F.2d 1473, 1480 n. 3 (9th Cir. 1986) (applying California law) (noting that for some products, such as automobiles, the parts market is distinct from the service market), *modified* 810 F.2d 1517 (9th Cir. 1987); *Digidyne Corp. v. Data General Corp.,* 734 F.2d 1336, 1339 (9th Cir. 1984), *cert. denied,* 473 U.S. 908, 105 S.Ct. 3534, 87 L.Ed.2d 657 (1985) (holding that separate markets existed for computer central processing unit and computer operating system).

Having established that a tying arrangement might exist, we next consider whether, assuming that such a tying arrangement exists, there is an issue of material fact as to whether Kodak has sufficient economic power in the tying product market to restrain competition appreciably in the tied product market. To determine such market power, courts commonly consider whether the defendant is able to force or to induce some potential tying- product customers (here potential Kodak parts customers) to purchase the tied product (here Kodak service) that these customers would not purchase absent the tying arrangement. *Jefferson Parish,* 466 U.S. at 12-18, 104 S.Ct. at 1558-61; *Mozart,* 833 F.2d at 1345; *Digidyne,* 734 F.2d at 1339-41. The district court did not decide this issue.

Appellants suggest that Kodak does have power in the parts market for two interdependent reasons. First, many Kodak parts are unique and available only from Kodak. *See Jefferson Parish,* 466 U.S. at 17, 104 S.Ct. at 1560 (explaining that a defendant may have market power if he offers a unique product that others are unable to offer). Second, owners of Kodak machinery cannot readily switch to other companies' machinery (thereby obviating the need for Kodak parts). Once one owns Kodak's expensive machinery, appellants argue, he is locked in to it. *See Digidyne,* 734 F.2d at 1342 (discussing how market power can be enhanced by

customer lock- in).

Kodak counters, first, that it does not have market power in the interbrand markets for copier or micrographic equipment.[115] Thus, Kodak argues, it cannot have market power in the after-market for spare parts. Kodak points out that appellants donot dispute that equipment purchasers consider the cost of parts and service when initially deciding between Kodak's equipment and its competitors' equipment. If Kodak were to charge supercompetitive prices for parts and service, equipment purchasers would buy competitors' equipment. Second, Kodak argues that appellants have failed to present sufficient evidence that its equipment owners cannot economically replace their current equipment.

We believe that competition in the interbrand markets might prevent Kodak from possessing power in the parts market. To be sure, this case is distinguishable from those in which the defendants had tied parts to equipment. In those cases, since equipment was the tying product, interbrand competition in the equipment market readily negated the plaintiffs' claims that the defendants possessed power in the tying product 617 market. *See, e.g., Grappone Inc. v. Subaru of New England, Inc.,* 858 F.2d 792 (1st Cir. 1988) (tying of cars to parts). In this case, Kodak has tiedparts to service, not equipment to parts. Interbrand competition in the equipment market does not in the abstract negate appellants' claim that Kodakhas power in the parts market. *See Dimidowich,* 803 F.2d at 1480 n. 3 (pointing out that an owner of a broken piece of Bell and Howell micrographicequipment cannot turn to people who service only Kodak or 3M equipment).

But just as equipment purchasers would turn toone of Kodak's competitors if Kodak tied supercompetitively priced parts or service directly to equipment, equipment purchasers might turn to one of Kodak's competitors if Kodak ties supercompetitively priced service to parts. Kodak's desire to attract new customers might, therefore, keep it from charging supercompetitive prices for service. As we stated in a case involvinga computer company's alleged tying of service andwarranty protection to computer hardware, "To have attempted to impose significant pressure to buy [computer parts] by use of the tying service only would have hastened the date on which [defendant] surrendered to its competitors in the small business computer market." *Philips,* 699 F.2d at 977; *see also Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.,* 866 F.2d 228, 236 (7th Cir. 1988) (Posner, J. dissenting) (suggesting, in the context of a tie of parts to motors, that market forces will keep a company that lacks interbrand market power from charging supercompetitive prices in the parts market), *cert. denied,*___ U.S. ___, 110 S.Ct. 141, 107 L.Ed.2d 100 (1989).

Nevertheless, we cannot uphold the district court's grant of summary judgment on this theoretical basis. Not only do we lack the benefit of the district court's consideration of the market power issue, we are presented with a record that was not fully developed through discovery on this issue.[116]

Furthermore, market imperfections can keep economic theories about how consumers will act

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[115] Kodak estimates its share of the micrographic market to be less than twentypercent. Kodak estimates its overall marketshare for plain paper copiers was less than two percent in 1984 and its current share of the high-volume segment of the copier market is approximately twenty-three percent. Appellants do not dispute Kodak'sassertion that it lacks market power in the interbrand markets.

[116] The district court permitted only very limited discovery on the market power issue. Appellants requested further discovery in their opposition to Kodak's summary judgment motion. For example, appellants requested to depose two ISO customers who allegedly would not sign accurate statements concerning Kodak's market power in the parts market. Not finding it necessary to reach the market power issue in its decision, the district court, of course, had no reason to grant this request.

from mirroring reality. *See Jefferson Parish,* 466 U.S. at 15 n. 24, 104 S.Ct. at 1560 n. 24 (noting that market imperfections can keep consumers from seeing the price and quality implications of a tying arrangement). While appellants have not conducted a market analysis and pin-pointed specific imperfections in the copier and micrographic markets, a requirement that they do so in order to withstand summary judgment would elevate theory above reality. It is enough that appellants have presented evidence of actual events from which a reasonable trier of fact could conclude that Kodak has power in the interbrand market and that competition in the interbrand market does not, in reality, curb Kodak's power in the parts market. For example, appellants have presented evidence that Kodak charges up to twice as much as appellants for service that is of lower quality than appellants' service. Appellants presented evidence that in some instances competition from ISOs drove down the price that Kodak was willing to charge for service and that in other instances some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems. *See Fortner,* 394 U.S. at 503-04, 89 S.Ct. at 1258-59 (a price differential may suggest market power).

Appellants' evidence distinguishes this case from *Philips.* In that case, involving a district court's proper summary judgment for a defendant on a tying claim based upon a lack of market power, we explicitly found that the plaintiff had "not presented facts from which [market power] could be inferred." *Philips,* 699 F.2d at 977. For example, in contrast to the situation in this case, it appeared uncontroverted that the higher price for the tied product was due to the product's greater reliability. *See Philips,* 699 F.2d at 969, 972-73, 618 977-78. The tied product did not go down in price after the tying arrangement ceased.

There also appears to have been no evidence that Philips was the exclusive source of service for Philips computers, the tying product. But appellants have presented evidence that many Kodak parts, the tying product, are unique and available only from Kodak.

Furthermore, Philips' share of the interbrand computer market never exceeded five percent. *Id.* at 969. At the time of Philips' alleged tying arrangement, Philips' share of the interbrand market was declining as Philips' computers were "threatened . . . with obsolescence." *Id.* at 970. Roughly one year into the lawsuit, Philips withdrew completely from the American computer market. *Id.* at 969-70. By contrast, Kodak's share of the interbrand copier and micrographic equipment markets varies and may approach as much as twenty-three percent. *See ante* at 616, n. 3. Far from being threatened with obsolescence, Kodak's equipment is state of the art.

Granted, appellants have not claimed that these factors are sufficient to give Kodak power in its interbrand markets. But just as market share is not alone determinative of market power, *cf. Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.,* 526 F.2d 1196, 1204 (9th Cir. 1975)(market share is not determinative of monopoly power), *cert. denied,* 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976), power in the interbrand market is not the *only* basis for power in the parts market. Some strength in the interbrand market, although short of actual market power, can combine with other factors to yield power in an after-market. We, therefore, believe that the contrast between Kodak's and Philips' strength in their interbrand markets is another indication of a difference in power in their after-markets. *Cf. Sterling,* 866 F.2d at 236 (Posner, J., dissenting) (defendant's market share was one-tenth of one percent).

Viewed in the light most favorable to appellants, the evidence that they have presented is sufficient to raise a material issue of fact as to whether Kodak has power in the parts market.

Kodak also contends that it has legitimate business reasons for refusing to sell parts to equipment owners who use ISOs. This court has held that a tying arrangement "does not violate the antitrust laws `if implemented for a legitimate business reason and if no less restrictive

alternative is available.'" *Mozart,* 833 F.2d at 1349 (citing *Phonetele, Inc. v. American Tel. Tel. Co.,* 664 F.2d716, 739 (9th Cir. 1981)). Kodak contends that it implemented its parts policies for three legitimate business reasons: (1) To guard against inadequate service, which reflects negatively on Kodak because customers cannot differentiate between bad service and bad equipment; (2) to remove inventory costs, which Kodak incurs in supplying replacement parts to non-users of Kodak service; (3) to prevent ISOs from free-riding on Kodak's investment in the copier and micrographic industry.

Appellants argue that Kodak's proffered reasons are pretextual or insufficient. Once again, the district court did not discuss this aspect of the caseand we cannot say as a matter of law that Kodak's proffered reasons for its policies are genuine and sufficient. To prevail on the basis of its first reason, Kodak would have to prove[117] that its tying arrangement is the only way that highest quality service can be assured. *See id.* at 1350 n. 7. But appellants have presented evidence that their service is superior to Kodak service. Furthermore, appellants have presented evidence from which a reasonable trier of fact could conclude that Kodak's first reason is pretextual. For example, appellants have presented evidence that Kodak for the first time refused to sell parts to appellant Image Technical Services, Inc. just two months after Image, in competitive bidding against Kodak, won contracts with the state ofCalifornia. Triable issues of fact surround Kodak'sfirst reason.

A reasonable trier of fact could also conclude that Kodak's second reason is pretextual. A reasonable trier of fact need not accept Kodak's assertion that not selling parts to equipment owners who useISOs will reduce its inventory costs. A reasonable trier of fact could conclude that equipment owners'need for Kodak-supplied parts is determined only by the frequency of equipment failure. Indeed, Kodak's policy is based on the premise that equipment owners will have to buy replacement parts from Kodak, even if it means not using ISOs.Thus, triable issues of fact surround Kodak's second reason.

As a matter of law, Kodak's third reason cannot justify its policy. Kodak believes that if ISOs areto compete with it, they should be required to overcome the barriers to entering the parts market as well as the barriers to entering the service market. But one evil of a tying arrangement is precisely that it creates an entry barrier for potential competitors by requiring them to enter two product markets simultaneously. *Fortner,* 394 U.S. at 509, 89 S.Ct. at 1261. For this reason, "recovery of investment costs has been explicitly excluded from the narrowly-construed exceptions to the *per se* rule against tie-ins." *Digidyne,* 734 F.2d at 1343-44 (quoting *In re Data General Corp.Antitrust Litigation,* 490 F. Supp. 1089, 1122 (N.D.Cal. 1980). As a matter of law, therefore, itis a less restrictive alternative for Kodak to structure its prices for equipment, parts, and service so that the price for which Kodak sellseach of these reflects Kodak's investment costs in that area. *Id.* at 1344 (citing *United States v. Jerrold Electronics Corp.,* 187 F. Supp. 545 (E.D.Pa. 1960), *aff'd per curiam,* 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961)).

Finally, Kodak suggests that it acted unilaterally in tying parts to service. It is true that independent action is not proscribed by Section 1 of the Sherman Act. *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984). But Kodak entered into agreements with its equipment owners, expressly set out in its "Terms of Sale," that it will sell parts only to users "who service only their own Kodak equipment." If such conduct were to be labelled "independent," virtually all tying arrangements would be

[117] The defendant bears the burden of proving legitimate business reasons under Section 1of the Sherman Act. *Id.* at 1349.

beyond the reach of Section 1. We donot believe that *Monsanto,* without discussing the courts' tying decisions, meant to overturn them. The district court improperly granted summary judgment on the Section 1 claim.

4.3. The Refusal to Deal Claim

Section 2 of the Sherman Act makes it illegal for any person to "monopolize, or attempt to monopolize, . . . any part of the trade or commerceamong the several States, or with foreign nations."15 U.S.C. § 2 (1982). For a person to be guilty of monopolization, he must (1) possess monopoly power in the relevant market; and (2) wilfully engage in conduct designed to maintain that powerimproperly. *See United States v. Grinnell Corp.,* 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966). For a person to be guilty of attempted monopolization, he must (1) possess a specific intent to monopolize the relevant market with a dangerous probability of success; and (2) wilfully engage in conduct designed to achieve monopoly power improperly. *California ComputerProd. v. IBM,* 613 F.2d 727, 736 (9th Cir. 1979).[118]

Appellants contend that they have presented genuine issues for trial as to whether Kodak has, in allegedly changing a long-standing policy of supplying Kodak parts to ISOs, engaged in improper monopolization or attempted 620 monopolization conduct.[119]

The district court found that Kodak had no duty to deal with its competitors. We agree with the district court's statement of this general rule; however, we believe that there are material issues of fact concerning whether Kodak falls within one of the exceptions to it. A monopolist may not refuse to deal with a competitor in an exclusionaryattempt to impede competition without a legitimate business reason. *Aspen Skiing Co. v.Aspen Highlands Skiing Corp.,* 472 U.S. 585, 608, 105 S.Ct. 2847, 2860, 86 L.Ed.2d 467 (1985); *Oahu Gas Service, Inc. v. Pacific Resources Inc.,* 838 F.2d 360, 368 (9th Cir.), *cert. denied,* ___U.S.___, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988).

In the same spirit, a monopolist may not retaliate against a customer who is also a competitor by denying him access to a facility essential to his operations, absent legitimate business justifications. *Otter Tail Power Co. v. United States,* 410 U.S. 366, 377, 93 S.Ct. 1022, 1029, 35 L.Ed.2d 359 (1973). Appellants have presented sufficient evidence, recounted above, from whicha reasonable trier of fact could find that Kodak's implementation of its policies was anticompetitive, exclusionary, and involved aspecific intent to monopolize. *Cf. Calculators Hawaii, Inc. v. Brandt, Inc.,* 724 F.2d 1332, 1339 (9th Cir. 1983) (service contractor for distributorof money-handling machines produced no evidence that manufacturer who refused to sellcontractor parts after manufacturer terminated distributor acted in a predatory manner or was not predominantly motivated by legitimate businesspurposes); *Bushie v. Stenocord Corp.,* 460 F.2d 116, 119-21 (9th Cir. 1972) (distributor of dictating equipment produced no evidence that manufacturer who terminated him was motivated by anticompetitive intent).[120]

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[118] The cases also identify the standing requirement of "causal antitrust injury." *Id.* Kodak does not dispute appellants' standing to bring its Section 2 claim.

[119] Kodak contends that appellants did not raise this argument below. From reading only appellants' Memorandum in Opposition to Kodak's Motion for Summary Judgment, one can reach this conclusion. Certainly the focus of appellants' Section 2 claim has changed onappeal. But after reading all the papers surrounding Kodak's summary judgment motion, we are not confident enough that the district court did not consider appellants' present argument to foreclose appellants from raising that argument here.

[120] The dissent implies that *Mozart* compels acceptance of Kodak's proffered quality control justification on Kodak's Section 2 claim. *See* Dissent at 624. However, *Mozart* merely held that substantialevidence supported a jury's determination that the defendant's proffered quality control justification was genuine,

We have already discussed Kodak's proffered business justifications in our treatment of appellants' Section 1 claim. Although there is no least restrictive alternative requirement in the context of a Section 2 claim,[121] we noted above that there exist triable issues of fact as to whether Kodak's first two proffered reasons are genuine rather than pretextual. With respect to Kodak's third reason, we observed above that it was precisely the kind of justification the theory behind Section 1 negated. The same is true under Section 2. A claim that one need not support a competitor's activities is merely a claim that one has no duty to deal with that competitor. Such a claim cannot serve as a justification for conduct which has been found to be exempted from this general rule.[122]

We have more trouble with the monopoly power (or dangerous probability of monopoly power) issue. The district court did not discuss whetherthe service of Kodak equipment could be a relevant market and whether Kodak might possess monopoly power or a dangerous possibility of monopoly power in that market. This court has strongly suggested that service of one company's micrographic equipment can be a relevant market 621 under Section 2. *See Dimidowich,* 803 F.2d at 1480-81 n. 3 ("[A]n owner of broken [Bell Howell] micrographic equipment is indifferent to people who can service Kodak or 3M machines. If the owner's only option is to request service from Bell Howell or Comgraphix (depending on his location), that is obviously the market the owner faces."); *Cf. Bushie,* 460 F.2d at 118 n. 1, 120-21 (implying without analysis that the relevant market for servicing dictating equipment is theinterbrand service market). We cannot say as a matter of law that service of Kodak equipment is not the relevant market in this case.

Assuming such a market, might Kodak have monopoly power in it? Monopoly power is the "power to control prices or exclude competition"in the relevant market. *United States v. E.I. DuPont DeNemours Co.,* 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956). It is something more than the market power that is a prerequisite to liability under Section 1. *See Digidyne,* 734 F.2d at 1339-41. The question whether appellants have presented sufficient evidence on this issue is thus not as easily answered as the question whether they have presented sufficient evidence on market power. We conclude that the evidence presented by appellants is sufficient to withstand summary judgment. Again, there is logical appeal in Kodak's theory that it could not have monopoly power (let alone market power) in the service market since it lacks economic power in the interbrand markets. But in light of appellants' evidence we cannot say that this theory mirrors reality.

The district court improperly granted summary judgment on the Section 2 claim.

The judgment of the district court is REVERSED and the case is REMANDED.

4.4. Dissenting

WALLACE, Circuit Judge, dissenting:

Mozart, 833 F.2d at 1350-51, 1352, despite the "skepticism" which "the quality control defense . . . usually has been accorded," *id.* at 1349

[121] The plaintiff also bears the burden of proving lack of legitimate business justifications in a Section 2 claim. *Calculators Hawaii,* 724 F.2d at 1339.

[122] We stress that there exists a triable issue offact as to whether Kodak has *any* non-pretextual legitimate business reason for itsconduct. We do not suggest, as the dissent contends, "that because the quality control defense failed under section 1, it must also fail under section 2." Dissent at 624. Likewise, the dissent's argument that the law allows a defendant to overcome a section 2 claim when he has acted in part out of a desire to exclude competition and in part for a legitimate business reason is beside the point.

I cannot agree with the conclusions reached by the majority. I would affirm the judgment of the district court on both the tying and the attempted monopolization claims. On the first claim, Image Technical Services (Image Tech) has failed to raise any genuine issues of material fact with regard to Kodak's market power in the market for replacement parts. On the second claim, the record shows that Kodak has a legitimate business reason for its allegedly monopolistic behavior. Therefore, summary judgment was proper on both claims.

I agree with the majority that Image Tech has raised triable issues as to whether Kodak's business practices constitute a tying arrangement. However, not all ties are proscribed by the antitrust laws. Rather, to establish a violation of section 1 of the Sherman Act, Image Tech must show that Kodak possesses sufficient power in the market for the tying product (parts) to appreciably restrain competition in the market for the tied product (service).

Image Tech does not contest that Kodak lacks market power in the interbrand market for copiers. Further, it is uncontested that purchasers of copiers consider costs of maintenance and repair in deciding which brand to buy. Therefore, I do not see how Kodak could have any market power in the market for replacement parts. If Kodak attempts to increase the price of replacement parts above the competitive level, new buyers will increase their estimates of the total price (including parts and service) of a Kodak copier. If some current Kodak owners are unwilling to scrap their copiers and buy new ones from other manufacturers, Kodak will gain short-run profits from the sale of parts. However, as new buyers switch brands, Kodak will lose market share in the sales of new copiers, to its long-term disadvantage.

I find persuasive Judge Posner's reasoning in the closely analogous case of *Parts Electric Motors, Inc. v. Sterling Electric, Inc.,* 866 F.2d 228 (7th Cir. 1988) (Posner, J., dissenting) (*Sterling*). In that case, Sterling tied replacement parts to purchases of new Sterling motors. The majority did not reach the question of the legality of the tie. Judge Posner did so, and concluded that Sterling's lack of power in the interbrand market for motors 622 precluded a finding of market power in the derivative market for replacement parts:

[Plaintiff] argues that Sterling has a monopoly of replacement parts *for Sterling motors.* This is true in the trivial sense that only Sterling manufactures parts usable in those motors. But it would be absurd to infer from this . . . that Sterling has market power, that is, power to raise the price of its parts above the price that a competitive market would charge, without losing so many sales as to make the price increase unprofitable. . . . Sterling could in principle exploit its "monopoly" by setting its price for replacement parts just below the point at which owners of Sterling motors would decide to scrap the motors rather than pay an exorbitant price for the parts necessary to keep them in service. But this would be a short-run game, since as soon as word got out no one would buy Sterling motors. *Id.* at 236 (Posner, J., dissenting).

We accepted a similar argument in *General Business Systems v. North American Philips Co.,* 699 F.2d 965 (9th Cir. 1983) (*General Business Systems*). There, Philips, a computer manufacturer, was accused of illegally tying service and warranty protection (the tying service) to parts (the tied product). Philips lacked market power in the primary interbrand small business computer market. We held that as a result, Philips could not have had any market power in the derivative markets for service and warranty protection. In affirming summary judgment for Philips, we stated: "To have attempted to impose significant pressure to buy [the tied product] by use of the tying service only would have hastened the date on which Philips surrendered to its competitors in the small business computer market." *Id.* at 977.

The majority acknowledges the force of this reasoning, but finds that it is too "theoretical" to

serve as a basis for summary judgment. Maj. op.at 616-17. The majority's principal argument isthat Image Tech has presented evidence suggesting that Kodak is exercising market power in the parts market. Moreover, the majorityobserves that the district court allowed only incomplete discovery on this issue, so that summary judgment would be inappropriate given the underdeveloped record.[123]

I think the majority has misconstrued the nature ofKodak's argument. Applying Judge Posner's analysis in *Sterling,* competition in the interbrand market dictates a simple choice: Kodak may eitherprice parts competitively and maintain itsinterbrand market share, or it may price parts supercompetitively — yielding a short-term gain but over the long term destroying its share of the interbrand market. In either case Kodak is not harming competition: if it adopts the latter strategy, competitive forces will exact a heavy toll in the interbrand market, and profits gained from the short-term parts mark-ups will quickly be eclipsed. The result would be "a brief perturbation in competitive conditions — not the sort of thing the antitrust laws do or should worry about." *Sterling,* 866 F.2d at 236 (Posner, J., dissenting).

That Image Tech presents some evidence suggesting that Kodak is not pricing parts competitively, or that Image Tech might be able todo so given additional discovery, should not be sufficient to defeat summary judgment. At best, this would be evidence that Kodak is pursuing a self-destructive pricing strategy which lacks long- term effects upon competition. It is not evidenceof true market power. Rather, because lack of power in the interbrand market *necessarily* precludes power in the derivative market, Image Tech must raise allegations that Kodak has interbrand market power. No amount of evidence of pricing in the derivative market can overcome this requirement.

The majority attempts to distinguish *General Business Systems* on its facts. The majority correctly points out that in *General Business* 623 *Systems,* there was some factual evidence supporting a finding that Philips lacked marketpower in the derivative market: the higher pricefor the tied product was attributable to theproduct's greater reliability, and Philips was notthe exclusive source of the tying product. *General Business Systems,* 699 F.2d at 977-78. However, we did not indicate that such evidence was necessary to the holding. Rather, we were persuaded by the theoretical argument — whichthe majority declines to accept — that any attempt to exercise power in the tying market would prove fatal in the long run; we then pointed out the factual evidence as additional support for our conclusion. *See id.* at 977. I am puzzled by the majority's argument that *General Business Systems* is also distinguishable because Kodak has a 25 percent share of the interbrand market, whereas Philips's share was small and declining. Maj. op. at 616. The majority does not suggest why this provides a meaningful distinction. Image Tech concedes that Kodak lacks I also believe that summary judgment was appropriate on the attempt-to-monopolize claim under section 2 of the Sherman Act. Kodak's policies cannot give rise to section 2 liability if they have a legitimate business justification. *Oahu Gas Service, Inc. v. Pacific Resources Inc.,* 838 F.2d 360, 368 (9th Cir.) (*Oahu Gas*), *cert. denied,* interbrand market power. Therefore, the majority's ______ U.S. _____, 109 S.Ct. 180, 102 L.Ed.2d 149 holding is tenable only if power in the interbrand market is not relevant to power in the derivative market. I cannot see how the magnitude of Kodak's interbrand market share — once it is conceded that it does not amount to market power — is relevant to any theory of this case. Although the majority states that Kodak's

[123] The majority also suggests that the theory outlined in *Sterling* and *General Business Systems* may not reflect the reality in this case because of "market imperfections." No evidence of market imperfections has been presented, and the majority does not identify any specific imperfections which might invalidate the theory.

market share, when combined with (unspecified) "other factors," could produce power in the derivative market, maj. op. at 618, no analysis is provided to support this contention.

General Business Systems cannot be so readily distinguished. Nor can the economic logic of Kodak's position be overcome. The majority purports to reject reliance upon theoretical bases in considering the tying claim. However, a theoretical question is necessarily presented: is it possible to have power in the derivative market for replacement parts without possessing power in the primary interbrand market for copiers? The majority answers in the affirmative. However, it does so without analysis or explanation, and without argument from economic principles or legal precedents. In essence, the majority simply ignores the reasoning of *General Business Systems* and Judge Posner's opinion in *Sterling.* No one — neither Image Tech nor the majority — offers a reason why these analyses should be disregarded.

Because I am convinced that power in the primary interbrand market is a prerequisite to power in the derivative market for replacement parts, I conclude that market power has not been demonstrated and would affirm the summary judgment on the section 1 claim. (1988); *see Aspen Skiing Co. v. Aspen Highlands Skiing Co.,* 472 U.S. 585, 608, 105 S.Ct. 2847, 2860, 86 L.Ed.2d 467 (1985). The burden of proof is on the plaintiff to show that there is no such legitimate justification. *Calculators Hawaii, Inc. v. Brandt, Inc.,* 724 F.2d 1332, 1339 (9th Cir. 1983).

Kodak submitted extensive and undisputed evidence of a marketing strategy based on high-quality service. Kodak alleges that independent service organizations (ISOs) such as Image Tech may provide low-quality service, which will reflect negatively on Kodak and undermine its quality-of-service strategy. According to Kodak, the tying of replacement parts to service is used to police against poor-quality service by the ISOs. To defeat a motion for summary judgment, Image Tech, as the party with the burden of proof, was required to present evidence to refute these allegations. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). It failed to do so. In *Mozart Co. v. Mercedes-Benz of North America, Inc.,* 833 F.2d 1342, 1350-51, 1352 (9th 624 Cir. 1987) (*Mozart*), *cert. denied,* _____U.S.__, 109 S.Ct. 179, 102 L.Ed.2d 148 (1988), we held that an almost identical argument was sufficient to defeat liability under section 2. There, Mercedes based its reputation in part on the quality of its replacement parts. Mercedes refused to supply dealers with new cars unless the dealer purchased parts from Mercedes. *Id.* at 1344, 1351. Mercedes argued that this policy was used to maintain the high quality of replacement parts. We held that this tying arrangement was permissible due to the legitimate business justification of quality control. *Id.* at 1351, 1352; *see also Drinkwine v. Federated Publications, Inc.,* 780 F.2d 735, 740 (9th Cir.) ("desire to control quality" held a legitimate business justification for a tying arrangement sufficient to support summary judgment on a section 2 claim), *cert. denied,* 475 U.S. 1087, 106 S.Ct. 1471, 89 L.Ed.2d 727 (1986).

Image Tech argues, and the majority agrees, that summary judgment is not appropriate because Kodak's policies may in part be motivated by a desire to exclude the ISOs. However, the mere presence of monopolistic motivations is insufficient to establish liability. "Where a monopolist's [activity] is based partially on a desire to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct [T]he desire to maintain market power — even a monopolists' market power — cannot create antitrust liability if there was a legitimate business justification for [the challenged action]." *Oahu Gas,* 838 F.2d at 368- 69.

Image Tech also argues that Kodak's proposed justification is insufficient because strategies are available to accomplish the same objectives that pose a lesser injury to competition. A

defendant's proposed business rationale cannot serve as a defense to a *section 1* tying claim unless the challenged practice is the least restrictive alternative for achieving the stated goal. *Mozart,* 833 F.2d at 1349. Thus, the majority rightly rejects Kodak's use of the quality-control defense in the context of the section 1 claim. Maj. op. at 618. However, no such requirement exists under section 2 *Any* business justification — whether or not it is the least restrictive — will defeat an attempt-to-monopolize claim. *Oahu Gas,* 838 F.2dat 368-69 (A monopolist's duties under section 2 "arise only when there is *no* justification for refusing to aid a competitor." (emphasis added)); *see also Mozart,* 833 F.2d at 1352. Thus, the majority's suggestion — that because the quality- control defense failed under section 1, it must also fail under section 2 — misconstrues the section 2 test. There is no less-restrictive alternative requirement here.

Image Tech has raised no genuine issue of material fact showing Kodak's policy to be unsupported by legitimate business judgment. While the policy may not be the least restrictive alternative, and while it may also involve in part a desire to enhance Kodak's market share in service, such circumstances are insufficient to establish liability under section 2. I would affirm the summary judgment on this claim as well.

5.Fraser v. Major League Soccer, 97 F. Supp. 2d 130 (D. Mass. 2000)

US District Court for the District of Massachusetts

Iain FRASER; Steve Trittschuh; Sean Bowers; Mark Semioli; Rhett Harty; David Scott Vaudreuil; Mark Dodd; and Mark Dougherty, Plaintiffs
v.
MAJOR LEAGUE SOCCER, L.L.C.; Kraft Soccer, L.P.; Anschutz Soccer, Inc.; Anschutz Chicago Soccer, Inc.; South Florida Soccer, L.L.C., Team Columbus Soccer, L.L.C.; Team Kansas City Soccer, L.L.C.; Los Angeles Soccer Partners, L.P.; Empire Soccer Club, L.P.; Washington Soccer, L.P.; and United States Soccer Federation, Inc., Defendants
Civil Action No. 1:97CV10342GAO.

United States District Court, D. Massachusetts**.**
April 19, 2000.

5.1. Memorandum And Order

O"TOOLE, District Judge.

The individual plaintiffs are the representatives of the certified class of professional soccer players who are or who have been employed by the defendant Major League Soccer, L.L.C. ("MLS"). MLS is a limited liability company ("LLC") organized under Delaware law. *See generally* Del.Code Ann. tit. 6, §§ 18-101, *et. seq.* (1996). The defendant United States Soccer Federation, Inc. ("USSF") is the national governing body for professional and amateur soccer in the United States. All the other defendants are investors in MLS, each a capital-contributing member of MLS that has contracted with MLS to operate one or more of MLS's teams.[124]

The plaintiffs assert a number of antitrust claims. In Count I, they allege that MLS and several of its investors who operate MLS teams (hereafter "operator-investors" or "operators") have unlawfully combined to restrain trade or commerce in violation to § 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, by contracting for player services centrally through MLS, effectively eliminating the competition for those services that would take place if each MLS team were free to bid for and sign players directly. In Count II, the plaintiffs assert as a second § 1 claim that all the defendants have conspired to impose anticompetitive "transfer fees" on player relocation that have the effect of restricting the ability of soccer players to move from one team to another, thus dampening competition for players' services worldwide. Count III alleges that all defendants have jointly exercised monopoly power in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. In Count IV, the plaintiffs allege that the transaction which brought MLS into existence violated § 7 of the Clayton Act, 15 U.S.C. § 18. Finally, the plaintiffs assert in Count V a California state law claim that certain contracts concerning players' promotional rights were unlawful contracts of adhesion. The plaintiffs seek declaratory and injunctive relief as well as damages.

The plaintiffs have moved for summary judgment as to the defendants' so-called "single entity" defense. (Answer to Am. Compl., First Aff. Def.) The gist of their argument is that although MLS appears to be a single business entity, so that its method of hiring players centrally can

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[124] MLS and its members may sometimes hereinafter be referred to collectively as the "MLS defendants."

be characterized as the act of a single economic actor for antitrust purposes, the organizational form is really just a sham that should be considered ineffective to insulate from condemnation what are in substance illegal horizontal restraints on the hiring of players resulting from the unlawful concerted behavior of the several MLS team operators. The MLS defendants have filed a cross-motion for summary judgment in their favor dismissing Count I, arguing that MLS, as a single entity, cannot commit a § 1 violation. The MLS defendants have also moved for summary judgment on Count IV, the plaintiffs' Clayton Act claim.

5.2. Relevant Facts

The following material facts are not subject to genuine dispute. At the time MLS was formed, no "Division I" or "premiere" professional outdoor soccer league operated in the United States. The last premiere soccer league to operate in this country had been the North American Soccer League ("NASL"), which led a turbulent existence from 1968 until the mid-1980s, when it collapsed. In 1988, Federation Internationale de Football Association ("FIFA") awarded to the United States the right to host the 1994 World Cup, soccer's illustrious international competition. In consideration for that award, the organizers of the event promised to resurrect premiere professional soccer in the United States.

In the early 1990s, Alan Rothenberg, the President of USSF and of World Cup USA 1994, with assistance from others began developing plans for a Division I professional outdoor soccer league in the United States. Rothenberg and others at the USSF consulted extensively with potential investors in an effort to understand what type of league structure and business plan they might find attractive. He also consulted antitrust counsel in the hope of avoiding the antitrust problems which other sports leagues such as the National Football League ("NFL") had encountered. Eventually the planners settled on the concept of organizing a limited liability company to run the league, and in 1995 MLS was formed.

The structure and mode of operation of MLS is governed by its Limited Liability Company Agreement ("MLS Agreement" or "Agreement"). The MLS Agreement establishes a Management Committee consisting of representatives of each of the investors. The Management Committee has authority to manage the business and affairs of MLS. Several of the investors have signed Operating Agreements with MLS which, subject to certain conditions and obligations, give them the right to operate specific MLS teams.[125] There are also passive investors in MLS who do not operate teams. None of the passive investors is a defendant here.

Operator-investors do not hire players for their respective teams directly. Rather, players are hired by MLS as employees of the league itself and then are assigned to the various teams. Each player's employment contract is between the player and MLS, not between the player and the operator of the team to which the player is assigned. MLS centrally establishes and administers rules for the acquisition, assignment, and drafting of players, and all player assignments are subject to guidelines set by the Management Committee. Among other things, the guidelines limit the aggregate salaries that the league may pay its players.

Under applicable player assignment policies, MLS centrally allocates the top or "marquee" players among the teams, aiming to prevent talent imbalances and assure a degree of comparability of team strength in order to promote competitive soccer matches. These

[125] The league itself is authorized by the MLS Agreement to operate teams directly and currently operates two teams (the Dallas Burn and the Tampa Bay Mutiny).

assignments are effective unless disapproved by a twothirds vote of a subcommittee of the Management Committee. Most of the rest of the playersthe non-"marquee" players are selected for teams by the individual operator-investors through player drafts and the like. The league allows player trades between teams, but MLS's central league office must approve (and routinely does approve) such trades. Team operators are not permitted to trade players in exchange for cash compensation.

MLS distributes profits (and losses) to its investors in a manner consistent with its charter as a limited liability company, not unlike the distribution of dividends to shareholders in a corporation. Revenues generated by league operations belong directly to MLS. MLS owns and controls all trademarks,[126] copyrights, and other intellectual property rights that relate in any way either to the league or to any of its teams. MLS owns all tickets to MLS games and receives the revenues from ticket sales. There are central league regulations regarding ticket policies, even including limits on the number of complimentary tickets any team may give away. Team operators do retain the ability to negotiate some purely local matters, including local sponsorship agreements with respect to a limited array of products and services and local broadcast agreements, but they do so as agents of MLS.

Under the Operating Agreement, each team operator receives from MLS a management fee. As of the time this action was filed, the management fee consisted of (a) 100% of the first $1.24 million, and 30% of the excess over $1.24 million, of local television broadcast and sponsorship revenues, the latter percentage subject to some specified annual increase; (b) 50% of ticket revenues from home games, increasing to 55% in year six of the league's operation; and (c) 50% of stadium revenues from concessions and other sources.

Expenses are allocated in a way similar to the allocation of revenues. MLS is responsible for most expenses associated with league operations. For example, MLS pays all player acquisition costs, player salaries, and player benefits. It also pays the salaries of all league personnel (including referees), game-related travel expenses for each team, workers' compensation insurance, fees and expenses of foreign teams playing in exhibition games promoted by MLS within the U.S., league-wide marketing expenses, and 50% of each individual team's stadium rental expense.

The team operators are responsible for the other half of their stadium rents, costs of approved local marketing, licensing, and promotion, and general team administration, including salaries of the team's management and coaching staff.

Passive investors do not pay any team operating expenses or receive any management fee. They share in the general distribution of profits (and losses) resulting from league operations.

Team operators cannot transfer their MLS interests or operational rights without the consent of the Management Committee. That consent may be withheld without cause, but the league is required to repurchase the team operator's interest at its fair market value if approval is withheld. Team operators derive whatever rights they may have exclusively from MLS, and the league may terminate these rights if a team operator violates these provisions or fails to act in the best interest of the league.

[126] Operators retain security interests in team trademarks.

5.3. The MLS Motion For Summary Judgment

I first consider the defendants' motion for summary judgment. Summary judgment may be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R.Civ.P. 56(c). *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A fact is material if its resolution would "affect the outcome of the suit under the governing law," and a dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). That an antitrust claim may be factually and legally complex does not necessarily preclude the entry of summary judgment; there is no heightened standard for summary judgment in complex cases. *See Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.,* 996 F.2d 537, 541 (2d Cir. 1993) (antitrust); *City of Mount Pleasant v. Associated Elec. Coop., Inc.,* 838 F.2d 268, 274 (8th Cir.1988) (same); *see also Data Gen. Corp. v. Grumman Sys. Support Corp.,* 36 F.3d 1147, 1159 (1st Cir.1994) (complex cases generally).

Most of the material facts necessary to decide the defendants' motion are undisputed. One possibly material fact that is disputed is the definition of the relevant market for purposes of the § 1 analysis. In evaluating the defendants' motion, I assume that the relevant market is the market for Division I professional outdoor soccer in the United States, which is the plaintiffs' position. In addition, the plaintiffs are entitled to all reasonable inferences from the undisputed facts.

5.4. The Operation Of MLS

Section 1 of the Sherman Act forbids contracts, combinations, and conspiracies in restraint of trade or commerce. *See* 15 U.S.C. § 1. Agreements between separate economic actors that have the effect of substantially and unreasonably reducing competition in a particular market violate § 1. The plaintiffs argue that MLS player policies constitute an unlawful agreement among the various team operators to limit or eliminate competition in the market for players' services.

Though the language of § 1 is sweeping, there are some limits to its reach. One critical limitation for the purposes of this case is that the statute does not prohibit single economic entities from acting unilaterally in ways that may, in some manner, decrease competition. *See Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984). Because it is directed against contracts, combinations or conspiracies, § 1 only prohibits collective activity by plural economic actors which unreasonably restrains competition. *See Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984) ("In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit."); *Mount Pleasant,* 838 F.2d at 274 ("A conspiracy requires a plurality of actors...."). The MLS defendants contend that MLS is a "single entity" and that even if its policies and practices have the effect of substantially reducing competition for players' salaries, they do not *cannot* as a matter of lawviolate § 1.

MLS is a limited liability company organized under Delaware law. An LLC is a form of statutory business organization that combines some of the advantages of a partnership with

some of the advantages of a corporation.[127] Under Delaware law, an LLC is a separate legal entity distinct from its members. Del.Code Ann. tit. 6, § 18-201(b). As in a corporation, investors (shareholders in a corporation, members in an LLC) have limited liability (*id.,* § 18-303), own undivided interests in the company's property (§ 18-701), are bound by the terms of their Agreement (like the corporate Articles), and share in the overall profits and losses ratably according to their investment or as otherwise provided by the organizing Agreement (§ 18-503). The Federal Trade Commission has treated LLCs like corporations. *See In re Monier Lifetile L.L.C.,* No. 9290 (F.T.C. Mar. 1999) (characterizing Monier Lifetile as a corporation); *In re Merck & Co.,* No. C-3853 (F.T.C. Feb. 18, 1999) (treating Merck-Medco Managed Care L.L.C., as a corporation); *In re Shell Oil Co.,* No. C-3803 (F.T.C. Apr. 21, 1998) (analyzing joint venture LLC in same manner as joint venture corporation).[128] In the present context, there is little reason to treat an LLC such as MLS differently from a corporation.

MLS's operations should therefore be analyzed as the operations of a single corporation would be, with its operator-investors treated essentially as officers and shareholders. There can be no § 1 claim based on concerted action among a corporation and its officers, nor among officers themselves, so long as the officers are not acting to promote an interest, from which they would directly benefit, that is independent from the corporation's success. *See Copperweld,* 467 U.S. at 770 n. 15, 104 S. Ct. 2731 (dictum); *Greenville Pub. Co. v. Daily Reflector, Inc.,* 496 F.2d 391, 399-400 (4th Cir.1974) (defendant, a newspaper publishing corporation, was accused of trying to destroy plaintiff's newspaper through predatory pricing; defendant and its president held capable of conspiring under § 1 because president had a stake in a *third* newspaper which would directly benefit from plaintiff's newspaper's elimination). If an LLC should be considered like a corporation for these purposes, as I conclude it should, then there can be no § 1 violation by reason of concerted action between the LLC as an entity and its members, or between the individual members themselves, unless the members are acting not in the interest of the entity, but rather in their own separate self-interest. The "independent personal stake" exception has not yet been squarely addressed in this Circuit; recognizing the risk that this exception, if left unchecked, might swallow the rule, courts that employ it have done so conservatively. *See,*

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[127] Both corporations and partnerships are strongly presumed to be single entities for the purposes of § 1. *See* Philip E. Areeda, *Antitrust Law* ¶ 1476d (1986).

[128] In addition, some courts have held, in non-antitrust contexts, that LLCs more closely resemble corporations than partnerships. *See Exchange Point LLC v. U.S. S.E.C.,* No. M-30, 1999 WL 386736, at *3 (S.D.N.Y. June 10, 1999) (finding LLC to be more similar to wholly owned corporation than partnership and thus not a person for the purposes of the Right to Financial Privacy Act of 1978); *Poore v. Fox Hollow Enterprises,* 1994 WL 150872, at *2 (Del.Super.Ct. March 29, 1994) (LLCs sufficiently resemble corporations such that the same rules which require Delaware corporations to retain Delaware counsel to represent them in state courts also apply to LLCs.).

Admittedly, these decisions do not conclusively determine the matter, since the question whether an organization may be liable for a conspiracy in restraint of trade is different from the questions these cases addressed. *See Bell Atlantic Bus. Systems Servs. v. Hitachi Data Sys. Corp.,* 849 F. Supp. 702, 707 (N.D.Cal.1994) ("Plaintiff's attempt to equate [Sherman Act] § 1 conspiracy liability with alter ego liability fails because § 1 deals with federal antitrust policies and the alter ego doctrine is governed by California corporation law. The two legal principles have different purposes and policy considerations."); *compare De Castro v. Sanifill, Inc.,* 198 F.3d 282, 283 (1st Cir.1999) (wholly-owned subsidiary's activities did not confer personal jurisdiction over parent) *with Copperweld,* 467 U.S. at 753, 104 S. Ct. 2731 (no § 1 liability for parent or wholly-owned subsidiary because the two corporations were a single entity for antitrust purposes).

Nonetheless, the cases do illustrate how courts generally understand the LLC structure to be like that of a corporation and generally apply legal rules applicable to corporations to LLCs as well.

e.g., Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 705 (4th Cir.1991) (limiting the scope of the exception to *Greenville Publishing's* specific rationale); *Williams v. 5300 Columbia Pike Corp.,* 891 F. Supp. 1169, 1174-75 (E.D.Va. 1995) ("narrow" exception applies only if officer acted to serve a self-interest entirely independent of corporation's success).[129]

The plaintiffs argue that even if MLS is deemed a single entity, the divergent self-interest of the operator-investors provides sufficient cause to invoke the independent personal stake exception. The plaintiffs base this argument largely on their assertion that the operator-investors do not truly share in MLS's profits and losses. Instead of owning undivided interests in the league that are not attached to the operation of any given team, they pay certain operating expenses individually and receive management fees from MLS that are calculated in large part according to their local team-generated revenues. Also, they are able to harvest the value of the particular teams they operate by selling their operational rights or, if the Management Committee vetoes the sale, by requiring the league to pay them the fair market value of their investment.

The management fee arrangement exists in addition to, not in place of, the overall profit and loss sharing specified in the Agreement. Indeed, the fact that there are passive investors in MLS is strong evidence that the payment of management fees and assignment of local expenses do not account for all economic risks and benefits associated with the league's operation.

Furthermore, successful local operation of a team benefits the entire league. The league's net revenues, not just the local operator's management fees, increase when more local revenues are generated.[130]

A similar effect is foreseeable in the market for operator-investor shares. Admittedly, unlike undifferentiated shares of stock, the market value of a team operator's investment will not simply reflect an aliquot share of the whole enterprise, but will also reflect in certain respects the success of the local operation. Nonetheless, unlike competition in most markets, where the value of an enterprise would usually be enhanced if its competitors grew weaker, the value of the right to operate an MLS team would be diminished, not enhanced, by the weaknesses of other teams, their operators, and the league as a whole. Management fees and operational rights notwithstanding, every operator-investor has a strong incentive to make the leagueand the other

[129] *Egan v. Athol Mem. Hosp.,* 971 F. Supp. 37 (D.Mass.1997), and *Benjamin v. Aroostook Med. Ctr.,* 937 F. Supp. 957 (D.Me.1996), rejected hospital-physician conspiracy claims similar to the one at issue in *Oksanen.* Neither case turned on a square assessment and application of the independent personal stake doctrine.

[130] Any number of businesses, from restaurants to car dealerships to law firms, require their employees and agents to individually assume certain operational costs and reward them with commissions directly tied to individual performance. That such arrangements may reflect incomplete unity of interest is immaterial, *see Chicago Professional Sports,* 95 F.3d at 598 (Complete unity of interest test "would be silly. Even a single firm contains many competing interests."). One would be hard pressed to say that this rather routine business practice scrambles the economic interests within the firm in such a way as to open it up to § 1 scrutiny. *See Siegel Transfer, Inc. v. Carrier Express, Inc.,* 54 F.3d 1125, 1135 (3d Cir.1995) (company in charge of freight broker's day-to-day operations was paid on percentage of broker's revenue; held that this encouraged efficient operation and made broker and operations company inseparable for § 1 purposes); *Coast Cities Truck Sales v. Navistar Int'l Transp. Co.,* 912 F. Supp. 747, 765 (D.N.J.1995) (truck manufacturer and associated dealerships were single entity even though each dealership operator received bonus tied to dealership's individual performance).

operator-investors as robust as possible. Each operator-investor's personal stake is not independent of the success of MLS as a whole enterprise.

The plaintiffs point to other ways in which the operator-investors compete on and off the field. That teams (and, by extension, their operators) compete playing soccer, and that operators directly hire certain staff, such as coaches, to make teams more capable of on-field heroics, does nothing to assist the plaintiffs.[131] Exciting on-field competition between teams is what makes MLS games worth watching. *Cf. Chicago Professional Sports,* 95 F.3d at 598-99 ("a league with one team would be like one hand clapping"). Game competition, without doubt, is part of the league's entertainment product, not an indicator of divergent economic interests among operators.

On balance, the business organization of MLS is quite centralized. The league owns the teams themselves; disgruntled operators may not simply "take their ball and go home" by withdrawing the teams they operate and forming or joining a rival league. MLS also owns all intellectual property related to the teams. It contracts for local-level services through its operators, who act on its behalf as agents.[132] Operators risk losing their rights to operate their teams if they breach the governing Agreement. The Management Committee exercises supervisory authority over most of the league's activities. It may reject, without cause, any operator's individual attempt to assign the rights to operate a team.

It is true that MLS is run by a Management Committee that can be controlled by the operator-investors, who constitute the majority of the members of the Committee. It is not remarkable that principal investors can collectively control the governing board of an LLC (or of a corporation). That fact hardly proves that the investors are pursuing economic interests separate from the interests of the firm. The notion that the members of the Management Committee of a single firm violate the antitrust laws when they vote together to maximize the price or minimize the cost of the firm's product is easily rejected.

As a factual matter, therefore, there is insufficient basis in the record for concluding that operators have divergent economic interests within MLS's structure. Even if one draws the most favorable inference on the plaintiffs' behalf, there is no reasonable basis for imposing § 1 liability.

MLS's player policies, in particular, do not call for application of the independent personal stake exception. The operator-investors benefit from those policies because centralized contracting for player services results in lower salaries. However, that benefit is, in the MLS structure, a derivative one. No operator has an individual player payroll to worry about; the league pays the salaries. Moreover, the MLS investor gets the lower-cost benefit in exchange for having surrendered the degree of autonomy that team owners in "plural entity" leagues typically enjoy. The reason an individual team owner in one of those other leagues is willing to bid up players'

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[131] Giving operators discretion over certain aspects of their duties while withholding it in other areas does not itself reflect disunity of interest. *See Williams v. I.B. Fischer,* 794 F. Supp. 1026, 1031 (D.Nev.1992) (franchiser and franchisees held to be single entity for purposes of restraint on poaching other franchisees' managers; franchisees' control over local pricing decisions did not establish lack of unity of interest).

[132] The plaintiffs argue that the operators, since they sit on MLS's Management Committee, are not MLS agents in this regard. That argument fails. Shareholderseven ones in positions of controlare not disqualified from serving as an agent of the corporation, *see, e.g., Ed Peters Jewelry Co. v. C & J Jewelry Co.,* 124 F.3d 252, 275 (1st Cir.1997).

salaries to get the particular players it wants is because by paying high salaries to get desirable players, the owner can achieve other substantial benefits, such as increased sales of tickets and promotional goods, media revenues, and the like. The MLS operator-investors have largely yielded that opportunity to the central league office. Plainly, there are trade-offs in the different approaches. The MLS members have calculated that the surrender of autonomy, together with the attendant benefit of lower and more controlled player payrolls and greater parity in talent among teams, will help MLS to succeed where others, notably NASL, failed. That is a calculation made on behalf of the entity, and it does not serve only the ulterior interests of the individual investors standing on their own. It is not an occasion for application of the independent personal stake exception to the general single-entity rule described in *Copperweld.*

The plaintiffs also argue that the structure of MLS is a sham designed to allow what is actually an illegal combination of plural actors to masquerade as the business conduct of a single entity. The plaintiffs do not argue that the structure of MLS as established by the its organizing Agreement is legally defective so that it should not be recognized as a lawful entity under Delaware law. Rather, they say that even if MLS is a legitimate LLCa legitimate single entity for state law purposes a court should disregard that legal form in evaluating under antitrust principles whether the operatorinvestors are engaged in a horizontal restraint in the market for players' services. To make the argument, the plaintiffs put a reverse spin on the *Copperweld* holding.

Copperweld held that a corporation could not conspire with its wholly owned subsidiary in violation of § 1 because, though the parent and subsidiary were distinct legal entities, the economic reality was that they functioned as a single business enterprise. Cases following *Copperweld* have mainly addressed the question whether to disregard formal distinctions among entities in order to find economic singularity for the purposes of § 1. *See, e.g., Sullivan v. NFL,* 34 F.3d 1091, 1099 (1st Cir.1994) (NFL, composed of separately owned clubs, not a single entity in the market for ownership of teams);[133] *Chicago Professional Sports Ltd. Partnership v. NBA,* 95 F.3d 593, 597-600 (7th Cir.1996) (characterizing NBA, composed of separately owned clubs, as a single entity for the purpose of league-wide limitations on locally televising games through "superstations," though expressly withholding judgment as to whether NBA was single entity in other markets, such as player contracting); *Oksanen,* 945 F.2d at 703 (hospital's engagement of legally-distinct medical staff in peer review process not actionable under § 1 because hospital and doctors were behaving as single entity in that context); *Mount Pleasant,* 838 F.2d at 276-77 (electric cooperative composed of legally distinct providers held to be single entity); *Seabury Management, Inc. v. Professional Golfers' Ass'n of Am., Inc.,* 878 F. Supp. 771, 777 (D.Md.1994) (PGA and partially owned regional golf association were, collectively, a single entity); *cf. Brown v. Pro Football, Inc.,* 518 U.S. 231, 248-49, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996) (in collective-bargaining context, the NFL looks "more like a single bargaining employer").

[133] The plaintiffs rely heavily on *Sullivan,* which rejected the NFL's argument that its teams had sufficient unity of interest to make the league a single entity under *Copperweld. Sullivan* does little to aid the plaintiffs because the NFL, despite certain similarities, is fundamentally different from MLS. The NFL is a confederation fused from agreements among preexisting, independently owned teams; unlike MLS, NFL football clubs do not exist as part of an overarching corporate structure. As explained in the text *infra,* MLS cannot be subjected to the wide-ranging analysis of economic interests that has been applied to the NFL. *United States Football League v. NFL,* 842 F.2d 1335 (2d Cir.1988); *Los Angeles Memorial Coliseum Comm'n v. NFL,* 726 F.2d 1381 (9th Cir.1984); and *North American Soccer League v. NFL,* 670 F.2d 1249 (2d Cir.1982), are distinguishable for the same reason.

The plaintiffs propose that the "economic reality" test should be applied not only to *ignore* formal legal distinctions between separate corporations as the court did in *Copperweld,* but conversely to *envision* distinctions in what is formally a single legal entity when doing so would accurately describe how the business of the entity actually operates. The argument may have some superficial appeal, but on close examination it appears that it rests on a misconception of the scope of the *Copperweld* principle.

It was noted above that the courts have not given the sweeping language of § 1 its broadest possible effect. The "rule of reason" is an obvious example of a limitation on the literal scope of the statutory language. *See Board of Trade of City of Chicago v. United States,* 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918) (Brandeis, J.) ("[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence").

The *Copperweld* rule similarly limits the reach of the statute's broad language. While concerted action between two separate corporations, one the parent and the other a subsidiary, could literally be described as a "combination" that restrains trade, the Supreme Court concluded that it was not the kind of combination that § 1 was intended to forbid. Like the coordination between a corporation and its unincorporated division, an agreement between a parent and its subsidiary did not represent "a sudden joining of two independent sources of economic power previously pursuing separate interests." *Copperweld,* 467 U.S. at 770, 104 S. Ct. 2731. The plaintiffs are correct that the Court was looking to substance, not merely form.

But that does not mean that form is irrelevant. *Copperweld* does not support the proposition that a business organized as a single legal entity should have its form ignored, or its "veil" pierced, so that courts could examine whether participants in the firm have conducted concerted activity that would violate § 1. Merely posing that proposition suggests how troublesome it would be as a practical matter. It would permit the atomization of firms into their constituent parts, then to have the relationships of those parts examined to see if they produced anticompetitive effects that, had they been brought about by independent economic actors, would have violated § 1. The number of companies that could be vulnerable to examination of internal business decisions under such an approach would be mind-boggling. No case has suggested that it would be appropriate to deconstruct a corporate entity in that way.

Practical objections aside, the theory is also fundamentally incompatible with the axiom the *Copperweld* Court's analysis started withthat coordination of business activities within a single firm is not subject to scrutiny under § 1. *Copperweld* cannot be understood to authorize an "economic reality" analysis that would require rejection of the very premise the holding of the case depended on. Moreover, the plaintiffs' proposition would plainly interfere with the objective of the antitrust laws. "Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote." *Copperweld,* 467 U.S. at 775, 104 S. Ct. 2731.

In sum, the plaintiffs' deconstruction efforts are unavailing. MLS is what it is. As a single entity, it cannot conspire or combine with its investors in violation of § 1, and its investors do not combine or conspire with each other in pursuing the economic interests of the entity. MLS's policy of contracting centrally for player services is unilateral activity of a single firm. Since §

1 does not apply to unilateral activityeven unilateral activity that tends to restrain trade[134] the claim set forth in Count I cannot succeed as a matter of law.

5.5. The Formation Of MLS

In addition to the claim that the player policies of MLS are an unlawful horizontal restraint of trade, the plaintiffs also claim that the very formation of MLS in the first place violated § 7 of the Clayton Act, which prohibits acquisitions or mergers the effect of which "may be substantially to lessen competition, or to tend to create a monopoly" in any line of commerce or activity affecting commerce, 15 U.S.C. § 18, as well as § 1 of the Sherman Act. The two theories are related.

5.5.1. The Clayton Act Claim

5.5.1.1. Antitrust Injury

Only those who have sustained injuries which the antitrust laws were designed to prevent may sue under § 7 of the Clayton Act. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977); *see also* Philip E. Areeda, *Antitrust Violations Without Damage Recoveries,* 89 Harv. L.Rev. 1127, 1130-37 (1976). The defendants' first response to the § 7 claim is that the plaintiffs cannot establish an antitrust injury resulting from the formation of MLS. In making this argument, the defendants rely primarily on *Alberta Gas Chemicals Ltd. v. E.I. Du Pont De Nemours and Co.,* 826 F.2d 1235, 1242-43 (3d Cir.1987).

Alberta Gas emphasizes the lesson that the antitrust laws provide remedies only for injury to *competition* itself, and not simply injury to *competitors.* A competitor adversely affected by a transaction that does not actually reduce the level of competition in the relevant market has no remedy under the antitrust laws. If the transaction defeats a competitor's expectations about how the market will evolve, but does not reduce the overall level of competition in the market in some manner injurious to the disappointed competitor, the dashed hopes are not a sufficient basis for an antitrust lawsuit. In *Brunswick,* for example, several independent bowling alley owners sued Brunswick for acquiring and then revitalizing their once-ailing competitors. While these acquisitions thwarted a potentially advantageous market consolidation anticipated by the independent alley owners, there was no injury to competition itself. In fact, the revitalization of former competitors caused an increase in competition, and it was actually the prospect of greater competition which threatened to injure the plaintiffs. That was not an antitrust injury. *See Brunswick,* 429 U.S. at 488, 97 S. Ct. 690.

The principle is not entirely apt here. The plaintiffs are not simply suing on dashed hopes of a windfall, as the plaintiffs in *Brunswick* were. The new Division I soccer league the World Cup promoters promised to create could have been structured in the same way other sports leagues had been structured: a number of independently owned teams collaborating in certain aspects

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[134] *See Copperweld,* 467 U.S. at 776, 104 S. Ct. 2731 ("The appropriate inquiry ... is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects .... Nor is it whether the term `conspiracy' will bear a literal construction that includes parent corporations and their wholly owned subsidiaries. For if these were the proper inquiries, a single firm's conduct would be subject to § 1 scrutiny whenever the coordination of two employees was involved. Such a rule would obliterate the Act's distinction between unilateral and concerted conduct, contrary to the clear intent of Congress, as interpreted by the weight of judicial authority").

but competing with one another for player services. Clearly, compared to this traditional form of sports league, MLS's structure reduces competition for player services. The claim does assert an injury to competition cognizable under the antitrust laws.

5.5.1.2. Existing Market

Unfortunately for the plaintiffs, the claim is not otherwise viable. There can be no § 7 liability because the formation of MLS did not involve the acquisition or merger of existing business enterprises, but rather the formation of an entirely new entity which itself represented the creation of an entirely new market. The relevant test under § 7 looks to whether competition in *existing* markets has been reduced. *See Brown Shoe Co. v. United States,* 370 U.S. 294, 320-22, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962) (§ 7 is a means for preventing the reduction of competition in existing markets); *SCM Corp. v. Xerox Corp.,* 645 F.2d 1195, 1210-11 (2d Cir.1981) (dismissing plaintiff's claim that acquisition of plain paper copying patents was a § 7 violation because, at the time of the acquisition, no market existed for plain paper copying). Where there is no existing market, there can be no reduction in the level of competition. There are no negative numbers in this math; there is nothing lower than zero. Competition that does not exist cannot be decreased. The creation of MLS did not reduce competition in an existing market because when the company was formed there was no active market for Division I professional soccer in the United States.

The plaintiffs try two avenues around this obstacle to their claim. First, they argue that § 7 is designed to arrest anticompetitive transactions in their incipiency, *see United States v. Penn-Olin Chem. Co.,* 378 U.S. 158, 171, 84 S. Ct. 1710, 12 L. Ed. 2d 775 (1964), so that it must apply not only to transactions that reduce existing competition, but includes also those transactions intended to stifle reasonably anticipated "potential competition." *See Tenneco, Inc. v. Federal Trade Comm'n,* 689 F.2d 346, 352 (2d Cir.1982); *Yamaha Motor Co. v. Federal Trade Comm'n,* 657 F.2d 971, 977-78 (8th Cir.1981).

The plaintiffs' reliance on the potential competition doctrine as explained in *Penn-Olin* and *Yamaha* is misplaced. In *Penn-Olin,* a vertical joint venture between two major participants in the sodium chlorate market was held to be subject to § 7 scrutiny. Similarly, in *Yamaha,* the Eighth Circuit applied § 7 to evaluate a proposed venture between the country's second largest seller of outboard motors and a major foreign producer that had not yet sold products here but had the ability to do so and concluded that the potential anticompetitive results of the venture were impermissible. In both cases, there was an existing, established relevant market, and the asserted violation was the preemption of likely competition in that market by the anticipatory acquisition of the potential competitors. The businesses already existed; it was the competition between them that was only "potential." Indeed, *Yamaha* cautions that the potential competition doctrine is limited to "acquisitions by a large firm in an oligopolistic market, if the acquisition eliminate[s] the acquired firm as a potential competitor, and if the acquired firm would otherwise have been expected to enter the relevant market de novo." *Yamaha* 657 F.2d at 977. *Accord Tenneco,* 689 F.2d at 352 (characterizing actual potential competitor doctrine as baring mergers that might increase oligopolistic behavior in existing markets). In the present case, both the market for Division I professional soccer in the United States and the existence of any competitors in that market were only "potential" until the transaction that formed MLS occurred. The "potential competition" doctrine does not apply in these circumstances.

The plaintiffs further argue that, even though no one was playing Division I soccer in the United States at the time MLS was created, the market nevertheless existed because the World Cup promoters had promised FIFA that a premiere soccer league would be established in the United States. As a result of the promise, they say, it was inevitable that there would be such a league. The operator-investors in MLS, therefore, would likely have been competitors in a traditional soccer sports league. The formation of MLS thwarted that prospective competition, violating § 7.

The expected market for Division I professional soccer in the United States at the time MLS was formed was much like the plain paper copying market when the relevant transactions in the *SCM* case occurred: it was foreseeable, perhaps even inevitable, but simply not yet in existence. As in *SCM,* here too the conclusion must be that MLS's formation is not actionable under § 7. The plaintiffs' attempt to distinguish *SCM* as an artifact of the occasionally tortured relationship between antitrust and patent law is not convincing. The *SCM* court explicitly allowed that the acquisition of patents, like other assets, could form the basis of § 7 liability. The court observed:

The existing market provides the framework in which the probability and extent of an adverse impact upon competition may be measured.... [I]t would have been impossible to examine the effects of the [patent purchase] upon the relevant product market and submarket ... because those markets did not come into being until [after the purchase].

More fundamentally, the flaw in the plaintiffs' existence-by-inevitability argument is that the inevitability of a professional soccer league is not the same as the inevitability of multiple competitors. Granting that there would inevitably be a league, it was not inevitable that the league would be formed and would operate the same way as previous sports leagues. *See* Areeda, 1478d, at 358-59 (1986) (proposing a "Hypothetical Football League" that resembles MLS and differs from historical leagues). By its very existence MLS has shown that a sports league can be organized differently, at least when it comes to existence by creation and not by evolution.

The defendants are entitled to judgment in their favor on the Clayton Act claim.

5.5.2. The Sherman Act Claim

In addition to the Clayton Act theory, the plaintiffs urge that the formation of MLS, by which multiple operator-investors combined to create the single entity, also violated the Sherman Act's prohibition of contracts, combinations or conspiracies in restraint of trade.

It is generally held that a coming together that does not violate § 7 of the Clayton Act does not violate § 1 of the Sherman Act either. *See White Consol. Industries v. Whirlpool Corp.,* 781 F.2d 1224, 1228 (6th Cir.1986) (failure to show Clayton § 7 violation precluded Sherman § 1 violation for same conduct). A merger of market participants that does not lessen competition and thus does not offend § 7 ordinarily would not constitute a combination in restraint of trade in violation of § 1. Though the statutory provisions present slightly different modes of analysis, when those modes are applied to the same constellation of facts, the answer will ordinarily be the same.

Here, the pertinent facts are that the founding investors of MLS created both a new company and simultaneously a new market, in effect increasing the number of competitors from zero to one. As explained above, that did not represent a lessening of actual or potential competition in an existing market. Similarly, it did not represent a "sudden joining of ... independent sources of economic power previously pursuing separate interests," *see Copperweld,* 467 U.S. at 770, 104 S. Ct. 2731, which is what is forbidden by § 1.

5.6. Conclusion And Order

For all the reasons set forth above, the defendants' motion for summary judgment in their favor under Counts I and IV of the Amended Complaint is GRANTED. It follows that the plaintiffs' motion for summary judgment on the defendants' "single entity" defense is DENIED.

It is so ordered.

6.Copperweld Corp. v. Independence Tube Corp.

467 U.S. 752 (1984)

6.1. Facts[135]

In 1972, Copperweld purchased the Regal division from Lear Siegler. Regal manufactured steel tubing for use in heavy equipment, cargo vehicles, and construction. The sale agreement between Copperweld and Lear Siegler contained a noncompetition provision that prevented Lear Siegler, or any subsidiary it controlled,from competing with Regal anywhere in the United States for a period of five years. After the sale, Copperweld transferred all Regal's assets to Regal Tube Company, a newly formed Pennsylvania corporation wholly owned by Copperweld.
At the time of the sale, David Grohne, a former president of Regal and then- currently Lear Siegler's corporate secretary, was actively pursuing establishing his own steel tubing business. In May 1972, he incorporated Independence Tube and sought bids to build a tubing mill, and in December 1972 gave Yoder Company a purchase order for the delivery of the mill by the end of December 1973.
When Copperweld learned of Grohne's plans, it thought that the noncompetition covenant it had with Lear Siegler would prevent Grohne, and through him Independence, from building a mill that would compete with Regal. Copperweld's attorney, however, advised that it did not, though he thought it might be possible to obtain an injunction against Grohne's activities if and when he made use of any of the "know-how, technical information, designs, plans, drawings, trade secrets or inventions of Regal," all of which Copperweld had purchased from Lear Siegler. Notwithstanding this advice, on February 19, 1973, Copperweld sent Yoder a letter (drafted by counsel) stating that Copperweld both was "greatly concerned if (Grohne) contemplates entering the structural tube market . . . in competition with Regal Tube" and vowed to take "any and all steps which are necessary to protect our rights under the terms of our purchase agreement and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler." Upon receiving the letter, Yoder voided its acceptance of the Independence purchase order. When Independence could not convince Yoder to build the new mill, Independence contracted with Abbey Etna Machine Company. Although Abbey Etna had also received one of Copperweld's warning letters, it nonetheless built the mill, which commenced operations on September 1974—nine months later than the original Yoder December 1973 completion date.
In 1976, Independence filed suit in the Northern District of Illinois against Copperweld, Regal and Yoder.[136] On special interrogatories, the jury found that Copperweld and Regal (but not Yoder) had conspired to restrain trade in the market for steel structural tubing in violation of Section 1 of the Sherman Act and that Copperweld induced Yoder to breach a contract with Independence. The jury also found that Regal (but not Copperweld) slandered Independence and wrongfully interfered with the business relationships of Independence and one of its customers.In the damages phase, the court instructed the jury that the damages for the Section 1 violation and for the inducement of the Yoder contract breach should be identical andtherefore should not be double-counted The jury assessed actual damages of $2,499,009

[135] The description of the facts is taken from the Seventh Circuit and Supreme Court opinions. *See Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310 (7th Cir. 1982), *rev'd*, 467 U.S. 752 (1984).
[136] Phillip H. Smith, Copperweld's Chief Executive Officer, was also named as a defendant, but Independence dismissed him from the case before the trial. [Why would Independence drop Smith from the case?]

against Copperweld and Regal jointly and severally for the antitrust and inducement violation, which the court trebled to $7,497,027.

In sustaining the jury verdict, the Seventh Circuit questioned the wisdom of holding that a parent corporation and its wholly-owned subsidiary—the only parties the jury found to have conspired—had the legal capacity to conspire with one another when a parent corporation and its unincorporated division (as Regal had been when owned by Lear Siegler) would have lacked the capacity. Even so, relying on Seventh Circuit precedent the court of appeals held that the capacity to conspire existed "when there is enough separation between the two entities to make treating them as two independent actors sensible." 691 F.2d at 318. The court also held that the jury instructions properly took account of the factors for determining how much separation Copperweld and Regal in fact maintained in the conduct of their respective businesses and that there was sufficient evidence for the jury to conclude that Regal was more like a separate corporate entity than a mere service arm of the parent.

The Supreme Court granted certiorari to determine whether a parent corporation and its wholly owned subsidiary are legally capable of conspiring with each other under Section 1 of the Sherman Act.

6.2. Judgment

Chief Justice BURGER delivered the opinion of the Court.

Petitioners, joined by the United States as *amicus curiae*, urge us to repudiate the intra-enterprise conspiracy doctrine.[137] The central criticism is that the doctrine gives undue significance to the fact that a subsidiary is separately incorporated and thereby treats as the concerted activity of two entities what is really unilateral behavior flowing from decisions of a single enterprise.

We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.

a. The Sherman Act contains a "basic distinction between concerted and independent action." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization.[138] It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster.[139] In part because it is sometimes difficult to distinguish robust

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[137] The doctrine has long been criticized. [Citations omitted]

[138] [Omitted]

[139] For example, the Court has declared that § 2 does not forbid market power to be acquired "as a consequence of a superior product, [or] business acumen." *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). We have also made clear that the "antitrust laws . . . were enacted for 'the protection of competition, not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977)

competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between *separate* entities. It does not reach conduct that is "wholly unilateral." *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968); accord, Monsanto Co. v. Spray-Rite Corp., *supra*, at 761. Concertedactivity subject to § 1 is judged more sternly than unilateral activity under § 2. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused. See generally *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958). Other combinations, such as mergers, joint ventures,and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect. *See*, *e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Chicago Board of Trade v. United States*,246 U.S. 231 (1918). Whatever form the inquiry takes, however, it is not necessaryto prove that concerted activity threatens monopolization.

The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

b. The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms "contract, combination . . . or conspiracy" in § 1. Nothing in the literal meaning of those terms excludes coordinated conduct among officers or employees of the *same* company. But it is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrustdangers that § 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them donot suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.[140]

Nothing in the language of the Sherman Act is inconsistent with the view that corporations cannot conspire with their own officers. It is true that a "person" under the Act includes both an individual and a corporation. 15 U.S.C. § 7. But § 1 does

(damages for violation of Clayton Act § 7) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

[140] [Omitted]

notdeclare every combination between two "persons" to be illegal. Instead it makes liable every "person" engaging in a combination or conspiracy "hereby declared tobe illegal." As we note, the principles governing § 1 liability plainly exclude from unlawful combinations or conspiracies the activities of a single firm.

There is also general agreement that § 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions.[141] Although this Court has not previously addressed the question,[142] there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor. The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficientmanner. Because coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previouslypursuing separate interests, it is not an activity that warrants § 1 scrutiny. Indeed, a rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits. This would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring.

c. For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control ofa single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resourcesthat had previously served different interests, and there is no justification for § 1 scrutiny.

Indeed, the very notion of an "agreement" in Sherman Act terms between a parentand a wholly owned subsidiary lacks meaning. A § 1 agreement may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). But in reality a parent and a wholly ownedsubsidiary *always* have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.[143]

The intra-enterprise conspiracy doctrine looks to the form of an enterprise's structure and ignores the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. A corporation has complete power to maintain a wholly owned subsidiaryin either form. The economic, legal, or other considerations that lead corporatemanagement to choose one structure over the other are not relevant to whether the enterprise's conduct

[141] [Omitted]
[142] [Omitted]
[143] [Omitted]

seriously threatens competition.[144] Rather, a corporation may adopt the subsidiary form of organization for valid management and related purposes. Separate incorporation may improve management, avoid special tax problems arising from multistate operations, or serve other legitimate interests.[145] Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability. Because there is nothing inherently anticompetitive about a corporation's decision to create a subsidiary, the intra- enterprise conspiracy doctrine "impose[s] grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect." *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962).[146]

If antitrust liability turned on the garb in which a corporate subunit was clothed, parent corporations would be encouraged to convert subsidiaries into unincorporated divisions. Indeed, this is precisely what the Seagram company did after this Court's decision in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).[147] Such an incentive serves no valid antitrust goals but merely deprives consumers and producers of the benefits that the subsidiary form may yield.

The error of treating a corporate division differently from a wholly owned subsidiary is readily seen from the facts of this case. Regal was operated as an unincorporated division of Lear Siegler for four years before it became a wholly owned subsidiary of Copperweld. Nothing in this record indicates any meaningful difference between Regal's operations as a division and its later operations as a separate corporation. Certainly nothing suggests that Regal was a greater threat to competition as a subsidiary of Copperweld than as a division of Lear Siegler. Under either arrangement, Regal might have acted to bar a new competitor from entering the market. In one case it could have relied on economic power from other quarters of the Lear Siegler corporation; instead it drew on the strength of its separately incorporated parent, Copperweld. From the standpoint of the antitrust laws, there is no reason to treat one more harshly than the other. As Chief Justice Hughes cautioned, "[r]ealities must dominate the judgment." *Appalachian Coals, Inc. v. United States*, 288 U.S., at 360.[148]

d. Any reading of the Sherman Act that remains true to the Act's distinction between

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[144] Because an "agreement" between a parent and its wholly owned subsidiary is no more likely to be anticompetitive than an agreement between two divisions of a single corporation, it does not matter that the parent "availed [itself] of the privilege of doing business through separate corporations," *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141 (1968). The purposeful choice of a parent corporation to organize a subunit as a subsidiary is not itself a reason to heighten antitrust scrutiny, because it is not laden with anticompetitive risk.

[145] [Omitted]

[146] [Omitted]

[147] [Omitted]

[148] The dissent argues that references in the legislative history to "trusts" suggest that Congress intended § 1 to govern the conduct of all affiliated corporations. See *post*, at 787-788. But those passages explicitly refer to combinations created for the very purpose of restraining trade. None of the cited debates refers to the postacquisition conduct of corporations whose initial affiliation was lawful. Indeed, Senator Sherman stated:

> *"It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination." 121 Cong. Rec. 2457 (1890).*

unilateral and concerted conduct will necessarily disappoint those who find that distinction arbitrary. It cannot be denied that § 1's focus on concerted behavior leaves a "gap" in the Act's proscription against unreasonable restraints of trade. See *post*, at 789. An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination, or conspiracy—itleaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conductof two firms subject to § 1 liability.

We have already noted that Congress left this "gap" for eminently sound reasons. Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote. See *supra*, at 767-769. Moreover, whatever the wisdom of the distinction, the Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct. Had Congress intended to outlaw unreasonable restraints of trade as such, § 1's requirement of a contract, combination, or conspiracy would be superfluous, as would the entirety of § 2.[149] Indeed, this Court has recognized that § 1 is limited to concerted conduct at least since the days of *United States v. Colgate & Co.*, 250 U.S. 300 (1919). Accord, *post*, at 789.

The appropriate inquiry in this case, therefore, is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects, as the dissent suggests. Nor is it whether the term "conspiracy" will bear a literal construction that includes parent corporations and their wholly owned subsidiaries. For if these were the proper inquiries, a single firm's conduct would be subject to § 1 scrutiny whenever the coordination of two employees was involved. Such a rule would obliterate the Act's distinction between unilateral and concerted conduct, contrary to the clear intent of Congress as interpreted by the weight of judicial authority. See n. 15, *supra*. Rather, the appropriate inquiry requires us to explain the logic underlying Congress' decision to exempt unilateral conduct from § 1 scrutiny, and to assess whether that logic similarly excludes the conduct of a parent and its wholly owned subsidiary. Unless we second-guess the judgment of Congress to limit § 1 to concerted

[149] Even if common-law intracorporate conspiracies were firmly established when Congress passed the Sherman Act, the obvious incompatibility of an intracorporate conspiracy with § 1 is sufficientto refute the dissent's suggestion that Congress intended to incorporate such a definition. See *post*, at 784-787. Moreover, it is far from clear that intracorporate conspiracies were recognized at common law in 1890. Even today courts disagree whether corporate employees can conspire with themselves or with the corporation for purposes of certain statutes, such as 42 U.S.C. § 1985(3). Compare, *e.g.*, *Novotny v. Great Am. Fed. Sav. & Loan Assn.*, 584 F.2d 1235 (CA3 1978) (en banc), vacated and remanded on othergrounds, 442 U.S. 366 (1979), with *Dombrowski v. Dowling*, 459 F.2d 190 (CA7 1972). And in 1890 it was disputed whether a corporation could itself be guilty of a crime that required criminal intent, such as conspiracy. Commentators appear to agree that courts began finding corporate liability for such crimes only around the turn of the century. See generally Edgerton, Corporate Criminal Responsibility, 36 Yale L.J. 827, 828, and n. 11 (1927); Miller, Corporate Criminal Liability: A Principle Extended to Its Limits, 38 Fed. Bar J. 49 (1979); Note, 60 Harv. L. Rev. 283, 284, and n. 9 (1946). Of course, Congress changed that common-law rule when it explicitly provided that a corporation could be guilty of a § 1 conspiracy. But the point remains that the Sherman Act did not import a pre-existing common-law tradition recognizing conspiracies between corporations and their own employees.

conduct, we can only conclude that the coordinated behavior of a parent and its wholly owned subsidiary falls outside the reach of that provision.

Although we recognize that any "gap" the Sherman Act leaves is the sensible result of a purposeful policy decision by Congress, we also note that the size of any such gap is open to serious question. Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine. A corporation's initial acquisition of control will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 18. Thereafter, theenterprise is fully subject to § 2 of the Sherman Act and § 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U.S.C. § 45. That these statutes are adequate to control dangerous anticompetitive conduct is suggested by the fact that not a single holding of antitrust liability by this Court would today be different in the absence of an intra-enterprise conspiracy doctrine. It is further suggested by the fact that the Federal Government, in its administration of the antitrust laws, no longer accepts the concept that a corporation and its wholly owned subsidiaries can "combine" or "conspire" under § 1.[150] Elimination of the intra-enterprise conspiracy doctrine with respect to corporations and their wholly owned subsidiaries will therefore not cripple antitrust enforcement. It will simply eliminate treble damages from private state tort suits masquerading as antitrust actions.

6.3. Conclusion

We hold that Copperweld and its wholly owned subsidiary Regal are incapable ofconspiring with each other for purposes of § 1 of the Sherman Act. To the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

6.4. Dissenting

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join,dissenting.

The Court's reason for rejecting the concept of a combination or conspiracy among a parent corporation and its wholly owned subsidiary is that it elevates form over substance—while in form the two corporations are separate legal entities, in substance they are a single integrated enterprise and hence cannot comprise the plurality of actors necessary to satisfy § 1. *Ante*, at 771-774. In many situations the Court's reasoning is perfectly sensible, for the affiliation of corporate entities often isprocompetitive precisely because, as the Court explains, it enhances efficiency. A challenge to conduct that is merely an incident of the desirable integration that accompanies such affiliation should fail. However, the protection of such conduct provides no justification for the Court's new rule, precisely because such conduct cannot be characterized as an unreasonable restraint of trade violative of § 1. Conversely, the problem with the Court's new rule is that it leaves a significant gap in the enforcement of § 1 with respect to

[150] "[T]he [intra-enterprise conspiracy] doctrine has played a relatively minor role in government enforcement actions, and the government has not relied on the doctrine in recent years." Brief for United States as *Amicus Curiae* 26, n. 42.

anticompetitive conduct that is entirely unrelated to the efficiencies associated with integration.

Since at least *United States v. Colgate & Co.*, 250 U.S. 300 (1919), § 1 has been construed to require a plurality of actors. This requirement, however, is a consequence of the plain statutory language, not of any economic principle. As an economic matter, what is critical is the presence of market power, rather than a plurality of actors.[151] From a competitive standpoint, a decision of a single firm possessing power to reduce output and raise prices above competitive levels has the same consequence as a decision by two firms acting together who have acquired an equivalent amount of market power through an agreement not to compete.[152]

Unilateral conduct by a firm with market power has no less anticompetitive potential than conduct by a plurality of actors which generates or exploits the same power,[153] and probably more, since the unilateral actor avoids the policing problems faced by cartels.

The rule of *Yellow Cab* [*United States v. Yellow Cab Co.,* 332 U.S. 218 (1947), which holds that affiliated corporations have the capacity to conspire] thus has an economic justification. It addresses a gap in antitrust enforcement by reaching anticompetitive agreements between affiliated corporations which have sufficient market power to restrain marketwide competition, but not sufficient power to be considered monopolists within the ambit of § 2 of the Act.[154] The doctrine is also useful when a third party declines to join a conspiracy to restrain trade among affiliated corporations, and is harmed as a result through a boycott or similar tactics designed to penalize the refusal. In such cases, since there has been no agreement with the third party,

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[151] Market power is the ability to raise prices above those that would be charged in a competitive market. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27, n. 46 (1984); *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 620 (1977); *United States v. E.I. du Pont de Nemours &Co.*, 351 U.S. 377, 391 (1956).

[152] Significantly, the Court never suggests that the plurality-of-actors requirement has any intrinsic economic significance. Rather, it suggests that the requirement has evidentiary significance: combinations are more likely to signal anticompetitive conduct than is unilateral activity: "In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction." *Ante*, at 769. That is true, but it is also true of any ordinary commercial contract between separate entities, as can be seen if one substitutes the word "contract" for "conspiracy" in the passage I have quoted. The language of the Sherman Act indicates that it treats "contracts" and "conspiracies" as equivalent concepts—both satisfy the multiplicity-of-actors requirement—and yet one of the most fundamental points in antitrust jurisprudence, dating at least to *Standard Oil*, is that there is nothing inherently anticompetitive about a contract. Similarly, an agreement to act "for common benefit" in itself is unremarkable—all agreements are in some sense a restraint of trade be they contracts or conspiracies. It is only when trade is unreasonably restrained that § 1 is implicated. The Court's evidentiary concern lacks merit.

[153] [Omitted]

[154] "[I]t is the potential which this conspiracy concept holds for the development of a rational enforcement policy which, if anything, will ultimately attract the courts. If conduct of a single corporation which restrains trade were to violate Section 1, a forceful weapon would be available to the government with which to challenge conduct which in oligopolistic industries creates or reinforces entry barriers. Excessive advertising in the cereal, drug, or detergent industries, annual style changes in the auto industry, and other such practices could be reached as soon as they threatened to inhibit competition; there would be no need to wait until a 'dangerous probability' of monopoly had been reached, the requirement under Section 2 'attempt' doctrine. Nor would a single firm restraint of trade rule be overbroad. It would in no way threaten single firm activity-setting a price, deciding what market it would deal in, or the like-which did not threaten competitive conditions." L. Sullivan, [Law of Antitrust] *supra*, n. 9, § 114, at 324 [(1977)] (footnotes omitted).

only an agreement between the affiliated corporations can be the basis for § 1 inquiry.[155] Finally, it must be remembered that not all persons who restrain trade wear grey flannel suits. Businesses controlled by organized crime often attempt to gain control of an industry through violence or intimidation of competitors; in such cases §1 can be applied to separately incorporated businesses which benefit from such tactics, but which may be ultimately controlled by a single criminal enterprise.[156]

The rule of *Yellow Cab* and its progeny is not one that condemns every parent- subsidiary relationship. A single firm, no matter what its corporate structure may be, is not expected to compete with itself.[157] Functional integration by its very nature requires unified action; hence in itself it has never been sufficient to establish the existence of an unreasonable restraint of trade: "In discussing the charge in the *Yellow Cab* case, we said that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act." *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948). Restraints that act only onthe parent or its subsidiary as a consequence of an otherwise lawful integration do not violate § 1 of the Sherman Act.[158] But if the behavior at issue is unrelated to any functional integration between the affiliated corporations and imposes a restraint on third parties of sufficient magnitude to restrain marketwide competition, as a matter of economic substance, as well as form, it is appropriate to characterize the conductas a "combination or conspiracy in restraint of trade."[159]

In sum, the question that the Court should ask is not why a wholly owned subsidiary should be treated differently from a corporate division, since the immunity accorded that type of arrangement is a necessary consequence of *Colgate*. Rather the question should be why two corporations that engage in a predatory course of conduct which produces a marketwide restraint on competition and which, as separate legal entities, can be easily fit within the language of § 1, should be immunized from liability because they are controlled by the same godfather. That is aquestion the Court simply fails to confront. I respectfully dissent.

[155] [Omitted]
[156] [Omitted]
[157] [Omitted]
[158] [Omitted]
[159] [Omitted]

7.American Needle, Inc. V. National Football League Et Al.

SUPREME COURT OF THE UNITED STATES

7.1. Syllabus

Certiorari to The United States Court Of Appeals For The Seventh Circuit

No. 08–661. Argued January 13, 2010—Decided May 24, 2010 Respondent National Football League (NFL) is an unincorporated association of 32 separately owned professional football teams, also re- spondents here. The teams, each of which owns its own name, colors, logo, trademarks, and related intellectual property, formed respon- dent National Football League Properties (NFLP) to develop, license, and market that property. At first, NFLP granted nonexclusive li- censes to petitioner and other vendors to manufacture and sell team- labeled apparel. In December 2000, however, the teams authorized NFLP to grant exclusive licenses. NFLP granted an exclusive license to respondent Reebok International Ltd. to produce and sell trade- marked headwear for all 32 teams. When petitioner's license was not renewed, it filed this action alleging that the agreements between re- spondents violated the Sherman Act, §1 of which makes "[e]very con- tract, combination . . . or, conspiracy, in restraint of trade" illegal. Respondents answered that they were incapable of conspiring within §1's meaning because the NFL and its teams are, in antitrust law jargon, a single entity with respect to the conduct challenged. The District Court granted respondents summary judgment, and the Sev- enth Circuit affirmed.

7.2. Held

The alleged conduct related to licensing of intellectual property constitutes concerted action that is not categorically beyond §1's cov- erage.

a. The meaning of "contract, combination . . . , or, conspiracy" in §1 of the Sherman Act is informed by the Act's " 'basic distinction be- tween concerted and independent action.' " *Copperweld Corp.* v. *In- dependence Tube Corp.*, 467 U. S. 752, 767. Section 1 "treat[s] con- certed behavior more strictly than unilateral behavior," *id.*, at 768, because, unlike independent action, "[c]oncerted activity inherently is fraught with anticompetitive risk" insofar as it "deprives the market- place of independent centers of decisionmaking that competition as- sumes and demands," *id.*, at 768–769. And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. That creates less risk of deterring a firm's necessary conduct and leaves courts to examine only discrete agreements. An arrangement must therefore embody concerted ac- tion in order to be a "contract, combination . . . or, conspiracy" under
b. In determining whether there is concerted action under §1, the Court has eschewed formalistic distinctions, such as whether the al- leged conspirators are legally distinct entities, in favor of a functional consideration of how they actually operate. The Court has repeatedly found instances in which members of a legally single entity violated §1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. See, *e.g., United States* v. *Sealy, Inc.*, 388 U. S. 350, 352–356. Conversely, the Court has found

that although the entities may be "separate" for purposes of incorporation or formal title, if they are controlled by a single center of decisionmaking and they control a single aggregation of economic power, an agreement between them does not constitute a "contract, combination . . . or, conspiracy." *Copperweld,* 467 U. S., at 769.

c. The relevant inquiry is therefore one of substance, not form, which does not turn on whether the alleged parties to contract, com- bination, or conspiracy are part of a legally single entity or seem like one firm or multiple firms in any metaphysical sense. The inquiry is whether the agreement in question joins together "separate economic actors pursuing separate economic interests," *Copperweld,* 467 U. S., at 768, such that it "deprives the marketplace of independent centers of decisionmaking," *id.*, at 769, and therefore of diversity of entrepre- neurial interests and thus of actual or potential competition. If it does, then there is concerted action covered by §1, and the court must decide whether the restraint of trade is unreasonable and therefore illegal.

d. The NFL teams do not possess either the unitary decisioning quality or the single aggregation of economic power characteristic of independent action. Each of them is a substantial, independently owned, independently managed business, whose "general corporate actions are guided or determined" by "separate corporate conscious- nesses," and whose "objectives are" not "common." Copperweld, 467 U. S., at 771. They compete with one another, not only on the play- ing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel. See, *e.g., Brown* v. *Pro Football, Inc.*, 518 U. S. 231, 249. Directly relevant here, the teams are poten- tially competing suppliers in the market for intellectual property. When teams license such property, they are not pursuing the "com- mon interests of the whole" league, but, instead, the interests of each "corporation itself." *Copperweld*, 467 U. S., at 770. It is not disposi- tive, as respondents argue, that, by forming NFLP, they have formed a single entity, akin to a merger, and market their NFL brands through a single outlet. Although the NFL respondents may be simi- lar in some sense to a single enterprise, they are not similar in the relevant functional sense. While teams have common interests such as promoting the NFL brand, they are still separate, profit- maximizing entities, and their interests in licensing team trade- marks are not necessarily aligned. Nor does it matter that the teams may find the alleged cooperation necessary to compete against other forms of entertainment. Although decisions made by NFLP are not as easily classified as concerted activity, the NFLP's decisions about licensing the teams' separately owned intellectual property are con- certed activity and thus covered by §1 for the same reason that deci- sions made directly by the 32 teams are covered by §1. In making the relevant licensing decisions, NFLP is "an instrumentality" of the teams. *Sealy,* 388 U. S., at 352–354.

e. Football teams that need to cooperate are not trapped by antitrust law. The fact that the NFL teams share an interest in making the entire league successful and profitable, and that they must coop- erate to produce games, provides a perfectly sensible justification for making a host of collective decisions. Because some of these re- straints on competition are necessary to produce the NFL's product, the Rule of Reason generally should apply, and teams' cooperation is likely to be permissible. And depending upon the activity in ques- tion, the Rule of

Reason can at times be applied without detailed analysis. But the activity at issue in this case is still concerted activ- ity covered for §1 purposes. 538 F. 3d 736, reversed and remanded.

7.3. Judgment

STEVENS, J., delivered the opinion for a unanimous Court

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Wash- ington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 08–661

AMERICAN NEEDLE, INC., PETITIONER v.
NATIONAL FOOTBALL LEAGUE ET AL.
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[May 24, 2010]

JUSTICE STEVENS delivered the opinion of the Court. "Every contract, combination in the form of a trust or otherwise, or, conspiracy, in restraint of trade" is madeillegal by §1 of the Sherman Act, ch. 647, 26 Stat. 209, asamended, 15 U. S. C. §1. The question whether an ar- rangement is a contract, combination, or conspiracy isdifferent from and antecedent to the question whether itunreasonably restrains trade. This case raises that ante- cedent question about the business of the 32 teams in theNational Football League (NFL) and a corporate entitythat they formed to manage their intellectual property.We conclude that the NFL's licensing activities constituteconcerted action that is not categorically beyond the cov-erage of §1. The legality of that concerted action must bejudged under the Rule of Reason.

I

Originally organized in 1920, the NFL is an unincorpo- rated association that now includes 32 separately ownedprofessional football teams.[160] Each team has its own name, colors, and logo, and owns related intellectual property.Like each of the other teams in the league, the New Or- leans Saints and the Indianapolis Colts, for example, havetheir own distinctive names, colors, and marks that arewell known to millions of sports fans.

Prior to 1963, the teams made their own arrangements for licensing their intellectual property and marketing trademarked items such as caps and jerseys. In 1963, the

[160] The NFL was founded in Canton, Ohio as the "American Professional Football Association." *United States Football League* v. *National Football League*, 842 F. 2d 1335, 1343 (CA2 1988). It took its current name in 1922. *Ibid.* Forty-one franchises failed in the first forty-one years of the League's existence. *Ibid*

teams formed National Football League Properties (NFLP) to develop, license, and market their intellectual property. Most, but not all, of the substantial revenues generated by NFLP have either been given to charity or shared equally among the teams. However, the teams are able to and have at times sought to withdraw from this arrangement.

Between 1963 and 2000, NFLP granted nonexclusive licenses to a number of vendors, permitting them to manu-facture and sell apparel bearing team insignias. Petitioner, American Needle, Inc., was one of those licensees. In December 2000, the teams voted to authorize NFLP to grant exclusive licenses, and NFLP granted Reebok International Ltd. an exclusive 10-year license to manufacture and sell trademarked headwear for all 32 teams. It there- after declined to renew American Needle's nonexclusive license.

American Needle filed this action in the Northern Dis-trict of Illinois, alleging that the agreements between the NFL, its teams, NFLP, and Reebok violated §§1 and 2 of the Sherman Act. In their answer to the complaint, the defendants averred that the teams, NFL, and NFLP were incapable of conspiring within the meaning of §1 "because they are a single economic enterprise, at least with respect to the conduct challenged." App. 99. After limited discov-ery, the District Court granted summary judgment on the question "whether, with regard to the facet of their opera- tions respecting exploitation of intellectual property rights, the NFL and its 32 teams are, in the jargon of antitrust law, acting as a single entity." *American Needle, Inc.* v. *New Orleans La. Saints*, 496 F. Supp. 2d 941, 943 (2007). The court concluded "that in that facet of their operations they have so integrated their operations that they should be deemed a single entity rather than joint ventures cooperating for a common purpose."

The Court of Appeals for the Seventh Circuit affirmed. The panel observed that "in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under §1." 538 F. 3d, 736, 741 (2008). Relying on Circuit precedent, the court limited its inquiry to the particular conduct at issue, licensing of teams' intellectual property.

The panel agreed with petitioner that "when making a single-entity determination, courts must examine whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes." *Id.*, at 742. The court, however, discounted the significance of potential competi- tion among the teams regarding the use of their intellec-tual property because the teams "can function only as one source of economic power when collectively producing NFL football." *Id.*, at 743. The court noted that football itself can only be carried out jointly. See *ibid.* ("Asserting that a single football team could produce a football game . . . is a Zen riddle: Who wins when a football team plays itself"). Moreover, "NFL teams share a vital economic interest in collectively promoting NFL football . . . [to] compet[e] with other forms of entertainment." *Ibid.* "It thus follows," the court found, "that only one source of economic power controls the promotion of NFL football," and "it makes little sense to assert that each individual team has the author- ity, if not the responsibility, to promote the jointly pro- duced NFL football." *Ibid.* Recognizing that NFL teams have "license[d] their intellectual property collectively" since 1963, the court held that §1 did not apply. We granted certiorari. 557 U. S. __ (2009).

II

As the case comes to us, we have only a narrow issue to decide: whether the NFL respondents are capable of en- gaging in a "contract, combination . . . , or conspiracy" as defined by §1 of the Sherman Act, 15 U. S. C. §1, or, as we have sometimes phrased it, whether the alleged activity by the NFL respondents "must be viewed as that of a single enterprise for purposes of §1." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 771 (1984).

Taken literally, the applicability of §1 to "every contract, combination . . . or conspiracy" could be understood to cover every conceivable agreement, whether it be a group of competing firms fixing prices or a single firm's chief executive telling her subordinate how to price their com- pany's product. But even though, "read literally," §1 would address "the entire body of private contract," that is not what the statute means. *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 688 (1978); see also *Texaco Inc.* v. *Dagher*, 547 U. S. 1, 5 (2006) ("This Court has not taken a literal approach to this language"); cf. *Board of Trade of Chicago* v. *United States*, 246 U. S. 231, 238 (1918) (reasoning that the term "restraint of trade" in §1 cannot possibly refer to any restraint on com-petition because "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence"). Not every instance of co-operation between two people is a potential "contract, combination . . . , or conspiracy, in restraint of trade."

The meaning of the term "contract, combination . . . or conspiracy" is informed by the "'basic distinction'" in the Sherman Act " 'between concerted and independent ac- tion'" that distinguishes §1 of the Sherman Act from §2. *Copperweld*, 467 U. S., at 767 (quoting *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 761 (1984)). Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action "monopolize[s]," 15 U. S. C. §2, or "threatens actual monopolization," *Cop-perweld,* 467 U. S., at 767, a category that is narrower than restraint of trade. Monopoly power may be equally harmful whether it is the product of joint action or indi- vidual action.

Congress used this distinction between concerted and independent action to deter anticompetitive conduct and compensate its victims, without chilling vigorous competi- tion through ordinary business operations. The distinc- tion also avoids judicial scrutiny of routine, internal busi- ness decisions.

Thus, in §1 Congress "treated concerted behavior more strictly than unilateral behavior." *Id.*, at 768. This is so because unlike independent action, "[c]oncerted activity inherently is fraught with anticompetitive risk" insofar as it "deprives the marketplace of independent centers of decisionmaking that competition assumes and demands." *Id.*, at 768–769. And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm's necessary conduct; courts need only examine discrete agreements; and such conduct may be remedied simply through prohibition.[161] See Areeda &

[161] If Congress prohibited independent action that merely restrains trade (even if it does not threaten monopolization), that prohibition could deter perfectly competitive conduct by firms that are fearful of litigation costs and judicial error. See *Copperweld*, 467 U. S., at 768 ("Judging unilateral conduct in this manner reduces the risk that the antitrust laws will

Hovenkamp 1464c, at 206.

Concerted activity is thus "judged more sternly than unilateral activity under §2," *Copperweld*, 467 U. S., at 768. For these reasons, §1 prohibits any concerted action "in restraint of trade or commerce," even if the action does not "threate[n] monopolization," *Ibid*. And therefore, an arrangement must embody concerted action in order to be a "contract, combi- nation . . . or conspiracy" under §1.

III

We have long held that concerted action under §1 does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a functional considera-tion of how the parties involved in the alleged anticom- petitive conduct actually operate.

As a result, we have repeatedly found instances in which members of a legally single entity violated §1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. In *United States* v. *Sealy, Inc.*, 388 U. S. 350 (1967), for example, a group of mattress manufacturers operated and controlled Sealy, Inc., a company that li- censed the Sealy trademark to the manufacturers, and dictated that each operate within a specific geographic area. *Id.*, at 352–353. The Government alleged that the licensees and Sealy were conspiring in violation of §1, and we agreed. *Id.*, at 352–354. We explained that "[w]e seek the central substance of the situation" and therefore "we are moved by the identity of the persons who act, rather than the label of their hats." *Id.*, at 353. We thus held that Sealy was not a "separate entity, but . . . an instru- mentality of the individual manufacturers." *Id.*, at 356. In similar circumstances, we have found other formally distinct business organizations covered by §1. See, *e.g., Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U. S. 284 (1985); *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85 (1984) *(NCAA); United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609 (1972); *Associated Press* v. *United States*, 326 U. S. 1 (1945); *id.*, at 26 (Frankfurter, J., con- curring); *United States* v. *Terminal Railroad Assn. of St. Louis*, 224 U. S. 383 (1912); see also Rock, Corporate Law Through an Antitrust Lens, 92 Colum. L. Rev. 497, 506–510 (1992) (discussing cases). We have similarly looked past the form of a legally "single entity" when competitors were part of professional

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dampen the competitive zeal of a single aggressive competitor"); cf. *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 441 (1978) ("[S]alutary and procompetitive conduct . . . might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty"). Moreover, if every unilateral action that re- strained trade were subject to antitrust scrutiny, then courts would be forced to judge almost every internal business decision. See 7 P. Areeda & H. Hovenkamp, Antitrust Law ¶1464c, at 206 (2d ed. 2003) (hereinafter Areeda & Hovenkamp) (unilateral behavior is "often difficult to evaluate or remedy").

organizations[162] or trade groups.[163]

Conversely, there is not necessarily concerted action simply because more than one legally distinct entity is involved. Although, under a now-defunct doctrine known as the "intraenterprise conspiracy doctrine," we once treated cooperation between legally separate entities as necessarily covered by §1, we now embark on a more functional analysis.

The roots of this functional analysis can be found in the very decision that established the intraenterprise conspir- acy doctrine. In *United States* v. *Yellow Cab Co.*, 332 U. S.218 (1947), we observed that "corporate interrelationships. . . are not determinitive of the applicability of the Sherman Act" because the Act "*is aimed at substance rather than form." Id., at 227. We nonetheless held that cooperation between legally separate entities was neces- sarily covered by §1 because an unreasonable restraint of trade "may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent.*" *Ibid.;* see also *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 215(1951).

The decline of the intraenterprise conspiracy doctrine began in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19 (1962).

In that case, several agricultural cooperatives that were owned by the same farmers were sued for violations of §1 of the Sherman Act. *Id.*, at 24–25. Applying a specific immunity provision for agricultural cooperatives, we held that the three coopera- tives were "in practical effect" one "organization," even though the controlling farmers "have formally organized themselves into three separate legal entities." *Id.*, at 29. "To hold otherwise," we explained, "would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect" insofar as "use of separate corporations had [no] economic significance."

Next, in *United States* v. *Citizens & Southern Nat. Bank*, 422 U. S. 86 (1975), a large bank, Citizens and Southern (C&S), formed a holding company that operated *de facto* suburban branch banks in the Atlanta area through ownership of the maximum amount of stock in each local branch that was allowed by law, "ownership of much of the remaining stock by parties friendly to C&S, use by the suburban banks of the C&S logogram and all of C&S's banking services, and close C&S oversight of the operation and governance of the suburban banks." *Id.*, at 89 (footnote omitted). The Government challenged the cooperation between the banks. In our analysis, we ob- served that "'corporate interrelationships . . . are not determinative,'" *id.*, at 116, "looked to economic sub- stance," and observed that "because the sponsored banks were not set up to be competitors, §1 did not compel them to compete."

Areeda & Hovenkamp ¶1463, at 200–201; see also *Citizens & Southern*, 422 U. S., at 119–120; Areeda, Intraenterprise Conspiracy in Decline, 97 Harv.L. Rev.

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[162] See, *e.g.*, *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447 (1986); *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332 (1982); *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679 (1978); *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975).

[163] See, *e.g.*, *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492 (1988); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961) *(per curiam); Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U. S. 457 (1941).

451, 461 (1983).

We finally reexamined the intraenterprise conspiracy doctrine in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752 (1984), and concluded that it was inconsis- tent with the "'basic distinction between concerted and independent action.'" *Id.*, at 767. Considering it "per- fectly plain that an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that §1 was designed to police," *id.,* at 769, we held that a parent corporation and its wholly owned sub- sidiary "are incapable of conspiring with each other for purposes of §1 of the Sherman Act," *id.,* at 777. We ex- plained that although a parent corporation and its wholly owned subsidiary are "separate" for the purposes of incor- poration or formal title, they are controlled by a single center of decisionmaking and they control a single aggre- gation of economic power. Joint conduct by two such entities does not "depriv[e] the marketplace of independ- ent centers of decisionmaking," *id.,* at 769, and as a re- sult, an agreement between them does not constitute a "contract, combination . . . or conspiracy" for the purposes of §1.[164]

IV

As *Copperweld* exemplifies, "substance, not form, should determine whether a[n] . . . entity is capable of conspiring under §1." 467 U. S., at 773, n. 21. This inquiry is some- times described as asking whether the alleged conspira-tors are a single entity. That is perhaps a misdescription, however, because the question is not whether the defen- dant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination . . . , or conspiracy" is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination . . .or conspiracy" amongst "separate economic actors pursu-ing separate economic interests," *id.*, at 769, such that the agreement "deprives the marketplace of independent centers of decisionmaking," *ibid.*, and therefore of "diver- sity of entrepreneurial interests," *Fraser* v. *Major League Soccer, L. L. C.,* 284 F. 3d 47, 57 (CA1 2002) (Boudin, C. J.), and thus of actual or potential competition, see *Freeman* v. *San Diego Assn. of Realtors*, 322 F. 3d 1133, 1148–1149 (CA9 2003) (Kozinski, J.); *Rothery Storage & Van Co.* v. *Atlas Van Line, Inc.*, 792 F. 2d 210, 214–215 (CADC 1986) (Bork, J.); see also Areeda & Hovenkamp 1462b, at 193–194 (noting that the "central evil addressed by Sherman Act §1" is the "elimin[ation of] compe-tition that would otherwise exist").

Thus, while the president and a vice president of a firm could (and regularly do) act in combination, their joint action generally is not the sort of "combination" that §1 is intended to cover. Such agreements might be described as "really unilateral behavior

[164] This focus on "substance, not, form," *Copperweld*, 467 U. S., at 773, n. 21, can also be seen in our cases about whether a company and its agent are capable of conspiring under §1. See, *e.g.*, *Simpson* v. *Union Oil Co. of Cal.*, 377 U. S. 13, 20–21 (1964); see also E. Elhauge & D. Geradin, Global Antitrust Law and Economics 787–788, and n. 7 (2007) (hereinafter Elhauge & Geradin) (explaining the functional difference between *Simpson* and *United States* v. *General Elec. Co.*, 272 U. S. 476 (1926), in which we treated a similar agreement as beyond the reach of §1).

flowing from decisions of a single enterprise." *Copperweld*, 467 U. S., at 767. Nor, for this reason, does §1 cover "internally coordinated conduct of a corporation and one of its unincorporated divisions," *id.*, at 770, because "[a] division within a corporate struc- ture pursues the common interests of the whole," *ibid.*, and therefore "coordination between a corporation and its division does not represent a sudden joining of two inde- pendent sources of economic power previously pursuing separate interests,".

Nor, for the same reasons, is "the coordinated activity of a parent and its wholly owned subsidiary" covered. See *id.*, at 771. They "have a complete unity of interest" and thus "[w]ith or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder."

Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged §1 viola- tion are legally distinct entities. Nor, however, is it de- terminative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture. The question is whether the agreement joins together "independent centers of deci- sionmaking." If it does, the entities are capa- ble of conspiring under §1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one.

V

The NFL teams do not possess either the unitary deci- sionmaking quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and inde- pendently managed business. "[T]heir general corporate actions are guided or determined" by "separate corporate consciousnesses," and "[t]heir objectives are" not "common." *Copperweld*, 467 U. S., at 771; see also *North American Soccer League* v. *NFL*, 670 F. 2d 1249, 1252 (CA2 1982) (discussing ways that "the financial perform- ance of each team, while related to that of the others, does not . . . necessarily rise and fall with that of the others"). The teams compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel. See *Brown* v. *Pro Football, Inc.*, 518 U. S. 231, 249 (1996); *Sullivan* v. *NFL*, 34 F. 3d 1091, 1098 (CA1 1994); *Mid- South Grizzlies* v. *NFL*, 720 F. 2d 772, 787 (CA3 1983); cf. *NCAA*, 468 U. S., at 99.

Directly relevant to this case, the teams compete in the market for intellectual property. To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the "common interests of the whole" league but is instead pursuing interests of each "corporation itself," *Copperweld*, 467 U. S., at 770; teams are acting as "separate economic actors pursuing separate economic interests," and each team therefore is a potential "independent cente[r] of decisionmaking," *id.*, at 769. Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that "depriv[e] the mar- ketplace of independent centers of decisionmaking," *ibid.*, and therefore of actual or potential competition. See *NCAA*, 468 U. S., at 109, n. 39 (observing a possible §1 violation if two separately owned companies sold their separate products through a "single selling agent"); cf. Areeda & Hovenkamp 1478a, at 318 ("Obviously, the most significant competitive threats arise when joint venture

participants are actual or potential competitors").

In defense, respondents argue that by forming NFLP, they have formed a single entity, akin to a merger, and market their NFL brands through a single outlet. But it is not dispositive that the teams have organized and own a legally separate entity that centralizes the management of their intellectual property. An ongoing §1 violation cannot evade §1 scrutiny simply by giving the ongoing violation a name and label. "Perhaps every agreement and combina-tion in restraint of trade could be so labeled." *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 598 (1951).

The NFL respondents may be similar in some sense to a single enterprise that owns several pieces of intellectual property and licenses them jointly, but they are not simi- lar in the relevant functional sense. Although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not nec- essarily aligned. See generally Hovenkamp, Exclusive Joint Ventures and Antitrust Policy, 1995 Colum. Bus. L. Rev. 1, 52–61 (1995); Shishido, Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture, 39 Hastings L. J. 63, 69–81 (1987). Common interests in the NFL brand "*partially* unit[e] the economic interests of the parent firms," Broadley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1521, 1526 (1982) (emphasis added), but the teams still have distinct, potentially com- peting interests.

It may be, as respondents argue, that NFLP "has served as the 'single driver'' of the teams' "promotional vehicle," "'pursu[ing] the common interests of the whole.'" Brief for NFL Respondents 28 (quoting *Copperweld*, 467 U. S., at 770–771; brackets in original). But illegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties. It is true, as respondents describe, that they have for some time mar-keted their trademarks jointly. But a history of concerted activity does not immunize conduct from §1 scrutiny. "Absence of actual competition may simply be a manifes- tation of the anticompetitive agreement itself." *Freeman*, 322 F. 3d, at 1149.

Respondents argue that nonetheless, as the Court of Appeals held, they constitute a single entity because without their cooperation, there would be no NFL football. It is true that "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival." *Brown*, 518 U. S., at 248. But the Court of Appeals' reasoning is unpersuasive.

The justification for cooperation is not relevant to whether that cooperation is concerted or independent action.[165] A "contract, combination . . . or conspiracy," §1, that is necessary or useful to a joint venture is still a "contract, combination . . . or conspiracy" if it "deprives the marketplace of independent centers of

[165] As discussed *infra*, necessity of cooperation is a factor relevant to whether the agreement is subject to the Rule of Reason. See *NCAA*, 468 U. S., at 101 (holding that NCAA restrictions on televising college football games are subject to Rule of Reason analysis for the "critical" reason that "horizontal restraints on competition are essential if the product is to be available at all").

decisionmaking," *Copperweld*, 467 U. S., at 769. See *NCAA,* 468 U. S., at 113 ("[J]oint ventures have no immunity from antitrust laws"). Any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is neces- sary. But that does not mean that necessity of cooperation transforms concerted action into independent action; a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to §1 analysis. Nor does it mean that once a group of firms agree to produce a joint product, cooperation amongst those firms must be treated as independent conduct. The mere fact that the teams operate jointly in some sense does not mean that they are immune.[166]

The question whether NFLP decisions can constitute concerted activity covered by §1 is closer than whether decisions made directly by the 32 teams are covered by §1. This is so both because NFLP is a separate corporation with its own management and because the record indi- cates that most of the revenues generated by NFLP are shared by the teams on an equal basis. Nevertheless we think it clear that for the same reasons the 32 teams' conduct is covered by §1, NFLP's actions also are subject to §1, at least with regards to its marketing of property owned by the separate teams. NFLP's licensing decisions are made by the 32 potential competitors, and each of them actually owns its share of the jointly managed as- sets. Cf. *Sealy*, 388 U. S., at 352–354. Apart from their agreement to cooperate in exploiting those assets, includ-ing their decisions as the NFLP, there would be nothing to prevent each of the teams from making its own market decisions relating to purchases of apparel and headwear, to the sale of such items, and to the granting of licenses to use its trademarks.

We generally treat agreements within a single firm as independent action on the presumption that the compo- nents of the firm will act to maximize the firm's profits. But in rare cases, that presumption does not hold. Agree- ments made within a firm can constitute concerted action covered by §1 when the parties to the agreement act on interests separate from those of the firm itself,[167] and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action. See, *e.g.*, *Topco Associates,*

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[166] In any event, it simply is not apparent that the alleged conduct was necessary at all. Although two teams are needed to play a football game, not all aspects of elaborate interleague cooperation are necessary to produce a game. Moreover, even if leaguewide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football.
The Court of Appeals carved out a zone of antitrust immunity for conduct arguably related to league operations by reasoning that coordi- nated team trademark sales are necessary to produce "NFL football," a single NFL brand that competes against other forms of entertainment. But defining the product as "NFL football" puts the cart before the horse: Of course the NFL produces NFL football; but that does not mean that cooperation amongst NFL teams is immune from §1 scru-tiny. Members of any cartel could insist that their cooperation is necessary to produce the "cartel product" and compete with other products.

[167] See Areeda & Hovenkamp ¶1471; Elhauge & Geradin 786–787, and n. 6; see also *Capital Imaging Assoc.* v. *Mohawk Valley Medical Assoc., Inc.*, 996 F. 2d 537, 544 (CA2 1993); *Bolt* v. *Halifax Hospital Medical Center*, 891 F. 2d 810, 819 (CA11 1990); *Oksanen* v. *Page Memorial Hospital*, 945 F. 2d 696, 706 (CA4 1991); *Motive Parts Warehouse* v. *Facet Enterprises,* 774 F. 2d 380, 387–388 (CA10 1985); *Victorian House, Inc.* v. *Fisher Camuto Corp.*, 769 F. 2d 466, 469 (CA8 1985); *Weiss* v. *York Hospital*, 745 F. 2d 786, 828 (CA3 1984).

Inc., 405 U. S., at 609; *Sealy,* 388 U. S., at 352–354.

For that reason, decisions by the NFLP regarding the teams' separately owned intellectual property constitute concerted action. Thirty-two teams operating independently through the vehicle of the NFLP are not like the components of a single firm that act to maximize the firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being. See generally Hovenkamp, 1995 Colum. Bus. L. Rev., at 52–61. Unlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders. And each team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits. See generally Shusido, 39 Hastings L. J., at 69–71. The 32 teams capture individual economic benefits separate and apart from NFLP profits as a result of the decisions they make for the NFLP. NFLP's decisions thus affect each team's profits from licensing its own intellectual property. "Although the business interests of" the teams "will *often* coincide with those of the" NFLP "as an entity in itself, that commonal- ity of interest exists in every cartel." *Los Angeles Memo-rial Coliseum Comm'n* v. *NFL*, 726 F. 2d 1381, 1389 (CA9 1984) (emphasis added). In making the relevant licensing decisions, NFLP is therefore "an instrumentality" of the teams. *Sealy,* 388 U. S., at 352–354; see also *Topco Asso-ciates, Inc.*, 405 U. S., at 609.

If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from §1, then any cartel "could evade the antitrust law simply by creating a 'joint venture' to serve as the exclu- sive seller of their competing products." *Major League Baseball Properties, Inc.* v. *Salvino, Inc.*, 542 F. 3d 290, 335 (CA2 2008) (Sotomayor, J., concurring in judgment). "So long as no agreement," other than one made by the cartelists sitting on the board of the joint venture, "explic-itly listed the prices to be charged, the companies could act as monopolies through the 'joint venture.'" *Ibid.* (Indeed, a joint venture with a single management structure is generally a better way to operate a cartel because it de-creases the risks of a party to an illegal agreement defect- ing from that agreement). However, competitors "cannot simply get around" antitrust liability by acting "through a third-party intermediary or 'joint venture'." *Id.*, at 336.[168]

VI

[168] For the purposes of resolving this case, there is no need to pass upon the Government's position that entities are incapable of conspiring under §1 if they "have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition . . . in that operational sphere" and "the challenged restraint [does] not significantly affect actual or potential competition . . . outside their merged operations." Brief for United States as *Amicus Curiae* 17. The Government urges that the choices "to offer only a blanket license" and "to have only a single headwear licensee" might not constitute concerted action under its test. *Id.*, at 32. However, because the teams still own their own trademarks and are free to market those trade- marks as they see fit, even those two choices were agreements amongst potential competitors and would constitute concerted action under the Government's own standard. At any point, the teams could decide to license their own trademarks. It is significant, moreover, that the teams here control NFLP. The two choices that the Government might treat as independent action, although nominally made by NFLP, are for all functional purposes choices made by the 32 entities with potentially competing interests.

Football teams that need to cooperate are not trapped by antitrust law.

"[T]he special characteristics of this industry may provide a justification" for many kinds of agreements. *Brown*, 518 U. S., at 252 (STEVENS, J., dis-senting). The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case is still concerted activity under the Sherman Act that is subject to §1 analysis.

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.[169] *NCAA*, 468 U. S., at 101; see *id.*, at 117 ("Our decision not to apply a *per se* rule to this case rests in large part on our recogni- tion that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institu- tions seek to market is to be preserved"); see also *Dagher*, 547 U. S., at 6. In such instances, the agreement is likely to survive the Rule of Reason. See *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 23 (1979) ("Joint ventures and other cooperative arrange-ments are also not usually unlawful. . . where the agree- ment . . . is necessary to market the product at all"). And depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it "can sometimes be applied in the twinkling of an eye." *NCAA*, 468 U. S., at 109, n. 39.

Other features of the NFL may also save agreements amongst the teams. We have recognized, for example, "that the interest in maintaining a competitive balance" among "athletic teams is legitimate and important," *NCAA*, 468 U. S., at 117. While that same interest applies to the teams in the NFL, it does not justify treating them as a single entity for §1 purposes when it comes to the marketing of the teams' individually owned intellectual property. It is, however, unquestionably an interest that may well justify a variety of collective decisions made by the teams. What role it properly plays in applying the Rule of Reason to the allegations in this case is a matter to be considered on remand.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

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[169] Justice Brandeis provided the classic formulation of the Rule of Reason in *Board of Trade of Chicago* v. *United States*, 246 U. S. 231, 238 (1918):

> "*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. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.*"

See also *Leegin Creative Leather Prod- ucts, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 885–887 (2007); *National Soc. of Professional Engineers,* 435 U. S., at 688–69.

It is so ordered.

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