No. 21-2088

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RELEVENT SPORTS, LLC,

Plaintiff-Appellant,

v.

United States Soccer Federation, Inc. and Federation Internationale de Football Association,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York, No. 19-CV-8359 (VEC)
Hon. Valerie Caproni

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the American Antitrust Institute states that it is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. See http://www.antitrustinstitute.org.[2]

INTRODUCTION

This case presents the question of whether a consortium of competitors that promulgates binding market-governance rules can be plausibly alleged to have engaged in concerted action under Section 1 of the Sherman Act. The plaintiff, Relevent Sports, LLC ("Plaintiff"), was prohibited from hosting sanctioned Spanish and Ecuadorian professional soccer league matches in the United States pursuant to an announced policy of Federation Internationale de Football Association ("FIFA), which is binding upon the United States Soccer Federation, Inc. ("USSF") (collectively "Defendants"), all of USSF's soccer leagues and teams,

[1] All parties consent to the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus curiae or its counsel—has contributed money that was intended to fund preparing or submitting this brief.

[2] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

and all other national soccer associations and all of their leagues and teams. A-493 ¶ 1; A-496 ¶ 8. FIFA has confirmed in a written press release that the policy Plaintiff challenges requires that "official league matches must be played within the territory" of the league's host country. A-523 ¶ 117 (quoting press release). Plaintiff maintains that the policy explicitly allocates geographic soccer markets horizontally; FIFA's press release characterizes the policy as a "sporting principle." *Id*.

The complaint alleges that sanctioned, "official" league games are pairings of professional soccer teams to form matches that are sold jointly by the teams as a commercial entertainment product marketed to soccer fans. A-495 ¶ 7, A-498 ¶¶ 18–19; A-525 ¶ 123; *cf. Am. Needle, Inc. v. NFL*, 560 U.S. 183, 199 n.7 (2010) ("two teams are needed to play a football game"). Plaintiff further alleges that official league games are governed by overlapping oversight bodies that each have increasingly broader governance remits. A-500 ¶¶ 28-33. Professional soccer leagues, such as Major League Soccer ("MLS") in the United States, are situated directly above the teams in the league. Leagues have a vertical orientation to the teams they govern but serve as a device for producing horizontal coordination among the teams to form sanctioned matches. A-494 ¶ 3, A-495 ¶ 6; *see also Fraser v. Major League Soccer, LLC*, 284 F.3d 47, 57 (1st Cir. 2002) (Boudin, J.), (describing MLS as "a nominally vertical device for producing horizontal coordination").

Above each league is a "national association," such as USSF, which is a nominally vertical device for producing horizontal coordination among more than one league and more than one league's teams within a given country. A-509 ¶ 70; *see also N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc*., 883 F.3d 32, 35 (2d Cir. 2018) ("*NASL*") ("USSF designates leagues as Division I, II, or III.").

Above national associations, and spanning the globe, is FIFA, "the world governing body of soccer," which is a nominally vertical device for producing horizontal coordination among more than one association and more than one association's leagues and teams. SPA-20 (citing A-499 ¶¶ 24–25).[3] FIFA is comprised of and controlled by private representatives from 211 economically distinct national associations, and it enacts statutes, regulations, directives and decisions to which all national associations and their leagues and teams must fully comply on penalty of suspension or expulsion from professional soccer. A-499-502 ¶¶ 24–35.

Plaintiff does not allege facts suggesting that each of FIFA's 211 national associations and their leagues and teams individually affirmed the challenged FIFA policy prior to its enactment, nor that the associations, leagues, and teams each subjectively intended to limit output. Plaintiff alleges only that these entities have collectively become bound to do so and have done so, under threat of suspension

[3] Six regional confederations also form a governance layer between national associations and FIFA. A-500.

or expulsion from professional soccer. *See* A-509 ¶ 70, A-516 ¶ 93, A-518 ¶ 100; SPA-28-40. The district court dismissed Plaintiff's claim on the pleadings for failure to allege concerted action, and Plaintiff appealed.

SUMMARY OF ARGUMENT

Plaintiff has plausibly pled a combination in restraint of trade. Plaintiff has alleged that the FIFA membership has the capacity to engage in concerted action, and it has alleged that the FIFA member associations and their leagues and teams have done so in a manner that reduces output by preventing independent foreign economic actors from pursuing independent entrepreneurial interests in the United States. Those facts, if proven, must and do satisfy the antecedent element of concerted action in a Section 1 case. The district court's holding therefore must be reversed.

1. The complaint alleges that the foreign professional soccer associations, leagues and teams operating under the auspices of FIFA are separate economic actors. It also alleges that these economically independent actors had separate economic interests in competing to win U.S. soccer fans in the United States, and that the FIFA policy limited output by preventing them from doing so. When Plaintiff alleged that these independent foreign actors ceded governance authority to FIFA and FIFA eliminated their freedom to compete in the United States, Plaintiff alleged concerted action. Because FIFA is a "competitor collaboration," Plaintiff

met its pleading burden by alleging facts plausibly suggesting that FIFA imposed binding, enforceable market-governance rules preventing separate economic actors from pursuing separate economic interests. *See infra* Part I.A.

The district court dismissed Plaintiff's complaint for failure to plead concerted action based on an erroneous application of Supreme Court precedent. Precedent treats restraints that bind separate economic actors with separate economic interests as concerted action, but the district court held the exact opposite. It held that the binding nature of such restraints is exculpatory, because it creates questions as to whether the alleged conspirators' made an independent decision to join the conspiracy or did so against their will. Such a rule, if allowed to stand, would gut the Sherman Act and lead to absurd results. Since every member of a conspiracy 'independently decides' to join the conspiracy, no proof would ever be proof of conspiracy unless it were accompanied by evidence of the defendants' mental state. That is not the law. Concerted action is determined by an objective inquiry into whether independent centers of decisionmaking have been eliminated, not a subjective inquiry into alleged conspirators' mindsets. *See infra* Part I.B.

2. The district court's fundamental error also led it to commit two additional errors. First, it mistook legal questions as to whether Plaintiff will win on the issue of concerted action for factual questions as to whether Plaintiff has alleged that a competitor collaboration prevented separate economic actors from pursuing sepa-

rate economic interests. Even if Defendants at summary judgment or trial would attempt to argue the legal defense that they were pursuing FIFA's unitary interest rather than the individual collaborators' separate interests—a defense that appears to be foreclosed by *American Needle* based on evidentiary facts already in the record—a plaintiff does not have to prove its case to plead it. Where Plaintiff's factual allegations are that a competitor collaboration has thwarted competition that would otherwise exist, Plaintiff has adequately pled concerted action. *See infra* Part II.A.

Second, the district court misconstrued the emphasis this Court has placed on the Supreme Court's requirement that concerted action must be "designed to achieve an unlawful objective" to be actionable under Section 1. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). That language does not mean plaintiffs must plead facts plausibly suggesting that the actors who were allegedly in concert subjectively intended to harm competition. It means plaintiffs must plead that the challenged restraint threatens to restrict actual or potential competition and reduce output. In a civil Section 1 case, the plaintiff does not have the burden to plead that the members of a competitor collaboration acted with intent to harm competition. Intent is an element of proof only in a criminal Section 1 case, and even there, a general intent to engage in the prohibited conduct is sufficient.

United States v. U.S. Gypsum Co., 438 U.S. 422, 435–36, n. 13 (1978). *See infra* Part II.B.

3. If not overturned, the district court's decision threatens dangerous consequences that go well beyond this case. By imposing a subjective-intent requirement that demands allegations of mental-state evidence nearly impossible for most antitrust plaintiffs to plead or prove, the ruling would wrongly immunize competitor collaborations operating in key sectors of the U.S. economy. Many of these competitor collaborations are "rife with opportunities for anticompetitive activity," *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp*., 456 U.S. 556, 571 (1982), and immunizing them would be particularly perverse because they tend to generate the most stable, durable, and harmful forms of cartel behavior. The district court's opinion must be overturned to uphold the basic policy of the Sherman Act, which is to protect competition. *See infra* Part III.

ARGUMENT

I. FIFA IS A COMPETITOR COLLABORATION THAT BINDS SEPARATE ECONOMIC ACTORS WITH SEPARATE ECONOMIC INTERESTS

A. FIFA's Rules Governing Commercial Behavior Are a Vehicle for Ongoing Concerted Activity

The federal antitrust agencies have published a 35-page guidance document on an economic relationship they describe as a "competitor collaboration." Fed. Trade Comm'n & U.S. Dep't of Just., Antitrust Guidelines for Collaborations

Among Competitors § 1.1, at 2 (2000). They define this oxymoronic term as "a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom." *Id*. When competitor collaborations are lawful, another helpful way to understand them is to think of them as the exception that proves antitrust law's *per se* rule. Lawful competitor collaborations embody the recognition that both competition and cooperation can be necessary and valuable in a market economy.

Antitrust law's *per se* rule applies to conduct that "'facially'" would "'always or almost always tend to restrict competition and decrease output.'" *NCAA v. Bd. of Regents*, 468 U.S. 85, 100 (1984) (quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc*., 441 U.S. 1, 19-20 (1979)). The behaviors that facially restrict competition and decrease output are the paradigmatically harmful antitrust violations that the government prosecutes criminally: horizontal price-fixing, bid-rigging, and customer or territorial allocation. U.S. Dep't of Just. Antitrust Div., Antitrust Division Manual III-12 (5th ed. 2012). Yet, within the confines of a single corporate family, conduct that could be colloquially described as horizontal price-fixing, bid-rigging, and market allocation not only is not criminal; it is beyond reproach under *Copperweld Corp. v. Indep. Tube Corp*., 467 U.S. 752, 767–68 (1984). This begs the question why single entities and combinations of entities are treated differently under Section 1.

The Supreme Court has explained that "[t]he Sherman Act contains a 'basic distinction between concerted and independent action.'" *Id*. at 765 (quoting *Monsanto*, 465 U.S. at 761). "Concerted activity" implicates competition because it "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Id*. at 768–69. Independent or "intra-enterprise" activity, by contrast, implicates protected cooperation; it "do[es] not provide the plurality of actors" necessary to generate competition and thereby increase market output. *Id*. at 766, 769.

Suppose, for example, that a parent company were to agree to divide its business geographically with a subsidiary. This would be a territorial allocation, but it would not be a *market* allocation. It nominally provides a plurality of actors, but not the kind of actors (*i.e.* rivals) that have the capacity to generate market competition. An agreement between a parent and its wholly owned subsidiary can neither generate nor eliminate competition in a market because the two "have a complete unity of interest." *Id*. at 771. "With or without a formal 'agreement,' the subsidiary acts for the benefit of the parent." *Id*. ("Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one."). Consequently, the Court in *Copperweld* held that a parent and subsidiary are incapable of conspiring for purposes of Section 1 of the Sherman Act. *Id*.

However, when rivals with different (*i.e.* competing) interests collaborate to form a distinct entity, such as a standard-setting association, a trade association, a commercial joint venture, or a sports league, they may blur this line between concerted, *per se* illegal, conspiratorial conduct and unilateral, legal, intra-enterprise conduct. Such collaborations do, as a rule, bring together separate economic actors, but the actors do not, as a rule, pursue only their separate economic interests. The actors sometimes, or even most of the time, may pursue a shared economic interest in the success of the collaborative enterprise itself. Such activity does not eliminate *independent* centers of economic decisionmaking if the collaborative enterprise itself is a single entity and the actors are pursuing the entity's unitary interests. But such activity does eliminate independent centers of decisionmaking if it interferes with the collaborators' *rivalrous* behavior—that is, if it causes the "joining of economic resources that had previously served *different* interests." *Copperweld*, 467 U.S. at 771 (emphasis added).

Competitor collaborations therefore call upon courts to determine where the competing interests of legally and economically distinct firms end and where those firms' shared interest in the success of their beneficial collaborative activity begins. The Supreme Court instructed the lower courts on this inquiry in *American Needle*, 560 U.S. at 191, and it directed them to focus on whether there is diversity of interests among the firms alleged to be conspiring, just as in *Copperweld*. The

Court held, once again, that "[t]he question is whether the agreement joins together 'independent centers of decisionmaking.'" *Id*. at 196 (quoting *Copperweld*, 467 U.S. at 769).

The Supreme Court also clarified that "[t]he inquiry is one of competitive reality." *Id*. In other words, to determine whether a competitor collaboration has eliminated independent centers of decisionmaking, substance trumps form. Herbert Hovenkamp & Christopher Leslie, *The Firm as Cartel Manager*, 64 Vand. L. Rev. 813, 849–851 (2011) (citing *Copperweld*, 467 U.S. at 773, n.21 ("substance, not form, should determine whether a[n] … entity is capable of conspiring under § 1"), and *American Needle*, 560 U.S. at 191 (eschewing "formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anti-competitive conduct actually operate.")). As the Court put it in *American Needle*:

> "[T]he question is not whether the defendant 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 pursuing separate economic interests,' such that the agreement 'deprives the marketplace of independent centers of decisionmaking,' and therefore of 'diversity of entrepreneurial interests,' and thus of actual or potential competition.'"

560 U.S. at 195 (cleaned up).

Here, importantly, there is no doubt that teams, leagues, and national associations that operate under the auspices of FIFA are, in their own right, separate eco-

nomic actors. They are independently owned, separately controlled, generate and capture revenue and other economic benefits separately, and otherwise lack the parent-subsidiary hallmarks of a single enterprise under *Copperweld*. *See Am. Needle*, 560 U.S. at 201. Neither the parties nor the district court is under the delusion that FIFA members and their affiliates fail to compete vigorously with one another, not only on the soccer field but for the hearts, minds, and dollars of commercial soccer fans.

FIFA is thus a "competitor collaboration." It brings together separate economic actors with separate economic interests to pursue a shared, worthy goal—regulating professional soccer matches on a global scale. But, under *American Needle*, the collaborators necessarily have the *capacity* to subvert this worthy goal toward anticompetitive ends, in which case FIFA would serve, "in essence, as a vehicle for ongoing concerted activity" by eliminating otherwise independent centers of decisionmaking capable of generating competition. 560 U.S. at 191.

Because FIFA is a competitor collaboration, Plaintiff's burden in pleading concerted action was to allege facts plausibly suggesting the challenged FIFA policy prevented separate economic actors from pursuing separate economic interests that would have otherwise generated competitive market behavior responsive to consumer preference. Plaintiff has done so. It alleges that foreign national associations, leagues, and teams were pursuing independent economic interests when

they took steps to schedule official league games in the United States, *see, e.g.,* A-498-99 ¶¶ 19-23, and that FIFA used the governance authority these entities ceded to FIFA to eliminate their decisionmaking independence. *See, e.g.*, A-516-18 ¶¶ 93-98. Nothing more is needed to plead the antecedent element of concerted action in a civil Section 1 claim.

B. Concerted Action Turns on Whether FIFA's Policies Bind Separate Economic Actors with Separate Economic Interests, Not the Alleged Conspirators' Mental States

The district court got this analysis exactly backwards. It treated well pled facts suggesting the elimination of rivals' decisionmaking independence as exculpatory—the precise opposite of *American Needle*'s teaching. The district court rejected Plaintiff's allegations of concerted action *because* the numerous leagues, teams, and other FIFA affiliates bound by FIFA's policy had no control over the policy's terms. SPA-30-31 (USSF and U.S. players and teams could have made a "decision to comply" with the policy out of fear that they would be deemed ineligible for World Cup play rather than out of a desire to reduce output). Instead of treating evidentiary allegations that market participants had lost entrepreneurial freedom as proof that they had become bound, it treated evidentiary allegations that market participants had become bound as proof that they had *not* lost entrepreneurial freedom. SPA-38 ("The relevant FIFA statute requires the National Associations to adhere to FIFA policies; it does not require them unlawfully to agree to

adhere to them,"); SPA-31, n.10 (Notwithstanding the condition of FIFA membership that all rivals must collectively comply with the FIFA policy, Plaintiff alleged only "unilateral compliance" that could have resulted from "independent business decisions.").

The district court's reasoning makes no sense and directly contravenes *American Needle* and *Copperweld*, which hold that antitrust law prohibits combinations that prevent separate economic actors from pursuing separate economic interests. The fact that market-wide rules promulgated by private governance bodies eliminate the entrepreneurial freedom of the governed is exactly what makes them so dangerous and illegal. "Many successful cartels function by taking control away from individual members and giving it to a single organization," which "becomes an ideal vehicle for cartel management." Hovenkamp & Leslie, *supra*, at 872. "[C]artels that are not democratic in the sense that the members have ceded decisionmaking authority on prices, output, and/or customer allocation to another entity … can reduce the agency costs of cartel management by controlling the diverse preferences of individual cartel members." *Id*. at 851. Indeed, "almost any market can be cartelized if the law permits sellers to establish formal, overt mechanisms for colluding." *In re High Fructose Corn Syrup Antitrust Litig*., 295 F.3d 651, 655 (7th Cir. 2002) (Posner, J.); *see also* Hovenkamp & Leslie, *supra*, at 859–72 (discussing case studies).

The Supreme Court has made very clear that "prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy." *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 505 (2015). It has said that "private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a … manner offering procompetitive benefits." *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 506–07 (1988). Consequently, until the district court's opinion, "[b]odies promulgating rules or standards for the competitive conduct of their members" have always been "routinely treated as continuing conspiracies" when doing so is necessary to "bring[] association rules having a competitive impact within the reach of § 1 of the Sherman Act." 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1477 (5th ed. 2020). Liability—let alone adequate pleading—has been found for anticompetitive market-governance rules enacted by competitor collaborations in countless industries. *See, e.g., Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. 679 (1978); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975); *Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963); *Associated Press v. United States*, 326 U.S. 1 (1945); *see also* Areeda & Hovenkamp, *supra* ¶ 1475a.

II. A COMPETITOR COLLABORATION IS "DESIGNED TO ACHIEVE AN UNLAWFUL OBJECTIVE" IF IT ELIMINATES INDEPENDENT CENTERS OF DECISIONMAKING AND REDUCES OUTPUT

The district court's basic error led to two other serious errors, each of which independently warrants reversal. First, the district court failed to credit unambiguous fact-based allegations of concerted action that, if taken as true, foreclose even the possibility of independent action. Second, the court required Plaintiff to allege more than the elements of a Section 1 claim, which requires only a combination that restrains trade unreasonably. It required Plaintiff to plead facts suggestive of various FIFA affiliates' mindsets as they went about honoring commercial obligations they had undisputedly become bound to honor—facts that substantive antitrust law does not require even criminal prosecutors to prove, and that are not available to civil plaintiffs at the complaint stage (if ever).

A. The Complaint Forecloses the Possibility of Independent Action, Which Far Exceeds What Pleading Law Requires

The district court went to great lengths to hold that Plaintiff had not alleged direct evidence of concerted action. SPA-29-31, 32-38. This characterization of Plaintiff's evidence is incorrect. Plaintiff alleges that the FIFA membership has stated in a press release that they have done what they are accused of doing—dividing soccer league play horizontally by country. *See, e.g., NASL*, 883 F.3d at 40 ("[A]n association's express regulation of its members' market" is "direct evi-

dence of an alleged conspiracy"); *In re Int. Rate Swaps Antitrust Litig*., 261 F. Supp. 3d 430, 466 (S.D.N.Y. 2017) ("'a document or conversation explicitly manifesting the existence of the agreement in question' is an example of direct evidence") (quoting *In re Ins. Brokerage Antitrust Litig*., 618 F.3d 300, 324 n.23 (2010)); *Corr Wireless Commc'ns, LLC v. AT&T, Inc.*, 893 F. Supp. 2d 789, 801 (N.D. Miss. 2012) ("Direct evidence explicitly refers to an understanding between the alleged conspirators[.]"). FIFA's publicly announced policy requires individual teams to boycott certain playing venues.

Even if one were to not treat Defendants' public statements as direct evidence of agreement, they are—at a minimum—unambiguous circumstantial evidence. The district court held that, in the absence of direct evidence of agreement, a plaintiff "must" establish conspiracy through inferences from plus factors, citing this Court's holding in *Mayor & City Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013). SPA-11. But plus factor analysis is only useful when a plaintiff relies on ambiguous circumstantial evidence of agreement (*i.e*. "parallel conduct") and therefore must allege additional circumstantial facts that nudge the allegation of parallel conduct over the line from conceivable to plausible agreement. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). It makes no sense to shoehorn the analysis of unambiguous evidence of an actual agreement into a paradigm created for ambiguous evidence.

Moreover, this Court in *Mayor & City Council* did not say "must." It said that, in the absence of the proverbial smoking gun, "a complaint *may*, alternatively, present circumstantial facts supporting the *inference* that a conspiracy existed." *Id.* at 136 (first emphasis added); *see United States v. Apple, Inc*., 791 F.3d 290, 315 (2d Cir. 2015) ("may"); *see also Petruzzi's IGA Supermarkets v. Darling-Delaware Co*., 998 F.2d 1224, 1233 (3d Cir. 1993); Christopher R. Leslie, *The Decline and Fall of Circumstantial Evidence in Antitrust Law*, 69 Am. U. L. Rev. 1713, 1724, n.53 (2020). Second Circuit precedent therefore does not prevent plaintiffs from satisfying the pleading requirement for the first element of a Section 1 claim by alleging unambiguous circumstantial evidence of concerted action. *Cf. Twombly*, 550 U.S. at 564 (distinguishing allegations of merely parallel conduct from "independent allegation[s] of actual agreement" without regard to directness of evidence).

If this Court holds that Plaintiff's evidence is not direct evidence, it should hold that a plaintiff may survive a motion to dismiss by alleging circumstantial evidence of concerted action that completely forecloses a competing inference of independent, parallel conduct. *Petruzzi's*, 998 F.2d at 1233 (In Section 1 cases it may be "unnecessary for a court to engage in the exercise of distinguishing strong circumstantial evidence of concerted action from direct evidence of concerted action, for both are 'sufficiently unambiguous.'"); *see also* William H. Page, *Direct*

Evidence of a Sherman Act Agreement, 83 Antitrust L.J. 347, 359, n.58 (2020) (explaining that circumstantial evidence can be at least as compelling as direct evidence; "'[D]og tracks in the mud' are more probative than 'the sworn testimony of 100 witnesses that no dog passed by.'") (quoting William Prosser, The Law of Torts 212 (4th ed. 1971)).

Here, Plaintiff has pled facts under which it is *not possible* that FIFA's governance rules failed to bind FIFA's various associations and their leagues and teams to collectively honor the challenged FIFA policy. *See* A-501-02 ¶¶ 32–35, 37. If the Court finds Plaintiff's evidence somehow is not direct evidence that Defendants acted in combination to do what Plaintiff has accused them of doing, it should be sufficient that it is unambiguous circumstantial evidence they have done so.[4] Plaintiff has alleged facts that require a concession that the challenged policy is currently a binding obligation on all FIFA national associations and their leagues and teams. A-523 ¶ 117.

Accordingly, if there is any doubt at all on the pleadings as to whether Plaintiff has satisfied the concerted action element, it is not factual doubt. The only open question is whether Plaintiff will win on this issue. Perhaps, for example,

[4] Alternatively, if the Court believes "plus factor" findings are essential absent direct evidence and Plaintiff's evidence is not direct, it should treat evidence that forecloses the possibility of independent action as a conclusive plus factor. *Cf.* Leslie, *supra*, at 1727 (courts "have not coalesced on a uniform definition of plus factors").

Defendants at summary judgment or trial will attempt to invoke the defense that they were pursuing the collaboration's unitary interest rather than the individual collaborators' individual interests; this Court, for example, found collaborating defendants to be pursuing a unitary interest in *AD/SAT v. AP*, 181 F.3d 216, 234 (2d Cir. 1999).[5] But even putting aside that this defense already appears to be foreclosed by *American Needle* based on record facts of separate economic actors pursuing separate economic interests, *see* A-523 ¶ 117, courts do not test the sufficiency of pleadings by determining whether the plaintiff will win its case. At the pleading stage, a plaintiff need only plausibly allege that the members of the collaboration had separate economic interests, and that the collaboration's restraint eliminated independent centers of economic decisionmaking that competition assumes and demands, as Plaintiff has alleged here. So long as Plaintiff's factual allegations are taken as true, discovery must be allowed to proceed on the question of whether national associations, leagues, and teams have separate economic interests in competing outside their home countries, such that Defendants would have engaged in concerted action by eliminating that diversity of interests.

[5] In *AD/SAT*, the court dismissed the complaint because plaintiff pled only procompetitive conduct, 181 F.3d at 234; the claim that procompetitive effects outweigh properly alleged anticompetitive effects, however, must be pled as a defense. It is not part of the plaintiff's *prima facie* case. *NCAA v. Alston*, 141 S. Ct. 2141, 2160 (2021) ("Should the plaintiff carry [its burden to show substantial anticompetitive effect], the burden then shifts to the defendant to show a procompetitive rationale for the restraint.").

The district court attempted to make analytical room for a set of facts involving "conscious parallelism" that, on the pleadings, cannot possibly exist. Despite the complaint's allegations that all FIFA associations and their professional leagues and teams are obligated to comply with FIFA directives, the district court characterized each act of compliance as an independent "decision to comply." SPA-13, SPA-38; *see* A-501-02 ¶¶ 32–35, 37. Perhaps in a metaphysical sense, every party with a binding commercial obligation "independently decides" whether to actually comply with the obligation. But the prospect of, for example, a willful breach of contract, and one party's willing assumption of the resulting penalties, does not render the contract any less of a contract for Section 1 purposes. *See, e.g., Copperweld*, 467 U.S. at 785 (Stevens, J., dissenting) ("[A]cquiescence in an anti-competitive scheme has been held sufficient to satisfy the statutory language" (citing cases)); *Interstate Cir., Inc. v. United States*, 306 U.S. 208, 227 (1939) (Participation "in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.").

The question of *why* Defendants and their affiliates undertook commercial actions they were unambiguously bound to undertake is incapable of generating an answer that would be relevant to the disposition of this civil Section 1 case. *Am. Needle*, 560 U.S. at 199 ("The justification for cooperation is not relevant to

whether that cooperation is concerted or independent action"). Antitrust courts do not countenance this speculation because "mind reading [is] not an accepted tool of judicial inquiry." *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994) (Posner, J.). It has no bearing on whether rivals have "join[ed] economic resources that had previously served different interests." *Copperweld*, 467 U.S. at 771.

B. A Combination that Restricts Competition and Decreases Output Is Designed to Achieve an Unlawful Objective "On Its Face"

The district court also erred by misinterpreting the emphasis this Court placed on language from Supreme Court pleading law in another soccer case, *NASL*, 883 F.3d at 40. In that case, which involved an alleged conspiracy to rig divisional designations in contravention of, rather than pursuant to, a USSF policy, *see id*. at 35, 40–41 (policy was to apply "Professional Standards" in designating leagues as Division I, II or III, not to rig votes), this Court explained that "it is when a § 1 plaintiff establishes the existence of *an illegal* contract or combination that the plaintiff can proceed to demonstrate that the agreement constituted an unreasonable restraint of trade. Evidence should tend to show that association members, in their individual capacities, consciously committed themselves to a common scheme *designed to achieve an unlawful objective*." *Id*. at 40 (quoting *AD/SAT*, 181 F.3d at 234 (emphasis added) (cleaned up)).

The district court here quoted the emphasized phrase at the end of this language and re-emphasized, seemingly at every turn, the requirement of an "unlawful objective," which it found lacking. *See* SPA-33 (citing *NASL* and attributing language to *AD/SAT*, 181 F.3d at 234); *see also* SPA-29, SPA-30, SPA-31, SPA-34. However, the district court misapplied this language, which comes from the Supreme Court's opinion in *Monsanto*, 465 U.S. at 764 ("[T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'") (internal citation omitted). *Monsanto* does not convert the concerted action inquiry from an objective test involving the elimination of independent centers of decisionmaking into a subjective test involving the defendants' intent. The requirement of an "unlawful objective" is the requirement that the restraint prevents competition that would otherwise exist; it does not introduce a *scienter* element into a civil Section 1 claim. Unlawful intent is an element of proof only in a criminal Section 1 case, and even there, s*ubjective* unlawful intent is not required.

The language at issue frequently appears alongside similar but distinct language from the Supreme Court's holding in *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946) (A conspiracy determination is justified by a finding that "the conspirators had a unity of purpose or a common design and under-

standing, or a meeting of minds in an unlawful arrangement"). The *Monsanto* Court cited the *American Tobacco* language alongside its "unlawful objective" language with the introductory signal "*cf.*" 465 U.S. at 764. The district court here did the same, although without an introductory signal. SPA-25-26.

The *American Tobacco* citation in *Monsanto* is potentially confusing because *American Tobacco* is a criminal Section 2 case. In criminal Section 2 cases, specific intent is an element of proof that the government prosecutor must affirmatively plead. *U.S. Gypsum Co*., 438 U.S. at 440–43, n.19 (discussing why "our general requirement of *mens rea* in criminal statutes" is salient in criminal antitrust context but not civil context and noting that this was consistent with the views expressed by the Sherman Act's framers). Importantly, *Monsanto* does not cite *American Tobacco* to suggest that civil Section 1 plaintiffs must plead "unlawful intent." On the contrary, *Monsanto* unequivocally states that "[t]he legality of arguably anticompetitive conduct should be judged primarily by its 'market impact'" and "economic effect." *Monsanto*, 465 U.S. at 762.

The "unlawful objective" language thus means that a plaintiff must plead an agreement that threatens to restrict competition and reduce output, as Plaintiff alleges here. And even were it otherwise, the Supreme Court has held that allegations of horizontal market allocation *satisfy* the requisite level of intent in a *criminal* Section 1 case. *United States v. Socony-Vacuum Co*., 310 U.S. 150, 219–

20 (1940); *see U.S. Gypsum*, 438 U.S. at 440 (distinguishing criminal Section 2 specific intent requirement from criminal Section 1 general intent requirement, citing *Socony-Vacuum*). Nothing more—especially not subjective intent—could possibly be required in this civil case.

The district court simply missed that restricting competition and reducing output is the unlawful objective to be pled. *Compare*, e.g., SPA-24 ("USSF denied Plaintiff's application, explaining that sanctioning the match would violate the FIFA Policy that prohibits staging Official Games outside the league's home territory."), *with* SPA-29 ("USSF's admitted compliance with the FIFA Policy is insufficient to support an inference" of an "unlawful arrangement."). Moreover, it missed that horizontal market allocation, like other *per se* violations in civil Section 1 cases, is designed to achieve this unlawful objective "on its face." *Bd. of Regents*, 468 U.S. at 113; *accord Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990) (agreement "not to compete in the other's territories" is "unlawful on its face"). *Compare, e.g.*, SPA-28 ("Plaintiff alleges that USSF admitted that it will not sanction Plaintiff's proposed games 'because of its agreement to follow the FIFA geographic market division policy.'"), *with* SPA-29 ("Plaintiff's Amended Complaint still alleges no facts to support the inference that, in complying with the FIFA Policy, USSF actually entered an agreement with FIFA to restrict output.").

To be sure, it is not always a foregone conclusion that the *per se* rule applies to horizontal market allocation. As relevant to this case (although not to the sufficiency of the pleadings, where factual allegations must be taken as true), the Supreme Court in *Board of Regents* applied the abbreviated rule of reason to horizontal market allocation occurring under the auspices of a sports governance body. It did so, however, because it recognized that "horizontal restraints on competition are essential if the product is to be available at all." *Bd. of Regents*, 468 U.S. at 101; *see also Alston*, 141 S. Ct. at 2157. The Court's decision to apply the abbreviated rule of reason was "not based on a lack of judicial experience with this type of arrangement." *Bd. of Regents*, 468 U.S. at 100. Rather, what was "critical" was that sports products are jointly offered products, the integrity of which require the cooperation of at least two teams. *Id*. at 101, 117 ("Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved.").

Notwithstanding that it applied the abbreviated rule of reason, the Court in *Board of Regents* still held firm to the conviction that horizontal market allocation is "perhaps the paradigm of an unreasonable restraint of trade." *Id*. at 100. It reminded the NCAA that, "[a]s a matter of law," "no elaborate industry analysis is required to demonstrate the anticompetitive character" of "an agreement not to

compete in terms of price or output." *Id*. at 109. And because the challenged market allocation scheme "on its face constitutes a restraint upon the operation of a free market," and the evidence adduced at trial (after plaintiffs adequately pled concerted action) was that "the NCAA's [restraints] have reduced output, subverted viewer choice, and distorted pricing," the Court could apply an abbreviated rule of reason "in the twinkling of an eye." *Id*. at 109, n.39, 110 n.42. It held not only that the plaintiffs had proved their *prima facie* case, but that "these hallmarks of anticompetitive behavior place upon [defendant] a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." *Id*. at 113.[6]

Because we are only at the pleading stage, whether this case should be tried under the *per se* rule or the rule of reason has not yet been determined. But Plain-

[6] The district court's attempts to distinguish the findings of concerted action in *Board of Regents* and *Alston* are unavailing. The court purported to distinguish *Alston* on grounds that it involved "admitted horizontal price-fixing," SPA-33, but the admission itself cannot be squared with the district court's analysis. The court in *Board of Regents* held that the NCAA members created a horizontal restraint not by voting but "[b]y participating in an association which prevents member institutions from competing against each other." 468 U.S. at 99. The concerted action element received so little scrutiny in these cases because it was so obvious. *Id*. ("undeniable" that challenged practices share characteristics of unreasonable restraints); *see also* Areeda & Hovenkamp, *supra* ¶ 1477 ("The court [in *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. 679] never asked whether the society as an entity had conspired with anyone; it saw the issue, obviously and correctly, as whether 'an agreement among competitors' (i.e. the engineer members) restrained competition unjustifiably. It seemed obvious to the parties that the rule was a contract, combination or conspiracy among the members.").

tiff has alleged both claims. Under a proper reading of *Monsanto* and *American Tobacco,* Plaintiff has plausibly alleged an unlawful objective under each.

III. THE DISTRICT COURT'S ERRORS THREATEN TO IMMUNIZE THE MOST STABLE AND HARMFUL FORMS OF CARTEL BEHAVIOR

If not overturned, the district court's errors will have uniquely dangerous consequences that go well beyond this case. Not everyone may view healthy sports-product markets as fundamental to a well-functioning democracy, but many of the cases imposing Sherman Act liability on private competitor collaborations that promulgate anticompetitive governance rules are set to the backdrop of critical markets. In the Supreme Court alone, liability—let alone adequate pleading—has been found in markets involving products and services implicating affordable medical insurance, the national infrastructure, the stock market, access to legal services, and the free press. *See supra* Part I.B. (citing cases). Many of these restraints involve *per se* or "quick look" offenses—the most harmful known to antitrust law.

The district court seemed concerned about the risk of inequity in imposing liability against actors whose hands were being forced. SPA-30-31. It seemed to suspect that many of the associations, leagues, and teams may be bending to the will of FIFA and may not actually support a policy of allocating league play horizontally by country. *Id*. But antitrust law has weighed these kinds of policy con-

siderations and, for several reasons, come out in favor of continuing to police cartels that coerce weaker parties into forced participation, even if this "may seem harsh." Areeda & Hovenkamp, *supra* ¶ 1408c.

First, "Some cartels would remain uncontrolled if coercion meant that no conspiracy existed." Areeda & Hovenkamp, *supra* ¶ 1408c. Second, "society prefers that coerced parties seek the protection of public authorities rather than help create a cartel." *Id*. (noting that coercion defense would be "frequently raised" and present "practical difficulties in defining what kinds of coercion should exculpate"). Third, "[d]ual allegiances are not always apparent to an actor." *N.C. State Bd. of Dental Exam'rs,* 574 U.S. at 505. For market participants considering whether to submit to forced cartel participation or report to authorities, normative considerations "may blend with private anticompetitive motives in a way difficult even for [the] market participants to discern." *Id*. "In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability." *Id*.

This case illustrates why it is essential that courts understand "how cartels operate" to "apply *American Needle* in a fashion that protects actual single entities from inappropriate antitrust liability while ensuring that concerted action does not escape scrutiny." Hovenkamp & Leslie, *supra,* at 859. Where concerted decisions on market output have been ceded to a private competitor collaboration with en-

forcement powers, the strongest, most harmful kind of cartel opportunity has been created—the kind that can police and prevent defections among cartel members seeking to "cheat" the cartel to the benefit of consumers. To raise the bar for punishing this behavior by adding impractical, extra-legal pleading requirements "would be foolish for antitrust law to hold." *Id*. at 851.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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October 14, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Randy M. Stutz

Dated: October 14, 2020

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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