Case No. 14-15139

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF SAN JOSÉ; CITY OF SAN JOSÉ AS SUCCESSOR AGENCY TO THE REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSÉ; and THE SAN JOSÉ DIRIDON DEVELOPMENT AUTHORITY,
Plaintiffs and Appellants,

v.

OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball; and ALLAN HUBER "BUD" SELIG,
Defendants and Respondents.

On Appeal from the United States District Court,
Northern District of California
Case No. 13-CV-02787-RMW, Honorable Ronald M. Whyte, Judge

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INTRODUCTION

Major League Baseball's opposition brief fails to recognize both the realities of today's society and how contemporary courts deal with the changing tide of interstate commerce and the relevant antitrust laws and decisions.[1] When Justice Holmes penned *Federal Baseball* nearly a century ago, baseball was the only professional sport played in America; only white ballplayers were allowed to play baseball; games were only played during the daytime; and Chicago and St. Louis were the Western frontier for professional games. MLB's opposition assumes nothing has changed.

However, since *Federal Baseball*, America has undergone profound economic, technological, and social change. So has Major League Baseball. MLB is a multi-national, multi-billion dollar industry. Yet, unlike all other sports in America, MLB asserts it is the sole professional sport to retain a judicially created exemption from the antitrust laws.

The time has come to treat baseball as the dominant business it is. If any exemption remains, what is the basis for it and what does it mean in today's commercial world? If MLB is exempt, the antitrust laws applicable to the National Football League, the National Basketball Association, and

[1] In *Flood*, the Supreme Court flatly rejected *Federal Baseball*'s basis for the exemption when it noted that professional baseball was a business that involved interstate commerce. *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

any other business engaged in interstate commerce simply do not apply to professional baseball. If MLB is not exempt, this Court could declare MLB's relocation rules an unreasonable restraint on trade in violation of Section 1 of the Sherman Act. MLB's relocation rules should be treated on **equal footing** with other professional sports and subject to the antitrust laws.

No industry, no company, no person is above the law. Yet if MLB is found to have a complete exemption, then a multi-billion dollar industry is outside the reach of the courts – rending the judiciary powerless to decide whether MLB is acting in an unreasonable or anticompetitive manner. Contrary to the opposition brief, there is no basis for finding MLB has a broad, free-floating exemption from federal and state law concerning team relocation. MLB relies solely on outdated opinions that merely parrot a decision employing a 1920's analysis of the Commerce Clause. The unique characteristics and needs of the business of baseball today do not include conduct, like franchise relocation, engaged in by every professional sport and every industry in America. Further, the burden of justifying an exemption for specific conduct should be squarely on the party asserting the exemption. This Court should find the three Supreme Court precedents (*Federal Baseball*, *Toolson*, and *Flood*) only shield the specific activities at issue in those narrow fact patterns, as discussed by many Courts. The

conduct and agreements of MLB Clubs related to franchise relocation were not involved in those decisions and should be subject to the antitrust laws to the same extent as if such conduct happened in other professional sports.

San José has standing because it has suffered (and continues to suffer) antitrust injury. As the Complaint specifically alleges: But for MLB's antitrust violations, the A's would have exercised the option and entered into a Purchase and Sale Agreement with the City of San José. *See* II ER 89, 94. San José should have the opportunity to prove why it has been the victim of unreasonable anticompetitive behavior with respect to franchise relocation.

Modern antitrust doctrine addresses issues like team relocation without throwing professional sports leagues into chaos. Yet, because MLB claims it is above the law, the owner of a Club can prevent another Club from moving into a nearby city, where it might compete in its marketplace. Baseball's "exemption" should be found to apply only to the reserve system and held not to extend to team relocation issues. As set forth below and in the Opening Brief, it is incumbent upon this Court to hold that franchise relocation for *all* sports is governed by federal antitrust and California's unfair competition laws and reverse the decision of the District Court.[2]

[2] Concurrent with this Reply, Appellants opposed Respondents' motion to take judicial notice. For the reasons stated therein, Appellants respectfully request this Court strike all references to pleadings and

ARGUMENT

I. BASEBALL'S LIMITED "EXEMPTION" DOES NOT APPLY TO FRANCHISE RELOCATION

Contrary to the opposition brief, there has never been a decision by the Supreme Court setting forth the scope of baseball's "exemption." There is no decision allowing the baseball owners to collude with impunity. After a careful reading of the Supreme Court's trilogy of baseball cases, one will find MLB's antitrust exemption is limited to, at most, the reserve clause. *Federal Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball*

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comments referenced in two unrelated cases: (1) *Stand for San José*, and (2) *Hale v. Brooklyn Baseball Club, Inc.*, including all references in MLB's Opposition Brief at 7.

In addition to its improper Request for Judicial Notice, MLB attempts to bolster its argument with inappropriate references outside the Complaint. Appellants object to and request this Court strike MLB's reference to I ER 173 n.21 and I ER 253, cited for the *improper* proposition that the "parcels purportedly available to the Athletics under the Option Agreement constitute some, but not nearly all, of the land required to build a ballpark on the proposed site." Opposition Brief at 8. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001) (court cannot consider matter outside the complaint in ruling on a motion to dismiss).

For the same reason, Appellants object to and request this Court strike MLB's reference to II ER 6:12-14, cited for the improper proposition that, "[a]fter thorough consideration, Commissioner Selig, pursuant to the Major League Rules, formally notified the Athletics' ownership on June 17, 2013 that its relocation proposal was not satisfactory." Opposition Brief at 8. This statement is particularly objectionable as, despite Appellants' request for a copy of the June 17, 2013 letter, MLB has refused to produce it and the letter never came into evidence below.

Clubs, 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); and *Flood v. Kuhn*, 407 U.S. 258 (1972). Even though the exemption was judicially created, the Supreme Court has never ruled on the scope of MLB's exemption. Instead, since *Flood*, courts have consistently limited the "exemption" to the facts of *Federal Baseball*. This narrow interpretation acknowledges the aberration of *Federal Baseball* and dictates that, to the extent the exemption persists, it must be limited to labor issues.

MLB argues that *Federal Baseball* "involved broad allegations of monopolization that extended beyond simple labor issues." Opposition Brief at 16. Yet Justice Holmes's opinion never reached these supposed broad allegations because it succinctly determined that professional baseball did not involve interstate commerce. This point was driven home by Justice Burton's dissent in *Toolson*:

> In the *Federal Baseball Club* case, the Court did not state that, even if the activities of organized baseball amounted to interstate trade or commerce, those activities were exempt from the Sherman Act. The Court acted on its determination that the activities before it did not amount to interstate commerce. The Court of Appeals for the District of Columbia, in that case, in 1921, described a major league baseball game as "local in its beginning and in its end." This Court stated that "The business is giving exhibitions of baseball, which are purely state affairs," and the transportation of players and equipment between states "is a mere incident. . . ." The main thrust of the argument of counsel for organized baseball, both in the Court of Appeals and in this Court, was in support of that proposition. Although counsel did argue that the activities of organized baseball, even

> if amounting to interstate commerce, did not violate the Sherman Act, the Court significantly refrained from expressing its opinion on that issue.

346 U.S. at 360. Contrary to MLB's assertion, the Court in *Federal Baseball* never reached these "broad allegations of monopolization." The brief opinion performed a 1920's Commerce Clause analysis, simply reasoning that offering baseball exemptions was a purely state affair, not amounting to interstate commerce. 259 U.S. at 208-09.

Not content to mischaracterize one Supreme Court decision, Respondents seek to improperly expand the reach of a second, *Toolson*, by describing the decision as "challeng[ing] a litany of allegedly anti-competitive arrangements." Opposition Brief at 16-17. Due to the brevity of the *per curium* opinion, Appellants again refer this Court to the description of the case in *Toolson*'s dissent:

> In cases Nos. 18 and 23 the plaintiffs here allege that they are professional baseball players who have been damaged by enforcement of the standard "reserve clause" in their contracts pursuant to nationwide agreements among the defendants. In effect, they charge that, in violation of the Sherman Act, organized baseball, through its illegal monopoly and unreasonable restraints of trade, exploits the players who attract the profits for the benefit of the clubs and leagues. Similarly, in No. 25, the plaintiffs allege that, because of illegal and inequitable agreements of interstate scope between organized baseball and the Mexican League binding each to respect the

> other's "reserve clauses," they have lost the services of and contract rights to certain baseball players.

346 U.S. 362-4.

Then MLB decided to go down swinging, whiffing on its description of the third Supreme Court case, *Flood*, and in the process unjustly accusing Appellants of being "false" with this Court. Opposition Brief at 17. Appellants' allegedly "false" statement is that "the holding in *Flood* was limited to the reserve clause." Opening Brief at 23 (emphasis added). Yet even MLB states: "In *Flood*, unlike in *Federal Baseball* or *Toolson*, the plaintiffs raised claims involving only the reserve system." Opposition Brief at 17-18 (emphasis added). Appellants not only do not see why their characterization is "false," but believe this Court should not construe the *Flood* decision as broader than the claims raised.

MLB takes these three, factually-focused decisions and brazenly asserts that *every* aspect of its business is exempt from scrutiny under the federal antitrust and state unfair competition laws. Opposition Brief at 19. Because the Supreme Court's baseball trilogy fails to provide guidance, this Court needs to determine (1) whether an exemption still exists; (2) what is the basis for the exemption; and (3) what is the scope of that exemption. As part of that analysis, this Court should find franchise relocation does not fall within the scope or meaning of baseball's anomalous exemption.

Even though MLB is clearly a "monopoly,"[3] Appellants are not here asserting this Court should find every aspect of professional baseball is subject to the antitrust laws. The claims arise from the failure of MLB to allow the A's to relocate to San José. If the exemption is construed expansively to include franchise relocation, without allowing application of a rule of reason analysis to baseball's conduct, it would allow the owners to dictate consumer welfare. *See NCAA v. Bd. Of Regents of the Univ. of Okla*., 468 U.S. 85, 98, 107-08 (1984) (Congress designed the Sherman Act to protect consumer welfare and "to prohibit only unreasonable restraints of trade."). If MLB is subject to the rule of reason test, it would be subject to the same antitrust scrutiny as other professional sports.[4] Further, such a rule of reason analysis would ensure that the economic viability of a relocation was determined by market forces, rather than by a private club of owners.

The Supreme Court baseball trilogy should not be construed to allow Respondents *carte blanche* to prevent a Club from relocating to another city.

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[3] *See Silverman v. Major League Baseball Relations Inc*., 880 F. Supp. 246, 261 (S.D.N.Y. 1995).

[4] *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 719 (6th Cir. 2003) (quoting *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998) ("'[C]ourts consistently have analyzed challenged conduct under the rule of reason when dealing with an industry in which some horizontal restraints are necessary for the availability of a product' such as sports leagues.").

While perhaps the exemption was historically necessary to protect the reserve clause, it is not necessary to apply the exemption to relocation. When MLB blocks a Club, such as the A's, from acquiring land, building a ballpark, and relocating the team, that practice should be subject to a proper rule of reason analysis as it is with any other professional sports league. *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League,* 726 F.2d 1381, 1391 (9th Cir. 1984) (where this Court used the rule of reason to engage in a "thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition.") This case should be sent back to the District Court for application of this same analysis: whether MLB can prevent the A's from moving to San José?

II. THE ABILITY TO STIFLE COMPETITION FOR FRANCHISE RELOCATION IS NOT A "UNIQUE CHARACTERISTIC AND NEED" OF BASEBALL

MLB misapprehends Appellants' argument regarding the necessity for discovery to adjudicate whether MLB's stranglehold on franchise relocation is such a "unique characteristic and need" of the sport that it is entitled it to an antitrust exemption for franchise relocation. Appellants are not stating they required discovery before the District Court determined MLB's motion to dismiss. Rather, Appellants assert that this case cannot be disposed of

without resolving whether the current unique aspects of the business of baseball include franchise relocation.

Citing *Frontier Enters. v. Amador Stage Lines*, 624 F. Supp. 137 (E.D. Cal. 1985), MLB argues "the Court does not need discovery to determine that MLB's relocation rules are covered by the [baseball] exemption." Opposition Brief at 28. Not surprisingly, MLB omits the critical component of the Eastern District's analysis: "Whether defendants' conduct is exempt from application of the antitrust laws **by virtue of the ICC's actions** is a question of law." *Id*. at 142 (emphasis added). The Interstate Commerce Commission (or ICC) and its actions have nothing to do with this appeal, the underlying motion, or this case.

To the extent MLB's antitrust exemption persists at all, it only exists, at best, for actions that go to "baseball's unique characteristics and needs." *Flood*, 407 U.S. at 282. Determining whether the Athletics' proposed relocation is a "unique characteristic and need" of the sport is a fact-based inquiry. Indeed, even the trial judge presiding in *Flood*, operating under the broader *Federal Baseball* standard, allowed Curt Flood to proceed with discovery because Flood's argument that the exemption should be overruled raised "serious questions of a factual nature" as to labor issues. *Flood v. Kuhn*, 312 F. Supp 404, 406 (1970). The factual record necessary to resolve

the franchise relocation issues predominating here, unlike MLB labor issues, have never been investigated.

Again confusing this Court, MLB counters that "the Ninth Circuit has applied the exemption to MLB's relocation rules, and it did so on a motion to dismiss." Opposition Brief at 28, citing *Portland Baseball Club, Inc. v. Kuhn*, 491 F.2d 1101, 1102 (9th Cir. 1974). In *Portland Baseball*, plaintiff contended that the defendants breached the Professional Baseball Rules by refusing to pay just compensation to the clubs in the **minor** baseball league, including plaintiff, after major league expansion clubs drafted two **minor** baseball league club territories. *Portland Baseball* had absolutely nothing to do with antitrust and unfair competition issues arising from MLB's refusal to allow a MLB franchise to relocate from one city to another.

Finally, grasping at straws, MLB argues "[o]ther courts have consistently found it appropriate to apply the antitrust exemption and dispose of cases at the motion to dismiss stage." Opposition Brief at 28. Yet none of the cases cited involved MLB franchise relocation. *See Toolson v. New York Yankees, Inc.,* 346 U.S. 356, 358 (1953) (reserve clause); *Professional Baseball Schools & Clubs, Inc. v. Kuhn*, 693 F.2d 1085 (11th Cir. 1982) (a baseball franchise in the minor leagues); *McCoy v. Major League Baseball*, 911 F.Supp. 454 (W.D. Wash. 1995) (antitrust action filed

by groups of fans and business owners located near baseball stadiums against MLB stemming from the owners' alleged unfair labor practice during the 1994 strike); *Salerno v. American League of Baseball Clubs*, 310 F.Supp. 729, 730 (S.D.N.Y. 1969) (alleged unlawful dismissal and boycott of plaintiffs from employment as American League umpires).

MLB's conclusory assertion that its "relocation rules are a central aspect of the business of baseball" is unavailing at the motion to dismiss stage. Opposition Brief at 29. Appellants must be allowed to develop the requisite factual record to properly adjudicate this question, either by motion for summary judgment or trial.

III. CONGRESS NEVER RECOGNIZED AN EXEMPTION FOR TEAM RELOCATION

The Curt Flood Act, which amended the Clayton Act in 1998, only applies to MLB players. 15 U.S.C. §26b.[5] The stated purpose of the Flood Act is to grant MLB players the same coverage under the antitrust laws as other professional athletes, *e.g.*, football and basketball players. *Id*. Therefore, any antitrust issues covering minor league baseball, franchise

[5] The Flood Act is the only legislation directly addressing MLB's exemption. The Flood Act specifically states that it does not change the application of antitrust law to any other aspect of baseball, including franchise relocation.

relocation, intellectual property, the Sports Broadcasting Act, and umpires, among others, are specifically excluded from coverage under the Flood Act.

The Flood Act only applies to the conduct, acts, practices, or agreements of MLB that affect the employment of MLB players. While the Flood Act repealed the antitrust exemption as it applied to the employment of major league baseball players, Congress explicitly stated it was not addressing whether the exemption applied for all matters "relating to or affecting franchise expansion, location or relocation, franchise ownership issues, including ownership transfers . . ." 15 USC § 26b(b)b.

The Senate Judiciary Committee even inserted language limiting a court's ability to rely on the Flood Act in changing or supporting how the antitrust laws are applied to baseball because it felt that the language was crucial in getting the Flood Act passed. Senator Orrin Hatch, Chair of the Senate Judiciary Committee and principal sponsor of the Flood Act, stated that the limiting language in the Act was "in keeping with the neutrality sought by the Committee with respect to parties and circumstances not between major league owners and major league players." 144 Cong. Rec. S9494-9498 (1998). "[W]hile providing major league players with the antitrust protections of their colleagues in the other professional sports," the legislative history of the Flood Act makes it clear that the Act "is absolutely

neutral with respect to the state of the antitrust laws between all entities and in all circumstances other than in the area of employment as between major league owners and players." *Id*.

Notwithstanding, citing the Flood Act, MLB argues "Congress explicitly declined to repeal the exemption as it applies to any other aspect of the business of baseball [other than labor issues]—including franchise relocation." Opposition Brief at 30. This argument is belied by the fact that Congress never enacted legislation exempting franchise relocation from the federal antitrust laws in the first place. Plainly, there is no statute to repeal. Likewise, the Supreme Court has never addressed franchise relocation for MLB Clubs. As MLB concedes, the Flood Act simply "maintains the status quo for franchise location." *Id*. at 31, citing 143 Cong. Rec. S379-01 (1997).

"While some might read Section B of the C[urt] F[lood] A[ct] as congressional endorsement of a broad antitrust exemption (aside from labor disputes involving current MLB players), in reality the statute remains agnostic regarding the remaining scope of the exemption." Nathaniel Grow, *"Defining the 'Business of Baseball': A Proposed Framework for Determining the Scope of Professional Baseball's Antitrust Exemption,"* 44 U.C. Davis L. Rev. 557, 576 (2010). Section B simply states that future courts may not rely on the Flood Act "as a basis for changing the application

of the antitrust laws," meaning that any then-existing precedent was unaffected by the statute. 15 USC § 26b(b)b. Because most of the conflicting precedents regarding the scope of the exemption had been issued before 1998, the Flood Act leaves the various judicial interpretations of the exemption untouched.

Aside from labor disputes involving current MLB players, the Flood Act's legislative history reveals that Congress did *not* intend for the statute to adopt or reject any of the conflicting interpretations of the exemption's scope pre- or post-*Flood*. Specifically, during Senate deliberations over the bill, Senator Paul Wellstone noted that some courts had recently narrowed the scope of the baseball exemption, and asked for confirmation that the Flood Act would not affect these precedents. 145 Cong. Rec. S9621 (1998) (statements of Sens. Wellstone, Hatch, and Leahy). In response, the bill's co-sponsors, Senators Orrin Hatch and Patrick Leahy, confirmed the Act was "intended to have no effect other than to clarify the status of major league players under the antitrust laws. With regard to all other context or other persons or entities, the law will be the same after passage of the Act as it is today." *Id*. Accordingly, the Flood Act does not implicate the scope of baseball's antitrust exemption aside from the fact that it permits antitrust suits to be filed by current major league players.

In contrast to *Flood's* challenge to labor market restraints, which became the impetus for the Flood Act, the instant dispute challenges restraints on franchise relocation. There is no comparable evidence of Congressional support for immunizing franchise relocation decisions from antitrust scrutiny. In fact, the principal evidence of Congressional endorsement of the reserve clause relied upon in *Flood* was the Report of the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary. H.R. Rep. No. 2002, at 229 (1952), cited in *Flood*, 407 U.S. at 272. The 1952 Report, in addition to endorsing "some sort of reserve clause," rejected the idea of completely immunizing baseball from the Sherman Act, *expressly citing restrictions on the relocation of baseball franchises as one area where immunity would be inappropriate*. H.R. Rep. No. 2002, at 229-230. By analogy, after extensive hearings, Congress has refused fervent pleas by the National Football League to exempt its relocation decisions from the Sherman Act. *See* Stephen F. Ross, *"Antitrust: New Economy, New Regime Second Annual Symposium of the American Antitrust Institute: Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues,"* 52 Case W. Res. 133, 168-169 (2001), citing Charles Gray, "*Comment, Keeping the Home Team at Home,*" 74 Cal. L. Rev. 1329 (1986).

Congress never recognized the purported broad scope of baseball's antitrust exemption. In fact, the only legislation on point limited the already narrow exemption to player labor disputes. Moreover, on the issue of franchise relocation, Congress has intimated that to the extent MLB attempts to broaden its limited exemption to franchise relocation, such expansion would be patently inappropriate and in direct contravention of federal antitrust laws.

IV. SAN JOSÉ HAS STANDING TO PURSUE CLAIMS FOR DAMAGES AND INJUNCTIVE RELIEF

A. SAN JOSÉ SATISFIES EACH OF THE FIVE FACTORS FOR ANTITRUST STANDING

"[A]ntitrust standing generally refers to the requirement that an antitrust plaintiff demonstrate 'injury in his business or property' by 'reason of anything forbidden in the antitrust laws,' and the prudential pre-requisites associated with this requirement." *In re Dynamic Random Access Memory Antitrust Litig.*, 536 F. Supp. 2d 1129, 1135 (N.D. Cal. 2008) (quoting, *inter alia*, 15 U.S.C. § 15(a)). Antitrust standing is determined after considering five factors: "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages." *Am.*

Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1054 (9th Cir. 1999) (citations omitted). "To conclude that there is antitrust standing, a court need not find in favor of the plaintiff on each factor." *Id*.; *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1996). Instead, courts balance the factors, "giv[ing] great weight to the nature of the plaintiff's alleged injury." *Am. Ad Mgmt.*, 190 F.3d at 1055; *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989).

B. SAN JOSÉ HAS SUFFERED ANTITRUST INJURY

Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *see also Am. Ad. Mgmt.*, 190 F.3d at 1055. "Antitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained." *Id*. at 1057. "[I]t is not the status as a consumer or competitor that confers antitrust standing, but the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff." *Id*. at 1058; *see also Amarel*, 102 F.3d at 1508. Parties suffer antitrust injury if injuries are 'inextricably intertwined' with the injuries of market participants" or with "the injury the conspirators sought to inflict." *Am. Ad. Mgmt.*, 190 F.3d at 1057 n.5. (citing *Blue Shield v. McCready*, 457 U.S. 465

(1982) and *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 745–46 (9th Cir. 1984)). "This exception applies when the claimant can be considered the 'direct victim' of a conspiracy or the 'necessary means' by which the conspiracy was carried out." *Lorenzo v. Qualcomm Inc*., 603 F. Supp. 2d 1291, 1300–01 (S.D. Cal. 2009) (quoting *Ostrofe*, 740 F.2d at 744–47 (citing *McCready*, 457 U.S. at 479)). More specifically, antitrust injury is harm to the "competitive process," rather than to individual competitors. *Cascade Health Solutions v. Peacehealth*, 515 F.3d 883, 901 (9th Cir. 2008). Where plaintiff seeks "damages for injuries to its commercial interests, it may sue under § 4." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972).

The first factor, antitrust injury, demands a showing of: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 372 (9th Cir. 2003) (quoting *Am. Ad Mgmt.*, 190 F.3d at 1055). While typically the plaintiff must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market, Courts recognize an exception to the market participant requirement "for parties whose injuries are 'inextricably intertwined' with

the injuries of market participants." *Am. Ad Mgmt.*, 190 F.3d at 1057, n.5 (citations omitted).

Appellants meet these tests. San José's injuries were "inextricably intertwined" with the injuries of market participants (consumers or competitors). Appellants seek damages for injuries to their commercial interests in the Diridon Redevelopment Project Area, owned by the City of San José as Successor Agency to the Redevelopment Agency for the City of San José, and alienable by Appellants, collectively.

Further, as a direct result of Respondents' actions, Appellants have been prevented from entering into a Purchase and Sale Agreement with the Athletics pursuant to the Option Agreement. S*ee also* II ER 067, ¶ 21; 079-080, ¶¶ 76-77; 089, ¶¶ 129-130; 090, ¶ 132; 091, ¶ 136; 094, ¶ 148; 103, ¶ 203. Appellants negotiated the Option Agreement with the Athletics Club. *Id*. at 79, 199-221 (Complaint, ¶ 76, **Ex. 3**). Appellants and the Athletics agreed to "negotiate, in good faith, a purchase and sale agreement" for the sale of land to build a major league men's professional baseball stadium. *Id*. Respondents' alleged unlawful conduct – blocking relocation of the Athletics to San José – is the only obstacle holding up the Athletics' relocation, and is causing Appellants harm. *Id.* at 133-138. Even assuming *arguendo* that Respondents' narrow construction of "consumer" or

"competitor" has some merit – **it does not** – Appellants' injuries are "inextricably intertwined" with injuries sustained by the Athletics, as a party to the Option Agreement. *See Am. Ad Mgmt.*, 190 F.3d at 1057, fn 5, citing *Blue Shield*, 457 U.S. at 483-484. Independently and through their contractual relationship with the Athletics, Appellants allege antitrust injury.

The definition of a "relevant market" for antitrust purposes is typically a factual inquiry. *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008). This Court has approved proposed relevant markets and submarkets narrowed to professional football. *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1394 (9th Cir. 1984). Like the instant case, that case involved an antitrust challenge to Rule 4.3 of Article IV of the NFL Constitution, which required that three-fourths of NFL member teams approve a move by one team into another team's home territory. *Id*. at 1385. While they disagreed as to the market's geographic scope, both plaintiffs in that action—the L.A. Coliseum and the Oakland Raiders—sought to define the relevant product market as NFL football entertainment. *Id*. at 1393 ("The Raiders attempted to prove the relevant market consists of NFL football (the product market) in the Southern California area (the geographic market). . . . The L.A. Coliseum claims the relevant market is stadia offering their facilities to NFL teams (the product

market) in the United States (the geographic market)."). The NFL contended that the actual product market was all forms of entertainment, arguing that a professional football team in a specific region competes not just with other football teams but rather with other forms of entertainment. *Id*. In affirming the district court's denial of the NFL's motion for judgment notwithstanding the jury's verdict, this Court found there was sufficient evidence as to the product market to support the jury's finding. *Id*. at 1393–94.

The *L.A. Coliseum* court did not affirmatively conclude that there existed a relevant market limited to NFL entertainment or products:

> In the context of this case in particular, we believe that market evidence, while important, should not become an end in itself. . . . Instead, the critical question is whether the jury could have determined that Rule 4.3 reasonably served the NFL's interest in producing and promoting its product, i.e., competing in the entertainment market, or whether Rule 4.3 harmed competition among the 28 teams to such an extent that any benefits to the League as a whole were outweighed. As we find below, there was ample evidence for the jury to reach the latter conclusion.

Id. at 1394.

The Court then described the role of exclusive territories: "Exclusive territories insulate each team from competition within the NFL market, in essence allowing them to set monopoly prices to the detriment of the consuming public. The rule also effectively foreclosed free competition

among stadia such as the Los Angeles Coliseum that wish to secure NFL tenants . . . . If the transfer is upheld, direct competition between the Rams and Raiders would presumably ensue to the benefit of all who consume the NFL product in the Los Angeles area." *Id*. at 1395.

However, the fact that *L.A. Coliseum* went well beyond the motion to dismiss stage of litigation based on the plaintiffs' allegation of the NFL-specific relevant product market should inform this Court's conclusion in the present case. In essence, the *L.A. Coliseum* court found that sufficient evidence had been presented from which the jury could have identified a relevant submarket limited to professional football. *Id*. at 1393 ("To some extent, the NFL itself narrowly defined the relevant market by emphasizing that NFL football is a unique product which can be produced only through the joint efforts of the 28 teams."); *see also U.S. Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1057 (S.D.N.Y. 1986), aff'd, 842 F.2d 1335 (2d Cir. 1988) ("I decline to accept the NFL's argument that no evidence has been presented demonstrating the existence of a distinct product market for professional football.").

C. SAN JOSÉ HAS ALLEGED DIRECT AND CERTAIN DAMAGES

Appellants allege direct harm. Appellants here seek damages for injuries to their commercial interests in the Diridon Redevelopment Project

Area, owned by the City of San José as Successor Agency to the Redevelopment Agency for the City of San José, and alienable by Appellants, collectively. *See* II ER 199, 206-213 (Complaint, **Ex. 3**, Recitals and Exhibit A thereto). This is not a case of "indirect ripples of harm" because only Appellants can alienate the Diridon Redevelopment Project Area. *See* Opposition Brief at 50. Instead, as a direct result of MLB's actions, Appellants have been prevented from entering into the Purchase and Sale Agreement with the Athletics pursuant to the Option Agreement. II ER 067, ¶ 21; 079-080, ¶¶ 76-77; 089, ¶¶ 129-130; 090, ¶ 132; 091, ¶ 136; 094, ¶ 148; 103, ¶ 203.

Citing *Am. Ad. Mgmt.,*190 F.3d at 1056, MLB argues there "can be no antitrust injury if the plaintiff stands to gain from the alleged unlawful conduct" and "San José would actually receive the full value of the land if the Athletics do not buy this property at its discounted price." Opposition Brief at 49. MLB's conclusory opinions about the value of the Diridon Redevelopment Project Area are irrelevant on a motion to dismiss and should be stricken on that basis alone.[6] Indeed, in *Am. Ad. Mgmt*., this Court

[6] Further, this Court should strike all of MLB's opinions about the purported value of the Diridon Redevelopment Project Area on the basis that MLB provides no admissible evidence on that point and, in any event, may not do so at the motion to dismiss stage.

only addressed the question of "value" – holding that appellants there stood to suffer, not gain, from the alleged conspiracy – on appeal from a *motion for summary judgment* brought *after* the appellants had an opportunity to conduct discovery. *Am. Ad. Mgmt.*, 190 F.3d at 1056.

MLB next argues San José's alleged harm is speculative, indirect, and remote. This argument defies the allegations of the Complaint:

- San José competed with Oakland and Fremont to house the Athletics. *See* II ER 073, ¶ 53; 075, ¶ 67; 078-079, ¶ 73; 086-087, ¶¶ 117-118.
- Ultimately, San José prevailed, resulting in the Option Agreement. *See* II ER 079, ¶ 76; II ER 198.
- The only impediment to the A's exercising the Option and negotiating the Purchase and Sale Agreement is MLB's refusal to allow the Athletics to relocate to San José. II ER 084, ¶ 101.

Appellants allege direct damage attributable to MLB's stranglehold on competition in the market for major league baseball, including competition to sell land for constructing a baseball stadium. II ER 069, ¶ 32. Far from a theoretical claim for attenuated potential harm, Appellants allege real damage flowing directly from MLB's refusal to allow the Athletics to strike a deal with San José to acquire the Diridon Redevelopment Project Area.

D. APPELLANTS HAVE STANDING UNDER SECTION 16 OF THE CLAYTON ACT

Citing *City of Rohnert Park v. Harris*, 601 F.2d 1040 (9th Cir. 1979), MLB further argues San José lacks standing to seek equitable relief under Section 16 of the Clayton Act. However, as Appellants argue in their Opening Brief and as the District Court found:

> Unlike in *Rohnert Park*, where the city's property interest was speculative, here, the complaint alleges that the City of San José owns the parcels of land set aside for the A's Stadium pursuant to the Option Agreement (the "Diridon land"). *See* Comp. ¶ 75. Also unlike in *Rohnert Park*, where there was no indication that the Rohnert Park would have been selected for the urban renewal project but for some antitrust violation, here, the A's have already selected the Diridon land as the prospective site for a new stadium. The allegations in the complaint, taken as true, along with the fact that the A's have elected to extend the option for a third year, indicate that the A's very seriously wish to relocate to San José, and would do so but for MLB's alleged antitrust violation.

I ER 025:12-19 (footnote omitted).

Stymied by the District Court's correct analysis, MLB attempts to bolster its Section 16 standing argument by introducing improper evidence outside the four corners of the Complaint. *See* Opposition Brief at 56. As discussed in detail in Appellants' concurrently filed "Opposition of Plaintiffs and Appellants to Motion of Defendants and Respondents to Take Judicial Notice," pleadings from the *Stand for San José* litigation are irrelevant and have no "direct relation" to the instant appeal.

In *City of Rohnert Park*, Rohnert Park could not show that, absent the alleged antitrust violation, it would have been chosen for the urban renewal project. *City of Rohnert Park*, 601 F.2d at 1044. In short, Rohnert Park competed and lost to Santa Rosa. Here, despite competition from Oakland and Fremont before it, San José has successfully competed to relocate the Athletics to San José. I ER 025:12-19 n. 15. The only impediment is Respondents' refusal to allow the Athletics' relocation. Appellants have standing under Section 16 of the Clayton Act.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court (1) reverse the trial court's order dismissing the Sherman Act, Cartwright Act, and unfair competition claims; and (2) vacate the Judgment as to those claims.

Respectfully submitted,

Dated: April 18, 2014

COTCHETT, PITRE & McCARTHY

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that, according to the word count provided by Microsoft Word 2013, the body of the foregoing brief contains 6,232 words, exclusive of those parts excluded by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than the 7,000 words permitted by Fed. R. App. P. 32(a)(7)(B). The text of the brief is in 14-point Times New Roman, which is proportionately spaced. *See* Fed. R. App. P. 32(a)(5), (6).

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CERTIFICATE OF SERVICE

I hereby certify that, on the dates and methods of service noted below, a true and correct copy of **REPLY BRIEF OF PLAINTIFFS AND APPELLANTS** was served on all interested parties electronically through CM/ECF DATED: April 18, 2014.

By: */s/ Philip L. Gregory*