

07-4927-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT



MADISON SQUARE GARDEN, L.P.,
Plaintiff-Appellant,

—against—

NATIONAL HOCKEY LEAGUE, NATIONAL HOCKEY LEAGUE ENTERPRISES, L.P.,
NHL INTERACTIVE CYBERENTERPRISES, NHL ENTERPRISES CANADA,
and NHL ENTERPRISES,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (PRESKA, J.)

APPELLANT'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Madison Square Garden, L.P., certifies that it is a wholly owned subsidiary of Regional Programming Partners, which is an indirectly wholly owned subsidiary of CSC Holdings, Inc. CSC Holdings, Inc. is a wholly owned subsidiary of Cablevision Systems Corporation and is not publicly traded. Cablevision Systems Corporation is a publicly held corporation and has no parent corporation. The following publicly held corporation owns 10% or more of Cablevision Systems Corporation's stock: Legg Mason, Inc. (through ClearBridge Advisors, LLC, Smith Barney Fund Management LLC, and ClearBridge Asset Management, Inc. as a group).

ORAL ARGUMENT REQUEST

Plaintiff-Appellant Madison Square Garden, L.P., respectfully requests oral argument and submits that argument may be useful to the Court to answer any questions that the Court may have in resolving the legal issues presented by this expedited appeal.

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PRELIMINARY STATEMENT

Plaintiff-Appellant Madison Square Garden, L.P. (“MSG”), appeals from an order of the United States District Court for the Southern District of New York (Preska, J.) denying MSG’s motion to preliminarily enjoin the National Hockey League and related entities (collectively, “the NHL”) from acting to prohibit MSG from operating an independent website, outside the League’s common-platform website, for the New York Rangers hockey team. The district court’s opinion is not published. *See Madison Square Garden, L.P. v. Nat’l Hockey League*, No. 07 CV 8455, 2007 WL 3254421 (S.D.N.Y. Nov. 2, 2007).

JURISDICTIONAL STATEMENT

MSG’s complaint asserts a claim arising under Section 16 of the Clayton Act, 15 U.S.C. § 26, for a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and a claim under New York General Business Law § 340. The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), § 1337 (actions arising under federal statutes regulating restraints of trade), and § 1367 (supplemental jurisdiction over pendent state-law claims). The district court’s order denying MSG’s motion for a preliminary injunction was entered on November 2, 2007, and MSG filed a timely notice of appeal on November 5, 2007. *See Fed. R. App. P. 4(a)(1)*. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

QUESTION PRESENTED

The NHL recently prohibited its member teams from operating independent websites that compete with the NHL's new collective website for all teams. Remarkably, the NHL *admits* this prohibition on existing competition is part of a strategy intended to suppress the production of websites that cater to the "tribal," team-centered preferences of consumers, in favor of a uniform, League-centered site that promotes "NHL Hockey," not "the Clubs' own narrow economic interests." The NHL has acted to increase its cartel's website traffic, and hence its profits, by eliminating competitors for such traffic—such as MSG's independent Rangers website. The district court denied MSG's motion for a preliminary injunction on the sole ground that this overt horizontal agreement between competitors to restrict output did not present even a serious question of antitrust law, relying on purported justifications for the NHL's formation of a common website platform—which MSG does not challenge and which is irrelevant to the ban on competing websites that MSG *does* challenge. The question presented on appeal is whether this holding—which, contrary to authority from the Supreme Court and this Court, allows the NHL broad freedom to restrict its members from competing with each other and with the joint venture—was legal error.

STATEMENT OF THE CASE

MSG filed its complaint on September 28, 2007, asserting antitrust violations against the NHL under Section 1 of the Sherman Act, 15 U.S.C. § 1, pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, as well as under New York law. As part of its so-called “New Media Strategy,” the NHL had demanded that MSG transfer the New York Rangers’ website to the NHL’s centralized website, and had threatened to fine MSG \$100,000 for each day that the Rangers continued to operate an independent Rangers website outside the NHL’s “common League platform.” (JA62-63.) To avoid these prohibitive fines and challenge other unlawful practices of the NHL, MSG filed its complaint and, on October 1, 2007, a motion for a preliminary injunction against the NHL’s effort to ban the Rangers from operating their independent website. (JA45-47.)

By order entered November 2, 2007, the district court denied MSG’s motion for a preliminary injunction and, thereafter, on November 6, 2007, denied MSG’s emergency motion for an injunction pending appeal. (SPA25; JA1255.) On November 15, 2007, this Court granted MSG’s motion for an expedited appeal.

STATEMENT OF THE FACTS

A. Overview

The thirty member teams of the NHL, particularly those geographically near each other like the three New York-area teams—the New York Rangers, New York Islanders, and New Jersey Devils—are independent, profit-oriented entities

that compete with one another in various ways for players, fans, ticket sales, television viewers, advertisers, and other revenue. (JA52; JA74-75; JA78-79.)

The NHL itself is merely a limited-purpose joint venture through which the member teams coordinate the provision of professional ice hockey to the public. (JA658; JA695-726.)

Until recently, one of the ways in which member teams of the NHL competed with each other was through Internet sites used to market their teams, sell tickets, attract television viewers, and create an interactive experience to generate excitement and develop and maintain fans. (JA49; JA68-70; JA74-75; JA80.) The individual teams also sold advertising space to advertisers on these independent sites. (JA53; JA68-69; JA78.) Websites are an increasingly important marketing tool for professional sports teams (JA53; JA79-80), and hockey fans, in particular, have been identified as among “the most tech savvy in sports.” (JA383; *see also* JA79-80.)

Through its “New Media Strategy,” the NHL joint venture has now agreed to require all of the teams to transfer their own unique websites to the League’s, to be operated through a League-controlled “common platform” and “content management system.” (JA871-72; JA966-67.) On each team-specific site, the NHL now provides League-wide content and, within the constraints of a standardized template, it also permits each team to provide local content to

portions of the site. (JA963-66.) Teams are now forbidden to operate a website independently of the NHL-controlled, common-platform website. (JA54.)

The district court record reflects that hockey fans, more than fans of any other major professional sport in the United States, are “tribal”: they have “fierce local loyalties” and tend not to have a more generalized interest in following professional hockey as a whole. (JA344-46; JA365; JA367; JA49; JA81-83.) Rangers fans, in particular, are intensely loyal to their team—and not to the NHL generally. (JA49; JA81-83.) Through its new prohibition on team-controlled websites, the NHL seeks to replace this “provincial approach,” based on intense fan loyalty for individual teams, with a “league-centric” approach that “emphasizes the importance of other League games, highlights, news, and content from other Clubs and markets around the League.” (JA345-46.) According to the NHL’s expert, “[t]he NHL wants to insure that its teams, particularly its most popular teams, utilize their websites so as to promote NHL Hockey and to enhance the value of NHL Intellectual property rather than solely or primarily to pursue the Clubs’ own narrow economic interests.” (JA154-55.)

The Rangers, however, *compete* with other teams in the NHL for fans, ticket sales, television viewers, advertisers, players, and other revenue. (JA81-82.) The Rangers’ brand and marketing strength are key aspects of its ability to compete in all of these areas. (JA48-50.) And MSG has expended considerable time, effort

and expense to develop and maintain the very “tribal” loyalties that the NHL expressly wants to *de-emphasize* through its new rules for the operation of team websites on the NHL’s common platform. (JA49; JA54-55; JA69-70; JA81-83.) MSG’s Internet marketing strategy is an important part of this effort and provides Rangers fans with a website that is focused on the Rangers *and not* on other teams or on the NHL as a whole; and, while MSG has no objection to the NHL’s common website platform and is willing to contribute Rangers-oriented content to it, MSG wants to preserve its right to offer consumers and advertisers the additional choice of an independent, team-focused website. (JA49; JA81-83.)

Whether the majority of the teams that control the NHL may (pending trial) lawfully prohibit MSG from operating an independent Rangers website—in competition with the sites of other NHL teams and the League as a whole—is the principal issue on this appeal.

B. The NHL Is a Limited-Purpose Joint Venture

Each of the thirty member clubs of the NHL independently owns and operates a professional hockey team in North America. (JA658.) Those teams compete against each other not only in hockey games, but also for players, fans, television ratings, merchandise sales, advertisers, and other revenue opportunities—particularly in the New York metropolitan area, which is home to three teams. (JA52; JA74-75; JA78-79.) Moreover, by the NHL’s calculation,

almost 40% of hockey fans—and more than 60% of Rangers fans—live outside their favorite team’s local market. (JA370.) Individual teams thus compete for fans throughout (at least) Canada and the United States. (*Id.*)

The member teams each have a representative on the NHL’s Board of Governors, which directs the NHL’s actions. (JA658; JA708.) As set forth in the NHL’s Constitution, the NHL is an entity created by agreement of these thirty member clubs for the purposes of perpetuating professional hockey in the United States and Canada, promulgating rules for hockey games, settling disputes between NHL member clubs and players, educating the public about hockey, developing youth hockey players, and promoting individual member clubs’ common interests. (JA696.) The NHL’s “core product,” however, is “on-ice professional hockey entertainment.” (JA175.)

In antitrust parlance, the NHL is a limited-purpose, “non-integrated” joint venture.¹ Although it has assets and specified operational functions, the NHL is

¹ See *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 356-57 (1982) (contrasting non-integrated association of “individual[s] who compete with one another” with an integrated venture, which is “regarded as a single firm,” comprising entities that “pool their capital and share the risks of loss as well as the opportunities for profit”); U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 1.3 (2000) (joint venture is treated as a horizontal merger when, *inter alia*, it “involves an efficiency-enhancing integration of economic activity” and “the integration eliminates all competition”).

controlled by its parents—the member teams of the NHL—and, importantly, those member teams are independent economic decision-makers, with separate profit and loss centers and investment activities, that continue to compete against each other. (JA658; JA52; JA74-75; JA78-79.)

C. The NHL’s Move To Ban Independent Team Websites

Prior to 1996, individual teams operated their own websites and competed in this way, among others. In June 1996, the NHL’s Board of Governors proposed to accommodate individual team websites within the League’s own website, so that the League site could include both league-wide and team-specific content.

(JA829-30.) But, in doing so, the Board confirmed that individual teams would still have ultimate control of their websites, including the right to design them and, if they chose, operate them on their own locally controlled servers. *See* JA829 (“[A] Club may design its own pages, subject to format and content guidelines and serve them from the IBM server or a local server . . .”).

Pursuant to a June 2000 authorization of the member clubs, in October 2000, the NHL Commissioner, Gary Bettman, issued regulations requiring, among other things, that each team set aside 35% of its individual site for an “NHL Area,” *i.e.*, NHL-controlled advertising and certain League-themed links. (JA673-74; JA846-56.) As in 1996, however, even these regulations expressly confirmed that each team had the right to operate its own unique website. (JA847.) The League made

certain content and features available to individual teams (*e.g.*, real-time scoring and live radio streams of the Club's games), but the clubs had the independent choice to either incorporate those features in their individual sites or not. (JA386.)

Following a year-long labor dispute that resulted in the cancellation of the 2004-2005 NHL season, however, the teams commenced new "efforts to promote and create increased interest in the overall NHL brand." (JA675.) In December 2005, the Executive Committee of the NHL's Board of Governors instructed the League to study the benefits of greater "centralization and integration of the League's media rights." (*Id.*) And, in January 2006, the Commissioner formed a New Media Committee, made up of representatives of ten member clubs, to do so. (*Id.*)

The NHL's New Media Committee met in March 2006 and thereafter prepared a report for the Board of Governors, *i.e.*, the owners of all thirty NHL teams. (JA676.) One of its principal recommendations was that NHL teams should "tak[e] a collective approach to the programming and monetization of the League and Club websites." (JA676; JA871; *see also* JA864.) The Committee recommended abandoning the NHL's previous model, which acknowledged individual teams' rights to design and operate their own websites, and to impose instead a "uniform format for all Club sites." (JA872.) It also recommended that the League "establish a common template and 'look' for the Club sites [and]

program basic elements of the site and hire additional staff.” (JA878.) Each team’s site would thus operate under a “League-wide template” dictated and controlled by the League “within which Clubs could publish some local editorial content and retain some inventory for their local business partners.” (JA864.)

At a Board meeting held on June 21, 2006, the League’s Vice President of Media, Doug Perlman, recommended that the Board adopt the New Media Committee’s proposed “collective approach.” (JA963.) Commissioner Bettman also endorsed this “philosophy of a more collective approach.” (JA966.)

Both before and during the June 2006 meeting, MSG objected that the proposed new restrictions would wrest control of website programming from individual teams and adversely affect each team’s ability to relate to its fans and sponsors. (JA965.) But, over the dissenting votes of the Rangers, the Minnesota Wild, and the Toronto Maple Leafs, the other NHL team owners voted 25-3 (with one abstention and one team absent) to adopt the recommendations of the New Media Committee. (JA966-67.) The League thereafter directed all teams to “migrate” their websites to the NHL’s common platform, and thus make them subject to the NHL’s content management system, by the start of the 2007-2008 season. (JA400.)

One of the openly acknowledged purposes of this new website approach is to “[d]efine and articulate a single NHL brand persona and voice across markets,

properties and media channels,” thereby making NHL.com “the hub of all marketing activity and most authoritative voice of all things NHL,” because, according to the NHL, hockey fans’ “tribal, purely team-centric passion is not translating into national scale.” (JA365; JA371; JA378.) In place of “team-centric passion,” the website plan adopted by the member clubs of the NHL substitutes a new—collectivist—goal: to become “One Brand” speaking with “One Voice.” (JA372.)

D. The NHL Prohibits the Rangers From Operating an Independent Rangers Website

In the summer of 2007, MSG and the NHL met several times to discuss proposals for accommodating the Rangers’ desire to continue to offer their fans and potential fans the choice of an independent, Rangers-focused and team-designed website. (JA53-54.) The parties discussed, *inter alia*, the operation of two competing Rangers websites (one on the NHL’s platform and one independent site), allowing the NHL to obtain content from the Rangers’ site for use on the League-controlled site, or allowing the NHL to link to MSG’s *newyorkrangers.com* site. (JA54; JA65-55; JA75-76.) The NHL refused to accept any of MSG’s proposals and insisted that the Rangers cease operating any independent site and leave as the only “Rangers” site the one on the League’s common platform, subject to the League’s standardized design template. *See* JA127-28 (“I [General Counsel of NHL Enterprises, L.P.] also understood—and

made clear to MSG at the meetings—that the League would not permit two Rangers’ websites to exist simultaneously.”); *see also* JA67; JA76-77.

By letter to MSG dated September 20, 2007, the League set September 28, 2007 as the deadline for MSG to transfer its website to the League platform and transfer to the League the domain name registration for *newyorkrangers.com*.

(JA62-63.) The NHL’s letter stated that the NHL “intends to launch the Rangers’ website on the common League platform on September 28 (with or without your cooperation.)” (JA62.) Moreover, the NHL threatened to impose a fine of

\$100,000 per day “beginning September 28, for each day on which your organization operates a Rangers’ website outside the common League platform.”

(JA63.) The League reiterated this threat in a September 27 e-mail to MSG.

(JA64.)

On September 28, 2007, at approximately noon, the League eliminated from its website a link to the Rangers’ website and posted a “Rangers” website of its own. (JA56.)

E. MSG’s Complaint and Its Motion for a Preliminary Injunction

MSG filed this action the same day that the NHL launched its Rangers website, and the next business day MSG filed a motion for a preliminary injunction. (JA10-44; JA45-47.) MSG’s complaint asserts that the NHL has unlawfully restrained competition—in violation of Section 1 of the Sherman Act

and New York law—through a series of restrictions on off-ice competition between and among the NHL member teams and the NHL, including certain restrictions on websites, the use of new electronic media, radio and television broadcasting rights, and individual teams’ relationships with advertisers. (JA17-20.) MSG’s motion for a preliminary injunction, however, focused only on the NHL’s enforcement of its prohibition against MSG operating a Rangers website independently of the League-controlled site. (JA45-47.)

In its motion, MSG argued that the NHL’s attempt to force the Rangers to stop operating an independent website is a “naked restraint” on output, subject to condemnation on “quick look” scrutiny or more detailed Rule of Reason scrutiny under the antitrust laws. MSG submitted declarations showing that the Rangers’ website is a critical marketing tool that MSG uses to compete with other NHL teams—particularly the two other New-York area NHL teams—to generate fan enthusiasm for, and loyalty to, the Rangers. (JA52-53; JA54-55; JA77-86; JA66-71.) MSG also provided testimony that the NHL’s ban injures the Rangers, their fans and their advertisers by depriving them of an important, unfiltered means of connecting with each other, and threatens irreparable injury from diminished fan loyalty and good will—including lost ticket sales, television ratings, and other revenue and advertising opportunities. *See id.*; *see also* JA1133-36. Finally, MSG reiterated that it does not object to the NHL’s operation of a League-wide platform

and, indeed, will contribute Rangers content to a Rangers site in that platform as permitted by the League. (JA54; JA66; JA75-76; JA86.)

The NHL's principal argument for opposing MSG's motion for preliminary injunction was that it is a "single entity" to which the antitrust laws purportedly do not apply. (Dkt. No. 21 at 11-14.) According to the NHL, its member clubs "are not business competitors, but instead are co-producers and co-sellers operating as a single integrated enterprise" (JA663) and therefore are immune from scrutiny under Section 1 of the Sherman Act. (Dkt. No. 21 at 11-14.)

The NHL alternatively argued that there are "procompetitive virtues" of taking a "collective approach" to integrating its member clubs' websites onto the NHL's "common platform, with a single CMS [content management system]." (Dkt. No. 21 at 17-18; *see also* JA76-77.) Among other things, the NHL provided testimony that NHL fans tend to be "tribal" or "provincial" in nature—that is, they show "fierce local loyalties" to their team, but lack "broader, League-wide interests." (JA345-48.) And, according to the NHL, the ban on independent websites is part of a "unified media strategy" intended to change this consumer preference, with "national branding" of the NHL to "leverage [fans'] 'tribal' interests into a broader, League-wide interest," and attract more national sponsors. (JA347-48; *see also* JA667.)

F. The District Court’s Order Denying MSG’s Motion for a Preliminary Injunction

The district court heard oral argument, but did not hold an evidentiary hearing, on MSG’s preliminary injunction motion; and, on November 2, 2007, denied the motion. (SPA26.) The district court’s decision rested solely on its ruling that MSG had not shown a “likelihood of success” or a “sufficiently serious question going to the merits” of its claim. (SPA25.)

The district court did not directly address the NHL’s argument that it is a “single entity” immune from scrutiny under Section 1 of the Sherman Act. It held, however, that the NHL’s prohibition on individual team websites was not an unlawful “naked restraint,” condemned under the antitrust “quick look” doctrine, because, in the court’s view, the NHL had established “several procompetitive effects of the New Media Strategy.” (SPA15-21.) In particular, the court found that the *overall* New Media Strategy “will attract national sponsors” with “online scale,” reduce transaction costs with such sponsors, increase “interconnectivity” between team websites, reduce “back office” website operations for each team, and enhance the NHL’s national brand. (SPA17.) The court did not, however, separately identify any procompetitive justifications for the *specific* restraint of prohibiting the Rangers from operating an independent website in addition to the League-controlled site. (SPA19-20.)

The district court also rejected MSG’s argument that under, *inter alia*, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19 (1979) (“*BMF*”), and *National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85 (1984) (“*NCAA*”), the NHL, as a non-integrated joint venture, must show (but could not show) that its restraint against individual teams’ operating independent websites is “necessary” to the joint venture. (SPA20.) According to the district court, such a rule would be inconsistent with cases assertedly upholding “intra-brand restraints” and unspecified cases upholding agreements “among parents of a joint venture not to compete in the market in which the joint venture operates.” (SPA20.)

Finally, the district court held that MSG’s motion did not present a serious question under the antitrust “rule of reason.” (SPA21-25.) The court rejected MSG’s argument that prohibiting independent team websites reduces output. (SPA23.) It also held that the NHL had shown offsetting “procompetitive” benefits for the restraint such as, for example, maintaining “League uniformity” and preventing what the court called “free-riding off of the League efforts,” but did not explain how the prohibition at issue advanced these goals. (SPA23-24.)

The district court expressly declined to reach “whether the League’s fine on the Rangers constitutes irreparable injury or whether the balance of hardships tips decidedly toward the team.” (SPA25.) After MSG filed its notice of appeal, the

district court denied MSG’s motion for an injunction pending appeal. (JA1252-55.) This Court thereafter granted MSG’s motion for an expedited appeal.

SUMMARY OF THE ARGUMENT

I. The district court erred in ruling that MSG’s claim does not, at a minimum, present a serious question of antitrust law. The NHL joint venture has ordered its member teams to transfer their individual websites to the League’s centrally controlled common platform, and has banned them from operating competing, individual websites. This ban on independent websites is an unlawful, “naked restraint” on competition between horizontal competitors—the member clubs of the NHL—that is subject to condemnation under “quick look” and Rule of Reason scrutiny.

A. Under the “quick look” doctrine, an overt, horizontal restraint of competition is unlawful unless the defendant can show “procompetitive justifications” for the restraint. The NHL ban on independent team websites is just such a highly suspect restraint. It overtly restricts output, and its express purpose is to eliminate the team-centric websites previously created by the unrestrained market and to ensure that websites are instead used “to promote NHL Hockey and to enhance the value of NHL Intellectual property rather than solely or primarily to pursue the Clubs’ own narrow economic interests.” (JA154-55.)

The district court erred in ruling that this ban survived “quick look” scrutiny. The court relied on the “procompetitive” common website platform, but MSG is not objecting to that platform and, indeed, will provide Rangers content for the League’s website. Rather, MSG objects to the ban on additional, competing sites. There is no procompetitive justification for that specific restraint.

B. MSG also showed below that it has a likelihood of success under the Rule of Reason. As demonstrated under “quick look” scrutiny, the NHL’s ban on independent team websites has substantially harmful effects on competition and no “procompetitive” effects.

The district court erred in holding that the ban passed Rule of Reason scrutiny—and that MSG had not carried its burden—because MSG had not “defin[ed] the relevant market.” (SPA22, emphasis omitted.) But the Supreme Court and this Court have repeatedly held that an antitrust plaintiff can satisfy its burden to show a substantially harmful effect on competition by showing *either* (i) “actual detrimental effects” on competition, such as a “reduction in output,” *or* (ii) that defendants have market power in the relevant market. Here, the NHL clubs have agreed to restrict output both in terms of the number of sites and in terms of the types of sites from which consumers can choose. This reduction of competition between the member clubs of the NHL has blatantly anti-competitive effects.

The district court also erred in addressing the purported procompetitive effects of the ban on independent team websites. The reasons the court invoked, such as “League uniformity,” “facilitating fan navigation,” and “preventing individual teams from free-riding,” may be justifications for a rule requiring all teams to participate in the League’s common website—which the Rangers are willing to do. But, again, they are not procompetitive justifications for eliminating competition from teams operating their own websites, independently of the League’s site.

II. The other criteria for entering a preliminary injunction have also been met here.

First, MSG will suffer irreparable harm in the absence of an injunction. A team website is a critical tool for a sports team to market itself and communicate, through an unfiltered voice, with its fans; and the Rangers have used their website for over ten years to generate the very type of “tribal” enthusiasm for their team that the NHL now seeks to suppress. With every day the Rangers are denied the opportunity to operate an independent website, they lose relationships and good will with their fans. Just as importantly, without an injunction to preserve the status quo pending trial, there will be irreparable harm to consumers and competition, because the NHL’s ban eliminates consumers’ and advertisers’ alternatives to the NHL-controlled sites.

This irreparable harm, moreover, is not mitigated by the Rangers' ability to supply local content on the NHL's website. The NHL has made clear that it intends to use its control over the Rangers' site to advance the League's common interests over the Rangers' interests. In addition, the League's standardized template will not only prevent MSG from designing the Rangers site in response to their fans' preferences, but will place the Rangers' content amid League-centric content in the League's mandatory format. This interference with a critical marketing tool inflicts irreparable harm on the Rangers and on competition.

Finally, under a balance of hardships, whereas MSG is suffering irreparable injury, there is no cognizable harm to the NHL from a preliminary injunction. MSG is not seeking to enjoin the League from operating a League-wide site. It merely wants to continue operating its independent team-focused website in addition to the League-controlled site pending trial. The only "harm" to which the League can point is a possible temporary frustration of its efforts to transform consumers' preferences by the stifling of competition among its member teams. That is not a legally cognizable harm.

STANDARD OF REVIEW

A district court's order on a motion for a preliminary injunction is reviewed for abuse of discretion. *See Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 (2d Cir. 2001). This Court will find an abuse of discretion when the district court's

order denying a preliminary injunction “rests on an error of law ... or a clearly erroneous factual finding,” or when “its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.” *Id.* at 169. The district court’s legal conclusions and mixed questions of law and fact are thus reviewed *de novo* and its findings of fact for clear error. *See id.* at 168 n.3.

ARGUMENT

Preliminary injunctive relief is appropriate once there is a showing of (1) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation, coupled with a balance of hardships tipping decidedly toward the movant; and (2) irreparable harm. *See, e.g., Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979). Here, the district court denied MSG’s motion based solely on its conclusion that the NHL member clubs’ overt agreement to prohibit inter-team competition through independent team websites presented no serious question of antitrust law. That conclusion is plainly wrong.

The agreement at issue is an agreement among competitors to restrict their own pre-existing competition. It was expressly designed to suppress the market’s production of output—“tribal” websites focused on inter-team competition—that consumers and advertisers prefer, in favor of collectively controlled sites that are

not responsive to that consumer preference. And it is intended to increase the cartel's profits by eliminating competition for advertisers and fans. In short, the prohibition imposed by the clubs is the kind of blatantly anticompetitive conduct that the Sherman Act prohibits.

As demonstrated below, the district court was able to find no serious question about this agreement only by making two fundamental errors, among others. First, the court ignored the applicable case law—from this Court and the Supreme Court—holding that agreements by joint venturers to restrict their own competition with each other and with the venture require close antitrust scrutiny and are frequently unlawful. Second, the court relied on a series of justifications for the NHL's *overall* New Media Strategy that bear no reasonable relationship to the specific restraint of trade that is at issue. Properly analyzed, the NHL clubs' prohibition on independent websites has obvious anticompetitive effects that match its overtly anticompetitive intent, and has no plausible competitive justification. Its clear effect, moreover, is to visit irreparable harm on the Rangers, and on consumers and advertisers, by eliminating an essential tool for differentiating the Rangers from their competitors, and for vying for the attentions and business of fans and advertisers.

I. THE NHL’S BAN ON INDEPENDENT TEAM WEBSITE COMPETITION VIOLATES THE ANTITRUST LAWS, OR, AT A MINIMUM, RAISES SERIOUS ANTITRUST ISSUES

This appeal concerns only a specific, overtly anticompetitive restraint that the member clubs of the NHL have attempted to impose on MSG. Although the formation and operation of a joint venture is subject to antitrust scrutiny, MSG does not challenge the legality of the NHL’s formation or existence as a non-integrated joint venture. Nor does MSG challenge the decision of the NHL’s members to offer thirty NHL team websites on a “common platform.” Indeed, MSG has made clear that it is willing to provide content for a Rangers site to be operated on such a common platform. Rather, in the context of MSG’s motion for a preliminary injunction, MSG’s only challenge is to the specific restriction adopted by the NHL member teams that prohibits MSG from operating an independent website in addition to—and in competition with—the centrally controlled site.

This prohibition on independent, competing team websites is unlawful. It is an overt horizontal agreement among competitors to restrict output—and is therefore inherently suspect. Moreover, it is a particularly noxious form of horizontal agreement: one that intentionally seeks to suppress the “tribal” focus preferred by fans, and thereby “reduc[es] the importance of consumer preference,” *NCAA*, 468 U.S. at 107, in determining the content of NHL websites. Under the

case law, such an open horizontal restraint on competition and consumer choice is “presumed unlawful,” *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005), and can be saved from illegality only if the defendant can “identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.” *Id.*

Here, the NHL argued below that, because all teams are marketing the professional hockey that the NHL makes possible, the ban was lawful as an internal rule imposed by a “single entity.” Even the district court did not directly embrace that wholly unfounded argument.² Rather, the district court held that the NHL’s prohibition on independent websites by competitor teams is justified by the putative benefits of the NHL’s overall New Media Strategy—and, in particular, the benefits of the common website platform that the NHL is creating. However, it is well-established that what must be demonstrated is some procompetitive benefit *of the restraint being challenged*—not merely of some broader activity with which

² See, e.g., *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1257 (2d Cir. 1982) (“NASL”); see also *Volvo N. Am. Corp. v. Men’s Int’l Prof’l Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1988) (“[S]ince joint ventures—including sports leagues and other such associations—consist of multiple entities, they can violate § 1 of the Sherman Act.”); *NCAA*, 468 U.S. at 113 (a sports league, like other joint ventures, has “no immunity from the antitrust laws”); *Sullivan v. NFL*, 34 F.3d 1091, 1098 (1st Cir. 1994) (rejecting single-entity defense because “it is well established that NFL clubs also compete with each other, both on and off the field, for things like fan support, players, coaches, ticket sales, local broadcast revenues, and the sale of team paraphernalia”).

the restraint is associated. *See, e.g., Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1073 (11th Cir. 2005). The district court mistakenly concluded that no such particular showing was necessary; and the NHL, in any event, made no such showing.

A. The NHL’s Prohibition Of Independent Team Websites Is Unlawful Under “Quick Look” Scrutiny

Under settled law, the NHL’s prohibition on independent team websites is precisely the sort of overt, horizontal restriction on competition that can be declared unlawful under so-called “quick look” scrutiny, *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 459-60 (1986), without any need for ““elaborate industry analysis”” or “proof of market power,” *NCAA*, 468 U.S. at 109-10 (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978)). The district court erred in suggesting to the contrary.

1. “Quick Look” Scrutiny Applies To Horizontal Agreements To Restrict Output That Are Not Shown To Be Reasonably Necessary For The Joint Venture They Allegedly Facilitate

The doctrine of “quick look” scrutiny establishes that, even when no rule of *per se* antitrust illegality applies, the likely anticompetitive effects of some horizontal restraints are sufficiently clear that, absent some convincing procompetitive justification, they can be declared illegal without “any great difficulty,” and without full-blown market analysis. *Ind. Fed’n*, 476 U.S. at 459; *see also NCAA*, 468 U.S. at 109 n.39 (“[T]he rule of reason can sometimes be

applied in the twinkling of an eye.”) (internal quotation marks omitted). This “quick look” approach applies “where a practice has obvious anticompetitive effects”; in such circumstances, “there is no need to prove that the defendant possesses market power,” and the court “proceed[s] directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects.” *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1020 (10th Cir. 1998). In the absence of such justifications, the court condemns the practice without need of a more extensive Rule of Reason analysis. *See Ind. Fed’n*, 476 U.S. at 459-62.

Restraints that have been invalidated under “quick look” scrutiny include, for example, “agreement[s] not to compete in terms of price or output,” *NCAA*, 468 U.S. at 109; an agreement not to “compete with respect to the package of services offered to customers” or otherwise “limiting consumer choice by impeding the ‘ordinary give and take of the market place,’” *Ind. Fed’n*, 476 U.S. at 459 (quoting *Prof’l Eng’rs*, 435 U.S. at 692); an agreement by joint venturers not to advertise their individual products in competition with the venture’s product, *Polygram Holding*, 416 F.3d at 38; an NCAA rule restricting salaries of certain coaches, *Law*, 134 F.3d at 1019-24; and a territorial allocation among the members of a truck leasing association, *General Leaseways, Inc. v. National Truck Leasing Association*, 744 F.2d 588, 595 (7th Cir. 1984). In particular, the “quick look”

doctrine has often been applied to efforts by joint venturers to justify, under the umbrella of the joint venture, restrictions on the individual competitive activities of members of the venture. The case law recognizes that “joint venture rules limiting or prohibiting venturers from engaging in outside business in competition with the venture”—like the prohibition at issue here—“should be given closer scrutiny than venture membership limitations generally.” XIII HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2213c, at 302 (2d ed. 2005).

In *Polygram Holding*, for example, two record companies established a joint venture to distribute a “Three Tenors” recording, and agreed as part of that venture temporarily to suspend advertising and promotion of earlier “Three Tenors” recordings that the companies owned individually. The D.C. Circuit applied “quick look” scrutiny, noting that “[a]n agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement between competitors.” 416 F.3d at 37. The court then rejected the argument that the venturers’ restriction on competition could be justified on the ground that it “enhanced the long-term profitability of all three concert albums and promoted the ‘Three Tenors’ brand,” holding that justifying an overt ban on competition on these grounds would be “a frontal assault on the basic policy of the Sherman Act.” *Id.* at 37-38.

Similarly, in *General Leaseways*, a truck-servicing joint venture prohibited its members from competing with each other by, among other things, imposing geographic restrictions on where they could locate. The Seventh Circuit, in an opinion by Judge Richard Posner, applied “quick look” scrutiny in upholding the entry of a preliminary injunction, on the ground that the venturers’ agreement “is a horizontal market division that does not appear to be ancillary to” the procompetitive purposes of the joint venture. 744 F.2d at 595. The court noted that “[i]t does not follow that because two firms sometimes have a cooperative relationship there are no competitive gains from forbidding them to cooperate in ways that yield no economies but simply limit competition.” *Id.* at 594.

Numerous other courts have reached similar conclusions about agreements between members of a joint venture to restrict their own continuing competitive activities. *See, e.g., NCAA*, 468 U.S. at 109-10 (applying “quick look” scrutiny in context of joint venture); *Law*, 134 F.3d at 1019-24 (same). As this Court has said of such agreements: “Each [venturer] has agreed not to compete with the others in a manner which the consortium considers harmful to its combined interests. Far from being ‘presumptively legal,’ such arrangements are exemplars of the type of anticompetitive behavior prohibited by the Sherman Act.” *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 242 (2d Cir. 2003).

2. The NHL's Ban On Independent Team Websites Fails "Quick Look" Scrutiny

The NHL's ban on independent team websites is just such a highly suspect horizontal output restriction. It, too, fails "quick look" scrutiny.

“'[H]orizontal' restraints . . . are particularly suspect because they typically serve no purpose other than to stifle competition.” *Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1092 (6th Cir. 1996). Since the NHL's decision here was controlled and directed by its member clubs, the League's ban on independent team websites is “a horizontal restraint—an agreement among competitors on the way in which they will compete with one another.” *NCAA*, 468 U.S. at 99; *see also, e.g., Maricopa County Med. Soc'y*, 457 U.S. at 342-43. The clubs are separate economic entities from each other. While they have formed a non-integrated joint venture to provide professional hockey, their agreement to restrain how individual teams provide Internet services is an additional, distinct agreement among horizontal competitors. And the particular horizontal restraint at issue here—a ban on independent Internet sites outside the NHL-controlled network—constitutes an especially suspect form of horizontal agreement, because it is an agreement that seeks to restrict output. In particular, it restricts output by preventing teams like the Rangers from offering their unique websites to fans (and advertisers) as an alternative to—and in addition to—the common platform sites offered by the NHL.

The independent website is itself an output, directly banned by the restraint the NHL has imposed through the collective vote of the Rangers' competitors. But the website is also a tool for promoting other outputs such as ticket sales, jersey sales, and other Rangers-specific items that may interfere with the league's goal of reducing tribalism. Indeed, a declaration from a Harvard Business School professor presented to the court below explained how interactive websites have become far and away the most important marketing tool in the current economy. (JA1129-37.) An attempt by the NHL to make the Rangers less effective in marketing their own brand is deeply suspect under the antitrust laws.

In addition to thus restricting the *number* of websites from which consumers and advertisers can choose, the NHL ban also limits output qualitatively, by restricting the *types* of websites that are produced. As the NHL's own submissions make clear, the majority of NHL clubs made a deliberate decision to ensure that, instead of the varied and largely "provincial" websites that the unrestrained market had produced, (JA346-47), all team websites would "articulate a single NHL brand persona and voice," (JA371), and that no independent sites that might vary from this template would be permitted. This effect, too, is a restriction of output, because "the relevant output consists of not merely the naked product itself, but all information, amenities, and other features" associated with it. XI HOVENKAMP, ANTITRUST LAW ¶ 901d, at 206. An agreement restraining *any* of the relevant

features of a potentially competitive product “is an ‘output reduction’ just as certainly as is an agreement increasing . . . price.” *Id.*; *see also Ind. Fed’n*, 476 U.S. at 459. The NHL clubs’ agreement to eliminate all websites that might offer consumers an experience or features different from those offered by the homogenized NHL-controlled sites easily fits this legal definition of an anti-competitive output restriction.³

As a naked, anticompetitive, horizontal restriction on output, the NHL’s prohibition on independent team websites is in its most critical respects indistinguishable from the restraints condemned under “quick look” scrutiny in *Polygram Holding*, *General Leaseways*, and the other cases cited above. By suppressing free competition among varied team Internet sites—leaving only sites subject to the standardization and League-centric focus preferred by the NHL—it

³ In light of the extensive record evidence that the NHL intends to change the “provincial” focus of websites like the Rangers’ to a more League-centered focus, *see* JA346-47—*i.e.*, to ensure that websites are used “to promote NHL Hockey and to enhance the value of NHL Intellectual Property rather than solely or primarily to pursue the Clubs’ own narrow economic interests,” (JA154-55)—the district court’s belief that there would be no meaningful difference between independent team websites and the NHL common platform sites, (SPA13 n.5), is untenable. The district court based this conclusion on the teams’ ability to contribute “local content” to the NHL sites, *id.*, but, as discussed in detail *infra* at pp. 56-59, the record establishes that teams are permitted only “some” local content on “a portion” of their websites (JA394-95; JA864), and that websites are, in any event, more than mere “distribution mechanism[s] for disseminating” particular content (JA1136).

is an agreement to restrict both quantitative output and “compet[ition] with respect to the package of services offered to customers.” *Ind. Fed’n*, 476 U.S. at 459.

There is thus a loss of advertising price competition among the NHL site and independent team sites; and there is a loss of competition, for example, for potential offers for registering on the competing sites, for products advertised on the competing sites, and for interesting content on these sites. Indeed, by openly seeking to eliminate the “tribal” websites that the market has previously produced in response to consumer demand, the restraint is expressly designed to “imped[e] the ‘ordinary give and take of the market place.’” *Id.* Finally, by putting ultimate control of all team websites in the hands of the NHL, the restraint “deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands.” *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

The anticompetitive effects of this naked restraint on trade are not justifiable under the law. While the antitrust laws allow competitors to jointly provide products or services where efficiencies justify joint action, they strongly frown on efforts of competitors to create exclusive providers of products and ban competition from fellow venturers. *See, e.g., BMI*, 441 U.S. at 23 (stressing that the individual members of the venture had not “agreed not to sell individually”); *Polygram Holding*, 416 F.3d at 37-38 (invalidating venturers’ agreement not to

compete with the joint venture); *General Leaseways*, 744 F.2d at 594-95 (enjoining enforcement of rule preventing competition among joint venturers). The case law allows such restraints only when they are reasonably necessary to an efficiency-enhancing aspect of cooperation among the joint venturers. *See, e.g., Law*, 134 F.3d at 1021 (only restraints “necessary” to the venture to be considered); *Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995) (restraint not ancillary because it “was not a necessary condition for” the procompetitive agreement at issue). But the district court made no finding of any such necessity, nor could it. The NHL joint venture has long existed without the ban; and it can continue with full efficiencies without it. Moreover, the joint venture can even expand to have a common website platform without also banning independent team websites that would compete with it. This restraint simply is not procompetitive, and thus is not justifiable.

3. The District Court’s Reasons For Finding That This Overt Ban On Independent Team Websites Survives “Quick Look” Scrutiny Are Unfounded

In holding that this facially anticompetitive ban survived “quick look” scrutiny, the district court rested on what it found to be offsetting “procompetitive virtues” of the NHL’s overall New Media Strategy. (SPA21.) This approach rests on a fundamental misunderstanding of the governing law, and offers no cognizable justification for the actual restraint under challenge.

a. In particular, the district court committed basic error in relying on the purported “procompetitive effects of the New Media Strategy”—that is, the *overall* strategy of combining 30 team sites on NHL servers—such as “increased online scale” and “reduc[ing] the costs of operating thirty ‘back office’ website operations.” (SPA17.) Cartels are not allowed to evade antitrust scrutiny “through the simple device of attaching the cartel agreement to some other, independently lawful transaction.” XI HOVENKAMP, ANTITRUST LAW ¶ 1908, at 255. Thus, the law is clear that each horizontal restraint on competition must be justified *individually* as procompetitive: such a restraint cannot be upheld merely because it is appended to a joint venture that is procompetitive *on the whole*. *See, e.g., NCAA*, 468 U.S. at 113-14 (rejecting argument that NCAA television restraint could be justified as part of overall joint venture where not independently procompetitive); *Polygram Holding*, 416 F.3d at 37-38 (analyzing justifications for the challenged restraint, not for the joint venture as a whole); *Schering-Plough*, 402 F.3d at 1073 (restraint not justified if “some of the restraint extinguishes competition without creating efficiency”); *Law*, 134 F.3d at 1021 (same).

Accordingly, the district court’s dismissal of “quick look” scrutiny based solely on the benefits of the overall New Media Strategy was a fundamental legal error.⁴

b. In addition, the district court seriously erred in holding that the NHL did not have to show that the challenged ban on independent team websites was “necessary” for the efficiency of the NHL venture. (SPA20.) Courts have repeatedly held that a restraint on venturer conduct can be justified only if it is truly “ancillary” to the venture, in the sense that it is reasonably *necessary* to the efficiency of the venture. *See, e.g., Law*, 134 F.3d at 1021 (only restraints “necessary” to the venture to be considered); *Blackburn v. Sweeney*, 53 F.3d at 828 (restraint not ancillary because it “was not a necessary condition for” the procompetitive agreement at issue); *Schering-Plough*, 402 F.3d at 1072 (“Ancillary restraints are generally permitted if they are ‘reasonably necessary’ toward the contract’s objective of utility and efficiency.”); *Rothery Storage & Van Co. v. Atlas*

⁴ For similar reasons, the district court’s reliance on two district court opinions, *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 420 F. Supp. 2d 212 (S.D.N.Y. 2005), and *American Needle, Inc. v. New Orleans Louisiana Saints*, 496 F. Supp. 2d 941 (N.D. Ill. 2007), SPA16-18, was misplaced. Neither case involved teams that sought to compete with their joint venture, and thus neither addressed any specific justification for a restraint on such competition. In addition, *American Needle* is premised on “single entity” reasoning, 496 F. Supp. 2d at 944, which this Court, and other courts of appeal, have flatly rejected. *See supra* at 25 & n.2.

Van Lines, Inc., 792 F.2d 210, 227 (D.C. Cir. 1986) (same). In other words, the restraint must be “reasonably related to the integration [of the joint venture] and reasonably necessary to achieve its procompetitive benefits.” U.S. DEP’T OF JUSTICE & FEDERAL TRADE COMM’N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.2 (2000). Absent such a showing of necessity, the restraint is unlawful. *See, e.g., Law*, 134 F.3d at 1021; *Blackburn*, 53 F.3d at 828.

The only case cited by the district court to support its rejection of this governing standard—*K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123 (2d Cir. 1995), *see* SPA20—is completely inapposite. *K.M.B.* addressed the vastly different issue of *vertical* restraints on intrabrand competition; it has no application to the far more suspect *horizontal* restraints at issue here. *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2714 (2007) (“horizontal restraints are generally less defensible than vertical restraints,” and are therefore governed by different rules) (internal quotation marks omitted).

Likewise, the district court’s suggestion that its view is supported by unspecified “cases upholding agreements among parents of a joint venture not to compete in the market in which the joint venture operates,” (SPA20), is fundamentally mistaken. As this Court emphasized in *Visa U.S.A.*, such agreements among joint venturers not to compete individually, “[f]ar from being

‘presumptively legal’ . . . are exemplars of the type of anticompetitive behavior prohibited by the Sherman Act.” 344 F.3d at 242; *see also Polygram Holding*, 416 F.3d at 38 (argument that venturers could justifiably agree not to compete with venture’s product was “nothing less than a frontal assault on the basic policy of the Sherman Act”); *General Leaseways*, 744 F.2d at 594-95 (invalidating joint venture’s rule against independent competition by venturers); XIII HOVENKAMP, ANTITRUST LAW, ¶ 2213c, at 302.

In short, the district court’s failure to require any demonstration that the prohibition on independent team websites was “reasonably necessary” to the claimed efficiencies of the New Media Strategy was fundamental legal error. It erroneously relieved the NHL of a key part of its burden of justification.

c. Even aside from the district court’s failure to apply the correct standard, moreover, it is clear that none of the NHL’s attempts to justify its ban on independent websites could satisfy that standard. None shows that the ban is reasonably necessary to the efficiency of the joint venture.

In particular, the NHL asserted that “[t]he ability to provide sponsors with . . . access to the largest group of unique visitors possible”—what the NHL refers to as “scale”—is “critical to the monetization of” the NHL’s online business, and the “Rangers’ fans represent an important demographic group” in “an anchor market for any national advertising campaign.” (JA134; JA137.) But “[a] restraint

cannot be justified solely on the ground that it increases the profitability of the enterprise that introduces the new product.” *Polygram Holding*, 416 F.3d at 38; *see also Law*, 134 F.3d at 1023 (“[M]ere profitability or cost savings have not qualified as a defense under the antitrust laws.”). The “monetization” of the NHL’s website business, while no doubt beneficial to the NHL, is hardly a benefit to *competition*—particularly where, as here, that monetization depends on increasing the number of “unique visitors” to the NHL site *by eliminating competing sites*. The Supreme Court has long made clear that an attempt to justify a restraint “on the basis of the potential threat that competition poses . . . is nothing less than a frontal assault on the basic policy of the Sherman Act.” *Prof’l Eng’rs*, 435 U.S. at 695.

Nor can the NHL justify suppressing independent team websites as necessary to ensure that fans (whom the NHL deems excessively “tribal” and “team-centric”) only have access to sites that advance the NHL’s “single brand” goals—*i.e.*, sites with “broader, more multi-dimensional hockey coverage that emphasizes the importance of other League games, highlights, news, and content from other Clubs and markets around the League”—instead of sites following the more “provincial approach” that the market has produced in reaction to consumers’ tribal preferences. (JA346-47; JA365; JA371.) The NHL “is not entitled to preempt the working of the market by deciding for itself that its customers do not need

that which they demand.” *Ind. Fed’n*, 476 U.S. at 462. Indeed, the notion that reducing consumer choice in this manner is “procompetitive” contradicts the basic principle that the Sherman Act is a “consumer welfare prescription,” and “[a] restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.” *NCAA*, 468 U.S. at 107 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

For the same reason, this suppression of consumer preference cannot be justified on the ground that “articulat[ing] a single NHL brand persona and voice,” (JA371), purportedly strengthens the NHL itself as a competitor in some broad sports or entertainment market. As the D.C. Circuit made clear in *Polygram Holding*, the desire to strengthen the joint venture’s brand by prohibiting the venturers from competing with the venture is not a cognizable procompetitive justification. 416 F.3d at 37-38 (rejecting justification based on desire to “promot[e] the ‘Three Tenors’ brand”); *see also* XI HOVENKAMP, ANTITRUST LAW ¶ 1907, at 245 (the argument “that reducing output in one market will create an offsetting output increase in a different but substitute market” is not a cognizable justification); *Visa U.S.A.*, 344 F.3d at 243 (upholding district court’s rejection of similar justification). Indeed, if such a justification *were* cognizable, any joint venture could seek to “strengthen its brand” in some putative market by prohibiting

competition by individual venturers. As explained earlier, however, such agreements by joint venturers are “exemplars of . . . behavior prohibited by the Sherman Act.” *Visa U.S.A.*, 344 F.3d at 242.

Finally, the NHL cannot justify suppressing independent team websites by reference to a purported threat of “free-riding off of the League efforts,” (SPA24-25)—a concern raised by the district court in a different section of its opinion. The issue here is not whether MSG should have to participate in the NHL’s common platform, or whether MSG should be able to take advantage of the common platform. The issue, rather, is whether MSG can *compete* with the common platform. That is not an issue of “free riding” at all. *See Polygram Holding*, 416 F.3d at 38 (prevention of free riding is not a valid justification where, as here, “[t]he ‘free-riding’ to be eliminated . . . [is] nothing more than the competition of products that were not part of the joint undertaking”).

Moreover, the district court’s invocation of the “free riding” label failed to indicate any way in which continuing the existence of the Rangers’ longstanding, independent website would in fact be “free riding” off the NHL’s new joint website venture. The support that the court cited—the NHL’s Fisher Declaration—likewise offers none.

Instead, Professor Fisher offers the astonishingly broad notion that any team’s use of even its own trademarks, logos, media and/or other intellectual

property is “free riding” on the *overall* “actions of the League, its other member teams and players,” (JA153-54), because NHL teams and their property “would have little or no value in the absence of their association with the NHL Hockey product.” (JA149.) But this overbroad argument ignores that the teams are independent decision-makers with their own separate assets at risk and their own distinct profit and loss activities. Thus, when the teams invest in and promote their own web-sites, they are not “free riding”; they are in fact paying their own way and competing to meet market demands. If Professor Fisher’s anti-free-riding justification were valid here, it would be hard to think of *any* anticompetitive restraint—even, perhaps, a restraint on teams selling tickets to their own games—that could not be justified by the purported need to prevent teams from free-riding on “their association with the NHL Hockey product,” (JA149).

In sum, the district court did not identify any procompetitive virtue of the “naked” ban on independent websites, and the League offered none. The NHL clubs’ overt ban on competition therefore fails “quick look” scrutiny.

B. The Ban On Independent Team Websites Also Cannot Survive Rule of Reason Analysis

Even if “quick look” scrutiny were not applicable and dispositive for purposes of this appeal, MSG also showed below that it had a likelihood of success on the alternative basis that the ban on independent website competition imposed by the NHL member clubs is unlawful under the Rule of Reason. At an absolute

minimum, the district court erred in holding that this horizontal restraint did not raise even a “sufficiently serious question going to the merits.” (SPA25.)

The Rule of Reason does not require consideration of different factors from those considered under “quick look” scrutiny. The difference is simply that some restraints are so obviously anticompetitive that, under “quick look,” the Rule of Reason can be applied “in the twinkling of an eye.” *See Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 763, 780 (1999) (internal quotation marks omitted). MSG respectfully submits that this is such a case because it involves a naked horizontal restriction on output. Even if that is not true, however, the factors discussed above are the same factors to be analyzed in a fuller rule-of-reason inquiry. *Id.* at 780-781 (“[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”). *Compare* VII HOVENKAMP, ANTITRUST LAW ¶ 1507 (describing rule of reason) with *id.* ¶ 1508 (describing “quick look”).

Whether applied quickly or not, the Rule of Reason requires a “weighing of the competitive effects of the agreement—both pro and con—to determine if the effects of the challenged restraint tend to promote or destroy competition.” *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 507 (2d Cir. 2004).

Under this Court’s approach to the Rule of Reason, once a plaintiff shows “that the defendants’ conduct or policy has had a substantially harmful effect on competition,” *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs. Inc.*, 996 F.2d 537, 546 (2d Cir. 1993), “the burden shifts to the defendants to offer evidence of the pro-competitive effects” of the restraint in issue. *Geneva Pharms.*, 386 F.3d at 507.

Here, as the earlier “quick look” discussion shows, the preliminary injunction proceeding showed manifest anticompetitive effects of the NHL’s ban on independent team websites—evidenced in a clear restriction on output. In contrast, as that discussion also shows, the record is barren of evidence of any cognizable “pro-competitive effect[.]” of that restraint. The district court thus plainly erred in holding that no serious Rule of Reason claim was presented.

1. The NHL’s Ban On Independent Team Websites Substantially Harms Competition

In a Rule of Reason inquiry, the plaintiff’s burden of showing a “substantially harmful effect on competition,” *Capital Imaging*, 996 F.2d at 546, may be satisfied in either of two ways: by showing “proof of actual detrimental effects, such as a reduction of output,” or by showing that the defendants have “the requisite market power so that their ‘arrangement has the potential for genuine adverse effects on competition.’” *Id.* (quoting *Ind. Fed’n*, 476 U.S. at 546). Here,

the “detrimental effect[]” on competition, through “a reduction of output,” is both self-evident and amplified by substantial evidence in the record.

a. By banning independent team Internet sites outside the NHL-controlled network, the NHL clubs have necessarily agreed to restrict output by preventing teams like the Rangers from offering independent sites to fans (and advertisers) as an alternative to—and in addition to—the common platform sites offered by the NHL. Under the ban, the Rangers may not offer a distinct Internet path for viewer traffic, placement of advertisements, and/or interaction of consumers, advertisers, and Rangers’ representatives. (JA54-56; JA62-64.) Indeed, as the record shows, the very purpose of the ban is to eliminate such alternative paths of Internet traffic. (*Id.*) But being a valued path for traffic is the key to success on the Internet (JA135; JA517), and the elimination of competing paths that would otherwise exist is, by definition, a serious reduction of economic output. See Eileen Colkin Cuneo, *Business Processes*, INFORMATIONWEEK, June 13, 2005, at 54 (“generat[ing] traffic for Web sites” is a “key component of any marketing and branding campaign”).

In addition to this quantitative restriction of output, as noted earlier, is the qualitative restriction of restricting the *types* of websites that are produced. The NHL clubs’ decision to ensure that all team websites would “articulate a single NHL brand persona and voice,” (JA371), and that no independent sites that might

vary from this template would be permitted, restricts output because “the relevant output consists of not merely the naked product itself, but all information, amenities, and other features” associated with it. XI HOVENKAMP, ANTITRUST LAW, ¶ 1901d, at 206. The NHL clubs’ agreement to eliminate websites that might offer consumers an experience or features different from those offered by the NHL-controlled sites clearly restricts output in this sense. *See, e.g., Ind. Fed’n*, 476 U.S. at 459 (condemning “[a] refusal to compete with respect to the package of services offered to customers”); *Visa U.S.A.*, 344 F.3d at 243 (cognizable harm to competition existed when, but for joint venture’s restraint on competition with the venture, “unique features . . . would likely become available”).

Even aside from this restriction on quantity and quality of output—and, by the same token, on consumer and advertiser choice—the record establishes an “actual detrimental effect[]” on competition, *Capital Imaging*, 996 F.2d at 546, in a further way: by demonstrably “reducing the importance of consumer preference,” *NCAA*, 468 U.S. at 107, in determining the content of professional hockey team websites. By the NHL’s own account, the preferences of hockey fans are unusually and intensely “tribal” and “team-centric,” (JA365), and the clubs’ collective move to websites with a more “League-centric,” “single brand” focus—coupled with the challenged agreement to ban independent websites, which might otherwise revert to the market-driven “provincial” focus that previously prevailed,

see JA346-47—shows a clear and intentional reduction in the “importance of consumer preference” in determining website content. While the NHL clubs are entitled to try to change consumer preferences by the products and services that they market, they are not entitled to defeat consumer preferences by prohibiting alternatives for consumers and thereby “pre-empt[ing] the working of the market by deciding for [themselves] that [their] customers do not need that which they demand.” *Ind. Fed’n*, 476 U.S. at 462.

b. Despite these multiple detrimental effects on competition, the district court ruled that MSG had not shown a likelihood of success under the Rule of Reason because it did not make a showing “on the complex question of defining *the* relevant market.” (SPA22, emphasis in original.) As an initial matter, there is no question that the NHL member clubs are the only competitors producing and marketing men’s major league professional ice hockey contests, and the challenged restraint plainly protects some (weaker) teams at the expense of competition from others, such as the Rangers, in that context. *See NCAA*, 468 U.S. at 119; *NASL*, 670 F.2d at 1257. But, in all events, the district court is simply wrong that a plaintiff cannot prevail under the Rule of Reason without a showing that defines the “relevant market” or demonstrates “market power.”

As this Court and the Supreme Court have made clear on multiple occasions, such a showing is *not* always necessary. *See, e.g., Capital Imaging*, 996 F.2d at

546 (market power is not “the *sine qua non* of antitrust liability”). Rather, such a showing is only an *alternative* means of showing anticompetitive effects, and is therefore necessary only when the plaintiff cannot demonstrate “actual detrimental effects.” *Id.* As the Supreme Court explained in *Indiana Federation*, “proof of actual detrimental effects, such as a reduction in output, can obviate the need for an inquiry into market power, *which is but a surrogate for detrimental effects.*” 476 U.S. at 460-61 (emphasis added; internal quotation marks omitted); *accord Capital Imaging*, 996 F.2d at 546; 7 HOVENKAMP, ANTITRUST LAW ¶ 1507a, at 381 (“[p]roof of actual anticompetitive effects, properly defined, can be used as a substitute for formal market analysis” even in a full Rule of Reason case).

The district court’s alternative holding—to wit, that MSG purportedly failed to show a detrimental effect on competition because “output does not simply refer to the number of units produced, it also involves a qualitative judgment,” (SPA23)—is equally misconceived. To the extent that the court meant that a restriction on the number of websites available to consumers does not establish a reduction in output, the authority that the court cited—Professor Hovenkamp’s treatise—establishes precisely the opposite. *See XI HOVENKAMP, ANTITRUST LAW* ¶ 1901d, at 205-06 (“[R]elevant output can be measured by a number of means. *The most obvious is the number of units sold.* Perhaps the second most obvious is the quality of the units.”) (emphasis added). Furthermore, the fact that restrictions

on the quality of output can *also* establish an output restriction, far from undercutting MSG’s showing of detrimental effects, actually supports that showing: As described above, the homogenization of team websites and the elimination of “team-centric” sites is a qualitative and fundamental output restriction.

Finally, the district court’s comment, citing *California Dental*, 526 U.S. at 774, that “making a judgment about output requires an empirical, not an *a priori*, analysis,” (SPA23), misconstrues both *California Dental* and the record in this case. The cited passage from *California Dental* addresses the weighing of potential procompetitive effects of a particular restraint against its potential anticompetitive effects; it does not address a simple judgment about whether output has been reduced, let alone state a general rule that a reduction in output cannot be identified without complicated analysis. In addition, the reductions in output at issue here are not “*a priori*”—the record reflects an *actual* restriction on the number of team websites that may be offered to consumers and advertisers; an *actual* restriction on the types of websites produced; and an *actual* reduction in the extent to which NHL team website availability and content is determined by consumer preferences. In short, the district court’s conclusory remark about empirical analysis does not address these actual effects on competition, let alone rebut them. It is, in other words, erroneous as a matter of law.

2. The District Court Erred In Finding Offsetting Procompetitive Justifications

MSG’s demonstration of actual detrimental effects on competition shifted “the burden . . . to the defendants to offer evidence of the pro-competitive effects” of the clubs’ agreement to prohibit independent team websites. *Geneva Pharms.*, 386 F.3d at 507. But the purported “procompetitive benefits” of the prohibition identified by the district court—“having League uniformity, facilitating fan navigation, attracting advertisers due to larger mass, reducing transaction costs in advertisement negotiations, and preventing individual teams from free-riding off of the League efforts,” (SPA24)—are patently inadequate to justify the ban on competitive websites.

First, “League uniformity” in and of itself is not a benefit to competition. To the extent that the court meant that uniformity among the NHL-controlled team sites is important to the success of the NHL’s common platform, that, even if true, provides no justification for banning competing, non-uniform sites *outside* the common platform. And, to the extent that the court meant that the very elimination of independent competition *itself*—*i.e.*, an across-the-board uniformity produced by banning competition and eliminating consumer choice—is somehow procompetitive, such a definition of “procompetitive” is not legally cognizable: “[T]he Rule of Reason does not support a defense based on the assumption that

competition itself is unreasonable.” *Prof’s Eng’rs*, 435 U.S. at 696; *accord NCAA*, 468 U.S. at 117.

The district court’s next purported justification, “facilitating fan navigation,” is equally empty as a rationale for banning independent sites. It is one thing for the NHL to try to facilitate fan navigation *among the NHL-controlled sites*, as that may promote the efficiencies of the common platform. But it is an entirely different thing to ban an independent, competitive site that consumers may choose to visit. That is a classic *anti*-competitive effect; and even if consumers might have some amount of difficulty in navigating from an independent team website to the NHL-controlled sites (a difficulty not established in the record as rising even to the level of a minor nuisance), that difficulty can hardly justify as “procompetitive” the complete elimination of competition from those independent sites.

The district court’s suggestion that the ban on competitive websites can be justified by the “larger mass” of website viewers that the common platform could then attract—making that platform, in turn, more attractive to advertisers—is even more profoundly wrong. Unless the courts are to abandon the established principle that “mere profitability or cost savings have not qualified as a defense under the antitrust laws,” *Law*, 134 F.3d at 1023, increasing NHL advertising revenues is a benefit only to the NHL, not to *competition*. Here, too, the district court perversely treated the elimination of competition—and a gain in “mass” resulting from the

elimination of consumers' alternatives—as somehow *procompetitive*, in what can only be termed “a frontal assault on the basic policy of the Sherman Act.” *Prof'l Eng'rs*, 435 U.S. at 695.

The district court's penultimate justification—“reducing transaction costs in advertisement negotiations”—is equally unfounded. The court offered no explanation—and pointed to no record evidence—showing how prohibiting a team like the Rangers from launching an independent website in any way affects the transaction costs to the NHL of selling advertising for the common-platform sites. It is hard to imagine how it does. And a joint venture's restrictions on competition cannot be justified when the venture is unable to demonstrate that the restrictions are legitimately necessary to serve the articulated goals, such that there is an “organic connection between the restraint and the cooperative needs of the enterprise.” *Gen. Leaseways*, 744 F.2d at 595; *see also Law*, 134 F.3d at 1021-22 (joint venture must demonstrate that the restraint at issue will actually serve the articulated *procompetitive* goals). There is an absence of such an “organic connection” here.

Finally, as explained earlier (*supra* at p. 40), the purported threat of “free riding” invoked by the district court has no application here: The district court offered no explanation of how independent sites would in any way be “free riding” on the efforts of the common platform venture; it cited only Professor Fisher's

“single entity” testimony, which is contrary to the facts of record and established law; and the invocation of “free riding” has been squarely rejected when, as here, “[t]he ‘free-riding’ to be eliminated . . . [is] nothing more than the competition of products that were not part of the joint undertaking.” *Polygram Holding*, 416 F.3d at 38. The district court’s citation of *Rothery Storage*, a case where there was a clearly-articulated threat of free riding that made the restraint at issue necessary to the very existence of the venture, 792 F.2d at 221-23, serves only to highlight the emptiness of any “free riding” claim here.

In sum, none of the purported procompetitive justifications cited by the district court establishes *any* procompetitive effect of the NHL clubs’ agreement to prohibit teams from operating independent websites, let alone sufficient procompetitive effect to outweigh the serious adverse effects on competition that MSG demonstrated. MSG has a substantial likelihood of success on the merits, and the district court plainly erred in holding to the contrary.

3. At A Minimum, MSG Demonstrated Serious Questions On The Merits Of The Antitrust Claim

Even if the district court had identified cognizable procompetitive justifications for the clubs’ agreement to ban independent team websites, its conclusion that MSG failed to demonstrate even a “sufficiently serious question going to the merits,” (SPA25), would be legally erroneous. Under those circumstances, the court would have been required to engage in a “weighing of the

competitive effects of the agreement—both pro and con—to determine if the effects of the challenged restraint tend to promote or destroy competition.”

Geneva Pharms., 386 F.3d at 507. But the district court did not engage in any such “weighing”—and, given the serious effects on competition identified by MSG, the need to perform such a weighing would, at a minimum, establish “serious questions” for purposes of the preliminary injunction calculus.

II. THE OTHER CRITERIA FOR ENTERING A PRELIMINARY INJUNCTION ARE MET HERE

A. Both MSG And The Public Interest In Competition Are Irreparably Harmed

The standard for irreparable harm is well-established. The movant must demonstrate an “imminent” injury that “will result if the relief is not granted,” *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 103 (2d Cir. 2005), and that “cannot be remedied if a court waits until the end of trial to resolve the harm.” *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (internal quotation marks omitted). MSG readily satisfied that standard here.

1. As the record below established, for ten years, MSG operated an independent website in competition with other NHL teams’ sites. The NHL clubs have now agreed to prohibit independent team websites and to limit teams to providing “*some* local editorial content,” (JA864, emphasis added), that will occupy a “portion” of an NHL-controlled team website. (JA394-95.) The League

will use its control over the sites, moreover, “to insure that its teams . . . utilize their websites so as to promote NHL Hockey and to enhance the value of NHL Intellectual Property rather than solely or primarily to pursue the Clubs’ own narrow economic interests.” (JA154-55.)

This loss of independence—and the accompanying fundamental shift in both the essential focus of what would be the only Rangers website, and in control over the content of the site—will irretrievably damage what is “by far the most important of all the tools,” (JA1130-31), in cultivating the Rangers’ relationships with their fans and advertisers and their competition with other NHL clubs. *See also* JA53; JA77-82; JA1108-15; JA1129-37. With every day that the Rangers are denied the opportunity to operate an independent website, they lose a perishable opportunity to build relationships and good will with Rangers fans in the ways that they—not the other NHL member teams—believe are best suited to those purposes.

These injuries—of, for example, lost relationships with fans, lost good will, and lost communications—are not easily quantifiable, are irreparable, and plainly support the entry of a preliminary injunction. *See, e.g., Tom Doherty Assocs., Inc. v. Saban Entm’t, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995) (noting that harm is irreparable where movant is “threatened [with] loss of good will and customers, both present and potential” and where it suffers “not merely loss of profits . . . but loss of good

will”) (internal quotation marks omitted); *Church of Scientology Int’l v. Elmira Mission of Church of Scientology*, 794 F.2d 38, 44 (2d Cir. 1986) (reversing district court finding of no irreparable harm from defendant’s misuse of licensed products after termination of license; “it is th[e] loss of control which is the very thing that constitutes irreparable harm in the licensing context”); *Reuters Ltd. v. United Press Int’l, Inc.*, 903 F.2d 904, 908 (2d Cir. 1990) (reversing finding of no irreparable harm to wire service where competitor threatened to interrupt flow of news and photographs; “interruption however short the time in a newspaper’s coverage of the news causes it to lose readership”).

Moreover, without an injunction to preserve the *status quo*, there will also be irreparable harm *to consumers and advertisers*. “Whenever a request for a preliminary injunction implicates public interests, a court should give some consideration to the balance of such interests in deciding whether a plaintiff’s threatened irreparable injury and probability of success on the merits warrants injunctive relief.” *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 233 (2d Cir. 1999) (quoting *Time Warner Cable v. Bloomberg, L.P.*, 118 F.3d 917, 929 (2d Cir. 1997)); *see also Brody v. Vill. of Port Chester*, 261 F.3d 288, 290 (2d Cir. 2001) (same). Moreover, in the antitrust context, “[f]ar more important than the interests of either the defendants or the existing industry . . . is the public’s interest in enforcement of the antitrust laws and in the preservation of competition.”

United States v. Columbia Pictures Indus., Inc., 507 F. Supp. 412, 434 (S.D.N.Y. 1980). This Court has thus made clear that, in antitrust actions where the public interest is clear and pervasive, any “doubts as to whether an injunction sought is necessary to safeguard the public interest” should be “resolved in favor of granting the injunction.” *Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 699 (2d Cir. 1973).

Here, the injury to consumers, advertisers and competition is clear. By prohibiting the Rangers from operating an independent website, the NHL has limited consumers’ and advertisers’ choice to an NHL-controlled site that is specifically designed to promote the NHL brand rather than respond to fans’ “tribal” preferences. Moreover, by putting control of all team websites in the hands of the NHL, the NHL’s prohibition on independent team sites “deprives the marketplace of the independent centers of decision-making that competition assumes and demands.” *Copperweld*, 467 U.S. at 768-69. These are precisely the sort of injuries to competition and consumer welfare at which the antitrust laws are aimed and that should be remedied by an injunction. *See Full Draw Prods. v. Easton Sports, Inc.*, 182 F.3d 745, 754 (10th Cir. 1999) (conduct that “reduced the number of competitors in the market from two to one” “decreas[ed] competition and harm[ed] consumers”).

2. In denying the preliminary injunction, the district court did not expressly rule on irreparable harm. It nonetheless downplayed the harm to the Rangers on the ground that the Rangers' ability to supply "local stories and information" to the NHL-controlled Rangers site is substantially equivalent to having an independent site. (SPA13 n.5.) This assessment is untenable on the record below.

In particular, the district court's assessment cannot be squared with the NHL's own evidence that the League intends to use its control over team websites to give the sites a fundamentally different focus, and to pursue goals different from the individual teams' goals. The NHL openly plans to ensure that team websites are used "so as to promote NHL Hockey and to enhance the value of NHL Intellectual Property rather than solely or primarily to pursue the Clubs' own narrow economic interests." (JA154-55.) The Rangers' ability to provide "some" local content on a "portion" of the site—all "within the parameters of the standardized template" (JA395-96; JA864)—is hardly sufficient to counteract the effect of the NHL's overall control of the site. Indeed, the Collins and Fisher declarations make clear that the NHL fully expects the focus of team sites, and their effect on fans and advertisers, to be significantly altered.

Moreover, as MSG showed below, the shift to a standardized NHL template will, at a minimum, eliminate full access to certain critical Rangers-oriented

features. (JA84-85.) As one example, the League’s standard template would replace the popular “Rangers On Demand” video feature—showing Rangers-focused video—with a more League-oriented video feature (JA85.)⁵ The imposition of an “NHL news” feature on the home page under the League’s template is another example of the dilution of the team-centric nature of the Rangers’ website in favor of a League-wide message. (JA81-82.)

In addition, the district court’s narrow focus on “local content” ignored Professor Deighton’s explanation that a website is *not* merely a “distribution mechanism for disseminating” particular content, and that its effect depends on the message conveyed by the site as a whole: *i.e.*, a website is a “total marketing environment,” and a “place” visited by fans that (to be effective) must convey the “direct, authentic, undistorted and unfiltered voice” of the team. (JA1135-37.) This uncontested evidence thoroughly rebuts any notion that the ability to submit “some” local content at the sufferance of the NHL is even remotely equivalent to having an independent site.

By way of analogy, if the New York Times were prohibited from publishing independently and instead had to use USA Today’s template—and submit to USA

⁵ Even on the NHL’s exhibit created for this litigation, purporting to show how a Rangers page within the League template “might have looked,” the Rangers on Demand feature is cut in half and relegated to a lower corner to make room for the NHL-oriented video function. *Compare* JA610 with JA611.

Today’s control over story placement and the use of colored bar graphs, pictures or other graphical information—the Times’ ability to supply “some” of its content in a “portion” of the newspaper, subject to USA Today’s format and control, plainly would not be the equivalent of publishing the Times independently. The Rangers’ limited ability to publish local content on an NHL-controlled site likewise does not eliminate the harm to the Rangers from the prohibition on independent team sites—let alone the harm to consumers and advertisers.

B. The Balance of Harms Weighs in Favor of a Preliminary Injunction

Finally, the balance of harms overwhelmingly supports MSG. As set forth above, the NHL’s restraint on MSG’s operating an independent website, if allowed to continue, will result in serious, irreparable harms to MSG, the Rangers, consumers, and advertisers.

In contrast, the NHL has no cognizable harms to weigh in the balance. MSG is not seeking to enjoin the NHL from operating its League-wide platform and, indeed, MSG is willing to provide Rangers content to the NHL’s website.

Accordingly, an injunction will not prevent the NHL from obtaining *any* of the legitimate benefits—as opposed to the purely anti-competitive benefits—that it asserts will flow from operating a common platform website, including enhanced interconnectivity between team sites on the NHL’s server, the ability to promote a more League-centric fan base, and reduced transaction costs with advertisers.

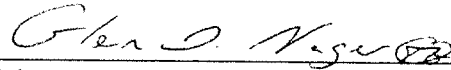
In short, the balance of equities tips decidedly toward MSG.

CONCLUSION

The Court should reverse the district court's order denying MSG's motion for a preliminary injunction and remand with instructions to enjoin the NHL against prohibiting an independent Rangers website, or imposing any sanction or penalty for the operation of such a site, pending trial in this action.

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Respectfully submitted,



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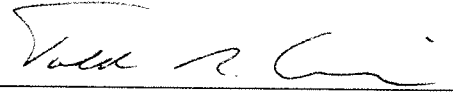
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B)(i). It contains 13,823 words as counted by the word-processing system used to prepare the brief, exclusive of the parts of the brief exempted from the type-volume limitation by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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ANTI-VIRUS CERTIFICATION

Case Name: Madison Square Garden, L.P. v. National Hockey League

Docket Number: 07-4927-cv

I, Nadia R. Oswald, hereby certify that the Appellant's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 11/16/2007) and found to be VIRUS FREE.

A handwritten signature in black ink, appearing to read "Nadia R. Oswald", written over a horizontal line.

Nadia R. Oswald
Record Press, Inc.

Dated: November 16, 2007