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I. INTRODUCTION

The “Sherman Act contains a ‘basic distinction between concerted and independent action.’”² The concerted action of several competing firms could be unlawful under Section 1 of the Act, perhaps even unlawful *per se*, when the same action, if independently taken by a single firm, undoubtedly would be lawful under Section 2 of the Act. Hence, a joint venture and its participants defending a Section 1 claim are apt to assert the absence of the plurality of actors required for a contract, combination, or conspiracy under Section 1. Rather, they could argue, the challenged action was taken by a single economic entity—the venture itself, and its participants acted, if at all, in their roles as the venture’s directors.³

In 1982 the Supreme Court invited joint ventures to make the single-entity argument by observing in *Maricopa County* that a “joint arrangement[] in which persons who would otherwise be competitors pool their capital and share risks of loss as well as the opportunities for profit” is “regarded as a single firm competing with the other sellers in the market.”⁴ Later that year, Justice Rehnquist encouraged the NFL to make the argument by opining that the NFL teams “compete with one another for home game attendance and local broadcasting revenues. In all other respects the league competes as a unit against other forms of entertainment.”⁵

After 1982, the NFL often made the single-entity argument unsuccessfully.⁶ In *American Needle*, however, the NFL relied on the argument in obtaining summary judgment against a plaintiff asserting that an exclusive license for all the teams’ logos and trademarks was the product of a horizontal agreement among the teams.⁷ The district court’s grant of summary judgment was affirmed by the court of appeals,⁸ and the Supreme Court will soon decide whether the lower courts were right.⁹

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² *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)).

³ Joint venture participants could make the argument most convincingly if they were not competitors before or after formation of the venture, but this article does not address such scenarios.

⁴ *Ariz. v. Maricopa County Med. Soc’y*, 457 U.S. 332, 356 (1982).

⁵ *NFL v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of cert.).

⁶ *See, e.g., Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir. 1994) (restraint on franchise ownership); *Los Angeles Mem’l Coliseum Comm. v. NFL*, 726 F.2d 1381, 1387–90 (9th Cir. 1984) (franchise location restraints); *McNeil v. NFL*, 790 F. Supp. 871, 878–80 (D. Minn. 1992) (labor market restraint).

⁷ *American Needle Inc. v. New Orleans Louisiana Saints*, 496 F. Supp. 2d 941 (N.D. Ill. 2007).

⁸ *American Needle Inc. v. NFL*, 538 F.3d 736 (7th Cir. 2008).

⁹ Certiorari granted, 129 S. Ct. 2859 (June 29, 2009) (No. 08-661); argued Jan. 13, 2010, *See Transcript of Oral Argument, American Needle Inc. v. NFL* (No. 08-661), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-661.pdf.

II. ANTITRUST DOCTRINE ON THE SINGLE-ENTITY ARGUMENT

The single-entity argument advanced by joint ventures is rooted in *Copperweld*, which held that commonly owned corporations are not separate economic entities for purposes of Section 1.¹⁰ *Copperweld* is relevant to joint ventures mainly because it articulated in general terms “the appropriate inquiry” for determining whether Section 1 applies—whether “the logic underlying Congress’ decision to exempt unilateral conduct from § 1 scrutiny . . . similarly excludes” the conduct at issue.¹¹

Copperweld held that “an internal ‘agreement’ to implement a single, unitary firm’s policies” does not “raise the antitrust dangers that § 1 was designed to police.”¹² The Court observed that “officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.”¹³ And the Court declared that “the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor,” reasoning that each division “pursues the common interests of the whole” so coordination among them entails no “sudden joining of two independent sources of economic power previously pursuing separate interests.”¹⁴ Although sister divisions, like those of General Motors, might engage in marketplace rivalry, the Court presumed that they would resolve all conflicts in favor of maximizing joint profits.

The multi-divisional corporate structures analyzed in *Copperweld* typically were created by mergers, as was the particular structure presented by that case.¹⁵ *Copperweld* teaches that, when two companies merge, they become a single economic entity for Section 1 purposes. This is so even if the companies thereafter operate as separate divisions engaged in marketplace rivalry.¹⁶ In this respect, *Copperweld* made Section 1 doctrine congruent with Section 7 doctrine. The essential premise for antitrust analysis of a merger always has been that the two firms cease to be “separate economic actors pursuing separate economic interests” and the merged firm “pursues the common interests of the whole.” However merging firms would be operated post merger, the law conclusively presumes that the merger eliminates the competition between them.¹⁷

¹⁰ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

¹¹ *Id.* at 776.

¹² *Id.*

¹³ *Id.* at 767.

¹⁴ *Id.* at 770–71.

¹⁵ The “agreement” at issue in the case was between *Copperweld Corp.* and *Regal Tube Co.*, which was purchased by *Lear Singer* then sold to *Copperweld*. *See Id.* at 756, 774.

¹⁶ *Copperweld* repudiated a line of cases focusing on whether subsidiaries had operated separately as a matter of fact. *See Id.* at 772 n.18.

¹⁷ *See, e.g., Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) (“Mergers among competitors eliminate competition . . .”); *Brown Shoe Co. v. United States*, 370 U.S. 294, 335 (1962) (“Where the arrangement effects a horizontal merger between companies occupying the same product and geographic market, whatever competition previously may have existed in that market between the parties to the merger is eliminated.”); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 717 (D.C. Cir. 2001) (referring to “indisputable fact that the merger will eliminate competition between the two merging parties”); *United States v. Rockford Mem’l Corp.*, 898 F.2d 1278, 1282 (7th Cir. 1990) (Posner, J.) (“every merger eliminates competition between the parties to the merger”).

III. JOINT VENTURES AS PARTIAL MERGERS

Beginning with *Penn-Olin*, enforcement agencies and courts have treated as mergers some transactions structured as joint ventures.¹⁸ The Supreme Court's rationale for applying Section 7 in *Penn-Olin* was largely that forming the joint venture eliminated competition between its two participants in the venture's market.¹⁹ Thus, the Court treated the formation of the joint venture as a merger because the essential premise of merger analysis applied.

Dagher provides a more recent example of joint venture formation treated as a merger.²⁰ The backdrop for that case was formation of two regional ventures in which Shell and Texaco combined operations in a manner "ending competition between the two companies in the domestic refining and marketing of gasoline."²¹ Formation of the joint ventures, therefore, was appropriately treated as a merger by the FTC.²² As described by the Supreme Court, each venture was "a single entity" with Shell and Texaco acting "in their role as investors, not competitors."²³

The joint ventures in *Penn-Olin* and *Dagher* affected only some of the markets in which their participants actually or potentially competed. In forming their joint ventures, Shell and Texaco eliminated competition between them in domestic gasoline markets but did not eliminate competition between them in other petroleum markets. In forming their joint venture, Pennsalt and Olin Mathieson eliminated the potential for competition between them in sodium chlorate production but did not eliminate competition between them in other chemicals. Yet as to the markets in which the ventures operated, the formation of both joint ventures was treated as a merger under Section 7.

In *Dagher* the Supreme Court did not address the legality of venture formation, but rather focused on a pricing policy of the ventures. The court of appeals had held that the policy was *per se* illegal unless shown to be ancillary, i.e., "reasonably necessary to further the legitimate aims of the joint venture."²⁴ In reversing, the Supreme Court declared that the ancillary restraints doctrine "governs the validity of restrictions imposed by a legitimate . . . joint venture, on **nonventure activities**" and that a joint venture is not required to offer any justification when "the business practice being challenged involves the core activity of the joint venture itself."²⁵ *Dagher* implies that "core activity" of the joint ventures was beyond the reach of Section 1, absent a challenge to formation,²⁶ which follows from the fact that the formation of the joint ventures effected a partial merger.

¹⁸ See, e.g., *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 167–72 (1964); *FTC v. Warner Commcn's Inc.*, 742 F.2d 1156, 1159, 1163–65 (9th Cir. 1984); *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 974, 976 (8th Cir. 1981); *FTC v. Harbour Group Invs.*, 1990-2 Trade Cas. (CCH) ¶ 69,247, at 64,913–14 (D.D.C. 1990); *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1414 (W.D. Mich. 1989).

¹⁹ See *Penn-Olin*, 378 U.S. at 169 ("[I]t may be assumed that neither [parent] will compete with the progeny in its line of commerce.").

²⁰ *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

²¹ *Id.* at 4.

²² See Brief for the United States as Amicus Curiae Supporting Petitioners 4, 13 & n.8, *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (Nos. 04-805 & 04-814).

²³ *Dagher*, 547 U.S. at 6–7. In contrast, the Court had been "moved by the identity of the persons who act, rather than the label of their hats" in *United States v. Sealy, Inc.*, 388 U.S. 350, 353 (1967).

²⁴ *Dagher v. Saudi Refining Inc.*, 369 F.3d 1108, 1121–22 (9th Cir. 2004).

²⁵ *Dagher*, 547 U.S. at 7 (emphasis added).

²⁶ The Court noted that formation could have been challenged under Section 1, but was not. *Id.* at 6 n.1. Assuming a joint venture's formation was lawful, its ordinary operations must also be lawful. "Because it would be senseless for antitrust law to take away with one hand what it gives with the other, . . . the subsequent realization of

Major professional sports leagues have much in common with the partial mergers in *Penn-Olin* and *Dagher*. The teams are merged as to league operations, such as making the rules for play and setting the schedule of games, yet they compete not only on the field but also in other ways such as hiring players and coaches.²⁷ Consequently, the Seventh Circuit held in *American Needle* “that the question of whether a professional sports league is a single entity should be addressed . . . ‘one facet of a league at a time.’”²⁸ Applying the *Copperweld* inquiry in that manner, the court explained that “the single-entity determination” focuses on “whether the conduct in question deprives the marketplace of the independent sources of control that competition assumes.”²⁹

For a joint venture effecting a partial merger of competitors, venture formation is subject to a conventional merger analysis focused on markets in which competition among participants ends. However, the analysis also must consider the possibility of spillovers to other markets. A partial merger with pro-competitive effects in the directly affected markets could indirectly produce anticompetitive effects in related markets. Indeed, a joint venture could be used to cartelize a market in which the participants ostensibly continue to compete.

The competitive danger uniquely associated with partial mergers is illustrated by an input supply venture formed by merging the captive supply operations of a group of manufacturers.³⁰ The venture could be used to restrict the manufacturers’ aggregate output and force up the market price. Alternatively, the venture could be used to increase the manufacturers’ marginal costs of production and induce them to raise their prices.³¹

Formation of the foregoing venture could be an unreasonable restraint of trade,³² but substantial efficiency benefits could outweigh competitive risks, making the joint venture lawful under the rule of reason. If so, Section 1 still safeguards against using the joint venture as a cartelization device. *Dagher* does not preclude scrutinizing the pricing and output decisions of a joint venture to limited extent of asking whether the manufacturers, like Shell and Texaco, acted “in their role as investors, not competitors.” The manufacturers act in the latter capacity if they use the venture to cartelize the downstream market.³³

Consistent with all of the foregoing, the merits brief filed by the Solicitor General in *American Needle* set out a pair of necessary and sufficient conditions for an action taken by a sports league to be that of a single entity for Section 1 purposes:

that which was foreseeable and judged reasonable at the time of creation must also be legal.” 7 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1478b1, at 320 (2d ed. 2003).

²⁷ See *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 58 (1st Cir. 2002) (Boudin, J.) (describing Major League Soccer); *Chicago Prof'l Sports Ltd. v. NBA*, 95 F.3d 593, 599–60 (7th Cir. 1996) (Easterbrook, J.) (describing the NBA).

²⁸ *American Needle Inc. v. NFL*, 538 F.3d 736, 742 (7th Cir. 2008) (quoting *Chicago Prof'l Sports*, 95 F.3d at 600).

²⁹ *Id.*

³⁰ For a more detailed discussion of this danger, see Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 723–24 & nn. 89–93 (1998).

³¹ This could be done by setting the price for the input well above competitive levels and paying out the joint venture’s profits in fixed ownership shares.

³² Cf. AREEDA & HOVENKAMP, *supra* note 26, ¶ 1478b2, at 321–22 (“Unacceptable spillovers on the parents’ competition with each other can be seen as an aspect of the agreement creating the venture and, if not avoidable by altering venture mechanics, could justify dissolution of the venture as unlawful collaboration among the parents.”).

³³ Moreover, if a venture supplies only its participants, it never acts, in the language of Maricopa County, as “a single firm competing with the other sellers in the market.”

First, the teams and the league must have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere. Second, the challenged restraint must not significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations.³⁴

The brief stresses that formation of a joint venture by competitors always entails concerted conduct, as does any reformation eliminating competition previously preserved.³⁵ This pair of conditions presumes that league formation either passes antitrust muster or is not challenged.³⁶

The application of the government's test depends on the nature of the plaintiff's allegations, in particular, on the relationship between the challenged conduct and the asserted anticompetitive effect giving rise to a claim. If both involve the same market, only the first part of the government's test is used. It asks whether the challenged conduct occurred within the aspects of operations the teams previously had merged in forming, or reforming, their league.³⁷ If the anticompetitive effect allegedly giving rise to the claim occurs in a market other than that in which the challenged conduct occurred, both parts of the test are used. The second part asks whether the asserted anticompetitive effect was proximately caused by a substantial spillover from challenged conduct in merged operations onto competition among the teams in unmerged operations.

IV. A FRAMEWORK FOR ANTITRUST ANALYSIS OF JOINT VENTURES

The implications of accepting or rejecting the single-entity argument are best appreciated in the context of a framework for the antitrust analysis of joint ventures. Below, I present the Solicitor General's test in a compatible framework of my own construction. I describe only the portion of the framework applicable to legitimate joint ventures formed by competitors.³⁸ A legitimate joint venture entails an efficiency-enhancing integration of economic activity and does not mask a cartel.

A central element of this framework is the "indivisibility principle" under which a joint venture is not treated as a collection of distinct agreements among the participants, each of which is individually subject to Section 1 scrutiny. As stated by Judge Sotomayor: "Joint ventures are typically evaluated as a whole under the rule of reason because the competitive effects of an individual restraint are intertwined with the effects of the remainder of the venture."³⁹ The

³⁴ Brief for the United States as Amicus Curiae Supporting Petitioners 17, *American Needle Inc. v. NFL* (No. 08-661). The brief set out criteria under which the federal enforcement agencies "ordinarily treat the formation of a joint venture as an effective merger." *Id.* at 18 n.8. See FTC & U.S. Department of Justice, *Antitrust Guidelines for Collaboration among Competitors* § 1.3 (Apr. 2000) (setting out the cited criteria); see also Werden, *supra* note 30, at 715-16 (advocating similar criteria).

³⁵ Brief for the United States, *supra* note 34, at 15-16.

³⁶ A premise of the brief was that "[t]he NFL is a legitimate joint venture." *Id.* at 5. The brief also observes that "cartels do not involve an effective merger." *Id.* at 19 n.9.

³⁷ The NBA mistakenly argued that the test implies that divisions of a single corporation are separate economic entities if they engage in marketplace rivalry. See Brief of Amicus Curiae National Basketball Association and NBA Properties in Support of Respondents 21-24, *American Needle Inc. v. NFL* (No. 08-661). Nearly every example of competing divisions cited by the NBA involved a corporate structure created by merger, and actual mergers necessarily constitute effective mergers.

³⁸ For the full framework, see Werden, *supra* note 30; Gregory J. Werden, *The Ancillary Restraints Doctrine after Dagher*, 8 *SEDONA CONF. J.* 17 (2007).

³⁹ See *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring) (emphasis added).

indivisibility principle also implements the notion that antitrust law imposes no obligation to form a joint venture in the most pro-competitive manner or to justify how it is formed.

The indivisibility principle asserts that a joint venture's formation agreements and ancillary restraints form an indivisible whole for Section 1 purposes. Formation agreements are embodied in the organic documents defining what a joint venture does and how it is governed. To whatever extent a joint venture's formation agreements eliminate competition among its participants, they are horizontal restraints subject to challenge under Section 1 (and possibly Section 7), but they are evaluated as a whole on the basis of their overall impact on competition.

The treatment of a restraint on the conduct of a joint venture's participants outside the venture depends on whether it is ancillary,⁴⁰ i.e., whether it "has an 'organic connection' to the venture's operations and serves to make the venture operate more efficiently or effectively."⁴¹ I interpret the ancillary restraints doctrine to hold that

a restraint collateral to a legitimate joint venture, limiting the ability of participants to compete outside the venture, is assessed as part of a package that includes the formation of the venture, if at the time the restraint was adopted, the restraint had an organic connection to venture and was reasonably necessary to make the venture more efficient or effective in achieving its procompetitive purposes.⁴²

In contrast, a non-ancillary restraint on participant conduct outside a venture is assessed independently and might easily be condemned.⁴³

The formation of a joint venture can effect a partial merger within a particular market. As highlighted by the Solicitor General's test, this occurs only if formation "eliminat[es] actual and potential competition among the [participants] and between the [participants] and the [venture] in that [market]."⁴⁴ To constitute an effective merger, a joint venture also must have a permanence comparable to that of a merger. A joint venture lacks such permanence if its formation agreements specify its termination within a relatively short time.⁴⁵ An effective merger can be accomplished through contracts transferring operational control of productive assets without transferring

⁴⁰ See *supra* note 25 and accompanying text; see also Werden, *supra* note 38, at 19–21.

⁴¹ *Id.* at 21–24 (collecting cases and quoting *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984) (Posner, J.)).

⁴² *Id.* at 27. Cf. *Salvino*, 542 F.3d at 338 (Sotomayor, J., concurring) ("under the doctrine of ancillary restraints, when a challenged restraint is not reasonably necessary to achieve any of the efficiency-enhancing purposes of a joint venture, it will be evaluated apart from the rest of the venture"). Some restraints should be treated as ancillary without inquiring into whether they are. These are restraints affecting only competition that exists because of the venture. See Werden, *supra* note 30, at 710–11.

⁴³ See *Salvino*, 542 F.3d at 338 (2d Cir. 2008) (Sotomayor, J., concurring) ("a per se or quick-look approach may apply to joint ventures . . . where a particular challenged restraint is not reasonably necessary to achieve any of the efficiency-enhancing benefits of a joint venture"); see also *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 113–15, 120 (1984) (condemning a restraint not reasonably necessary to achieve a procompetitive purpose).

⁴⁴ The federal enforcement agencies had set out criteria under which the formation of a joint venture is treated as a merger, including that formation "eliminates all competition among the participants in the relevant market." See Guidelines, *supra* note 34, § 1.3.

⁴⁵ The federal enforcement agencies treat the formation of joint venture as a merger only if it "does not terminate within a sufficiently limited period by its own specific and express terms." The agencies generally "use ten years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger." *Id.* § 1.3 & n.10. On point is *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981). The joint venture agreement had a ten-year term and allowed either party to terminate during the ten years by giving notice. Yamaha gave notice of termination before the appeal was docketed, but the appeals court nevertheless held that the limited duration of the joint venture did not preclude treating it as a merger under Section 7. *Id.* at 974–75, 979–80 & n.11.

ownership.⁴⁶ As in *Copperweld*, antitrust law should reject any rule that “looks to the form of an enterprise’s structure and ignores the reality.”⁴⁷

In applying the Solicitor General’s test, the relevant aspects of operations can be defined by the complaint’s relevant market allegations, and the formation agreements, therefore, should be sufficient for determining whether those aspects of operations were effectively merged. The test can be applied without resolving disputes over the scope of the relevant market. The test addresses only the threshold issue of whether separate economic entities acted in concert. A fact-intensive inquiry into the reasonableness of the challenged conduct is required if it is found to be concerted.⁴⁸

The formation of a joint venture treated as a partial merger is subject to challenge under Section 1 or Section 7. The basis for finding a violation of either statute normally would be that venture formation substantially lessens competition in one or more markets within which formation effectively merges the operations of the participants. In exceptional cases, the basis for finding a violation could be that a spillover lessens competition among the participants in a related market in which the participants ostensibly continue to compete.

In a challenge to joint venture formation, all pro-competitive effects of the venture are weighed against any anticompetitive effects. This is the key practical consequence of the indivisibility principle. For the vast majority of joint ventures, the indivisibility principle makes a formation challenge exceptionally difficult to win, and, consequently, the indivisibility principle makes such challenges rare.

If the governance structure of a joint venture assigns operating control to an independent management, management actions within the ambit of the effectively merged operations are those of a single economic entity. With such joint ventures, the participants are ordinary investors; indeed, such a venture often is a stock company in which the participants own stock in equal shares. The delegation of control to the joint venture’s management is subject to challenge on the basis of its foreseeable effects at that time. If a joint venture later proves anticompetitive, its formation can then be challenged on the basis that the overall actual effect of the venture has been to lessen competition.⁴⁹

⁴⁶ *Cf.* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984) (“initial acquisition of **control** will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act” (emphasis added)); *United States v. Archer-Daniels-Midland Co.*, 584 F. Supp. 1134 (S.D. Iowa 1984) (13-year lease with option to purchase treated as an acquisition under Section 7).

⁴⁷ *Copperweld*, 467 U.S. at 772. Appeals courts have held that separately owned entities were not legally separate when they pursued a common interest. See, e.g., *Jack Russell Terrier Network v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1034–36 (9th Cir. 2005); *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 271, 277 (8th Cir. 1988).

⁴⁸ The petitioner in *American Needle* had no sound basis for asserting that the “‘effective merger’ test would undoubtedly increase the length, expense, and uncertainty of antitrust litigation.” Reply Brief of Petitioner 23, *American Needle Inc. v. NFL* (No. 08-661). Nor did NFL have a sound basis for asserting that “the government’s test would lead to . . . endless and costly rounds of litigation.” Brief for the NFL Respondents 49, *American Needle Inc. v. NFL* (No. 08-661).

⁴⁹ The Supreme Court has held that a merger challenge can be made decades later on the basis of effects apparent at the time of suit. See *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 622 n.14 (1957). Spillover effects, in particular, might not be apparent until well after consummation. If the joint venture is unlawful, the proper remedy could be reformation or dissolution, depending on the nature of the anticompetitive effect and the mechanism through which it is produced.

If the governance structure of the joint venture assigns the participants an active role in decision making, particular actions by the venture are not subject to challenge under Section 1 if they are within an effectively merged area of operations and do not have significant spillover effects on the unmerged operations of the participants. Under these conditions, the participants, as in *Dagher*, act not as competitors, but rather as the directors of a single economic entity.⁵⁰ Applying the logic of *Copperweld*, their actions do not “suddenly bring together economic power that was previously pursuing divergent goals.” In the venture’s marketplace dealings with non-participants, decisions on basic business operations, especially on price and output of the venture’s products, are the actions of a single economic entity.⁵¹

A business decision within a merged area of operations, however, could “suddenly bring together economic power that was previously pursuing divergent goals” if it had a significant spillover on competition among the participants in unmerged operations. Spillovers are addressed in a single-entity analysis only if the asserted anticompetitive effect allegedly results from such a spillover. To be of significance in the single-entity analysis, a spillover on unmerged operations must be substantial and proximately caused by the challenged conduct within a merged area of operations.

Consideration of spillovers in the single-entity analysis does not assess and weigh the competitive effects of the challenged conduct as the rule of reason would.⁵² The single-entity analysis merely parses the allegations made and assesses the plausibility of any allegations of the requisite spillovers.⁵³ Plausible allegations of such spillovers are unlikely with a sports league, so the second part of the Solicitor General’s test is apt to come into play only with other sorts of ventures, such as the supply joint venture discussed above.

If the formation of a joint venture effectively merges the participants’ operations in one or more affected markets, the participants could remain competitors in unaffected markets. The participants continue to act as separate economic entities in the unaffected markets, and any non-ancillary restraint on how they compete in an unaffected market, or whether they compete, is a horizontal restraint of trade subject to Section 1.

V. IMPLICATIONS FOR THE NFL

Because the NFL teams are independently owned and operated, the petitioner in *American Needle* argued that the NFL never acts as a single economic entity.⁵⁴ The petitioner even insisted that the rules governing play on the field and the schedule of league games are subject to

⁵⁰ It does not matter that the participants could have conflicting interests outside the joint venture. *See Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 598 (7th Cir. 1996) (“*Copperweld* does not hold that only conflict-free enterprises may be treated as single entities.”) (Easterbrook, J.). Ordinary investors in public companies could have conflicting interests.

⁵¹ *See Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006) (“As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products it sells”); *AREEDA & HOVENKAMP*, *supra* note 26, ¶ 1478c, at 325.

⁵² The petitioner in *American Needle* mistakenly asserted that the “proposed ‘effective merger’ test is obviously just a truncated Rule of Reason inquiry into competitive effects” and that applying the test is “likely to require frequent jury determinations.” Petitioner’s Reply, *supra* note 48, at 24–26.

⁵³ Implausible allegations would not survive a motion to dismiss. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

⁵⁴ *See* Brief of Petitioner 16–27, *American Needle Inc. v. NFL* (No. 08-661).

Section 1 challenge.⁵⁵ In contrast, the NFL argued that its teams always act as a single economic entity in the production or promotion of NFL football which, the NFL asserted, is all they do.⁵⁶ The NFL even insisted that team owners would act as a single economic entity if they agreed on prices for their franchises.⁵⁷ The NFL conceded that its teams could act as separate entities but pointed only to hypothetical activities unrelated to football.⁵⁸

Undesirable implications of the litigants' positions are avoided by the Solicitor General's effective merger test. Under that test, the NFL acts as a single economic entity in governing league play, including setting the number of games in the NFL season and the specific schedule for each team. The NFL also acts as a single economic entity in marketing the league as a whole, for example, in negotiating broadcasting contracts for all of the league's games.

Under the effective merger test, the NFL does not act as a single economic entity in restraining competition off the field, particularly as regarding competition to hire players or coaches, but restraints on such competition might be ancillary. For example, limiting player salaries might be reasonably necessary to maintain competitive balance. Any ancillary restraints should be treated as part of joint venture formation, which means, as a practical matter, that they will be lawful under the rule of reason.

Under the effective merger test, it is not clear on the existing record whether the conduct challenged in *American Needle* was that of a single economic entity. But granting of an exclusive license to Reebok could have been the act of a single economic entity on the basis that the NFL teams had effectively merged their intellectual property licensing operations. NFL Properties was created in 1963 to do all the teams' licensing,⁵⁹ and each team later granted NFL Properties (either directly or indirectly through the NFL Trust) the exclusive right to license its intellectual property.

Pooling the intellectual property was concerted conduct, and the petitioner insists that it challenged the pooling.⁶⁰ But the pooling undoubtedly produced efficiencies yet was unlikely to have eliminated meaningful competition. To a vendor like American Needle, seeking to license the intellectual property of all NFL teams, licensing rivalry among the teams could not be meaningful because there would be no way to play one team off against another. To a vendor seeking to license the intellectual property of a single NFL team, no form of licensing rivalry would be possible because each team has a monopoly over its own intellectual property. Competition has the potential to be meaningful only in implausible scenarios.

⁵⁵ See Transcript, *supra* note 9, at 6–10.

⁵⁶ See NFL Brief, *supra* note 47, at 20–29.

⁵⁷ See Transcript, *supra* note 9, at 60–61.

⁵⁸ See *Id.* at 47–48; NFL Brief, *supra* note 47, at 14, 20, 52–53.

⁵⁹ It appears that there was no significant licensing by NFL teams until 1959, when Roy Rogers pitched a marketing plan. For four years, his company marketed the IP of all of the NFL teams. The first president of NFL Properties was Larry Kent, who had been Roy Rogers' manager of marketing. See Neil Steinberg, *He Could Always Move Merchandise*, SPORTS ILLUSTRATED, July 27, 1998, available at <http://images.si.com/vault/article/magazine/MAG1013413/index.htm>.

⁶⁰ See Petitioner's Reply, *supra* note 48, at 28–30; Transcript, *supra* note 9, at 26–27.