Case No. 14-15139

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

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

PLAINTIFFS AND APPELLANTS' OPENING BRIEF

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INTRODUCTION

This case involves the validity and contours of the judicially created "baseball exemption" to the American antitrust laws. The "baseball exemption" is based on highly questionable precedent set in 1922 in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), a decision premised on the now defunct argument that the business of baseball is an entirely *intrastate* affair. Justice Blackmun referred to the "baseball exemption" as an "anomaly and aberration," writing that "[w]ith its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly." *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). Justice Douglas added that "[t]his Court's decision in *Federal Baseball Club … is a derelict in the stream of the law that we, its creator, should remove*." *Id.* at 286 (emphasis added). Judge Ronald W. Whyte, from whose court this appeal arises, wrote that he was bound by the 1922 *Federal Baseball* decision, but added:

> This court agrees with the other jurists that have found baseball's antitrust exemption to be 'unrealistic, inconsistent, or illogical.' The exemption is an 'aberration' that makes little sense given the heavily interstate nature of the 'business of baseball' today.

I ER 021:18-21 (Order Granting-in-Part and Denying-in-Part Defendants' Motion to Dismiss Plaintiffs' Complaint*)*; *citing Radovich v. National Football League*, 352 U.S. 445, 452 (1957); *Flood*, 407 U.S. at 282.

A product of a bygone era, *Federal Baseball* is the most widely criticized of the Supreme Court's antitrust decisions. *Federal Baseball*, now approaching its centennial anniversary, has not withstood the test of time. Other Commerce Clause decisions from that era have been updated in light of a keener awareness of real world business circumstances. This Court should find the outdated "baseball exemption" is based on the reserve clause and does not prevent these claims from proceeding under federal and state antitrust and California unfair competition laws.

Many courts and commentators have opined and written on the antiquated nature of *Federal Baseball*. Writing for the Second Circuit, Judge Friendly commented, "We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days [and] that the rationale of *Toolson* is extremely dubious …" *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971). As legal historian Stuart Banner writes in the introduction to his recent book, *The Baseball Trust*, "Scarcely anyone believes that baseball's exemption makes any sense." (Oxford, 2013). *See*

Samuel G. Mann, *In Name Only: How Major League Baseball's Reliance on Its Antitrust Exemption Is Hurting the Game*, 54 Wm. & Mary L. Rev. 587 (2012); Mitchell Nathanson, *The Irrelevance of Baseball's Antitrust Exemption: A Historical Review*, 58 Rutgers L. Rev. 1 (2005); Morgan A. Sullivan, *A Derelict in the Stream of Law: Overruling Baseball's Antitrust Exemption*, 48 Duke L.J. 1265 (April 1999); Stephen F. Ross, *Reconsidering Flood v. Kuhn*, 12 U. Miami Ent. & Sports L. Rev. 169 (1994-1995); Andrew Zimbalist, *Baseball Economics and Antitrust Immunity*, 4 Seton Hall J. Sport L. 287 (1994); and Connie Mack & Richard M. Blau, *The Need for Fair Play: Repealing the Federal Baseball Antitrust Exemption*, 45 Fla. L. Rev. 201 (1993).

This case was brought because Defendants and Respondents Office of the Commissioner of Baseball and Allan Huber "Bud" Selig (collectively, "MLB") have and continue to deny the rights of baseball clubs and cities to freely negotiate relocation and stadium deals. MLB justifies its conduct under highly questionable legal precedent and, if allowed to continue, will damage Plaintiffs and Appellants the City of San José, the City of San José as successor agency to the Redevelopment Agency of the City of San José, and the San José Diridon Development Authority (collectively, "San José" or the "City of San José"), as well as many other operations of baseball –

each of which should be governed by the same antitrust laws affecting *all other sports in the United States*. MLB has operated and continues to openly operate in violation of American antitrust laws based on 1922 legal authority that is both unsupported by contemporary jurisprudence and the object of widespread criticism. There is a strong public interest in preventing this illegal conduct from continuing.

This appeal arises out of MLB's exclusive territorial rights agreement between and among member clubs, which constitutes a blatant market allocation scheme *illegal* under the American antitrust laws for all other professional sports. II ER 062-064, ¶ 1, 4-11 (Complaint). "A market allocation agreement between competitors at the same market level is a classic *per se* antitrust violation." *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991), *citing United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972). Pursuant to this illegal exclusive territorial rights agreement, MLB has refused to permit the Athletics Club to relocate from Oakland to San José, purportedly because the San Francisco Giants Club "owns" the exclusive territorial rights to San José. II ER 066, ¶ 19.

After years of preliminary negotiations, in November 2011, the City of San José and the Athletics Club entered into an Option Agreement which granted the Athletics a two year option (with a one year extension) to

acquire property in San José, and relocate the Athletics Club to San José. II ER 079, ¶ 76; *see also id*. at 199 (Option Agreement). The City of San José spent considerable time, resources, political capital, and effort to secure the rights to property within San José that would be able to accommodate a professional sports stadium. The Option Agreement included an extension for a third year. *Id*. The Athletics exercised this extension for a third year, thereby extending the option through November 2014. III ER 038:14-17. The Athletics Club has not been able to exercise its option, however, because MLB continues to refuse to allow the Athletics to relocate to San José, illegally restraining competition pursuant to the MLB Constitution and the exclusive territorial rights agreement between and among the MLB Clubs. II ER 081-083, ¶¶ 85-96.

MLB has conducted business in violation of the antitrust laws of the United States since the United States Supreme Court decision in *Federal Baseball Club*, a decision that was dubious in 1922 and indefensible in 2014. Major League Baseball as a *sport* emphasizes competition. Yet Major League Baseball as a *business* refuses to believe it is subject to the same antitrust rules that apply to all other sports. MLB grounds its entire defense in an outdated construction of baseball's reserve clause "exemption" – one that relies on the now defunct proposition that the business of baseball is an

intrastate affair exempt from federal regulation. However, Appellants' claims flow from two distinct violations of federal and California law that have nothing to do with the reserve clause exemption – the only exemption from the federal antitrust laws ever recognized by the Supreme Court.

MLB asserts that it is exempt from laws applicable to all other professional sports, businesses, and individuals of the United States and California, respectively. MLB's argument misapprehends the nature of U.S. Supreme Court precedent such as *Flood v. Kuhn* and misreads the breadth of the *Flood* decision. MLB is not exempt, neither as to Appellants' federal antitrust claims nor as to their state law claims. Appellants have adequately pled all claims. As other courts and commentators have determined, the "exemption" should be found to apply *only* to the reserve clause and *not* to relocation of a team. Accordingly, Appellants respectfully request that this Court (1) reverse the trial court's order dismissing the Sherman Act, Cartwright Act, and unfair competition claims; and (2) vacate the Judgment as to those claims.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this case pursuant to Section 4(a) and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, and 28 U.S.C. §§ 1331 and 1337(a).

On October 11, 2013, the District Court issued an Order Granting-In-Part and Denying-In-Part Defendants' Motion to Dismiss Plaintiffs' Complaint Under Federal Rule of Civil Procedure 12(b)(6). I ER 007-032. The District Court dismissed Appellants' Sherman Act claims and their state law claims for violation of the Cartwright Act and for unfair competition. I ER 007. On December 27, 2013, the District Court dismissed *without prejudice* to refiling in the appropriate state court the two remaining state law claims (tortious interference with prospective economic advantage and tortious interference with contractual advantage). I ER 005.

On January 3, 2014, the District Court entered in its docket a final Judgment in favor of Respondents, finding "plaintiffs are entitled to no relief by way of their complaint," and thereby resolving any remaining issues in the case. I ER 003.

Appellants timely filed a notice of appeal on January 23, 2014. I ER 001. This Court now has jurisdiction pursuant to 28 U.S.C. § 1291 (appellate jurisdiction over final decisions of the district courts).

ISSUES PRESENTED

1. Appellants charge Respondents with violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2. The question is whether MLB's alleged

restraints on relocation of the Athletics baseball club are exempt from Appellants' antitrust claims.

- Is the "baseball exemption" limited to baseball's reserve system, *i.e.*, labor issues?
- Whether Appellants' Sherman Antitrust Act claims – rooted in MLB's restraint on competition in the market for relocation of MLB Clubs – present questions of fact that can only be adjudicated by the trier of fact, *i.e.*, *improperly* resolved at the motion to dismiss stage.
- Whether Appellants have standing under sections 4 or 16 of the Clayton Act. *See* 15 U.S.C. § 15(a) (Section 4 of the Clayton Act, which confers standing for the recovery of treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ."); 15 U.S.C. § 26 (Section 16 of the Clayton Act, which permits claims for injunctive relief "against threatened loss or damage by violation of the antitrust laws").

2. Appellants charge Respondents with violations of California's Cartwright Act. Cal. Bus. & Prof. Code § 16700 *et seq*. The questions on appeal are twofold:

- Whether MLB's alleged "baseball exemption" under the Federal antitrust laws expressly preempt Appellants' Cartwright Act claims, granting Respondents *carte blanche* to violate California law.
- Whether Appellants' Cartwright Act claims – rooted in Respondents' restraint on competition in the market for relocation of MLB Clubs – present questions of fact that can only be adjudicated by the trier of fact, *i.e.*, *improperly* resolved at the motion to dismiss stage.

3. Appellants charge MLB with violations of California's Unfair Competition Laws. Cal. Bus. & Prof. Code § 17200 *et seq*.

- Whether MLB engaged in "unlawful" business practices by violating the Cartwright Act. Cal. Bus. & Prof. Code § 16722.
- Whether MLB engaged in "unfair" competition by engaging in "conduct that threatens an incipient violation of an antitrust law, *or* violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, *or* otherwise significantly harms competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 187 (1999) (emphasis added). Specifically, whether Respondents' antitrust violations constitute unfair competition and/or whether Respondents'

intentional delay tactics to forestall any decision on relocation of the Athletics to San José constitutes unfair competition.

- Whether Appellants' Unfair Competition Law claims present questions of fact that can only be adjudicated by the trier of fact, *i.e.*, *improperly* resolved at the motion to dismiss stage.

Pursuant to Circuit Rule 28-2.7, pertinent statutes, regulations, and rules are set forth verbatim in an addendum to this brief.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's order granting a motion to dismiss pursuant to Rule 12(b)(6). *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1018 (9th Cir. 2011). To survive dismissal, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This Court must accept "all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029-30 (9th Cir. 2009) (*quoting Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005)).

"On a motion to dismiss in an antitrust case, a court must determine whether an antitrust claim is 'plausible' in light of basic economic principles." *Id.,* citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

Dismissal under Rule 12(b)(6) is only proper when the complaint either (1) lacks a cognizable legal theory, or (2) fails to allege sufficient facts to support a cognizable legal theory. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). However, motions to dismiss are "especially disfavored" where the complaint sets forth a novel legal theory. *McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004).

STATEMENT OF THE CASE

On June 18, 2013, the City of San José filed this case against MLB bringing both federal claims under the federal antitrust laws and California state law claims. II ER 059. On August 7, 2013, MLB filed a motion to dismiss. I ER 147. On October 4, 2013, the District Court heard MLB's motion to dismiss. III ER 001. On October 11, 2013, Judge Whyte denied the motion to dismiss as to the California state law interference claims for damages,[1] but granted the motion to dismiss as to the federal and California antitrust and unfair competition claims under *Federal Baseball*. I ER 007.

This appeal relates to a *purely federal question* of significant importance regarding the validity and appropriate scope of the so-called "baseball exemption" to the American antitrust laws. This purported

[1] The state law interference claims were subsequently dismissed without prejudice. I ER 005 (Order Declining to Retain Supplemental Jurisdiction of State Law Claims).

exemption is based on a 1922 decision of the United States Supreme Court that professional baseball did not involve "interstate commerce," a proposition of no validity today. *See Federal Baseball Club*, 259 U.S. at 206. Judge Whyte agreed with other jurists, finding baseball's antitrust exemption to be "*unrealistic, inconsistent or illogical*." I ER 021:18-19 (emphasis added). Judge Whyte also found "the exemption is an 'aberration' that makes little sense given the heavily interstate nature of the 'business of baseball' today." I ER 021:19-21. However, Judge Whyte concluded he was duty bound to grant the motion to dismiss because, "[d]espite this recognition, the court is still bound by the Supreme Court's holdings …." I ER 021:21-22. This appeal follows.

STATEMENT OF FACTS

The Office of the Commissioner of Baseball, doing business as Major League Baseball, is an unincorporated association of thirty Major League Baseball Clubs, "organized into two leagues, the American League and the National League, with three divisions in each League." I ER 057, 063. All thirty Clubs are "entitled to the benefits of" and "bound by" the Major League Constitution and the rules adopted and promulgated by the Commissioner pursuant thereto. I ER 057, 060, 072. With respect to Club relocation, the Major League Constitution provides that "[t]he vote of three-

fourths of the Major League Clubs" is required for the approval of "[t]he relocation of any Major League Club." I ER 060-062, Art. V § 2(b)(3).

The Athletics are a Major League Baseball Club in the American League, Western Division. I ER 063-064, Art. VIII. Pursuant to the Major League Constitution, the Athletics "operating territory" is "Alameda and Contra Costa Counties in California." I ER 066, Art. VIII, § 8. The team was founded in Philadelphia, PA in 1901 as the "Philadelphia Athletics," one of the American League's eight charter franchises. *Id*. In 1955, the team relocated to Kansas City, MO and became the "Kansas City Athletics." *Id*. Just over a decade later, in 1968, the Athletics moved to Oakland. II ER 072, ¶ 48. The Athletics enjoyed tremendous success in the next two decades, winning three consecutive World Championships in the 1970s; three American League Pennants in 1988, 1989, and 1990; and the 1989 World Series. *Id*. Today, the Athletics remain in Oakland. Their stadium is formally named the O.co Coliseum, and commonly known as the "Oakland Coliseum" or "Coliseum," which the team shares with the Oakland Raiders of the National Football League. II ER 072, ¶ 50.

Since 1990, however, attendance at A's games has plummeted. II ER 073, ¶ 51. There are various reasons for this decline, including the following: (1) the Coliseum is currently the fourth-oldest ballpark in Major

League Baseball; (2) according to the 2010 census, the Giants' territory includes 4.2 million people and the Athletics' territory only 2.6 million; and (3) the team is heavily dependent on revenue sharing. II ER 072-073,¶¶ 49-52. Indeed, the Athletics are one of the most economically disadvantaged teams in MLB because MLB does not split team revenues as evenly as in other professional sports. II ER 072, ¶ 49.

For several years, the Athletics have considered possible alternative locations in Northern California for their home stadium, including Fremont (which ultimately failed in February 2009), elsewhere in Oakland, and San José. II ER 086-087, ¶¶ 117-118. Since 2009, Athletics owner Lew Wolff has focused the Club's relocation efforts on San José. *Id.* In early 2009, the City of San José issued an Economic Impact Analysis detailing the economic benefits of the proposed Athletics' stadium in San José, which would consist of 13.36 acres near the Diridon train station and would seat 32,000 fans. II ER 075-078, ¶¶ 68-70; II ER 106. In March 2011, San José's Redevelopment Agency purchased six parcels of land with the intent that the property would be developed into a MLB ballpark. II ER 198.

The MLB Constitution, however, designates San José as within the San Francisco Giants' operating territory. I ER 067. Unlike Clubs in Chicago, Los Angeles, and New York, which share their respective

operating territories, the Athletics' and the Giants' territories do *not* overlap. I ER 066-068. Because San José is outside of the Athletics' operating territory, relocation requires a three-quarter majority approval by MLB's Clubs. I ER 061-062, Art. V, § 2(b)(3); 068. As such, Commissioner Selig asked the Mayor of San Jose, Chuck Reed, to delay a public vote on whether the Athletics could purchase land to build a new stadium in San José. II ER 078-079, ¶ 73. Mayor Reed acquiesced and awaited the *imminent* final decision by the "Special Relocation Committee" appointed by Commissioner Selig in March 2009 to evaluate and resolve the Bay Area territorial dispute. *Id.*

Still having made no decision, at the January 2012 owners' meetings, Commissioner Selig said the situation was on the "front burner." II ER 081, ¶ 84. As recently as May 16, 2013, Commissioner Selig said MLB had no news on the quest of the Athletics to relocate to San José. *Id.* As of the filing of the Complaint in this matter, according to Commissioner Selig, the MLB Relocation Committee appointed in March 2009 "is still at work." *Id.*

The San Francisco Giants, aware of the Athletics' desire to move to San José, have prevented the Athletics from moving to San José based on the Giants' assertion that if the Athletics were allowed to move there, it would undermine the Giants' investment in its stadium in San Francisco and

marketing to fans. II ER 086-087, ¶ 118; 088 ¶ 121. Commissioner Selig, commenting on the territorial dispute, stated:

> Wolff and the Oakland ownership group and management have worked very hard to obtain a facility that will allow them to compete into the 21st century . . . The time has come for a thorough analysis of why a stadium deal has not been reached. The A's cannot and will not continue indefinitely in their current situation.

II ER 087, ¶ 119.

On November 8, 2011, the San José City Council and the Athletics Investment Group entered into a two-year Option Agreement giving the Athletics the option to purchase six parcels of land set aside by the Redevelopment Agency for the purposes of building the ballpark for a purchase price of $6,975,227. II ER 198. The Athletics Investment Group paid $50,000 for the initial two year option, which included the option to renew for a third year for an additional $25,000. II ER 200. The Athletics Investment Group recently paid the additional $25,000 to extend the option for a third year. III ER 038:14-17.

Despite knowledge of the Option Agreement, MLB has intentionally delayed approving the Athletics' relocation to San José for over four years, effectively preventing the Athletics from exercising its option to purchase the land set aside by the City of San José under the Option Agreement and resulting in damages to the City in the form of lost revenue reasonably

expected under the Option Agreement and the related Purchase Agreement, respectively. II ER 096-097, ¶¶ 162-164. The territorial rights restrictions in the MLB Constitution and MLB's failure to act on the instant territorial dispute restrain competition in the Bay Area baseball market, perpetuate the Giants' monopoly over the San José market, and create anticompetitive effects that lead to consumer harm in violation of federal and state antitrust laws and California's unfair competition laws. The inability of Clubs to relocate causes a ripple effect that forces small market teams to remain in non-profitable, hopeless environments, while allowing big market teams to reap the financial benefits.

SUMMARY OF ARGUMENT

Appellants allege claims under the Sherman Antitrust Act and California's Cartwright Act on the basis that MLB inhibits competition in the market for major league baseball contests, including the sale of land for the construction of professional baseball stadiums. II ER 099-103, ¶¶ 178-203. Specifically, *after* competing with Oakland and Fremont to host the Athletics Baseball Club, San José prevailed and entered into an Option Agreement with the Athletics. II ER 078-079, ¶¶ 73, 76. The only impediment to this free and open competition is MLB's refusal to allow the Athletics to relocate to San José. II ER 081, ¶ 85.

In the district court, MLB grounded its motion to dismiss in the purported baseball "exemption," the antiquated and oft-criticized doctrine coined in 1922 by *Federal Baseball Club of Baltimore, Inc. v. National League*, 259 U.S. 200 (1922). The District Court, adopting MLB's overbroad construction of *Federal Baseball*, analyzed Appellants' antitrust claims under the presumption that the baseball "exemption" persists *and* applies to the "business of baseball," an amorphous and unbounded monolith supposedly exempt from the same antitrust laws that bind every other professional sport and business in the United States. *As discussed in detail below, to the extent it remains good law, the holding of Federal Baseball only applies to player/labor matters.* Indeed, the judicially created "baseball exemption" is limited to the reserve clause and does *not* apply to the relocation of MLB Clubs. Thus, San José is entitled to injunctive relief and treble damages for MLB's antitrust violations.

Appellants allege claims for unlawful and unfair competition under California's Unfair Competition Law. II ER 097-099, ¶¶ 166-177. In the district court, MLB premised its argument against Appellants' claim for unfair competition on the assumption that the claim relies solely on alleged federal antitrust violations. Even if true, Appellants adequately plead antitrust claims. Appellants' Cartwright Act claim clearly alleges "an

agreement or conspiracy to act among defendants." II ER 062, ¶ 1; 081, ¶ 85; 090, ¶ 134; 091-092, ¶ 139; 094, ¶ 148; 100, ¶ 188. In addition to and independent of their antitrust claims, Appellants' unfair competition claim arises from MLB's intentional delay tactics to prevent a final decision on relocation of the Athletics to San José under the guise of the MLB Relocation Committee. II ER 081, ¶¶ 83-85. By pleading both "unlawful" and "unfair" business practices, Appellants have met and exceeded the pleading requirements of California's Unfair Competition Law.

ARGUMENT

I. APPELLANTS' ADEQUATELY PLEAD FEDERAL ANTITRUST VIOLATIONS

"[E]xemptions from the antitrust laws must be construed narrowly."

Union Labor v. Pireno, 458 U.S. 119, 126 (1982) (emphasis added). Liability under Section 1 of the Sherman Act, 15 U.S.C. § 1, requires a "contract, combination . . ., or conspiracy, in restraint of trade or commerce." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548 (2007). To assert a Section 1 claim, Appellants must plead: (1) a contract, combination or conspiracy among two or more persons or business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce; (3) which actually injures competition. *Id.*

Section 2 claims may be premised upon predatory conduct aimed at achieving or maintaining a monopoly in a given market. A claim for monopolization of trade has two elements: "the possession of monopoly power in the relevant market and . . . the acquisition or perpetuation of this power by illegitimate 'predatory' practices." *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 541 (9th. Cir. 1991), citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596, n.19 (1985); *Catlin v. Wash. Engergy Co*., 791 F.2d 1343, 1348 (9th Cir. 1986). Similarly, to state a claim for attempted monopolization, the plaintiff must allege facts that, if true, will prove: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 893 (9th Cir. 2008), quoting *Spectrum Sports, Inc. v. McQuilan*, 506 U.S. 447, 456 (1993).

At issue in this case is the scope of MLB's exemption from antitrust laws. MLB asserts an ironclad, all-encompassing exemption for all aspects of its business from both state and federal antitrust legislation, no matter whether MLB, as constituted, is the same in 2014 as it was in 1922 (*Federal Baseball*) or 1972 (*Flood*). Yet the most recent district court analysis of the "exemption," *Piazza v. Major League Baseball*, 831 F. Supp. 420, 438 (E.D.

Pa 1993), held the "[a]ntitrust exemption created by *Federal Baseball* is limited to baseball's reserve system," and does not apply to the relocation of baseball clubs. The District Court there determined that, because *Flood* found MLB to be a business engaged in interstate commerce, that decision had stripped *Federal Baseball* of "any precedential value . . . beyond the particular facts there involved, *i.e.*, the reserve clause." *Id*. at 436.

As in *Piazza*, there are compelling reasons for this Court to narrowly construe baseball's "exemption": (1) MLB's exemption is judicially created and thus should be narrowly construed; (2) MLB's exemption stems from a decision premised on the now-defunct notion that MLB is an entirely *intrastate* affair; (3) the U.S. Supreme Court's consideration of the issue has been limited to labor issues, and the Court has called MLB's exemption an "aberration," stating if it were operating with a clean slate it would decide the issue differently; (4) there is no evidence MLB is constituted the same way today as it was in 1922 or 1972; and (5) every other professional sport is subject to the antitrust laws.

A. THE JUDICIALLY CREATED "BASEBALL EXEMPTION" IS LIMITED TO PLAYER/LABOR ISSUES

Baseball's so-called "exemption" refers to a line of decisions that began with *Federal Baseball.* The facts of *Federal Baseball* involved whether the two major baseball leagues (the American and the National) had

utilized a player reserve clause to prevent the rival Federal League from securing enough qualified players to produce baseball exhibitions. In that case, the plaintiff was a baseball club based in Baltimore, which, along with seven other teams, made up the Federal League of Professional Baseball. The plaintiff alleged the defendants were guilty of an illegal conspiracy in restraint of trade when they purchased some of the constituent clubs of the Federal League and induced all of the clubs, except for the plaintiff, to leave their league and join the National League. The U.S. Supreme Court held the "business [of] giving exhibitions of base ball [*sic*]" was a local business not involved in interstate commerce and, therefore, not governed by antitrust laws.

The Supreme Court next applied antitrust law to baseball in *Toolson v. New York Yankees*, 346 U.S. 356 (1953). The players in *Toolson* alleged they had been harmed by the reserve clauses in their contracts. *Id.* at 362. In a one paragraph opinion, the Court re-affirmed *Federal Baseball*: "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Id.* at 357. Justice Burton's well-reasoned dissent pointed out that, whatever the situation in 1922, by 1953 baseball was decidedly operating in interstate commerce. *Id.* at 358.

In 1972, the Supreme Court addressed application of antitrust laws to baseball for the third time and, as in the prior cases, the holding was limited to the reserve clause. *Flood v. Kuhn*, 407 U.S. 258 (1972). In fact, the opening sentence reads: "For the third time in 50 years the Court is asked specifically to rule that *professional baseball's reserve system* is within the reach of the federal antitrust laws." *Id.* at 259 (emphasis added). In keeping with *Federal Baseball* and *Toolson*, the Court found baseball's *reserve system* exempt from the antitrust laws, very specifically stating:

> *With its reserve system enjoying exemption from the federal antitrust laws,* baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.

Id. at 282 (emphasis added).

The Court made clear that its adherence to *stare decisis* was not based on arid formalities but rather "because of a recognition and acceptance of baseball's unique characteristics and needs." *Flood*, 407 U.S. at 282.

Determining whether MLB's refusal to allow the Athletics to relocate to San José is a "unique characteristic and need" of the sport is a fact-based inquiry. Even the district court in *Flood*, operating under the *Federal Baseball* standard, allowed Curt Flood to proceed with discovery because Flood's argument that the exemption should be overruled raised "serious questions of a factual nature." *Flood v. Kuhn,* 312 F. Supp. 404, 406 (1970).

In his opinion, Justice Blackmun emphasized the district court's finding that even most of Flood's witnesses conceded some form of a reserve clause was "a necessary element of the organization of baseball as a league sport." *Id*. at 268 (quoting 316 F. Supp. At 275). Justice Blackmun noted that the principal congressional study of baseball and antitrust had concluded that a reserve clause was necessary for the sport. *Id*. at 272-73.

Flood does not cover all conceivable agreements in commerce to which baseball clubs may agree. In fact, this Court has previously found that the "exemption" did not apply to agreements between baseball clubs and stadium concessionaires. *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc*., 676 F.2d 1291 (9th Cir.), *cert. denied,* 459 U.S. 1009 (1982). Also, all other sports are governed by the Rule of Reason analysis regarding efforts to restrict franchise moves.[2] In *Los Angeles Memorial Coliseum*

[2] Respondents have argued *United States v. Shubert*, 348 U.S. 222 (1955) (applying antitrust law to theatrical performances), further entrenched MLB's exemption. However, in *Shubert*, Justice Warren, writing for the Court, confirmed that *Federal Baseball* is limited to the reserve clause: "For over 30 years there has stood a decision of this Court specifically fixing the status of the baseball business under the anti-trust laws *and more particularly the validity of the so-called 'reserve clause.'" Id*. at 229 (emphasis added). *Radovich v. National Football League*, 352 U.S. 445 (1957), decided two years after *Shubert*, declined to apply *Federal Baseball* and *Toolson* to professional football. *Radovich* involved a claim by a professional football player that he had been "blackballed" after breaking a contract with a club. The Supreme Court again alluded to the specific nature

Commission v. National Football League, 726 F.2d 1381 (9th Cir. 1984), this Court held that relocation impairments in the NFL Constitution could be an unreasonable restraint on trade, *and it was up to a jury to decide the question based on the particular facts of the case*. *Id*. at 1397-98. Using the rule of reason and engaging in a "thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition," this Court invalidated the NFL's franchise relocation rule, which was very similar to MLB's current rule for occupied territory. *Id*. at 1391 (quoting *Cascade Cabinet Co. v. W. Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir. 1983)), 1401; *See* Mitchell Nathanson, *The Irrelevance of Baseball's Antitrust Exemption: A Historical Review*, 58 Rutgers L. Rev. 1, 22 (2005).

In *Henderson Broadcasting Corp. v. Houston Sports Ass'n, Inc.*, 541 F. Supp. 263, 265-72 (S.D. Tex. 1982), Judge McDonald stated the baseball exemption has a "narrow scope," does not apply to radio broadcasting of baseball, and does not apply to agreements between baseball teams and non-baseball business enterprises. The scope of the exemption also was at issue in *Postema v. National League of Professional Baseball Clubs*, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992), which held the baseball exemption did not

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of the issue in *Federal Baseball* and *Toolson*, *i.e.*, the reserve clause. *Id*. at 449-450.

apply to antitrust claims about employment relations with umpires. Following *Henderson,* the district court assessed whether the challenged conduct was "central enough to baseball to be encompassed in the baseball exemption." *Id*. at 1489. *Postema* treated *Flood* as an opinion limiting the scope of the exemption to baseball's "unique characteristics and needs" and applied that narrow scope to *Postema*'s claims:

> Unlike the league structure or the reserve system, baseball's relations with non-players are not a unique characteristic or need of the game. Anti-competitive conduct toward umpires is not an essential part of baseball and in no way enhances its vitality or visibility.

Id. at 1489. Likewise, anti-competitive conduct towards cities competing to relocate struggling MLB Clubs is not an essential part of baseball and in no way enhances its vitality or visibility. In fact, it does the opposite. *See* II ER 078, ¶ 71(e). *See also* I ER 117-118, ¶¶ 12-14 (Decl. of Roger G. Noll).

Courts have treated the exemption differently depending on the aspect of the game under challenge. Virtually all cases after *Flood* that found aspects of baseball to fall within the "exemption" concerned characteristics and needs of baseball that were unique to baseball and not any other sport, such as restraints on competition for players or agreements concerning the minor leagues. *See, e.g., Professional Baseball Schools & Clubs, Inc. v. Kuhn*, 693 F.2d 1085 (11th Cir. 1982) (challenge to minor league structure);

Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978) (challenge to Commissioner order regarding sale of player contracts); *McCoy v. Major League Baseball*, 911 F. Supp. 454 (W.D. Wash. 1995) (owners' negotiating strategy leading to 1994 strike); *New Orleans Pelicans Baseball, Inc. v. National Ass'n of Prof'l Baseball Leagues, Inc.*, Civ. No. 93-253, 1994 U.S. Dist. LEXIS 21468 (E.D. La. Feb. 26, 1994) (challenge to minor league franchise location rules). Analysis of whether a restriction's harm to competition outweighs any procompetitive effects is necessary if the anticompetitive impact of a restraint is less clear or the restraint is necessary for a product to exist at all. *See NBA v. SDC Basketball Club, Inc.*, 815 F.2d 562, 567-68 (9th Cir. 1987) (relocation rules).

Two current justices of the Supreme Court have stated their views on the ongoing viability of the "exemption." As then District Judge (now Supreme Court Justice) Sonia Sotomayor found, Major League Baseball is a "monopoly industry." *Silverman v. Major League Baseball Relations Inc.*, 880 F. Supp. 246-261 (S.D.N.Y. 1995). Later, Justice Samuel Alito analyzed the origins of the "baseball exemption" in "*The Origin of the Baseball Antitrust Exemption: Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*," 34 Journal of Supreme Court History 183 (July 2009). Justice Alito found *Federal Baseball* to represent

"a fairly orthodox application of then-prevalent constitutional doctrine." *Id.* Justice Alito characterized *Federal Baseball* as being "pilloried pretty consistently in the legal literature since at least the 1940s." *Id*. at 192. Justice Alito concluded that *Federal Baseball* no longer represented appropriate Commerce Clause analysis, agreeing with the assessment that *Federal Baseball* was "'scorned principally for things that were not in the opinion, but later added by *Toolson* and *Flood*.'" *Id*. at 193 (citations omitted).

In his Order on MLB's Motion to Dismiss, Judge Whyte conceded that, "when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom," outmoded law may be overruled. I ER 007, citing *Salerno,* 429 F.2d at 1005. It is clear only the occasion is needed to finally pronounce the doom of the "baseball exemption." *This is the occasion.*

B. ANY ANTITRUST EXEMPTION DOES NOT EXTEND TO FRANCHISE RELOCATION

In 1993, a District Court decided the judicially created baseball exemption *is limited to the reserve clause and does not apply to the relocation of baseball clubs*. *Piazza,* 831 F. Supp. at 438 ("Antitrust exemption created by *Federal Baseball* is limited to baseball's reserve system"). A group of investors had attempted to purchase the San Francisco Giants and relocate the team to Tampa Bay, Florida. MLB refused to

approve the sale. The district court denied MLB's motion to dismiss, finding baseball's exemption limited to the reserve clause. The district court determined that, because *Flood* found MLB to be a business engaged in interstate commerce, it had stripped *Federal Baseball* of "any precedential value . . . beyond the particular facts there involved, *i.e.*, the reserve clause." *Id*. at 436.

Piazza is strikingly similar to the case at bar. There the plaintiffs brought suit asserting the defendants violated sections 1 and 2 of the Sherman Act because MLB "monopolized the market for Major League Baseball teams and that [it] has placed direct and indirect restraints on the purchase, sale, transfer, relocation of, and competition for such teams." *Id*. at 436. The plaintiffs claimed these actions unlawfully restrained their business opportunities with MLB. The *Piazza* court analyzed the value of *stare decisis* when it determined MLB's antitrust exemption post-*Flood*. *Piazza* recognized that, although lower courts are bound by Supreme Court decisions, the Supreme Court may change the standard or result established in an earlier case if it is "unsound in principle or unworkable in practice." *Id*. at 436. *Piazza* concluded that *Flood* effectively removed the "rule of *stare decisis*" as to *Federal Baseball* and *Toolson* since baseball qualifies as interstate commerce. *Id*. at 436. *Piazza* also determined that, in *Flood*, the

Supreme Court stated the "exemption" applies only to the reserve clause. *Id*. at 436. Thus, *Piazza* concluded lower courts should not and must not follow the broad rule in *Toolson* and *Federal Baseball*. *Id*. at 435-6.

But the opinion did not stop there – the court went on to assess the scope of the exemption if it was wrong and the exemption was not limited to the reserve clause. In making this alternative assessment, *Piazza* reviewed prior precedents concerning the exemption and generated a list of activities within the exemption if it were more broadly construed. *Id*. at 440.

Determining which aspects of league structure are "central . . . to the unique characteristics of baseball exhibitions" or which types of league and team decisions or agreements are part of baseball's league structure are factual questions that could only be decided on the basis of a factual record. *Id*. at 441; s*ee also* 836 F. Supp. 269, 271-73 (E.D. Pa. 1993).

One year after *Piazza*, in *Butterworth v. Nat'l League of Prof'l Baseball Clubs,* 644 So.2d 1021 (Fla. 1994), the Supreme Court of Florida came to the same conclusion as Judge Padova in *Piazza*.[3] In *Butterworth*, the Florida Supreme Court held *the baseball exemption does not apply to franchise relocation – it only applies to the reserve system*. *Id*. at 1030. After

[3] *See also Morsani v. Major League Baseball*, 663 So.2d 653, 655 (Fla. App. 2 Dist. 1995) ("the antitrust exemption for baseball is limited to the reserve clause").

MLB owners voted against the sale of the Giants to a Tampa Bay investment group, then-Florida Attorney General Robert Butterworth issued antitrust civil investigation demands ("CIDs") to the National League Clubs. The circuit court quashed the CID's: "decisions concerning ownership and location of baseball franchises clearly fall within the ambit of baseball's antitrust exemption." *Id*. at 1026 (McDonald, S.J., dissenting), quoting trial judge's order. The Florida Supreme Court overruled, citing *Piazza*. The *Butterworth* court determined the precedential value of *Federal Baseball* and *Toolson* is limited to their facts. Again it concluded MLB's antitrust exemption applies only to the reserve clause.

In 1998, Congress passed the Curt Flood Act (15 U.S.C. § 26b(a)), which overturned the *Federal Baseball* line of cases and subjected MLB's player/labor decisions to antitrust laws. MLB claims the Flood Act "preserved the rest of baseball's exemption." I ER 160:21-22. However, the Flood Act merely specifies that it does not apply to aspects of baseball other than the employment of major league players, including matters relating to broadcasting, the minor leagues, relationships between teams, location and ownership of franchises, and employment of umpires. 15 U.S.C. § 26b(a). Thus, the language regarding relocation simply states the Flood Act does not apply to the issue. There is no evidence of congressional support for

immunizing franchise relocation decisions from antitrust scrutiny. The *Flood* opinion itself refers to congressional intent *vis-a-vis* "baseball's reserve system." 407 U.S. at 283. Indeed, the principle evidence of congressional endorsement of the reserve clause in *Flood* was the Report of the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, H.R. Rep. No. 2002, 82d Cong., 2d Sess. (1952) [hereafter "1952 Report"]. *See Flood*, 407 U.S. at 272. That report, in addition to endorsing "some sort of reserve clause," 1952 Report at 229, rejected completely immunizing baseball from the Sherman Act, citing restrictions on the relocation of baseball franchises as one area where immunity would be inappropriate. *Id*. at 230.

C. THE DISTRICT COURT ERRED IN CONCLUDING THE "BASEBALL EXEMPTION" APPLIES TO TEAM RELOCATION

After acknowledging that the "reasoning and results" of *Federal Baseball*, *Toolson*, and *Flood* "seem illogical today," the District Court here dismissed Appellants' federal antitrust claims, reasoning that the "federal antitrust exemption for the 'business of baseball' remains unchanged, and is not limited to the reserve clause." I ER 014:25-28, 023:10-11; *see also* I ER 023:17-19. ("The court holds that MLB's alleged interference with the A's relocation to San José is exempt from antitrust regulation. Accordingly, the court dismisses the City's Sherman Act claims"). Adopting the holding in

Flood, the District Court reasoned that "Congressional inaction . . . shows Congress's intent that the judicial exception for the 'business of baseball' remain unchanged." I ER 022:6-10.

Appellants respectfully assert the District Court misconstrued *Flood* and the doctrine of *stare decisis*. Because *Flood* found MLB to be a business engaged in interstate commerce, it stripped *Federal Baseball* of any precedential value beyond the particular facts of the reserve clause. *See Piazza*, 831 F. Supp. at 436. To the extent the "baseball exemption" persists at all – Appellants assert that it does *not* – it does *not* apply to franchise relocation. *See Butterworth*, 644 So.2d at 1030.

A careful analysis of the Supreme Court's decisions about MLB's "exemption" from antitrust regulation shows the "exemption" is a judicially created rule that Congress has never expressly codified or rejected. *See* Mitchell Nathanson, *The Irrelevance of Baseball's Antitrust Exemption: A Historical Review*, 58 Rutgers L. Rev. 1, 2 (2005). Acknowledging that "baseball is a business . . . engaged in interstate commerce," the Supreme Court provided a new, superseding rationale for dismissing challenges to the reserve clause. *Flood*, 407 U.S. at 282. The Court made clear that its adherence to *stare decisis* was "because of a recognition and acceptance of baseball's unique characteristics and needs." *Id*. Determining whether the

Athletics' proposed relocation is a "unique characteristic and need" of the sport is a fact-based inquiry. Even the trial judge presiding in *Flood*, operating under the broader *Federal Baseball* standard, allowed Curt Flood to proceed with discovery because Flood's argument that the exemption should be overruled raised "serious questions of a factual nature." *Flood v. Kuhn*, 312 F. Supp. 404, 406 (1970). Appellants should be allowed to do the same here.

In this vein, a fundamental error underlying the District Court's opinion is the factual assumption that the operations of MLB existing in 1922 or 1972 still exist today. Section 1 of the Sherman Act prohibits any concerted action "in restraint of trade or commerce," even if the action does not "threate[n] monopolization." *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752, 771 (1984). In order to determine if an arrangement constitutes concerted action, a court must determine the nature of the vehicle for ongoing concerted action:

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

American Needle Inc. v. National Football League, 560 U.S. 183, 191 (2010). This Court also should eschew "formalistic distinctions" (a blanket

"exemption" for MLB) in favor of "functional consideration[s]" and recognize that the decision as to whether the "exemption" currently applies turns, in part, on whether MLB is organized in the same way as it was when the Supreme Court granted it an "exemption" for its reserve clause. As *Copperweld* exemplifies, "substance, not form, should determine whether a[n] … entity is capable of conspiring under § 1." 467 U.S. at 773.

The questions on this point are factual: (1) whether MLB's current agreement is different from its agreements in 1922 or 1972; (2) if MLB's current agreement is different, then does it join together "independent centers of decision making," *id*. at 769; and (3) if it does, are these entities capable of conspiring under Section 1. Only once these questions are answered can the trier of fact determine whether MLB's restrictions on Club relocation go to the "unique characteristics and needs" of MLB in 2014.

A Section 1 "contract, combination . . . or conspiracy" necessary or useful to a joint venture is still a "contract, combination … or conspiracy" if it "deprives the marketplace of independent centers of decision making." *Copperweld,* 467 U.S., at 769. *See also National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 113 (1984) ("[J]oint ventures have no immunity from antitrust laws"). Because the District Court failed to make the appropriate factual findings about MLB's current

operations, it could not decide whether, as now constituted, MLB fell within the historical "exemption." Therefore, the decision of the District Court must be reversed so that this case can proceed to its discovery phase.

II. APPELLANTS' STATE LAW CLAIMS ARE *NOT* PREEMPTED

Federal antitrust laws do not expressly preempt the Cartwright Act. *See California v. ARC America Corp.*, 490 U.S. 93, 105-106 (1989). There is no preemption even when a Cartwright Act claim targets interstate commerce and not solely intrastate California commerce. *See R. E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal.App.3d 653, 664 (1974). Appellants acknowledge that, under certain circumstances not applicable here, federal law may preempt application of the Cartwright Act. *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 41 Cal.4th 929, 935-936 (2007) (defining four types of preemption: express, conflict, obstacle, and field).

In the district court, MLB failed to identify which form of preemption it asserted and therefore failed to meet its burden on the motion to dismiss. The District Court, overlooking this fundamental omission, dismissed Appellants' Cartwright Act claims, reasoning that "[a]llowing the state claims to proceed would prevent needed national uniformity in the regulation of baseball." I ER 027:4-8 (internal citation omitted).

The District Court was in error. The Flood Act overturned the *Federal Baseball* line of cases and provided MLB's labor decisions are subject to the antitrust laws. 15 U.S.C. § 26b(a). As discussed at length above, the Flood Act merely specifies that it does not apply to aspects of baseball other than the employment of major league players; *it does not exempt matters of team relocation from federal or state antitrust laws.* 15 U.S.C. § 26b(a). Accordingly, to the extent MLB's exemption applies at all – Appellants assert it does not – it is strictly limited to the reserve clause, *i.e.*, labor matters.[4]

Not surprisingly then, all but one[5] "preemption" case cited by MLB in its motion to dismiss involves labor matters. *See Flood*, 407 U.S. 258 (antitrust claim challenging MLB's reserve system barred); *In re Brand*

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[4] *See* Cal. Code Civ. Proc. § 1858 ("In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted . . ."); Cal. Civ. Code § 3530; *see also Iselin v. United States*, 270 U.S. 245, 251 (1926) ("To supply omissions transcends the judicial function").

[5] *Major League Baseball v. Crist*, 331 F.3d 1177, 1186 (11th Cir. 2003), the only case cited by MLB that postdates the Flood Act, dealt with league contraction, not team relocation, and ignored the Flood Act in its entirety. After admitting its "holding is in considerable tension with the usual standard for preemption," the Eleventh Circuit found "federal law establishes a universal exemption in the name of uniformity." *Id*. at 1185. To the extent this Court considers *Crist*, it should strictly limit *Crist* to the issue of MLB contraction of Clubs because the Eleventh Circuit admitted it was departing from accepted preemption analysis.

Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 611 (7th Cir. 1997) (inapposite price fixing case with passing reference to *Flood*); *Robertson v. National Basketball Assoc.*, 389 F. Supp. 867 (S.D.N.Y. 1975) (basketball players alleged sports clubs restrained competition through a reserve clause in mandatory contracts); *Partee v. San Diego Chargers Football Co.*, 34 Cal.3d 378, 381 (1983) (football player alleged antitrust violations for blocking employment contract with team in competing league); *Hebert v. Los Angeles Raiders, Ltd.*, 23 Cal.App.4th 414, 419 (1991) (football player sued team for preventing him from bargaining as a free agent). MLB's focus on these cases is a red herring because Congress has not: (1) expressly addressed team relocation; (2) enacted law that would produce conflicting results under state antitrust laws; or (3) preempted all matters related to team relocation for professional sports. Indeed, under MLB's construction, there is no limit to the "baseball exemption," granting MLB *carte blanche* to violate California law. This expansive interpretation of preemption flies in the face of the precept that courts are reluctant to infer preemption and a party claiming that a state law is preempted has the burden of proving it. *Viva! Internat. Voice for Animals*, 41 Cal.4th at 936; *see also Farm Raised Salmon Cases*, 42 Cal.4th 1077, 1088 (2008) (consumer protection laws, such as the Unfair Competition Law, are not preempted by the Federal Food,

Drug and Cosmetic Act). MLB did not carry its burden of proving preemption. San José's Cartwright Act claims are *not* preempted.

The U.S. Supreme Court has consistently dictated narrow construction of antitrust exemptions. As explained in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 (1977), antitrust laws establish an "overarching and fundamental" policy that "a regime of competition" is the "fundamental principle governing commerce in this country."[6] Accordingly, there is a presumption against any exclusion from the antitrust laws. One need only compare the antitrust reserve clause issues challenged in *Flood* and the antitrust relocation at issue in this case. Generally, a non-compete agreement among employers would violate the Sherman Act. Although baseball owners, no doubt, wanted the reserve clause to exploit their collective bargaining power *vis-a-vis* players, they had a plausible business justification for their conduct. As *Flood* recognized, the unique interdependence of sports leagues requires some restriction on free competition to maintain overall quality. In contrast, the relocation restrictions at issue here – the agreement between MLB Clubs to preserve San José as an "operating territory" for the San Francisco Giants – are no

[6] *Lafayette*, like the instant case, involved a judicially created exemption (whether the exemption for state-directed restraints created by *Parker v. Brown*, 317 U.S. 341 (1942), extended to city-directed restraints).

different from any attempt by rivals to preserve existing territories and prevent entry into their market. *See United States v. Sealy, Inc.,* 388 U.S. 350 (1967) (restrictions on entry into established "territories" imposed by joint venture of mattress manufacturers).

Because Respondents' conspiracy impacts the specific market for location of baseball stadiums in California, state law applies. The "business of baseball" does not involve harming actual competitors for relocation of MLB Clubs. For example, inhibiting competition between and among the cities of San José, Fremont, and Oakland, on the one hand, and cities that would vie for relocation of an MLB Club under competitive circumstances, on the other hand, is not a part of the "business of baseball." Indeed, the anticompetitive conduct here is akin to the separate concession market in *Twin City Sportservice, supra.,* 676 F.2d 1291, or the separate radio market in *Henderson Broadcasting Corp., supra.,* 541 F. Supp. 263, both of which fell outside the *Flood*'s exemption.[7]

[7] As *Henderson* noted, 541 F.Supp. at 269, the House subcommittee report relied on in *Flood* distinguished the "sale of radio and television rights, *management of stadia*, purchase and sale of advertising, the concession industry, and many other business activities" from "the aspects of baseball which are solely related to the promotion of competition on the playing field." 1952 Report, *supra*, at 230 (emphasis added).

Consistent with the federal courts' practice to narrowly construe antitrust exemptions, *Flood* does not extend to collusion among MLB owners resulting in artificial restriction of franchise relocation. Such decisions do not fall within the scope of MLB's exemption. *Flood* limited the exemption to "business activities which are directly related to the unique needs and characteristics of professional baseball." 407 U.S. at 282. The U.S. Supreme Court declined to extend MLB's exemption to other professional sports, and lower federal courts properly declined to extend MLB's exemption to activity not solely related to competition on the playing field. Likewise, this Court should decline to read *Flood* as sanctioning Respondents' continued conspiracy to impede the relocation of the Athletics to San José.

III. APPELLANTS HAVE ANTITRUST STANDING

Appellants have Clayton Act standing, both under Section 4 for treble damages and Section 16 for injunctive relief.[8]

A. APPELLANTS HAVE STANDING UNDER SECTION 4 OF THE CLAYTON ACT

Appellants ground their claim for treble damages in Section 4 of the Clayton Act:

[8] Respondents also challenged Appellants' standing under the Cartwright Act in I ER 174, fn 22. For the same reasons articulated under the Clayton Act, Respondents' standing arguments under the Cartwright Act fail.

> [A]ny person who shall be injured in his *business or property by reason of* anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (emphasis added). In determining standing under Section 4 of the Clayton Act, courts weigh: (1) the nature of the plaintiffs' alleged injury – whether it was the type the antitrust laws intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages. *Associated General Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983) ("*AGC*"); *see also American Ad Mgmt., Inc. v. General Tel. Co.*, 190 F.3d 1051, 1054 (9th Cir. 1999). "To conclude that there is antitrust standing, a court need not find in favor of the plaintiff on each factor. Generally no single factor is decisive. Instead, we balance the factors." *American Ad*, 190 F.3d at 1055.

The District Court improperly concluded Appellants lack Section 4 standing under prongs two (directness of injury) and three (speculative measure of harm), *supra*, on the basis that "the alleged economic injury resulting from the A's not relocating to San José has not yet occurred, and depends on an assumption that future events will take place . . .." I ER 024:7-16. This holding contradicts the District Court's later finding that

"[t]he court cannot say at this stage that the City has incurred no damages owing to MLB's frustration of the contract."[9] I ER 031:25-27. Having inadequate facts to make a finding under prongs two and three, the District Court erred in not conducting the full balancing test under *AGC*. As the ensuing analysis makes clear, the *AGC* balancing test shows Appellants have Section 4 standing.[10]

B. PLAINTIFFS PROPERLY ALLEGE ANTITRUST INJURY

To state a claim for antitrust injury, Appellants must allege: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Id*. at 1055. Respondents did not even attempt to challenge Appellants on prongs 1-3. Misapprehending *AGC* and its progeny, Respondents took issue with prong 4, arguing Appellants have not pled the type of injury antitrust laws prevent because they were "neither a consumer nor a competitor in the market in which trade was restrained." I ER 174:6-9. Here, the relevant market is "the provision of

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[9] Whereas this finding goes to Appellants' claim for tortious interference with contract – dismissed without prejudice for adjudication in California State Court – and whereas that claim exists independent of Appellants' antitrust claims, the damages accruing to San José and articulated by the District Court arise out of the same antitrust misdeeds of MLB and entitle San José to damages under Federal and California antitrust laws.

[10] At the very minimum, Appellants are entitled to discovery in order to establish Section 4 standing.

major league men's professional baseball contests," including the sale of land for the construction of a major league men's professional baseball stadium. *See* II ER 069, ¶ 32. Construing "consumers" and "competitors" narrowly, MLB limits standing to the Commissioner and the MLB Clubs. I ER 174:13-21. Section 4 of the Clayton Act is not so limited:

> The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948); *see also American Ad*, 190 F.3d at 1055-1058. "[I]t is not the status as a consumer or competitor that confers antitrust standing, but the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff." *American Ad*, 190 F.3d at 1058.

Here, Appellants negotiated the Option Agreement with the Athletics Club. *See* II ER 079, ¶ 76; II ER 198. San José and the Athletics agreed to "negotiate, in good faith, a purchase and sale agreement" for the sale of land to build a major league men's professional baseball stadium. *Id*. MLB's alleged unlawful conduct – blocking relocation of the Athletics to San José – is the only obstacle to the Athletics' relocation, harming Appellants. *See* II ER 069, ¶ 135. Assuming *arguendo* that MLB's narrow construction of

"consumer" or "competitor" has merit – *it does not* – San José's injuries are "inextricably intertwined" with injuries sustained by the Athletics, as a party to the Option Agreement. *See American Ad*, 190 F.3d at 1057, fn 5 ("We recognize that the Supreme Court has carved a narrow exception to the market participant requirement for parties whose injuries are 'inextricably intertwined' with the injuries of market participants"). Independently and through their contractual relationship with the Athletics, Appellants allege antitrust injury.

C. APPELLANTS' INJURIES ARISE FROM HARM TO COMPETITION IN THE RELEVANT MARKET

The antitrust injury requirement means Appellants must allege MLB's actions resulted in an adverse effect on competition as a whole in the relevant market. *George Haug Co. v. Rolls Royce Motor Cars*, 148 F.3d 136, 139 (2d Cir. 1998), internal citations omitted. Here, San José competed with Oakland and Fremont to house the Athletics. *See* II ER 073, ¶ 53; 075, ¶ 67; 078-079, ¶ 73; 086-087, ¶¶ 117-118. Ultimately, San José prevailed, resulting in the Option Agreement. *See* II ER 079, ¶ 76; II ER 198. The only impediment to the exercise of the Option Agreement is MLB's refusal to allow the Athletics to relocate. II ER 084, ¶ 101. Thus, San José is damaged by MLB's stranglehold on competition in the market for major league baseball, including competition to sell land for constructing a baseball

stadium. II ER 069, ¶ 32. MLB prevents relocation of any Club by withholding its authorization.[11]

Grasping at straws, Respondents cite *Baseball at Trotwood, LLC v. Dayton Prof'l Baseball Club, LLC*, 113 F.Supp.2d 1164, 1174 (S.D. Ohio 1999), quoting the **dissent** in *Fishman v. Estate of Wirtz*, 807 F.2d 520, 563 (7th Cir. 1986), to argue "Plaintiffs do not allege a reduction in competition in the relevant market." I ER 175:28 – 176:6. The *Trotwood* plaintiffs lost to another group vying for a minor league team in Dayton. Here, Appellants successfully competed to relocate the Athletics to San José. II ER 086-087, ¶¶ 117-118; 089, ¶ 129. The sole impediment to consummating the deal is Respondents' veto in restraint of competition.[12]

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[11] Respondents not only harm competition for relocation of the Athletics, but, according to Roger G. Noll, Professor Emeritus of Economics at Stanford University, "preventing the Oakland Athletics baseball team from moving to San Jose causes harm to competition because relocating to San José would substantially increase the potential fan base and attendance of the team." I ER 116, ¶ 8. "Given that San José is substantially more economically attractive than Oakland as a home location for the Athletics, the only plausible reason for preventing relocation of the Athletics to San José is to protect the Giants from more intense competition from the Athletics." I ER 118, ¶ 15.

[12] Respondents' citation to *St. Louis Convention & Visitors Comm'n v. NFL*, 154 F.3d 851 (8th Cir. 1998), *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 783 F.2d 1347 (9th Cir. 1986), and *Mid-South Grizzlies v. National Football League*, 720 F.2d 772 (3d Cir. 1983), are similarly inapposite. In *St. Louis*, the City obtained an NFL team, and there was no evidence *at trial* that any other willing and able bidder was in the market for a stadium. *St. Louis*, 154 F.3d at 861, 864. Here, San José has not obtained

D. APPELLANTS' INJURIES ARE DIRECT AND CERTAIN

Appellants seek damages for injuries to their commercial interests in the Diridon Redevelopment Project Area, owned by the City of San José as Successor Agency to the Redevelopment Agency for the City of San José, and alienable by Appellants, collectively. *See* II ER 198 and II ER 206. This is not a case of "indirect ripple effect," because only Appellants can alienate the Diridon Redevelopment Project Area. *See* I ER 177:13-24, citing *McCoy v. Major League Baseball*, 911 F.Supp. 454, 458 (W.D. Wash. 1995). Instead, as a direct result of MLB's actions, Appellants have been prevented from entering into a purchase and sale agreement with the Athletics pursuant to the Option Agreement. II ER 201, § 4(B)*; see also* II ER 067, ¶ 21; 079-080, ¶¶ 76-77; 089, ¶¶ 129-130; 090, ¶ 132; 091, ¶ 136; 094, ¶ 148; 103, ¶ 203.

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an MLB Club and there have been multiple bidders for the Athletics, including Oakland and Fremont. *See* II ER 073, ¶ 53; 075, ¶ 67; 078-079, ¶ 73; 086-087, ¶¶ 117-118. In *Seattle Totems*, the Totems hockey club was granted a conditional NHL franchise but failed to fulfill the conditions precedent to obtain a final franchise. *Seattle Totems*, 783 F.2d at 1350. Here, MLB refuses to give San José any rights to consummate its deal to relocate the Athletics. Further, in *Seattle Totems*, there was "no contention or showing that the denial was to protect any other major league team in the Seattle market." *Id*. at 1350. Here, Respondents' denial of the Athletics' move to San José is to protect the San Francisco Giants. *See* II ER 080-083, ¶¶ 80-81, 85, 88, 90, 94-95, 98. Finally, *Mid-South Grizzlies* is inapposite as it dealt with the NFL's denial of a request to add a football franchise, not relocate an existing franchise.

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

Appellants ground their claim for injunctive relief on Section 16 of the Clayton Act:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, . . .

15 U.S.C. § 26. The standing requirements under Section 16 of the Clayton Act are "far broader" than those under Section 4. *Hawaii v. Standard Oil Co.*, 431 F.2d 1282, 1284 (9th Cir. 1970). "To have standing under § 16, a plaintiff must show (1) a *threatened* loss or injury cognizable in equity (2) proximately resulting from the alleged antitrust violation." *City of Rohnert Park v. Lynn*, 601 F.2d 1040, 1044 (9th Cir. 1979) (emphasis added).

Threatened loss or injury cognizable in equity: Appellants seek damages for real and threatened injuries to their commercial interests in the Diridon Redevelopment Project Area. *See* II ER 198. MLB's actions directly prevent Appellants from entering into a purchase and sale agreement with the Athletics pursuant to the Option Agreement. Further, Appellants may be estopped entirely from reaching a purchase and sale agreement unless MLB

is enjoined from committing further antitrust violations. II ER 201; *see also* II ER 067, ¶ 21; 089, ¶¶ 129-130; 090, ¶ 132; 091, ¶ 136; 094, ¶ 148; 103, ¶ 203.

In the district court, MLB argued that Appellants lack standing because San José's interest in "improving a local commercial zone, and its ownership of the property in the commercial zone" do not give rise to a threatened loss or injury cognizable in equity. I ER 172:17-21. Respondents cited *City of Rohnert Park*, where Rohnert Park alleged construction of a regional shopping center in Santa Rosa would discourage development of a similar center in Rohnert Park. *City of Rohnert Park*, 601 F.2d at 1044. Here, Appellants do not allege a *hypothetical* negative impact based on competition with a sister city; Appellants allege an *existing* impediment to their ability to compete for relocation of the Athletics to San José, where Appellants have authority to sell, lease, or otherwise dispose of land to the Athletics. *See* II ER 198 and II ER 206.[13]

[13] Appellants also have standing to vindicate the interests of their constituents, the citizens of San José, including local consumers of Major League Baseball and the businesses that will benefit from relocation of the Athletics to San José. *City of Rohnert Park*, 601 F.2d at 1044, citing *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 131 (9th Cir. 1973) ("political subdivisions such as cities and counties . . . [may] sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants").

Proximately resulting from the alleged antitrust violation:

Appellants' harm is not just proximate; it is a direct result of MLB's actions to block relocation of the Athletics to San José. *See* II ER 0102-103, ¶¶ 197, 203. Ticking off a list of hypotheticals in its moving papers in support of the motion to dismiss, MLB argued Appellants' harm is "entirely speculative." I ER 172:22 - 173:5. Discerning minds are always capable of injecting uncertainty into facts; were that the standard, no grievance, even one rooted in contract, would survive Section 16 scrutiny. Here, Respondents' hypotheticals are belied by the facts pled in the Complaint alleging real and threatened harm to San José:

- The Diridon Development Authority and the Athletics are parties to an Option Agreement which requires the parties to negotiate, in good faith, a purchase and sale agreement for the Diridon Redevelopment Project Area. *See* II ER 201.

- A 2009 Economic Impact Analysis detailed the economic benefits of the proposed Athletics' stadium in San José. II ER 077, ¶ 70; II ER 106.

- The San José City Council reviewed and unanimously approved an environmental impact study. II ER 078-079, ¶ 73.

- Drawings for the new ballpark have been completed. II ER 075-076, ¶ 68.

- In 2010, San José Mayor Chuck Reed called for a public vote on if the Athletics could purchase the Diridon Redevelopment Project Area and build a new stadium. II ER 078-079, ¶ 73.

- At Commissioner Selig's request, Mayor Reed delayed the vote pending the MLB Relocation Committee's determination of the Athletics-Giants territorial dispute. *Id*.

- The Athletics have indicated their continued desire to relocate to San José. II ER 078, ¶ 71.

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

The District Court agreed with the foregoing analysis, finding that while "the City may have standing to sue for injunctive relief, there is still a question as to whether the City's claimed injury to the Diridon property would sufficiently state an injury in the relevant market." I ER 025:20-22. Notwithstanding, the District Court concluded it need not rule on Appellants' Section 16 standing "because the court dismisses the antitrust claims on the basis of the federal antitrust exemption for the business of baseball." I ER 026:4-6. As discusses at length supra, any persisting

"baseball exemption" does not apply to team relocation. Appellants have Section 16 standing.

IV. APPELLANTS' UNFAIR COMPETITION LAW CLAIMS ARE SUFFICIENTLY PLED

In addition to antitrust violations, Appellants allege state law claims for unfair competition. These claims arise in conjunction with *and* independent of Appellants' antitrust claims. MLB argued "Plaintiff's claim is merely a naked attempt to enforce the Sherman Act in the guise of a Section 17200 claim." I ER 165:9-13, citing *Nat'l Credit Reporting Ass'n v. Experian Info. Solutions, Inc.*, 2004 U.S. Dist. LEXIS 17303 (N.D. Cal. July 21, 2004). *National Credit* is inapposite for at least three reasons:

First, whereas *National Credit* "did not assert a cause of action under any specific antitrust law," Appellants have specifically sued under provisions of the Cartwright Act and the Sherman Act. *Id*. at * 3; *see also* II ER 099-103 (Complaint, Claims Four-Six).

Second, whereas *National Credit* attempted to block removal to federal court, Appellants here filed in federal court.

Third, *National Credit* alleged claims for monopolization and attempted monopolization, claims only addressed under Section 2 of the Sherman Act. *Nat'l Credit*, * 9-10. Here, Appellants allege "an agreement or conspiracy to act among defendants," among other claims clearly under the

Cartwright Act. *Id*., *see also* II ER 062, ¶ 1; 081, ¶ 85; 090, ¶134; 091 ¶ 139; 094, ¶ 148; 100, ¶ 188.

The District Court dismissed Appellants' claim for unfair competition on the theory that the claim relies solely on alleged antitrust violations. I ER 028:8-13. ("Even considering the unfair competition claim, the court does not find that the alleged conduct—an unwarranted and intentional delay in approving the A's relocation request—can arguably violate the policy or spirit of the antitrust laws where MLB remains exempt from antitrust regulation"). As discussed in detail above, Appellants have adequately pled antitrust claims. In addition to and independent of these claims, however, San José's unfair competition claim arises from Respondents' intentional delay tactics to prevent a final decision on relocation of the Athletics to San José. *See* II ER 078-079, ¶ 73; 081, ¶ 83; 087, ¶ 120; 096-097, ¶ 162. By pleading both "unlawful" and "unfair" business practices, San José has met and exceeded the pleading requirements of California Business and Professions Code section 17200 *et seq*.

San José and MLB agree California's Unfair Competition Law requires a plaintiff to prove an "unlawful, unfair *or* fraudulent business act *or* practice." I ER 165:17-19, citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 180 (1999) (emphasis

added). "Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition – acts or practices which are *unlawful*, or *unfair*, or *fraudulent*." *Podolsky v. First Healthcare Corp.*, 50 Cal.App.4th 632, 647 (1996) (emphasis added).

"Unlawful" Competition: "[T]he plaintiff bringing a claim based on the unlawful prong must identify the particular section of the statute that was allegedly violated, and must describe with reasonable particularity the facts supporting the violation." *Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC*, 634 F.Supp.2d 1009, 1022 (N.D. Cal. 2007). Appellants here allege violations under the Cartwright Act, California Business and Professions Code section 16722. *See* II ER 098, ¶ 170; 100, ¶ 185. In the district court, MLB did not challenge San José's Unfair Competition Law claim on particularity grounds; rather, it based its entire argument on the premise that the "business of baseball" is exempt from federal and state antitrust laws. I ER 165:21-23. As detailed above, this argument is unavailing.

"Unfair" Competition: "Unfair" competition means "conduct that threatens an incipient violation of an antitrust law, **or** violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, **or** otherwise significantly threatens or harms competition." *Cel-Tech*, 20 Cal.4th at 187 (emphasis added). Again, in the

district court, MLB relied entirely on the purported "baseball exemption" to the antitrust laws. I ER 166:2-3. In so doing, MLB completely ignored both the second and third definitions of "unfair" *and* San José's allegations of MLB's threat to competition by intentionally engaging in tactics to delay any decision of the MLB Relocation Committee for over four years. *Cel-Tech*, 20 Cal.4th at 187; *see also* II ER 078-079, ¶ 73; 081, ¶ 83; 087, ¶ 120; 096-097, ¶ 162. To determine whether San José has adequately pled a violation of the "policy or spirit" of the antitrust laws *or* a significant threat or harm to competition, this Court must determine (1) whether MLB's conduct is protected under a safe harbor and, if not, (2) whether that conduct is "unfair." *Cel-Tech,* 20 Cal. 4th at 187.

First, MLB is not protected by a safe harbor because it cannot point to a single provision that expressly sanctions team relocation restrictions or unreasonable delay in deciding team relocation requests. The Unfair Competition Law "was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." *Cel-Tech*, 20 Cal.4th at 181. Accordingly, "[t]o forestall an action under the unfair competition law, another provision must *actually 'bar'* the action or *clearly permit* the conduct." *Id*. at 183 (emphasis added). No such provision exists.

Second, whether MLB's conduct is "unfair" should not be determined on a motion to dismiss. *Id*. at 188-189. In *Cel-Tech*, after a court trial, the California Supreme Court remanded the question of unfairness to the Superior Court for adjudication based on the relevant evidence. *Id*. Here, the Parties have yet to commence discovery. Further, whether MLB intentionally engaged in tactics to delay any decision of the MLB Relocation Committee for over four years and whether that conduct "significantly threatens or harms competition" is a disputed question of fact only a jury should decide.

CONCLUSION

> Sports leagues are big businesses. They are run for profit and have a great impact on the American culture. They should not be allowed to operate without the judicial supervision required in virtually every other business. When individual owners with independent economic interests form agreements, the reasonableness of those agreements should be subject to antitrust review.[14]

For the foregoing reasons, Appellants respectfully request that this Court (1) reverse the trial court's order dismissing the Sherman Act, Cartwright Act, and unfair competition claims; and (2) vacate the Judgment as to those claims. As other courts and commentators have determined, the "exemption" should be found to apply *only* to the reserve clause and *not* to

[14] Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 Tul. L. Rev. 751, 762 (1989).

team relocation. Based on the record before this Court, there is no basis to conclude – without any factual inquiry – that MLB's ability to block the relocation of the Athletics to a lucrative market like San José is in any way essential to our National Pastime.

Respectfully submitted,

Dated: March 5, 2014

COTCHETT, PITRE & McCARTHY

By: */s/ Joseph W. Cotchett*
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RELATED CASES

Appellants do not know of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that, according to the word count provided by Microsoft Word 2013, the body of the foregoing brief contains 12,943 words, exclusive of those parts excluded by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than the 14,000 words permitted by Fed. R. App. P. 32(a)(7)(B). The text of the brief is in 14-point Times New Roman, which is proportionately spaced. *See* Fed. R. App. P. 32(a)(5), (6).

By: */s/ Philip L. Gregory*

TABLE OF ADDENDA

ADDENDUM

15 U.S.C. § 1

TITLE 15: COMMERCE AND TRADE

CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2

TITLE 15. COMMERCE AND TRADE

CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 2. Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 15

TITLE 15. COMMERCE AND TRADE

CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states.

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if--

(A) such foreign state would be denied, under section 1605(a)(2) of title 28 of the United States Code, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions. For purposes of this section--

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of title 28, United States Code, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of title 28, United States Code.

15 U.S.C. § 26

TITLE 15. COMMERCE AND TRADE

CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49, United States Code. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

15 U.S.C. § 26b

TITLE 15. COMMERCE AND TRADE

CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 26b. Application of the antitrust laws to professional major league baseball

(a) Subject to subsections (b) through (d), the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce.
(b) No court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a). This section does not create, permit or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to, any conduct, acts, practices, or agreements that do not directly relate to or affect employment of major league baseball players to play baseball at the major league level, including but not limited to—

(1) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players;

(2) the agreement between organized professional major league baseball teams and the teams of the National Association of Professional Baseball Leagues, commonly known as the "Professional Baseball Agreement", the relationship between organized professional major league baseball and organized professional minor league baseball, or any other matter relating to organized professional baseball's minor leagues;

(3) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting franchise expansion, location or relocation, franchise ownership issues, including ownership transfers, the relationship between the Office of the Commissioner and franchise owners, the marketing or sales of the entertainment product of organized professional baseball and the licensing of intellectual property rights owned or held by organized professional baseball teams individually or collectively;

(4) any conduct, acts, practices, or agreements protected by Public Law 87-331 (15 U.S.C. 1291 et seq.) (commonly known as the "Sports Broadcasting Act of 1961");

(5) the relationship between persons in the business of organized professional baseball and umpires or other individuals who are employed in the business of organized professional baseball by such persons; or

(6) any conduct, acts, practices, or agreements of persons not in the business of organized professional major league baseball.

(c) Only a major league baseball player has standing to sue under this section. For the purposes of this section, a major league baseball player is—

(1) a person who is a party to a major league player's contract, or is playing baseball at the major league level; or

(2) a person who was a party to a major league player's contract or playing baseball at the major league level at the time of the injury that is the subject of the complaint; or

(3) a person who has been a party to a major league player's contract or who has played baseball at the major league level, and who claims he has been injured in his efforts to secure a subsequent major league player's contract by an alleged violation of the antitrust laws: Provided however, That for the purposes of this paragraph, the alleged antitrust violation shall not include any conduct, acts, practices, or agreements of persons in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, including any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players; or

(4) a person who was a party to a major league player's contract or who was playing baseball at the major league level at the conclusion of the last full championship season immediately preceding the expiration of the last collective bargaining agreement between persons in the business of organized professional major league baseball and the exclusive collective bargaining representative of major league baseball players.

(d) (1) As used in this section, "person" means any entity, including an individual, partnership, corporation, trust or unincorporated association or any combination or association thereof. As used in this section, the National Association of Professional Baseball Leagues, its member leagues and the clubs of those leagues, are not "in the business of organized professional major league baseball".

(2) In cases involving conduct, acts, practices, or agreements that directly relate to or affect both employment of major league baseball players to play baseball at the major league level and also relate to or affect any other aspect of organized professional baseball, including but not limited to employment to play baseball at the minor league level and the other areas set forth in subsection (b), only those components, portions or aspects of such conduct, acts, practices, or agreements that directly relate to or affect employment of major league players to play baseball at the major league level may be challenged under subsection (a) and then only to the extent that they directly relate to or affect employment of major league baseball players to play baseball at the major league level.

(3) As used in subsection (a), interpretation of the term "directly" shall not be governed by any interpretation of section 151 et seq. of title 29, United States Code (as amended).

(4) Nothing in this section shall be construed to affect the application to organized professional baseball of the nonstatutory labor exemption from the antitrust laws.

(5) The scope of the conduct, acts, practices, or agreements covered by subsection (b) shall not be strictly or narrowly construed.

Cal. Bus. & Prof. Code § 16700

Division 7. General Business Regulations

Part 2. Preservation and Regulation of Competition

Chapter 2. Combinations in Restraint of Trade

Article 1. General Provisions

§ 16700. Provisions cumulative

The provisions of this chapter are cumulative of each other and of any other provision of law relating to the same subject in effect May 22, 1907.

Cal. Bus. & Prof. Code § 16722

Division 7. General Business Regulations

Part 2. Preservation and Regulation of Competition

Chapter 2. Combinations in Restraint of Trade

Article 2. Prohibited Restraints on Competition

§ 16722. Enforceability of contracts

Any contract or agreement in violation of this chapter is absolutely void and is not enforceable at law or in equity.

Cal. Bus. & Prof. Code § 17200

Division 7. General Business Regulations

Part 2. Preservation and Regulation of Competition

Chapter 5. Enforcement

§ 17200. Definition

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

CERTIFICATE OF SERVICE

I hereby certify that, on the dates and methods of service noted below, a true and correct copy of

1. **PLAINTIFFS-APPELLANTS' BRIEF**

2. **PLAINTIFFS-APPELLANTS' EXCERPTS OF RECORDS VOLUMES 1-3**

was served on all interested parties electronically through CM/ECF DATED: March 5, 2014.

By: */s/ Philip L. Gregory*