No. 08-661

IN THE
Supreme Court of the United States

AMERICAN NEEDLE, INC.,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE THE NATIONAL HOCKEY LEAGUE IN SUPPORT OF THE NFL RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE* [1]

Amicus is one of the four major professional sports leagues in North America and, like the other leagues, is a joint venture created to make, promote and sell its sport – National Hockey League ("NHL") hockey, including its related products. *Amicus* has a significant interest in this case. Like numerous other legitimate and output-enhancing joint ventures across the country, *Amicus* has a vital concern that the antitrust laws are clear, predictable and fair.

As it relates to this case, *Amicus* has a critical interest in the Court clarifying that legitimate joint ventures such as the NHL – "like any other firm" – can decide how to make, promote and sell the venture's products without the risk and cost of protracted, complex and uncertain antitrust litigation under Section 1 of the Sherman Act, 15 U.S.C. § 1. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006).[2] Accordingly, with respect to the activities that fall within the scope of the NHL venture itself –

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *Amicus* recognizes that if the member teams of a professional sports league enter into restraints *outside* the scope of the venture's business, § 1 would continue to apply; under *Dagher*, an ancillary restraints analysis would apply to such activity. *See* 547 U.S. at 7-8.

such as those in *American Needle Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2008) – including the production of the game, the promotion of the sport, the licensing of league and team intellectual property and the sale of related products, there is a significant and recurring need for this Court to address whether § 1 should *ever* apply to the core business decisions of legitimate joint ventures.

SUMMARY OF ARGUMENT

1. In *Dagher*, 547 U.S. 1, this Court recognized the importance of joint ventures to the American economy and the need for legitimate joint ventures to be able to operate "like any other firm." The Court, however, did not have the opportunity to address whether § 1 should apply at all to the decisions of legitimate joint ventures – judicial direction that would greatly benefit the thousands of businesses planning, forming and operating joint ventures every day.

2. This Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), did not have occasion to assess how the single-entity principles set forth in the parent-subsidiary context should apply to the ongoing production, promotional and marketing decisions of legitimate joint ventures. Since then, lower federal court decisions concerning § 1's application to joint ventures, and professional sports leagues in particular, either directly conflict or provide no consistent guidance to the business community. This Court should clarify that, under *Copperweld*'s principles, the decisions of professional sports leagues derive from a single economic

"source," a single functioning enterprise and a single entity – the league – that ultimately controls the venture and its products. Absent such guidance, the conflicts and confusion over the applicability of *Copperweld*'s principles to professional sports leagues will persist.

3. The continued conflict and ambiguity concerning the applicability of § 1 to the core business decisions of legitimate joint ventures significantly chills innovation and the competitive activities of such ventures, including *Amicus* and other professional sports leagues. Section 1 should not be an invitation for every venture member, customer, supplier or vendor to second-guess internal venture business decisions by threatening § 1 treble damages actions. *Amicus* has been subject to several such cases in the past and is now involved in a costly and protracted antitrust challenge to the basic way in which the NHL makes, promotes and sells NHL hockey, including its related products. *See Madison Square Garden, L.P. v. Nat'l Hockey League*, No. 07 Civ. 8455 (S.D.N.Y.) ("*MSG v. NHL*") (§ 1 challenge to NHL's licensing of league and team intellectual property rights, national and local broadcasting arrangements, merchandising and marketing of league and team products, advertising and sponsorship regulations, and new media activities).

4. As with this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), there are strong policy reasons for considering whether § 1 should be interpreted to avoid time-consuming, complex and costly antitrust litigation – here, over the basic business decisions of legitimate joint ventures.

ARGUMENT

I. Certiorari Should Be Granted to Clarify That, Under the Reasoning of *Dagher*, the Core Business Decisions of Legitimate Joint Ventures Should Be Treated As Single-Firm Conduct

In *Dagher*, 547 U.S. 1, this Court highlighted that joint ventures are an "important and increasingly popular form of business organization," *id.* at 5, and that businesses need clarity with respect to how § 1 applies to their core business decisions. Finding that "[a]s a single entity, a joint venture, *like any other firm*, must have the discretion to determine the prices of the products that it sells," *id.* at 7 (emphasis added), this Court held – on the narrow question presented – that *per se* scrutiny of "internal . . . decisions of a legitimate joint venture" would be inappropriate as a matter of law. *Id.* This Court in *Dagher* emphasized that, because the respondents had not put forth a rule of reason claim, it was unnecessary to "address petitioners' alternative argument that § 1 of the Sherman Act is inapplicable to joint ventures." *See id.* at 7 n.2.

Granting certiorari to review *American Needle*, 538 F.3d 736, would provide this Court with the opportunity to address the important question of federal law that *Dagher* left unsettled: Whether § 1 scrutiny should *ever* apply to the core business decisions of a legitimate joint venture – i.e., how to

make, promote and sell the very products that the venture creates.[3]

In *Dagher*, this Court asked whether the venture members were "competitors" prior to formation, and whether they would remain independent competitors after creating or joining the venture. This Court found that the members:

> [D]id not compete with one another in the relevant market . . . but instead participated in that market jointly through their investments in [the venture]. In other words, the pricing policy challenged here amounts to little more than price setting by a single entity–albeit within the context of a joint venture–and not a pricing agreement between competing entities with respect to their competing products.

547 U.S. at 5-6; *see also Copperweld*, 467 U.S. at 768-69. Thus, in *Dagher*, this Court implicitly found that § 1 should apply to members of a legitimate

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[3] The district court cited *Dagher* in finding that, with respect to its blanket licensing of league and team intellectual property, the National Football League ("NFL") should be treated as a single entity. *See Am. Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941, 944 (N.D. Ill. 2007) ("[I]n answering *Copperweld*'s functional question, we believe cooperative marketing does serve to promote NFL football and falls on the 'unilateral' action side of the line.") (citing 547 U.S. 1). However, the Seventh Circuit did not directly address *Dagher*, again highlighting the need for this Court to clarify the evident application of *Dagher*'s reasoning to the single-entity question.

joint venture only if: (1) prior to venture formation, the venture members were "competing entities" with respect to "competing products"; (2) after forming the venture, the members remain independent competitors capable of offering competing products; and (3) the members offer products *outside* the scope of the venture's activities that "compete" with the venture. *See Dagher*, 547 U.S. at 7-8 (implicitly limiting § 1 to an "ancillary restraints" analysis of such "outside venture" activities).

The reasoning of *Dagher* is particularly compelling as applied to decisions of professional sports leagues. In *Dagher*, two previously independent competitors agreed to cease competing with one another – for a limited duration – and participate in the market only jointly through the venture. This Court referred to the joint venture's internal pricing decision regarding its product as "little more than price setting by a single entity." *See* 547 U.S. at 5-6 (noting that "though [the venture]'s pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense").

By contrast, for professional sports leagues, there is no pre-existing economic competition among the teams at the time of league formation. In turn, there can be no potential "independent" competition after formation of the league: the venture's products cannot be created without the collective participation of the venture's members; and, after formation, § 1 should not apply to the decisions regarding how to make, market or promote the venture's products. *See id.*; *see also* 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478c, at 325 (2d ed. 2003) ("Once a venture is judged to have been lawful

at its inception and currently, decisions that do not affect the behavior of the participants in their nonventure business should generally be regarded as those of a single entity rather than the parents' daily conspiracy.").

The Seventh Circuit below found that the NFL teams jointly create a product that *no* one team can make alone and that the teams are fully economically interdependent – i.e., they simply cannot be independent economic entities with respect to any "competing product" outside the NFL venture. *See Am. Needle*, 538 F.3d at 737, 743. Indeed, no member of a professional sports league, or any of its team-specific products or intellectual property, can have any meaningful value outside of participation in the league enterprise.

Nothing in the Seventh Circuit's opinion is inconsistent with applying *Dagher*'s underlying principles to shield from § 1 scrutiny *all* of a professional sports league's decisions regarding the production, promotion and sale of the venture's products. *See* Petition for a Writ of Certiorari at 12, *Am. Needle*, No. 08-661 (U.S. filed Nov. 17, 2008) ("Nor can the Seventh Circuit's decision be limited to those aspects of league activities necessary to the production of games. The Seventh Circuit's decision extends the NFL's exemption, *derivatively*, to activities . . . that 'promote' the interests of the League or the teams.") (emphasis in original).

In light of the importance of joint ventures to the U.S. economy, certiorari should be granted to extend *Dagher*'s underlying reasoning to decisions of all legitimate joint ventures, including the economically interdependent members of professional sports

leagues, so that such enterprises can operate "like any other firm."

II. Certiorari Should Be Granted Because, at a Minimum, *Copperweld* Should Apply to the Core Business Decisions of Legitimate Joint Ventures

Since this Court's decision in *Copperweld*, 467 U.S. 752, the application of the single-entity doctrine to legitimate joint ventures, such as professional sports leagues, can be described as, at worst, a morass of conflicting circuit court decisions and, at best, an important federal question mired in ambiguity and confusion. *See, e.g., Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 55-56 (1st Cir. 2002); *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 599-600 (7th Cir. 1996) ("*Bulls II*"). Moreover, when coupled with *Dagher*'s underlying principle that legitimate joint ventures should be able to operate as do single firms with respect to the products the ventures create, *see* 547 U.S. at 7, the need for clarity regarding the single-entity issue under *Copperweld* becomes all the more compelling.

In *Copperweld*, this Court enunciated the principles under which § 1 should not apply to formally separate entities. Such entities cannot conspire for purposes of § 1 if the agreement or coordination at issue: "does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests," 467 U.S. at 771; and/or does not "deprive[ ] the marketplace of the independent centers of decisionmaking that competition assumes and demands," *id.* at 769.

Separately, the Court made clear that if "the parent may assert full control" in the event that the affiliate "fails to act in the parent's best interests," *id.* at 771-72, the entities cannot be deemed separate for § 1 purposes. The Court did not have to reach that issue in *Copperweld* because, as it observed, a parent and a wholly-owned subsidiary, the alleged "co-conspirators" in *Copperweld*, share a "complete unity of interest" and therefore do not "deprive[ ] the marketplace of . . . independent centers of decisionmaking." *Id.* at 771.

The resulting conflict and confusion – both in and out of the professional sports league context – is well documented. Many courts, latching on to the "complete unity of interest" language, have held that the separate teams of a professional sports league must be treated as separate economic entities under *Copperweld*. *See, e.g., Fraser*, 284 F.3d 47; *Sullivan v. Nat'l Football League*, 34 F.3d 1091 (1st Cir. 1994); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984) (pre-*Copperweld* but cited approvingly in *Freeman v. S.D. Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003)); *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d Cir. 1982) (pre-*Copperweld* but cited approvingly in *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335 (2d Cir. 1988)).

Other courts, recognizing that this "complete unity of interest" language was not a limiting principle at all,[4] have applied *Copperweld*'s

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[4] *See, e.g., Bulls II*, 95 F.3d at 598 (describing "complete unity of interest" as a "statement of fact about the parent-subsidiary relation, not as a proposition of law about the limits

(cont'd)

principles to find that § 1 should not apply to the core business decisions of professional sports leagues and other non-sports legitimate joint ventures. For example, in *Bulls II*, the Seventh Circuit found that, in the context of a professional sports league, there can be only one source of economic power. 95 F.3d at 599 ("From the perspective of fans and advertisers (who use sports telecasts to reach fans), 'NBA Basketball' is one product from a single source even though the Chicago Bulls and Seattle Supersonics are highly distinguishable, just as General Motors is a single firm even though a Corvette differs from a Chevrolet."); *see also Am. Needle*, 538 F.3d at 744; *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 277 (8th Cir. 1988) ("Even though the cooperatives may quarrel among themselves on how to divide the spoils of their economic power, it cannot reasonably be said that they are *independent sources* of that power. Their power depends, and has always depended, on the cooperation among themselves. They are interdependent, not independent.") (emphasis in original); *Nat'l Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting) (the NFL "competes *as a unit* against other forms of entertainment") (emphasis added).

Courts also have rejected § 1's application to these decisions because of *how* leagues necessarily function – i.e., from its inception, a professional sports league collectively decides how to produce,

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of permissible cooperation. As a proposition of law, it would be silly").

promote, market and sell its jointly created products. *See Am. Needle*, 496 F. Supp. 2d 941, 943-44 (recognizing the role of NFL Properties in the blanket licensing of league and team intellectual property and finding that "[d]elegated decision-making does not deprive the marketplace of independent centers of decision-making"); *see also City of Mt. Pleasant*, 838 F.2d at 274-75.

Finally, the court in *Seabury Management, Inc. v. Professional Golfers' Association of America, Inc.*, 878 F. Supp. 771 (D. Md. 1994), *aff'd in part, rev'd in part on other grounds*, 52 F.3d 322 (4th Cir. 1995), held that single-entity treatment applies where the enterprise has the ultimate power to reign in a related entity that wishes to pursue its own divergent interests. *See id.* at 778 & n.6 (noting that the "PGA always had ultimate control over the section[s], which could not function as [sections] independent of the PGA" – "[t]his type of 'ability to control' is perhaps the determinative factor in the *Copperweld* analysis").

The core business decisions of a professional sports league satisfy each of these *Copperweld* principles. The products would not exist but for the "source" of the league's formation. The league functions as a single enterprise from the league's very creation, collectively deciding how to make, promote and sell the venture's products. And the enterprise has the ultimate control over the individual teams, including the right to terminate a franchise, if any venture member fails to act in the enterprise's best interest.

Nevertheless, *American Needle* is illustrative of the lingering conflict over *Copperweld*'s application

to the decisions of professional sports leagues. Petitioner states that:

> The League does not have any ownership interest in any of the teams and no team owns any interest in any other team. Each team has its own players, coaches, managers, administrators and marketers. The teams do not share capital, profits or losses, and income and profits vary considerably from team to team. The teams operate the League by agreement, through a constitution that may be amended only by agreement of the teams.
>
> . . .
>
> The teams own and control their respective Club Marks separately; neither the League nor any other team has any rights to another team's Club Marks. But for their agreement not to, the teams have the right to license their Club Marks independently of, and in competition with, each other and the League.

Petition for a Writ of Certiorari at 3, *supra*. Yet, the Seventh Circuit held that – because the product could not exist but for the formation of the NFL joint venture – under *Copperweld* "the NFL teams are best described as a *single source of economic power* when promoting NFL football through licensing the

teams' intellectual property." *See Am. Needle*, 538 F.3d at 744 (emphasis added). Indeed, the common refrain from antitrust plaintiffs that teams, as joint venture partners, can nevertheless "compete" against each other or the league venture itself in an "antitrust sense" not only ignores the teams' complete economic interdependence, it confirms the need for this Court to clarify once and for all *Copperweld*'s application to professional sports leagues.

As the Seventh Circuit explained:

> [T]he NFL is an unincorporated association of (now) 32 separately owned and operated football teams that collectively produce an annual series (or "season") of over 250 interrelated football games. Each season culminates in a championship game–a game better known as the Super Bowl. As such, the product that the teams produce jointly–NFL football–requires extensive coordination and integration between the teams. After all, NFL football is produced only when two teams play a football game. Thus, although each team is a separate corporate entity or partnership unto itself, no team can produce a game–the product of NFL football–by itself, much less a full season of games or the Super Bowl. Likewise, the teams' individual success is necessarily linked to the success of the league as a whole; to put it another way, it makes little difference if a team

> wins the Super Bowl if no one cares about the Super Bowl.

Am. Needle, 538 F.3d at 737. Simply stated, there would be no product without the ongoing cooperation within the NFL joint venture, and no team would have *any* economic value were it not a member of the venture.[5]

Likewise, the Seventh Circuit held that "[c]ertainly the NFL teams can function only as one source of economic power when collectively producing NFL football." *See Am. Needle*, 538 F.3d at 743 (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 101 (1984) ("[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports.") (citation and internal quotation marks omitted); *Bulls II*, 95 F.3d at 599 ("[T]he NBA has no existence independent of sports. It makes professional basketball; only it can make 'NBA Basketball' games; and . . . the NBA also 'makes' teams."); *Nat'l Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting) ("The NFL . . . competes with other sports and other forms of entertainment in the entertainment market. Although individual NFL teams compete with one another on the playing field, they rarely compete in the market place.")).

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[5] *See Am. Needle*, 538 F.3d at 743 ("Asserting that a single football team could produce a football game is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself?"); *Bulls II*, 95 F.3d at 598-99 ("[A] league with one team would be like one hand clapping.").

American Needle thus provides a well-ripened opportunity for this Court to clarify *Copperweld*'s application to the decisions of professional sports leagues. *See Super Sulky, Inc. v. U.S. Trotting Ass'n*, 174 F.3d 733, 741 (6th Cir. 1999) ("[T]he notion of concerted action liability in the field of professional sports is at best confusing."). This Court should grant certiorari to hold, under one or more of *Copperweld*'s principles, that § 1 scrutiny should never apply to the production, promotional and marketing decisions of professional sports leagues – or any other legitimate joint venture for that matter – where the alleged restraints reflect nothing more than the members' ongoing venture activities.

III. Certiorari Should Be Granted Because Confusion over Whether Courts Should Treat Legitimate Joint Ventures, Including Professional Sports Leagues, As "Single Firms" Discourages These Ventures from Innovating and Serving Consumers

The ever increasing conflict and ambiguity concerning the application of § 1 have a significant chilling effect on legitimate joint ventures, including professional sports leagues such as *Amicus*. The risk of a potential treble damages (or disruptive injunctive) action looms following literally *every* internal dispute regarding how best to make, promote and sell the venture's products, including intellectual property the value of which the venture creates. Consequently, rather than serving the marketplace and responding to consumer demand, as would "any other firm," professional sports leagues

and other legitimate joint ventures – within the venture itself – will tend to calibrate their innovation and competitive vigor to account for the risk of protracted and costly rule of reason litigation.

Amicus currently finds itself in the midst of just such a litigation, defending against a lawsuit brought by one of its team owners that – after losing a vote among all of its venture partners regarding how best to promote NHL hockey, including related products, through "new media" – turned to the federal courts and § 1 for outside relief. The case, *MSG v. NHL*, No. 07 Civ. 8455 (S.D.N.Y.), demonstrates the confusion surrounding the applicability of § 1 to the business decisions of legitimate joint ventures and the resultant difficulty for such ventures in effectively planning and operating. Madison Square Garden ("MSG"), owner of the New York Rangers, sued *Amicus*, alleging violations of § 1 regarding the territorial exclusivity rights of the NHL teams and the allocation of other venture rights collectively shared among the teams, as compared to those reserved to an individual team within its local territory. MSG is seeking injunctive relief against a broad array of the NHL's core business decisions, including licensing of league and team intellectual property rights, national and local broadcasting arrangements, merchandising and marketing of league and team products, advertising and sponsorship regulations, and all new media activities – all of which are collectively governed within the league venture by MSG and the twenty-nine other team owners, and all of which clearly relate to NHL hockey and the products jointly created by the 30 NHL teams. MSG's lawsuit attacks practices and policies both past – many

dating back to the league's formative document, the NHL Constitution – and future, including how *Amicus* should best exploit the venture's online and other new media opportunities.

The effect on *Amicus*' business is evident. Putting aside the cost of such broad-ranging litigation – both monetary and in terms of business opportunities and goodwill lost with potential business partners, as well as Rangers and NHL fans – MSG seeks to have a federal court step inside the NHL joint venture and review virtually every one of its output-related business decisions, the vast majority of which are decades old. If joint ventures are to be treated "like any other firm," *see Dagher*, 547 U.S. at 7, § 1 jurisprudence cannot permit unhappy venture members, customers, suppliers or vendors to have the federal courts second-guess the venture's basic business decisions. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (observing that federal courts "are ill-suited" to "act as central planners, identifying the proper price, quantity and other terms of dealing" of a single firm). With respect to these internal venture decisions regarding the venture's product, the venture members are not competitors "in the antitrust sense," *see Dagher*, 547 U.S. at 5-6, and such internal decisions allocating decision-making authority between the league and individual teams pose no economic threat to competition or the consumer. *See* 7 Areeda & Hovenkamp, *supra*, ¶ 1462b, at 194 ("Coordination within an otherwise lawful enterprise does not create additional market power or facilitate a restraint.").

Ultimately, it is the consumer who suffers from this ambiguity surrounding § 1. Venture members

are more likely to forestall innovation or other plans aimed at better competing in the marketplace if a member or disadvantaged customer (such as Petitoner), supplier or vendor disagrees with the strategy. This cannot be the law applicable to joint ventures with respect to the products the ventures create, *see Verizon*, 540 U.S. at 414 (cautioning against any construction of antitrust law that may "chill the very conduct the antitrust laws are designed to protect") (citation and internal quotation marks omitted). Accordingly, this Court should grant certiorari to ensure the ability of legitimate joint ventures to bring their products to market "like any other firm."

IV. Certiorari Should Be Granted Because Rule of Reason Scrutiny of the Core Business Decisions of Legitimate Joint Ventures Leads to the Type of Costly Antitrust Litigation Against Which *Twombly* Counsels

The inevitable consequences of *not* granting certiorari to address this recurring § 1 issue are predictable: many federal courts (again, often in conflict with prior precedent) will assess these antitrust challenges to the fundamental business decisions of legitimate joint ventures under the "full" rule of reason, typically resulting in massive and protracted fact discovery and expert testimony prior to summary adjudication or trial. *See, e.g., Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008); *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, No. 05-138, 2008 WL 113987 (E.D. Ky. Jan. 7, 2008). And, while many courts now recognize that the ongoing internal

business decisions of professional sports leagues regarding the production, promotion and sale of the venture products (and derivative products) are inevitably procompetitive and efficiency enhancing, *see, e.g.*, *Salvino*, 542 F.3d 290, as long as the allure of § 1 treble damages and the potential antitrust hammer of injunctive relief remain available to disgruntled venture members, customers, suppliers and vendors, these costly litigations will persist.

This Court should grant certiorari to assess whether the policy concerns articulated in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), are equally applicable to these single-entity issues as applied to the decisions of legitimate joint ventures. In *Twombly*, this Court characterized discovery in antitrust actions as a "sprawling, costly, and hugely time-consuming undertaking," *see id.* at 1967 n.6, while discussing the need for clarity with respect to the pleading standards under Rule 8, Fed. R. Civ. Proc. 8. *See Twombly*, 127 S. Ct. at 1964-69. This Court also noted that judicial supervision ("careful case management"), "careful scrutiny of evidence at the summary judgment stage," and "lucid instructions to juries" have all proved ineffective in curbing discovery abuses. *See Twombly*, 127 S. Ct. at 1967 (adding that the "threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment or trial] proceedings").

These same concerns are no less relevant to legitimate joint ventures that face, as the default standard, full rule of reason discovery and litigation. Cases such as *MSG v. NHL*, No. 07 Civ. 8455 (S.D.N.Y.), cost millions of dollars to defend, take up incalculable time, and inconvenience both parties

and non-parties. These cases also tend to undermine relationships with customers, suppliers and vendors – relationships that should be managed in the corporate boardroom rather than in the federal courts.

The procedural posture of *American Needle* – i.e., the affirmance of summary judgment on the single-entity issue – presents this Court with the rare opportunity to grant certiorari on this important question of federal law. Rule of reason cases tend to be intensely factually driven, requiring voluminous fact discovery and complex economic expert discovery. *See, e.g.*, *Salvino*, 542 F.3d 290. Regardless of which party prevails, these massive cases are rarely litigated and appealed on the single-entity issue. *See, e.g., id.* This Court should clarify § 1 to remedy the *in terrorem* effect these lawsuits have on the functioning of legitimate joint ventures, s*ee Twombly*, 127 S. Ct. at 1966 (discussing "practical significance" of Rule 8 in preventing groundless claims aimed at settlement), as well as to resolve the conflict among the circuit courts on this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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