

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMERICAN NEEDLE, INC.,)	
)	PUBLIC REDACTED
Plaintiff,)	VERSION
)	
v.)	
)	Civil Action No. 04-CV-7806
)	
NEW ORLEANS LOUISIANA SAINTS, <i>et al.</i> ,)	Judge Sharon Johnson Coleman
)	
Defendants.)	Argument Date: August 27, 2013

REPLY IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT (CAUSATION)

Timothy B. Hardwicke
Michael J. Nelson
LATHAM & WATKINS LLP
233 South Wacker Drive, Suite 5800
Chicago, IL 60606
(312) 876-7700/fax (312) 993-9767
tim.hardwicke@lw.com/
michael.nelson@lw.com

Counsel for Reebok International Ltd.

Gregg H. Levy (*pro hac vice*)
Derek Ludwin (*pro hac vice*)
Leah E. Pogoriler (*pro hac vice*)
Ross A. Demain (*pro hac vice*)
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 662-6000/fax (202) 662-6291
glevy@cov.com/dludwin@cov.com/
lpogoriler@cov.com/rdemain@cov.com

Richard Del Giudice
GOZDECKI, DEL GIUDICE, AMERICUS &
FARKAS LLP
One East Wacker Drive, Suite 1700
Chicago, IL 60601
(312) 782-5010/fax (312) 782-4324

Counsel for the NFL Defendants

July 22, 2013

INTRODUCTION

American Needle offers no admissible evidence to dispute our showing that the conduct it challenges could not have caused its antitrust injury. American Needle fails even to engage on the dispositive question: whether it would have received a license *but for* the limited exclusivity provision of the Reebok license agreement.

The undisputed record confirms that the NFL decided to change its licensing model to one with far fewer licensees selected by a process that included competitive bidding. It also confirms that American Needle, which submitted an indisputably uncompetitive bid—a bid that its Opposition makes no effort to defend or explain—would not have received a license in any model under consideration.

Those *undisputed* facts make it impossible for American Needle to prove what it must: but-for causation. American Needle would not have received a license if the NFL had granted *two* (or more) headwear licenses, and thus it cannot show that its asserted injury flows, in the words of the Supreme Court, “from that which [allegedly] makes defendants’ acts unlawful”—*i.e.*, the NFL’s grant of only one.

Before turning to the arguments raised in the Opposition, we invite the Court’s attention to American Needle’s responses to our Statement of Undisputed Facts. American Needle generally ignores the substantive evidence, purporting to “dispute” statements of fact because they use the acronym “NFL” (which we had already defined as a shorthand for the NFL Defendants), or on the ground that “the documents speak for themselves,” or based on the unsupported assertion (which we address at pages 7 to 8, below) that “[t]he bidding was a sham.” In all material respects, the substance of our statements of fact, and their underlying record support, remain undisputed by admissible evidence.

Antitrust injury is a core element of an antitrust plaintiff's claim, not an affirmative defense. American Needle argues (Opp. at 1, 3-4) that defendants' causation motion raises an "affirmative defense[] that [defendants] did not plead in their answers to the complaint and [therefore] waived." This claim is wrong in two respects.

First, antitrust injury is not an affirmative defense. It is black-letter law that "the elements a *plaintiff* must satisfy" include "*antitrust injury* . . . [*i.e.*,] whether the violation was the cause-in-fact of the injury." *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993) (internal citations omitted). Second, American Needle apparently overlooked the NFL Defendants' Answer and Reebok's Answer, both of which raise the absence of antitrust injury as a defense. (*See* Dkt. 29 at 10 ("Plaintiff has not suffered antitrust injury"); *accord* Dkt. 30 at 10.)

"Actual causation" is not the relevant standard. American Needle's principal argument (Opp. at 2) is that "[a]ctual causation is not disputed." That argument is both wrong and irrelevant. The standard for determining whether antitrust injury has occurred is "whether the violation was the cause-in-fact of the [plaintiff's] injury: *that 'but for' the violation, the injury would not have occurred.*" *Greater Rockford Energy*, 998 F.2d at 395 (emphasis added) (relying on the Supreme Court's holding that in order to show *antitrust injury*, a plaintiff must show that his injury "flows from that which [allegedly] makes defendants' acts unlawful," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). As set forth in detail in our opening brief (at 17-19), undisputed evidence demonstrates that the challenged exclusivity provision was *not* the "but-for" cause of American Needle's failure to secure a license: American Needle would not have received a license under any alternative under consideration.

American Needle does not address or even mention “but-for” causation in its Opposition; nor does it mention “antitrust injury.” Instead, American Needle asserts that it has satisfied a vague and undefined “actual causation” standard. American Needle cites no precedent for its putative standard, and for good reason: the Supreme Court and the Courts of Appeals have consistently held that in antitrust cases, a specific, rigorous standard—“but-for” causation—is required. *See Brunswick*, 429 U.S. at 488-89; *Greater Rockford Energy*, 998 F.2d at 395.

Because “*plaintiff* must satisfy” a “but-for” causation standard, *Greater Rockford Energy*, 998 F.2d at 395, American Needle’s derisive comments (Opp. at 2 *et seq.*) about an “even if” defense are upside down. Quite simply, it is American Needle’s burden to show that, but for the purported violation, it would have received new licenses.

We do, in fact, submit that “American Needle’s licenses wouldn’t have been renewed ‘even if’ the defendants had not agreed to create the Reebok exclusive.” (*Id.* at 2.) We have offered sworn testimony and contemporaneous documents, including voluminous materials from the bidding process, that so confirm. Despite extensive discovery, including the opportunity to cross-examine numerous current and former NFL employees, that testimony and those documents remain undisputed.

In order to survive summary judgment, American Needle was not required to “disprove” our extensive evidence (*id.* at 5), but it was required to offer evidence showing a *genuine* dispute as to a *material* fact. It utterly failed to do that. It explicitly chose instead to assume that, if the NFL had opted not to grant an exclusive license, the world would have stayed the same and it would have received a license in the “normal course.” (*Id.* at 6.) That

unsupported speculation—on an element of its affirmative case *as to which American Needle bears the burden*—cannot bar summary judgment for defendants here.

American Needle’s reliance on the “normal course” is unavailing. American Needle asserts that “there is ample evidence that [its] licenses would have been renewed in the *normal course*.” (*Id.* at 6 (emphasis added)). As a threshold matter, as we showed in our initial memorandum (at 16 n.29), undisputed evidence, as well as established legal authorities, preclude any argument that American Needle’s prior licenses gave rise to a reasonable expectation of renewal, the premise of American Needle’s “normal course” theory.¹

What is more, there is overwhelming evidence, none of which is disputed, that the NFL had decided *not* to continue with the *status quo* and *not* to continue its practice of granting and renewing apparel licenses in the “normal course.” Indeed, even American Needle concedes that “NFLP and the teams decided to change the apparel licensing model.” (Dkt. 304, Pl.’s Response to Defs.’ Causation SOF 8.) The NFL decided that it had to do something different, and it chose from among various models that all entailed significantly reducing or even eliminating its licensee base. (Dkt. 242-2, Defs.’ Causation SOF 9-10.)

In the face of this undisputed record, American Needle has offered no admissible *evidence* to support its position that, notwithstanding a decision to change the “normal course,” its licenses would have been renewed if the NFL had decided not to grant an exclusive headwear license but instead to issue more than one. The two record items cited by American Needle—the

¹ For similar reasons, American Needle’s reliance on the fact that it received certain licenses from NFLP prior to the change in licensing model—indeed, prior to the solicitation of bids via the RFP process—is misplaced. (Resp. to Pl.’s ASF 3; Defs.’ Ex. 65 at AN202 (“acknowledge[ment] that NFLP ha[d] no express or implied obligation to renew” the licenses).)

“ample evidence” to which American Needle refers—fail to create a genuine issue of material fact.

Plaintiff’s Exhibit 22 (NFLP2219) is a one-page excerpt from a multi-page document produced by the NFL in discovery, the complete version of which was filed as Exhibit 9 in support of defendants’ motions for summary judgment. The excerpt that American Needle submitted to the Court is indecipherable; nothing in the record supports American Needle’s interpretation of that page. (Resp. to Pl.’s ASF 2.) But the pages immediately before and immediately after that one-page snippet—pages that American Needle elected not to share with the Court—are clear and compelling. They reflect the fact that the NFL viewed American Needle as a “non-performing licensee[,]” and that it had marked American Needle for “deletion” and “eliminat[ion]”—even in a model with multiple headwear licensees. (*Id.*; Defs.’ Ex. 9 at NFLP2218, 20-22.)

That document confirms undisputed testimony that American Needle was “viewed as not being as capable a licensee as the others,” including in “the design of products, the distribution, the advertising and promotion . . . [and the] ability to work effectively with the” NFL, and that it would not have received a license even if the NFL had chosen a non-exclusive model. (Defs.’ Ex. 121, Gertzog Dep. 201:1-202:16.)² American Needle’s only response to that testimony—that it is “self-serving”—is of no moment; the testimony is fully corroborated by an extensive, contemporaneous documentary record. (Dkt. 242-2, Defs.’ Causation SOF 27-29.)

The second piece of evidence upon which American Needle relies—and the sole premise for its assertion (Opp. at 2) that “[a]ctual causation is not disputed”—is a declaration

² Citations to Defs.’ Exs. 118 to 124 are to the sequentially numbered exhibits attached to the declaration of Leah E. Pogoriler filed concurrently with this reply.

from American Needle's president, Robert Kronenberger (Pl.'s Ex. 21), which discusses a conversation that Mr. Kronenberger had in 2001 with Susan Rothman, then an NFL employee. According to Mr. Kronenberger's declaration, Ms. Rothman informed him in that conversation that American Needle's licenses would not be renewed "because the league had decided to grant the exclusive license to Reebok" (Opp. at 2 (emphasis removed)).

That assertion irreconcilably conflicts with Mr. Kronenberger's prior sworn deposition testimony addressing the same conversation. In his deposition, Mr. Kronenberger testified that [REDACTED]

[REDACTED].³ Accordingly, Mr. Kronenberger's declaration should be stricken or disregarded. *See Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049, 1056 (7th Cir. 2000) (upholding application of "'well-established rule' that affidavits in conflict with prior sworn testimony should be disregarded" where plaintiff's affidavit contradicted deposition testimony disclaiming knowledge).⁴ And, even if it is considered, Mr. Kronenberger's declaration is of no moment; it does not (and cannot) rebut the undisputed evidence that the Reebok license was, at most, "merely a step in a sequence" in the non-renewal, and not its but-for cause. *O.K. Sand & Gravel v. Martin Marietta Techs., Inc.*, 36

³ Resp. to Pl.'s ASF 1; Defs.' Ex. 123, Kronenberger Dep. 224:13-16 ([REDACTED])

[REDACTED], 225:19-226:2 ([REDACTED])

[REDACTED]).

⁴ *See also Clark v. Takata Corp.*, 192 F.3d 750, 759-61 (7th Cir. 1999) (affirming district court's striking of affidavit from consideration at summary judgment proceeding because "'[a] party cannot claim a lack of general knowledge about a subject and later make a statement which requires detailed knowledge about the same subject.'" (citation omitted)); *Lambert v. Peri Formworks Sys., Inc.*, 2012 U.S. Dist. LEXIS 74177, at *11 n.4 (May 25, 2012) (Coleman, J.) ("Parties cannot create issues of fact by submitting an affidavit that contradicts prior deposition testimony.").

F.3d 565, 573-74 (7th Cir. 1994) (plaintiff failed to show that alleged antitrust violations were but-for cause of termination even though “termination was a necessary prerequisite” because it was “merely a step in a sequence” and could be explained by other factors).

The *character* of the evidence upon which American Needle relies—the meaningless one-page snippet from a document that, on the immediately surrounding pages, dooms its claims, and a declaration from American Needle’s president that purports to recall the substance of a conversation as to which he had previously and under oath disclaimed recollection—speaks volumes about the absence of any genuine dispute as to any material fact here.

American Needle voluntarily waived its claims against the NFL Defendants.

Finally, it remains undisputed that by responding to the RFP, American Needle “agree[d] that NFLP’s decision not to award a license to [American Needle] shall not give rise to any rights in favor of [American Needle].” (Dkt. 242-2, Defs.’ Causation SOF 31; Defs.’ Ex. 29 at NFLP8052.) Once again, American Needle’s assertion (Opp. at 1) that the NFL Defendants “did not plead [this defense] in their answer[] to the complaint” is simply wrong, as is clear from the face of the answer. (*See* Dkt. 29 at 11.)

Implying that it was fraudulently induced into submitting its bid and waiving its claims, American Needle argues that the bidding process was a “sham.” That theory has no support in the record other than Mr. Kronenberger’s testimony that [REDACTED]. But that testimony is obviously inadmissible hearsay: It recites an out-of-court statement offered for the truth of the matter asserted, and it is not subject to any exception to the hearsay rule because, as the testimony makes clear, [REDACTED]

Respectfully submitted,

/s/ Timothy Hardwicke
Timothy B. Hardwicke
Michael J. Nelson
LATHAM & WATKINS LLP
233 South Wacker Drive, Suite 5800
Chicago, IL 60606
(312) 876-7700/ fax (312) 993-9767
tim.hardwicke@lw.com/
michael.nelson@lw.com

Counsel for Reebok International Ltd.

/s/ Derek Ludwin
Gregg H. Levy (*pro hac vice*)
Derek Ludwin (*pro hac vice*)
Leah E. Pogoriler (*pro hac vice*)
Ross A. Demain (*pro hac vice*)
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 662-6000/fax (202) 662-6291
glevy@cov.com/dludwin@cov.com/
lpogoriler@cov.com/rdemain@cov.com

Richard Del Giudice
GOZDECKI, DEL GIUDICE, AMERICUS &
FARKAS LLP
One East Wacker Drive, Suite 1700
Chicago, IL 60601
(312) 782-5010/fax (312) 782-4324

Counsel for the NFL Defendants

July 22, 2013

CERTIFICATE OF SERVICE

I, Derek Ludwin, an attorney, do hereby certify that I caused a copy of the foregoing to be electronically filed with the Court and to be served on all parties on July 22, 2013 using the Court's electronic case filing system.

By: /s/ Derek Ludwin
Derek Ludwin