

NO. 21-1441

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

HOBART-MAYFIELD, INC.,
Plaintiff-Appellant,

v.

NATIONAL OPERATING COMMITTEE ON
STANDARDS FOR ATHLETIC EQUIPMENT, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan
Case No. 2:19-12712
The Honorable Gershwin A. Drain

BRIEF OF APPELLANT HOBART-MAYFIELD, INC.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 21-1441

Case Name: Hobart-Mayfield, Inc. v. NOCSAE, et al.

Name of counsel: Christopher M. Wyant, Allen Bachman

Pursuant to 6th Cir. R. 26.1, Hobart-Mayfield, Inc.

Name of Party

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1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

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No

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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case involves claims under Sherman Act § 1 that affect nation-wide markets and football helmet safety products used by millions of individuals in the United States. The issues are complex. Appellant believes oral argument would assist the Court, and respectfully requests it.

INTRODUCTION

This action addresses a simple question: should a small group of football helmet manufacturers be permitted to exclude competing products from the market, even when those products *meet or exceed all relevant, independently-established safety standards*? Under Section 1 of the Sherman Act, 15 U.S.C. § 1, the answer is “no.”

Appellee-Defendant National Operating Committee on Standards for Athletic Equipment (“NOCSAE”) is a standard setting organization that exists to promulgate safety and technical standards for athletic equipment, including football helmets. Substantially all of organized football—from pee-wee to professional—requires that football helmets receive NOCSAE certification to be used in play. NOCSAE’s work *should be* an independent, market-neutral process: any and all equipment passing relevant safety tests should be “NOCSAE-certified” and allowed into organized football play.

The equipment products at issue in this case are football helmet “Add-ons.” Add-on products are researched, developed and marketed by companies other than the original helmet manufacturers, which include Appellee-Defendants Riddell, Inc. (“Riddell”), Kranos Corp (d/b/a/ “Schutt Sports”), and Xenith, LLC (“Xenith”) (collectively, the “Helmet Manufacturers”). NOCSAE does not have a safety standard for Add-ons, but (in theory) should grant NOCSAE certification to an Add-

on manufacturer if its Add-on meets NOCSAE testing standards when combined with a NOCSAE-certified helmet.

Appellant-Plaintiff Hobart-Mayfield, Inc. (“Mayfield”) is one of many Add-on manufacturers. Mayfield designed, patented and produces the S.A.F.E.Clip. The S.A.F.E.Clip affixes a helmet’s facemask to the helmet itself. As established by independent, NOCSAE-authorized testing labs, the S.A.F.E.Clip (i) passes *all NOCSAE safety standards* when used on NOCSAE-certified football helmets, and (ii) reduces impact to football players by up to 35% beyond the original helmet design. The S.A.F.E.Clip makes helmets safer. It protects players better than the standard helmets used on their own.

Since 2018, NOCSAE has formed agreements with the three Helmet Manufacturers allowing them to exclude Add-on products. Specifically, NOCSAE granted Helmet Manufacturers the right to “void” the NOCSAE certification whenever a player attaches any Add-on. This de-certification right exists *regardless of whether the helmet/Add-on combination meets or exceeds NOCSAE’s own safety test requirements*. The Helmet Manufactures have used these agreements to issue a blanket de-certification of all helmet/Add-on combinations. Thus, NOCSAE has rendered its standards meaningless, and the only qualification for NOCSAE certification is whether the Helmet Manufacturers—which control almost 100% of the market for new helmets—allow products to enter the market.

These explicit agreements between NOCSAE and Helmet Manufacturers alone allow each Helmet Manufacturer to substantially foreclose Add-on manufacturers from relevant markets. Indeed, because Riddell controls 60% of the football helmet market, the agreement between NOCSAE and Riddell is alone enough to unreasonably foreclose Add-on manufacturers under the antitrust laws.

Separately, the Helmet Manufacturers and NOCSAE have engaged in an overarching conspiracy to exclude Add-on manufacturers from the market through a group boycott of customers that wish to use Add-ons. Mayfield alleges with supporting evidence that customers want to purchase and use Add-ons, including the S.A.F.E.Clip, in organized play. However, they do not because Helmet Manufacturers will void the NOCSAE certification of any helmet whenever a player attaches an Add-on. Through this conduct, Helmet Manufacturers coerce customers not to purchase Add-ons, eliminating any competition from Add-on manufacturers.

The anticompetitive effects of both the individual Licensing Agreements and the overarching conspiracy to boycott customers is simple: all potential customers are prohibited from buying and using Add-ons in organized league play, regardless of the safety, innovation and cost benefits they confer. Thus, Mayfield and all other Add-on manufacturers are excluded entirely from selling their products to the players, teams and coaches that want to buy and use them. Appellees' agreements

have succeeded in eliminating any competition from Add-on manufacturers, resulting in higher prices and reduced innovation.

Mayfield filed this action seeking to enjoin the unlawful NOCSAE/Helmet Manufacturer agreements and recover damages for violations of the Sherman Act and Michigan Antitrust Reform Act. Mayfield also asserted common law claims for tortious interference. The District Court dismissed Mayfield's First Amended Complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, Mayfield seeks reversal of the District Court's order and remand such that this case can proceed to discovery and trial.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337 because the Complaint asserted federal law claims under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. FAC ¶¶ 24-25, R. 61, Page ID # 1347-48. The District Court had jurisdiction of the pendent state law claims under 28 U.S.C. § 1367 because they arose out of the same factual nucleus as the federal claims. *Id.* (¶ 26, Page ID # 1348).

This Court has jurisdiction under 28 U.S.C. § 1291 because the District Court dismissed the Complaint with prejudice. Judgment, R. 69, Page ID # 1973.

This appeal is timely under Fed. R. App. P. 4(a)(1)(A) because the order dismissing the Complaint was filed on April 22, 2021, Order, R. 68, Page ID # 1950-

72, Judgment was entered on April 22, 2021, Judgment, R. 69, Page ID # 1973, and the notice of appeal was filed on May 3, 2021. Notice of Appeal, R. 70, Page ID # 1974.

ISSUES PRESENTED

1. Does Count I plead a plausible violation of Sherman Act § 1 where the FAC alleges (i) an explicit written agreement in the form of NOCSAE Licensing Agreements and written policies allowing Helmet Manufacturers to de-certify any helmet/Add-on combination, *even if the combination continues to meet all NOCSAE safety standards*, and (ii) the Helmet Manufacturers have adopted blanket policies of de-certifying any helmet with an Add-on, effectively excluding all Add-on products from the football helmet markets?

2. Does Count II plead a plausible violation of Sherman Act § 1 where the FAC alleges that (i) Appellees have acted together with the effect of boycotting all Add-on customers and excluding all Add-on products from the relevant markets, and (ii) Appellees' boycott was pursuant to an overarching conspiracy, the existence of which is supported by Appellees' parallel conduct and "plus factors"?

3. Do Counts III-VI plausibly allege claims for tortious interference with a business relationship or expectancy where the FAC alleges (i) both individual lost sales opportunities and a defined category of market opportunity, and (ii) *per se* wrongful acts by Appellees in the form of antitrust violations?

STATEMENT OF THE CASE

The following derives from the well-pled factual allegations in Mayfield's First Amended Complaint ("FAC"), including exhibits A-S. FAC, R. 61, Page ID # 1338-1568.

A. NOCSAE Sets the Standards for Football Helmets

NOCSAE is a standard-setting organization that holds itself out as an "independent, non-profit body that 'develops voluntary performance and test standards for athletic equipment that are available for adoption by any athletic regulatory body.'" FAC ¶ 33, R. 61, Page ID # 1350. NOCSAE provides a safety testing standard for football helmets known as the "severity index" and a testing standard for football facemasks known as "Standard ND087 17m17c." *Id.* (¶¶ 35, 37, Page ID # 1350). The testing is not conducted directly by NOCSAE, but rather by third-party testing labs through a process managed under a separate entity known as "The Safety Equipment Institute" ("SEI") *Id.* (¶ 38, Page ID # 1350-51).

NOCSAE controls its testing and certification process through "Licensing Agreements." *Id.* (¶¶ 40-41, Page ID # 1351-52). If a football helmet manufacturer wishes to sell "NOCSAE certified" helmets, it must enter into a NOCSAE Licensing Agreement pursuant to which the manufacturer provides SEI-approved test results

to NOCSAE. *Id.*¹ Assuming the helmets pass NOCSAE safety tests, and the manufacturer pays the requisite fee, the NOCSAE Licensing Agreements allow the manufacturer to affix a trademarked NOCSAE logo to the product:



Id. (¶¶ 40-44, Page ID # 1352-53).

B. NOCSAE Certification is required to Access the Market

Obtaining the “NOCSAE Certified” logo is critical for any football helmet manufacturer to access the market. “The NFL, NCAA, National Federation of State High School Associations, International Federation of American Football, USA Football, and US Department of Defense Education Activity *require* that all players use NOCSAE certified football helmets.” *Id.* (¶ 48, Page ID # 1354-56) (emphasis added). As a result, “Football helmets that do not meet NOCSAE standards . . . are

¹ See also NOCSAE’s statement to the United States Senate Committee on Commerce, Science and Transportation as found here: <https://www.commerce.senate.gov/services/files/57F6FBF1-1FD5-47F7-8629-B6B9EE4E941D>. The Court may take judicial notice of NOCSAE’s public statement. See *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir.1999), *overruled in part on other grounds*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508-14 (2002).

almost entirely excluded from the respective markets for football helmets.” *Id.* (¶ 52, Page ID # 1356).

C. The Football Helmet Manufacturer Oligopoly

There are only three manufacturers of NOCSAE-certified football helmets in the United States: Riddell, Schutt Sports² and Xenith. *Id.* (¶ 110, Page ID # 1371). “These Helmet Manufacturers collectively control approximately 100% of the football helmet and football helmet replacement part markets.” *Id.* (¶ 111, Page ID # 1371). The Helmet Manufacturers produce and sell new helmets as well as helmet faceguards and faceguard clips (which affix the faceguard to the helmet). *Id.* (¶¶ 112-13, Page ID # 1371-72).

D. Football Helmet Add-On Products

Apart from the Helmet Manufacturers, many additional companies have developed Add-on football helmet products that reduce the risk of head injury and concussions for football players. *Id.* (¶ 72, Page ID # 1360). Mayfield is one³ such Add-on manufacturer. *Id.* (¶ 61, Page ID #1358). Mayfield developed a patented

² Defendants Kranos Corp. d/b/a “Schutt Sports” filed for bankruptcy during the pendency of the case below. R. 64.

³ Others include Zuti Facemasks, LLC (producing non-welded faceguards), Shockstrip, Inc. (producing impact absorbent adhesive to reduce impact severity), Wegener Safety Latch (producing a chin strap latch that virtually eliminates the possibility of a helmet loss during play), and Guardian Sports (producing the “guardian cap” soft shell helmet cover to reduce impact). *Id.* (¶¶ 72-83, Page ID # 1360-63).

technology known as the S.A.F.E.Clip, which is a faceguard clip that affixes a faceguard to the football helmet. *Id.* (¶ 62, Page ID # 1358). The S.A.F.E.Clip incorporates a shock-absorbing technology that reduces the impact forces to the head each time a football player is hit. *Id.* (¶ 63, Page ID # 1358).

Between 2016 and 2018, Mayfield refined its S.A.F.E.Clip and submitted it in combination with several popular football helmet models to ICS Laboratories for testing. *Id.* (¶¶ 66-67, Page ID # 1358-59). ICS Laboratories, which is independent and adheres to NOCSAE standards for football helmet testing, confirmed that (i) eleven separate S.A.F.E.Clip/helmet combinations *passed all NOCSAE safety standards*, and (ii) the current version of the S.A.F.E.Clip resulted in force reductions *as high as 35% per hit*. *Id.* (¶¶ 67-68, Page ID # 1358-59). Based on these test results, Mayfield attempted to widely market its S.A.F.E.Clip directly to individual consumers, sports teams, and retailers, as well as establish business relationships with the Helmet Manufacturers. *Id.* (¶¶ 70-71, Page ID # 1360). As described below, Mayfield has been excluded from the market.

E. The NOCSAE Policy Statements

Beginning in 2013, NOCSAE began issuing written policy statements in the form of “press releases” to address the certification of football helmets incorporating Add-on products. *Id.* (¶¶ 84-86, Page ID # 1363-64). The first policy statement was issued on July 16, 2013, and included an unequivocal statement that the “addition of

after-market items by anyone that changes or alters the protective system . . . voids the certification of compliance with NOCSAE standards.” *Id.* (¶ 86, Page ID # 1364). A mere three weeks later, NOCSAE revised its policy statement in a press release entitled “Certification to NOCSAE Standards and Add-on Helmet Products,” which provided in relevant part:

Companies which make add-on products for football helmets *have the right to make their own certification of compliance* with the NOCSAE standards on a helmet model, but when that is done, the certification and responsibility for the helmet/third-party product combination would become theirs, (not the helmet manufacturer).

Id. (¶ 88, Page ID # 1365-66 and Ex. J, Page ID # 1522-23) (emphasis added). Thus, beginning in 2013, NOCSAE permitted Add-on Manufacturers like Mayfield to submit helmet/Add-on combinations for independent testing and obtain certification if the helmet continued to pass on NOCSAE standards. Mayfield operated under this policy in developing the S.A.F.E.Clip. *Id.* (¶ 89, Page ID # 1366).

The 2013 NOCSAE Add-on policy came to an abrupt end in 2018. *Id.* (¶ 90, Page ID # 1366-67). On May 8, 2018, NOCSAE issued yet another policy statement, granting a veto right to the Helmet Manufacturers for all Add-on products, even if the Add-on products render the helmet *safer* as measured by NOCSAE standards:

- The addition of an item(s) to a helmet previously certified without the item(s) creates a new untested model. **Whether the add-on product improves the performance or not**, the helmet model with the add-on product is no longer “identical in every aspect” to the one originally certified by the manufacturer.

- **When this happens, the helmet manufacturer has the right, under the NOCSAE standards, to declare its certification void.** It may elect to allow the certification to remain unaffected, or it may also decide to engage in additional certification testing of the new model and certify the new model with the add-on product, but it is not required to do so.

Id. As a result of this 2018 policy statement, the NOCSAE Licensing Agreements now allow the Helmet Manufacturers to (i) obtain NOCSAE certification logos allowing them to sell the helmets into all levels of organized play, and (ii) de-certify any helmet that incorporates an Add-on (thereby excluding the helmet from all organized play) *even if the Add-on/helmet combination meets or exceeds all NOCSAE safety standards.* *Id.* Helmet Manufactures now have the right to exclude from the market Add-ons that make helmets *safer* by all objective measurements.

F. Helmet Manufacturers De-Certify All Add-On Combinations

Shortly after NOCSAE’s 2018 policy change, the Helmet Manufacturers began exercising their new de-certification rights and excluded all Add-on products from the market. On August 17, 2018, Riddell, which is by far the largest Helmet Manufacturer, issued a “Response to Address Aftermarket Accessories and NOCSAE Certification” on its website, stating: the NOCSAE certification “is void if the helmet or face mask is modified in any way. Riddell recommends against the use of any third party aftermarket accessories . . . as such modifications void the NOCSAE certification and render the helmet or face mask illegal for most organized

play.” *Id.* (¶ 155, Page ID # 1385-86 and Ex. P, Page ID # 1555). Schutt Sports followed suit on its website with similar blanket de-certification of helmet/Add-on combinations. *Id.* (¶ 157, Page ID # 1386 and Ex. R., Page ID # 1563-64). All Helmet Manufacturers have now stated “publicly and to Mayfield Athletics that they will void the NOCSAE certification of any helmet using any third-party Add-on.” *Id.* (¶ 92, Page ID # 1367).

G. Additional Indications of Collusion among the Appellees.

The express, written agreements and conduct by NOCSAE and the Helmet Manufacturers described above are in and of themselves unlawful under the Sherman Act. But they are not the only indication of a concerted effort to keep Add-on products off the market. While the allegations in the FAC are too extensive to recount in full, these indications can be summarized as follows:

- NOCSAE’s Board of Directors includes representatives controlled by the Helmet Manufacturers. *Id.* (¶¶ 132-33, Page ID #1377-78).
- For the period from 2013-2018, when NOCSAE allowed Add-on manufacturers to test and certify Add-on/helmet combinations, NOCSAE imposed discriminatory testing requirements far more onerous for Add-on manufacturers than those imposed on the Helmet Manufacturers. *Id.* (¶¶ 134-138, Page ID #1378-80).
- NOCSAE representatives, which should have been market-neutral as to football helmet products, directed Add-on manufacturers to “have an arrangement

with the helmet manufacturers” in order to access the market. *Id.* (¶¶ 145-48, Page ID #1382-83).

- NOCSAE representatives expressly *discouraged* potential customers from purchasing Add-on products, even where such products met or exceeded NOCSAE’s safety standards. *Id.* (¶¶ 149-153, Page ID # 1383-85).

- NOCSAE’s actions to exclude Add-on products from the market are against its own economic interest in generating revenue from the Licensing Agreement process. *Id.* (¶¶ 163-166, Page ID # 1388-89).

- The Helmet Manufacturers had opportunities to exchange information regarding Add-ons and their Add-on policies. *Id.* (¶¶ 168-174, Page ID # 1390-92).

- The Helmet Manufacturers have a common motive to conspire and exclude Add-on products that would compete directly with the Helmet Manufacturer products and/or force the Helmet Manufacturers to innovate and make their own products safer. *Id.* (¶¶ 175-185, Page ID # 1392-95).

- The football helmet market is highly susceptible to collusion because it is dominated by an oligopoly, football helmets are largely fungible products, and demand is inelastic (a player cannot participate in football without a NOCSAE-certified helmet). *Id.* (¶¶ 186-187, Page ID # 1395-96).

H. Procedural History

Mayfield filed suit in this action on September 16, 2019. Compl., R.1. Mayfield filed the FAC on October 20, 2021. R. 61. The FAC alleged two separate violations of Sherman Act § 1 and the Michigan Antitrust Reform Act (Counts I and II), FAC ¶¶ 219-236, R. 61, Page ID # 1408-10, as well as tortious interference (Counts III-VI), *Id.* (¶¶ 237-264, Page ID # 1410-1415). Appellees filed a motion to dismiss the FAC pursuant to Federal Rule of Civil Procedure 12(b)(6), which was fully briefed and heard at oral argument on April 13, 2021. R. 62, 63, 65 and 67, Page ID # 1569-1603 (Motion), 1604-1637 (Response), 1935-1945 (Reply).

On April 22, 2021, the District Court issued an Opinion and Order Granting Defendants' Motion to Dismiss [#62] (the "Order," R. 68, Page ID # 1950-72) and a Judgment dismissing the case (R. 69, Page ID 1973). Mayfield filed its Notice of Appeal on May 3, 2021. R. 70, Page ID # 1974.

SUMMARY OF THE ARGUMENT

The District Court's Order and Judgment dismissing this lawsuit with prejudice was incorrect and should be reversed and remanded.

Section I explains that Count I alleges a plausible violation of Sherman Act § 1 as to the NOCSAE Licensing Agreements and the 2018 NOCSAE Policy, which constitute an *explicit* "agreement." Pursuant to that agreement, Appellees have unreasonably restrained trade under the "rule of reason" by voiding the certification

of all helmet/Add-on combinations, even where the *helmets meet all NOCSAE safety standards*. As a result, customers cannot purchase Add-ons for use in organized play, Appellees have eliminated competition from all Add-on manufacturers, and innovation in the football helmet market has been stifled. Appellees' conduct has harmed competition in specific product (helmets, helmet parts, and reconditioning parts) and geographic (the United States) markets. Mayfield has suffered harm as a result.

Section II explains why Count II alleges a plausible overarching conspiracy among the Appellees to exclude Add-ons from the market by boycotting all customers who seek NOCSAE-compliant football helmets with Add-on products (the "Overarching Conspiracy"). In contrast to Count I, the Overarching Conspiracy is based upon parallel conduct and circumstantial "plus-factors" indicating a conspiracy among Appellees. Such a conspiracy to boycott Add-on customers and exclude all Add-on products is a violation of the Sherman Act under both the *per se* standard and the rule of reason.

Section III explains why Counts III-VI allege claims for tortious interference under Michigan's common law. The FAC includes allegations indicating Mayfield had a reasonable likelihood or probability of an expectancy with an identifiable class of purchasers, including examples of specific customers who rejected Mayfield's products due to Appellees' interference. The FAC also adequately alleges antitrust

violations (as described above), which is sufficient conduct to establish “intentional interference” by Appellees. Mayfield has been harmed by Appellees’ interference with an extremely large and identifiable class of potential purchases—millions of participants in organized football play.

STANDARD OF REVIEW

A District Court order dismissing a complaint for failure to state a claim is reviewed *de novo*. *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006) (citation omitted).

ARGUMENT

I. COUNT I ALLEGES A VIOLATION OF SECTION 1 ARISING FROM THE LICENSING AGREEMENTS, THE NOCSAE POLICY, AND APPELLEES’ BLANKET REJECTION OF ADD-ONS.

“Section 1 of the Sherman Act forbids conspiracies ‘in restraint of trade or commerce among the several States.’ 15 U.S.C. § 1.” *Watson Carpet & Floor v. Mohawk Indus., Inc.*, 648 F.3d 452 (6th Cir. 2011). A plaintiff need only plead three elements to state a Section 1 claim: (1) an agreement (2) affecting interstate commerce (3) that unreasonably restrains trade. *White and White, Inc. v. Am. Hosp. Supply Corp.*, 723 F.2d 495, 504 (6th Cir. 1983).

Count I alleges an *explicit* agreement by the Appellees to exclude Add-on products from the market through the NOCSAE Licensing Agreements and the 2018 NOCSAE de-certification policy. The District Court erred in concluding Mayfield’s allegations did not assert a plausible claim in Count I.

A. The Licensing Agreements and 2018 NOCSAE policy constitute a Section 1 “agreement.”

“To plead unlawful [Section 1] agreement[s], a plaintiff may allege either an explicit agreement to restrain trade, or sufficient circumstantial evidence tending to exclude the possibility of independent conduct.” *Watson Carpet*, 648 F.3d at 457 (internal citations omitted).⁴ “[T]he facts alleged must plausibly suggest, rather than be merely consistent with, an agreement to restrain trade in violation of the Sherman Act.” *Id.* But “the plausibility standard is not akin to a *probability* requirement.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (emphasis added). “Often, defendants’ conduct has several plausible explanations. Ferreting out the most likely reason for the defendants’ actions is not appropriate at the pleadings stage.” *Watson Carpet*, 648 F.3d at 458.

The “agreement” in Count I is explicit.⁵ It is comprised of express, written Licensing Agreements together with NOCSAE’s 2018 written policy allowing

⁴ In *Watson Carpet*, the plaintiff alleged an express agreement between its competitor and a mutual supplier to drive the plaintiff out of business by refusing to sell it carpet. 648 F.3d at 454. Because the plaintiff alleged an explicit agreement, the “contentious issue” was “whether the complaint adequately alleged that the refusals to sell carpet were undertaken as part of that agreement, or whether they were independent actions” *Id.* at 457.

⁵ Contrary to the Order, these agreements are not mere “evidence of a conspiracy.” Order, R. 68, Page ID # 1954. The FAC alleges that these license agreements themselves are the explicit, unlawful agreements in violation of Section 1.

Helmet Manufacturers to de-certify helmet/Add-on combinations that pass all NOCSAE safety tests.

The first step in the “agreement” occurred when NOCSAE entered into written contracts with Riddell, Schutt Sports and Xenith “whereby it licenses sports equipment manufacturers the right to market football helmets as certified to satisfy NOCSAE’s standards.” FAC ¶¶ 3, 41, 44, R. 61, Page ID # 1340, 1351-52. The Licensing Agreements themselves are not merely a grant of intellectual property rights to use NOCSAE’s trademarks. Rather, NOCSAE regulates compliance with its safety standards through the Licensing Agreements. As NOCSAE explained in testimony to the United States Senate, the Licensing Agreements obligate each manufacturer to (i) comply with the specific requirements of the NOCSAE standards, (ii) provide quality assurance documentation, (iii) provide certification testing data, and (iv) provide reports from third party testing laboratories. *See supra* n. 1. NOCSAE grants each manufacturer a license for the NOCSAE logos in return for a fee per helmet sold *only if* the manufacturer meets the safety compliance obligations. *Id.* NOCSAE therefore uses the Licensing Agreements to conduct “enforcement of its standards.” *Id.*

The second step in the formation of the Section 1 “agreement” occurred when NOCSAE promulgated written policies that changed the manner in which the License Agreements operated, thereby amending the terms of the Licensing

Agreements. FAC ¶¶ 86-88, 90 and 221, R. 61, Page ID # 1364-66 and 1408. Through these policies, NOCSAE eventually granted Helmet Manufacturers the right to void a NOCSAE certification when Add-on products were incorporated *even where the products met or exceeded all NOCSAE standards*.⁶

NOCSAE initially began modifying the License Agreements in 2013, when it allowed a Helmet Manufacturer to de-certify a helmet with an Add-on unless the Add-on manufacturer submitted the helmet/Add-on combination for testing and certification. FAC ¶ 88, R 61, Page ID # 1365-66. In 2018, after Add-on manufacturers began to market their products, NOCSAE changed its written policy. *Id.* The 2018 policy eliminated the ability of any Add-on manufacturer to obtain NOCSAE certification for a helmet/Add-on combination that passed NOCSAE's safety tests. *Id.* (¶¶ 90-91, Page ID # 1366-67).

The 2018 policy gave the Helmet Manufacturers a “veto” right to reject the use of any and all Add-ons and it eliminated the right of Add-on manufactures to pursue their own certification helmet/Add-on combinations. Critically, NOCSAE and the Helmet Manufacturers revised the “licensing” process to allow de-

⁶ As noted in the Order, Appellees will likely argue these policy statements do not amend the NOCSAE License Agreements. Order, R. 68, Page ID # 1958. But whether they do or not is a dispute of fact that must be resolved in favor of Mayfield for purposes of ruling on a motion pursuant to Rule 12(b)(6). *Mayer v. Mylod*, 988 F. 2d 635 (6th Cir. 1993) (“If an allegation is capable of several inferences, the allegation must be construed in a light most favorable for the plaintiff.”).

certification even if the Add-on manufacturer could establish through independent, NOCSAE-approved, objective testing that a helmet/Add-on combination *met or exceeded all NOCSAE testing standards*. *Id.* (¶¶ 118-19, Page ID # 1373). Thus, the 2018 policy rendered the NOCSAE certification standard meaningless as an independent standard. Instead, it delegated sole authority over the NOCSAE certification to the Helmet Manufacturers, who are now permitted to decide who can and cannot introduce competing products in markets for helmet improvement and reconditioning parts.⁷

The allegations in the FAC plead an express Section 1 “agreement” to restrain trade. Taken collectively, the allegations establish: (i) express written License Agreements between NOCSAE and each Helmet Manufacturer regulating safety testing and certification; (ii) a 2018 written policy promulgated by NOCSAE allowing Helmet Manufacturers to void the License Agreement certifications if any Add-on is used, regardless of test results.

Mayfield is not alleging in Count I that Appellees have surreptitiously conspired to exclude all Add-on products from the market. Rather, the unlawful agreement in Count I is the License Agreement itself between NOCSAE and each

⁷ The Helmet Manufacturers’ ability to exclude competing improvement and reconditioning parts enables them to avoid constraints on price and the need to innovate in ways that would compete with Add-ons.

Helmet Manufacturer, as amended by the NOCSAE’s 2018 policy allowing Helmet Manufacturers to exclude products meeting or exceeding all NOCSAE safety standards. Absent this agreement, there would be no means to exclude NOCSAE-compliant helmet/Add-on combinations from the market. Indeed, if the agreement alleged in Count I is declared unlawful and enjoined—as Mayfield requests in the FAC—Appellees could not continue to de-certify helmets that meet all of NOCSAE’s testing requirements and market competition would resume. *See* FAC at ¶ 256(a), R. 61, Page ID # 1416.

Mayfield is not required to allege a “secret conspiracy” among each Appellee to form the Licensing Agreements and 2018 NOCSAE policy for the explicit purpose of eliminating Add-on competition.⁸ In fact, unlawful Section 1 agreements are often well publicized. *See, e.g., Realcomp II, Ltd. v. Fed. Trade Comm’r*, 635 F.3d 815 (6th Cir. 2011) (applying Sherman Act jurisprudence to an appeal from FTC decision and affirming finding that website policy restricting access to property listing information constituted an “agreement” among member real estate

⁸ The District Court’s error was in requiring “allegations of any communication, agreement or conspiratorial conduct between Defendants about the policy change or any of the Manufacturer Defendants’ licensing agreements.” Order, R. 68, Page ID # 1960. The District Court misread Count I as alleging a secret, back-room conspiracy among all Defendants to form the Licensing Agreements and NOCSAE 2018 policy for an ulterior purpose of restraining the market. Instead, the unlawful agreement in this case has always been explicit and publicly available.

associations); *United States v. Kentucky Real Estate Commission*, Case No. 05-cv-0188-CRS, Dkt. Nos. 25-2 and 27 (W.D. Kentucky Nov. 23, 2005) (order granting entry of consent judgment enjoining unlawful policy by a state-wide Real Estate Commission to restrict competition). The agreement alleged in Count I is explicit and does not depend on circumstantial evidence or inferences.

B. The Licensing Agreements and NOCSAE policies unreasonably restrain trade under the Rule of Reason.

Count I of the FAC adequately pleads an unreasonable restraint of trade arising from the Licensing Agreements and 2018 NOCSAE policy. Whether a restraint is unreasonable is determined under either a *per se* rule or the “rule of reason.” *Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469 (6th Cir. 2005).⁹

Mayfield alleges that the License Agreements and NOCSAE policy are unreasonable restraints under the “rule of reason” test.¹⁰ Under the rule of reason, to

⁹ The District Court erred by not fully analyzing the “restraint of trade” element under either the *per se* or “rule of reason” standard. *See* Order, R. 68, Page ID # 1959, 1961 and 1968.

¹⁰ Given the nature of the agreement and restraint in this case, it would also be appropriate to apply the “quick look” rule of reason analysis. *See Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 770, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999). The “quick look” is an abbreviated form of rule of reason analysis used for situations in which “an observer with even a rudimentary of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” *Id.* at 770. Given there is no pro-competitive reason for granting one narrow set of market participants (Helmet Manufacturers) a right to exclude all competing Add-on products *even where the products meet all NOCSAE safety*

prove a restraint is unreasonable, “a plaintiff has the burden of demonstrating significant anti-competitive effects within a relevant market.” *Nat’l Hockey League Players Ass’n*, 419 F.3d at 469 (citations and quotations omitted). Once the plaintiff meets that *prima facie* burden, “the defendant is required to proffer evidence of pro-competitive effects of the restraint justifying the anti-competitive injuries.” *Id.* Finally, if the “defendant succeeds in doing so, the burden shifts back to the plaintiff to ‘show that any legitimate objectives can be achieved in a substantially less restrictive manner.’” *Id.* Count I pleads a *prima facie* claim under the “rule of reason” standard. As discussed below, the FAC contains specific factual allegations sufficient to “plausibly” plead that the License Agreements and 2018 NOCSAE policy have significant anticompetitive effects within relevant markets.

1. *The FAC pleads significant anticompetitive effects from the Licensing Agreements and 2018 NOCSAE policy.*

The FAC includes extensive allegations of a plausible “unreasonable restraint of trade.” *First*, the agreements restrain trade because customers will not purchase helmets without NOCSAE certification. Organized football leagues at all levels of play *require* NOCSAE certification for players to participate. But the NOCSAE agreements grant Helmet Manufacturers the right to exclude Add-ons from use by

standards, Mayfield has pled a Section 1 claim in Count I under the “quick look” analysis.

de-certifying them, even when the helmet/Add-on combination satisfies all NOCSAE certification standards.

Second, the existence of trade restraint is not theoretical—indeed, the FAC alleges that each Helmet Manufacturer has exercised its right under the Licensing Agreement to exclude all Add-ons. Appellees have in fact restrained trade under the NOCSAE License Agreements and 2018 policy. Riddell and Schutt Sports have adopted blanket policies de-certifying *any helmet* that included an Add-on. Riddell stated in August 2018 that the NOCSAE certifications for its helmets are “void if the helmet or face mask is modified in any way” and, further, “Riddell recommends against the use of any third party aftermarket accessories . . . as such modifications void the NOCSAE certification and render the helmet or face mask illegal for most organized play.” FAC ¶ 155, R. 61, Page ID # 1385-86. Schutt stated its policy on its website: “Alterations, additions or any component deletions or removals made to the helmet or faceguard that do not follow the manufacturer’s guidelines . . . will void the NOCSAE certification of the helmet and faceguard.” *Id.* (¶ 157, Page ID # 1386). Xenith is also among the Appellees who have publicly stated they will void the NOCSAE certification of any helmet using any third-party Add-on. *Id.* (¶¶ 92, Page ID # 1367).¹¹

¹¹ The District Court labeled Mayfield’s allegations of exclusion “speculative” because it had not “submitted evidence to the Manufacturer Defendants that demonstrated [Mayfield’s] product...complied with NOCSAE standards.” Order, R.

In addition to the Helmet Manufacturers’ general statements that they will de-certify any helmet with an Add-on, Helmet Manufacturers have in fact followed through on these statements and “voided their NOCSAE helmet certification in instances where Add-on manufacturers have proven through testing in authorized labs that helmets continue to satisfy all NOCSAE standards when used in conjunction with Add-ons.” *Id.* (¶ 158, Page ID # 1386). For example, Zuti, an Add-on manufacturer and affiliate entity of Mayfield, submitted its facemask in combination with a Riddell Speedflex helmet to Riddell with test results confirming that the combination met all NOCSAE standards. *Id.* (¶ 160, Page ID # 1387). Riddell representatives *agreed* that the Zuti/Riddell helmet combination satisfied all applicable NOCSAE standards but Riddell nevertheless still voids the certification for such helmets. *Id.* Thus, the FAC pleads actual—not speculative—restraints of trade.

68, Page ID # 1963-64. Such exclusion is not speculative in the face of *blanket policies* by the Helmet Manufactures that *all* helmet certifications are void when used with any Add-on. These policies alone have an anticompetitive effect because they convince most potential customers that the use of any Add-ons will void their helmet certification and thus discourage all potential customers from even considering the use of an Add-on regardless of their merits or subsequent testing establishing their compliance with NOCSAE standards. Through the Sherman Act claims, Mayfield is seeking to enjoin the NOCASE agreements and ensure that independent, third-party testing labs determine whether Add-ons meet NOCSAE’s standards. The Helmet Manufactures themselves cannot be the arbiters, as they have a vested interest in excluding Add-ons from the market.

Third, the restraint of trade under the agreements is *unreasonable* because it presents significant anticompetitive effects: (a) the FAC includes specific examples of customers who otherwise would have purchased Add-ons that *satisfy all NOCSAE certification standards* not buying the products because of the NOCSAE License Agreements and policies; (b) Helmet Manufacturers are avoiding competitive pressure from companies producing products that improve helmets and make them safer; (c) Helmet Manufacturers are avoiding competitive pressure from Add-on products that could be used to recondition helmets in lieu of new helmet purchases that would accrue only to the Helmet Manufacturers; and (d) the agreements reduce innovation in the football helmet market, as there is no incentive for any company other than the three Helmet Manufacturers to develop new and improved products if the Helmet Manufacturers can simply exclude innovative Add-on products from the market.¹² *Id.* (¶¶ 189-195 and 199-207, R. 61, Page ID # 1397-1402 and 1403-1405).

¹² The District Court erred in dismissing Count I claim because it “did not establish that the licensing agreements and the NOCSAE policies were unreasonable restraints on trade.” The District Court concluded that NOCSAE policy changes “did not impact what the Manufacturer Defendants could or could not do with NOCSAE certifications” and they did not “require that any action be taken with respect to Add ons.” Order, R. 38, Page ID # 1959. The District Court, however, ignored the clear anticompetitive effects resulting from these agreements that are pled with specificity in the FAC. With the 2018 policy, for the first time, NOCSAE gave the Manufacturer Defendants the right to block any Add-on’s path to market by removing an Add-on manufacturers right to establish a certification as its own. Moreover, the District court ignored the allegations in the FAC articulating how the Licensing Agreements resulted in Helmet Manufacturers adopting *blanket* policies that decertify all helmets/Add-on combinations. These Helmet Manufacturer polices—which can

Fourth, Appellees have incorrectly argued that there is no anticompetitive effect “in light of [their] competing interest and valid interests in maintaining their brand credibility and helmet safety standards.” Order, R. 38, Page ID # 1961. This argument ignores the most fundamental aspect of Count I: the NOCSAE License Agreement and 2018 policy now permit de-certification of helmet add-on combinations *that meet or exceed all applicable NOCSAE certification standards*. Even if Appellees’ “brand and safety” alternative theory were applicable at the pleading stage (it is not),¹³ neither the Helmet Manufacturers nor NOCSAE could have *any* valid brand or safety concerns related to the use of an Add-on when the helmet/Add-on combination is submitted by the Add-on manufacturer and *passes all of NOCSAE standards*.¹⁴ Indeed, NOCSAE’s Add-on policy from 2013-2018 allowed Add-on manufacturers to undertake their own certifications.

* * *

The NOCSAE Licensing Agreements and 2018 policy, together with the Helmet Manufacturers’ blanket policy of de-certifying any helmet/Add-on

exist only because of the NOCSAE Licensing Agreements—are convincing customers not to buy Add-ons. FAC ¶¶ 198-208, R. 61, Page ID # 1403-05.

¹³ There are no allegations or Exhibits to the FAC indicating NOCSAE and the Helmet Manufacturers entered into the Licensing Agreements and 2018 NOCSAE policy for “brand and safety” reasons. Such assertions are *post hoc* explanations outside the scope of the FAC.

¹⁴ Notably, Helmet Manufacturers are not required to pass any additional safety standards beyond the NOCSAE standards that Add-ons also meet.

combination, have effectively eliminated competition from Add-on products in the markets for new helmet design, faceguards, faceguard clips, and reconditioning parts. FAC ¶¶ 120 and 190-195, R. 61, Page ID # 1373 and 1397-1402. The three Helmet Manufacturers collectively control nearly 100% of the football helmet market, and the 2018 Policy removed the ability of Add-on manufacturers to pursue their own NOCSAE certification for helmet/Add-on combinations. Appellees' actions have therefore foreclosed Mayfield and other Add-on manufacturers from entire markets. *Id.* (¶ 121, Page ID # 1374). These facts are more than sufficient to plead "plausible" allegations of anticompetitive effects under the rule of reason.

2. *The FAC pleads the relevant geographic and product markets.*

The FAC properly alleges the relevant product and geographic markets, as well as Appellees' market share. *Id.* (¶¶ 93-115, Page ID # 1368-72). The product markets are NOCSAE-certified football helmets being sold to retailers, teams and players, NOCSAE-certified faceguards, NOCSAE-certified faceguard clips, and helmet reconditioning parts. *Id.* (¶¶ 93, 96, 100 and 103, Page ID # 1368-69). Such helmets, faceguards, faceguard clips, and helmet reconditioning parts are not interchangeable with non-certified helmets because nearly every football league in the United States requires NOCSAE certification. *Id.* (¶¶ 94, 97, 101 and 104, Page ID # 1368-70). The relevant geographic market for football helmets, faceguards, faceguard clips, and helmet reconditioning parts is the United States. *Id.* (¶¶ 95, 98

102 and 105, Page ID # 1368-70). The Helmet Manufacturers are an oligopoly, controlling nearly 100% of the relevant markets. *Id.* (¶ 111, Page ID # 1371).

3. *The FAC pleads antitrust injury to Mayfield.*

The FAC alleges facts establishing that the Licensing Agreements and 2018 NOCSAE policy have caused an antitrust injury to Mayfield. *Id.* (¶¶ 196-208, Page ID # 1402-05). Mayfield has pled: (i) the size of the potential market, with over six million football participants and a \$782,000,000 market for helmets and accessories (*Id.* at ¶ 197, Page ID # 1402); (ii) policies and statements by Appellees regarding Mayfield's products that led potential purchasers of the S.A.F.E.Clip to decline to do business with Mayfield (*Id.* at ¶¶ 198-207, Page ID # 1403-1405)); and (iii) Mayfield's and all other Add-on manufacturers' exclusion from the relevant markets as a result of Appellees' agreement and blanket policy of de-certifying all helmet/Add-on combinations (*Id.* at ¶ 208, Page ID # 1405).

II. COUNT II ALLEGED A CLAIM FOR VIOLATION OF SECTION 1 BASED ON APPELLEES' PARALLEL CONDUCT AND PLUS-FACTORS

In Count II, Mayfield alleges a separate agreement among Appellees to exclude all Add-on products from the relevant markets. *Id.* (¶¶ 228-36, Page ID # 1409-10). Under this agreement, which the FAC refers to as an Overarching Conspiracy, the Helmet Manufacturers all announced that they will void—and in fact have voided—the NOCSAE certification on any football helmet that a customer

combines with an Add-on in order to induce the customers not purchase Add-ons. This is functionally the same as the Helmet Manufacturers refusing to sell a NOCASE-certified helmet or the NOCSAE certification to any purchaser of a helmet that wishes to use an Add-on. In contrast to Count I, the “agreement” in Count II is based on circumstantial evidence: parallel conduct by Appellees and so-called “plus factors” that plausibly suggest an agreement to restrain trade in violation of the Sherman Act. *Watson Carpet*, 648 F.3d at 457. Because Count II is based on a refusal to sell a NOCSAE-certified helmet or NOCSAE certification to customers in order to coerce them not to buy Add-ons, the restraint is unlawful as a “group boycott” under both the *per se* and “rule of reason” standards.¹⁵

A. Appellees are engaged in a “group boycott” that is illegal under both the *per se* and rule of reason standards.

1. The FAC sufficiently pleads a per se unlawful group boycott.

Under the *per se* rule, “[c]ertain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused.” *In re Cardizem*

¹⁵ The pleading requirements of Counts I and II are fundamentally different. Count I does not require any further evidence of an agreement, but requires Mayfield to plead—as it has—that the Licensing Agreements are unreasonable restraints of trade. Count II requires Mayfield to plead circumstantial evidence of an agreement between NOCSAE and the Helmet Manufacturers, but does not require the Plaintiff to plead that the alleged agreement is unreasonable because it is *per se* illegal as a group boycott. Nonetheless, Plaintiff pleads that the agreement alleged in Count II is also unreasonable.

Antitrust Litig., 332 F.3d 896, 907 (6th Cir 2003). “Once [the per se rule is] applied, ‘no consideration is given to the intent behind the restraint, to any claimed pro-competitive justifications, or to the restraint’s actual effect on competition.’” *Id.* at 906-07.

The FAC sufficiently pleads that the Overarching Conspiracy among NOCSAE and Helmet Manufacturers (*see* FAC ¶¶ 8, 188, R. 31, Page ID # 1343, 1396) is a *per se* unlawful group boycott. A *per se* unlawful group boycott occurs when “firms with market power boycott . . . customers in order to discourage them from doing business with a competitor” *Fed. Trade Comm’n v. Ind. Fed. of Dentists* 476 U.S. 447, 458, 106 S. Ct. 2009, 90 L.Ed.2d 445 (1986). The Supreme Court has defined the categories of *per se* violations to include circumstances nearly identical to his case. In *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, a plaintiff submitted a product to a trade association for testing and certification but alleged that the association’s members, which included competitors, conspired to reject certification and denied plaintiff a “seal of approval” for otherwise safe and effective products. 364 U.S. 656, 658, 81 S. Ct. 365, 5 L.Ed.2d 358 (1961).¹⁶

¹⁶ Appellees are likely to argue that *Radiant Burners* has been supplanted by later Supreme Court case law regarding group boycotts. The Supreme Court has never overruled *Radiant Burners*. Although the Supreme Court has narrowed the scope of *per se* illegal group boycotts, facts analogous to those in *Radiant Burners* continue to be subject to *per se* illegality. *See Ind. Fed’n of Dentists*, 476 U.S. at 458-59.

Distributors would not sell gas for use in plaintiff's burners without the seal of approval, and the denial of the critical approval effectively excluded plaintiff's gas burners from the entire market. *Id.* (reversing dismissal of plaintiff's claim).

Here, the FAC alleges (i) the three Helmet Manufacturers control approximately 100% of the market for NOCSAE-certified football helmet and football helmet replacement parts (FAC ¶ 111, R. 31, Page ID # 1371), (ii) the Helmet Manufacturers each produce or sell products in the markets for faceguards, faceguard clips, and reconditioning parts, and are thus in direct competition with Mayfield, which produces and sells the S.A.F.E.Clip in the market for faceguard clips (*Id.* ¶¶ 110-115, Page ID # 1371-72), (iii) the Helmet Manufacturers' control over the market for NOCSAE certified football helmets and replacement parts, along with NOCSAE's Licensing Agreements, allows them to void the NOCSAE certification of *any* helmet/Add-on combination, giving them complete control over all Add-on markets (*id.*), and (iv) the Helmet Manufacturers used their power in the markets and their ability to void the NOCSAE certification of helmet/Add-on combinations to refuse to sell to customers NOCSAE-certified helmets if those customers wish to combine their helmets with Add-ons (*Id.* ¶¶ 154-62, Page ID # 1385-88). Thus, by threatening to void and in fact voiding the NOCSAE

certification whenever the Add-ons are used, the Helmet Manufacturers induce customers not to purchase Add-ons and thus exclude Add-ons from the market.¹⁷

As in *Radiant Burners*, the FAC pleads “one of the ‘classes of restraints which from their nature or character are unduly restrictive, and hence forbidden by both the common law and the [Sherman Act]’”: a concerted boycott of customers (both end-users and intermediate dealers) that is a *per se* unlawful action. 364 U.S. at 659-60 (internal quotations omitted). Cases to which the Supreme Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by “either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.” *Nw. Wholesale Stationers v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 294, 105 S. Ct. 2613, 86 L.Ed.2d 202 (1985).

2. *The FAC alleges violations of the Sherman Act under the rule of reason.*

Although “classic” group boycotts such as the Overarching Conspiracy

¹⁷ Appellees are likely to suggest numerous reasons Helmet Manufacturers may want to discourage their customers from using Add-ons. This misses the point. Mayfield does not claim that Helmet Manufacturers are prohibited by Section 1 from making true statements about their products or engaging in otherwise lawful advertising discouraging customers from using Add-ons. The *unlawful* conduct under Section 1 is conspiring to withhold the critical NOCSAE helmet certification from customers that attempt to use an Add-on with their helmets even when the helmet/Add-on combinations meet or exceed all NOCSAE standards. This conspiracy excludes all Add-ons from the market.

remain *per se* illegal, boycotts that may not fit in the *per se* mold remain illegal if they violate the rule of reason. *Ind. Fed'n of Dentists*, 476 U.S. at 458. A group boycott violates the rule of reason if its purpose is to disadvantage competitors, if the conspirators have “market power,” and if the refusal to deal cannot be justified as “intended to enhance overall efficiency and make markets more competitive.” *Nw. Wholesale Stationers*, 472 U.S. at 294-96.

The FAC sufficiently alleges that the Overarching Conspiracy violates the Sherman Act under the rule of reason. It properly alleges the relevant geographic and product markets, as well as market shares. FAC ¶¶ 93-115, R. 31, Page ID # 1368-72. The FAC alleges the existence of the Licensing Agreements and the Overarching Conspiracy. *See infra* Part II.B. The FAC alleges that these agreements produce numerous anticompetitive effects without any valid business justification, including (a) elimination of any market for Add-ons not produced by the Helmet Manufacturers (*Id.* ¶ 120, Page ID 1373-74); (b) higher prices and reduced quality in the markets for NOCSAE-certified football helmets (*Id.* ¶ 190, Page ID # 1397), reconditioned parts that do not void NOCSAE certification (*Id.* ¶ 191, Page ID # 1399), faceguards (*Id.* ¶ 192, Page ID # 1399-1400), faceguard clips (*Id.* ¶ 193, Page ID # 1400-01), and other Add-ons (*Id.* ¶ 194, Page ID # 1401); and (c) decreased innovation in the market for Add-ons (*Id.* ¶ 195, Page ID # 1401-02). Finally, the FAC alleges harm to Mayfield as a result of Appellees’ conduct. *Id.* (¶¶ 196-208,

Page ID # 1402-05).¹⁸ The FAC contains all allegations needed for a plausible rule-of-reason claim in Count II.

B. The FAC pleads an overarching conspiracy to boycott customers and Add-on manufacturers.

While this Overarching Conspiracy is not set forth in express written form among the Appellees (at least that Mayfield knows of), “sufficient circumstantial evidence,” referred to as “plus factors,” plausibly suggests that Appellees have agreed to restrain trade in violation of the Sherman Act. *Watson Carpet*, 648 F.3d at 457. Plus factors include, “(1) whether the defendants’ actions, if taken independently, would be contrary to their economic self-interest; (2) whether defendants have been uniform in their actions; (3) whether defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; and (4) whether defendants have a common motive to conspire.” *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 907 (6th Cir. 2009) (citation omitted). This list is “neither exhaustive nor exclusive, but rather illustrative of the type of circumstances which, when combined with parallel behavior, might permit a jury to infer the existence of an agreement.” *Id.* The FAC

¹⁸ These anticompetitive effects of the Licensing Agreements and the Overarching Conspiracy as alleged are so blatant that full rule of reason analysis is likely not required, and they are unlawful under the “quick look” analysis.

includes extensive allegations of parallel conduct and plus factors that more-than-plausibly plead a Section 1 agreement.

First, the FAC alleges parallel conduct taken to exclude Add-ons from use in all organized play, which mandates the use of NOCSAE-certified football helmets. Each Helmet Manufacturer adopted substantively identical policies to void warranties and NOCSAE certifications for any helmets used with an Add-on. FAC ¶¶ 154-62, R. 61, Page ID # 1385-62. And Helmet Manufacturers acted pursuant to the NOCSAE Licensing Agreement to void or threaten to void certifications for helmet/Add-on combinations, *including in instances where combinations passed all NOCSAE standards*. *Id.* (¶¶ 4, 154-62, 167, Page ID # 1341-42, 1385-90). These allegations are factual, not conclusory, as they identify specific statements by each Helmet Manufacturer. *Id.* (¶¶ 155-57, Page ID # 1385-86).

Second, to support the inference that the parallel conduct was committed pursuant to an agreement among Appellees, Mayfield alleged numerous recognized plus factors. In reviewing these factors, “[a] court must look to the evidence as a whole and consider any single piece of evidence in the context of other evidence.” *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004). The plus factors alleged in this case are as follows.

1. *The Helmet Manufacturers control and direct NOCSAE’s board decisions regarding Add-on policies.*

The FAC alleges that Helmet Manufacturers control and influence NOCSAE's board of directors through funding NOCSAE, representation on NOCSAE's board, and direct authority over NOCSAE board members through other businesses or organizations. FAC ¶¶ 40, 46-47, 132-133, R. 61, Page ID # 1351, 1353-54, 1377-78. This is a plus factor because the Helmet Manufacturers' control and influence over NOCSAE makes it more probable that NOCSAE changed the Licensing Agreements in 2018 after conspiring with the Helmet Manufacturers, not independently, as part of an overarching agreement to exclude Add-ons.¹⁹ The FAC supports its allegation of control and influence through more than mere allegations of innocuous "ties" between NOCSAE and Helmet Manufacturers. For example, the FAC alleges that NOCSAE's Vice President, Gregg Hartley, serves on NOCSAE's Board of Directors *as a representative* of the Sports & Fitness Industry Association, an organization controlled by Riddell's CEO and President, Dan Arment. *Id.* (¶ 46, Page ID # 1353).

2. *NOCSAE discriminated against Add-on manufacturers.*

When NOCSAE facially permitted Add-on manufacturers to obtain NOCSAE certification for helmet/Add-on combinations in 2013, NOCSAE discriminated

¹⁹ See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S. Ct. 1931, 100 L.Ed.2d 497 (1988) (upholding Section 1 liability for a member of a fire safety association that influenced the association to adopt a biased safety code to benefit its product and disfavor competing products).

against Add-on manufacturers, imposing testing standards that are costlier and more burdensome than those imposed on Helmet Manufacturers. *Id.* (¶ 134, Page ID # 1378).

3. *NOCSAE incorporated the de-certification policy into the Licensing Agreements once Add-on manufacturers began passing NOCSAE's safety tests.*

NOCSAE abruptly changed its policy to prevent Add-on manufacturers from obtaining NOCSAE certification for helmet/Add-on combinations only after it became apparent Mayfield's testing was proving compliance. *Id.* ¶ 139, Page ID # 1380.

4. *NOCSAE directed the manufacturers to do business with the Helmet Manufacturers.*

Contrary to NOCSAE's purported role as a standard-setting organization, it directed Add-on manufacturers to *work with* Helmet Manufacturers rather than introduce new products into the free market. *Id.* (¶ 145, Page ID # 1382). David Halstead is NOCSAE's Technical Director and the co-founder and director of the organization responsible for technical standards development and implementation. *Id.* ¶ 39, Page ID # 1351. Through Halstead, NOCSAE not only directed Add-on manufacturers *not* to compete with Helmet Manufacturers,²⁰ it represented that

²⁰ In January 2017—when NOCSAE's policy still purported to allow Add-on manufacturers to certify helmet/Add-on combinations—David Halstead directed Add-on manufacturer Zuti not to compete with Helmet Manufacturers in the sale of faceguards, but instead to work with them. *Id.* (¶ 146., Page ID # 1382-83). And in

Helmet Manufacturers would use NOCSAE’s policy under the Licensing Agreements to prevent Add-ons from being used in organized play. *Id.* (¶ 147, Page ID # 1383).

Absent an agreement between NOCSAE and Helmet Manufacturers to eliminate Add-on competition, NOCSAE would have no incentive to encourage Add-on manufacturers to avoid competing with Helmet Manufacturers. These statements evidence a conspiracy to eliminate Add-on competition.

5. *NOCSAE directed customers away from Add-on products.*

Contrary to NOCSAE’s purported impartial role as a standards body, NOCSAE discouraged customers from buying Add-ons and told potential customers that Helmet Manufacturers would void NOCSAE certification. *Id.* (¶ 149, Page ID # 1383-84). This implicates collective discussions and understandings among *all Appellees* to exclude Add-ons from the market.

6. *NOCSAE acted contrary to its economic interests.*

NOCSAE’s actions were contrary to its economic interests. *Id.* (¶ 163, Page ID # 1388). The FAC alleges that NOCSAE has an economic interest in improving player safety by certifying helmet/Add-on combinations that—based on independent

2019—after NOCSAE changed its policy to *allow* Helmet Manufacturers to decertify helmets paired with Add-ons—Halstead told Add-on manufacturer Shockstrip that the “only way” for the Shockstrip to be used in organized play was via Helmet Manufacturers.

testing to NOCSAE’s standards—reduce concussions. *Id.* (¶ 166, Page ID # 1389). But NOCSAE is acting against this interest when it permits the Helmet Manufacturers to issue blanket de-certifications for all helmet/Add-on combinations. Indeed, when Helmet Manufacturers de-certify helmets with Add-ons that pass NOCSAE standards, *they implicitly suggest to consumers that the NOCSAE standards are not based on safety considerations.* In addition, NOCSAE’s policy reduces the pool of license agreements and, correspondingly, NOCSAE’s revenue from licensing fees. *Id.* NOCSAE’s 2018 policy is thus contrary to its interests.

7. *Appellees exchanged confidential information about Add-on products.*

Appellees’ exchange of confidential information about Add-ons is yet another plus factor. In *In re Generic Pharma. Pricing Antitrust Litig.*, plaintiffs alleged that various conspiracies by different groups of defendants to fix the price of individual generic drugs were, in fact, part of an overarching conspiracy to fix the price of all generic drugs. 394 F. Supp. 3d 509, 531-32 (E.D. Pa. 2019). The court denied a motion to dismiss the overarching conspiracy claim because the plaintiffs alleged “sustained contacts” among defendants, including that drug manufacturers were: (i) represented on trade association boards of directors, (ii) trade association members, and (iii) attendees at trade association meetings, events, and other industry gatherings. *Id.* They also alleged two defendants discussed “pricing of at least [one generic drug].” *Id.* at 532.

Here, Appellees routinely attended trade association meetings and overlap with one another through membership in trade associations or representation on trade association boards of directors, including NOCSAE. FAC ¶¶ 45-47, R. 61, Page ID # 1353-54. Two Appellees also exchanged information about the certification of the S.A.F.E.Clip *in violation of non-disclosure agreements*.²¹ *Id.* (¶¶ 168-74, Page ID # 1390-92).

8. *The football helmet market is ripe for collusion.*

The football helmet market is highly susceptible to collusion because Appellees control nearly 100% of the market. *Id.* (¶ 186(a), Page ID # 1355); *Washington Cty. Health Care Auth., Inc. v. Baxter Int'l Inc.*, 328 F. Supp. 3d 824, 841 (N.D. Ill. 2018) (“market structure can provide some evidence of an unlawful agreement”).

9. *The Helmet Manufacturers have strong incentives to collude and exclude Add-on products.*

Helmet Manufacturers have common motives to use their control over NOCSAE and concerted action among themselves to exclude Add-ons from their

²¹ Appellees have no lawful business justification to violate a non-disclosure agreement (“NDA”) in order to discuss testing of the S.A.F.E.Clip. If Appellees had actual concerns with the S.A.F.E.Clip, they were free to express those to Mayfield without violating the NDA. It is plausible to infer that Appellees violated the NDA in order to align their positions on the S.A.F.E.Clip. Moreover, the FAC alleges that Mayfield’s current iteration of the S.A.F.E.Clip satisfies the NOCSAE standard when paired with a NOCSAE certified helmet.

markets, including (i) to maintain higher prices for helmets and reconditioning parts, (ii) to reduce or eliminate the need to compete on innovation, and (iii) to insulate themselves from potential product liability. *Id.* (¶ 175, Page ID # 1392).

The Helmet Manufacturers’ purported²² concerns about “safety” are not exculpatory, as there is no basis for objections to helmet/Add-on combinations that pass all NOCSAE standards. The Helmet Manufacturers face an ongoing threat of product liability claims by current and former football players. If firms develop innovative safety technology in the form of Add-ons, the availability of those products may be used as evidence against the Helmet Manufacturers in product liability cases; *i.e.* evidence of reasonable alternative technology that the Helmet Manufacturers did not incorporate. *See, e.g., Daniels v. Prevost Car U.S., Inc.* No. 13-13774, 2015 WL 470793, at *4 (E.D. Mich. Feb. 4, 2015) (Michigan plaintiffs must present evidence of “the magnitude of the risks involved and the reasonableness of any proposed alternative design” to assert design defect product liability claim). Better for the Helmet Manufacturers to collectively assert that the alternative technology is not viable and to exclude it from the market.

²² If the Helmet Manufacturers were truly concerned about helmet safety and not excluding competition, they would not de-certify helmets that incorporate the S.A.F.E.Clip and other Add-on products that have been empirically shown to improve helmet safety.

Helmet Manufacturers also have a motive to conspire to eliminate Add-ons because, if customers could affix Add-ons to helmets, they would do so in order to improve their helmets. Over time, customers would demand lower prices for new helmets that customers must then improve to a higher quality with Add-ons. FAC ¶ 177, R. 61, Page ID #1392-93. Customers would also likely forego purchasing new helmets if Add-ons extended the life of their current helmet, further reducing Helmet Manufacturers' revenue. *Id.* (¶ 178, Page ID # 1393).

* * *

When taken collectively—and not in isolation—the allegations above plead a plausible claim in Count II that there is a separate conspiracy among Appellees to exclude Add-on products from the relevant markets.

III. THE FIRST AMENDED COMPLAINT STATES A CLAIM FOR TORTIOUS INTERFERENCE

The FAC alleges that Appellees tortuously interfered with Mayfield's business relationships or expectation. Under Michigan law, “[t]he elements of a claim for tortious interference with economic relations are: (i) the existence of a valid business relationship or expectancy; (ii) knowledge of the relationship or expectancy on the part of the defendant; (iii) intentional interference causing or inducing a termination of the relationship or expectancy; and (iv) resultant actual

damage.” *Lucas v. Monroe Cty.*, 203 F.3d 964, 978-79 (6th Cir. 2000) (citing *Wilkerson v. Carlo*, 101 Mich. App. 629, 300 N.W.2d 658, 659 (1980)).²³

The FAC contains extensive allegations that identify a reasonable likelihood or probability of an expectancy with an identifiable class of purchasers. *See Lucas*, 203 F.3d at 979 (6th Cir. 2000) (a plaintiff asserting a tortious interference claim need only show an anticipated business relationship with an “identifiable class of third parties”). Mayfield was engaged in earnest sales discussions with multiple football teams (Georgetown University, Jackson High School, Brookfield Central High School) and equipment dealers (Sports, Inc., Capital Varsity Sports). *See, e.g.*, FAC ¶¶ 199-207, R. 61, Page ID # 1403-05. The FAC also alleges exemplary statements by third parties who were interested in purchasing the S.A.F.E.Clip but declined to do so based on the express statements from Helmet Manufacturers. *Id.* (¶¶ 203, 205-06, Page ID # 1404-05). These allegations are sufficient to state a plausible claim that there was an identifiable class of S.A.F.E.Clip purchasers (i.e., football teams and equipment dealers), some of whom would have made purchases but for Appellees’ interference. The full extent of the prospective purchasers and of Mayfield’s damages are matters for discovery and expert testimony; the absence of

²³ The District Court concluded that Counts III-VI did not allege (i) the existence of a valid business relationship or expectancy or (ii) improper motive or interference by Appellees. Order, R. 68, Page ID # 1970-71.

a full accounting of lost business opportunities is not a basis for dismissal at the pleading stage.

With respect to allegations of “intentional interference,” the pleading requirements are satisfied by pleading that the “the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation, or (b) preventing the plaintiff from acquiring or continuing the prospective relation.” *Lucas*, 203 F.3d at 979 (quoting Restatement Second of Torts § 766B). Pleading an antitrust violation by Appellees satisfies the requirement of intentional interference. *See Am. Council of Certified Podiatric Physicians and Surgeons v. Am. Bd. Of Podiatric Surgery, Inc.*, 185 F.3d 606, 624 (6th Cir. 1999) (noting that an antitrust violation appears to satisfy this element of a tortious interference claim); FAC ¶¶ 219-236, R. 61, Page ID # 1408-10.

As described above, Mayfield has pled antitrust violations that resulted in lost business opportunities. The FAC also includes numerous untrue statements by NOCSAE and the Helmet Manufacturers that Add-ons were “illegal,” which interfered with potential sales in order to keep Mayfield from competing. *See, e.g.*, FAC ¶¶ 150, 155, 157, 199, 205, Ex. A at 10, Ex. P at 1, Ex. R at 2, R. 61, Page ID # 1384-86, 1403-04, 1559, 1564). *See Luxury Limousine, Inc. v. Nat’l Indem. Co.*, Case No. 19-10893, 2019 WL 3714458 at *3 (E.D. Mich. Aug. 7, 2019) (denying motion to dismiss tortious interference claim where plaintiff alleged that defendant

made false statements about Plaintiff and noting “the issue of Defendant’s motivation is best left to further factual development”). These allegations are more than sufficient to plead intentional interference by Appellees under Counts III-VI.

CONCLUSION

The District Court misapplied the law and incorrectly held that Mayfield failed to allege violations of the Sherman Act and Michigan statutes, as well as a common law claim for tortious interference. Its decision dismissing the Complaint accordingly should be reversed and this case remanded for further proceedings.

Respectfully submitted, this 10th day of August, 2021.

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**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

CERTIFICATE OF COMPLIANCE

6th Cir. Case Number(s): 21-1441

1. I am the attorney or self-represented party. I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B)(i) because, according to the word-count feature of Microsoft Word, this brief contains 9,011 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Signature: *s/ Christopher M. Wyant*

Date: August 10, 2021

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the ECF system, which will send notification of such filing to all counsel of record.

Signature: *s/ Christopher M. Wyant*

Date: August 10, 2021

ADDENDUM

**DESIGNATION OF RELEVANT
DISTRICT COURT DOCUMENTS**

Pursuant to 6 Cir. R. 30(g), Appellants hereby designate the following electronic filings as relevant district court documents:

R#	Description	Page ID # Range
61	First Amended Complaint	1338-1568
62	Motion to Dismiss First Amended Complaint	1569-1603
63	Response to Motion to Dismiss First Amended Complaint	1604-1637
65	Reply to Response to Motion to Dismiss First Amended Complaint	1935-1945
68	Opinion and Order Granting Defendants' Motion to Dismiss First Amended Complaint	1950-1972
69	Judgment	1973
70	Notice of Appeal	1974