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2023 WL 2375884

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United States Court of Appeals, Second Circuit.

RELEVANT SPORTS,
LLC, Plaintiff-Appellant,

v.

UNITED STATES SOCCER FEDERATION,
INC., Fédération Internationale De Football
Association, Defendants-Appellees.

Docket No. 21-2088-cv

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August Term, 2021

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Argued: April 7, 2022

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Decided: March 7, 2023

Synopsis

Background: Soccer promoter brought action against national and international soccer associations, alleging defendants conspired to prohibit official soccer games in the United States in violation of the Sherman Act. The United States District Court for the Southern District of New York, [Valerie E. Caproni, J., 551 F.Supp.3d 120](#), granted national association's motion to dismiss for failure to state a claim and international association's motion to dismiss for lack of personal jurisdiction and failure to state a claim. Promoter appealed.

Holdings: The Court of Appeals, [Lohier](#), Circuit Judge, held that:

[1] promoter sufficiently alleged that international association was subject to personal jurisdiction in New York, under New York's long-arm statute, and

[2] promoter plausibly alleged that an anticompetitive agreement was formed, as required to state a claim for violation of Sherman Act's restraint of trade provision.

Vacated and remanded.

West Headnotes (15)

[1] **Federal Courts**  Pleading

District court's judgment dismissing the complaint for failure to state a claim upon which relief can be granted is reviewed de novo on appeal.

[2] **Constitutional Law**  Personal jurisdiction in general

Federal Courts  Actions by or Against Nonresidents; "Long-Arm" Jurisdiction

Federal Courts  Personal jurisdiction

To defeat a motion to dismiss for lack of personal jurisdiction, a plaintiff must have a state-law statutory basis for jurisdiction and demonstrate that the exercise of personal jurisdiction comports with due process. *U.S. Const. Amend. 14.*

[3] **Federal Courts**  Particular Entities, Contexts, and Causes of Action

Soccer promoter sufficiently alleged that international soccer association, through its agent, a national soccer association, transacted business within New York, as required for international association to be subject to personal jurisdiction in New York, under New York's long-arm statute, in promoter's action against both associations alleging that they conspired to prohibit official soccer games in the United States in violation of the Sherman Act; promoter alleged that international association authorized national association, incorporated as a New York not-for-profit, to act on its behalf to sanction professional soccer leagues in the United States and in New York, and that international association authorized national association's refusal to sanction official season games in New York. Sherman Act § 1, *15 U.S.C.A. § 1*; *N.Y. CPLR § 302(a)(1)*.

[4] **Constitutional Law** 🔑 Non-profit, charitable, and educational organizations

Federal Courts 🔑 Particular Entities, Contexts, and Causes of Action

Soccer promoter sufficiently alleged that international soccer association had sufficient minimum contacts with New York, as required for exercise of personal jurisdiction over international association in New York, pursuant to New York's long-arm statute, to comport with due process; promoter alleged that international association vested national soccer association, incorporated as a New York not-for-profit, with exclusive authority to sanction all men's professional soccer leagues and games played in the United States, and that national association undertook those actions as international association's agent. U.S. Const. Amend. 14; N.Y. CPLR § 302(a)(1).

[5] **Constitutional Law** 🔑 Non-residents in general

Courts 🔑 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction

Although the New York long-arm statute and the Due Process Clause are not technically coextensive, the New York requirements for jurisdiction over a nonresident principal based on the acts of an agent are consonant with the due process principle that a defendant must have purposefully availed itself of the privilege of doing business in the forum. U.S. Const. Amend. 14; N.Y. CPLR § 302(a).

[6] **Antitrust and Trade Regulation** 🔑 Cartels, Combinations, Contracts, and Conspiracies in General

First question in Sherman Act restraint of trade case is whether the challenged conduct stems from independent decision or from an agreement, tacit or express. Sherman Act § 1, 15 U.S.C.A. § 1.

[7] **Antitrust and Trade Regulation** 🔑 Cartels, Combinations, Contracts, and Conspiracies in General

Distinguishing between concerted action and independent individual behavior is important in Sherman Act restraint of trade case because concerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands; if the challenged conduct reflects concerted action, then court considers whether that action unreasonably restrains trade. Sherman Act § 1, 15 U.S.C.A. § 1.

[8] **Antitrust and Trade Regulation** 🔑 Conspiracy or combination

At the pleading stage, in a case asserting a claim under Sherman Act's restraint of trade provision, a plaintiff need only allege enough factual matter, taken as true, to suggest that an agreement was made; in other words, a plaintiff must allege facts that reasonably tend to prove that the defendant and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. Sherman Act § 1, 15 U.S.C.A. § 1.

[9] **Antitrust and Trade Regulation** 🔑 Restraints and misconduct in general

Facts that support a claim under Sherman Act's restraint of trade provision can constitute either direct evidence that the defendants entered into an agreement designed to achieve an unlawful objective or circumstantial facts supporting the inference that a conspiracy existed. Sherman Act § 1, 15 U.S.C.A. § 1.

[10] **Antitrust and Trade Regulation** 🔑 Sports
Antitrust and Trade Regulation 🔑 Antitrust Law and Trade and Professional Associations

Business, professional, trade, and sports organizations and associations, are all subject to federal antitrust laws if their members demonstrate a conscious commitment to a common scheme designed to achieve an unlawful objective.

[11] Antitrust and Trade Regulation 🔑 Antitrust Law and Trade and Professional Associations

When a trade association member surrenders himself completely to the control of the association in a contractual restraint of interstate trade, designed in the interest of preventing competition, then a rule that imposes duties and restrictions in the conduct of the members' separate businesses demonstrates an agreement for purposes of Sherman Act's restraint of trade provision. Sherman Act § 1, 15 U.S.C.A. § 1.

[12] Antitrust and Trade Regulation 🔑 Sports

Soccer promoter did not need to allege a prior "agreement to agree" or conspiracy to adopt geographic market division policy, prohibiting soccer leagues and teams from playing official season games outside of their home territory, in order state a claim against national and international soccer associations for violation of Sherman Act's restraint of trade provision; alleging facts that showed the adoption of the policy, combined with the member leagues' prior agreement, by joining international association, to adhere to its policies, would constitute direct evidence of an agreement on the part of all—whether they voted in favor of the policy or not—to adhere to the announced restriction on competition. Sherman Act § 1, 15 U.S.C.A. § 1.

[13] Antitrust and Trade Regulation 🔑 Antitrust Law and Trade and Professional Associations

Although a trade association by its nature involves collective action by competitors, a trade association is not by its nature a walking conspiracy. Sherman Act § 1, 15 U.S.C.A. § 1.

[14] Antitrust and Trade Regulation 🔑 Antitrust Law and Trade and Professional Associations

In determining whether a decision by a trade association violates federal antitrust laws, a court focuses on improprieties reducing competition among the members or with their competitors, not the day-to-day operations of the organization including buying, selling, hiring, renting, or investing decisions. Sherman Act § 1, 15 U.S.C.A. § 1.

[15] Antitrust and Trade Regulation 🔑 Sports

Soccer promoter plausibly alleged that an anticompetitive agreement was formed when international soccer association adopted a policy prohibiting its national association members from sanctioning any official season games held outside of the participants' home territory, as required to state a claim against national and international associations for violation of Sherman Act's restraint of trade provision; promoter alleged that international association's decisions bound various national associations, which agreed to adhere to its policies by becoming members, which in turn bound their respective leagues and teams, that those leagues and teams would otherwise compete with each other for fans and sponsors, and that enforcement of geographic market division policy prevented leagues and teams that did not want to adhere to the policy from competing in the relevant market. Sherman Act § 1, 15 U.S.C.A. § 1.

Appeal from the United States District Court for the Southern District of New York ([Caproni, J.](#)).

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Before: LIVINGSTON, Chief Judge, LYNCH, and LOHIER, Circuit Judges.

Opinion

LOHIER, Circuit Judge:

*1 Soccer, also known as “the beautiful game,” unites the world in shared competition. This case, by contrast, concerns an allegedly anticompetitive policy that restricts access to the game by prohibiting soccer leagues and teams from playing official season games outside of their home territory. Relevant Sports, LLC (“Relevant”), a U.S.-based soccer promoter, alleges that the Fédération Internationale de Football Association (“FIFA”) and the United States Soccer Federation, Inc. (“USSF”) adopted and enforced this geographic market division policy (“2018 Policy”) in violation of Section 1 of the Sherman Antitrust Act and Sections 4 and 16 of the Clayton Antitrust Act.

The United States District Court for the Southern District of New York (Caproni, *J.*) determined that Section 1 required Relevant to present either direct or circumstantial evidence of an “antecedent ‘agreement [among horizontal competitors] to agree to vote a particular way’ to adopt such a policy.”

Special App’x 33 (alteration in original). After concluding that Relevant failed to allege that the 2018 Policy itself stemmed from or constituted direct evidence of such a prior agreement among the Defendants, the District Court dismissed Relevant’s complaint for failure to state a claim.

We disagree with the District Court’s conclusion. Relevant plausibly alleges that the 2018 Policy reflects a contractual commitment of head-to-head competitors to restrict competition. Because Relevant’s complaint challenges the 2018 Policy itself “as violative of the antitrust laws,” the “promulgation of [the policy] ... constitute[s] direct evidence of § 1 concerted action.” *N. Am. Soccer League v. U.S. Soccer Fed’n*, 883 F.3d 32, 41 (2d Cir. 2018) (“*NASL*”); see *Associated Press v. United States*, 326 U.S. 1, 12, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945). No further allegation of an agreement is necessary. In holding that no inference of concerted activity can be drawn from the “promulgation” of the 2018 Policy, the District Court’s decision conflicts directly with this core principle. The judgment of the District Court is thus **VACATED** and the matter is **REMANDED** for further proceedings consistent with this opinion.

BACKGROUND¹

[1] We start with an overview of the governance structure of international soccer. FIFA, a private membership-based association comprised of over 200 national associations, is the well-known international governing body for soccer. Each national association is itself membership-based and comprised of professional soccer leagues and teams. FIFA’s legislative body, the FIFA Congress, includes representatives from every national association in the world and adopts and amends the FIFA Statutes, which contain many of FIFA’s rules and policies. A smaller entity within FIFA, the FIFA Council, “has authority to interpret the FIFA Statutes and to adopt rules and policies not specifically addressed in the FIFA Statutes.” App’x 502.

*2 National associations represent their members in FIFA decision-making and agree to “comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time.” App’x 500–01. In turn, the national associations require their members to agree to comply with these same rules and policies. USSF is the FIFA-authorized national association for the United States. “[USSF] and its members are, to the extent permitted by governing law, obliged to respect the statutes, regulations, directives and decisions of FIFA ... and

to ensure that these are likewise respected by their members.” App’x 502 n.12 (alterations in original) (quoting BYLAWS OF THE UNITED STATES SOCCER FEDERATION, INC., Bylaw 103 § 1). Leagues and players that fail to comply with FIFA rules and policies are subject to discipline and sanction, including exclusion from the FIFA World Cup.

Relevant organizes, promotes, and hosts soccer matches in the United States and globally. Because it is a violation of the FIFA Statutes for a soccer club affiliated with a FIFA-sanctioned league to play in the United States without USSF’s approval, Relevant had to obtain approval from USSF to organize a match in the United States between teams from other countries. And third-party promoters such as Relevant must also obtain approval from each team’s national association, each team’s regional confederation, and, of course, FIFA.

In the past, Relevant has tried to host official season games for international professional soccer leagues in the United States—including for La Liga (Spain), Liga MX (Mexico) and LigaPro Serie A (Ecuador)—without success. Its efforts to host have been foiled by the FIFA Council each time.² In 2018, for example, Relevant and La Liga, the Spanish professional soccer league, agreed to host an official season game in Miami. Given La Liga’s worldwide popularity, the game would undoubtedly have drawn a large audience. In response, the FIFA Council “issued a policy prohibiting FIFA’s National Association members, including USSF, from sanctioning any official season games held outside of the participants’ home territory.” App’x 523. A FIFA press release memorializing this policy stated:

Following a request for guidance ... the FIFA Council discussed La Liga’s proposal to host an official 2018/19 regular season league match outside Spain (in Miami).

Consistent with the opinion expressed by the Football Stakeholders Committee, the Council emphasized the sporting principle that official league matches must be played within the territory of the respective member association.

App’x 601 (2018 Policy). “[B]ecause this was a formal policy announced by a FIFA decision-making body, any leagues and teams who did not comply with it would run the risk of FIFA penalties and all such leagues and teams were required to agree to adhere to this policy.” App’x 523. As a result, the game in Miami never took place.

Relevant filed this action against USSF in 2019. The District Court dismissed Relevant’s first complaint without prejudice for failing to allege an unlawful vertical agreement between USSF and FIFA or an unlawful horizontal agreement between USSF and other national associations, leagues, and teams sufficient to support an antitrust violation. The court added that even if Relevant “had adequately alleged an agreement between USSF and FIFA,” its “claim for injunctive relief would be dismissed for failure to join” FIFA as “an indispensable party.” Special App’x 15 n.12. Relevant then filed an amended complaint adding FIFA as a defendant. In the amended complaint, Relevant claimed that the Defendants violated Section 1 of the Sherman Act and Sections 4 and 16 of the Clayton Act, and were liable under New York law for tortious interference with business relationships.³ Relevant principally alleged that “FIFA and USSF, in combination with numerous FIFA-affiliated men’s top-tier professional soccer leagues and teams, including Major League Soccer (“MLS”)⁴ and its teams, have entered into an agreement to divide geographic markets, including the United States market, which stifles competition in the U.S.” App’x 493.

*3 The District Court granted the Defendants’ motion to dismiss Relevant’s amended complaint for failure to state a claim. It again held that Relevant failed to allege that USSF and other national associations in FIFA entered into an unlawful vertical agreement with FIFA to apply the 2018 Policy against their member leagues and teams. The District Court likewise again held that Relevant failed to allege a horizontal conspiracy between USSF and FIFA’s other top-tier men’s professional soccer leagues and their teams outside the United States. The 2018 Policy, the District Court explained, did not constitute direct evidence of a horizontal conspiracy because there was neither an antecedent “agreement to agree” among the Defendants to adopt the policy, Special App’x 32 n.12, nor any circumstantial evidence of an agreement among the members of the FIFA Council to adopt the 2018 Policy. Finally, the District Court determined that universal adherence to the 2018 Policy was insufficient to support a claim that the Defendants engaged in a horizontal conspiracy.

This appeal followed.

DISCUSSION

I. Personal Jurisdiction

To start, the Defendants argue that FIFA is not subject to personal jurisdiction in New York. They contend that this action must therefore be dismissed because, in their view, FIFA is a necessary and indispensable party to the action. We conclude that FIFA is subject to personal jurisdiction in this case.

[2] “A plaintiff must have a state-law statutory basis for jurisdiction and demonstrate that the exercise of personal jurisdiction comports with due process.” [Charles Schwab Corp. v. Bank of Am. Corp.](#), 883 F.3d 68, 82 (2d Cir. 2018). “New York’s long-arm statute provides in relevant part that ‘a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent ... transacts any business within the state or contracts anywhere to supply goods or services in the state,’ ” as to any cause of action arising from such a transaction or contract. [Licci ex rel. Licci v. Lebanese Canadian Bank, SAL](#), 732 F.3d 161, 168 (2d Cir. 2013) (alterations in original) (quoting N.Y. C.P.L.R. 302(a) (1)).

[3] On the record before us, FIFA is subject to personal jurisdiction in New York under New York’s long-arm statute. According to Relevant’s amended complaint, FIFA “authorizes USSF ... to act on its behalf to sanction professional soccer leagues in the U.S. and this District.” App’x 513. USSF, which is incorporated as a New York not-for-profit, is FIFA’s agent and transacts substantial business on behalf of FIFA in New York. For example, FIFA authorized USSF’s “refusal to sanction the official season games sought to be promoted by Relevant from its headquarters in [New York].” App’x 513–14; *see also* App’x 506–07 (“As FIFA’s National Association in the U.S., USSF is vested with the exclusive authority to sanction, on behalf of FIFA, all men’s professional soccer leagues and games played in this country.”). These allegations establish, at the pleading stage, that USSF “acted in New York for the benefit of, with the knowledge and consent of, and under some control by” FIFA. [Charles Schwab](#), 883 F.3d at 85. No party disputes that USSF’s actions subject it to personal jurisdiction in New York on Relevant’s claims. That USSF undertook those actions as FIFA’s agent is thus sufficient to subject FIFA to personal jurisdiction in New York as well. *See id.* at 85–86 (“[A]n agency relationship between a parent corporation and a subsidiary that sells securities on the parent’s behalf could

establish personal jurisdiction over the parent in a state in which the parent ‘indirectly’ sells the securities.”).

[4] [5] FIFA also has the minimum contacts with New York necessary to satisfy constitutional due process principles.

Although the long-arm statute and the Due Process Clause are not technically coextensive, the New York requirements (benefit, knowledge, some control) are consonant with the due process principle that a defendant must have purposefully availed itself of the privilege of doing business in the forum. And where we have found personal jurisdiction based on an agent’s contacts, we have never suggested that due process requires something more than New York law.

*4 *Id.* at 85 (cleaned up). Here, the same alleged contacts that subject FIFA to New York’s long-arm statute—including vesting USSF with the exclusive authority to sanction all men’s professional soccer leagues and games played in the United States—satisfy the Constitution’s due process requirement of minimum contacts with New York such that the suit “does not offend traditional notions of fair play and substantial justice.” [Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.](#), — U.S. —, 141 S. Ct. 1017, 1024, 209 L.Ed.2d 225 (2021) (quoting [Int’l Shoe Co. v. Washington](#), 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

II. Antitrust Liability

A. Legal Standard

[6] [7] Section 1 of the Sherman Act prohibits “[e]very contract, combination ... or conspiracy[] in restraint of trade or commerce.” 15 U.S.C. § 1. The first question is “whether the challenged conduct stems from independent decision or from an agreement, tacit or express.” [United States v. Apple, Inc.](#), 791 F.3d 290, 314–15 (2d Cir. 2015) (cleaned up). Distinguishing between concerted action and independent individual behavior is important because “concerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent

centers of decisionmaking that competition assumes and demands.” [Am. Needle, Inc. v. NFL](#), 560 U.S. 183, 190, 130 S.Ct. 2201, 176 L.Ed.2d 947 (2010) (cleaned up). If the challenged conduct reflects concerted action, then we consider whether that action unreasonably restrains trade. [Id.](#) at 186, 130 S.Ct. 2201.⁵

[8] [9] At the pleading stage, a plaintiff need only allege “enough factual matter (taken as true) to suggest that an agreement was made.” [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In other words, a plaintiff must allege facts that “reasonably tend[] to prove that the defendant and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.” [Apple](#), 791 F.3d at 315 (cleaned up). Those facts can constitute either “direct evidence that the defendants entered into an agreement” or “circumstantial facts supporting the inference that a conspiracy existed.” [Id.](#) (quotation marks omitted).

[10] [11] Competitors do not avoid antitrust liability by hiding behind or acting through third-party intermediaries. See Amici Br. of Antitrust, Sports Law, and Economics Professors at 3–4. Business, professional, trade, and sports organizations and associations, for instance, are all subject to federal antitrust laws if their members demonstrate “a conscious commitment to a common scheme designed to achieve an unlawful objective.” [Apple](#), 791 F.3d at 315 (quotation marks omitted); see also [Am. Needle](#), 560 U.S. at 190, 130 S.Ct. 2201. When an association member “surrender[s] himself completely to the control of the association” in a “contractual restraint of interstate trade, designed in the interest of preventing competition,” then a rule that imposes “duties and restrictions in the conduct of [the members’] separate businesses” demonstrates an agreement for purposes of Section 1 of the Sherman Act. [Associated Press](#), 326 U.S. at 8, 19, 65 S.Ct. 1416 (quotation marks omitted).

*5 [12] It follows from this precedent that the adoption of a binding association rule designed to prevent competition is direct evidence of concerted action. No further proof is necessary. See, e.g., [Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma](#), 468 U.S. 85, 99, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) (“[T]he policies of the NCAA with respect to television rights” give rise to “a horizontal restraint—an agreement among competitors on the way in which they will compete with one another.”); [Nat’l Collegiate Athletic Ass’n v. Alston](#), — U.S. —, 141 S.

Ct. 2141, 2154, 210 L.Ed.2d 314 (2021) (“[T]he NCAA [does not] dispute that its member schools ... remain subject to NCAA-issued-and-enforced limits on what compensation they can offer. ... [Accordingly,] this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control.”); [Nat’l Soc’y of Pro. Eng’rs v. United States](#), 435 U.S. 679, 683, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978) (finding “[e]vidence of” an unlawful “agreement” in an engineering society’s “Code of Ethics”); [Allied Tube & Conduit Corp. v. Indian Head, Inc.](#), 486 U.S. 492, 500, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988) (“Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products.”). Contrary to the District Court’s conclusion, there is no need for Relevant to allege a prior “agreement to agree” or conspiracy to adopt the policy; the adoption of the policy, combined with the member leagues’ prior agreement, by joining FIFA, to adhere to its policies, constitutes an agreement on the part of all—whether they voted in favor of the policy or not—to adhere to the announced restriction on competition.

[13] [14] Of course, not every decision by an association violates federal antitrust laws. As we have said, although a “trade association by its nature involves collective action by competitors, a trade association is not by its nature a walking conspiracy.” [NASL](#), 883 F.3d at 40 (cleaned up). Take sports associations, for example. “Without some agreement among rivals—on things like how many players may be on the field or the time allotted for play—the very competitions that consumers value would not be possible.” [Alston](#), 141 S. Ct. at 2156. For this reason, “we focus on those improprieties reducing competition among the members or with their competitors,” not the “day-to-day operations of the organization” including “buying, selling, hiring, renting, or investing decisions.” [AD/SAT, Div. of Skylight, Inc. v. Associated Press](#), 181 F.3d 216, 234 (2d Cir. 1999) (quoting 7 Phillip E. Areeda et al., [Antitrust Law](#) ¶ 1477, at 347 (1999)).

We recently applied these principles in [NASL](#), where the NASL (a second-tier soccer league in the United States)⁶ brought an antitrust challenge to USSF’s application of its Professional League Standards, which establish requirements for sanctioning professional soccer leagues in the United States. See [NASL](#), 883 F.3d at 35–36. We recognized that “[i]f NASL were challenging the [Professional League] Standards themselves—in totality—as violative of the antitrust laws, then the USSF Board’s promulgation of them would constitute direct evidence of § 1 concerted action in that undertaking.”

Id. at 41. But the NASL, we explained, had opted to allege an “overarching conspiracy to restrain competition in markets for top- and second-tier men’s professional soccer leagues in North America,” so that “the promulgation of the Standards” constituted only “circumstantial evidence of that conspiracy,” not direct evidence. Id. So how the plaintiff frames a challenge affects how we analyze the adequacy of its pleadings. If the plaintiff alleges that a policy or rule is in service of a plan to restrain competition, then it must allege enough additional facts to show that agreement to such a plan exists. If, on the other hand, the plaintiff adequately alleges that the policy or rule is the agreement itself, then it need not allege any further agreement.

*6 In dismissing Relevant’s complaint, the District Court misapplied the lesson of NASL.

B. Application

[15] Relevant attacks the 2018 Policy directly as anticompetitive. It alleges that “this anticompetitive agreement was expressly formulated in 2018,” App’x 494, and more specifically that “[o]n October 26, 2018, the FIFA Council adopted a policy embodying the anticompetitive market division agreement at issue in this case,” App’x 502, and “issued a policy prohibiting FIFA’s National Association members, including USSF, from sanctioning any official season games held outside of the participants’ home territory,” App’x 523. “The FIFA geographic market division policy was, and is,” Relevant alleges, “a horizontal division of geographic markets agreement.” App’x 523; see App’x 503 (alleging that the USSF president “participated in the FIFA Council’s consideration and adoption of the geographic market division agreement in October 2018”).

These allegations provide “enough factual matter (taken as true) to suggest that an agreement was made,” Twombly, 550 U.S. at 556, 127 S.Ct. 1955, and the District Court erred in concluding that the 2018 Policy was not itself direct evidence of an agreement under Section 1. The District Court held that “[i]n order for an organizational decision or policy to constitute concerted action and, therefore, to serve as direct evidence of an unlawful agreement, Plaintiff must plausibly allege an antecedent ‘agreement [among horizontal competitors] to agree to vote a particular way’ to adopt such a policy.” Special App’x 33 (alteration in original); see also id. at 34 n.15 (“Plaintiff also fails to ... include allegations that those unidentified [remaining members of the FIFA Council]

agreed with USSF (or with anyone else) to vote in favor of the Policy.”). Applying this mistaken premise, the District Court concluded that Relevant “fails entirely to allege any facts suggesting that there was an ‘agreement to agree.’” Special App’x 34.

A plaintiff challenging an association rule that governs the conduct of members’ separate businesses need not allege an antecedent agreement to agree. The promulgation of the rule, in conjunction with the members’ “surrender[] ... to the control of the association,” sufficiently demonstrates concerted action. Associated Press, 326 U.S. at 19, 65 S.Ct. 1416; see also Anderson v. Shipowners’ Ass’n of Pac. Coast, 272 U.S. 359, 363, 47 S.Ct. 125, 71 L.Ed. 298 (1926) (“The absence of an allegation that such was the specific intent is not important, since that is the necessary and direct consequence of the combination and the acts of the associations under it ...”). Here, Relevant alleges that the national associations, leagues, and teams have “surrendered [their] freedom of action ... and agreed to abide by the will of the association[].” Anderson, 272 U.S. at 364–65, 47 S.Ct. 125. That is enough. See Board of Regents, 468 U.S. at 99, 104 S.Ct. 2948 (“By participating in an association which prevents member institutions from competing against each other ... the NCAA member institutions have created a horizontal restraint ...”); Amicus Br. of the United States at 11–12 (“Because the member has already agreed to abide by all association rules, there would be no need for the member to agree to any particular rule to be bound by it.”).

*7 This conclusion comports with our decisions in NASL and AD/SAT. In NASL, plaintiffs alleged an “overarching conspiracy” instead of challenging “the Standards themselves.” 883 F.3d at 41. And in AD/SAT, plaintiffs challenged an inferred policy as opposed to any specific written or promulgated policy. See 181 F.3d at 233. Here, by contrast, Relevant challenges a specific policy—the “policy embodying the anticompetitive market division agreement” adopted by “the FIFA Council” on “October 26, 2018.” App’x 502. In this circumstance, the “promulgation of [the policy] constitute[s] direct evidence of § 1 concerted action.” NASL, 883 F.3d at 41.⁷

FIFA and USSF defend the District Court’s decision against Relevant’s attacks by urging that the 2018 Policy is not direct evidence of concerted action. First, they contend that Relevant forfeited or waived its direct evidence theory by raising it for the first time on appeal. Not so. The amended complaint alleges that “[t]he FIFA geographic market division

policy was, and is, a horizontal division of geographic markets agreement.” App’x 523. Relevant also advanced this argument in response to the Defendants’ motion to dismiss. See Relevant Sports, LLC’s Mem. of Law in Opp’n to Mots. to Dismiss 34 n.9, Dist. Ct. ECF No. 77 (“Relevant ... alleges, among numerous other specific allegations, that the market division policy itself is direct evidence of such an unlawful conspiracy.”); Tr. of Oral Arg. on Mots. to Dismiss 35, Dist. Ct. ECF No. 94 (“[The] main factual allegation” “is that FIFA has a rule that says you can’t play out of your own geographic territory.”). And the District Court also specifically considered and rejected this argument. See Special App’x 32 (“Plaintiff argues that the FIFA Policy itself constitutes direct evidence of ... [a] common scheme. The Court disagrees.” (alteration in original) (quotation marks omitted)); Jacques v. DiMarzio, Inc., 386 F.3d 192, 201 (2d Cir. 2004) (holding that where “the district court was made fully aware of [a] position ... and the trial judge discussed and explicitly rejected [the] position in its written opinion on the motion,” “the issue is not waived on appeal”).

Next, the Defendants argue that leagues and teams are not members of FIFA, and that the national associations that are members of FIFA are not competitors. But this argument runs headlong into Relevant’s allegations, which we must accept as true, that the FIFA Council’s decisions bind the various national associations, which in turn bind their respective leagues and teams; that those leagues and teams would otherwise compete with each other for fans and sponsors but dodge competition because FIFA and the national associations enforce the 2018 Policy;⁸ and that, as a result, “[t]he FIFA geographic market division policy has created a barrier to entry which has prevented leagues and teams that do not want to adhere to this policy from competing in the relevant market,” App’x 516. Taken together, these allegations clearly depict a rule governing how an association’s separate members’ separate businesses compete. As Relevant puts it, “[e]ffectively, the National Associations and their respective leagues agreed to stay home, so that each league will be free from competition within its own territory.” Relevant Br. 2.

*8 Finally, the Defendants argue that the 2018 Policy was merely a non-binding “sporting principle.” Once again, we

consider the allegations in the amended complaint. According to Relevant, “the FIFA Council—one of FIFA’s decision-making bodies with authority to issue policies that each National Association and their member leagues and teams have agreed to follow—adopted a geographic market division policy.” App’x 523; see also App’x 502 (“On October 26, 2018, the FIFA Council adopted a policy embodying the anticompetitive market division agreement at issue in this case ...”). And “because this was a formal policy announced by a FIFA decision-making body, any leagues and teams who did not comply with it would run the risk of FIFA penalties and all such leagues and teams were required to agree to adhere to this policy.” App’x 523. These allegations, corroborated by the fact that the 2018 Policy does not on its face relate to “things like how many players may be on the field or the time allotted for play,” Alston, 141 S. Ct. at 2156, but rather relates to a geographic limitation on where various leagues can compete for ticket sales, plausibly allege that in adopting the 2018 Policy, FIFA and its member associations adopted an anticompetitive geographic market division.

* * *

The District Court correctly observed that “the FIFA Council announced a ‘policy’ that prohibits staging Official Games outside the participants’ home territory,” and that “all National Associations, leagues, clubs, and players must comply with FIFA directives.” Special App’x 23. Relevant directly challenges the 2018 Policy as anticompetitive. Under these circumstances, the very promulgation of the 2018 Policy is direct evidence of an agreement for purposes of Section 1 of the Sherman Act.

CONCLUSION

For the foregoing reasons, we **VACATE** the judgment of the District Court and **REMAND** for further proceedings consistent with this opinion.

All Citations

--- F.4th ----, 2023 WL 2375884

Footnotes

- 1 These facts are drawn from the amended complaint and assumed to be true for purposes of our *de novo* review of the District Court's judgment dismissing the complaint for failure to state a claim upon which relief can be granted. See [Schlosser v. Kwak](#), 16 F.4th 1078, 1080 (2d Cir. 2021).
- 2 As fans know, there is a difference between “friendly” (or exhibition) games, which Relevant has organized, promoted, and hosted in the United States, and official season games. Official season games affect the standing of teams in their respective leagues or tournaments.
- 3 On appeal, Relevant pursues only its antitrust claims.
- 4 MLS is the top-tier FIFA-affiliated professional soccer league in the United States.
- 5 The antecedent question of whether the inference of concerted action could be drawn from the 2018 Policy itself is distinct from the subsequent question of whether any concerted action was “unlawful.” *Cf.* Special App'x 34 (Dist. Ct. Op.) (“Plaintiff's Amended Complaint lacks any non-conclusory factual allegations [that] ... the FIFA Council unlawfully agreed to adopt the Policy.” (emphasis added)). We express no view on the latter question. See [Am. Needle](#), 560 U.S. at 202–03, 130 S.Ct. 2201 (“The fact that NFL teams share an interest in making the entire league successful and profitable ... provides a perfectly sensible justification for making a host of collective decisions” that qualify as “concerted activity under the Sherman Act that is subject to § 1 analysis.”).
- 6 As we observed in [NASL](#), “[t]he three most prominent men's professional soccer leagues have historically occupied their respective divisions in isolation. [MLS] has been the only Division I men's soccer league since MLS's start in 1995. NASL has existed since 2009 and has operated as a Division II league since 2011. The United Soccer Leagues, LLC ... ordinarily has filled the Division III slot.” [NASL](#), 883 F.3d at 35.
- 7 The District Court also observed that “Plaintiff in this case is not challenging FIFA's standards as a whole, but merely the impact of a single FIFA Policy.” Special App'x 32 n.12. That distinction, presumably based on the words “in totality” in [NASL](#), is immaterial. Neither [NASL](#) nor any other precedent of which we are aware requires a plaintiff to challenge an association's entire set of by-laws. *Cf., e.g., Associated Press*, 326 U.S. at 9, 65 S.Ct. 1416 (determining whether particular by-laws of the AP violated antitrust laws).
- 8 See App'x 498 (Alleging that “an official season game between La Liga teams in the U.S. would directly compete for fans and sponsors with the official season games of USSF-member MLS, which currently benefits from a monopoly position in the U.S. market”).