In the

United States Court of Appeals

For the Seventh Circuit

No. 16-3582 [SEAL]

RIGHT FIELD ROOFTOPS, LLC, *et al*.,

Plaintiffs-Appellants,

v.

CHICAGO CUBS BASEBALL CLUB, LLC, *et al*.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 15 C 551 — **Virginia M. Kendall**, *Judge.*

ARGUED MAY 23, 2017 – DECIDED SEPTEMBER 1, 2017

Before BAUER, EASTERBROOK, and RIPPLE, *Circuit Judges*.

BAUER, *Circuit Judge.* Plaintiffs-appellants Right Field Rooftops, LLC, doing business as Skybox on Sheffield; Right Field Properties, LLC; 3633 Rooftop Management, doing business as Lakeview Baseball Club; and Rooftop Acquisition, LLC (the "Rooftops"), filed

suit against defendants-appellees Chicago Baseball Holdings, LLC; Chicago Cubs Baseball Club, LLC; Wrigley Field Holdings, LLC; and Thomas S. Ricketts (the "Cubs"), alleging that the Cubs violated antitrust laws and breached an agreement in which the Rooftops provide the Cubs 17% of their profits in exchange for the Cubs' promise not to obstruct the view of Wrigley Field (the "License Agreement").

The Rooftops control two buildings and businesses that sell tickets to view Cubs games and other events at Wrigley Field. Both businesses are situated on the 3600 block of North Sheffield Avenue in Chicago, Illinois. Spectators have long enjoyed a view into Wrigley Field from the roofs of the buildings on Sheffield and Waveland Avenues. In the mid-1980's, rooftop owners gradually converted their flat-topped roofs into bleacher-style grandstands and formed businesses to serve the growing market for viewing Cubs games and other Wrigley Field events. In 1998, the City of Chicago enacted an ordinance formally allowing the rooftop businesses to operate for profit. By 2002, there were eleven such businesses.

In 2000, the City began the process of naming Wrigley Field a landmark. While the landmarking process unfolded, the Cubs announced a proposal to expand the Wrigley Field bleachers in 2001. Prior to the 2002 Major League Baseball season, the Cubs installed a large green windscreen above the outfield bleachers, obstructing the views from the rooftop businesses on Sheffield Avenue.

On December 16, 2002, the Cubs filed suit against a number of rooftop businesses, including the Rooftops, claiming that they were misappropriating Cubs' property by charging admission fees to watch Cubs games.[1] Prior to the 2004 baseball season, the parties settled the suit by entering into the License Agreement, in which the rooftop businesses agreed to pay the Cubs 17% of their gross revenues in exchange for views into Wrigley Field. The License Agreement expires on December 31, 2023. Section 6 of the License Agreement contemplated the expansion of Wrigley Field and established protocols to facilitate such an expansion. The pertinent provisions are as follows:

> 6. Wrigley Field bleacher expansion.
>
> 6.1 If the Cubs expand the Wrigley Field bleacher seating and such expansion so impairs the view from any Rooftop into Wrigley Field such that the Rooftop's business is no longer viable unless it increases the height of its available seating, then such Rooftop may in its discretion lect [sic] to undertake construction to raise the height of its seating to allow views into Wrigley Field and the Cubs shall reimburse the Rooftop for 17% of the actual cost of such construction.
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> 6.2 If the Cubs expand the Wrigley Field bleacher seating and such expansion so

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[1] *See Chi. Nat'l League Ball Club, Inc. v. Skybox on Waveland, et al.*, No. 02 C 9105, United States District Court for the Northern District of Illinois.

impairs the View from any Rooftop into Wrigley Field such that the Rooftop's business is no longer viable even if it were to increase its available seating to the maximum height permitted by law, and if such bleacher expansion is completed within eight years from the Effective Date, then if such Rooftop elects to cease operations . . . the Cubs shall reimburse that Rooftop for 50% of the royalties paid by that Rooftop to the Cubs . . .

. . .

6.4 If the Cubs expand the Wrigley Field bleacher seating and such expansion impairs the view from any Rooftop into Wrigley Field such that the Rooftop's Gross Revenue in the year of expansion is more than 10% below the average Gross Revenue for that Rooftop in the two years prior to expansion . . . then the affected Rooftop can seek a reduction in the Royalty rate for all subsequent years of the Term . . . .

6.5 Nothing in this Agreement limits the Cubs' right to seek approval of the right to expand Wrigley Field or the Rooftops' right to oppose any request for expansion of Wrigley Field.

6.6 The Cubs shall not erect windscreens or other barriers to obstruct the views of the Rooftops, provided however that temporary items such as banners, flags, and decorations for special occasions, shall

> not be considered as having been erected to obstruct views of the Rooftops. Any expansion of Wrigley Field approved by governmental authorities shall not be a violation of this Agreement, including this section.

On February 11, 2004, the City completed the landmarking process; Wrigley Field's landmark designation limited future alterations to the field. However, following the 2005 baseball season, the Cubs were permitted to add approximately 1,790 bleacher seats.

In Fall 2009, the Ricketts family and certain related entities purchased 95% of the Cubs and acquired Wrigley Field from the Tribune Company. The acquisition was subject to the preexisting License Agreement. Shortly thereafter, the Cubs began to acquire ownership interests in a number of the rooftop businesses,[2] but failed in their attempt to purchase all of them. In 2010, the Cubs announced plans to install a "Toyota" sign in left field. Ricketts stated that the sign "[would not] affect any rooftops and everyone will be able to see."

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[2] The Cubs first acquired "Down the Line," a rooftop business located at 3621 N. Sheffield. In total, six rooftop businesses changed hands: three to the Cubs and three to unrelated investors. In conjunction with their Rule 59(e) motion, the Rooftops provided documentation showing that the holding companies that acquired six of the rooftop properties were owned by Greystone, LLC, which in turn was owned by Northside Entertainment Holdings, LLC. Northside, of which Ricketts serves as the executive vice president, owns and operates the Chicago Cubs.

In early 2012, the Cubs sought approval from the City for several Wrigley Field renovations, including bleacher seating expansion, an outfield sign package, and two video boards. On April 15, 2013, the Cubs announced a new renovation plan, which included a 6,000-square-foot video board in left field and a 1,000-square-foot billboard in right field. The Cubs released a mock-up of its proposed renovation on May 28, 2013, to all the rooftop business owners, which revealed that the rooftop businesses would be largely blocked by the construction.

After numerous meetings and public hearings stretching out over two years, where a number of rooftop businesses appeared and objected to the proposed construction, the Chicago Plan Commission, City Council, and Commission on Chicago Landmarks approved the Cubs' plan, including the construction of the bleachers, video boards, and billboards. The City approved the Cubs' final plan to construct a total of eight outfield signs above the bleachers, including a video board in both left and right field.

During the approval process, the Rooftops contend that Cubs' representatives used the threat of blocking rooftop views as leverage to force a sale of the rooftops to the Ricketts at below-market prices. The Rooftops allege that the Cubs demanded the Rooftops set minimum ticket prices and that the failure to do so would lead to having their views blocked. Once the City approved the Cubs' initial construction plan in July 2013, the Rooftops allege that the Cubs engaged a number of rooftop business owners in strong-arm negotiations to

purchase their properties. In May 2014, Ed McCarthy, one of the owners of the Rooftops, proposed a potential sale to the Cubs of both Rooftops. McCarthy offered to sell the Rooftops to the Cubs for fair market value, but was met by a Cubs representative stating that McCarthy should accept whatever sale terms the Cubs offer because the buildings would be worth nothing once they no longer had views into Wrigley Field. The Cubs offered McCarthy a significantly lower price, and McCarthy refused. The Cubs also told McCarthy that they would block any rooftop business they did not purchase.

At the annual Cubs Convention held in January 2014, in response to a question regarding the construction at Wrigley Field, Ricketts stated:

> It's funny – I always tell this story when someone brings up the rooftops. So you're sitting in your living room watching, say, Showtime. All right, you're watching "Homeland." You pay for that channel, and then you notice your neighbor looking through your window watching your television.
>
> And then you turn around, and they're charging the other neighbors to sit in the yard and watch your television. So you get up to close the shades, and the city makes you open them. That's basically what happened.

The Rooftops contend that the audience, populated by the media and ticket-purchasing fans, interpreted this statement as an accusation that the Rooftops were stealing the Cubs' property.

The Cubs began construction on their expansion project in September 2014. The Cubs removed the outfield outer walls, purchased approximately fifteen feet of sidewalk and street on Waveland and Sheffield Avenues, increased the bleachers' seating capacity by several hundred, and increased the bleachers' height by approximately 40 feet. In total, the construction entails new seats in the outfield bleachers, a new "fan deck" in the bleachers, increased concessions, signs and video boards, and new light systems.

The Rooftops filed suit against the Cubs on January 20, 2015, seeking relief for: (1) attempted monopolization; (2) false and misleading commercial representations, defamation, false light, and breach of the non-disparagement provision; and (3) breach of contract. Three weeks later, the Rooftops sought a temporary restraining order and a preliminary injunction enjoining the Cubs from constructing a video board. The district court conducted a hearing, and on February 19, 2015, it denied the motion for a TRO. On April 2, 2015, the court denied the Rooftops' motion for a preliminary injunction. The Cubs moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). The court granted the Cubs' motion with prejudice on September 30, 2015.

Specifically, it dismissed the monopolization claims because: (1) Major League Baseball's antitrust exemption applies to the Cubs; (2) the Rooftops failed to establish a plausible relevant market; and (3) the Cubs cannot be limited by antitrust law from distributing their own product. It dismissed the breach-of-contract claim because the plain language of the

contract did not limit expansions to the seating capacity of Wrigley Field. The court dismissed the six remaining counts related to Ricketts' statements because the Rooftops failed to plausibly allege any "actionable false statement of fact."

The Rooftops moved to alter or amend the judgment under Rule 59(e) and to file an amended complaint under Rule 15(a). The Rooftops claimed to have discovered "new evidence" in the form of public deeds from January and May 2015, indicating that a corporate entity other than the Chicago Cubs had purchased the competing rooftops. The Rooftops sought to amend their antitrust claims: (1) to allege that "the business in which the Rooftops are involved is not the 'business of baseball;' " (2) to modify the relevant market to include occasional non-baseball events at Wrigley Field; and (3) to allege that the Cubs have no right to "sell views into Wrigley Field."

The court denied both motions. It held that the Rooftops were not entitled to relief under Rule 59(e) because the new evidence was actually a matter of public record and readily available, and therefore could not be considered "newly discovered." It also held that amending the complaint would be futile because, even with the proposed amendments, the Rooftops' antitrust claims would still be subject to the baseball exemption and lacked a plausible relevant market. This appeal followed.

I. DISCUSSION

We review *de novo* a district court's decision granting a motion to dismiss under Rule 12(b)(6), accepting all well-pleaded factual allegations in the complaint as true and drawing all reasonable inferences in favor of the appellants. *St. John v. Cach, LLC*, 822 F.3d 388, 389 (7th Cir. 2016). To avoid dismissal, the complaint must "state a claim to relief that is plausible on its face." *Jackson v. Blitt & Gaines, P.C.*, 833 F.3d 860, 862 (7th Cir. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

On appeal, the Rooftops challenge the district court's dismissal of their attempted monopolization, breach-of-contract, and breach of the non-disparagement provision claims. The Rooftops also contend that district court erred in denying their motion to amend. We will address each argument in turn.

A. Attempted Monopolization

The Rooftops contend that certain conduct by the Cubs constitutes monopolistic behavior in violation of the Sherman Act, 15 U.S.C. § 1, *et seq*., including: attempting to set a minimum price for tickets; attempting to purchase all rooftop businesses; acquiring several rooftop businesses, threatening to obstruct views of rooftop businesses if they refuse to sell to the Cubs; and constructing the video board that blocks the Rooftops' views.

The Supreme Court first exempted the business of baseball from federal antitrust laws almost a century ago in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922). In *Federal Baseball*, the Court held that the Sherman Act had no application to the "business [of] giving exhibitions of base ball" because such "exhibitions" are "purely state affairs." *Id*. at 208. In *Toolson v. New York Yankees, Inc*., 346 U.S. 356, 357 (1953) (per curiam), the Court reaffirmed *Federal Baseball*'s holding, reasoning that the business of baseball had "been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation." Therefore, "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." *Id*. Finally, in *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972), the Court noted that Congress had acquiesced in the baseball exemption and thus "by its positive inaction . . . clearly evinced a desire not to disapprove [it] legislatively." *See Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978) (discussing *Federal Baseball* and its progeny before concluding that "the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws.").

Eventually, Congress took action to narrow the scope of the baseball exemption in 1998 with the passage of the Curt Flood Act, 15 U.S.C. § 26b. The Act established that "the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to

or affecting employment of major league baseball players . . . are subject to the antitrust laws. . . .” 15 U.S.C. § 26b(a). The Rooftops do not – and cannot – plausibly contend that this carve-out applies to the Cubs’ conduct, as it is unrelated to the employment of Major League Baseball players.

Instead, the Rooftops argue that their claims are outside the scope of the baseball exemption because they do not concern the “rules and restrictions related to baseball itself.” As an initial matter, the Rooftops’ suggested “rules and restrictions” litmus test is not supported by case law. However, we have recognized limits to the scope of the exemption. In *Charles O’Finley* [sic], we found that “[the] exemption does not apply wholesale to all cases which may have some attenuated relation to the business of baseball.” 569 F.3d 541 n.51. But we do not view the Cubs’ conduct as attenuated to the business of baseball. By attempting to set a minimum ticket price, purchasing rooftops, threatening to block rooftops with signage that did not sell to the Cubs, and beginning construction at Wrigley Field, the Cubs’ conduct is part and parcel of the “business of providing public baseball games for profit” that *Federal Baseball* and its progeny exempted from antitrust law. *See Toolson*, 346 U.S. at 357.

The Rooftops also contend that the exemption is inapplicable to Count II, which involved the acquisition of other rooftop businesses, because Ricketts, rather than the Cubs, engaged in the anticompetitive conduct. The district court dismissed this argument, recognizing that the Supreme Court applied the

baseball exemption in *Toolson*, in which the defendants included both the owner and general manager of the Cincinnati Baseball Club. *See Corbett v. Chandler*, 202 F.2d 428 (6th Cir. 1953) (per curiam), *aff'd sub nom*., *Toolson*, *supra*. We agree with the district court.

Finally, the Rooftops argue that the exemption is inapplicable because their business is "not to publicly display baseball games," but instead "to sell views of live events inside" Wrigley Field, including concerts, Big 10 football games, and professional hockey games. As the Cubs correctly point out, this contention is at odds with their complaint, which alleges attempted monopolization of "the market for watching Live Cubs Games." It is also belied by the Rooftops' brief, which concedes, as it must, that "the most significant portion of the Rooftops' current business is to sell views of Cubs games. . . ." Nonetheless, the business model of the Rooftops is not determinative. The relevant inquiry is whether the Cubs' challenged conduct falls within the business of providing public baseball games for profit, and we have already found that it does. Consequently, the Rooftops' antitrust claims are subject to the baseball exemption, and were properly dismissed.[3]

B. Breach of Contract

The Rooftops contend that the Cubs violated the License Agreement by constructing the video board

[3] Having determined that the antitrust claims were properly dismissed, we will forego an analysis of the Rooftops' relevant market and distribution arguments.

that blocks the views of Wrigley Field from the Rooftops.[4] Section 6.6 of the License Agreement states the following: "The Cubs shall not erect windscreens or other barriers to obstruct the views of the Rooftops. . . . Any expansion of Wrigley Field approved by governmental authorities shall not be a violation of this Agreement, including this section."

The basic rules of contract interpretation under Illinois law are well settled. In construing a contract, the primary objective is to give effect to the intention of the parties. *Gallagher v. Lenart*, 874 N.E.2d 43, 58 (Ill. 2007) (citation omitted). "A court must initially look to the language of a contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent." *Id*. (citation omitted). A contract must be construed as a whole, viewing each provision in light of the other provisions. *Id*. (citation omitted). "If the words in the contract are clear and unambiguous, they must be given their plain, ordinary and popular meaning." *Cent. Ill. Light Co. v. Home Ins. Co.*, 821 N.E.2d 206, 213 (Ill. 2004) (citation omitted). However, if the language of the contract is susceptible to more than one meaning, it is ambiguous. *Gallagher*, 874 N.E.2d at 58 (citation omitted). If the contract language is ambiguous, a court can consider extrinsic evidence to determine the parties' intent. *Id*.

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[4] Although the Rooftops' complaint seeks relief for an anticipatory breach of contract, we will analyze this claim as a breach of contract, as the district court did, because the video board has been constructed.

The Rooftops argue that the entirety of § 6 contemplates bleacher expansion, including remedies for various types of bleacher expansion such as sharing the cost of increasing the height of the Rooftops' seating (§§ 6.1, 6.3), or renegotiating the royalty rate (§ 6.4). The Rooftops' argument relies in part on the fact that the title of § 6 is "Wrigley Field bleacher expansion[.]" Thus, the Rooftops conclude that the term "any expansion" in § 6.6 refers only to the expansion of bleacher seating, rendering the construction of the video board a violation of the License Agreement. We disagree.

As an initial matter, we note that the Rooftops' argument is contrary to the plain, unambiguous language of the provision. If the parties wished to clarify that "any expansion" meant "bleacher expansion," they could have done so. This is particularly evident in light of the fact that every reference to an expansion in §§ 6.1 through 6.4 specifies "bleacher seating" expansion, and only §§ 6.5 and 6.6 use the general term "expansion." "[W]hen parties to the same contract use such different language to address parallel issues . . . it is reasonable to infer that they intend this language to mean different things." *Taracorp, Inc. v. NL Indus., Inc.*, 73 F.3d 738, 744 (7th Cir. 1996) (analyzing Illinois law). Thus, we presume that the use of the general term "any expansion" in §§ 6.5 and 6.6 is an intentional departure from the prior sections' use of "bleacher seating" expansion.

In response, the Rooftops, relying on *BeerMart, Inc. v. Stroh Brewery Co.*, 804 F.2d 409, 411 (7th Cir.

1986), argue that "where the parties have agreed upon a specific term, an apparently inconsistent general statement must yield to the more specific term." The Rooftops contend that the prohibition on "windscreens and other barriers" is a specific term, and the exception of "any expansion" is a general term that must yield. First, we note that *BeerMart* analyzed Indiana law, not Illinois. However, even if this principle of construction is applicable under Illinois law, it is only applicable where a specific and general term "cannot stand together." *BeerMart*, 804 F.2d at 411. These two sentences are not inconsistent or contradictory. The second sentence clarifies that the prohibition of windscreens and other barriers in the first sentence is not applicable to any government-approved expansion. Therefore, *BeerMart*'s construction principle is inapplicable.

The Rooftops argue that our proposed construction renders the first sentence of § 6.6 meaningless. In their view, the video board is a barrier that obstructs the view of the Rooftops. Following their train of logic, a video board or any other construction that blocks views into Wrigley Field, whether government-approved or not, would be impermissible under the License Agreement. But this assertion is contrary to the plain language of the provision, which carved out government-approved expansion from the list of prohibited items. Section 6.6 makes it clear that any government-approved expansion "shall not be in violation of this Agreement, *including this section*." (emphasis added). This is in direct reference to the prohibition

on windscreens or other barriers in the preceding sentence. Again, the Rooftops' interpretation asks us to ignore the plain language of the provision. The first sentence is not meaningless; any windscreen or other barrier that is not government-approved is still prohibited under the License Agreement.

The Rooftops also argue that our reading of § 6.6 disharmonizes the other provisions of the License Agreement, specifically the 17% royalty provision in § 3. The Rooftops contend that if the royalty obligation remains in "full-force" despite their obstructed views, they will have "assumed enormous risks and got nothing in return." *See Curia v. Nelson*, 587 F.3d 824, 832 (7th Cir. 2009). The Rooftops fail to acknowledge that to the extent their revenues are negatively impacted by the video board, the Cubs' royalties will decrease proportionately.

But more to the point, the Rooftops fail to acknowledge that a primary function of a contract is to allocate risks between parties. Here, the risk is that future expansions of Wrigley Field will obstruct the Rooftops' views. Section 6.5 provides a mechanism for the parties to dispute the Cubs' proposed expansion projects. Section 6.6 declares that if the Cubs prevail in the dispute, their projects may proceed. That is precisely what occurred here – the Rooftops vigorously opposed the Cubs' expansion efforts, but ultimately lost. The parties were free to allocate risk in a different manner, but chose not to do so. *See McClure Eng'g Assocs., Inc. v. Reuben H. Donnelly Corp.*, 447 N.E.2d 400, 402-03 (Ill. 1983) (recognizing "a widespread policy of

permitting competent parties to contractually allocate business risks as they see fit." (collecting cases)). Absent a defect in the negotiation process, such as disparity in bargaining power, absence of meaningful choice on the part of one party, or the existence of fraud, duress, or mistake, we will not second-guess that allocation. *Dana Point Condo. Ass'n, Inc. v. Keystone Serv. Co., a Div. of Cole Coin Operated Laundry Equip., Inc*., 491 N.E.2d 63, 66 (Ill. App. Ct. 1986).

We do not view the royalty provision in § 3 as an inappropriate allocation of risk. Similarly, we do not find that our reading of the License Agreement "disharmonizes" the marketing promotion provision in § 7, as even with obstructed views, both parties benefit financially by the Cubs' continued promotion of the Rooftops.

Because the video board falls within the plain language of the carve-out for government-approved expansions in § 6.6, we find that it is not in violation of the License Agreement. Accordingly, the Rooftops' breach of contract claim fails.

C. Non-Disparagement Provision

In addition to § 6, the Rooftops argue that Ricketts violated § 8.2, the License Agreement's non-disparagement provision, with his remarks at the 2014 Cubs Convention.[5] Section 8.2 states that "[t]he Cubs

[5] Ricketts' remarks also formed the basis of the Rooftops' claims under the Lanham Act, the Uniform Deceptive Trade Practice Act, and the Illinois Consumer Fraud and Deceptive Business

will not publicly disparage, abuse or insult the business of any Rooftop or the moral character of any Rooftop or any Rooftop employee." Under Illinois law, disparagement is defined as "statements about a competitor's goods which are untrue or misleading and are made to influence or tend to influence the public not to buy." *Lexmark Int'l, Inc. v. Transp. Ins. Co.*, 761 N.E.2d 1214,1225 (Ill. App. Ct. 2001) (citation and brackets omitted). The district court found that the Rooftops failed to establish that Ricketts' statement was untrue or misleading. We agree.

Ricketts voiced his opinion as to the nature of the relationship between the Cubs and the Rooftops at the 2014 Cubs Convention. Illinois courts have refused to find this type of hyperbolic, opinion statement as actionable. *See Xlem De-watering Solutions, Inc. v. Szablewski*, No. 5-14-0080, 2014 WL 4443445, *5 (Ill. App. Ct. Sept. 8, 2014) ("[S]tatements of opinion cannot form the basis for a commercial disparagement claim." (citation omitted)); *Pease v. Int'l Union of Operating Eng'rs Local 150, et al.*, 567 N.E.2d 614, 619 (Ill. App. Ct. 1991) ("Words that are mere name calling or found to be rhetorical hyperbole or employed only in a loose, figurative sense have been deemed nonactionable." (citation omitted)). We do not find Ricketts' statement to be "untrue or misleading," as it is not a factual assertion whose veracity can be proven.

Practices Act, as well as claims for defamation and false light. The Rooftops do not challenge the dismissal of these claims, and thus we limit our discussion to the breach of the non-disparagement provision of the License Agreement.

Furthermore, it is not the type of statement that Illinois courts have found to be "untrue or misleading[.]" In *Pekin Insurance Company v. Phelan*, the defendant attempted to lure customers away from her employer's salon by falsely telling them that the salon was either closing or moving to a new location. 799 N.E.2d 523,524 (Ill. App. Ct. 2003). In addition to telling customers that the salon was relocating, she provided them with the address of her newly opened salon. *Id*. The court found her statements to be untrue and misleading. *Id*. at 526. The *Pekin* defendant told an objectively false statement to mislead customers and ultimately lure them away. In contrast, Ricketts' statement was an analogy to explain his perspective on the contentious relationship between the Cubs and Rooftops – it was neither untrue nor misleading. Therefore, we find that Ricketts' statement did not violate the License Agreement's non-disparagement provision.

Seeking to avoid this result, the Rooftops argue that because they assert a breach of contract claim rather than a common law disparagement claim, we should apply principles of contract interpretation by analyzing the specific language in § 8.2 to determine if a breach has occurred. Consequently, the Rooftops contend that any statement that "abuse[s]" or "insult[s]" the Rooftops also breaches the non-disparagement provision.

To make this argument, the Rooftops rely on *Rain v. Rolls-Royce Corp*., 626 F.3d 372, 380-81 (7th Cir. 2010), in which we used the dictionary definition of

"disparage" to determine if a non-disparagement agreement had been violated under Indiana law. While this approach may have been appropriate under Indiana law, the Rooftops have not cited to any Illinois cases following a similar approach. Moreover, Illinois cases such as *Pekin* and *Lexmark* involve non-disparagement provisions of insurance policies, which are analyzed similarly to contracts; those courts used the "untrue or misleading" standard to analyze claims arguing breach of the policies' non-disparagement provisions. 799 N.E.2d at 526; 761 N.E.2d at 1218, 1225. Consequently, we reject the Rooftops' attempt to broaden the scope of the non-disparagement provision.

D. Motion to Amend

The Rooftops argue that the district court erred in denying their motion to amend. Rule 15 provides that, as a general rule, a court "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). District courts, nevertheless, "have broad discretion to deny leave to amend where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile." *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008). Generally, we review a district court's denial of leave to amend for an abuse of discretion. *Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510,524 (7th Cir. 2015). However, "our review for abuse of discretion of futility-based denials includes *de novo* review of the legal basis for the futility." *Id*.

Here, the district court determined that the Rooftops' proposed amendments would be futile. The Rooftops' proposed amendments addressed their antitrust claims. The Rooftops sought to include Northside Entertainment Holdings, LLC as a defendant in an attempt to evade the Sherman Act's baseball exemption. However, Ricketts operates this entity, and it, in turn, owns and operates the Cubs. Based on our discussion of *Toolson* above, we find that the baseball exemption applies with equal force to Northside. If the exemption applied to the owner and general manager in *Toolson*, we see no reason that it would not extend to the entity that owns the Cubs, and the Rooftops have not offered a compelling one. Furthermore, according to the Rooftops' amended complaint, Northside is engaged in the same conduct as the other Cubs defendants that we already found exemplifies "the business of providing public baseball games for profit." Consequently, we agree with the district court that this amendment would be futile, as the baseball exemption applies to Northside. Based on this conclusion, we need not review the Rooftops' additional proposed amendments regarding the relevant market.

II. CONCLUSION

We **AFFIRM** the district court's dismissal of the Rooftops' suit.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[SEAL]

FINAL JUDGMENT

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September 1, 2017 [SEAL]

Before: WILLIAM J. BAUER, Circuit Judge
FRANK H. EASTERBROOK, Circuit Judge
KENNETH F. RIPPLE, Circuit Judge

No. 16-3582	RIGHT FIELD ROOFTOPS, LLC, et al., Plaintiffs-Appellants v. CHICAGO CUBS BASEBALL CLUB, LLC, et al., Defendants-Appellees
Originating Case Information:	
District Court No: 1:15-cv-00551 Northern District of Illinois, Eastern Division District Judge Virginia M. Kendall	

The District Court's dismissal of the Rooftops' suit is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RIGHT FIELD ROOFTOPS, LLC et al,	)	
Plaintiff,	)	
v.	)	No. 15 C 551
CHICAGO CUBS BASEBALL CLUB, LLC et al,	)	Judge Virginia M. Kendall
Defendant.	)	

MEMORANDUM OPINION AND ORDER

(Filed Sep. 30, 2015)

Due to the extensive history that has already occurred in this case – a hearing on a motion for temporary restraining order and voluminous briefing with corresponding evidentiary exhibits leading up to a hearing on a motion for preliminary injunction – it may seem odd that the Court returns to the original complaint to determine whether it states a claim. Yet, that is the posture this matter takes at this point in the litigation in spite of the Court's rulings in February and April of this year. Those rulings took into account the likelihood of success on the merits, but now we must return to the initial stage to determine whether the complaint states a claim in order to determine whether the case should proceed to full discovery and a decision on the merits. Plaintiffs, Right Field Rooftops, LLC; Skybox on Sheffield; Right Field Properties,

LLC; Lakeview Baseball Club; and Rooftop Acquisition, LLC (the "Rooftops") initiated this action against Defendants, Chicago Baseball Holdings, LLC; Chicago Cubs Baseball Club, LLC; Wrigley Field Holdings, LLC; and Thomas Ricketts (the "Cubs") alleging that the Cubs engaged in anti-competitive behavior and breached a contract wherein the parties agreed the Rooftops would provide the Cubs 17% of their profits in exchange for the Cubs promise to not block the view of Wrigley Field from the Rooftops (the "License Agreement"). The Rooftops' nine-count complaint can be grouped as claims seeking relief for: (1) attempted monopolization (Counts I and II); (2) false and misleading commercial representations, defamation, false light, and breach of the non-disparagement clause (Counts III-VII); and (3) breach of contract (Count VIII and IX). The Cubs filed a motion to dismiss all counts pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, the Court grants the Cubs' Motion to Dismiss all counts with prejudice.

BACKGROUND

A full description of the facts giving rise to the complaint is set forth in the Court's preliminary injunction opinion. *See Right Field Rooftops, LLC v. Chicago Baseball Holdings, LLC*, No. 15 C 551, 2015 WL 1497821, at *2-5 (N.D. Ill. Apr. 2, 2015). The Court assumes familiarity with those facts. Briefly, this dispute began years ago from the embattled relationship between the Rooftops and the Cubs, who continually clash over the Rooftops' patrons viewing live Cubs

games. It specifically pertains to the Cubs' construction of a video board that blocks the view of Wrigley Field from the Rooftops, Cubs' acquisition of rooftop properties, and attempts by the Cubs to set minimum ticket prices for the rooftops. The Rooftops' defamation claims derive from a statement made by Ricketts at the Cubs convention about the nature of the relationship between the Rooftops and the Cubs.

The Rooftops filed their complaint on January 20, 2015, and three weeks later sought a temporary restraining order ("TRO") and preliminary injunction enjoining the Cubs from constructing a video board. On February 18, 2015, the Court held a TRO hearing and denied the Rooftops' motion for TRO the following day. Then on April 2, 2015, the Court denied the Rooftops motions for a preliminary injunction because: (1) the exemption of Major League Baseball teams forecloses antitrust claims; (2) live Cubs games are not a relevant market; (3) plans to construct the video board did not constitute anticipatory repudiation; (4) the Rooftops failed to establish that they would suffer irreparable harm and had no adequate remedy at law besides injunctive relief; and (5) a balance of hardships weighed in favor of denying injunctive relief. The Court now grants the Cubs' motion to dismiss all counts with prejudice.

LEGAL STANDARD

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the viability of a

complaint by arguing that it fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6); *Doe v. Village of Arlington Heights*, 782 F.3d 911, 914 (7th Cir. 2015). To survive a motion to dismiss under Rule 12(b)(6), the complaint must provide enough factual information to "state a claim to relief that is plausible on its face" and "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). All well-pled facts are taken as true and viewed in the light most favorable to the plaintiff, *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 743 (7th Cir. 2010), but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

DISCUSSION

I. Cubs' Motion to Dismiss Counts I and II

The Cubs move to dismiss Counts I and II that allege attempted monopolization by the Cubs in violation of the Sherman Act. They argue first that the Major League Baseball exemption from antitrust laws applies to the Cubs, and in the alternative, that the Rooftops failed to state an antitrust claim because there is no plausible relevant market and the Cubs cannot monopolize distribution of their own product.

As this Court has previously held, the Supreme Court in a series of decisions exempted Major League Baseball from the reach of antitrust laws. *See Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l*

Baseball Clubs, 259 U.S. 200, 208 (1922) (the Sherman Act had no application to the "business [of] giving exhibitions of base ball"); *Toolson v. New York Yankees*, 346 U.S. 356, 357 (1953) (after recognizing that Congress had thirty years since *Federal Baseball* to bring baseball within the antitrust laws and had not done so, concluding that "the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws"); *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972) (because Congress had acquiesced in the baseball exemption by inaction, "the business of baseball [is] outside the scope of the [Sherman] Act"). In spite of numerous commentators arguing it should be otherwise, *see* D. Logan Kutcher, Note, *Overcoming an "Aberration": San Jose Challenges Major League Baseball's Longstanding Antitrust Exemption*, 40 J. Corp. L. 233 (2014); Michael J. Mozes, et al., *Adjusting the Stream? Analyzing Major League Baseball's Antitrust Exemption After American Needle*, 2 Harv. J. Sports & Ent. L. 265 (2011), both the Supreme Court and the Seventh Circuit have taken a broad reading of the baseball exemption. Because the Cubs' business and conduct is central to "the business of providing public baseball games for profit," *Toolson*, 346 F.3d at 356-57, the Court finds that the antitrust exemption applies to the Rooftops' claims.

As the Court has already held, the exemption applies to the "business of baseball" in general, not solely those aspects related to baseball's unique characteristics and needs. *See Charles O. Finley & Co., Inc. v.*

Kuhn, 569 F.2d 527, 541 (7th Cir. 1978) (despite references to the player reserve system in Supreme Court precedent, "it appears clear from the entire opinions . . . that the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws"); *see also City of San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686, 689-90 (9th Cir. 2015) (plaintiff's contention that baseball exemption only applies if activity is "sufficiently related to 'baseball's unique characteristics and needs'" discarded because nothing in Supreme Court precedent suggests that the exemption is "based on some fact-sensitive analysis of the role" the activity played within the baseball industry). Therefore, the Court finds that the Cubs are exempt from antitrust laws as a business that produces and presents live baseball to the public. This exemption protects the general "business of baseball" from antitrust laws, and the public display of baseball games is integral to that business. *See Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978); *see also Toolson*, 346 U.S. at 356-57; *City of San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686, 689-90 (9th Cir. 2015). By attempting to set a minimum ticket price, purchasing rooftops, threatening to block rooftops with signage that did not sell to the Cubs, and beginning construction at Wrigley Field, the Cubs directly engaged in the business of publicly displaying baseball games. As such, the Court finds that the Cubs' conduct falls into the Major League Baseball exemption from antitrust laws and therefore Counts I and II must be dismissed

Even if the baseball exemption did not apply, the Court would still dismiss Counts I and II because there is no plausible relevant market. The Rooftops must show the existence of a plausible relevant market to prove attempted monopolization. *See Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 719-20 (6th Cir. 2003); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001). The Rooftops argue that two possible relevant markets exist: a "Live Cubs Game Product" market and a "Live Rooftop Games Product" market. (Compl. ¶¶ 116, 157.) Neither is a plausible relevant market however because each depends upon the Cubs' presentation of live professional baseball, and a single brand product like producing live-action Cubs games cannot be a relevant market. *Compare, PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 418 (5th Cir. 2010) (a women's accessories brand not a single brand product); *House of Brides, Inc. v. Alfred Angelo, Inc.*, No. 11 C 07834, 2014 WL 64657 at *6 (N.D.Ill. Jan. 8, 2014) ("highly differentiated and unique" wedding products not a single brand product). Moreover, this situation does not align with the limited circumstances where a single brand product or service can constitute a relevant market. First, consumers were not "locked in" to purchasing a future product or service because of the Cubs' conduct, and second, viewing a live Cubs game is not so unique that there is no substitute. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461-79 (1992) (relevant market existed where consumers were effectively "locked in" to the Kodak brand because service and parts for Kodak equipment were not

compatible with other manufacturers' service); *Right Field Rooftops, LLC*, 2015 WL 1497821 at *8-9 ("arguments of consumer preferences . . . fall short of rending it plausible that there exist no interchangeable substitutes for live Cubs games."). Therefore, the Court dismisses Counts I and II with prejudice also on the alternative ground that there is no plausible relevant market for the presentation of live Cubs games.

Finally, the Court dismisses Counts I and II for the additional reason that antitrust laws cannot limit how the Cubs distribute their own product, specifically live baseball games. A defendant cannot monopolize its own product unless there is proof that the product has no economic substitutes. *See, e.g.*, *Elliott v. United Center*, No. 95 C 5440, 1996 WL 400030, at *3 (N.D. Ill. July 15, 1996) (no antitrust violation because operation of food at the United Center is defendant's own product that cannot constitute a relevant market). The product at issue is the Cubs presentation of live baseball games, which is the product of the Cubs alone that thus cannot be monopolized by the Cubs. And as explained in the Court's preliminary injunction opinion, there are economic substitutes for live Cubs games such as "other baseball games, sporting events, or live entertainment". *Right Field Rooftops, LLC*, 2015 WL 1497821 at *9. The Court therefore holds that the antitrust claims in Counts I and II are dismissed with prejudice.

II. Cubs' Motion to Dismiss Counts III-VII and IX

Counts III-VII and IX all pertain the statement made by Ricketts that the Rooftops allege harmed them. Each requires Ricketts's statement be an actionable false statement of fact. Counts III and IV are allegations of violations of the Lanham Act and the Illinois Uniform Deceptive Trade Practices Act (the "UDTPA") respectively and can be analyzed using the same framework. *See, e.g.*, *MJ & Partners Rest. Ltd. P'ship v. Zadikoff*, 10 F. Supp. 2d 922, 929 (N.D. Ill. 1998). At the Cubs Convention, in response to a question regarding the construction at Wrigley Field, Ricketts stated:

> It's funny – I always tell this story when someone brings up the rooftops. So you're sitting in your living room watching, say, Showtime. All right, you're watching "Homeland." You pay for that channel, and then you notice your neighbor looking through your window watching your television. (Dkt. No. 1. at ¶80.)

The Rooftops contend that this statement is defamatory because it is a false statement of fact and also that it constitutes defamation per se because it alleges criminality on the part of the Rooftops. AS to the Lanham Act and UDTPA allegations, to establish liability in Counts III and IV, the Rooftops must prove:

> (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the

> deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a loss of goodwill associated with its products.

Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 819 (7th Cir. 1999). Two types of false statements can violate the Lanham Act and the UDTPA: "(1) commercial claims that are literally false as a factual matter; or (2) claims that may be literally true or ambiguous, but which implicitly convey a false impression, are misleading in context, or likely to deceive consumers." *Id.* at 820. Similarly, Count IX for breach of the License Agreement's non-disparagement clause requires that a statement be "untrue or misleading." *Pekins Ins. Co. v. Phelan*, 343 Ill. App. 3d 1216, 1220 (Ill. Ct. App. 2003). The Consumer Fraud and Deceptive Business Act claim brought in Count V contains identical elements as a Lanham Act and UDTPA violation except there is no requirement that any person was misled, deceived, or damaged by the unfair method of competition. *See* 815 ILCS 505/2. Count VI for defamation per se and Count VII for false light also require a false statement of fact about the plaintiff. *See Green v. Rogers*, 234 Ill.2d 478, 491 (2009) ("To state a defamation claim, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff[.]"); *Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755, 764 (Ill. Ct. App. 2002) ("As in defamation actions,

statements that are expressions of opinion devoid of any factual content are not actionable as false light claims."). In sum, Counts III-VII and IX each hinge on the need for a statement of fact.

In order to survive a motion to dismiss these counts, the Rooftops must allege facts that show that under the circumstances alleged, an observer could plausibly believe Ricketts's statement to be factual. *See, e.g.*, *Rosenthal Consulting Group, LLC v. Trading Techs. Intern., Inc.*, No. 05 C 4088, 2005 WL 3557947, *9 (N.D. Ill. Dec. 26, 2005). The statement must not be a subjective statement or mere puffery; the statement must be objectively verifiable by specific or absolute characteristics. *See Coastal Abstract Service, Inc. v. First American Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999) (finding statement that plaintiff was too small to handle a certain amount of business was vague and subjective, and thus not actionable under the Lanham Act); *Rosenthal*, 2005 WL 3557947, at *9 (in order to be actionable under Lanham Act, statement must be specific or absolute in that the claim can be objectively tested).

In determining whether a statement constitutes an opinion or factual assertion, the Court considers: "(1) whether the statement has a precise and readily understood meaning; (2) whether the statement is verifiable; and (3) whether the statement's literary or social context signals that it has factual content." *Madison v. Frazier*, 539, F3d 646, 654 (7th Cir. 2008) (citing *J. Maki. Constr. Co. v. Chicago Reg'l Council of Carpenters*, 379 Ill. App. 3d 189, 200 (2008)).

Furthermore, "statements that do not contain verifiable facts, such as opinions or rhetorical hyperbole, are not actionable as defamation" or the other counts at issue requiring a false statement of fact. *Frain Group, Inc. v. Steve's Frozen Chillers*, No. 14 C 7097, 2015 WL 1186131, at *3 (N.D. Ill. Mar. 10, 2015).

Here, it cannot be said that any reasonable person hearing the statement would believe that is [sic] was a fact and not a personal opinion about the relationship between the Cubs and the Rooftops in the form of a readily understandable metaphor. Ricketts's statement, made to fans during a convention, was his own personal interpretation of how he viewed his relationship with the Rooftops. He used a metaphor to describe his feelings. In fact, he stated as much. Ricketts prefaced his statement with, "I always tell this story" as if to describe how he feels about the situation by using a non-factual, personal description to describe the conflict. There is no objective way to verify his statement because there is no way to fact check whether the Rooftops are similar to those who charge admission to watch their neighbor's television. *See e.g.*, *Id.* at *4 (statements that plaintiff "ripped off" defendant and plaintiff's product was "butchered piece of junk" are non-actionable statements of opinion while statements about the age of the plaintiff's machine and its deficient construction are actionable factual statements); *Pease v. Int'l Union of Operating Eng'rs Local 150, et al.*, 208 Ill. App. 3d 863, 870 (1991) ("Words that are mere name calling or found to be rhetorical hyperbole

or employed only in a loose, figurative sense" are non-actionable).

The Rooftops further allege that Mr. Ricketts's "story" alleges criminal conduct by "telling the consumer public and media outlets that the Rooftop Businesses were thieves that were preventing the Cubs from winning the World Series." (Dkt. No. 1 at ¶¶82-83.) In short, they allege defamation *per se* due to the statement allegedly stating they committed a crime. In order for that to be the case, his story must specifically allege criminal conduct on the part of the Rooftops; his statement also must be false and cannot be an opinion. *See Green v. Rogers*, 234 Ill.2d 478, 491 (2009) (elements of a defamation claim are "that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages."). Yet, even taking the allegations in the light most favorable to the Rooftops, Ricketts's statement fails to fulfill the elements of defamation *per se*.

First, there is no statement of fact, but rather, a colorful story that is used to show the convention attendees how he feels about the dispute regarding the attempted renovation. The story can only be interpreted as expressing Ricketts's own personal frustration at the situation. Comparing the Rooftops to nosey neighbors viewing his television program is hardly an accusation of criminality. Instead, it is a personal description to personalize how he feels about the Rooftops viewing the Cubs baseball games. Second, to

suggest that this interpretation falsely represents the actual dispute between the parties fails to take into account the decades-old battle that the parties have engaged in wherein the Cubs have continually taken a position that the Rooftops are not entitled to view their game for free. Even the settlement agreement is premised on the understanding that the Cubs believed that the Rooftops owed them money for viewing the games and the agreement that they entered into provided them with some of that money. So to suggest that the story somehow makes false accusations belies the very litigation history between the parties and the basis for the agreement in the first place. Third, to the extent that the Rooftops allege defamation *per se*, the statement must be more than merely a suggestion of criminality, it must clearly refer to a specific offense that is indictable. *Adams v. Sussman & Hertzberg, Ltd.*, 292 Ill. App. 3d 30, 47 (1 st Dist. Ill. Ct. App. 1997). No reasonable person could hear the "story" of Ricketts's personal frustration and make the leap that he was accusing the Rooftops of an indictable offense. In fact, it is easily capable of an innocent construction – Ricketts's frustration that his neighbors continue to seek to view the Cubs baseball games in spite of a contract that says he is allowed to erect a sign now that he has received governmental approval. There is nothing criminal alleged; there is nothing false alleged; and no reasonable person could interpret his statement as anything other than the frustrations of an individual who has litigated the same issue in different fora and in various forms for years.

The Court grants the Cubs motion to dismiss Counts III-VII and IX with prejudice because Ricketts expressed an opinion and made not allegation of criminal activity on the part of the Rooftops, and did not make a statement that was false.

III. Cubs' Motion to Dismiss Count VIII[1]

The Rooftops allege that the Cubs violated the License Agreement by constructing the video board that blocks the view of Wrigley Field from the Rooftops. At issue is Subsection 6.6 of the License Agreement, which states that "any expansion of Wrigley field approved by governmental authorities shall not be a violation of this Agreement, including this section." (License Agmt. § 6.6.) The Court rejected the Rooftops' argument during the preliminary injunction hearing that "any expansion" refers only to expansion in the form of increased seating capacity because of the term's plain meaning and context. Where a contract is unambiguous, the Court need not look past its plain meaning and discovery is unnecessary. *See, e.g.*, *McWane Inc. v. Crow Chicago Indus., Inc.*, 224 F.3d 582, 584 (7th Cir. 2000) (finding district court properly dismissed a claim based on its reading of the plain language of the contract); *Metalex Corp. v. Uniden Corp.*, 863 F.2d 1331, 1333 (7th Cir. 1998) (where court determines that contract language is unambiguous, court

[1] In their complaint, the Rooftops seek relief for an anticipatory breach of contract on this count. But since the relevant video board has now been constructed, the Court will analyze this claim as a breach of contract.

may determine its meaning as a matter of law); *Charles Hester Enter., Inc. v. Illinois Founders Ins. Co.*, 114 Ill.2d 278, 287 (1986) (unambiguous contract controls over contrary allegations in the plaintiff's complaint).

Under Illinois law, when interpreting a contract the Court must look first at the language of the contract "given its plain and ordinary meaning" in order to decipher the parties' intent. *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007). Moreover, "[a] contract must be construed as a whole, viewing each provision in light of the other provisions." *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). Within the plain meaning and context of the License Agreement, the installation of the video board qualifies as an expansion under Subsection 6.6. It is undisputed that the government approved its construction.

In light of the entirety of Section 6, the Court holds that "any expansion" of Wrigley Field means every addition of volume or mass, including additions that are not incidental to expanded seating. Individually, "any" means "every or all" and "expansion" means "any change to Wrigley Field that adds volume or mass." *Right Field Rooftops*, 2015 WL 1497821, at *10 (citing to *Owens v. McDermott, Will, & Emery*, 316 Ill. App. 3d 340, 349 (2000)). The Rooftops argue that "any expansion" should be limited to expansion in the form of added seating. But because Section 6 as a whole contemplates expansion not related to increased seating, the Court declines to so narrowly interpret this term. For instance, Subsection 6.1 guarantees the Rooftops

reimbursement if the Cubs "expand the Wrigley Field bleacher seating" and Subsection 6.6 outlines when the Cubs may "not erect windscreens or other barriers." (License Agmt. §§ 6.1, 6.6.) If these provisions of the License Agreement spell out when "expansion" refers only to added seating or to other variations such as windscreens, then the unqualified term "any expansion" must encompass expansions other than those incidental to increased seating. *See Right Field Rooftops*, 2015 WL 1497821, at *10-11 ("[W]hile the four corners of the License Agreement limit the definition of expansion to expansion in the bleacher area of Wrigley Field, the term encompasses expansions that do not add seating capacity to the stadium.").

Furthermore, the Rooftops' proposed interpretation of Subsection 6.6 is antithetical to the provision's final phrase which establishes that "[a]ny expansion of Wrigley Field approved by governmental authorities shall not be a violation of this Agreement, *including this section*." (Dkt. No. 27 Ex. 3) (emphasis added). The prior portions of this subsection address "windscreens or other barriers" that do not increase the seating. And as this Court noted previously, "[i]f 'any expansion' were limited to construction projects that increased Wrigley Field's seating capacity, or even structural expansions, it would be unnecessary to specify that windscreens and other barriers were subject to the governmental approval exception." *Right Field Rooftops*, 2015 WL 1497821, at *11. The Court thus concludes that the video board constitutes an "expansion" under Subsection 6.6, and because the Cubs received

governmental approval for its installation they did not plausibly breach the License Agreement. As a result, the Court grants the Cubs' motion to dismiss Count VIII with prejudice.

CONCLUSION

For the reasons stated herein, the Court grants the Cubs' motion to dismiss all counts with prejudice.

/s/ Virginia M. Kendall
Virginia M. Kendall
United States
District Court Judge
Northern District of Illinois

Date: 9/30/2015

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

RIGHT FIELD ROOFTOPS, LLC, d/b/a SKYBOX ON SHEFFIELD; RIGHT FIELD PROPERTIES, LLC; 3633 ROOFTOP MANAGEMENT, LLC, d/b/a LAKEVIEW BASEBALL CLUB; and ROOFTOP ACQUISITION, LLC, Plaintiffs, v. CHICAGO BASEBALL HOLDINGS, LLC; CHICAGO CUBS BASEBALL CLUB, LLC; WRIGLEY FIELD HOLDINGS, LLC; and THOMAS S. RICKETTS, Defendants.	No. 15 C 551 Judge Virginia M. Kendall

MEMORANDUM OPINION AND ORDER

(Filed Sep. 1, 2016)

Plaintiffs Right Field Rooftops, LLC; Skybox on Sheffield; Right Field Properties, LLC; 3633 Rooftop Management, LLC; Lakeview Baseball Club; and Rooftop Acquisition, LLC (the "Rooftops") filed this action

against Defendants Chicago Baseball Holdings, LLC; Chicago Cubs Baseball Club, LLC; Wrigley Field Holdings, LLC; and Thomas S. Ricketts (the "Cubs") alleging that the Cubs engaged in anti-competitive behavior and breached a contract under which the Rooftops would pay 17% of their profits to the Cubs in exchange for the Cubs' promise to not block the view of Wrigley Field from the rooftops (the "License Agreement").

The Court previously grouped the Rooftops' nine claims as follows: (1) attempted monopolization (Counts I and II); (2) false and misleading commercial representations, defamation, false light, and breach of the non-disparagement clause of the License Agreement (Counts III-VII and IX); and (3) breach of contract (Count VIII). The Court dismissed all nine counts with prejudice. The Rooftops, having retained new counsel, attempt one more time to file a new complaint with another argument and now move the Court to amend its judgment pursuant to Federal Rule of Civil Procedure 59(e) and to grant them leave to amend the Complaint pursuant to Federal Rule of Civil Procedure 15(a). (Dkt. No. 78). For the following reasons, the Court denies the Rooftops' motion.

BACKGROUND

The facts underlying the Complaint are set forth in the Court's order denying Plaintiffs' motion for preliminary injunction. *See Right Field Rooftops, LLC v. Chicago Baseball Holdings, LLC*, 87 F. Supp. 3d 874,

878-83 (N.D. Ill. 2015). The dispute arose from the Cubs' construction of a video board in Wrigley Field that blocks the view into the stadium from the surrounding rooftops, the Cubs' acquisition of some rooftop properties, and the Cubs' attempts to control minimum ticket pricing for the rooftops. The Rooftops filed their initial Complaint on January 20, 2015. Three weeks later, the Rooftops sought a temporary restraining order and preliminary injunction to enjoin the Cubs from constructing the video board.

The Court held a TRO hearing on February 18, 2015 and denied the Rooftops' motion for TRO the following day. On April 2, 2015, the Court denied the Rooftops' motions for preliminary injunction because: (1) the exemption of Major League Baseball teams forecloses antitrust claims; (2) live Cubs games are not a relevant market; (3) plans to construct the video board did not constitute anticipatory repudiation; (4) the Rooftops failed to establish that they would suffer irreparable harm and had no adequate remedy at law besides injunctive relief; and (5) a balance of hardships weighed in favor of denying injunctive relief.

On February 17, 2015, the Cubs filed a motion to dismiss all nine counts pursuant to Federal Rule of Civil Procedure 12(b)(6). On September 30, 2015, the Court granted the Cubs' motion to dismiss. *See Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC*, No. 15 C 551, 2015 WL 5731736 at *4 (N.D. Ill. Sep. 30, 2015). The Court dismissed the monopolization claims (Counts I and II) because Major League Baseball's antitrust exemption applies to the Cubs, the

Rooftops failed to establish a plausible relevant market, and the Cubs cannot be limited by antitrust law from distributing their own product. *Id.* at *5-6. The Court dismissed the false and misleading commercial representations, defamation, false light, and breach of the non-disparagement clause claims (Counts III-VII and IX) because the statements made by Defendant Ricketts on which the Rooftops relied to demonstrate these various causes of action were nonactionable statements of opinion by Ricketts that no reasonable person could interpret to be statements of fact or accusations of criminal activity in the context in which Ricketts made them. *Id.* at *6-8. Finally, the Court dismissed the breach of contract claim (Count VIII) because the plain language of the contract allowing the Cubs to conduct any expansion that was approved by the City of Chicago was not limited to expansions to the seating capacity of Wrigley Field, but rather allowed the Cubs to make any expansion including the construction of the video board at issue in this case. *Id.* at *8-9.

The Rooftops did not appeal the dismissal. Instead, on October 28, 2015, the Rooftops filed this motion seeking to amend or alter the Court's judgment and to obtain leave to amend the Complaint. (Dkt. No. 78.) On the same day, the Rooftops' counsel filed a motion to withdraw, (Dkt. No. 76.), which the Court granted on October 29, 2015. (Dkt. No. 84.) In their motion to alter or amend the judgment and allow the Rooftops to amend their Complaint, the Rooftops contend that their recent discovery of the corporate

structure of the entities acquiring some of the rooftop businesses at issue requires the Court to reconsider and alter its September 30th Order. (Dkt. No. 80 at 2-3.) Specifically, the Rooftops argue that this new information requires the Court to alter its judgment with regards to Count II, under which the Rooftops allege attempted monopolization in violation of the Sherman Act. *Id.*

DISCUSSION

I. Rule 59(e) Motion to Amend or Alter Judgment

"Once judgment has been entered, there is a presumption that the case is finished, and the burden is on the party who wants to upset that judgment to show the court that there is good reason to set it aside." *Hecker v. Deere & Co.*, 556 F.3d 575, 591 (7th Cir. 2009). Under Rule 59(e), the Court may alter or amend its judgment if the movant "clearly establish[es] (1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment." *Blue v. Hartford Life & Accident Ins. Co.*, 698 F.3d 587, 598 (7th Cir. 2012). This rule "enables the court to correct its own errors and thus avoid unnecessary appellate procedures." *Miller v. Safeco Ins. Co. of Am.*, 683 F.3d 805, 813 (7th Cir. 2012). However, such motions are not appropriate vehicles for relitigating arguments that the district court previously rejected, or for arguing issues or presenting evidence that could have been raised during the pendency of the motion

presently under reconsideration. *Sigworth v. City of Aurora*, 487 F.3d 506, 512 (7th Cir. 2007). The decision to grant a Rule 59(e) motion lies in the sound discretion of this Court, and its ruling is reviewed deferentially and will only be disturbed upon a showing that the Court abused that discretion. *See Matter of Prince*, 85 F.3d 314, 324 (7th Cir. 1996); *Billups v. Methodist Hosp.*, 922 F.2d 1300, 1305 (7th Cir. 1991).

The Rooftops contend that the Court should grant their motion because newly discovered evidence precludes entry of the prior judgment and because the Court committed manifest errors of law. The Rooftops also submit that because the Rule 59(e) motion is accompanied by a motion to amend pursuant to Rule 15, the Court should apply the more liberal amendment standard to determine if it is appropriate to alter the judgment. *See Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d 510, 520-22 (7th Cir. 2015). Even applying this more liberal standard, the motion to amend or alter the judgment must still be denied because the proposed First Amended Complaint is futile, as discussed in greater length in Section II.

A. Newly Discovered Evidence

To support a motion for reconsideration based on newly discovered evidence, the moving party must "show not only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence [during the pendency of

the motion]." *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996); *see also Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 955 (7th Cir. 2013) (movant must have been unable to discover information despite exercise of due diligence). In this case, the new evidence set forth by the Rooftops concerns the relationships between entities named in the original Complaint, Defendant Ricketts, and entities that have acquired other rooftop properties. Specifically, the Rooftops have provided documentation showing that the holding companies that acquired six of the rooftop properties were owned by Greystone, LLC, which in turn was owned by Northside Entertainment Holdings, LLC. (*See* Dkt. No. 78 Exs. A-C). Northside Entertainment Holdings, of which Ricketts is the executive vice president, owns and operates the Chicago Cubs. (Dkt. No. 78-2 at 41.) The Rooftops have also provided the declaration of an advisor to two of the Plaintiff Rooftops explaining why the Rooftops believed the Cubs were the entity acquiring the rooftop properties, as opposed to Northside Entertainment Holdings, which owns the entities that own and operate the Chicago Cubs and Wrigley Field. (Dkt. No. 78-2 at 2-4.)

All of this information, however, was then and is now a matter of public record and cannot be considered "newly discovered" for purposes of Rule 59(e). *See*, *e.g.*, *APC Filtration, Inc. v. Becker*, 646 F. Supp. 2d 1000, 1007 (N.D. Ill. 2009) (evidence not newly discovered under Rule 59(e) where previously available as public record); *Duffin v. Exelon Corp.*, No. 06 C 1382, 2007 WL

1385369, at *2 (N.D. Ill. May 4, 2007) (same); *Entm't, Inc. v. City of Northlake*, No. 03 C 692, 2004 WL 1243972, at *2 (N.D. Ill. June 3, 2004) (same). The alleged new documentation was obtained either through the Cook County Recorder of Deeds or the Illinois Secretary of State website and even the declarant averred that he was able to obtain some of the information through mere internet searches. Moreover, all of this information was available to the Rooftops prior to this Court's order of September 30. The purchasing entities recorded the deed for one of the properties on January 12, 2015, (Dkt. No. 78-2 at 19); three others on January 15, 2015, (Dkt. No. 78-2 at 23, 25); and two others on May 15, 2015, (Dkt. No. 78-2 at 6, 12.) Thus, all of the "newly discovered evidence" was available on the public record well before the Court's dismissal of this case. The Rooftops' allegation that their lack of actual knowledge was based in part on the participation of officers of the Cubs in negotiations for acquisition of the rooftop properties is immaterial to the analysis of whether the evidence was newly discovered within the meaning of Rule 59(e), as the information was a matter of public record. Accordingly, the Court will not amend or alter the judgment based on the Rooftops' discovery of new evidence.

B. Manifest Error of Law or Fact

The Rooftops next claim that this Court erred in its determinations of whether: (1) Major League Baseball's Antitrust exemption applies to the rooftop businesses; (2) a plausible relevant market exists with

respect to the rooftop businesses; and (3) the monopolization of the rooftop businesses is nothing more than the Cubs taking over the distribution of their own product. A manifest error of law or fact occurs where "the district court commits a wholesale disregard, misapplication, or failure to recognize controlling precedent." *Burritt v. Ditlefsen*, 807 F.3d 239, 253 (7th Cir. 2015) (internal quotations omitted) (citing *Oto v. Metro Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000). A motion to reconsider cannot, however, "be used to rehash previously rejected arguments. *Vesely v. Armlist LLC*, 762 F.3d 661, 666 (7th Cir.2014) (internal quotations omitted) (citing *Oto*, 224 F.3d at 606).

The Rooftops begin by arguing that the Major League Baseball Antitrust Exemption does not apply in this case. They maintain that the monopolization claim does not concern the business of the Chicago Cubs, but concerns "the market for the sale of views of live Cubs games from Rooftop Businesses outside of Wrigley Field, by independent competitors, who historically have had no involvement with the Chicago Cubs . . . " (*See* Dkt. No. 80, 7). The Court properly considered this argument in issuing its first three orders in this case. As stated in its dismissal order, this Court has "already held, the exemption applies to the 'business of baseball' in general, not solely those aspects related to baseball's unique characteristics and needs." (*See* Dkt. Not. [sic] 74, 4 (citing *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978) (despite references to the player reserve system in Supreme Court precedent, "it appears clear from the entire

opinions . . . that the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws")). The Cubs are engaged in the business of publicly displaying baseball games, which is "integral" to the business of baseball. (*See id*. at 5).

Plaintiffs' attempt to circumvent the baseball exemption by now arguing that it is not solely live Cubs game [sic] that the Cubs are trying to monopolize, but rather "Live Views of Wrigley Field Events, which do not consist solely of baseball games" is inappropriate under Rule 59(e). (*See* Dkt. No. 80 at 7). This new argument, is not new at all in that it was actually conceded by Plaintiffs' counsel at oral argument. Yet, it was not raised in the Plaintiffs' previous motions and was not alleged in the Complaint. Raising this argument at this stage is "too little too late" and it is waived for purposes of appeal. *See Wilson v. Wilson*, 46 F.3d 660, 667 (7th Cir. 1995) (citing *Laserage Tech. v. Laserage Labs.*, 972 F.2d 799, 804 (7th Cir. 1992)). And, regardless, even if it had been addressed appropriately, the amendment is futile.

Next, the Rooftops move the Court to reconsider whether a plausible relevant market exists with respect to the rooftop businesses. The Rooftops contend that the Court incorrectly held that the Rooftops cannot plead any plausible relevant market, given the fact that the Rooftops were given no opportunity to amend the Complaint. As to the Rooftops' assertion that they were not given an opportunity to amend the Complaint, the instant motion is the Rooftops' first attempt

to seek leave to amend. This is despite the fact that they were given ample notice of the deficiencies in their Complaint based on the Court's denial of their TRO request on February 19, 2015, as well as their preliminary injunction request on April 2, 2015. Additionally, the motion to dismiss that the Court ultimately granted was filed on February 17, 2015; at no point during the pendency of that motion did the Rooftops seek to amend their Complaint. The Rooftops' argument that they were not given opportunity to amend the Complaint is untrue; they have only just requested such an opportunity. Moreover, as discussed below, the proposed amendment is futile.

The Rooftops also argue that the Court incorrectly determined that a single brand cannot be a relevant market because the Rooftops are not defining the relevant market on a single brand and there is no rule precluding a market from being comprised of a single brand. As with the antitrust exemption for Major League Baseball, the Rooftops offer no new case law nor any new facts tending to show a manifest error of law or fact; again, they merely contend that the Court incorrectly applied the law and attempt to argue the Court's September 30th Order was erroneous. This is not appropriate grounds for a Rule 59(e) motion.

Lastly, the Rooftops contend that the Court incorrectly held that that [sic] the Cubs' attempt to monopolize the rooftop businesses is no more than the Cubs taking over distribution of their own product. In their motion, not only did the Rooftops fail to identify any precedential decision the Court ignored, they did not

cite to any case law at all. In sum, the Rooftops failed to offer any controlling law or material facts that the Court ignored prior to the September 30th Order. Accordingly, the Rooftops failed to establish a manifest error of law or fact. Coupled with their failure to establish that the discovery of new evidence requires the Court to alter its judgment, the Rooftops' motion to alter or amend the judgment is denied.

II. Rule 15 Motion to Amend

The fact that the Rooftops are simultaneously seeking leave to amend their Complaint under Rule 15(a) does nothing to save their motion. Even applying the liberal standard of Rule 15(a), the Rooftops' motion still fails. *See Gonzalez-Koeneke v. West*, 791 F.3d 801, 807 (7th Cir. 2015) (evaluating motion to reconsider and leave to amend under the Rule 15(a) standard); *Runnion v. Girl Scouts of Greater Chi. & NW Ind.*, 786 F.3d 510, 521 (7th Cir. 2015) (same). Under Rule 15(a)(2) of the Federal Rules of Civil Procedure, "[a] district court may deny leave to file an amended complaint in the case of 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment.'" *Childress v. Walker*, 787 F.3d 433, 441 (7th Cir. 2015) (quoting *Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010) (internal quotation marks and citations omitted)).

This Court's denial of a motion for leave to amend is reviewed under an abuse of discretion standard and will not be reversed "when the court provides a reasonable explanation for why it denied the proposed amendment." *See Gonzalez-Koeneke v. West*, 791 F.3d 801, 808 (7th Cir. 2015). "A district court acts within its discretion in denying leave to amend, either by dismissing a complaint with prejudice or by denying a post-judgment motion, when the plaintiff fails to demonstrate how the proposed amendment would cure the deficiencies in the prior complaint." *See id*. (citing *Indep. Tr. Corp. v. Stewart Inf. Serv's Corp.*, 665 F.3d 930, 943-44 (7th Cir. 2012) (district court did not abuse its discretion by dismissing a complaint without allowing an opportunity to amend because the plaintiff "did not offer any meaningful indication of how it would plead differently"); *Hecker v. Deere & Co.*, 556 F.3d 575, 591 (7th Cir. 2009) (district court did not abuse its discretion by denying a motion for reconsideration requesting leave to amend the complaint "because the plaintiff did not attach an amended complaint and did not indicate the 'exact nature of the amendments proposed' " (quoting *Twohy v. First Nat'l Bank*, 758 F.2d 1185, 1189 (7th Cir.1985)).

Here, the Rooftops' proposed amendments are futile. First, the Rooftops seek to include Northside Entertainment Holdings, LLC and other entities involved in the purchase of the rooftops that are found to be necessary parties as defendant(s). (*See* Dkt. No. 80, 5). Adding these "non-Cub" entities to the complaint will not save Count II from the baseball exemption. In its

original order dismissing this case, the Court considered and dismissed the individual defendant, Thomas Ricketts. In so doing, the Court recognized that the proper inquiry with respect to the baseball exemption is the type of conduct at issue. (*See* Dkt. No. 69, Prelim. Inj. Order at 13) (noting that the "*Toolson* defendants themselves included . . . both the owner and general manager of the Cincinnati club"). Specifically, the issue is whether the conduct is the business of baseball, regardless of whether that business is conducted by a team or owner or separate corporation. *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 772 n.19 (1984) (internal quotation marks and citation omitted) (refusing to apply heightened antitrust scrutiny in case where parent "availed [itself] of the privilege of doing business through separate corporations").

The Rooftops also move to amend Count II and clarify that the relevant market is not a single brand, but "Live Views or [sic] Wrigley Field Events." (*See* Dkt. No. 80, 11.) As already mentioned, the Plaintiffs conceded at oral argument that – contrary to their new position – the "very purpose of one of these clubs is to sell admissions to watch a Cubs game." *See* TRO Tr. at 20; *see also McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677, 680 (7th Cir. 2002) (an admission "at oral argument is a binding judicial admission, the same as any other formal concession made during the course of proceedings."). Moreover, this proposed amendment does not render the relevant market allegations plausible. As the Court previously stated, "[t]he use or uses to which a product is put controls the boundaries of the relevant

market. The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." (*See* Dkt. No. 69, 16) (internal citations and quotation marks omitted). Events other than live Cubs games, such as concerts, are reasonably interchangeable with substitutes. Yes, Wrigley Field may be a popular venue to watch a concert, but the "relevant market should be expanded to all other comparable places . . . " such as other music venues in this case. *See Elliott v. United Ctr.*, 126 F.3d 1003, 1005 (7th Cir. 1997). Plaintiffs' proposed amendment fails to allege a plausible relevant market.

Lastly, the Rooftops seek to amend their Complaint to clarify that "Plaintiffs do not concede that the attempt to monopolize the Rooftop Businesses by the Ricketts family, through Defendant Northside Entertainment Holdings, LLC, constitutes the 'takeover' of the distribution of Cubs baseball by the supplier, Chicago Cubs Baseball Club, LLC." (*See* Dkt. No. 80, 12.) The Rooftops maintain that Northside Entertainment, which is invested in by the Ricketts family, is one of the investors in both Chicago baseball Holdings, LLC and Wrigley Field Holdings, LLC; and that it is the Ricketts family and Northside Entertainment, not the Cubs, that are investing in the Rooftops Businesses. The Rooftops, however, have failed to provide any case law demonstrating why this "clarification" would allow the Amended Complaint to survive a second motion to dismiss. *See Weinstein v. Schwartz*, 422 F.3d 476, 477 n. 1 (7th Cir. 2005) (internal quotation marks and

citation omitted) ("We have repeatedly made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived. . . ."). This lack of supporting case law is especially problematic with respect to this argument because the Court's holding that the Cubs cannot monopolize their own product was merely used in this Court's September 30th order as an "additional reason" for dismissal beyond the fact that there is no plausible relevant market for the presentation of live Cubs games. The argument is deemed waived. *See id*. The Court notes, however, that merely because an entity with ownership interest in the Cubs – and not the Cubs themselves – purchased the Rooftop Businesses, does not render this additional reason for dismissal any less valid. *See*, *e.g.*, *S.W.B. New England, Inc. v. R.A.B. Food Grp., LLC.*, No. 06 Civ. 15357(GEL), 2008 WL 540091, at *1 (S.D.N.Y. Feb. 27, 2008) (rejecting a vertical-integration-as monopoly theory where the vertical integration occurred between two "affiliated" but separate businesses "under common ownership and control"). Because Plaintiffs' proposed amendments would still be subject to the baseball exemption and because they have failed to allege a plausible relevant market, the Court denies the Rooftops' Motion to Amend the Complaint. *See Foster v. Deluca*, 545 F.3d 582, 584 (7th Cir. 2008) (internal quotations and citations omitted) (a motion for leave to amend may be denied where "the proposed amendment fails to cure the deficiencies in the original pleading, or could not survive a second motion to dismiss.").

CONCLUSION

For the reasons stated, the Court denies the Rooftops' Motion to Amend Judgment and for Leave to File an Amended Complaint. (Dkt. No. 78).

Date: 8/31/2016

/s/ Virginia M. Kendall
Virginia M. Kendall
United States District Court Judge
Northern District of Illinois

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 17, 2017

Before

WILLIAM J. BAUER, *Circuit Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

No. 16-3582

RIGHT FIELD ROOFTOPS, LLC, *et al*., *Plaintiffs-Appellants*,

v.

CHICAGO CUBS BASEBALL CLUB, LLC, *et al*., *Defendants-Appellees*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 15 C 551

Virginia M. Kendall, *Judge*.

ORDER

On consideration of plaintiffs-appellants' petition for rehearing and rehearing *en banc*, filed on September 18, 2017, in connection with the above-referenced case, all of the judges on the original panel have voted to deny the petition for rehearing, and no judge in active service has requested a vote on the petition for rehearing *en banc*.* It is, therefore, ORDERED that

* Judge Joel M. Flaum and Judge Michael S. Kanne did not participate in the consideration of this petition for rehearing.

the petition for rehearing and rehearing *en banc* are DENIED.

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

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

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15 USCS § 2. Monopolization; penalty

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

CURT FLOOD ACT OF 1998,
1998 Enacted S. 53, 105 Enacted S. 53

Enacted, October 27, 1998

Reporter

112 Stat. 2824 *; 105 P.L. 297; 1998 Enacted S. 53; 105 Enacted S. 53

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Curt Flood Act of 1998".

SEC. 2. PURPOSE.

It is the purpose of this legislation to state that major league baseball players are covered under the antitrust laws (i.e., that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that the passage of this Act does not change the application of the antitrust laws in any other context or with respect to any other person or entity.

SEC. 3. APPLICATION OF THE ANTITRUST LAWS TO PROFESSIONAL MAJOR LEAGUE BASEBALL.

The Clayton Act (15 U.S.C. 12 et seq.) is amended by adding at the end the following new section:

"SEC. 27.(a) Subject to subsections (b) through (d), the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce.

"(b) No court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a). This section does not create, permit or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to, any conduct, acts, practices, or agreements that do not directly relate to or affect employment of major league baseball players to play baseball at the major league level, including but not limited to –

"(1) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, any organized professional baseball

amateur or first-year player draft, or any reserve clause as applied to minor league players;

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

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

"(4) any conduct, acts, practices, or agreements protected by Public Law 87-331 (5 U.S.C. 1291 et seq.) (commonly known as the 'Sports Broadcasting Act of 1961');

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

business of organized professional baseball by such persons; or

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

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

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

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

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

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

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

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

to or affect employment of major league baseball players to play baseball at the major league level.

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

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

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