No. 20-16075

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CITY OF OAKLAND,
Plaintiff-Appellant,

v.

OAKLAND RAIDERS, et al.,
Defendant-Appellees.

On Appeal from the
United States District Court for the Northern District of California
No. 3:18-cv-07444 (Hon. Joseph C. Spero)

BRIEF OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE UNITED STATES

The United States has responsibility for enforcing federal antitrust laws and has a strong interest in their correct application in both public and private antitrust enforcement actions in order to protect competition and innovation for the benefit of consumers. This case presents a novel issue in the Ninth Circuit regarding the scope of recoverable injuries available under the antitrust laws to a plaintiff suing to recover treble damages for harm to sovereign interests. Suits for treble damages can be important adjuncts to public enforcement of the antitrust laws when rooted in sound interpretation of the antitrust laws. When, however, such suits are overly broad or aggressive they can lead to harmful over-deterrence. The United States, therefore, has a strong interest in the correct interpretation of doctrines that affect suits for treble damages, including the requirement of injury to "business or property" under Section 4 of the Clayton Act and the general requirement of antitrust standing.

The United States offers this brief, pursuant to Fed. R. App. P. 29(a), to urge this Court to affirm the district court's holding that Oakland's claims for lost tax revenues related to the Raiders' departure are unrecoverable under the Clayton Act. The United States does not address and takes no position on the remainder of the district court's ruling, the viability of Oakland's other alleged injuries, or the merits of its substantive claims.

STATEMENT OF THE ISSUE

Whether the district court correctly determined that a sovereign's lost general tax revenues derived from general economic activity are not compensable under the antitrust laws.

STATEMENT OF THE CASE

The City of Oakland seeks to recover *inter alia* tax revenue it lost from the departure of the Oakland Raiders professional football team and brought this case alleging antitrust violations and breach of contract. The district court dismissed the City's original complaint on multiple grounds but granted leave to amend. ER558. After the City filed an amended complaint, the district court concluded the City's amended complaint also failed to state an antitrust claim, and it dismissed the amended complaint with prejudice. ER7. Oakland brings this appeal seeking reversal on the full scope of issues on which the district court dismissed in its amended complaint.

1. The Raiders, a professional football franchise of the NFL, previously performed in Oakland but recently moved to Las Vegas. The City of Oakland asserted Sherman Act Section 1, 15 U.S.C. § 1, violations against the NFL and each of its member franchises, alleging that Defendants conspired to 1) boycott and refuse to deal with Oakland and 2) fix prices for the presence of a professional football team, in facilitating the Raiders' move from Oakland to Las Vegas. ER170 (FAC ¶¶ 14-15, 86, 99-105, 111-116, 124-127, 134-135).[1]

Oakland seeks damages for forgone "significant tax and other income that it derives from the presence of the Raiders and the economic activity their presence generates," among other damages. ER623. Defendants moved to dismiss, arguing that Oakland did not allege an antitrust injury and did not have standing to recover under Section 4 of the Clayton Act, 15 U.S.C. § 15.[2] *See* Def. Mot., ER135; Def. Reply, ER77.

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[1] Plaintiff also seeks recovery under various state contract law claims that are not addressed in this brief.

[2] Defendant also asserted substantive defects in the complaint, but the United States takes no position on them.

2. The district court dismissed Oakland's complaint, with prejudice, on multiple grounds. ER7. After generally concluding that "none of Oakland's damages are of a type compensable under the Clayton Act," the court specifically addressed the tax claims in holding that "Oakland cannot recover damages based on lost tax revenue from the broad scope of economic activity associated with the presence of a professional football team." *Id.* at ER25-26. The court reasoned that "the Supreme Court has held that while the Clayton Act allows a state to seek[] damages for injuries to its commercial interests, it does not authorize recovery for economic injuries to the sovereign interests of a State." *Id.* (quotation marks omitted). The court did leave "open [the] possibility that there could perhaps be circumstances where a tax specifically negotiated as part of an agreement between a local government and a private entity could take on a 'commercial' instead of—or as well as—'sovereign' character," but observed no such allegations. *Id.* (quotation marks omitted). This appeal followed.

SUMMARY OF ARGUMENT

The district court correctly held that lost general tax revenue is not a cognizable injury under the Clayton Act. The Clayton Act permits recoveries only for injuries to "business or property," that is, commercial interests. General tax revenues are sovereign interests, not commercial interests, and thus are categorically excluded from the statute. In addition, lost tax income is an insufficient basis to establish antitrust standing because the harm is inherently derivative of other more direct harm and is not the type of injury the antitrust laws were intended to address. These limitations on antitrust recoveries are important because they help prevent the over-deterrence that could result from permitting any plaintiff with an injury remotely related to alleged anticompetitive conduct to recover treble damages. Accordingly, the district court correctly dismissed Oakland's antitrust claims based on lost tax revenues as a non-cognizable injury under the Clayton Act. The United States urges this Court to affirm that specific holding but takes no position on the remainder of Oakland's appeal.

ARGUMENT

I. Tax Revenue Losses Are Not "Business or Property" Under the Clayton Act

Section 4 of the Clayton Act permits parties to recover only injuries to their "business or property" resulting from violations of the antitrust laws 15 U.S.C. § 15(a). This limitation permits private parties and non-federal governmental entities to recover injuries to their commercial interests due to antitrust violations. Purely sovereign interests, however, do not qualify as "business or property" and are ineligible for recovery under the Act. Because a government's interest in general tax revenue is a sovereign interest, such lost tax revenue therefore should not be recoverable.

A. Only a Government's Commercial Interests Qualify as "Business or Property"

In *Hawaii v. Standard Oil Co. of Cal.*, the Supreme Court explicitly interpreted "business or property" under Section 4 to limit recoverable injury to "commercial interests or enterprises." 405 U.S. 251, 264 (1972). In that case, the state sought to recover the overcharges it paid for petroleum products from defendants and, significantly, for general harm to the state's economy. *Id.* at 255. The Court rejected that latter claim.

The Court began its statutory analysis with Section 4A of the Clayton Act, 15 U.S.C. § 15a, which authorizes the United States to recover damages in antitrust suits. It held that Section 4A limits recovery to "those injuries suffered in [the United

States'] capacity as a consumer of goods and services," that is, injury to its "business or property." *Hawaii* at 265. The Court went on to reason that "the conclusion is nearly inescapable that Section 4, which uses identical language, does not authorize recovery for economic injuries to the *sovereign interests* of a State," but only for injury to its "commercial interests"—i.e., as a market participant. *Id.* at 264-65 (emphasis added).

In sum, the Court distinguished between a state's entitlement to recover "payment of money wrongfully induced" through violations of the antitrust laws when operating "in its capacity as a consumer in the marketplace" and its ability to recover for "sovereign interests." *Id.* at 263 n. 14, 265. The latter are not "business or property" under the Clayton Act.

Oakland attempts to characterize *Hawaii's* holding as a narrow restriction against political entities' suing "in *parens patriae* under the antitrust laws for general damages to their citizens or economies," whereas Oakland brings the case on behalf of itself in a "proprietary capacity." Br. 30-33. The Supreme Court was very clear, however, that "[t]he question in this case is not whether Hawaii may [sue] on behalf of its citizens, but rather whether the injury for which it seeks to recover is compensable under [Section] 4 . . . ." *Hawaii*, 405 U.S. at 259. As such, the question here, as in *Hawaii*, is whether sovereign interests are recoverable under the Clayton Act, not whether the City can sue on behalf of itself or its residents. Because the Court held that "business or property" is limited to commercial interests, Section 4 does not permit governments to recover for economic injuries to their sovereign interests regardless of whom they represent. *Id.* at 265.

Oakland also mistakenly argues that "*Hawaii* places no limitation whatsoever on what damages flow from antitrust injury to Hawaii, Oakland, or any other political entity suing in its 'proprietary capacity.'" Br. 32. This assertion is explicitly counter to *Hawaii's* holding, which definitively limits the scope of recoveries available to governments when suing in any capacity: "[Section] 4 permits Hawaii to sue in its proprietary capacity for three times the damages it has suffered [to business or property]. .

. . [T]he . . . words 'business or property' . . . refer to commercial interests or enterprises." 405 U.S. at 262, 264.

B. Generalized Tax Losses Are Sovereign Interests and Thus Are Not Recoverable

Like injury to a state's "general economy," Oakland's claim for lost general tax revenue is not an injury that the City suffers to its commercial interests but an injury to its sovereign interests.

"Commercial interests" are those where a claimant was "a party to a commercial transaction." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341-42 (1979). A "transaction," of course, is an "act or an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract." Black's Law Dictionary 1535 (8th ed. 2004). In other words, parties to transactions agree voluntarily to exchange goods or services in return for money (or other goods or services in the case of barter). General tax revenue enjoyed by a sovereign is not part of a commercial transaction. It is not a voluntary exchange in ordinary business practice.

Rather, such taxation is a function of a jurisdiction's sovereign authority. It has long been established that "taxation . . . is an incident of sovereignty" and thus "[a]ll subjects over which the sovereign power of a state extends, are objects of taxation." *McCulloch v. Maryland*, 17 U.S. 316, 429 (1819). A jurisdiction's interest in its general tax revenue, therefore, derives not from its participation in a commercial transaction but from its exercise of sovereign authority.

The Supreme Court explained this distinction in the context of taxation by Indian tribes. "[A] tribe acts as a commercial partner when it agrees to sell the right to the use of its land for mineral production, but the tribe acts as a sovereign when it imposes a tax on economic activities within its jurisdiction." *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985). Because taxation was a sovereign act, the tribe could tax activity on its land without approval of the Interior Secretary. *Id.*; *see also McCulloch*, 17 U.S. at 338-39 ("the right of taxing property . . . [t]his is the highest attribute of sovereignty, the right to raise revenue.").

The district court went on to hypothesize an exception to these cases that underscores the general rule they establish. The court stated that "there could perhaps be circumstances where a tax specifically negotiated as part of an agreement between a local government and a private entity could take on a 'commercial' instead of—or as well as—'sovereign' character." ER26, citing ER579. Whether this exception is consistent with binding authority—especially *Hawaii*, which holds that sovereign interests are not recoverable "business or property," 405 U.S. at 264, and *McCulloch*, which holds that taxation is an attribute of sovereignty, 17 U.S. at 429—is of no moment here. As the district court noted, the complaint alleged no such circumstances. ER26.

Oakland argues that "tax revenues associated with an NFL team in Oakland are specially part of the commercial transaction between the city and Respondents," Br. 33, but the City did not allege in its complaint that these tax revenues were anything more than an unpromised but anticipated benefit of the Raiders' presence in Oakland. Prospective tax revenues may influence Oakland's decisions to invest in city infrastructure, but that does not make them part of the commercial transaction and thus a commercial interest. In particular, Oakland did not allege that tax revenues were the subject of this or any other transaction with Defendants, as the district court specifically observed. ER26. More broadly, it would conflate illogically the concepts of sovereign and commercial interests—which the Supreme Court has repeatedly distinguished—to conclude that merely anticipated tax revenues are sufficient to establish a city as "a party to a commercial transaction." *Reiter,* 442 U.S. at 341-42.

In sum, because the complaint included no allegations that Oakland acts as a market participant or party to any commercial transaction when it merely taxes transactions that might be affected by alleged anticompetitive conduct, it cannot rightfully recover tax losses under the Clayton Act.

II. Oakland's Tax Revenue Losses Are Too Remote from the Alleged Harm to Competition to Satisfy the Standing Requirements of Section 4

Tax revenues also are not recoverable under Section 4 because a plaintiff seeking to recover lost tax revenues cannot satisfy the requirements for antitrust standing. A Section 4 injury must be caused "by reason of" conduct that violates the antitrust laws. 15 U.S.C. § 15(a). Courts have interpreted this language as imposing a standing requirement, incorporating notions of proximate causation, for recovery of antitrust damages. Although an antitrust violation "may be expected to cause ripples of harm to flow through the Nation's economy," the Supreme Court has held that not every person "tangentially affected" by an antitrust violation can recover damages. *Blue Shield of Va., Inc. v. McCready,* 457 U.S. 465, 476-477 (1982); *see also Bubar v. Ampco* Foods, Inc., 752 F.2d 445, 448 (9th Cir. 1985) (same).

In evaluating whether an alleged injury is too remote or removed, courts apply an antitrust standing framework based on: "(1) . . . the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2), more particularly . . . the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4." *McCready* ,457 U.S. at 478. Oakland's claim for lost tax revenues satisfies neither requirement.

A. General Tax Losses Are Merely Derivative of Harm to Direct Market Participants

As an initial matter, Oakland's tax claims are too remote from the alleged violation. After *McCready*, the Supreme Court reiterated the need to assess the "directness or indirectness of the asserted injury," and limited Section 4 recoveries to those injuries directly connected to alleged violations. *Associated Gen. Contractors v. Cal. State Council of Carpenters* ("*AGC*"), 459 U.S. 519, 540 (1983). Where "the chain of causation between the [plaintiff's] injury and the alleged restraint . . . contains several somewhat vaguely defined links," the Court considered it "obvious that any such injuries were only an indirect result of whatever harm may have been suffered by [direct market participants]." *Id.* at 540-41.

Oakland's lost tax revenues are derivative and indirect by the very nature of taxation—the taxed entity, not the taxing entity, typically is the direct victim of any competitive harm. As *Hawaii* recognized, sovereign interests sought by the state, such as the taxes sought here, are "no more than a reflection of injuries to . . . consumers," which could recover of their own volition. 405 U.S. at 263-64. Oakland contemplates lost taxation of a wide range of goods and services, from ticket sales to concessionaire sales to player compensation and any other taxable commerce stimulated by the presence of the Raiders. ER246. The counterparty in each of these taxed transactions, however, is a more direct plaintiff to state a claim for competitive injury. The existence of such a class of more direct victims "diminishes the justification for allowing a more remote party" to seek relief under Section 4. *AGC*, 459 U.S. at 542. As inherently indirect injuries, Oakland's lost tax revenues are insufficient to warrant standing.

B. Tax Losses Are Not an Injury of the Type Likely Caused by Competitive Harm

McCready further limits recoverable injuries to those associated with competitive harm. That requirement was previously articulated in *Brunswick*: "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful . . . . It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)); *see McCready*, 457 U.S. at 482 (following *Brunswick*). "The antitrust laws were enacted for 'the protection of *competition*, not *competitors*.'" *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

As this Court has explained, "the nature of the plaintiff's alleged injury is of 'tremendous significance' in determining whether a plaintiff has antitrust standing." *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1996), *as amended* (Jan. 15, 1997) (quoting *Bhan v. NME Hospitals, Inc.,* 772 F.2d 1467, 1470 n.3 (9th Cir.1985)). Specifically, this Court requires a plaintiff to show "that 'the alleged injury be related to anti-competitive behavior,' [and] that 'the injured party be a participant in the same market as the alleged malefactors.'" *Id.* at 1508. To be a participant, the plaintiff "must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." *Eagle v. Star–Kist Foods, Inc.,* 812 F.2d 538, 540 (9th Cir. 1987).

As a general matter, lost tax revenue does not appear to be an "injury of the type the antitrust laws were intended to prevent."

Brunswick, 429 U.S. at 489. Fundamentally, it is not at all clear whether tax revenue would tend to increase or decrease in the presence of anticompetitive conduct within a sovereign's jurisdiction. For instance, the sovereign could well benefit from certain violations; e.g., it could tax supra-competitive profits earned by per se illegal price-fixing. Indeed, Oakland's tax revenues to date might have been inflated by the alleged limitations on competition in the professional football market. Oakland's lost tax revenue is therefore not the type of injury that is likely to flow from competitive harm. *Cf. AGC*, 459 U.S. at 539 (reasoning the plaintiff was improper in part because "[i]t is not clear whether the Union's interests would be served or disserved by enhanced competition in the market"); *Am. Ad Mgt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1056 (9th Cir. 1999) ("There can be no antitrust injury if the plaintiff stands to gain from the alleged unlawful conduct.").

Likewise, Oakland's role as a tax collector and general provider of municipal services cannot be sufficient to make it "a participant in the same market as the alleged malefactors." *Bhan,* 772 F.2d at 1470. Even if the Court finds Oakland's other (non-tax based) injuries somehow implicate the City as a market participant, such a finding must be limited to the associated injury. Arguably, all corporate residents within a city's jurisdiction "reap the taxpayer-financed benefits derived from the prospects of tax revenues," ER247, but that alone does not make a city a participant in the market of each resident. To allow otherwise would dramatically expand the scope of antitrust liability beyond any court's prior reading of the Clayton Act.

C. Oakland Attempts to Supplant Established Clayton Act Standing Requirements with Those of Irrelevant Statutes

Despite the Supreme Court's articulation of standing requirements specific to the Clayton Act, *see AGC*, 459 U.S. at 540-41, Oakland attempts to seek refuge in the jurisprudence of certain non-antitrust statutes, not at issue here, that afford standing to cities pursuing lost tax revenues. Specifically, Oakland argues that "numerous courts have recognized that states, municipalities, and municipal entities, suing in their proprietary capacity, can seek the recovery of lost tax revenues." *See* Br. 32-33 and 32 n.9. (citing cases discussing the Fair Housing Act, 42 U.S.C. § 3601; the Oil Pollution Act of 1990, 33 U.S.C. § 2701; the National Labor Relations Act of 1935, 29 U.S.C. § 151–169; and the Administrative Procedure Act, 5 U.S.C.A.

§ 551.). That some statutes have this feature is neither surprising nor relevant, as standing afforded under any particular statute does not imply standing under any other. This Court previously cautioned, "[a] plaintiff must . . . satisfy the non-constitutional standing requirements *of the statute under which he or she seeks to bring suit*." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004) (emphasis added). *Cf. AGC*, 459 U.S. at 535 n.31 ("Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action."). Courts determine statutory standing by "using traditional tools of statutory interpretation [to determine] whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). Oakland's claim for generalized lost tax revenues falls outside the scope of the cause of action the legislature has conferred.

As outlined above, *Hawaii*, *AGC*, and *McCready*, among other controlling precedents, define the Clayton Act's standing requirements based on its specific language and various indicia of legislative intent.

Importantly, among other differences between the Clayton Act and the statutes at issue in the cases cited by Oakland, none of those other statutes define the interests they protect as the plaintiff's "business or property." As much as Oakland may prefer the more liberal standing thresholds of other statutes not at issue here, its lost tax revenues do not amount to an antitrust injury and are thus insufficient to convey standing under the Clayton Act.

III. Allowing Governmental Entities to Recover Treble Lost Tax Revenues Could Create an Over-Deterring, Anticompetitive Effect

The automatic treble damages provision of Section 4 is an uncommonly powerful tool, serving both to encourage private enforcement and to deter wrongdoers. Wielded indiscriminately, however, it can impose more harm than good: "Given the potential scope of antitrust violations and the availability of treble damages, an over-broad reading of § 4 could result in 'overdeterrence,' imposing ruinous costs on antitrust defendants, severely burdening the judicial system and possibly chilling economically efficient competitive behavior." *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 394 (7th Cir. 1993). Section 4's rigorous standing requirements are intended to mitigate this risk: "[B]y restricting the availability of private antitrust actions to certain parties, we ensure that suits inapposite to the goals of the antitrust laws are not litigated and that persons operating in the market do not restrict procompetitive behavior because of a fear of antitrust liability." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1449 (11th Cir. 1991).

Oakland's claim for lost general tax revenues poses the very threat contemplated by these courts. If upheld, local governments could bring substantial Section 4 claims anytime anticompetitive conduct was found to reduce economic activity in their jurisdictions. Congress did not intend this result. Though "it could have . . . required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations . . . [,] this remedy was not selected." *Hawaii,* 405 U.S. at 262. To reverse the district court and award antitrust standing to Oakland for its lost tax revenues would expand antitrust liability beyond the intended scope of the Clayton Act and threaten to deter the very competition it was designed to protect.

CONCLUSION

Generalized lost tax revenue is not a cognizable injury under Section 4 because it is an injury to Oakland's sovereign interests, not its "business or property." The lost tax revenue also is too remote from the alleged anticompetitive conduct and is not the type of injury against which the antitrust laws were designed to protect. Recognizing Oakland's claim would result in a significant risk of overdeterrence. Accordingly, this Court should affirm the district court's holding that Oakland's claims for lost tax revenues are unrecoverable under the Clayton Act as a matter of law.

Respectfully submitted.

October 15, 2020

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CERTIFICATE OF SERVICE

I certify that on October 15, 2020, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users, including counsel for the parties.

/s/ Jeffrey D. Negrette
Counsel for the United States