CONTRACTS AND ANTITRUST – ECONOMIC DURESS AND ANTI-COMPETITIVE PRACTICES – COERCIVE TACTICS UTILIZED BY THE NATIONAL FOOTBALL LEAGUE TO PREVENT FRANCHISE RELOCATION – *V.K.K. Corporation v. National Football League*, 244 F.3d 114 (2d Cir. 2001).

I. INTRODUCTION

Constraining the avenues available for self-preservation in the business world deviates from the anti-monopolistic policies of this nation.[1] In the wake of the United States Government's attempted breakup of Microsoft and the corporation's subsequent preservation by the Court of Appeals for the D.C. Circuit[2], the purview of the Sherman Antitrust Act remains unclear.[3] The Supreme Court has mandated that competition in the corporate setting is encouraged and shall not be hindered.[4] Likewise, limiting the freedom of business entities to engage in reasonable

1. *See* Title 15 U.S.C. § 1 (2001). "The main purpose of this section is to forbid combinations and conspiracies in undue restraint of trade or tending to monopolize it, and the object of equitable proceedings is to decree, by as effectual means as a court may, end of such unlawful combinations and conspiracies." U.S. v. American Optical Co., 97 F. Supp. 66 (N.D. Ill. 1951). *See Infra*, note 99.

2. U.S. v. Microsoft Corp., 253 F.3d 39 (D.C. Cir. 2001). The district court held that Microsoft had committed several antitrust violations, attempted to operate and did operate as a monopoly and ordered the disbanding of the corporation. *Id.* In June of 2001, the Court of Appeals for the D.C. Circuit reversed the district court's decision in part, specifically finding that Microsoft did not attempt to operate as a monopoly and the break up of the company was not required. *Id.* Without an order mandating change in Microsoft's business practices, it is quite obvious that certain industries are outside the boundaries of federal antitrust laws. Steven Levy, *A Cloud Lifted—After Dodging a Breakup, Microsoft—Its Foes Say—Is Back to the Same Tactics That Got the Company in Trouble in the First Place*, NEWSWEEK, July 9, 2001 at 38.

3. Perhaps the court can reconcile the *Microsoft* matter with the Act by relying on the company's inventiveness in a rapidly growing field. The fact that a company operates as a monopoly alone is not fatal provided its status was achieved through skill, foresight or industry. United States v. Aluminum Company of America, 377 U.S. 271 (1964). However, when a corporation becomes a monopoly through anti-competitive practices, questions are automatically raised as to whether its operations are prohibited by law. *Id.*

4. Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918). The legality of certain commercial practices is determined by the level of competition that is suppressed or destroyed. An impermissible restraint is shown by an evaluation of factors such as the nature of the business before and after the alleged restraint was imposed, what the restraint consists of, and the intent behind the levying of the restraint.

transactions within a particular industry is prohibited.[5]

The National Football League and other sports organizations have sidestepped potential liability for domineering tactics and anti-trust violations since their inceptions.[6] This note intends to detail and critique a recent example of how these organizations have managed to remain unaccountable for their coercive and monopolistic behavior.

In the National Football League, if a team is failing economically on a yearly basis, should its owner be reprimanded for taking a proactive stance in trying to save both his personal assets and the quiet legacy of one of the NFL's earlier teams?[7] The Second Circuit's opinion in *V.K.K. v. National Football League* offers some behind the scenes insight into the current monopolistic practices of America's most popular sport.[8]

I. V.K.K. CORP. V. NATIONAL FOOTBALL LEAGUE, 244 F.3D 114 (2D CIR. 2001).

A. Facts Of The Main Case

V.K.K. v. National Football League involved Victor K. Kiam, II ("Kiam"),[9] VKK Corporation and VKK Patriots, Inc. ("VKK").[10] Kiam, through these two corporate entities, became the majority owner[11] of the

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5. Title 15 U.S.C. § 1, (2001), *See infra*, note 99.

6. Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381 (9th Cir. 1984); Murray v. Nat'l Football League, Lexis 9108, 82-4 (E.D. Pa. 1996); St. Louis Convention and Visitors Comm'n. v. Nat'l Football League, 154 F.3d 851, 861 (8th Cir. 1998); Nat'l Football League v. Oakland Raiders, 93 Cal. App. 4th 572 (2001).

7. New England Patriots, at http://www.Patriots.com/history (last visited Nov. 10, 2001). New England first gained its football franchise on November 16, 1959. *Id.* As part of the American Football League, the team scored the very first touchdown in the now defunct league. *Id.* In 1966, as part of the merger with the National Football League, the Patriots were preserved. *Id.* It has since been a member of the National Football League, attaining moderate success, having once, prior to the initiation of this lawsuit, and once since, reached the Superbowl. *Id.*

8. Hoovers, at http://www.hoovers.com/co/capsules. (last visited on Nov. 10, 2001). As America's most popular sport, television revenues generated are staggering. *Id.* As recently as 1998, an eight-year, $17.6 billion dollar contract was signed to televise the games of the Houston Texans, a franchise that will join the league in 2002. *Id.*

9. Victor Kiam was the Chief Executive Officer of Remington Products, Inc. and at the time was most noted for his Remington electric razor commercials.
BBC News, at http://news.bbc.co.uk/hi/english/world/americas/newsid_1356000/1356903.stm (last visited Nov. 10, 2001).

10. V.K.K. Corp. v. Nat'l. Football League, 244 F.3d 114, 125 (2d Cir. 2001).

11. *Id.* at 119. The purchase price for 51% ownership of the team was $85 million. V.K.K. Corp. v. Nat'l. Football League, 55 F. Supp. 2d 196, 200 (S.D.N.Y. 1999). An integral requirement to the undertaking of the majority interest was the purchase of a creditor of the previous owner's

New England Patriots.[12] During this period of ownership, the Patriots occupied Foxboro Stadium in Foxboro, Massachusetts.[13] VKK claimed that shortly after it had assumed control over the team, it began to sustain economic losses due to the stadium's physical deficiencies.[14] Compounding the problem was an unyielding lease that required the team to remain in Foxboro.[15]

VKK, aware that it must adhere to the provisions of the constitution and bylaws of the National Football League, acquiesced to the majority purchase.[16] Approval of the NFL was required should VKK desire to transfer its majority interest in the team.[17] Moreover, any move to another city or stadium necessitated the approval of the member teams of the NFL.[18]

Under Kiam's ownership, the New England Patriots incurred financial losses during the 1988 and 1989 seasons.[19] Kiam was forced to guarantee loans personally and address any cash flow deficiencies by injecting his own personal capital into the team.[20] In 1990, negotiations to erect a new stadium in Boston terminated and Kiam began searching for alternative

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shares in the team. *V.K.K.*, 244 F.3d at 119, n. 2. Fran Murray would have to act as Kiam's partner and Kiam must agree that Murray could later force him to buy out his 49% interest in the Patriots. *V.K.K.*, 55 F. Supp. 2d at 201.

12. http://www.Patriots.com/history (last visited Nov. 10, 2001). On July 28, 1988, Kiam purchased the New England Patriots from the Sullivan family. *Id.* William H. Sullivan was the team's owner since its creation in 1959. *Id.*

13. *Id.* The Sullivan's had been responsible for the varied site locations of the team for the better part of thirty years. *Id.* The team entertained home games at Boston University Field, Harvard Stadium, Fenway Park, Boston College Alumni Stadium and Legion Field in Birmingham, Alabama. *Id.* Ultimately, the team settled into Foxboro in 1971. *Id.*

14. *V.K.K.*, 55 F. Supp. at 201.

15. *Id.* The stadium itself was owned by Robert K. Kraft. *Id.* The restrictiveness of the lease served as a measure to ensure that an NFL team remained in the New England area, protecting any potential future interest Mr. Kraft may have in the club, as Kraft eventually became the team's owner in 1994. *Id.* The court noted that during the purchase period, Kiam had knowledge that the stadium lease did not expire until 2001 season, the stadium was in an unenviable location and it was in deteriorating condition. *V.K.K.*, 55 F. Supp. 2d at 200-01.

16. *V.K.K.*, 244 F.3d at 119. All teams "subscribe to agree to be bound by the Constitution, bylaws, rules, and Regulations of the League and any amendments or modifications thereof." NFL CONST. AND BYLAWS, § 3.3(A)(6).

17. *Id.* Acting Commissioner of the NFL, Paul Tagliabue, delivered a public statement declaring that "a sale of any club would only become effective if approved by the affirmative vote of... [at least] three-fourths... of the members of the League." *Id.* Additionally, Kiam signed a letter agreement dated September 13, 1988 stating that he agreed to attain advanced approval by the NFL for any sale of his ownership interest. *V.K.K.*, 55 F. Supp. at 200.

18. *Id.* "Article 4.3 of the NFL Constitution and By-laws prohibits any club from 'transfer[ring] its franchise or playing site to a different city without first obtaining League approval." *Id.* at 200. (quoting NFL CONST. AND BYLAWS, § (1988)).

19. *V.K.K.*, 55 F. Supp. at 200-201.

20. *Id.* at 202.

locations to house his team.[21]

During this period, several cities, including Jacksonville, Florida submitted proposals for franchise expansion.[22] Touchdown Jacksonville, Inc. ("TJI") was established to procure a team for the city.[23] VKK and TJI discussed moving the Patriots to Jacksonville in the Spring of 1991.[24] TJI informed the NFL that negotiations with VKK would likely culminate in the execution of a contract for relocation.[25]

According to a consultant for TJI, representatives of the NFL notified the consultant that the League would not support the relocation and that any chance Jacksonville had for obtaining a franchise would be negated if negotiations with the Patriots continued.[26] The same consultant further testified that as a consequence of the NFL's verbal warning, TJI immediately halted its discussions with VKK.[27] Subsequently, in November of 1993, the NFL awarded the city of Jacksonville the franchise currently known as the Jacksonville Jaguars.[28]

Requests by Kiam to relocate were rebuffed by the Commissioner in 1991.[29] However, pursuant to Kiam's demands, the League did agree to

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21. *V.K.K.*, 244 F.3d at 119. It is important to note that at this time, the NFL's Executive Committee permitted teams suffering economically to relocate to new cities. *Id.* Among them were the Indianapolis Colts in 1984 (formerly of Baltimore), Los Angeles Raiders in 1982 (formerly and now currently of Oakland), and the Phoenix Cardinals in 1987 (formerly of St. Louis), among others. http://www.football-reference.com (last visited on Nov. 10, 2001). Eventually, the Los Angeles Rams followed suit by relocating to St. Louis in 1996. *Id.*

22. *V.K.K.*, 244 F.3d at 119.

23. *Id.* at 120. Touchdown Jacksonville, Inc. was ultimately supplanted by Touchdown Jacksonville, Ltd. ("TJL") in 1991, which is basically the same company. *Id.* TJI's and TJL's president was David Seldin. *Id.* He also served as the chief operating officer for TJL. *Id.* TJL was comprised of a partnership of nine members. *Id., also available at* http://www.jaguars.com/history/history.asp?y=1991 (last visited Nov. 10, 2001). An absorption of some assets of TJI by TJL enabled the partnership to purchase the Patriots http://www.law.com/cgi-bin/gx.cgi (last visited on Nov. 6, 2001). For purposes of this discussion, both entities will hereinafter be referred to as "TJI".

24. *V.K.K.*, 244 F.3d at 120.

25. *Id.*

26. *Id.* Specifically, the consultant was informed that the NFL "did not favor the move, and that if it wanted the support of the NFL, which it needed to procure a franchise, it would cease negotiations with the Patriots." *Id.*

27. *Id.*

28. http://www.football-reference.com (last visited Nov. 10, 2001). The acquisition was not without its difficulties for the Jacksonville partnership. *Id.* After having received approval for a $60,000 renovation of the Gator Bowl from the Jacksonville City Council, the N.F.L. informed TJL that the necessary costs for renovation were $112 million. *Id.* Jacksonville's bid for a franchise was removed. *Id.* However, after four months of inactivity negotiations were revived. *Id. Also available at* http://www.jaguars.com/history/ history.asp?y=1993 (last visited Nov. 10, 2001).

29. *V.K.K.*, 244 F.3d at 119. Kiam claims that prior to purchasing the team, he was given confidence by then-acting commissioner, Pete Rozelle, that a move of the Patriots would be approved if the acquisition of a new stadium in the New England area did not come to fruition. *Id.* at

increase the debt limit of the team by $10 million to allow the Patriots some flexibility to deal with its creditors.[30] Despite the debt increase, VKK's losses continued to mount and Kiam determined that the sale of the team was his only alternative.[31]

Even with Kiam's diligent efforts to procure a buyer, the NFL, only weeks before the scheduled closing date, threatened to withhold approval of the sale unless Kiam released all potential claims against it.[32] Mr. Orthwein expressed his hesitancy about consummating the deal unless Kiam signed the release.[33] Finally, on May 8, 1992, Kiam signed the release and executed the sale to Orthwein.[34]

B. Procedural History

On November 16, 1994, Kiam and VKK initiated a lawsuit against the National Football League, twenty-two of its member clubs and TJL in the Federal District Court for the Southern District of New York.[35] The complaint averred that the defendants had committed violations of the Sherman Act by participating in conspiratorial and monopolistic conduct that depreciated the value of the Patriots and had produced negative

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30. *Id.* In exchange for the debt relief, VKK agreed to not move the team until at least 1993. *Id.*

31. *Id.* V.K.K. secured a prospective buyer, with NFL approval, in the person of James Orthwein. Orthwein was a prominent St. Louis businessman. *Id.* Approval of the sale by the NFL was contingent upon Orthwein agreeing not to transfer the team to St. Louis. *Id.* In 1996, St. Louis reacquired a franchise when the Los Angeles Rams were relocated to the city. *Supra*, note 25.

32. *V.K.K.*, 244 F.3d at 119. The petitioners contended that just prior to this deal, Norman Braman, the former owner of the Philadelphia Eagles, did not have to sign a release with the NFL to execute the sale of his team. *Id.*

33. *Id.* The text of the release provided in pertinent part that VKK and Kiam:

> for good and valuable consideration, . . . hereby release and forever discharge the National Football League . . . of and from any and all past or present or, if based, in whole or in part, on facts, actions, claims or matters existing or occurring from the beginning of the world to the date of this Release, future claims . . . causes of action at law or in equity . . . of whatever kind or nature arising out of or in any way relating to the Releasors ownership interest in KMS Patriots. . . this Release covers known and unknown claims.

V.K.K., 55 F. Supp. at 204-05.

34. *V.K.K.*, 244 F.3d at 119. The deal closed on May 8, 1992, only three days after the contract was executed. *Id.*

35. *Id.* The defendants are listed as follows: National Football League, B & B Holdings, Inc., The Five Smiths, Inc., Buffalo Bills, Inc., The Chicago Bears Football Club, Inc., Cincinnati Bengals, Inc., Cleveland Browns Football Co., Dallas Cowboys Football, Inc., PDB Sports, Inc., The Detroit Lions, Inc., The Green Bay Packers, Inc., Houston Oilers, Inc., Indianapolis Colts, Inc., Kansas City Chiefs Football Club, Inc., Miami Dolphins, Ltd., Minnesota Vikings Football Club, Inc., New York Football Giants, Inc., New York Football Jets, Inc., Pittsburgh Steelers Sports, Inc., San Diego Chargers Football Co., Seattle Seahawks, Inc., Tampa Bay Area NFL Football, Inc., PRO Football, Inc. and Touchdown Jacksonville, Ltd. *Id.*

competitive effects in many markets.[36] Further, the plaintiffs also claimed economic duress and therefore argued that the release was void or voidable under the part and parcel doctrine.[37] Finally, Kiam and VKK claimed that the release was invalid because they had not received adequate consideration in exchange for its execution.[38]

Discovery in this matter was initially stayed and then limited to issues relating to the validity of the release.[39] After a motion to amend the complaint to add TJI as a defendant was granted by Judge John Sprizzo, the matter was bifurcated.[40] The case was reassigned to Judge Milton Pollack, who conducted a trial solely on the issue of economic duress.[41] The jury found in favor of the NFL defendants.[42] The defendants then moved for summary judgment on the remaining counts.[43] On June 22, 1999, the district court granted the motion in full, finding that the release was not unenforceable as part and parcel of a violation of the Sherman Antitrust Act.[44] The court also held that adequate consideration existed to form a valid contract for release.[45] Noting finally that the claims against TJI did not relate back due to statute of limitations violations,[46] Judge Milton concluded that no genuine issues of material fact existed regarding the antitrust claims.[47]

The petitioners appealed the district court's decisions to the Court of Appeals for the Second Circuit.[48] The circuit court determined that the release was valid, holding that claims of economic duress were inadequate because they were not filed in a reasonably prompt manner.[49] The court concluded that the release was not part and parcel to an illegal transaction because it was not an integral component of the sale.[50] The court also found that the form of permission that was granted to execute the sale of

36. *Id.* at 121.
37. *V.K.K.*, 244 F.3d at 121. *See infra*, notes 77, 78.
38. *Id.*
39. *V.K.K.*, 55 F. Supp. at 197.
40. *V.K.K.*, 244 F.3d at 121. The bifurcation saw the matter split into two main issues. *Id.* First, a jury trial was to be held on the issue of the validity of the release. *Id.* Second, all other matters were to be considered separately, such as economic duress, antitrust violation and lack of consideration allegations. *Id.*
41. *Id.*
42. *Id.*
43. *V.K.K.*, F.3d at 121.
44. *Id.*
45. *V.K.K.*, 244 F.3d at 121.
46. *Id.*
47. *V.K.K.*, 55 F. Supp. at 211-12.
48. *V.K.K.*, 244 F.3d at 121.
49. *Id.* at 125.
50. *Id.* at 127.

the franchise was adequate consideration to substantiate the release.[51] Additionally, the court found that claims against TJI did relate back to the date of the filing of the original complaint and were not time-barred.[52] Finally, the court determined that summary judgment was improper regarding the antitrust claims because genuine issues of fact existed that required resolution through further discovery and a possible trial.[53]

C. *Analysis Of The Main Case*

Writing for the majority, Judge Sack, commenced the analysis of the petitioners' claims with an in depth discussion on the validity of the release.[54] Judge Sack first addressed the economic duress allegations in securing the release.[55] The court reiterated the petitioners' claim that the National Football League forced them to sign a release of all claims of duress, specifically asserting that approval of the much needed sale of the team was made contingent on the execution of the release.[56]

The court explained that the law will not abide by an agreement wherein an advantage is unlawfully achieved over another party by the threat of economic harm.[57] Judge Sack expressed that signing a contract,

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51. *Id.*

52. *V.K.K.*, 244 F.3d at 131.

53. *Id.* The court found that there could be disputed evidence of a potential conspiracy between the NFL and TJI. *Id.*

54. *Id.*

55. *Id.* In discussing claims of economic duress the court articulated that two avenues existed in determining which law to apply, the laws of the state of New York or federal law. *Id.* The question arose because the crux of petitioners' claims involves alleged Sherman Antitrust violations, a federal statute. *Id.* The court looked to the legislative intent of Congress in enacting the statute and whether Congress desired to create a uniform federal standard regarding claims of economic duress in this context. *Id.* The court determined that no such intent was forthcoming, so it looked to the standard that governs when the legislative history is silent, announced in United States v. Kimball Foods, Inc., 440 U.S. 715, 728-29 (1979). The court "assess[es] whether: (1) the issue requires 'a nationally uniform body of law;' (2) application of state law would frustrate specific objectives of the federal programs and (3) application of a federal rule would disrupt commercial relationships predicated on state law." *Id.* at 728-729. The court reasoned that a national uniform body of law was not in order. *V.K.K.*, 244 F.3d at 122 (following Texas Ind., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 642 (1981)). Next, the court did not find that following state law on this issue would frustrate the goals of certain federal programs and lastly, determined that reasonable parties normally anticipate that state law will govern in matters of contract. *Id.* Satisfying the test of *Kimball Foods*, the court applied New York law to the contractual aspects of this matter. *Id.*

56. *Id.* at 121.

57. *Id.* (quoting Scientific Holding Co. v. Plessy, Inc., 510 F.2d 15, 22 (2d Cir. 1974)). Specifically, the court stated that "the doctrine of economic duress arises from the theory that 'the courts will not enforce an agreement in which one party has unjustly taken advantage of the economic necessities of another and thereby threatened to do an unlawful injury.'" *Id.* *Scientific Holding*, involved an action against a purchasing company for failing to remit the agreed upon purchase price. *Id.* at 20. After negotiations culminated in the agreed purchase of the plaintiff's

even though under duress, constitutes a valid agreement if the signing party does not promptly repudiate the release or contract.[58] Failure to disavow the validity of the contract will constitute a waiver or ratification.[59] The court suggested that both silence in the face of knowledge that a contract was procured under duress and conduct that indicates continued performance within the terms of the contract, provide adequate bases for finding an implied waiver.[60] Additionally, the court stated that the party attempting to avoid a contract carries the burden of demonstrating economic duress.[61] That burden will increase proportionately according to the amount of time that passes before a suit challenging the contract's validity is commenced.[62]

Judge Sack recognized that true equality of standing in a contract is not often a reality.[63] The judge explained that parties often enter into a contract completely aware of the other party's economic advantage.[64] This is acceptable because the bargaining process takes such inequities into account when resolving a mutually favorable deal.[65] The court, however, posited that the execution of a release of all claims was inherently suspect

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assets, expected profits were not realized and the defendant corporation threatened to back out of the deal, claiming inaccuracies in the plaintiff's financial statements. *Id.* at 19. Plaintiff was forced to agree to amend the original agreement, allow defendant's management team in and, subsequently, suffered even further losses. *Id.* at 21. The court held that, if duress were present in entering into the contract, the contract is voidable, but did not make a finding of duress in that case. *Id.* at 23.

58. *V.K.K.*, 244 F.3d at 122. (citing DiRose v. PK Management Corp., 691 F.2d 628, 633 (2d Cir. 1982)). *DiRose* involved an inducement into the signing of a release to prevent any future claims against a joint venturer. *Id.* The defendant convinced the plaintiff, owner of several pizza restaurants, to purchase the stock of the defendant's wholly owned subsidiary to increase operating capital. *Id.* The defendant withdrew from the venture insisting that his son-in law would aid the plaintiff in raising the necessary capital. *Id.* Shortly after defendant's withdrawal, the son-in-law severed all ties with the plaintiff and the plaintiff was unable to garner enough funds to keep his business afloat. *See DiRose*, 691 F.2d at 630. The court expressed that any claim of economic duress had to be filed without delay or a compelling explanation must otherwise be set forth. *Id.* The plaintiff failed to set forth an economic duress claim until two years after signing the release. *Id.* at 634.

59. *V.K.K.*, 244 F.3d at 122.

60. *Id.* at 123. (citing In re Boston Shipyard Corp., 886 F.2d 451, 455 (1st Cir. 1989)). In this case, the First Circuit determined that inaction against the contract for a period over one and a half years was unreasonable and the actions of the plaintiff in performing under the contract constituted a waiver of any claims of economic duress. *Id.*

61. *V.K.K.*, 244 F.3d at 123.

62. *Id.* (citing International Halliwell Mines, Ltd. v. Continental Copper and Steel Indus., Inc., 544 F.2d 105, 108 (2d Cir. 1976)). New York law has firmly established the need for prompt repudiation. *Id.*

63. *V.K.K.*, 244 F.3d at 123. The court also stated that equality of standing is not necessary to finding validity of a contract. *Id.*

64. *Id.*

65. *Id.*

because the party is given complete authority to disavow his ordinary and customary obligations.[66] Therefore, the affirmance to the validity of a release is only granted in limited circumstances.[67]

The court further explained that it was necessary to confine economic duress claims to promptly filed grievances in order to prevent the party in the weaker bargaining position from turning the tables and gaining a decided advantage.[68] If such a party were permitted to wait until contractual obligations were performed to determine if it would be in its best interests to institute an economic duress claim, it would place the other party (the initially superior party) at an extreme disadvantage.[69]

Turning to the facts of the instant case, the majority viewed the thirty months that Kiam waited to bring suit as falling outside the intended timeliness of the rule.[70] Case law demonstrated that it is the knowledge of, and not the actual acts of duress, that dictate the period of time from which the allowance of a claim may be asserted.[71] The court dismissed Kiam's claim that he did not have knowledge of the conversations between TJI and the NFL until the fall of 1993.[72] The court explained that Kiam had received a letter from the NFL shortly after the release signing, outlining the scope of the release and the need for League approval for any plans to relocate the Patriots.[73] Kiam was also aware of the NFL's previous attempts to prohibit franchise movement of other teams.[74] Finally, the

66. *Id.*

67. *Id.* at 123.

68. *V.K.K.*, 244 F.3d at 123.

69. *Id.* The court explained that the rule of promptness regarding economic duress promotes fairness because the party under duress generally will be aware at the execution of the contract or shortly thereafter that the conditions were oppressive. Prompt disavowal frees the parties from uncertainty in the continued fulfillment of the contract. *Id.* at 124.

70. *Id.*

71. *Id.* (citing Corcoran v. New York Power Auth., 202 F.3d 530, 541 (2d Cir. 1999)). Although *Corcoran* involved a fraud claim grounded in wrongful death due to exposure to radiation, its holding is pertinent to the present matter. *Id.* The court in *Corcoran* found that the plaintiff's claims were barred because they were not timely filed. *Id.* The period to assert a claim "began to run either when the fraud was committed or at the time the fraud was, or could reasonably have been discovered." *Id.* The plaintiff was aware of the acts of fraud that eventually caused the injury and eventual death of her husband, but did not file her claim until much later. *Id.*

72. *V.K.K.*, 244 F.3d at 121. Kiam claims that he first learned of the conspiracy after reading a newspaper article in 1993 describing the agreement between the Jacksonville group and the NFL to preclude Kiam's relocation of the Patriots. *Id.*

73. *Id.* at 124.

74. *Id.* (citing Los Angeles Memorial Coliseum Comm'n. v. National Football League, 726 F.2d 1381, 1387-90 (9th Cir. 1984)). In fact, Kiam was aware of the NFL's opposition to the Patriots being moved to St. Louis. *Id.* In *Murray v. National Football League*, Francis Murray, the same person that had owned a 49% interest in the team, had filed suit against the NFL for alleged breach of contract and violations of the Sherman Antitrust Act. LEXIS 9108, 82-4, (E.D. Pa. 1996). After purchasing his interest in the team, Murray had secured a lease and stadium financing in St. Louis to

court illustrated that Kiam knew he would be forced to sell the team at a depressed price because of the prohibition against relocation that would be forced on any future buyers.[75] The court concluded, that Kiam and VKK did not promptly file their claim for economic duress because throughout the negotiations they had harbored knowledge of the League's coercive behavior.[76]

Next, the court discussed petitioners' part and parcel theory.[77] Judge Sack explained that the part and parcel theory requires finding that a release to an antitrust claim was so integral to an illegal transaction that it must be considered void at its inception.[78] The court detailed two aspects of the petitioners' claims under this doctrine.[79] First, VKK and Kiam stressed that the release was integral to the scheme because it was necessary in order to keep any future owners in New England.[80] The court dismissed this contention, finding that petitioners were free to bring antitrust claims before executing the release.[81] Also, the court noted that other future owners still had potential antitrust causes of action available to them.[82] The NFL and TJI, therefore, would have been able to carry out

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relocate the team. *Id.* The NFL, at an agreed upon arbitration, found that his contract with Kiam did not contain a buyout of Kiam's shares of the team and once again the NFL prevented a move of the Patriots to areas outside the New England area. *See* Mid-South Grizzlies v. Nation Football League, 720 F.2d 772, 778 (3d. Cir. 1983) (the court upheld the denial by the NFL of an application of a qualified group seeking to obtain a franchise for the city of Memphis, finding that no antitrust violations existed because the League was not required to accept all qualified offers.).

75. *V.K.K.*, 244 F.3d at 124. The court recalled that the deal with Orthwein to sell the Patriots was contingent on Orthwein signing an iron-clad commitment not to move the team. *Id.* This restriction severely limits the avenues a future owner can pursue in the event the team is not profitable, therefore, Kiam was aware that the sale price of the team was depressed. *Id.* Also, Kiam was informed early on of the substance of conversations between the NFL and TJI through the Chief Executive Officer of the Patriots, Sam Jankovich. *Id.*

76. *Id.*

77. *Id.* Part and Parcel doctrine has developed through case law. In *United States v. Delaware, Lackawanna & W.R.R. Co.*, the Supreme Court determined that restraints on trade are void as violations of the Sherman Antitrust Act, emphasizing the need to look at the contract as a whole and the need to evaluate how integral the questionable conduct was to the transaction. 238 U.S. 516, 531 (1915). Justice Cardozo further expanded the doctrine to apply to the validity of releases in the antitrust context. *Id.* If the illicit transaction cannot be carried out without the execution of a release, the agreement is void, and the release is considered to be part and parcel to the agreement. *Id.* Since the release is inseparable from the transaction, it is also deemed illegal and it, as well as the entire deal, are voidable. Radio Corp. of America v. Raytheon Mfg. Co., 296 U.S. 459, 462 (1935).

78. *V.K.K.*, 244 F.3d at 125. Under this theory, a release must be invalidated if it was a crucial component of a deal to violate antitrust laws. Redels Inc. v. General Electric Co., 498 F.2d 95, 100-101 (5th Cir. 1974). *See also* Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1315 (5th Cir. 1983); Dobbins v. Kawasaki Motors Corp., 362 F. Supp. 54, 58 (D. Or. 1973).

79. *V.K.K.*, 244 F.3d at 125.

80. *Id.*

81. *Id.*

82. *Id.*

their agreement without the release.[83]

Second, the court addressed the assertion that the terms of the release exposed the member clubs to potential liability if they permitted Orthwein to move the team.[84] Judge Sack quickly dismissed this argument, noting that although the provision was beneficial to the NFL in preserving the team's location, the release was not integral to their discussions with TJI.[85] The court questioned the continued validity of the doctrine[86] and showed reluctance to find the release integral to the conspiracy or scheme because it was more of an outgrowth from the deal than part and parcel to its creation.[87]

Next, the judge attacked the petitioners' lack of consideration argument. The court noted that New York law and federal law regarding consideration are dissimilar.[88] Under New York law, a release is not deemed invalid if there is a lack of consideration.[89] Under federal law, an exchange of adequate consideration is essential to the creation of a valid release.[90] The court found that valuable consideration existed in the grant of permission for the sale of the team to Orthwein and held that Petitioner's argument must therefore fail under both federal or state law.[91]

The court next turned to an evaluation of whether adding TJI as a defendant was permissible.[92] After allowing the amendment of the

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83. *V.K.K.*, 244 F.3d at 126.

84. *Id.*

85. *Id.*

86. *Id.*

87. *V.K.K.*, 244 F.3d at 126.

88. *Id.* at 127.

89. *Id. at* 126-27. "[A] written instrument which purports to be a total or partial release of all claims . . . shall not be invalid because of the absence of consideration or of a seal." N.Y. GEN. OLIG. LAW § 15-303 (2001).

90. *Id.* at 127. Consent to the transfer of a franchise represents adequate consideration as required by federal law. Brock v. Entre Computer Ctrs., Inc., 933 F.2d 1253, 1261 (4th Cir. 1991).

91. *Id.*

92. *Id.* Because TJI was not named initially and petitioners only named TJI, the petitioners were compelled to seek an amendment of the complaint under FED. R. CIV. P. 15(c) which provides:

> An amendment of a pleading relates back to the date of the original pleading when:
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
> (3) the amendment changes the party or the naming of the party against whom the claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for mistake concerning the identity of the proper party, the action would have

complaint to relate back, the judge considered the defendants' argument that the release unambiguously pertained to the Jacksonville defendants.[93] The court articulated that, under New York Law, the initial inquiry is to determine if the language of a contract is ambiguous.[94] The court's review of the exact language of the release resulted in a finding that its scope was not intended to cover the Jacksonville entities from future claims.[95] The court noted that the release stated that all member clubs were exempt from liability.[96] Further, the text of the document failed to state that TJI or future member clubs were protected within the release.[97]

Finally, Judge Sack addressed the district court's grant of summary

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been brought against the party. *Id.*

All requirements of 15(c)'s subsections must be satisfied prior to allowing an amendment to relate back. *See* Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 174 (3d Cir. 1977). FED. R. CIV. P. 15(c)(2) requires that the claim "asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading." Rule 15(c)(3) necessitates that the defendant is given notice of the institution of the action against him within the time specified in Rule 4(m), 120 days from the filing of the complaint. Hutchins v. Gilley, 202 F.2d 268 (6th Cir. 1999) (quoting Cox v. Treadway, 75 F.3d 230, 240 (6th Cir. 1996)). The Court has held that the added party is deemed to have notice in light of its identity of interests or close association with the original defendant. *See* Hernandez Jiminez v. Calero Toledo, 604 F.2d 99, 102-09 (9th Cir. 1979) (citing Cooper v. United States Postal Service, 471 U.S. 1022, 1025, n.3 (1985)).

The court also looked at the possibility of prejudice in granting the amendment. It is well settled that "prejudice to the non-moving party is the touchstone for the denial of an amendment." Cornell & Co., Inc. v. Occupational Safety and Health Review Comm'n, 573 F.2d 820, 823 (3d Cir. 1978). In assessing prejudice, the Court should consider the extent of the delay and the degree to which the amendment will needlessly delay the disposition of the case. *See* Cahill v. Carroll, 695 F. Supp. 836 (E.D. Pa. 1988). Delay itself can amount to prejudice, warranting denial of a motion to amend when such delay is extreme. Fort Howard Paper v. Standard Havens Inc., 901 F.2d 1373, 1380 (7th Cir. 1990). The court in the present matter determined that TJI was described in the original complaint and it was simply an oversight by the petitioners that caused the omission, not resulting in any prejudice to the defendants. *Id.* Petitioners' claims against TJI were, therefore permitted to relate back. *Id.*

93. *V.K.K.*, 244 F.3d at 129.

94. *Id.* (citing Cable Science Corp. v. Rochdale Village, Inc., 920 F.2d 147, 151 (2d Cir. 1990)). "If the contract is capable of only one reasonable interpretation . . . we are required to give effect to the contract as written." K. Bell & Associates, Inc. v. Lloyd's Underwriters, 97 F.3d 632, 637 (2d Cir. 1996).

95. *V.K.K.*, 244 F.3d at 129.

96. *Id.*

97. *Id.* at 130. Specifically, the release stated that it pertains to "the National Football League, its officers, directors, . . . employees, subsidiaries, affiliates, partners, predecessors . . . successors." *Id.* The court noted that affiliates or successors may loosely be interpreted as referring to future teams, however, the term affiliate, as the court explained, usually refers to something presently associated with and successor requires taking the place of another entity. *Id.* (citing BLACK'S LAW DICTIONARY, 59, 1446 (7th ed. 1999)). The Jacksonville Jaguars were a wholly new entity that did not succeed any team. *Id.* The court relied on the theory of *expresio unius est exclusio alterius*, which means that "to express or include one thing implies the exclusion of the other, or of the alternative." BLACK's LAW DICTIONARY at 602. Because the release was not precise in stating that it included future member teams, it is construed as not pertaining to them. *Id.*

judgment in favor of the defendants on the antitrust claims.[98] The judge reasoned that the Sherman Antitrust Act was designed to encourage trade and competition in the commercial setting.[99] The court differentiated typical restraints of trade from those in the sports setting.[100] Specifically, the Second Circuit noted that courts will review restraints to analyze whether any procompetitive effects are overshadowed by the damage to professional competition.[101] Under Section 1 of the Act, the burden is on the plaintiff to demonstrate that (1) the effect of the agreement was to restrain trade; (2) the plaintiff was harmed as a direct and proximate result; and (3) damage assessment is feasible and capable of being determined with certainty.[102]

The circuit court condemned the district court's determination that there were no genuine issues of material fact regarding the antitrust claims.[103] Judge Sack concluded that evidence of a conspiracy to limit

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98. *V.K.K.*, 244 F.3d at 130.

99. *Id.* at 131. *See* 15 U.S.C. § 1. The Sherman Antitrust Act provides in pertinent part that:

> 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 . . .

The purview of the Act is restricted to those actions which at common law would be considered illegal. Columbia River People's Util. V. Portland General Elec. Co., 217 F.3d 1187 (9th Cir. 2000). Under the common law the repression of competition was strictly precluded. *Id.* The harm must center on damage to competition separately from harm to the individual competitor. *Id.* (citing Rutman Wine Co. v. E. & J Gallo Winery, 829 F.3d 729, 734 (9th Cir. 1974)). *See also* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (determining that the goal of the Sherman Act was to protect competition).

100. *V.K.K.*, 244 F.3d at 131.

101. *Id.* (citing St. Louis Convention and Visitors Comm'n. v. National Football League, 154 F.3d 851, 861 (8th Cir. 1998)). In that matter, the plaintiffs challenged the NFL's imposition of extremely high fees upon those teams which sought to relocate to other cities. *Id.* The court ultimately held that these fee arrangements, although they may have served as a deterrent to franchise relocation, were within the League's authority and would survive scrutiny under the Sherman Antitrust Act. *See*, Scafuri, Angela *ANTITRUST: Restraint on Trade—National Football League Relocation Policies do not Create an Anticompetitive Environment*, 9 SETON HALL J. SPORTS L. 575 (1999). The defendant's actions in an antitrust suit must have the effect of suppressing competition in a particular market. Ezzo's Investments, Inc. v. Aveda Corp., 238 F.3d 420, 423 (6th Cir. 2000). The defendant must be shown to have market power in that industry or else it cannot be demonstrated that it was capable of affecting the market in a negative way. *Id.*

102. *V.K.K.*, 244 F.3d at 131. (citing St. Louis Convention and Visitors Comm'n., 154 F.3d at 861).

103. *Id.* Judge Sack believed that credible evidence of a conspiracy had been presented. *Id.* The facts presented to defeat a summary judgment motion on an antitrust claim are not susceptible to inferences based on ambiguous evidence. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588. The non-moving party on summary judgment must proffer evidence that demonstrates that the alleged conspirators did not act independently. *Id.* Evidence of the conversations between the NFL and TJI regarding preventing Kiam from moving the team was competent enough to defeat the within motion. *V.K.K.* 244 F.3d at 131.

Kiam's maneuverability existed.[104] The court noted TJI, on the cusp of executing a deal with Kiam for the Patriots, ceased negotiations after consultation with the NFL.[105] Statements by TJI officials, as well as testimony from other owners, also lent support to the petitioners' claims of conspiracy.[106] The court rationalized that the information produced thus far was sufficient to permit a reasonable inference that a conspiracy had been committed.[107] Judge Sack concluded that this evidence required a resolution by a jury and remanded the matter for a determination through trial.[108]

III. CONCLUSION

The holding in *V.K.K. v. National Football League* does not clarify whether the NFL and similar professional athletic leagues are outside the scope of antitrust laws. The court was very protective of the NFL's rights under the release and chose not to offer safeguards for the injured party. Also, to the dismay of Victor Kiam and VKK, the court strictly interpreted the law regarding economic duress. Instead of focusing on the actual coercive behavior of the NFL, the court simply looked to the amount of time that had passed since Kiam had signed the release.

Although thirty months is an extensive period of time, Kiam stated that his knowledge of the full effects of entering into the agreement was not realized until he was able to distance himself from the transaction. It was not until after he had read a newspaper article published in 1993 describing the transaction that he was able to gauge the actions of the NFL. The NFL may have forced Kiam to sign the release because they knew they were perpetrating antitrust violations. Moreover, the release was not of the sort traditionally required by the NFL before allowing the sale of a member team.

The law regarding economic duress is flawed because its standards do not create uniformity. Courts vary on what "prompt action" by a plaintiff means. In certain situations, it is reasonable to infer from the circumstances that a plaintiff did not understand the consequences of

104. *Id.*

105. *Id.*

106. *Id.* After being informed of the NFL's desire to keep the Patriots in New England, TJI officials stated to the NFL that "We are going to do what you tell us to do." *Id.* Additionally, Norman Braman, the owner of the Philadelphia Eagles, testified that the president of the NFL informed those cities seeking to gain an expansion team that any conversations with Mr. Kiam would result in them being excluded from any consideration for a new team. *Id.*

107. *V.K.K.*, 244 F.3d at 131. *See also Matsushita Elec. Indus. Co.*, 475 U.S. at 587-88.

108. *Id.*

signing a release of all claims until much later. Often, when parties enter into a contract, they do not realize that they have been placed in an inferior bargaining position, or that the deal is actually one-sided. Kiam was placed in such a situation. Desperate to sell or move his team because of the severe financial losses he was incurring, he found a potential buyer in Orthwein. In an attempt to alleviate his losses, he sold the team to Orthwein at a depressed price. As a businessman, Kiam acted appropriately.

Although relocation had proved to be very positive for other teams, the NFL prohibited Kiam's requested move. This restraint alienated most potential buyers because it offered them few avenues to pursue in the event the team began to fail economically. Kiam had to sell to Orthwein and had to sign the release. Unfortunately, Kiam did not bring suit until thirty months after the deal was made. Under the court's subjective determination, he should have known of the duress sooner.

Additionally, under the part and parcel doctrine the release was integral to the transaction. But for the signing of the release, the sale would not have been consummated. The release was a major component to the illegal conspiracy between the NFL and TJI, for it sanctioned their illicit behavior. The court questioned the vitality of the doctrine as being suspect. The part and parcel doctrine has found support, however, in situations similar to the present matter.[109] Therefore, the contract for release should have been voided.

Moreover, although the court remanded the antitrust matter to the

109. *V.K.K.*, 244 F.3d at 126. The court in this matter remarked that no other Court of Appeals in this nation has utilized the part and parcel doctrine to determine the validity of a release. *Id.* The court went as far as borrowing the language of the Third Circuit in saying that it is unimaginable that the procurement of a release can be part of and in furtherance of a conspiracy. *See* Taxin v. Food Fair Stores, Inc., 287 F.2d 448, 451 (3d Cir. 1961). However, in *Will-O-Wheel Farms v. A.O. Smith Harvestore Products, Inc.*, the Sixth Circuit recognized that although in that matter the release was not part and parcel of a RICO conspiracy, it did envision that there may be circumstances where a release may be an integral part of an illegal transaction whose goals are to violate antitrust laws. 915 F.2d 1566 (1991). That court cited two Fifth Circuit cases that involved similar claims to the present matter and although found that the releases were not part and parcel to the illegal transaction, there may arise situations where such releases satisfy the doctrine and therefore are void. *See* Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295 (5th Cir. 1983); Redels, Inc. v. General Electric Co., 498 F.2d 95 (5th Cir. 1974). The court in *Ingram* failed to find that the release was integral to an illegal transaction, but explained that based on the particular facts in that matter the release was an outgrowth of the deal. Ingram, 698 F.2d at 1315. *Ingram* involved the execution of a release of all antitrust claims two years after the plaintiff had left the construction business. *Id.* The release did not serve as a mechanism to compel the plaintiff's departure from the field, but was drawn up after several years of negotiation. *Id. Ingram* is distinguished from the present matter because Kiam was compelled to sign the release prior to effectuating the sale of his team. *Id.* Here, the release was not an outgrowth of the transaction, but was so intertwined with the entire deal that without its execution the NFL refused to consummate any sales or attempts at relocation. *Id.*

district court for a further determination, its language was not forceful enough to convey the gravity of the likely violations by the NFL. Simply stated, the NFL and other major sports leagues operate as a monopoly. On Sunday afternoons and Monday nights, from September through January, no other football leagues compete with the NFL. Although lesser leagues are prevalent, none compare with the NFL in its viewership market, revenue generated, or endorsements. The NFL is a self-contained, money-making machine that conducts its business affairs in a dictatorship-like fashion.

It is understood that a business entity must protect its interests. It makes sense for the NFL executive committee to require three-fourths approval of the member teams before any move is agreed upon. However, the NFL sets forth its reasons for not allowing the Patriots to relocate as follows: the New England area was critical to the television market; keeping the Patriots in New England maintained stability within the League, Kiam mismanaged the team; and television revenues for the NFL as a whole were on the rise, so the Patriots would benefit from the increased proceeds.[110] The League's reasons were vague generalizations that were largely unsubstantiated and based solely on speculation. Even if true, they do not justify the behavior of the NFL in blacklisting Kiam.

Regardless of its popularity and revenue generating capabilities, the NFL is a business and must be subjected to the same rules as other businesses. Suffocating competition is strictly prohibited under the Sherman Antitrust Act and the NFL must be held accountable for its actions, otherwise similar conduct will be repeated and the level of competition in the league will greatly suffer.[111] Professional athletic organizations are purely commercial enterprises and any monopolistic conduct must not be sanctioned.

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110. *VKK*, 55 F. Supp. at 203.

111. This is pure speculation on the part of the author, but if owners are blacklisted, as Kiam was in this matter, and prevented from exploring avenues that might jump start team revenues, they will be compelled to cut salaries and talent in an effort to prevent substantial financial losses. The teams that are affected by the NFL's restrictions are often those in the smaller markets with less revenue generating capabilities. To remain even somewhat profitable, a team owner will be forced to make a choice between protecting his assets and diminishing the quality of the team. In this era of free agency, players have the ability to work for an employer that is willing to pay the most money. A team without any bargaining power serves little purpose other than to provide a pool of talent that other more profitable teams may decimate once its players achieve a certain status.