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Open Markets Group Backs Oakland Lawsuit Against Raiders

By **Matthew Perlman**

Law360 (April 12, 2022, 5:57 PM EDT) -- An advocacy group that promotes strong antitrust enforcement has urged the U.S. Supreme Court to take up a case from the city of Oakland, California, over the loss of the NFL's Raiders franchise, arguing that the lower courts are reading the antitrust laws too narrowly.

The Open Markets Institute filed an amicus **brief** on Monday supporting the city's petition for **high court review** in Oakland's case looking to recover losses from the NFL and the Raiders over the team's 2020 move to Las Vegas.

In affirming dismissal of the suit in December, Open Markets said the Ninth Circuit wrongly applied a balancing test to determine that Oakland lacked standing to bring its claims accusing the Raiders of colluding with the rest of the league to limit the number of teams and drive up demands team owners can impose on potential host cities.

The text of the Clayton Act, the brief said, allows for "any person" injured by anti-competitive activity to bring antitrust claims and doesn't call for any restrictions or a balancing of factors.

"Yet, the lower courts have adopted and applied tests for standing that disregard that expansive phrase, substituting their own policy judgments for those made by Congress," Monday's brief said. "This is not a prerogative of the courts."

A number of circuits, including the Ninth Circuit, have applied this balancing test when deciding standing in antitrust cases, the brief said, considering factors including the nature and directness of an injury and whether the alleged harm is speculative. The Ninth Circuit affirmed dismissal of Oakland's case after finding the harm the city allegedly suffered from the relocation was too speculative, among other things.

Some circuits, the brief argued, have gone even further, using the balancing test to create bright-line rules that bar anyone but consumers and competitors from enforcing the antitrust laws.

In a series of tweets on Tuesday, Sandeep Vaheesan, legal director for Open Markets, said that despite the broad language of the Clayton Act, courts have narrowed the law by applying this balancing test to effectively permit standing only for "persons who convince judges that they are a good plaintiff."

"The current judicial interpretation of the Clayton Act effectively rewrites the text of the law," Vaheesan said in a tweet. "The courts have usurped the legislative authority of Congress."

Oakland alleges that the NFL and the league's 32 teams violated antitrust law by boycotting the city, refusing to negotiate in good faith to stay in Oakland and refusing to allow another franchise to replace the Raiders. The relocation left Oakland with an empty stadium and millions of dollars in lost economic revenue, according to the suit.

The city contends that it attempted to keep the Raiders, even working out a potential deal for a new \$1.3 billion stadium, but that the team just strung the city along until it got a better offer from Las Vegas, where it eventually moved into the new \$1.9 billion Allegiant Stadium. Oakland also alleges the other NFL owners split a \$378 million relocation fee from the move.

A Ninth Circuit panel affirmed the lower court's tossing of the claims in December, saying Oakland was simply priced out of the market for an NFL team and that because the city was a "nonpurchaser" in the market, it did not suffer any real loss, making its alleged harm too speculative.

Oakland argued in its petition for high court review last month that the appellate panel based its decision on an outdated doctrine of "prudential standing" and ignored that the NFL drove up the price in a cartel-like fashion by capping the number of teams and refusing to negotiate with Oakland in good faith.

This goes against the Supreme Court's "modern approach" to standing, the city argued, saying courts should not be allowed to balance factors to "deny congressionally granted causes of action on prudential grounds."

Open Market Institute argued in its amicus brief on Monday that the justices should do what the high court did in its 2014 decision in [Lexmark International v. Static Control Components](#), a case involving standing to bring false advertising claims under the Lanham Act. There, the brief said, the court found plaintiffs have standing when the claims are within the "zone of interests" protected by the statute and can establish a connection between the violation and the alleged injury.

"The Lexmark Court rejected on textualist grounds both the multi-factor balancing tests that some lower courts had used and the rule that other courts had adopted permitting only competitors to bring Lanham Act suits," the brief said. "The court should apply the approach articulated in Lexmark to determine antitrust standing too."

Representatives for Oakland and the NFL did not respond to requests for comment Tuesday.

Open Markets is represented by Sandeep Vaheesan internally and Andrew Schmidt of Towards Justice.

Oakland is represented by Barbara Jean Parker, Maria Bee and Malia J. McPherson of the city attorney's office, Thomas C. Goldstein, Kevin R. Russell, Eric F. Citron and Erica Oleszczuk of Goldstein & Russell PC, Clifford H. Pearson, Daniel L. Warshaw, Thomas J. Nolan, Michael H. Pearson, Matthew Pearson and Benjamin E. Shiftan of Pearson Simon & Warshaw LLP, and James W. Quinn, Michael M. Fay, Jenny H. Kim and Emily Burgess of Berg & Androphy.

Counsel information for the Raiders and the NFL was not immediately available.

The petition is City of Oakland, California, Petitioner v. Oakland Raiders et al., case number 21-1243, in the Supreme Court of the United States.

--Additional reporting by Zachary Zagger. Editing by Ellen Johnson.