UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS LAUMANN, ROBERT SILVER, DAVID DILLON, and GARRETT TRAUB, representing themselves and all others similarly situated, Plaintiffs, v. NATIONAL HOCKEY LEAGUE, et al., Defendants	12-cv-1817 (SAS)
FERNANDA GARBER, MARC LERNER, DEREK RASMUSSEN, ROBERT SILVER, GARRETT TRAUB, and VINCENT BIRBIGLIA, representing themselves and all others similarly situated, Plaintiffs, v. OFFICE OF THE COMMISSIONER OF BASEBALL, et al., Defendants	12-cv-3704 (SAS) ECF Cases Filed under Seal

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF DEFENDANTS' EXPERT DR. JANUSZ ORDOVER

ARGUMENT

Defendants misunderstand Plaintiffs' challenge to Dr. Ordover's testimony. Plaintiffs are not challenging Dr. Ordover's credentials or his industrial organization expertise. What Plaintiffs are challenging is Dr. Ordover's failure to ground his core assumptions in economic analysis. Despite his limited experience with the industries involved in this litigation, Dr. Ordover relied exclusively on Defendants' self-serving declarations for the two central premises of his declaration. This unsurprisingly led to the same opinion that Dr. Ordover has invariably reached in every class declaration he has submitted over the last two decades: that the case cannot be certified as a class action. His declaration is not expert testimony. It is a repackaging of Defendants' arguments and fact declarations.

While Defendants cite to pages of "economic analysis" in Dr. Ordover's report, they do not describe that analysis or explain how it supports his conclusions. An actual examination of the paragraphs Defendants cite shows that Dr. Ordover's conclusion that there would be "winners" and "losers" if Defendants' territorial restraints were removed is based on two untested assumptions.

First, Dr. Ordover contends that in the face of competition some broadcasters would stop producing high-quality telecasts of games. Ordover Decl. ¶¶ 21-32. In making this contention, Dr. Ordover does not examine the actual economics behind the production of sports broadcasts. Even though it goes to the heart of his analysis, he does not calculate how much a Regional Sports Network ("RSN") would have to earn to continue to produce the telecasts profitably or compare the amount they currently earn to the amount they would earn in the counter-factual world.[1] Instead of actually undertaking the factual study and economic analysis necessary to

[1] *See* Memorandum of Law in Support of Plaintiffs' Motion to Exclude the Opinion and Testimony of Defendants' Expert Dr. Janusz Ordover ("Pls.' Ordover Mem."), at 4 n.18-21 (quoting Dr. Ordover's admissions that he does not know the amount an RSN would have to earn to warrant producing a high-quality broadcast, or how much RSNs currently pay for broadcast rights).

determine whether RSNs would still have an incentive to produce professional sports broadcasts, he simply states that RSNs earn more as monopolists than they would if they faced competition. Ordover Decl., ¶¶29-31.[2] This may well be true—that is the nature of a monopoly, after all—but it does not provide an answer to the question Dr. Ordover purports to ask.[3] Instead of actually conducting an economic analysis of the broadcasters' economic incentives, Dr. Ordover rests his conclusion that RSNs would lose interest in broadcasting games on "statements by RSN executives." Ordover Dec. ¶32 (citing the Litner, Crumb, and Krolik declarations).[4] Indeed, despite Plaintiffs discussing this foundational flaw for a full third of their *Daubert* motion, *see* Pls.' Ordover Mem. at 4-6, Defendants do not even attempt to defend this portion of Dr. Ordover's opinion.[5] Nor, unlike the other expert witnesses, has Dr. Ordover submitted a rebuttal declaration defending his position.

Second, Dr. Ordover concludes that if individual club telecasts were broadcast alongside the League packages, the introduction of that competition would raise the cost of the packages. Ordover Decl., ¶¶33-40. In reaching the counter-intuitive conclusion that more competition would lead to price increases, Dr. Ordover reveals his lack of understanding of the economic relationships between clubs, leagues, RSNs, and MVPDs. Dr. Ordover's conclusion rests on his assumption that RSNs would not provide their feeds to the Leagues "for free" only to have the

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[2] The ability to extract higher prices is an anticompetitive harm Plaintiffs seek to remedy, not a necessary component of sports broadcasting. *See* Plaintiffs' SJ Opp'n 16-25.

[3] As Plaintiffs have explained in other contexts, the amounts distributors would earn in the counter-factual world would have to fall precipitously for them to lose interest in producing high-quality sports broadcasts. *See* SJ Opp'n 16-25.

[4] The Defendants have not conducted any economic analysis themselves of the consequences of removing the restraints, *see* SJ Opp'n 57, and thus Dr. Ordover is relying on the unsupported assumptions of Defendants' own executives.

[5] The closest Defendants come to even mentioning this issue is an oblique assertion that Dr. Ordover "undertook significant economic analysis of the incentives of content owners, producers and distributors." Memorandum of Law in Opposition to Plaintiffs' Motion to Exclude the Opinion and Testimony of Dr. Janusz Ordover ("Defs.' Ordover Mem."), at 7. Beyond this vague statement, Defendants appear to have abandoned Dr. Ordover's claim that some games might not be broadcast altogether.

Leagues turn around and bundle those feeds in a competing League package. This imagined bargaining is circular and nonsensical. Broadcast rights are initially owned by the clubs and league. The clubs then sell a certain package of rights to an RSN. Dr. Ordover assumes that the RSN would acquire nationwide rights from a particular club—significantly *more* than they currently obtain—but then separately bargain to sell some of those new rights *back*. This irrational bargaining arrangement would not exist in the counterfactual world because it would be illogical for an RSN to pay a license fee to the club and then charge a separate royalty back to the club or the league for the rights they just acquired.

Defendants try to minimize the fact that Dr. Ordover did not know who held the copyrights to NHL and MLB broadcasts as though this were some trivial issue of law. Def.'s Memo at 9 n.9. In reaching opinions regarding who would license what to whom and at what fees, the ownership of rights is not an issue of law out of the purview of an economist. It is the basic starting point of a proper analysis. The ownership of rights is set out explicitly in the relevant contracts between the teams and RSNs and in requirements of the leagues for broadcast right contracts. One cannot offer opinions about which parties would sell which rights if one does not know the ownership of those rights in the present world.

Instead of examining the actual contracts or amounts of money involved (let alone using econometric tools to predict what would happen), Dr. Ordover once again relied on one of Defendants' executives for the conclusory statement that the likely revenues generated by the league package would be insufficient for the League to continue offering it. *See* Ordover Decl., 23 n.54 (citing the NHL Commissioner's unsupported speculation about future package revenues). Dr. Ordover conducted no analysis of what the league revenues for the packages currently are or what they would be in the counterfactual world. As with his analysis of whether RSNs would continue to have an interest in broadcasting games, he rests his conclusion on the unsupported testimony of Defendants' fact witnesses.

Defendants caricature Plaintiffs' argument, suggesting that Plaintiffs' motion is based on "the proposition that an expert economist's opinions are inadmissible under Rule 702 unless he sub-specializes in the particular industry at issue." Defs.' Ordover Mem. at 4. This is an obvious straw man. Dr. Ordover's lack of relevant experience in sports economics might not prevent him from testifying *if* he had appropriately inquired into the relevant economics of sports broadcasting—the costs, revenues, contracts, and structures that determine whether games will be produced and how they are distributed. Conversely, if Dr. Ordover had an independent expertise in the sports or broadcasting industries, perhaps his failure to test his core assumptions or study the relevant ownership structures would be excusable, but he does not.[6] It is Dr. Ordover's lack of prior expertise, *coupled with his failure to investigate the facts or provide economic analysis in support of his core assumptions*, that requires exclusion of his opinions. Because Dr. Ordover is not a sports economist, he lacks the necessary background to opine without an identified foundation for his opinions.[7] Dr. Ordover was candid about his very limited knowledge of professional baseball and hockey. *See, e.g.*, Pls.' Ordover Mem. at 2-4 & nn.8-15, 18-21. It may well be that Dr. Ordover once sufficiently educated himself about the retail sales of breakfast cereal or hydrogen peroxide, as Defendants proclaim, but that does not obviate the

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[6] As Defendants' expert, Dr. McFadden, has testified, sports economics is a recognized "specialization in microeconomics." McFadden Tr. 23.

[7] Although Dr. Ordover has never published any papers regarding sports economics or taught any classes in the field, Defendants try to build up Dr. Ordover's experience in sports by citing to cases in which he has appeared as an expert. This effort only underlines Dr. Ordover's lack of expertise. His retention in the Pac-Ten case Defendants cite occurred over 20 years ago. *Pappas Telecasting, Inc., v. Prime Ticket Network*, No. 92-cv-5589 (E.D. Cal.). As for his experience working with Comcast, Dr. Ordover had trouble recalling it and testified that it was irrelevant to this case. Ordover Tr. 139-140 ("I think—well, I think that the issue involved hockey or baseball. I don't remember as I sit here. So, I do know that I did some of the work, but the details, again, it's not something that is—that is relevant…--for the analysis of the issues—in this case."). The two *NCAA* cases defendants cite are discussed in plaintiffs' initial memorandum. Pls.' Ordover Mem. 3 & n.12. They involved NCAA athletic scholarship rules and had little to do with sports economics.

requirement—in each case in which he submits an opinion—that he ground his testimony in "sufficient facts or data." *Amorgianos v. Amtrak*, 303 F.3d 256, 265 (2d Cir. 2002). Defense experts, no less than plaintiffs' experts, are subject to "a rigorous examination of the facts on which the expert relies." *Id.* at 269.

Dr. Ordover's efforts to conclude that Plaintiffs cannot show antitrust impact without proper basis are further undermined by the fact that he has been consistently hired to offer this same opinion, regardless of the industry at issue.[8] While Defendants argue that his testimony has not previously been *excluded* on *Daubert* grounds, it has been repeatedly *rejected* on grounds that would have warranted exclusion under *Daubert*. Though one would expect objective expert testimony to have a consistent track record, even among the cases Defendants cite, the classes have been certified more often than not.[9]

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[8] Defendants try to minimize the implication of this consistent pattern by arguing that Plaintiffs "disregard[] the cases in which Dr. Ordover declined to become involved." Defendants' Memorandum at n. 4. There is no evidence that Dr. Ordover has ever declined to become involved in a case because he believed class certification was appropriate. When plaintiffs asked Dr. Ordover whether there had been such cases, Defendants' counsel instructed him not to answer. Ordover Tr. 84 ("Q. Have you ever advised the client that you could not render an opinion that there could not be 'common proof' of class certification—of impact onto the class?….Mr. Toscano: Instruct you not to answer.").

[9] *See, e.g.*, *In re Polyurethane Foam Antitrust Litig.*, No. 10-md-2196, 2014 WL 6461355, at *30 (N.D. Ohio Nov. 17, 2014) ("Ordover … again misunderstands what it means for a customer to suffer antitrust impact."); *id.* at *49 ("Ordover articulates a view of damages calculation that conflicts with the longstanding antitrust standard."); *Pecover v. Elec. Arts, Inc.*, No. 08-cv-2820, 2010 WL 8742757, at *24 (N.D. Cal. Dec. 21, 2010) ("[T]he court finds Ordover's arguments unconvincing."); *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd.*, 262 F.R.D. 58, 70 (D. Mass. 2008) (rejecting Ordover's opinion that prices to some customers would be higher in but-for competitive world; "common sense does not explain why Tyco would rationally give small purchasers a better deal in the actual world where there is little competition to restrain prices, as compared to in the but-for world where there is sharp competition for their business"); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 312 (N.D. Cal. 2010) (certifying class, even though "Dr. Ordover … reaches conclusions diametrically opposed to those of [plaintiffs' expert]"); *In re OnLine DVD Rental Antitrust Litig.*, No. 09-md-2029, 2010 WL 5396064 (N.D. Cal. Dec. 23, 2010); *White v. Nat'l Collegiate Athletic Ass'n*, No. 06-cv-999, 2006 WL 8066803 (C.D. Cal. 2006); *J.B.D.L. Corp. v. Wyeth-Ayerst Labs. Inc.*, 225 F.R.D. 208, 219 (S.D. Ohio 2003); *Arden Architectural Specialties, Inc. v. Wash. Mills Electro Minerals Corp.*, No. 95-cv-7574, 2002 WL 31421915, at *10 (W.D.N.Y. 2002). Recently the D.C. Circuit affirmed the

Even in cases in which Dr. Ordover has testified where courts have denied class certification, they have often distanced themselves from his testimony. *See, e.g.*, *In re Optical Disk Drive Antitrust Litig.*, No. 10-md-2143, 2014 WL 4965655, at *9 (N.D. Cal. Oct. 3, 2014) ("Whether Dr. Ordover's modification to the models are analytically sound need not be decided at this juncture. …"); *In re NCAA I-A Walk-On Football Players Litig.*, No. 04-cv-1254, 2006 WL 1207915, at *11 (W.D. Wash. May 3, 2006) ("[T]his Court will not engage in a battle of the experts or a detailed back-and-forth between the expert declarations submitted on this motion. Nor will it endorse either party's approach.").

Finally, Defendants seriously misread the Third Circuit's opinion in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008). Defendants claim that the court found Dr. Ordover's analysis to "raise[] substantial doubts … about whether common proof would be available for plaintiffs to demonstrate antitrust impact at trial." Defs.' Ordover Mem. at 3 (quoting *id.* at 325). This inappropriately elides the Third Circuit's opinion, which was merely noting that "*Defendants contend* Ordover raised substantial doubts … ." *In re Hydrogen Peroxide*, 552 F.3d at 325 (emphasis added). The Third Circuit did not assess the substance of Dr. Ordover's analysis at all, let alone endorse it. It had no need to reach the content of Dr. Ordover's opinion, because the district court had erroneously "assumed it was barred from weighing Ordover's opinion against [plaintiffs' expert's] for the purpose of deciding whether the requirements of Rule 23 had been met." *Id.* at 322. The Third Circuit therefore remanded to the district court for it to actually weigh the experts' dueling reports.[10]

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rejection of Dr. Ordover's testimony in a different context. *See Music Choice v. Copyright Royalty Bd.* --- F.3d ----, 2014 WL 7234800, at *7 (D.C. Cir. Dec. 19, 2014) ("The Judges were within their broad discretion to discount Ordover's benchmarks and look elsewhere for guidance.").

[10] Dr. Ordover's opinions never were tested by a court. Before the district court could act on the remand, the last defendants settled the case—on a classwide basis. *See In re Hydrogen Peroxide Antitrust Litig.*, No. 05-cv-666, Doc. No. 553 (E.D. Pa. Apr. 21, 2009).

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Respectfully Submitted,

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