UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS LAUMANN, ROBERT SILVER, GARRETT TRAUB, and DAVID DILLON, representing themselves and all other similarly situated, Plaintiffs, v. NATIONAL HOCKEY LEAGUE, et al. Defendants.	12-cv-1817 (SAS) ECF Case <u>FILED UNDER SEAL</u>
FERNANDA GARBER, MARC LERNER, DEREK RASMUSSEN, ROBERT SILVER, GARRETT TRAUB, and PETER HERMAN, representing themselves and all other similarly situated, Plaintiffs, v. OFFICE OF THE COMMISSIONER OF BASEBALL, et al. Defendants.	12-cv-3704 (SAS) ECF Case <u>FILED UNDER SEAL</u>

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' JOINT MOTION TO EXCLUDE OPINIONS AND TESTIMONY OF PLAINTIFFS' EXPERT DR. ROGER NOLL

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PRELIMINARY STATEMENT

In response to Defendants' *Daubert* motion, Plaintiffs erroneously claim that criticism of Dr. Noll's methodology by Defendants' experts is limited to a critique of its "implementation." To the contrary, Defendants' *Daubert* motion goes to the heart of Dr. Noll's flawed methodology, which flies in the face of well-accepted economic theory. Plaintiffs also submit a new, 69-page declaration from Dr. Noll that presents a third model as a "refinement" to address some of the defects that Defendants have identified.[1] Yet this new model ignores other, equally fundamental problems and contains new defects. Finally, Plaintiffs ask this Court not to assess, as it must, whether Dr. Noll's third model shows common impact and damages but rather to kick the can down the road to trial until Dr. Noll reinvents his model yet again in a future analysis.[2]

As explained below, the defects in Dr. Noll's ever-changing model are fundamental failures both of methodology under *Daubert* as well as requisite "fit" under *Joiner*.

First, Dr. Noll now expressly assumes that in-market blackouts will continue in the but-for-world ("BFW") "as they currently exist," bringing his opinions and model into direct conflict with Plaintiffs' own allegations and requested remedies, which seek to eliminate "blackouts" and the in-

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[1] While Dr. Noll is entitled to respond to criticisms that have been levied at his model, he is not entitled to construct a brand new model at this stage of the class certification process. *See, e.g.*, *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 500-01 (N.D. Cal. 2008) (allowing expert rebuttal declaration submitted with class certification reply papers but disallowing new regressions submitted at that time as untimely and unfair to defendants); *Chart v. Town of Parma*, No. 10-CV-6179P, 2014 WL 4923166, at *23 (W.D.N.Y. Sept. 30, 2014) (excluding supplemental expert report that maintained previous opinion but was "supported by different calculations and assumptions" as untimely and improper); *Lidle v. Cirrus Design Corp.*, No. 08 Civ. 1253 (BSJ)(HBP), 2009 WL 4907201, at *7 (S.D.N.Y. Dec. 18, 2009) (limiting expert to conclusions and reasons expressed in his opening report). Dr. Noll also exceeded by 44 pages the 25 pages the Court allotted to him for a reply report to respond to Defendants' criticisms. (10/27/14 Hearing Tr. 40:16-41:8.) The Court should ignore Dr. Noll's third model on these bases alone.

[2] Dr. Noll must demonstrate *now* that his model can prove damages on a class-wide basis. "A party's assurance to the court that it intends or plans to meet the [class certification] requirements is insufficient." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2008); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, n.5 (2011).

market/out-of-market distinction. Under *Comcast*, the indisputable inconsistency between Plaintiffs' claims and Dr. Noll's analysis renders his model unreliable and unhelpful for class certification as a matter of law.

Second, under prevailing econometric principles, a reliable structural model must have a bargaining element, where, as here, it is *undisputed* that BFW bargaining would occur. Dr. Noll concedes that the BFW would involve at least six months of bargaining throughout the vertical supply chain, including between and among teams, leagues, regional sports networks ("RSNs"), and independent distributors ("MVPDs"). Perhaps the best example of requisite BFW bargaining relates to Dr. Noll's assumption that RSNs will still produce all the games and provide feeds to the leagues for free, something that only makes sense when the scope of RSNs' broadcast rights is defined by the leagues' exclusive broadcast territories. Indeed, the primary structural model relied upon by Dr. Noll (C&Y) concluded that the failure to conduct a bargaining analysis for the same vertical supply chain at issue in this case results in completely erroneous results. In addition to ignoring bargaining over feeds and carriage by MVPDs, Dr. Noll's model disregards the reality that MVPDs price their products to consumers to achieve profit margins, thereby assuming away the resulting effect of "double marginalization" on the prices he predicts. And even if, as Plaintiffs claim, a non-bargaining Bertrand model were relevant to this supply chain, it is error for Dr. Noll to apply Bertrand as if RSNs deal directly with customers; RSNs do *not* set the prices for TV products—MVPDs *do*. Nor can Dr. Noll just ignore MVPDs because of the growth in Internet consumers. Dr. Noll ignores the immutable economic principle that, when a firm offers multiple products, the firm will tend to *increase* its prices, not drive its own prices down by pitting one product against the other. Here, Dr. Noll assumes the RSNs and MVPDs each offer multiple products in the BFW.

Third, Dr. Noll's third model (like his prior models) fails the fundamental methodological requirement that an economic model be in "equilibrium"—*i.e.*, that all parties are settled in pursuing their best, profit-maximizing options. Dr. Noll's model is plainly in disequilibrium because, as Dr. Pakes has demonstrated, under Dr. Noll's own data, every team would have an incentive to drop out of the bundle, and all other teams would do better if this occurred. And Dr. Noll has no answer to

Dr. Ordover's showing that it violates economic rationality to assume that the teams and RSNs would continue to provide game feeds to the leagues for free in the BFW, where those identical feeds would be used in direct competition with the RSNs. Dr. Noll's admitted failure to analyze RSNs' (and others') likely profit-*maximizing* options in the BFW is fatal to his model as a matter of basic economics.

Fourth, Dr. Noll's model ignores that, even in the BFW, leagues are comprised of their teams and that a model must account for that lawful joint venture relationship rather than treat leagues and their members as completely independent entities. Dr. Noll offers no rebuttal to Dr. Pakes's economic analysis that the price of the BFW League Package would go up in view of the undisputed profit maximizing incentives arising from the teams' financial interest in sales of the BFW League Package. It is a basic economic principle—acknowledged by the federal antitrust agencies—that ownership interests within a joint venture will affect pricing incentives *even assuming no coordination among the members of the joint venture*. Plaintiffs' argument that Dr. Pakes's and Dr. Ordover's analyses assume a different form of "collusion" is wrong. Defendants' experts assume that the price of the BFW League Package will be set *independently* of any input from the teams. Dr. Noll simply fails to model the *independent* bargaining and pricing incentives of joint venture parties, which have nothing to do with collective action.

Fifth, from the demand side, Dr. Noll's third model remains a fatally flawed model for proving injury and damages. The model demonstrably is still *not* "built upon" real world viewership data, but rather continues to produce nearly the same injury and damages even when materially different data is fed into the model—a critical methodological flaw under *Daubert*. Further, as a matter of logit modeling (a field created by Dr. McFadden), it is not proper to extrapolate demand from an extremely small sample size consisting entirely of atypical consumers (*i.e.*, the avid fans that currently buy the out-of-market packages) in the face of highly segmented and differentiated consumer tastes. Yet Dr. Noll predicts that new customers who do not currently subscribe to out-of-market baseball or hockey packages would enter the market in droves in the BFW. By design, Dr.

Noll chose not to follow industry-standard methodology for collecting useful data about this larger group of would-be consumers (e.g., through the use of surveys).

Finally, in assessing all of these critical methodological flaws under *Daubert*, it matters not whether Dr. Noll is a "sports economist." Dr. Noll offers nothing to support his assumptions about the BFW other than his experience, but even a well-credentialed expert must proffer a reliable *methodology* to support his opinions. *See, e.g.*, *E.E.O.C. v. Bloomberg L.P.*, No. 07 CIV. 8383, 2010 WL 3466370, at *15 (S.D.N.Y. Aug. 31, 2010) ("Merely touting his expertise . . . does not make [him] 'an expert as Rule 702 defines that term.'") (citation omitted). The problems of methodology and fit here are not cured by a background in sports.

ARGUMENT

I. DR. NOLL'S REPLY HIGHLIGHTS THE MISMATCH BETWEEN PLAINTIFFS' THEORY OF LIABILITY AND DR. NOLL'S OPINIONS AND MODEL

In *Comcast*, the Supreme Court was explicit that "at the class-certification stage (as at trial), *any model supporting a 'plaintiff's damages case must be consistent with its liability case*.'" *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (emphasis added) (citation omitted).

Here, Plaintiffs' opposition papers reveal a fundamental disconnect between Dr. Noll's model and Plaintiffs' claims. Plaintiffs allege that each league's territorial system, including in-market blackouts of local teams' games on the league packages, is anticompetitive and illegal. *Laumann* Second Am. Compl. ¶¶ 2, 60-74; *Garber* Second Am. Compl. ¶¶ 2, 84-85. Plaintiffs assert that their challenge to the blackouts is part and parcel of their attack on the territorial restraints they are challenging.[3] (Ex. B, at 1 ("It has always been Plaintiffs' position that the blackouts imposed pursuant to such agreements are unlawful.").) They are seeking an injunction precluding the blackouts. *See* Pls. Pre-Mot. Letter ISO Class Cert., at 1 ("All class members seek the same relief: an injunction ending the [HTT] restrictions *and attendant blackouts*") (emphasis added); Pls.

[3] Attached as Exhibits A & B are Beth Wilkinson's January 8, 2015 letter to Plaintiffs and Ned Diver's January 12, 2015 response.

Mem. ISO Class Cert., at 2 ("In the absence of the challenged restrictions, . . . there would be no artificially protected markets.").

Yet Dr. Noll's third model expressly assumes those challenged blackouts will continue in the BFW. (Noll Reply 16 ("[M]y models assume that blackouts of live game telecasts within a team's home broadcast territory continue.").) When Defendants asked Plaintiffs about this discrepancy, Plaintiffs brushed it aside, declaring that Dr. Noll's model "does not address the in-market distribution question nor assume any answer to it." (Ex. B, at 1.) But Dr. Noll actually claims to solve many of the methodological problems identified by Drs. Pakes and McFadden by leaving in-market blackouts *in place* in his model:

- "[T]he premise of defendants' economic experts that I assume that the leagues will no longer black out local in-market games is false. . . " (Noll Reply 9-10.)
- "The refined model calculates counter-factual prices and market shares . . . by making blackouts explicit. . . . [I]n-market RSNs in each region are removed from [consumers'] choice sets." (Noll Reply 13.)
- "[M]y preliminary analysis did not explicitly take into account how local blackouts restrict viewer choice and demand; however, . . . this refinement has now been accomplished." (Noll Reply 15.)
- "Because my models assume that blackouts of live game telecasts within a team's home broadcast territory continue, none of [Defendants' content exclusivity] arguments are a relevant criticism of my analysis." (Noll Reply 16.)
- Defendants' criticism regarding the free feeds assumption "erroneously assumes that in the counter-factual world league bundles would not black out a team's live game telecasts in the team's home territory." (Noll Reply 16.)

It is no response to say that the model is designed only to determine the overcharge for the subset of Plaintiffs' allegations relating to out-of-market restrictions. Defendants demonstrated that in-market blackouts are essential to maintaining content exclusivity, which provides the incentive for RSNs to produce the broadcasts that form the out-of-market packages. Plaintiffs cannot ask this Court to eliminate those blackouts under the antitrust laws, but then not have their expert model the implications of their theory of antitrust liability. The Supreme Court does not countenance such cherry-picking. *See Comcast*, 131 S. Ct. at 1435. This mismatch renders Dr. Noll's model unreliable and unhelpful to the Court in determining whether members of the putative class have suffered a common injury.

II. DR. NOLL'S FAILURE TO MODEL BARGAINING IN THE BFW VERTICAL SUPPLY CHAIN IS A FUNDAMENTAL METHODOLOGICAL FLAW

In considering what should have been modeled as a matter of methodology or fit, the Court has the benefit of certain critical facts not being in dispute. First, Dr. Noll concedes that, in the BFW, there would be, at a minimum, many months of negotiations between and among all participants in the vertical supply chain, including teams, leagues, RSNs, and MVPDs. (Noll Tr. 360-61.) This includes bargaining over the BFW production of games, the provision of feeds (if any) to the leagues (and at what price) and bargaining between RSNs and MVPDs. As this Court recognized, this bargaining potentially affects not only the prices of the products, but also the terms by which they are packaged and distributed. *See* Summ. J. Op., at 49 & n.163. Second, there is no dispute that MVPDs are distinct businesses in the vertical supply chain and are the entities that price the products to television consumers—with significant margins. (Noll Decl. 44; Pakes Decl. ¶ 3.v; Pakes Reply ¶ 5.)

From a structural-modeling perspective, these facts inform the inquiry as to what methodology is reliable and helpful, and any scientifically legitimate model would need to account for all significant BFW changes in the incentives and bargains between and among teams, leagues, RSNs, and MVPDs. (*See* Pakes Decl. ¶¶ 8, 37, 51-79.) None of these BFW factual issues is in dispute.

A. A Bargaining Model Is Now The Industry Standard For Modeling "But For" RSN/MVPD Negotiations

In the context of these undisputed facts, Plaintiffs' opposition on the subject of bargaining models is devoid of support. To begin, they assert without citation that the use of bargaining models in a vertical supply relationship is the "exception" rather than the standard. (Pls. Opp. at 2.) But Dr. Pakes confirms that the opposite is true for industries, as here, that have multiple intermediaries. As Dr. Pakes explains, "the most directly applicable model is the one described in the C&Y, in which the authors study the strategic interactions between content providers and MVPDs, *exactly the industry and strategic interactions that are at issue in the current case.*" (Pakes Reply ¶ 3 (emphasis added).) Equally specious are Plaintiffs' claims that C&Y is "the only basis for Defendants' assertion that bargaining is necessary" (Pls. Opp. at 12) and that, under C&Y, bargaining between RSNs and MVPDs over sports programming would cause prices to go down. To the contrary, Dr. Pakes explains why bargaining models are necessary for vertical supply chains involving intermediaries (including RSNs and MVPDs) and that a failure to conduct bargaining analysis is methodologically unsound, yielding fundamentally unreliable results. Indeed, C&Y found that bargaining analysis reveals a flip in the expected result from consumer welfare to consumer loss, which is why actually modeling the bargaining, rather than just surmising about what would happen, is essential.[4]

Only by refusing to undertake the necessary bargaining analysis can Dr. Noll assume away Dr. Ordover's showing that the assumption of "free feeds" in the BFW is a fairy tale. Without methodological support, Dr. Noll offers nothing but the irrational assertion that RSNs (or teams), upon entering out-of-market territories in the BFW, would be willing to hand over their game feeds *for free* to the league packages, which would then compete on price against them, using the exact same content. Dr. Noll cannot and does not contest that this model of "competition"—whereby a company gives away its exclusive content to a direct competitor—would significantly affect an RSN's incentives and business model.[5]

Nor can Plaintiffs and Dr. Noll hide behind the *ipse dixit* that RSNs and teams must choose between either accepting the free sharing of feeds for out-of-market broadcasts or no longer offering

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[4] Further, Dr. Noll's argument that C&Y's article shows sports programming prices going down from unbundling (Noll Reply 19, n.20) is contrary to his statement that it is "unknown" if the prices would go down (*id.*), and contrary to the specific disclaimers by C&Y in their article. In fact, a more recent C&Y paper found that sports programming has the exact qualities of "intensity" and "willingness to pay" that C&Y indicates would make prices go *up*, and C&Y confirm that sports is the highest input cost to MVPDs. (Pakes Reply ¶ 10.)

[5] Even Dr. Noll's clarification regarding in-market blackouts does not cure his fundamentally flawed model of "competition," because with respect to out-of-market subscribers, he continues to assume that an RSN would compete against itself by giving away its exclusive content to a direct competitor for free. (*See* Noll Reply 40.)

baseball or hockey altogether. (Noll Tr. 69; 135; 159:12-160:17.) Again, the teams would have an incentive in the BFW to negotiate changes in league rules that are no longer economically sensible, but Dr. Noll neither models nor analyzes those negotiations.[6] He thus ignores the real-world options for the RSNs and teams to *increase their profitability* in the BFW by electing to opt out of the bundle or charge the leagues a positive fee for use of their broadcasts. (*See* Ordover Decl. Part IV.)

In sum, Dr. Noll provides no basis for his "conclu[sion] that a bargaining model is not appropriate here" (Noll Reply 19), especially because he admits that, in the BFW, there would be intensive bargaining among several intermediaries, including RSNs and MVPDs.[7] Dr. Noll cannot escape this problem by asserting that use of a bargaining simulation would be time consuming or difficult. (Noll Tr. 466-67.) *See, e.g.*, *Diehl v. Xerox Corp.*, 933 F. Supp. 1157, 1169 (W.D.N.Y. 1996) (an expert must "exhaust[] the analytical tools at her disposal" and cannot "simply conclude[]" that a particular econometric model is unnecessary, regardless of whether such analysis "might have been difficult").

Finally, this is not just a television issue (as Plaintiffs maintain): a proper model would also have to account for the BFW incentives and likely conduct of teams and RSNs as it relates to

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6 It is important to note that the free sharing of feeds with MLB for use in the league packages is premised on the League and the teams being able to ensure that RSNs retain content exclusivity, such that the league packages do not use the RSNs' own feeds in direct competition against them. (*See, e.g.*, MLB0432164 at 228, MLB Local Telecast Regulations § 2 ([redacted] The agreements relating to the creation and sale of the league packages, which provide for use of the free feeds in those packages, are approved by the teams. (*See, e.g.*, MLB0349171 at 185 & 221 (Agreement between the Office of the Commissioner of Baseball, as agent for the Major League Baseball Clubs, and DIRECTV, Inc., dated April 4, 2007).)

7 Although Dr. Noll purports to rely on "models that have been published in leading peer-reviewed economic journals" (Noll Reply 3), omitting the bargaining model used by C&Y and substituting a Bertrand simulation without foundation itself renders his analysis unreliable. *See, e.g.*, *Elcock v. Kmart Corp.*, 233 F.3d 734, 748-49 (3d Cir. 2000) (rejecting expert's unprecedented "hodgepodge" approach of combining factors from two different methodologies).

distributing programming over the Internet.[8] Pricing simultaneous offerings, such as television and Internet products, is known as "multi-product" pricing, as to which there is universal agreement among economists that prices are driven *up*; more importantly, this, too, is a necessary subject of modeling for the BFW distribution of sports programming. (Pakes Reply ¶¶ 6, 23.) Dr. Noll's model, however, fails to account for multi-product pricing not only in the prices set by RSNs, but also in the prices set by MVPDs, which also offer multiple products in the BFW. (*Id.*) Although Dr. Noll recognizes that the BFW would involve significant changes in the incentives of practically all parties in the vertical supply chain (*see, e.g.*, Noll Tr. 184:8; 398:12-21), he does not even address the resulting implications for modeling offerings on television or the Internet.

B. Even If Bertrand Simulation Were Acceptable, MVPDs Cannot Be Ignored

Dr. Noll incorrectly asserts (or assumes) that use of a Bertrand model can avoid the economic reality of "double marginalization"—a term referring to the fact that independent businesses in vertical supply relationships *each* set a price to earn a profit (first, the RSNs' or teams' prices to MVPDs,[9] and then the MVPDs' prices to consumers). The phenomenon of double marginalization was taken into account in the C&Y model, which recognized that margins would be earned by both cable channels and MVPDs. As Dr. Pakes explains, where such vertical relationships exist, it is fundamental and *required* to model the profit margin that would be earned at each level of the supply chain in order to predict ultimate prices to consumers. (*See* Pakes Reply ¶¶ 15-16.)

Plaintiffs cannot justify Dr. Noll's failure to model double marginalization. First, they assert that double marginalization is a "problem" for consumers—a point that, even if accepted, underscores the need for it to be *modeled* to accurately analyze consumer prices. (Pls. Opp. at 13.) Second, Plaintiffs concoct a theory of joint profit maximization by RSNs and MVPDs, claiming that

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[8] It is undisputed that RSNs make most of their money from MVPD carriage fees, and Dr. Noll offers no model or analysis explaining why RSNs would jeopardize those revenues by offering their programming over the Internet in price competition with MVPDs' offerings of their broadcasts.

[9] To the extent that Dr. Noll now assumes that teams may sell game feeds directly to MVPDs or Internet streaming services (Noll Reply 18), that is yet another new, unproven business model that, like the rest of his analysis, is untethered to real-world practices.

Dr. Noll's model somehow reflects "the parties' intent" to avoid double marginalization. (*Id.*) But Plaintiffs cite nothing in support of that argument, and not a single term, equation, or variable in Dr. Noll's model speaks to this mysterious "joint maximization" theory Plaintiffs now posit. The undisputed facts are that, in the actual world, RSNs and MVPDs contract on a per-subscriber basis (*i.e.*, there is double marginalization in the industry). Such a business model accomplishes the economic goals of both parties, including providing MVPDs pricing control and the opportunity to obtain their own margins. This is a business practice that would not change at all in the BFW, as the exact same economic incentives would still exist. (*See* Pakes Reply ¶¶ 15-16.) Because Dr. Noll's model ignores the MVPDs and their profit-maximizing incentives altogether, the model lacks "fit" with market reality. (*See* Pakes Reply ¶¶ 12-16); *see also In re Fresh Del Monte Pineapples Antitrust Litig.*, No. 04-MD-1628RMBMHD, 2009 WL 3241401, at *16 (S.D.N.Y. Sept. 30, 2009) (excluding expert who testified that he "performed 'a reasoned economic analysis,'" but "failed sufficiently to explain what this 'reasoned economic analysis' entailed and how it was applied to the facts").

C. Dr. Noll Has Not Fixed the Disequilibrium in His Model and Maintains the Unsupportable Assumption that RSNs Will Not Maximize Profits in the BFW

Dr. Noll's third model also fails to address one of Dr. Pakes's most fundamental criticisms—that Dr. Noll violates basic economic principles of modeling market behavior by failing to identify an "equilibrium"—*i.e.*, a "resting point" where each agent will go forward with the assumed model because, given the actions of the other agents, each agent's *profits are maximized*. Dr. Noll instead simply inquires whether, under his model, each agent would settle for attaining a "non-zero" level of profitability even if they could engage in other, more profitable actions. Absent that rationalization, Dr. Noll's primary response to this BFW state of disequilibrium is to suggest that the actual world is in disequilibrium, claiming the Yankees currently have an incentive to deviate from the package but cannot because of League rules. (Noll Reply 45-46.) Critically, however, Dr. Noll ignores that in the actual world (according to his own data) if the Yankees deviated, *every other team would be worse off*. (Pakes Reply ¶ 20.) By contrast, in the BFW that Dr. Noll posits, if the

Yankees deviated, *every team (but one) would be better off*. (*Id.*) The actual world is definitely in equilibrium, whereas Dr. Noll's BFW is manifestly out of equilibrium, and thus is fundamentally unreliable.

Moreover, Plaintiffs are equally mistaken in their argument that, because Dr. Noll now holds constant RSNs' in-market game exclusivity from blackouts, *see infra* Part I, he need not model the RSNs' renegotiations of their contractual relationships with teams, the leagues (through the teams), and MVPDs, including negotiations over the critical issue of whether and under what circumstances RSNs would provide feeds to the leagues at all. (Pls. Opp. at 13-14.) Dr. Noll maintains this state of suspended animation despite asserting that each RSN's relationship both with the leagues (including providing the OMP feeds for free) and with its counterparty team (including the payment of rights fees) is dependent on the existence of the current territorial rules. (Noll Tr. 59:8-61:23.) ("[Y]ou can't separate all the components."). His position is that, whatever the outcomes of the inevitable bargains that would be negotiated in the BFW (which he does not model), they will still result in "positive revenues" for RSNs and teams. (*Id.* at 75-76.) This only highlights the serious degree of disequilibrium within his model; there is no analysis at all of what course of action would be *most* profitable for RSNs (or their affiliated teams) in a BFW without HTTs. (*See* Pakes Reply ¶¶ 17-20.) These modeling defects violate the Second Circuit's "critical" requirement that "an expert's analysis be reliable at every step," and "'*any* step that renders the [expert's] analysis unreliable under the *Daubert* factors *renders the expert's testimony inadmissible*.'" *Amorgianos* v. *Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994)) (emphasis in original).

III. STANDARD MODELING OF COMPETITION BETWEEN A JOINT VENTURE AND ITS MEMBERS CAPTURES PRICING EFFECTS BASED ON THE UNILATERAL INCENTIVES OF THE ACTORS, NOT COORDINATION

Finally, Plaintiffs have no answer to Dr. Pakes's and Dr. Ordover's findings that BFW prices would actually *increase* based on a standard modeling of a joint venture that is presumed to be competing with members who continue to share in the joint venture's profits from that competition. Plaintiffs' and Dr. Noll's primary response is that Drs. Ordover's and Pakes's analyses replace one form of collusion with another. (*See* Pls. Opp. at 16; Noll Reply 11, 44.) Not so. No part of Dr. Pakes's model requires or even suggests any coordination between the teams and the decision maker who sets the price of the BFW League Package. (Pakes Reply ¶ 24.) Rather, Dr. Pakes is pointing out *uncontested* economic principles that would result in higher prices for the two products in the absence of any collusion.

Here, Plaintiffs and Dr. Noll simply flout standard economic modeling principles for assessing competitive entities that share profits within a legitimate ownership or venture relationship. Indeed, economists and the antitrust agencies have for many years explained in detail why such entities—*without coordination or collusion*—have a *unilateral* incentive to take into account the effect on the related party when setting price. Such "unilateral effects" analysis is the theoretical premise of scrutinizing minority investments in competitors or competition within joint ventures, even if firewalls are in place to ensure that pricing processes remain unilateral. *Cf.* DOJ and FTC Horizontal Merger Guidelines §§ 6, 13 (2010) ("Acquiring a minority position in a rival might significantly blunt the incentive of the acquiring firm to compete aggressively because it shares in the losses thereby inflicted on that rival"). In fact, applying those principles to the case at hand, Dr. Ordover concluded that each and every team's *unilateral* pricing incentives would either raise prices or destroy the profitability of the league package, and thus create winners and losers among a class divided into purchasers of single- or multiple-team packages. (*See* Ordover Decl. Part IV.) But by modeling the competition between the league packages and individual team packages as if they were completely independent competitors, Dr. Noll has ignored these well-recognized principles—again, a clear example of Dr. Noll's model not fitting the industry standard.

IV. FROM THE DEMAND SIDE, DR. NOLL'S THIRD MODEL CONTAINS FATAL FLAWS IN HOW IT PURPORTS TO MEASURE CONSUMER DEMAND

A. Dr. Noll's Model Is Not "Built Upon" Viewership Data

In his initial report, Dr. McFadden tested whether Dr. Noll's second model was based on viewership demand (as Dr. Noll claims) and demonstrated that it was not. Dr. McFadden substituted data reflecting dramatically different viewership patterns to see if the model produced the results that would be expected given the changes. Dr. McFadden found that Dr. Noll's model failed this elementary "falsifiability" test[10] because the prices predicted by Dr. Noll's model did not change in the manner that would be expected and, in fact, hardly changed at all. Dr. Noll protests that "no purpose is served" by Dr. McFadden's experiment. (Noll Reply 52.) Yet it is exactly the type of scientific testing required by *Daubert*:

> ***"Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry."*** (citations omitted); K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 37 (5th ed. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability.").

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593 (1993) (emphasis added). Despite Dr. Noll making a number of changes specifically aimed at passing the tests in Dr. McFadden's original declaration, he has not actually fixed the underlying methodological flaws that caused these problems. Indeed, the model still fails simple reliability tests.

Most starkly, Dr. Noll's model still produces the same damages when viewership intensity—which is supposed to be a critical parameter in Dr. Noll's model—is reduced by 50%. (McFadden Reply ¶¶ 8-9.) This is because Dr. Noll's impact and damages are driven primarily by simple market share extrapolations (themselves flawed) and marginal cost figures, rather than the actual viewership data as Dr. Noll claims. (*Id.*¶ 7.)

Further, Dr. Noll's efforts to jerry-rig his model to pass Dr. McFadden's earlier tests have simply created new problems. Specifically, to address Dr. McFadden's "Super Fan" experiment, Dr. Noll now divides all consumers into one of three buckets: (i) someone who prefers to watch only a single RSN, (ii) someone who prefers to watch two RSNs, and (iii) someone who prefers to watch multiple RSNs. But, as Dr. McFadden demonstrates, *Dr. Noll's third model completely discards the data regarding consumers' actual viewership habits*, instead artificially dictating that each consumer's viewing habits conform precisely to the bucket to which he or she is assigned.

[10] "Falsifiability" means that a model or experiment must be capable of producing a contrary result (here, no impact or damages) if the underlying facts or data would dictate such a result.

Thus, the model assumes that consumers who are assigned to the single RSN bucket have no desire to watch any other RSN, and the model "zeroes out" any utility they receive from other RSNs. The disconnect to actual viewership data is easily demonstrated. By assigning [redacted] of consumers to the single-RSN bucket and [redacted] of consumers to the two-RSN bucket, Dr. Noll's model dictates that only [redacted] of consumers would view more than two RSNs if given the option—even though [redacted] of viewers in Dr. Noll's actual data have watched more than two RSNs. (*Id.* ¶¶ 13-16.) Further, by assuming the vast majority of consumers derive value from only one or two RSNs in the league bundle and zeroing out the conflicting data, Dr. Noll devalues the league bundle in his model and, as a result, understates its BFW price. (*Id.* ¶ 17.) There is no sound methodological justification for discarding or "zeroing out" the very data he is supposed to be using. (*Id.*) As Dr. McFadden explains, Dr. Noll should have matched the proportion of consumers he predicts to watch each RSN to the actual data—which is exactly what was done in the C&Y paper. (*Id.* ¶ 20.)

B. Dr. Noll's Model Improperly Extrapolates "But For" Demand from a Small and Non-Representative Sample

It is undisputed that Dr. Noll uses data from only the small percentage of baseball and hockey fans who have purchased out-of-market packages. (*See* McFadden Decl. ¶¶ 25, 27, 38.) He admits that these most avid fans represent only a few percent of baseball and hockey fans. He then uses this data to extrapolate the demand of all baseball and hockey fans, including fans at the opposite end of the intensity spectrum who watch nothing more than the World Series or Stanley Cup Finals. As Dr. McFadden explained in his original declaration, this serious methodological flaw dramatically overestimates demand for the products at issue. (*Id.* ¶ 11.)

The fact that Dr. Noll now assumes blackouts would remain in place in the BFW League Packages does not somehow cure this fundamental flaw,[11] but instead reveals yet another

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[11] Dr. Noll still predicts purchasing decisions of fans for whom he has no data and who demonstrably have very different preferences from the few fans for whom he has data. This remains a fundamental methodological flaw. (*See* McFadden Reply ¶ 24); *Fishman Transducers, Inc. v. Paul*, 684 F.3d 187, 195 (1st Cir. 2012) (excluding expert who failed to undertake "difficult, time-consuming and expensive efforts" to obtain "direct testimony from customers, [or]
(cont'd)

fundamental defect. In calculating market shares, Dr. Noll is using the average number of viewers of the Stanley Cup Finals and World Series to calculate the size of the relevant markets (*i.e.*, the denominators in his market share equations). That includes ***100%*** of consumers who have any interest in the sports, regardless of whether they live in the market of their favorite team. As a result, because Dr. Noll now reveals that he is attempting to model only out-of-market demand, he dramatically overestimates the size of the market. Indeed, in ordinary course business documents relied on by Dr. Noll, DirecTV estimated that only [redacted] of its subscribers who are baseball fans are fans of an out-of-market team. (McFadden Reply ¶ 29.)

Simply put, Dr. Noll's predictions are not scientifically reliable because he has dramatically exaggerated the size of the potential market and then effectively assumed that 25% of that inflated market would purchase an Internet product. He further assumes, without support, that these new viewers would have preferences that are the same as the 3.6% of viewers that purchased an Internet product in the actual world. Legitimate science, however, would require an assessment of the taste profiles of the potential new consumers—work that Dr. Noll could have done but chose not to do. (*See* McFadden Dep. 90; 100-101.)[12]

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Although each of Dr. Noll's methodological flaws is an independent basis for his exclusion, even if "each methodological flaw, standing alone, may not mandate exclusion, . . . the cumulative effect of the methodological flaws . . . so diminishes the reliability and probative value . . . that . . . exclusion is warranted." *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 574 (S.D.N.Y. 2007) (Scheindlin, J.).

(cont'd from previous page)
market research surveys of [product] purchasers as to their reasons for purchases" since, without them, "[the expert's] report was merely a basis for jury speculation").

[12] As reflected in his Reply Declaration, Dr. McFadden's analysis confirms that Dr. Noll's third model also contains several other fundamental flaws. Dr. Ordover has also concluded that Dr. Noll's third model is seriously flawed and does not affect any of his principal opinions. Drs. Pakes, McFadden and Ordover are prepared to address these issues at the scheduled hearing.

CONCLUSION

For the foregoing reasons, Dr. Noll's model and opinions should be ruled inadmissible under Rule 702 and excluded from the Court's consideration of Plaintiffs' motion for class certification.

Dated: January 16, 2015

Respectfully submitted,

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January 8, 2015

By Email

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Re: *Garber* v. *Office of the Commissioner of Baseball*, No. 12-cv-3704
Laumann v. *National Hockey League*, No. 12-cv-1817

Dear Sirs:

We write on behalf of all Defendants to seek clarification of the nature and extent of the relief requested by Plaintiffs in the above-captioned actions.

Plaintiffs' complaints in both the *Garber* and *Laumann* actions challenge Major League Baseball's and the National Hockey League's home television territory ("HTT") restrictions, including blackouts of both the home and away club feeds of a club's game within its HTT. The complaints further seek an injunction that would, according to Plaintiffs, lead to individual clubs being able to license the broadcast and streaming of games nationwide without regard to HTTs, such that those games would be available both in-market and out-of-market from multiple sources on both television and the Internet.[1] Likewise, Plaintiffs' pre-motion letter and briefing to the Court on class certification state that the class seeks to end *all* blackouts (Pls. Pre-Mot. Letter ISO Class Cert., at 1 ("All class members seek the same relief· an injunction ending the [HTT] restrictions and *attendant blackouts* . . . ."); Pls. Mem. ISO Class Cert., at 2 ("In the absence of the challenged restrictions, there would be no such thing as an 'out-of-market' game, because there would be no artificially protected markets to be 'out of ' Class members in all locations would have access to single-club programming, without regard to location, both on the Internet and television."); *id* at 3 (asserting that clubs would offer, in the but-for world, "nationwide telecasts of live games").) Finally, until recently, Dr. Noll's model was described as reflecting a but-for world that includes no in-market blackouts. (*See, e g* , Pls. Mem. ISO Class Cert., at 16 n.10 ("Professor Noll calculated the price of a complete package of games. That is, of course, an improvement on what plaintiffs actually received, which was a compromised version subject to blackouts.").)

Dr. Noll's most recent declaration, however, describes his prior and current models as assuming that the previously challenged in-market blackouts remain intact in the but-for world. He states, for example:

> My analysis assumes that RSNs would enjoy the same "content exclusivity" in the counter-factual world that they currently enjoy, which is to be <u>the only source of in-market live telecasts of games</u> involving the team for which they have acquired exclusive television rights within the team's home territory.

(Noll Reply Decl., at 16-17 (emphasis added).)[2] Dr. Noll's latest model thus does not purport to disturb any aspect of the RSN's current exclusive rights to broadcast within its

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1 *See, e g* , *Laumann* Dkt 87, 2d Am Compl ¶ 14 ("Plaintiff Thomas Laumann would prefer not to have to subscribe to pay television to be able to watch New York Islanders games involving [local clubs], which are blacked out "), *id* ¶ 17 ("Plaintiff David Dillon is unable to watch any [local-team] games through the NHL Gamecenter Live package "), *id* ¶¶ 72-73 ("[S]ubjecting the viewer to local blackouts" is an "express restriction[] on competition "), *id* ¶ 102 ("Plaintiffs have been prevented from obtaining games involving a local team from any source other than the team's RSN "), *Garber* Dkt 177, 2d Am Compl ¶ 17 ("Plaintiff Marc Lerner would prefer not to have to subscribe to pay television to be able to watch New York Yankees games involving [local clubs] "), *id* ¶ 92 ("[P]rovid[ing] in-market streams, but only to consumers who already subscribe to the [local RSN] serve[s] to prevent any competitive effects "), *id* ¶ 95 ("[A]ll MLB Extra Innings games involving a team whose exclusive territory encompasses the viewer's location are blacked out to protect the local network from competition "), *id* ¶ 111 ("Plaintiffs have been prevented from obtaining games involving a local team from any source other than the team's RSN ")

2 *See also* Noll Reply Decl at 14-15 ("The model does not estimate prices and market shares of in-market live game telecasts, but assumes that subscribers to league bundles currently and in the counter-factual world can access these <u>games only through in-market RSNs</u>"), *id* at 11 ("[D]efendants' economic experts incorrectly assert that my counter-factual analysis assumes that league bundles would not <u>black out in-market games</u> "), *id* at 16 n 16 ("In the counter-factual world an RSN would

HTT the *games* played by the RSN's affiliated club—that is, except for situations involving overlapping HTTs (as when the Mets play the Yankees), no other RSN nor the League Packages (nor any other source not licensed by the in-market club) can broadcast a club's games in that club's HTT.

Plaintiffs' Reply Brief also indicates that some blackouts would remain in the but-for world they seek, but describes those remaining blackouts differently than Dr. Noll does. The Reply Brief states, for example, that RSNs would *not* have (as they currently do) "exclusive control over distribution of a particular [club's] game[s]" within its HTT—what Plaintiffs call "game exclusivity"—and would instead have only the exclusive right to broadcast its own feeds of those games. (Pls. Reply Br. ISO Class Cert., at 11 & n.12.)

These statements are inconsistent with one another and with the relief Plaintiffs have previously indicated they are seeking. It is essential for Defendants and the Court to understand what relief Plaintiffs seek and purport to have modeled. We therefore request that you clarify, as soon as possible, whether and to what extent Plaintiffs no longer challenge the existence of in-market blackouts. To that end, please confirm whether, in the but-for world, Plaintiffs retain the following blackouts:

- The blackout in the League Packages (television and Internet), of both the home and away clubs' feeds within the HTTs of both clubs participating in a game.

- In any individual club-licensed telecast or Internet stream of a game, the blackout of the game in the HTT of the opposing club participating in the game.

In other words, in the but-for world that Plaintiffs envision, within a club's own market, can that club license full "game exclusivity" to an RSN or other telecast or streaming partner for its games (again, except for situations involving overlapping HTTs)? Or can that club license only "feed exclusivity"?

It may be easiest to clarify these issues by way of example. Thus, if the relief Plaintiffs are now seeking were granted, when the Braves play the Yankees:

- Would the League Packages available to viewers in New York black out the feed produced by YES Network (for the Yankees)?

- Would the League Packages available to viewers in New York black out the feed produced by Fox Sports South (for the Braves)?

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acquire *team exclusivity* in a team's home territory," meaning "exclusive rights to telecast games involving a particular team.") (underlined emphases added).

- Would the Fox Sports South game feed, as available to viewers independent from the League Packages, be blacked out in New York?

- Would any other telecast or stream of that game not licensed individually by the Yankees (whether licensed to YES or some other network/streaming service) be blacked out in New York?

In view of the upcoming deadlines for *Daubert* briefing, we ask that you provide your response no later than this Monday, January 12, 2015.

Best regards,

Beth A. Wilkinson

Cc (by email): All counsel of record

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January 12, 2015

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Re: *Laumann, et al. v. National Hockey League, et al.*, 12-cv-1817 (SAS)
Garber, et al. v. Office of the Commissioner of Baseball, et al., 12-cv-3704 (SAS)

Dear Ms. Wilkinson:

There is no inconsistency. Plaintiffs are challenging the horizontal restraints that prevent clubs and RSNs from distributing their products nationwide. Defendants have implemented these restraints in the form of unlawful blackouts. It has always been Plaintiffs' position that the blackouts imposed pursuant to such agreements are unlawful. Plaintiffs do not, however, challenge the unilateral decisions of a single club as to how to license its own broadcasts.

Defendants conflate three different issues: what practices are illegal, what particular broadcast decisions would be made by the parties in a competitive market, and what Dr. Noll has modeled. First, Defendants confuse the question of what Defendants may not agree to do *jointly* with the counterfactual question of what each Defendant would choose to do *unilaterally* in the absence of the challenged agreements. Defendants' opposition to class certification is premised on a prediction about what the parties would independently choose to do in the absence of the restraints—in particular, that the clubs and/or RSNs would choose to maintain "content exclusivity" within their local territories. Plaintiffs believe that Defendants have employed a muddled notion of "content exclusivity" and that the removal of the challenged restraints would result in the broader, nationwide availability of all currently available content on both the Internet and television. Plaintiffs agree with Mr. Bowman that "[over-the-top] services can be compatible with MVPD distribution of the same content." Bowman Decl. ¶ 14. Absent the restraints, it is likely that the clubs would allow league-wide packages to broadcast their own games into their home markets.

Professor Noll's damages model, however, does not address the in-market distribution question nor assume any answer to it. The model is designed to determine the overcharge that Plaintiffs incurred by determining what they should have paid for the products they *actually* *purchased*—which included only out-of-market games. For this purpose, it does not matter whether or not individual teams would maintain local content exclusivity through their RSNs. Accordingly, as Plaintiffs have made clear, Dr. Noll's damages model determines the overcharge for non-local broadcasts and "takes no position" on whether a local team's broadcasts would be available in league-wide packages in the absence of the restraints.[1] Br. at 12.

None of this is new. At his deposition, Defense counsel repeatedly asked Professor Noll about the application of his damages model to local broadcasts, and he repeatedly testified that the model is not intended to address that issue. *See, e.g.*, Noll Tr. 526 (stating that "whether they actually carry the in-market stuff or not is irrelevant"); *see also id.* at 453-54, 502-05.

It is neither necessary nor possible to predict every detail of a world without the unlawful restraints at issue here. Suffice it to say, individual clubs may, in general, lawfully make exclusive arrangements for the particular content they own and control, and there is no reason to expect that the clubs would change their current practice of arranging for telecasts by both teams, each of which would likely provide for distribution nationwide. *See, e.g.*, Noll Decl. 114. The relief Plaintiffs request, however, does not require an answer to every question about what the parties would choose to do in a competitive market. Plaintiffs seek to remove the anticompetitive restraints and to obtain compensation for the overcharges on the products Plaintiffs purchased.

Respectfully,

Ned Diver

cc: All counsel (by email)

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[1] While his initial model did not expressly exclude local-team broadcasts and was, therefore, a model of "a complete package of games," it was still a model of prices of non-local games, because it was based on supply and demand data for each of the teams' games out-of-market. That assumption was also, as the language Defendants quote from Plaintiffs' brief makes clear, a conservative one insofar as any blackouts make the packages *less* valuable to consumers, which lowers the amount of money they would be willing to pay for them. Thus, a modeled package with no blackouts would be expected to result in a higher benchmark price, reducing damages.