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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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3 THOMAS LAUMANN, ROBERT SILVER,
4 GARRETT TRAUB, and DAVID DILLON,
representing themselves and all
others similarly situated,

5 Plaintiffs,

6 v.

12 CV 1817(SAS)

7 NATIONAL HOCKEY LEAGUE, et al.,

8 Defendants.

9 -----x
10 FERNANDA GARBER, MARC LERNER,
11 DEREK RASMUSSEN, ROBERT SILVER,
GARRETT TRAUB, and PETER HERMAN,
representing themselves and all
others similarly situated,

12 Plaintiffs,

13 v.

12 CV 3704(SAS)

14 OFFICE OF THE COMMISSIONER OF
15 BASEBALL, et al.,

16 Defendants.

17 New York, N.Y.
18 March 18, 2015
10:00 a.m.

19 Before:

20 HON. SHIRA A. SCHEINDLIN,

District Judge

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1 (In open court)

2 THE COURT: Are we ready for the first witness?

3 MR. BURKE: Good morning. Art Burke for the
4 defendants. We call Professor Janusz Ordover.

5 THE COURT: Remain standing.

6 (Witness sworn)

7 JANUSZ A. ORDOVER,

8 called as a witness by the Defendants,

9 having been duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. BURKE:

12 Q. Good morning, Dr. Ordover. I understand that you have
13 prepared some slides to help us today with your presentation,
14 so I'm going to refer to those, if that makes sense to you.

15 A. Yes. Of course.

16 Q. So just to start off today, Dr. Ordover, what was the
17 assignment that you undertook in connection with this matter?

18 A. I have two main assignments: The first one was to assess
19 the competitive effects of the lifting of territorial
20 restraints or restrictions that the plaintiffs are asking for;
21 and the second set of conclusions analysis focused on Dr.
22 Noll's claims about these effects.

23 Q. And what was your conclusion with respect to the first
24 assignment concerning the evaluation of the plaintiffs' relief?

25 A. The first conclusion was that the lifting of the

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1 territorial restrictions or restraints will result in what have
2 now been referred to as winners and losers. The winners of
3 doing -- lifting that will be individuals that have a strong
4 interest in potentially just watching one team, whatever team
5 it might be, and just to remind everybody, I'm talking about
6 out-of-market teams because many of these viewers, of course,
7 watch their home team as well. So the lifting of the restraint
8 will enable these viewers to buy a single-team feed potentially
9 everywhere in the United States and watch them as opposed to
10 buying the whole package.

11 And who are going to be the losers, potential losers,
12 those are going to be the viewers whose viewing patterns are
13 much more diverse, who, during the course of the season, watch
14 more than -- spend most of their time on more than one team,
15 and these people would purchase the package. And it's my
16 conclusion that in the but-for-world that I have analyzed, the
17 package may either not exist or would be more expensive.

18 Q. And what was your conclusion with respect to the second
19 assignment that you undertook?

20 A. My overarching conclusion in that respect was that the
21 various models that Dr. Noll advanced during this case are all
22 flawed in a variety of ways or different ways and therefore
23 that the analysis and his conclusions that are stemming from
24 these models are also unreliable.

25 Q. Dr. Ordover, I'd like to direct your attention to the slide

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1 before you and ask you what significance this analysis has with
2 respect to your conclusion that there will be winners and
3 losers in the but-for-world?

4 A. Well, the emergence of winners and losers arises in part
5 from the fact that people's viewing preferences are
6 differentiated, potentially highly differentiated. There are
7 people, who, as I said, concentrate most of their viewing on
8 one out-of-market team, but there are also viewers who spend a
9 lot of viewing time on five or six or more teams. So I divided
10 these pizzas here into three segments, each of which captures
11 the viewing behavior of different types of viewers. Those are
12 actually viewing behaviors that I have observed or we can
13 observe in the data.

14 As you can see, when you look at, for example, NHL
15 Internet, your Honor, we see that 23 percent of the Internet
16 viewers of NHL program spend a good chunk, actually 90 percent
17 of their time or 90 percent of their views on just one team.
18 So that's just a definition. One can use 95 percent, or I
19 could use 85 percent. It doesn't really make any difference.
20 I look at sensitivity of those numbers with respect to changing
21 the threshold, but nothing much changes.

22 So you see that for MLB.tv 90 percent of the
23 subscribers spend 90 percent of their viewing on -- devoted 90
24 percent of their viewing to just one team and the rest
25 obviously maybe on some other numbers of team, but I don't know

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1 about that.

2 At the same time, on the other extreme we have
3 substantial chunks of individuals of their 45 percent for the
4 NHL and 44 percent for MLB who reached the 90 percent of their
5 viewing but by watching a large number of teams, actually six
6 or more teams.

7 Q. And who are the winners and who are the losers in your
8 but-for-world, Dr. Ordover?

9 A. Well, as I already mentioned, the winners are likely to be
10 the people in the blue, I think it's blue, slides of those
11 disks, pizza pies. Why is that? Because as I said, they are
12 going to have open an option now which they did not have
13 heretofore and that is to instead of watching -- buying a
14 package in order to watch their most favorite team, they will
15 simply be able to buy that team through a single RSN in those
16 geographic areas in which the team actually will be available.

17 And the losers are going to be the folks in the green
18 portion. They are the ones who are going to be -- who are
19 buying -- watching at the moment a large number of teams and if
20 the package is not available, they're likely to be the losers.
21 And I also showed that in the but-for-world, the package is
22 likely to be more expensive and therefore if they stay with the
23 package, they will pay more than they otherwise would.

24 Q. So you spent some time in your report talking about the
25 concept of content exclusivity, and I think you opined that Dr.

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1 Noll's but-for-world is inconsistent with content exclusivity.

2 Can you explain what you mean by content exclusivity, please?

3 A. Yes, I think I prepared a slide that summarizes my views,
4 three aspects in bullet points. To me, from the standpoint of
5 the definitional aspect of it, which I think is agreed,
6 commonly agreed, when it comes to not only content but to all
7 kinds of property rights, exclusivity exists when a single
8 owner controls the licensing of its content for distribution.

9 So the idea of being -- that we have a single entity,
10 which actually may be representing a number of entities, but
11 there's a single entity that makes what I would call three key
12 business decisions. First of all, to whom to license. I
13 should have said "to whom" as opposed "to who." Forgive me,
14 your Honor, for that. It's my third language. The second
15 point being how much, so that that controller will set the fee
16 for access to content. And then there would be also other
17 terms in the contractual relationship, and there may be many of
18 those terms, and we already discussed some yesterday, such as
19 including territorial limitations, output in sourcing, so on
20 and so forth.

21 Q. Is content exclusivity incompatible with selling content to
22 the multiple distribution channels?

23 A. Not at all. I think the fact is that many owners of
24 content or controllers of content will, for profit-maximizing
25 reasons, distribute the content through a variety of channels;

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1 they get the benefit of doing so and they do so as long as this
2 is a profitable strategy. So we see multiple channel
3 distribution of content in many industries in the United States
4 and worldwide.

5 Now, I actually make the last point here which maybe I
6 should mention because I believe that it's actually critical to
7 match up with what I've been doing, and that is, that given the
8 value of content and how it can contribute to the firm's
9 profits, it makes no economic sense or business sense to
10 license such a valuable content to a competitor, that is to a
11 firm, that will implement that content and turn around and
12 compete with the licensor.

13 THE COURT: Who is the competitor in this example?

14 THE WITNESS: Well, this is fairly general statement.

15 THE COURT: I know, but in our scenario, who is the
16 competitor?

17 THE WITNESS: In our scenario, your Honor, the
18 competitor will be the league --

19 THE COURT: Right.

20 THE WITNESS: -- which obtains the content from the
21 teams.

22 THE COURT: Right. So it's not a typical competitor
23 because the content controller is going to get some money back
24 from that -- from any sale, right? 1/30th the league will
25 share, right?

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1 THE WITNESS: Excellent question, but it does not go
2 to the heart of the issue. The league will share that is
3 delivered to the owner of the content is a part of the
4 arrangement that the teams have with the league.

5 THE COURT: That's right, but you're going to get some
6 money back.

7 THE WITNESS: Yes.

8 THE COURT: Usually your competitor doesn't pay you
9 money.

10 THE WITNESS: Well, the fact that I get 1/30th is
11 potentially a drop in the bucket.

12 THE COURT: That may be, but usually a competitor
13 doesn't pay their competitor, do they? Typically?

14 THE WITNESS: Typically, I don't know what's typical
15 or not, but I'm saying you're a hundred percent right that in
16 this case, this issue of the fee -- of the profits of the
17 league coming to the teams as a distribution of the league
18 profit.

19 THE COURT: Right, and I'm still saying, I don't know
20 why you don't agree, that typically competitors don't pay each
21 other. They compete, and they don't pay each other.

22 THE WITNESS: That's true, they do compete, and the
23 issue of the fee is separate from that distribution component.
24 I think I'll come back to it at some point.

25 THE COURT: It's atypical competitor who actually

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1 gives money back to the controller?

2 THE WITNESS: It is atypical in that sense, but in
3 many other senses, it is highly typical because it does divert
4 business from the league, from the team.

5 THE COURT: Yes, it does.

6 THE WITNESS: That's what I'm looking at.

7 THE COURT: Yes and no because the team gets 1/30th
8 back. So they get something back.

9 THE WITNESS: Yes.

10 THE COURT: We can move on.

11 MR. BURKE: We'll have some additional questions on
12 precisely this issue, your Honor.

13 Q. Dr. Ordover, is content exclusivity prevalent in media
14 industries?

15 A. Yes. I have looked at a number of media industries for a
16 variety of issues, but content exclusivity is quite pervasive
17 across the media industries.

18 Q. Any examples that come to mind?

19 A. Well, I like to use books, for example, as an easy
20 understandable case in which the -- a particular book author
21 will sell the rights to the manuscript to a single publisher
22 and the publisher will then sell the books through a variety of
23 distribution channels via the brick and mortar stores such as
24 Barnes & Noble, the few that still exist, we go to the Amazon
25 and so on. So the world is now -- so the book rights are in

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1 the hands of the publisher. The publisher pays upstream to the
2 author, and the publisher then distributes the content. But it
3 is not the case that the same book will be owned by more than
4 just one publisher. That will just make no sense from the
5 economic perspective.

6 Q. So turning to the industrial at hand, Dr. Ordover, how is
7 content exclusivity maintained in the real world currently?

8 A. Well, I think your Honor may have seen this version of this
9 slide already yesterday but what it says is the following: I
10 have divided the world as it's divided in this case into
11 territories that are called in-market or home television
12 territories and out-of-market. And the competitive
13 environments in-market and out-of-market are different.

14 In-market, the team/RSN has the sole control over how
15 to distribute the content. It goes through MVPDs and then
16 MVPDs sell their programming down to folks like you and I, but
17 you and I don't watch sports.

18 THE COURT: Right. I figured that.

19 THE WITNESS: Sorry about that. Okay. That
20 transparent?

21 THE COURT: Yes, was that transparent. Three
22 languages told me the whole story.

23 A. The free feed which is the feed that actually team and RSN
24 have in the in-market, they get transferred out-of-market to
25 the league and the league has two channels of distribution, one

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1 is the MVPD, or MVPDs actually, and then there is an Internet
2 package. The Internet package is, of course, distributed to
3 the people in the couch directly. They can subscribe to it
4 without -- or bypassing the MVPD, although not always.

5 Q. Dr. Noll observed that it's frequently the case that
6 multiple MVPDs will distribute the same content. Is that
7 inconsistent with your concept of content exclusivity,
8 Dr. Ordoover?

9 A. No. I think I already answered that question, which is
10 that as long as the league is the deciding -- is the
11 decision-maker in terms of how to distribute it to how many
12 MVPDs to distribute it and on what terms, the content
13 exclusivity as it's commonly defined is not breached, it's not
14 violated at all.

15 Q. Now, I'd like to turn to this next slide and ask you how is
16 content exclusivity violated in the but-for-world conceived of
17 by Dr. Noll?

18 A. Right. So let's look at in-market for a moment. Nothing
19 changes in-market, although there's been a lot of debate about
20 the blackouts and so on that seem to be still not conclusive as
21 far as I can tell. But the action is all on the right-hand
22 side which is the but-for world out-of-market. And there we
23 have a circumstance whereby the teams and the league are going
24 to be competing for the same population of viewers with teams
25 now being able to sell their feed directly on -- over the

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1 Internet and through the MVPDs and the league selling the same
2 content, albeit assembled from the number of teams through the
3 MVPDs and over the Internet to the same people on that couch.
4 And those people will be choosing which channel to watch
5 depending on their preferences and prices.

6 Q. Sorry. Are you done, Dr. Ordover?

7 A. Yes.

8 Q. What's the consequence of the elimination of content
9 exclusivity in the but-for-world out of market?

10 A. Well, the consequence is that the same feed, the Yankees'
11 YES Network, for example, which contains the Yankees' games,
12 and then abstracting from the Yankees' Network aspect which
13 distributes the so-called shoulder programming, that's not
14 entering into any of it, you can, in principle, will be able to
15 watch, if you so choose, your Honor, you'll be able to
16 subscribe to the YES Network. You'll be able to subscribe to
17 the single-team Internet offering. And you will see the same
18 feed if you subscribe to the league package either over the
19 Internet going directly to the consumer or over the MVPDs,
20 which will be marketing the so-called league package.

21 So now the same content is available potentially from
22 four different sources; and that is the kind of competition
23 that I believe is in violation of the principles of content
24 exclusivity.

25 THE COURT: Can we go back one slide for my sake, so

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1 to speak.

2 The other one you said four different sources. You
3 counted TV Internet as two.

4 THE WITNESS: Yes.

5 THE COURT: It was four. So this slide says two
6 sources?

7 THE WITNESS: That's true.

8 THE COURT: You're comparing two and four; not one and
9 four.

10 THE WITNESS: No. Two is fine. Why? Because you can
11 see that these arrows and these little green things, the waves
12 they're all emanating from the upper level of the league and
13 the league sets the price on the MVPD side and the Internet
14 side; entirely exactly what I said is the right way to think
15 about it.

16 THE COURT: One source.

17 THE WITNESS: Yes.

18 THE COURT: One source, two options; the other one was
19 two sources, four options?

20 THE WITNESS: Exactly. Right.

21 THE COURT: I was a good student. Okay.

22 THE WITNESS: You're an amazingly -- in terms of being
23 able to pick up on this.

24 THE COURT: Never mind. Let's go on.

25 Q. How are Dr. Noll's damages results affected by the

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1 competition between the team RSN and the league to distribute
2 the game feeds?

3 A. Well, the damages that he claims are resulting from the
4 removing of these territorial restraints is that the downstream
5 competition for -- between the teams and the league for the
6 downstream consumers or subscribers is going to of course
7 affect the prices for all of those products, including the
8 price of the Internet packages, as well as the price of the
9 product sold via MVPDs.

10 And he projects all of these prices to be lower,
11 although we have some debate as to how good his estimates are,
12 but that's what he projects, the prices to fall. And because
13 prices fall, there's -- there are damages.

14 The dollar amounts will depend on how much falling
15 price there are, but that's his basis. His basis is
16 competition will depress prices and that competition is being
17 restrained now by territorial restrictions and therefore the
18 whole case is that.

19 Q. It's the competition between two owners of content
20 distributing the same content in competition that's driving the
21 results?

22 A. Well, I think it's worse than that. I think it's the
23 competition that the owner of the content faces from the league
24 which uses its content to compete with the owner. That is the
25 unusual circumstance. We normally don't see it unless that

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1 kind of competition is mediated through, for example, prices or
2 the license fees, those kinds of terms.

3 So in Dr. Noll's world, that mediation, there is no
4 such mediation. It's head-to-head competition of the league
5 and the team using the same content, albeit the league has more
6 stuff in the package than just YES' content or Yankees'
7 content.

8 Q. So in a world where the teams have the power, the right to
9 sell their content in the out-of-market, how could they -- what
10 steps could they take to preserve content exclusivity in that
11 world?

12 A. Well, I think that there are two steps and I will focus on
13 the second. The first step is, of course, for the teams to
14 stop making the league package available. I mean, after all,
15 they own the league or the league is controlled by the teams
16 and the teams can make a decision that the package is not
17 something that they wish to offer.

18 Similarly, in principle, a team can refuse to license
19 its product to the package and that will have potentially
20 substantially ramifications, because some teams a lot of people
21 would like to watch. So when that feed gets removed from the
22 package, the package is no longer the same package as we have
23 it today, it's a different package, and therefore it will have
24 impact on people's utilities of those people who continue to
25 subscribe to the package. So that's one set of solutions.

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1 The second set of solutions is the one that I will
2 speak a little bit more fully about is that the team/RSN - I'm
3 making no distinction between team and RSN in this part of my
4 discussion - the team/RSN pair can decide, consistent with its
5 rights that are allocated to it, how much to charge for the
6 right of access to its feed.

7 And it's my view, and I believe it's going to
8 be -- it's the view of pretty much all the economists that I
9 can think of that the availability of the feed fee will be a
10 solution to the exclusivity -- content exclusivity problem.
11 Why is it the solution? Because it will reflect the profit
12 maximizing decision by the team --

13 THE COURT: Yeah, but if the league makes a decision
14 as a joint venture that the fee is 3.3 percent for each team in
15 the league, then that's the fee. They've agreed that my fee
16 for my feed is 3.3 percent of the profits. It's a joint
17 venture. We want to keep things equal. So that's what we're
18 going to take as a fee.

19 THE WITNESS: Your Honor, it's not that simple
20 because --

21 THE COURT: I didn't think it was that simple.

22 Q. Maybe we can ask you to sort of address her Honor's
23 questions, how did you go about calculating what you thought
24 the feed fee would be in the but-for-world, Dr. Ordover?

25 A. Yes. I used a fairly standard way of thinking how this

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1 process will play itself out in the world in which the team has
2 actual right to license its content. What you, your Honor, has
3 instanced is a situation in which the team has no right, it's
4 the league that says the team are going to pay you 1/30th.

5 THE COURT: No. I'm saying all the teams decide that
6 is in their interest, not because it's profit maximizing, but
7 because it's good for baseball or it's good for hockey, if we
8 keep that share equal, we're going to have good games,
9 everybody can buy rich players, we're going to, you know, I'm
10 serious, we're going to keep the game competitive, so to speak.
11 I'm not using the word competition in economics, but we're
12 going to make the game competitive. So we decide it's in our
13 interest for us to have an equal share, that's what our team
14 voted for.

15 Instead of maximizing our profit where the Yankees are
16 getting ten percent but the Giants are getting only two
17 percent, we're all going to take three and-a-third percent,
18 what if that's their vote?

19 What if the teams do that?

20 THE WITNESS: Well, I cannot argue that if the teams
21 together can make that decision that they will not make the
22 decision.

23 Although I can point out that in my declaration, I
24 actually considered that point and show that in the world that
25 will emerge if the territorial restrictions are lifted, the

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1 teams will -- the league will, in fact, agree to pay a per-feed
2 fee to the teams, this is what is referred to as Section VI
3 analysis, in which the league acting on behalf of the industry,
4 which includes its profits and the profits of the member teams,
5 decides on what the per-feed fee is. So in a way, this
6 approximates the conditions that you are speaking of.

7 And in a sense, it is a solution to the problem in
8 which the teams have the rights to charge
9 individually-determined feed fees if it so choose, but I
10 abstract them from that in Section VI and say, okay, well,
11 let's see what the league that is interested in maximizing
12 profits of all the component parts will decide the right feed
13 fee is. And it turns out that it's somewhat lower than what
14 the Section IV analysis does, but it still will be positive.
15 In other words, despite the presence of this back-end
16 distributions of 1/30th of the league profits, the league,
17 acting on behalf of its member teams, will indeed impose or
18 introduce a per-feed fee for reasons that I will come back to
19 in a minute.

20 THE COURT: Let me make sure I understand. If it was
21 done that way, it may be that the Yankees' feed would make a
22 lot more money than the Astros' feed, and they become even a
23 richer team, right?

24 THE WITNESS: Under that assumption, the feed fee that
25 the Yankees will earn is going to be X cents per subscriber.

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1 THE COURT: Therefore more than the Astros will make
2 because there are more subscribers for the Yankees, no?

3 THE WITNESS: No, your Honor. The number of
4 subscribers is the same because it's subscribers in the league
5 package. So in that account, everybody is going to be making
6 the same amount, right?

7 THE COURT: Yes.

8 THE WITNESS: If the feed fee is ten cents per
9 subscriber and you as a member -- you are the Yankees and I'm
10 the Astros.

11 THE COURT: Right.

12 THE WITNESS: And the number of packages sold is a
13 thousand, then each one of us will make ten cents times a
14 thousand. And at the end of the day, we also get 1/30th of
15 what's left of the profits.

16 THE COURT: So all the teams are making the same
17 amount of money?

18 THE WITNESS: Exactly. So nothing has changed as a
19 result of that. The only thing that is affected is, of course,
20 the prices for the league package and for the standalone fee --
21 standalone prices as well because in the Professor Noll model,
22 those are determined competitively through the so-called
23 Bertrand model of price competition.

24 THE COURT: So no one team is going to bargain as to
25 what its fees is going to be; it's going to be the same as

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1 every other team.

2 THE WITNESS: Yes, that's why I think it's a
3 ridiculous assumption. I think one would expect the teams to
4 try to bargain for a feed fee that reflects the value of the
5 team's feed to the package as well as that reflects the
6 competitive implications for its own standalone programming
7 sales by virtue of competition between the team and the league,
8 so there are two aspects that will be in play.

9 MR. BURKE: Perhaps I can put a question to
10 Dr. Ordover that might crystalize this.

11 Q. Her Honor has asked why not just accept a 1/30th share of
12 the profits; isn't that sufficient compensation for the teams
13 for giving their fee to the league? Why do you think that's
14 not a sufficient compensation for the teams?

15 A. It's not a sufficient compensation for a simple reason that
16 it's totally unrelated to the value of the team to the package,
17 as well as to the competitive implications of the team from
18 licensing its feed to the package. And those two elements'
19 effect are going to be the ones that the teams are going to
20 bargain for. And I showed that they would bargain for the fees
21 that are, at the minimum, 17 cents per subscriber.

22 Q. Briefly, can you just explain how you calculated what the
23 feed fee would likely be in the but-for-world.

24 A. I adopted the standard approach to modeling bilateral
25 negotiations between single party on one side and the numerous

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1 counterparties on the other side. That is the economic models
2 that deal with that and I think those models or those
3 approaches are referenced in Dr. Noll's declaration, but
4 they're certainly referenced in the paper by Crawford and
5 Yurukoglu which sponsors as part of their analysis type of
6 bargaining that I will describe in a second if you ask me a
7 question.

8 Q. What's the consequence for the price of the out-of-market
9 package based upon the feed fees that you calculated?

10 A. Well, the consequences are on the slide. Because the feed
11 fees are going to be positive as a result of this bargaining,
12 the league is going to be paying more for the feed than it's
13 paying in the actual world. In the actual world, the league is
14 paying nothing, getting the feed for free, distributing the
15 profits at back end as your Honor pointed out, but in the
16 but-for-world that in envisage with teams bargaining in the
17 standard fashion with the league, the feed fees are going to be
18 positive and the agglomeration of those feed fees is going to
19 have the upward pressure effect on the price of the package.
20 And I was -- and I calculated those prices using the third
21 version of Dr. Noll's econometric model.

22 Q. What's the relevance of this to your conclusion with
23 respect to the existence of winners and losers in the
24 but-for-world?

25 A. Well, the relevance is that if the package is more

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Ordover - direct

1 expensive in the but-for-world than those people who currently
2 buy a package, some of them may end up paying more - not all of
3 them because some will go to standalone fees - but those who
4 remain will be paying more and the numbers are actually
5 substantially more.

6 Q. Now I know everyone is very eager to get to the subject of
7 double marginalization, but before we do that, I have one
8 question for you, Dr. Ordover.

9 Dr. Noll criticizes your analysis as a collusive.
10 What's your response to that?

11 A. My response is it's a total misunderstanding of what I'm
12 doing. What I'm doing is I'm analyzing how we'll -- the league
13 and the standalone and the teams try to arrange their affairs
14 in the but-for-world in which the teams now have a new right
15 which they did not have before. The new right is to sell their
16 programming in the -- outside of their home television
17 territories, HTTs, and they will bargain with the league for
18 some right to access that feed.

19 So this is a procompetitive proconsumer activity
20 because it expands output and it enables the league to obtain
21 access to feeds that they may otherwise not obtain access to.

22 Q. Does your model involve any coordination between or among
23 the teams with respect to the negotiations with the league?

24 A. No, not at all. The negotiations are bilateral between the
25 team or the team's RSN and the league, and no other teams are a

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Ordover - direct

1 part of that negotiation.

2 Q. All right. Now, the subject we have all been waiting for.
3 Dr. Noll has criticized your analysis as introducing double
4 marginalization in an inefficient fashion. Before we address
5 that, could you just briefly describe for the Court what double
6 marginalization is?

7 A. Yes. Double marginalization, we spent a lot of time on it
8 yesterday so very quickly, it's a circumstance in which the
9 product of the service moves down from the top level all the
10 way down to consumers; and the potentially at every stage of
11 the process economic actors impose a margin on the costs that
12 they pay for getting the product to themselves.

13 So the wholesaler imposes the markup on the product
14 that it sells to the retailer, and the retailer turns around
15 and imposes its markup, so there are two markups. That's why
16 it's called double marginalization.

17 Q. Does double marginalization exist in the real world?

18 A. Absolutely. Double marginalization is something that
19 exists in the real world for a variety of reasons.

20 Q. Can you provide an example or two.

21 A. Well, again, we already spoke about the books in which
22 there are margins along the way in which the author will put a
23 markup on its costs when it negotiates for a book contract, the
24 publisher puts a markup on its cost when it sells the book to
25 the retailer or to the wholesaler, and the wholesaler puts a

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1 markup and so on, and the retailer will put a mark up on the
2 top of the costs that it incurs by the time the book reaches
3 the bookstore.

4 We have the same type of markups in music and we
5 certainly have these types of markups in patents or in the
6 license of intellectual property when the owner of the
7 intellectual property will charge a per-unit royalty and the
8 firm that uses the patent will potentially and generally mark
9 up the price of the product that uses the IP.

10 MR. LANGER: Your Honor, we object to the extent
11 Dr. Ordover is now testifying to the matters that are supposed
12 to be Dr. Pakes' testimony. So it would be duplicative, and
13 your Honor issued an order as to this.

14 MR. BURKE: I think there were two different issues
15 raised with respect to double marginalization. Dr. Ordover has
16 introduced double marginalization with respect to a fee that is
17 charged by the teams to the leagues, and that has been
18 criticized by Dr. Noll as introducing double marginalization.

19 What Dr. Pakes addresses is a separate part of the
20 chain of distribution. What he says is that there will be a
21 charge from RSNs to MVPDs and Dr. Noll failed to model that.
22 There was a lot of discussion about that yesterday. That's a
23 different part of the chain of distribution.

24 We actually acknowledge there's some overlap here and
25 we're not going to reread things, but I think Dr. Pakes will

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Ordover - direct

1 have some unique things to say about double marginalization and
2 that other part of the distribution chain.

3 THE COURT: It's your time. You have four minutes
4 left, so objection overruled. You want to spend the four
5 minutes going over material that's going to be covered by
6 somebody else, that's okay with me.

7 MR. BURKE: I think, if you don't mind, I'll take a
8 little time out of my redirect if that's possible. I have 15
9 minutes of redirect.

10 THE COURT: You have 15 minutes of redirect. How much
11 of that do you want to use on direct?

12 MR. BURKE: I think I'll go up to 55, so if you don't
13 mind, I'll just leave five for redirect.

14 THE COURT: Okay.

15 BY MR. BURKE:

16 Q. Dr. Ordover, your model imposes a curve -- a per-subscriber
17 fee to the league, is that correct?

18 A. Yes.

19 Q. And does that create double marginalization?

20 A. It does.

21 Q. Why is it in a team's interest to create double
22 marginalization in the but-for-world?

23 A. It's in the team's interest because, as we just discussed,
24 the league competes with the team for subscribers, and
25 therefore, the team has an interest in the price at which the

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Ordover - direct

1 league is going to be able to compete. By charging a feed fee,
2 it is going to be trying to capture the profits that it loses
3 on diverted sales. This is the whole underlying economics
4 behind what I'm doing.

5 Q. And just to go back to her honor's questions, why doesn't
6 just sharing it 1/30th of the profits of the league, why
7 doesn't that accomplish the same thing?

8 A. Because that has nothing to do with either the value of the
9 fee or with the issue which I just instanced, which is the fact
10 that the team is going to be losing its subscriptions to the
11 league and how many subscriptions its going to lose depends in
12 part of what the package sells for and what the package sells
13 for, as we know from the calculations that Dr. Noll has enabled
14 us to make, is going to depend on the sum total of the costs of
15 the feed fees to the league.

16 Q. And have you looked at real-world contracts in this
17 industry?

18 A. Yes.

19 Q. And is double marginalization present?

20 A. Yes, it is.

21 Q. Now, Dr. Noll points to the 2007 ExtraInnings contract
22 between Comcast and DirecTV on the one hand and MLB. And he
23 says double marginalization has been eliminated in that
24 contract because there's resell price maintenance essentially
25 established in that contract.

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Ordover - direct

1 How does that analysis relate to your opinions?

2 A. It's entirely consistent with my analysis because the price
3 that will be established, whether directly by the team or by
4 the negotiation between the team and the league package, is
5 going to be set at the point at which these diversion effects
6 are going to be reflected. In other words, just because
7 there's an RPM it does not mean that the RPM, retail price
8 maintenance, and it's a minimal one, minimal RPM, does not
9 leave the margin both for the team and for the -- from the
10 MVPD.

11 Q. I'd like to direct you to a passage from the Crawford and
12 Yurukoglu - yeah, pronounce that - the passage from their
13 article. And I guess I'll read it for you and briefly ask a
14 few questions about it.

15 C&Y say "Linear input costs above the production
16 marginal costs, in this case zero, are often considered
17 unrealistic because with downstream monopoly, the upstream and
18 downstream firms can find fixed transfers that make both better
19 off after changing the input cost to marginal cost."

20 What are they getting at in that sentence,
21 Dr. Ordover?

22 A. What they are getting at of the sentence is that in some
23 circumstances, when there's, for example, a single firm
24 upstream dealing with a single firm downstream, one way to get
25 around the double marginalization is to sell the product at

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Ordover - direct

1 marginal cost and then soak up the profits through a fixed fee;
2 and that is a well-known result in economic literature. It's
3 familiar to everybody who works in that particular --

4 Q. Do you agree with that statement?

5 A. Yes, I do.

6 Q. Let's focus on the second sentence that's highlighted.

7 "When there is downstream competition, however, committing to
8 linear contracts is one way of avoiding the dissipation of
9 profits due to such competition."

10 First off, when we refer to linear contracts, what is
11 that a reference to?

12 A. That's in a reference to a contract in which the amount
13 paid is a function of the per-unit fee times number of units
14 sold.

15 Q. Is there double marginalization in linear contracts?

16 A. Yes, as long as the per-unit fee is set by the marginal
17 cost.

18 Q. What does that second sentence mean if you can try to
19 translate for us.

20 A. What it means is the upstream firm, the licensing firm,
21 does not want the downstream firms to compete whatever profits
22 they might make, they would make or can make because by doing
23 so, it undermines its own business or its own profitability.
24 In the instant case, that is certainly even more transparent by
25 virtue of the fact that the downstream firm has downstream

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Ordoover - direct

1 business. And when it offers the fee to the package, it is
2 going to affect the package's cost and thereby have an impact
3 on how intense that competition is going to be.

4 And as I said, it's a well-known result in economics
5 that the licensor will try to capture in the fee, through the
6 fees the diversion of profits from itself to the rival, so try
7 to be compensated for it.

8 Q. To try to bring this little section to a close, one of the
9 criticisms that plaintiffs have leveled at you is that you're
10 confusing the allocation of rights between RSNs and the teams.
11 Does that affect your analysis at all, Dr. Ordoover?

12 A. No, it doesn't make any difference whatsoever. The
13 team/RSN pair is going to be doing the bargaining or the team
14 itself can be doing the bargaining. This is irrespective of
15 how the upstream segment is organized.

16 Q. Just to finish up this section, I want to make sure we have
17 sufficiently answered one of the issues raised by her Honor,
18 which is the idea that an idea teams that might be
19 profit-maximizing they might be, I don't know, altruistic in
20 taking account the interests of baseball.

21 Does Dr. Noll's model assume any of that or does it
22 assume profit maximization?

23 A. Dr. Noll's model, everything in his model, including the
24 demand estimation, the competition is all driven by the
25 assumption that the teams are, and the league are,

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Ordover - direct

1 profit-maximizing entities. He does not allow for all of these
2 kinds of considerations whatsoever; and, therefore, I don't see
3 what's the issue *vis-à-vis* what I'm doing, but one in principle
4 could account for those other considerations through
5 mathematical adjustments to the objective functions.

6 THE COURT: In these various reports, I have seen the
7 word "differentiated" and "undifferentiated" to describe
8 competing products or not.

9 Are these products in your view directly competitive
10 or are they different products? Because it may be that they're
11 different products and some people just want the standalone and
12 don't want the package and other people want the package and
13 would never want the standalone.

14 So, are they head-to-head competitors in that sense?
15 Like two companies who are selling hammers, they're really the
16 same, it's just whether you like, I don't know what, one
17 company or another company, but the hammer is the same and it
18 does exactly the same thing.

19 THE WITNESS: Well, let's take potatoes because they
20 are less differentiated than hamburgers.

21 THE COURT: I said hammers.

22 THE WITNESS: I'm sorry. Hammers.

23 THE COURT: They're really the same and they do the
24 same thing.

25 THE WITNESS: Yes, unless you are a connoisseur of

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Ordoover - direct

1 hammers --

2 THE COURT: Right.

3 THE WITNESS: -- they're the same, or nails, so yes,
4 you are right differentiated products are not perfect
5 substitutes. In other words, when I get to watch a feed of the
6 Yankees versus the Diamondbacks, I'm not deriving the same
7 amount of satisfaction and, therefore, I may be willing to pay
8 less for the team that I care less about.

9 THE COURT: No, but I meant the single standalone
10 versus the package.

11 THE WITNESS: Sure. The package competes with the
12 standalones, but it's a different product to the extent that it
13 has a collection of standalones in it. But I think it's
14 recognized here by everybody on the economists' side that while
15 these are not perfect substitutes, there are substitutes which
16 is why Professor Noll uses the so-called Bertrand model of
17 competition to model the intensity of that competition.

18 THE COURT: Between the standalones and the package?

19 THE WITNESS: And -- yes, exactly.

20 THE COURT: Not between two standalones, but between
21 the standalone and the package?

22 THE WITNESS: He models competition among all of the
23 products, but in particular between the package, the league
24 package and the standalone or the standalones. That are the
25 drivers of the outputs of -- on price together with the costs

F3IGLAU1

Ordover - direct

1 going into each one of those products.

2 But he assumes that those products while
3 differentiated, they are not so differentiated as to offer no
4 competitive restraint on each other. That's the basis of
5 everything he said.

6 Q. In fact, all of the damages that he generated, a
7 predominate amount of the damages, is as a result of that
8 competition between the standalone and the package, right?

9 A. That is true.

10 Q. We're almost done here. I just have one last issue we want
11 to address. We heard some testimony yesterday regarding this
12 slide which illustrated the fact that under Dr. Noll's model,
13 the multiteam fan it turns out that sort of counterintuitively
14 99 percent of them are going to buy the standalone package and
15 only one percent will buy the league package.

16 You heard Dr. Noll's testimony about that yesterday?

17 A. Yes, I had.

18 Q. He explained I believe at the time that the explanation for
19 this was that multiteam fans were especially price-sensitive
20 and therefore they would opt for the lower cost option, even
21 though it didn't give them the robust number of teams that they
22 would appear to want.

23 Do you recall that?

24 A. I do. I thought it was a peculiar kind of explanation, but
25 I won't go into that.

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Ordover - direct

1 Q. Did you do any analysis to test that conclusion and whether
2 in fact this could be explained by a differential in price
3 sensitivity?

4 A. Yes. In fact, the test is on the next slide, your Honor.
5 Here, I was able to calculate or derive the traces the
6 different types of fans would make in the world in which they
7 pay exactly the same amount for the package and for the -- or
8 for the standalone.

9 Now, I think most people would say, well, gee, if I
10 can pay \$20 and a nickel for a package versus standalone, I'm
11 likely to buy a package? Why? Because I get everything: I
12 get the standalone and everything else. Right?

13 So, what are the results from that kind of a
14 calculation? Because that removes the issue of different
15 prices for a standalone versus the package and therefore
16 removes the issue of price sensitivity. There is no
17 differences in prices, and economic logic would suggest that
18 everybody is going to likely opt out for the package.

19 Well, the results do not support common sense and
20 every time the results do not support common sense, I generally
21 tend to go with common sense.

22 What we see in the last row, if you -- what we see is
23 the multiteam fan, those are the people who like the sport,
24 they all end up buying -- or 86 percent of them end up buying a
25 standalone.

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Ordover - direct

1 THE COURT: Ninety-six.

2 THE WITNESS: Ninety-six percent of them end up buying
3 a standalone, only four percent of them buy a package, despite
4 the fact that the package is equally priced and contains the
5 standalone. So why? Well, we can talk about it, but I run out
6 of time.

7 Q. Anything to say in conclusion?

8 A. Yes. I think my conclusion is quite straightforward and
9 that is that everything that Dr. Noll generates in terms of
10 impact and his calculations of damages is all driven by what I
11 believe is an economically unsound assumption, which is that in
12 the but-for-world in which the teams have the right to sell
13 their feeds out-of-market and they have the right obviously, as
14 he admitted, to negotiate with the league package for the fees,
15 that they will indeed continue to deliver the product for free
16 or for the amount of back end that the package distributes in
17 the end. As I said, the amount of back end the package
18 distributes at the back end has nothing to do with the
19 licensing. It has to do with the economic arrangements that
20 precede all of this -- the whole circumstance that we are
21 dealing with. So in a way, his model is really hard-wired to
22 deliver the results that he has reported in his declaration.

23 Q. Thank you, Dr. Ordover.

24 A. Thank you.

25 THE COURT: Do you need to take a ten-minute recess

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Ordover - direct

1 now because I really rather take it by the clock than by the
2 schedule. Could you do your cross?

3 MR. LANGER: I could begin, and may I do it from
4 counsel table?

5 THE COURT: Sure, sure.

6 MR. LANGER: I'd like to hand the witness, your Honor
7 and your Honor's clerk a book of documents that I'm going to be
8 using as well as the joint exhibits that we'll need to make
9 reference to them as well. And also at a certain point, I'm
10 going to be using documents that the defendants deem highly
11 confidential. And rather than have everyone exit the
12 courtroom, what I suggest we do, since I'm not going to put
13 them on the screen is I will not identify the teams in my
14 questioning and ask the witness not to because the team
15 identification is not essential.

16 THE COURT: Okay. Just remind me, though, of your
17 name.

18 MR. DIVER: I'm Howard Langer.

19 THE COURT: Mr. Langer.

20 MR. LANGER: Does everybody have the exhibits? The
21 joint exhibits as well?

22 CROSS-EXAMINATION

23 BY MR. LANGER:

24 Q. Dr. Ordover, you've never written in the field of sports
25 economics, is that correct?

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Ordover - cross

1 A. That's correct, sir.

2 Q. And you never taught a course in the theory of sports
3 economics, is that correct?

4 A. That is also true.

5 Q. And you already told your Honor you're not a sports, is
6 that right.

7 A. I watch some, but not necessarily the two sports that we
8 spoke about.

9 Q. And you're not an econometrician, is that correct?

10 A. That is true. I've never taught a course in econometrics.

11 Q. And you never written on econometrics; is that right?

12 A. That is true, but I use the tools of econometrics in my
13 daily practice.

14 Q. And in your preparation for your opinions, you didn't
15 review any articles on sports economics or sports broadcasting;
16 is that correct?

17 A. I have reviewed several articles in the past prior because
18 of preparing for another case; and since my deposition I have
19 also looked at a number of articles relating to sports
20 economics.

21 Q. Well, would you look at your -- an Exhibit 4 in the book.

22 A. Sure.

23 THE COURT: Four you said?

24 MR. DIVER: Yes.

25 MR. LANGER: Yes, your Honor.

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Ordoover - cross

1 THE COURT: Which is titled "documents considered."

2 MR. LANGER: Right.

3 Q. These are the documents that you listed as the documents
4 that you considered that were attached to your declaration; is
5 that correct?

6 A. Yes, sir.

7 (Continued on next page)

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Ordover - cross

1 Q. And it doesn't contain any documents relating to sports
2 economics, is that correct?

3 A. Yes, that is true. I did not review any such articles.

4 Q. OK. Now, you are an expert in the field of proof of impact
5 in class actions, is that correct?

6 A. I do not believe there is such a field of expertise.

7 Q. Well, you testified in at least 25 cases on the subject,
8 have you not?

9 A. I think you are characterizing my testimony as evidence of
10 proof of expertise. My expertise is as an industrialization
11 economist who spends most of the time thinking about antitrust
12 economics, but I also engage in other types of economics. So,
13 that's your characterization, not mine.

14 THE COURT: Not characterizing it though, you have
15 testified at 25 trials involving class actions?

16 THE WITNESS: I have not testified at 25 trials
17 involving class actions.

18 THE COURT: Well, forget the word trials. In 25 cases
19 involving class actions, whether by deposition, trial,
20 hearings?

21 THE WITNESS: Yes. Yes, I have, yes.

22 Q. And in every instance you were of the opinion that impact
23 could not be proven on a class basis, is that correct?

24 A. In the cases that I testified, that's the answer, yes.

25 Q. Yes. And you have also given opinions in the areas in

F3I7LAU2

Ordoover - cross

1 class actions that didn't involve antitrust law, is that right?

2 A. That did not?

3 Q. Yes, involve antitrust law.

4 A. Yes, I testified on other types of class actions.

5 Q. And your opinion in every instance in those cases as well
6 was that impact could not be proven on a class basis, is that
7 correct?

8 A. In the cases I have testified, yes.

9 Q. OK. Now, in light of the fact that you have testified so
10 much on the subject, you are aware that antitrust class actions
11 have been certified and tried to juries, and verdicts have been
12 upheld on appeal, isn't that correct?

13 A. Yes, and some have not been certified, and I testified in
14 some of those, yes.

15 Q. Now, you realize last year there was a case called Urethane
16 antitrust litigation, which was a class action on behalf of
17 purchasers of Urethane, where the case was tried to a jury, a
18 verdict of treble of over a billion dollars was obtained, and
19 it was upheld on appeal by the Court of Appeals? Do you recall
20 that?

21 A. I do recall that case, because I was the expert witness,
22 and the hearing on class certification was not in front of the
23 jury but it was in front of the judge.

24 Q. Excuse me, that was a case called Polyurethane.

25 A. Oh, I'm sorry.

F3I7LAU2

Ordoover - cross

1 Q. This is a case called Urethane.

2 A. I was not involved in that case, so I don't know anything
3 about it.

4 Q. You don't know anything about it. You have no idea how
5 impact was proven on a class basis.

6 A. It was not my case. All I saw was the write-up in the BNA,
7 but I don't know much about that.

8 Q. You're aware that there was a trial in a case called In Re
9 Plywood Antitrust Litigation that was tried to a jury on a
10 class basis, and a verdict was rendered and upheld on appeal?

11 A. Yes, I heard about it from reading the BNA, but I was not
12 part of that litigation.

13 Q. Did you ever endeavor to find out how impact was proven in
14 that case?

15 A. The answer, that would be no. There are limited avenues
16 for finding how it was proven, and, second, I don't see any
17 reason to learn such things because I have my own ways of
18 thinking about these types of issues, yes.

19 Q. Recently you offered the opinion that proof of impact could
20 not be proven on a class-wide basis in a national class action
21 involving corrugated boxes, is that correct?

22 A. Yes.

23 Q. OK. You are familiar with the fact that in 1982 the Third
24 Circuit upheld a class certification for a class, a national
25 class of purchasers of corrugated boxes and upheld the

F3I7LAU2

Ordoover - cross

1 certification of the class?

2 A. I am aware of it in the same way that I'm aware of other
3 cases, by reading or perusing the BNA Trade Reporter.

4 Q. But in reaching your opinion you did not seek to -- in that
5 case you did not seek to find out how impact was shown on a
6 class-wide basis for the exact same industry in another case
7 that was upheld on appeal.

8 A. I did not testify in that case. I had no access to the
9 record and, therefore, there was nothing for me to learn other
10 than know that that particular case went to the jury, as you
11 say, and that the class was certified.

12 Q. Excuse me. The Court of Appeals for the Third Circuit
13 completely describes in their opinion how the two experts were
14 going to prove impact. You did not endeavor to learn that, is
15 that correct?

16 A. No, I did not endeavor to do that, because, as I said, I am
17 capable of undertaking my own analysis, and some of my analyses
18 were actually found persuasive enough in class certification
19 cases.

20 Q. OK. Now, in the majority of those cases they were not, is
21 that correct?

22 A. A number of cases my analyses were not upheld, and in
23 several rather important cases my analyses were upheld.

24 Q. Now, you testified at the beginning that this case is about
25 lifting territorial restrictions and the effect of that, is

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Ordover - cross

1 that right?

2 A. That's how I understand that.

3 Q. OK. Now, did you prior to this case do any work or have
4 any knowledge of the territorial restrictions of Major League
5 Baseball?

6 A. Beyond what one reads in the newspaper, the answer is no.

7 Q. Turn to paragraph 14 of your declaration, please.

8 THE COURT: Do I have that?

9 A. That's which tab number?

10 Q. It's Joint Exhibit 5.

11 A. So this is --

12 THE COURT: I don't have that book.

13 A. That's in the white notebooks?

14 Q. Yes.

15 THE COURT: But I don't have that.

16 MS. WILKINSON: Your Honor, we have copies.

17 THE COURT: Thank you. Now I have 1 through 14. Is
18 there a second volume?

19 MS. WILKINSON: There is.

20 THE COURT: No rush. I am only looking at Exhibit 5.

21 MR. LANGER: While your Honor is getting it --

22 THE COURT: I have Exhibit 5.

23 Q. Look at page 8, paragraph 14.

24 A. One second, please, sir.

25 Q. Do you see that?

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Ordoover - cross

1 A. Yes.

2 Q. And in this paragraph you say in the third sentence, "In
3 general, a team's home team territory is the geographic area
4 around the location of its home stadium arena." Do you see
5 that?

6 A. Yes.

7 Q. Let me ask you this: You know that Las Vegas is within the
8 home team territory of Los Angeles, is that correct?

9 A. Yes.

10 Q. Is that in the location of its home team stadium arena? Do
11 you think someone is going to go from Las Vegas to watch a game
12 in Los Angeles?

13 A. I have no opinion on that. It's not likely that somebody
14 will travel that distance, but those territories are devised by
15 the league, and they design the territories according to
16 whatever criteria they use to design those territories.

17 Q. You understand that San Francisco is in the -- Las Vegas is
18 also in the home team territory of San Francisco?

19 A. Yes.

20 Q. You understand that Des Moines, Iowa is in the home team
21 territory of the teams in Minneapolis, Chicago, St. Louis,
22 Milwaukee and Kansas City, is that right?

23 A. I have not memorized all of those states or cities, but I
24 take your representation as being true.

25 Q. And in none of those circumstances do those cities

F3I7LAU2

Ordover - cross

1 represent the -- does Des Moines represent the geographic area
2 around those cities, is that correct?

3 A. That is true, but those are not -- there are a number of
4 circumstances, a preponderance of circumstances, a majority of
5 circumstances in which what I'm saying is true, and in fact I
6 offer citations to support those statements, so I'm not making
7 them up, sir.

8 Q. Now, also you say that the teams require, that the whole
9 economic system that's here requires that these territories be
10 allocated in this fashion in order for them to derive
11 sufficient economic return to maintain the system that exists.
12 That's the core of your testimony, is it not?

13 A. No, it has nothing to do with my testimony.

14 Q. I see. Now, Albany, New York, in hockey that's deemed to
15 be in the home territory of Buffalo, isn't that correct?

16 A. If you say so.

17 Q. You mean you haven't studied these things in offering this
18 testimony?

19 A. I am familiar with the fact that there are home team
20 territories. I have not devoted the time required to memorize
21 them, because I do not believe that any of these issues bear on
22 the core of my testimony, which is how the licensing of rights
23 would occur in the "but for" world.

24 Q. I see. And in baseball Albany is considered in the home
25 team territory of New York, is that right?

F3I7LAU2

Ordover - cross

1 A. That's my understanding, yes.

2 Q. Bangor, Maine is in the home team territory of Boston,
3 right?

4 A. If you say so.

5 Q. And Billings, Montana, which is 980 miles by car from
6 Seattle, is in the home team territory of Seattle.

7 A. If you say so. I will not challenge any of your claims.

8 Q. And having studied and seen these things, you made a
9 statement in your affidavit that in general a team's HTT is the
10 geographic area around the location of its home stadium. Is
11 that right?

12 A. In general.

13 Q. In general?

14 A. In general. That means as far as I know in the English
15 language that it's not always the case, but it's generally the
16 case.

17 Q. I see. Now, does hockey allocate its territories among
18 teams in the same way as baseball?

19 A. I think there are some differences. Again, I'm not
20 testifying as to whether they are material or not. And that
21 makes no difference for any of my conclusions that I have
22 reached in my reports.

23 Q. So, you don't know whether hockey has -- if I told you that
24 hockey as part of its system has what is called spheres of
25 influence, you wouldn't know what I was talking about, is that

F3I7LAU2

Ordoover - cross

1 right?

2 A. I understand the plain meaning of those two words, and I
3 also know that in hockey there are three layers of home team
4 territory, depending on the distance from the stadium, as well
5 as on the reach of the cable system and the RSN.

6 Q. And do you know what the rights are and how they differ
7 according to each of those territories?

8 A. Again, that's my memory, and it's also totally irrelevant
9 to everything that I have testified to, and that is that when
10 you move outside of the core home team territory to the outer
11 boundaries, the team has to pay some miniscule amounts per
12 subscriber or per viewer to the league for the rights to
13 televise into those territories, so we have a double
14 marginalization.

15 Q. You expressed the opinion that in a "but for" world there
16 will be fewer games broadcast and the broadcasts will be of
17 inferior quality. Is that correct?

18 A. Well, you have to read the whole thing. I made that
19 statement in a particular set of context.

20 Q. Well, look at paragraph 30 of your declaration, sir.

21 A. Paragraph what?

22 Q. 30. I'm sorry, I didn't mean to shout. I'm so used to
23 speaking quietly that sometimes in the courtroom I get carried
24 away.

25 Do you see on page 18 you say declarations from RSN

F3I7LAU2

Ordoover - cross

1 executives from 21 CF, DirectTV and Comcast confirm that
2 requiring RSNs to provide their live game feeds to the BFW
3 league package for free would result in fewer games being
4 produced in the BF world or a decline in the production
5 quality. Do you see that?

6 A. Yes.

7 Q. That's what you said.

8 A. That's what I learned from the declarations of the
9 executives that testified, and I believe that there is some
10 merit to these claims.

11 Q. Right. But you testified at your deposition, did you not,
12 that you did no economic analysis at all to confirm that.

13 A. That is true, but those conclusions are entirely consistent
14 with economic analysis, and they are entirely consistent with
15 my views about the benefits of exclusive ownership of rights.

16 Q. Right. And you testified you relied on the declarations of
17 those experts, correct?

18 A. I don't recall the exact words, but I cited them, and I
19 used them as a part of my analytical approach to issues in this
20 case.

21 Q. Right. And your declaration is dated what date, sir?
22 November 12, is that right?

23 A. That is true.

24 Q. And if you turn to Exhibit 3, which gives the dates of all
25 of those executives' declarations -- do you see that, Exhibit

F3I7LAU2

Ordover - cross

1 3?

2 A. Yes.

3 Q. They are also all dated November 12, is that right?

4 A. That is true.

5 Q. And you testified at your deposition that you did not
6 receive drafts of them in advance, is that correct?

7 A. That is true.

8 Q. OK, thank you.

9 A. But may I finish my answer?

10 Q. Well, it was a yes or no question.

11 THE COURT: I think you did finish your answer, but go
12 ahead and explain.

13 A. Anyway, I explained in my deposition that I spoke to a
14 number of those executives prior to the filing of the
15 declaration.

16 Q. Right. So, according to your declaration, you spoke to
17 those people, you read their declarations and read their
18 depositions, but when I asked you at your deposition who any of
19 them were, you couldn't identify a one of them, is that right?

20 A. That is true, because my memory for names is very weak.

21 Q. OK. Now, did you see other documents in which other of
22 your clients disagreed with those executives?

23 A. I may have or I may have not. I will be happy to review
24 those documents with you.

25 Q. Would you look at Exhibit 17, please.

F3I7LAU2

Ordover - cross

1 A. Sorry?

2 Q. Exhibit 17.

3 THE COURT: Which book are we in?

4 MR. LANGER: In the black book of exhibits.

5 Q. Do you see this?

6 A. I will be there in one second. OK.

7 Q. This is an e-mail from Mr. Bowman. Do you see that?

8 A. Yes.

9 Q. And Mr. Bowman is one of the people whose declaration and
10 depositions you read, is that right?

11 A. Yes.

12 Q. OK. Do you see in the last paragraph of this e-mail -- and
13 you know Mr. Bowman is the head of MLBAM, is that right?

14 A. Yes.

15 Q. OK. Do you see in the last paragraph of this e-mail,
16 Mr. Bowman says: Advancing this point one more inch, yes, I do
17 believe that it is anachronistic and a dying sport to black out
18 games via the Internet in the local market. RSN advertisers
19 will actually get a higher CPM from Internet delivery of the
20 Red Sox games. The MSOs will love you, more of the costs, they
21 will add broadband subscribers, a far more profitable business,
22 and most important your fans will love you for opening up
23 channels.

24 Did you consider that e-mail in coming to your
25 conclusions?

F3I7LAU2

Ordoover - cross

1 A. I don't recall reading that, but it's entirely consistent
2 with all of my conclusions. Why? Because the circumstance in
3 which the same controller will be now deciding on prices over
4 the Internet and to the MVPDs. So, this is not undermining
5 anything I have said.

6 Q. OK. Now, one of your clients in this case is Madison
7 Square Garden, is that correct?

8 A. Yes.

9 Q. Could you look at the next exhibit.

10 A. Well, can I just clarify? I understand that Madison Square
11 Garden is one of the defendants. I don't think they're my
12 personal client, so I just want to make sure that distinction
13 is on the record.

14 Q. But you are testifying on behalf of all of the defendants
15 today.

16 A. That is true.

17 Q. OK. And certainly all of their documents were made
18 available to you.

19 A. That is true too.

20 Q. OK. Would you take a look at Exhibit 18, please.

21 A. I have it.

22 Q. This is a complaint that Madison Square Garden filed
23 against the National Hockey League, is that right?

24 THE COURT: That's what it says; that's the caption.

25 A. Yes, that's what it says right here.

F3I7LAU2

Ordover - cross

1 Q. OK. Would you turn, please, to paragraph 16, 16C.

2 A. OK.

3 Q. And you see it's entitled "Excessive League Control Over
4 Individual Club Broadcasting and Other Distribution
5 Opportunities." Do you see that?

6 A. I see that headline, yes.

7 Q. And you see looking down at the third sentence, among other
8 things it says, "At the same time, the NHL members clubs,
9 acting collusively as the league, and through the commissioner,
10 have restrained the individual clubs' broadcasting and other
11 distribution opportunities, and in doing so eliminated
12 competition among the clubs in ways that are not reasonably
13 necessary." It goes on. And I'm not going to read it all to
14 you, but I would like her Honor to see what it says there.

15 Then I would like you to look at paragraph 42. OK?

16 A. 42 in the same complaint?

17 Q. Yes.

18 A. Yeah OK, I see 42.

19 Q. You see it's entitled the section, "The Agreements of
20 Restraint Horizontal Competition Have Had Anticompetitive
21 Effects and Led to Consumer Harm." Do you see that?

22 A. Yes.

23 Q. Among the things they say in paragraph 42, looking at the
24 penultimate sentence, "The teams would compete with each other
25 and with the NHL in broadcasting, rebroadcasting, and other

F3I7LAU2

Ordoover - cross

1 distribution of NHL games, apart from any national broadcasting
2 contract, game highlights and game footage in a variety of
3 media and further in the operation of their websites," that is,
4 in the event that these restrictions were lifted by the court
5 in the case.

6 Did you see that before you came to your opinions
7 based on the declarations of certain of your clients?

8 A. But, sir, my opinions are going to the issue of class
9 certification. I am expressly prohibited to discuss the
10 merits. I'm not talking about the merits. I am talking
11 about -- let me finish -- I'm talking about the implications of
12 those removals on different types of subscribers to the current
13 league packages. That's the whole grand total of my testimony.

14 Q. You think there will be winners and losers because the
15 competition will occur in a certain way that you define, is
16 that correct?

17 A. I believe there will be winners and losers because in the
18 "but for" world there will be fees that the users of the
19 now-available fees will have to pay to access them.

20 Q. Would you look at paragraph 27D. Sorry, page 27, paragraph
21 D.

22 A. Yes.

23 Q. Madison Square Garden says, "Output of broadcast,
24 rebroadcasts, and Internet and other distribution of NHL games,
25 as well as the output of game highlights, is lower, and prices

F3I7LAU2

Ordover - cross

1 are higher than they would be in the absence of the exclusive
2 agreements. Adverse events exist." And it goes on to describe
3 it, and it says that prices would be lower if those
4 restrictions were removed. Is that right?

5 A. The prices -- some prices would be lower. And the whole
6 purpose of my testimony was to examine whether all prices would
7 be lower. And my view is they won't be. And in particular the
8 price of the packages may be higher. In fact, the packages may
9 not exist.

10 Q. OK. Now, on MLB.tv you can pay for basic or premium
11 service, isn't that right?

12 A. I beg your pardon?

13 Q. You can pay for basic or premium service, is that right?

14 A. Yes.

15 Q. OK. The basic service costs \$109, is that right?

16 THE COURT: Would you remind me, is this Internet?

17 MR. LANGER: Yes.

18 THE COURT: And \$109 a year?

19 MR. LANGER: Yes.

20 THE WITNESS: The season is a year? It doesn't make
21 any difference.

22 MR. LANGER: The season. I mean a season.

23 THE COURT: The whole season.

24 Q. The whole season, the premium is \$129, is that right?

25 A. Yes, sir.

F3I7LAU2

Ordover - cross

1 Q. And the principal difference you say in your declaration
2 between the premium and the basic is that the premium gives you
3 a choice of watching either the home team feed or the visiting
4 team feed, is that right?

5 A. That is true.

6 Q. So people are willing to pay \$20 more per season -- which
7 is a significant amount more, considering the prices here -- in
8 order to get the choice of feeds, is that correct?

9 THE COURT: You mean for the same game, right?

10 MR. LANGER: Correct.

11 A. Yes, the actual game is the same, but it's announced by
12 different people, there may be additional programming
13 associated with it. The answer is, yes, some people are but
14 not everybody.

15 Q. Well, you testified that the majority of people are willing
16 to subscribe to the premium package, didn't you?

17 A. I don't recall the testimony. I would have to be
18 refreshed. I'm sorry.

19 Q. Would you look at page 179 of your deposition.

20 THE COURT: Where do I find the deposition?

21 MR. LANGER: Bear with me, your Honor. It is number 3
22 in the black book of depositions.

23 THE WITNESS: I think it's the big binder here.

24 THE COURT: I only have one white binder. I don't
25 have the second white binder. Oh, now I do, if I can lift it.

F3I7LAU2

Ordover - cross

1 THE WITNESS: Number 3? Got it.

2 Q. OK. I asked you --

3 THE COURT: What page.

4 MR. LANGER: 179.

5 THE COURT: 179.

6 Q. I asked you: "What proportion of people do you know who
7 purchased the MLB packages purchased the premium package?"

8 Do you see that?

9 A. I see that.

10 Q. And you answered: "As I sit here, I cannot tell you. I
11 think that the premium package is the one that is more
12 frequently bought."

13 Is that right?

14 A. The first sentence says: "As I sit here, I cannot tell
15 you." So, it's quite clear that I don't know the exact numbers
16 or the distribution.

17 THE COURT: Well, he didn't ask you exact numbers, but
18 the bottom line is you said I think the premium package is the
19 one that is more frequently bought. All he is asking is that
20 what you said.

21 THE WITNESS: That's what I said, it's right here in
22 plain English.

23 THE COURT: OK.

24 Q. Now in your declaration you talk about all about this
25 crucial aspect called exclusivity, right?

F3I7LAU2

Ordoover - cross

1 A. Yes, content exclusivity.

2 Q. Content exclusivity. Is content exclusivity -- am I
3 correct when you begin describing it you describe what Fox does
4 with the World Series, is that right?

5 A. I have an example of the fact that the World Series --
6 again this would be on Fox.

7 Q. And in the case of the World Series there is only one game
8 playing at that time. Is that right? There aren't other
9 baseball games playing at the time of the World Series.

10 A. That would be my understanding, yes.

11 Q. So what Fox is buying is essentially what you would call
12 sport exclusivity. They have the right to broadcast the only
13 baseball game that day that the World Series is playing, is
14 that right?

15 A. I never used the term sport exclusivity. You are the
16 ones -- you and Dr. Noll are the ones who introduced that
17 concept of sports exclusivity.

18 THE COURT: But his underlying fact is correct, that's
19 the only baseball game that night.

20 THE WITNESS: That is true, but you call it sports
21 exclusivity.

22 THE COURT: I don't care.

23 Q. Then there was a concept called game exclusivity, is that
24 correct?

25 A. Yes. That's not my concept either, but I heard that used.

F3I7LAU2

Ordoover - cross

1 Q. And that's the idea that no matter what feeds there are, or
2 whatever, only one team has the right to broadcast that game in
3 one area.

4 A. I think that's the definition that's being used, yes.

5 Q. And then you have an area called content exclusivity, is
6 that right?

7 A. That is true.

8 Q. And that's the only area of exclusivity that you have
9 examined, is that right?

10 A. That is true. I focused on content exclusivity and the
11 implications for content exclusivity of the "but for" world
12 that Dr. Noll constructs or you construct.

13 Q. Now you had a chart up there in which you said it would be
14 irrational for somebody to give away content to someone else
15 who would distribute that content.

16 THE COURT: Well, to a competitor. It would be
17 irrational to give it away for free to a competitor.

18 MR. LANGER: Right.

19 Q. And I think at your deposition I think you told me it would
20 be "lunacy of the highest order". Is that right?

21 A. I might have been on my high horse at that time. Yes. I
22 think -- I would say it makes no economic sense, unless you get
23 something in return, to give your content or any scarce asset,
24 valuable asset, to your rival for free.

25 Q. Look at Exhibit 6, please.

F3I7LAU2

Ordover - cross

1 THE COURT: Which book? Black book?

2 MR. LANGER: Black book, 6.

3 THE WITNESS: Give me a second.

4 THE COURT: While he is doing that, it's a November 2,
5 2004 memo from somebody named Chris Tully to all the major
6 league executives and broadcast directors and counsel. Who is
7 Chris Tully? Does anybody know?

8 MR. LANGER: I'm not sure actually.

9 THE COURT: Well, if anybody is willing to help me,
10 who is Chris Tully?

11 MS. WILKINSON: Yes, he was the head of media
12 broadcasting for the league, your Honor.

13 THE COURT: Thank you.

14 Q. Attached to this memo are the required language for both
15 local television telecasts -- for television telecasts and for
16 radio broadcasts, is that right?

17 A. Well, I have to read it. I don't know.

18 THE COURT: Well, that's the title. I see it. That's
19 the title. We can move on. That's the required language for
20 local telecast agreements as of November 1, 2004.

21 Q. Do you see it has a section on copyright?

22 THE COURT: Yes. I don't need for him to answer that.
23 Yes, I see it says copyright. Next.

24 Q. And it shows that the copyright is retained by the team,
25 which is the ownership. Is that right?

F3I7LAU2

Ordoover - cross

1 A. That's the ownership in the game.

2 Q. And the RSN is hired under the terms of the copyright law
3 as someone who is constructing a work for hire for the team, is
4 that correct?

5 A. I guess. I will have to read it, sir. I'm not a copyright
6 expert.

7 THE COURT: Well, the parties acknowledge and agree
8 that each of the work shall constitute a work made for hire.

9 A. As I say, I would have to read it.

10 THE COURT: I know. I just did.

11 Q. And you see that for hockey -- excuse me, not for hockey --
12 for radio it has the exact same language under copyright. Do
13 you see that?

14 A. No, I don't.

15 Q. On the bottom it's page 12952.

16 THE COURT: Required language for radio broadcast
17 agreements as of November 1, '04, section A, copyright, the
18 parties acknowledge and agree that each of the work shall
19 constitute a work made for hire. OK.

20 Q. OK. Then going to page 12947.

21 THE COURT: Yes.

22 Q. This is where it describes how -- this is the local
23 regulations which require, without me getting into it, for
24 there to be an exhibit to a contract?

25 THE COURT: Right, it says MLB local telecast

F3I7LAU2

Ordover - cross

1 regulations, it's Exhibit A to the contract.

2 Q. You will see it says game telecast feeds and excerpts?

3 A. I see that.

4 Q. Do you see that it requires the RSN to provide the team
5 contemporaneously with any feed without any charge?

6 A. I see that, yeah.

7 Q. OK. And if you look at the regulations for hockey --
8 excuse me -- for radio -- I keep saying hockey. I'm sorry --
9 on 2957 -- excuse me, wrong page here. Sorry -- on 2956?

10 A. 2956?

11 Q. Yes.

12 A. OK, got it.

13 Q. You see it has substantially similar language, is that
14 right?

15 A. Well, I don't know, but you're going so fast I don't even
16 have a chance to find the paragraph.

17 THE COURT: OK, 2956 is Exhibit A, radio broadcast
18 regulations. Number 2 says game broadcast feeds and excerpts,
19 and it says shall provide without any charge.

20 Q. Do you see that?

21 A. Upon the request, yes, without any charge, yes.

22 Q. Now can you turn to Exhibit 7, please.

23 THE COURT: 7. OK, the next exhibit. OK.

24 A. OK.

25 Q. Do you see that game day audio -- which is the radio

F3I7LAU2

Ordoover - cross

1 version of the package --

2 A. Yes.

3 Q. -- provides that it will be provided on a non-blacked-out
4 basis to people who want to pay for it, in contrast to the
5 television in which it is blacked out? Do you see that?

6 A. I presume you are able to locate the real document. I can
7 barely decipher it.

8 Q. It says right at the top: Listen to every 2015 regular
9 season and post-season game live online with no blackouts. Do
10 you see that?

11 A. Now that you told me to look for it, yes, I can try to see
12 it.

13 Q. You see they are charging \$20 a year for that, \$19.99?

14 A. Yes.

15 Q. And this is a circumstance exactly what you say would not
16 happen, where a team is providing -- excuse me -- where the
17 broadcaster is providing the team with the feed, and the team
18 is then broadcasting it in the very same market where the radio
19 station is. Is that correct?

20 A. That is correct, but it's not at all contrary to what I
21 said.

22 Q. I see. OK. Let's go to Exhibit A, please.

23 A. OK.

24 Q. These are the hockey regulations regarding radio. Do you
25 see that?

F3I7LAU2

Ordover - cross

1 A. Yes, I see that, hockey.

2 Q. And it says, "Station agrees to provide such designee as
3 the club or club shall authorize, or require free of charge all
4 live feeds and recordings of the club's productions." Do you
5 see that?

6 A. Yes. Can you tell me where it is so that I can orient
7 myself?

8 THE COURT: B, grant of rights. The third line, free
9 of charge, all live feeds.

10 Q. In the NHL for radio they're required -- the radio station
11 is required to give the team the feed for free, is that
12 correct? The live feed. Isn't that correct?

13 THE COURT: Station agrees to provide such designee,
14 the club, free of charge all live feeds.

15 THE WITNESS: Yes, it says that.

16 THE COURT: OK.

17 A. It's entirely consistent with my analysis, yes.

18 Q. Then if you go to Exhibit 9, this is I represent to you the
19 description of the NHL app on iTunes?

20 A. Yes.

21 Q. Do you see there it says under description, where it says
22 free features include live game audio from every game, no
23 blackouts? Do you see that?

24 A. Yes.

25 Q. And again here is a circumstance in which the NHL, just

F3I7LAU2

Ordoover - cross

1 like baseball -- only it's better here because it's even
2 free -- is taking from the radio station their feed and giving
3 it away for free in the market in the Internet? Is that right?

4 A. Yes. That, as I said, is entirely consistent with my views
5 because the economics underlying the decision has been likely
6 to be negotiated out and decided upon in view of the overall
7 benefits of doing so.

8 Q. But you said it would be the height of lunacy -- that was
9 your testimony -- the height of lunacy for somebody to give
10 someone a feed?

11 THE COURT: Not someone, a competitor.

12 Q. A competitor a feed for free, which it was then going to
13 give away in the same market. Isn't that correct?

14 A. Well, first of all, you have to establish that the radio
15 and the live game show on television or over the Internet are
16 in the same market, which you have not established yet at all.

17 Q. Excuse me, I'm not saying the television. I'm saying there
18 is a radio broadcast in New York City of a Yankee game.

19 A. Yes.

20 Q. OK? Well, it's not a good example, but we will take
21 that -- of a Yankee game -- and the Yankees then insist that
22 that station -- well, let me use a different one. There is a
23 radio broadcast in Philadelphia of a Phillies game. OK?

24 A. OK.

25 Q. And that station that's broadcasting the game is required

F3I7LAU2

Ordoover - cross

1 to give the Phillies that broadcast, is that right,
2 contemporaneous with that broadcast. The Phillies then turn
3 around and then give it to the league, which sells it in
4 Philadelphia to the very same people that that radio station is
5 trying to attract to listen to its station. Isn't that
6 correct?

7 A. You know, I really don't have a full grasp of all of those
8 flows that you are instancing, so why don't we try to make it
9 simple. There is a game, there is a telecast of the game, and
10 there is also audio cast, and under the agreements -- which
11 then are reflected in the rates, in the prices that various
12 economic agents in that environment pay -- these transfers for
13 free or some other consideration are calculated. So, the
14 amount --

15 Q. Why can't that be done in other sports like hockey on
16 television and baseball on television? Why is it limited to
17 the radio that they can negotiate this and it becomes a
18 rational economic situation, but you say that when you come to
19 baseball on television and hockey on television it suddenly
20 becomes an irrational circumstance?

21 A. Because you uttered the key word: Negotiated out. And
22 this is exactly what I have been writing about, which is to say
23 if there is a negotiation, then the prices will be arrived that
24 reflect both sides' economics and, therefore, will not entail
25 the taking of the scarce and valuable right for free, without

F3I7LAU2

Ordover - cross

1 there being a negotiation. I am perfectly happy to say that
2 you negotiate the price that is zero as long as it is a
3 negotiated price.

4 THE COURT: OK. Let's take the ten-minute recess now.
5 We're halfway through yours. You have gone 30 minutes. Let's
6 take the ten minutes, and then you will finish up. OK.

7 (Recess)

8 JANUSZ ORDOVER, resumed.

9 CROSS-EXAMINATION (Continued)

10 BY MR. LANGER:

11 Q. Dr. Ordover, would you go to paragraph 31 of your
12 declaration, please, page 18.

13 THE COURT: Which exhibit is that again?

14 MR. LANGER: That is Joint Exhibit 5, your Honor.

15 THE COURT: Joint Exhibit 5, page 18. OK.

16 Q. Do you see that?

17 A. Not yet. Which page?

18 Q. Page 18, paragraph 31.

19 A. Yes.

20 Q. OK. You say consistent with economic efficiencies, so
21 forth and so on, that this content exclusivity is prevalent in
22 other sports. Is that right?

23 A. Yes.

24 Q. OK. But let me ask you, you have a footnote for the
25 National Basketball League, but how do you know that it is

F3I7LAU2

Ordover - cross

1 exclusive in this fashion with motor racing?

2 A. I'm sorry.

3 Q. It says that content exclusivity exists for Indy car racing
4 and NASCAR racing. How do you know that?

5 A. Well, I had my team do Internet research on the available
6 information regarding those contractual arrangements, sir.

7 Q. You checked those. Did you check what your team did?

8 A. I do recall checking things, yes.

9 Q. Well, how is it done? Do they block it out on the
10 Internet? Do they charge on the internet? Is it done
11 geographically? How do they handle it in Indy car racing?

12 A. As I sit here, I cannot tell you. At the time of the
13 report I likely knew the details, but now we just have a
14 report.

15 Q. And that would be true of NASCAR as well, you wouldn't know
16 how it's done?

17 A. As I sit here I don't recall how it was done, but I can go
18 back on the Internet and verify it.

19 Q. You don't know whether it involves geographic restrictions
20 like those involved here.

21 A. No.

22 Q. How about English Premiere League soccer, do you know how
23 that is blacked out or how that content exclusivity is
24 preserved? Is it national across England? Can I watch a game
25 in New Castle when the New Castle game is playing in London?

F3I7LAU2

Ordover - cross

1 How does it work?

2 A. As I sit here, I don't know the details. I just provided
3 some information that I believe is consistent with the facts,
4 and I would be very happy to go back to the Internet and verify
5 the statements, but I don't know about those facts as I sit
6 here.

7 Q. The fact is you have cherry picked, have you not, the teams
8 and sports that you show, and that there are a number of sports
9 that don't black out and have feeds in the very market that you
10 say nobody other than someone engaging in the height of lunacy
11 would be involved in, isn't that correct?

12 A. I will be happy to talk about those instances if you
13 provide me with the relevant documents. I'm not going to be
14 subscribing to your statements, because I haven't the faintest
15 idea what you are talking about.

16 Q. Let's look at Exhibit 11.

17 THE COURT: Which book?

18 MR. LANGER: The black book, your Honor.

19 Q. Exhibit 11 is the website for American Major League soccer,
20 not English soccer. Do you see that?

21 A. Not yet. I haven't gotten to it. OK.

22 Q. And this is the package that people buy, correct?

23 A. Yes.

24 Q. And you see on the third page it shows you the blackout
25 policy. Do you see that?

F3I7LAU2

Ordover - cross

1 THE COURT: I don't yet.

2 MR. LANGER: It starts on the second page, on the
3 bottom, your Honor, 2 of 4.

4 THE COURT: I see.

5 Q. Then on the third page do you see Philadelphia union there?

6 THE COURT: Yes.

7 A. Yes.

8 Q. And I have a bias towards Philadelphia even though I grew
9 up in New York. That what happens I guess over time. But do
10 you see where it says no local blackouts? Do you see that?

11 A. That is true, but there are other entries which say there
12 are blackouts.

13 Q. Right. But it would be the height of lunacy for the team
14 that has the rights for the Philadelphia team, for the RSN to
15 give them for free to major league soccer to sell in
16 competition with them, wouldn't it?

17 A. No, if they had negotiated the right price, that reflects
18 the absence of the blackouts.

19 THE COURT: He used the word "for free" in his
20 question, "for free, in other words they have negotiated a
21 price of zero.

22 THE WITNESS: Well, yes, but there is a potential
23 price between the other agents that are participating in this
24 particular sport in terms of what it is their roles are, so I
25 can understand the circumstances in which there is a negotiated

F3I7LAU2

Ordoover - cross

1 result, a zero price, which is then reflected in other terms as
2 well.

3 Q. OK. Now if you turn to the next page, do you see that's
4 the schedule for the Philadelphia union. Do you see that?

5 THE COURT: No.

6 MR. LANGER: Oh, I'm sorry, Exhibit 12.

7 THE COURT: Exhibit 12. OK.

8 THE WITNESS: Yes.

9 THE COURT: We see.

10 Q. And you see it shows you what stations the games are being
11 broadcast on. And if I represent to you that TCN stands for
12 the Comcast Network and CSN stands for Comcast Sports Net.
13 It's your own client, Comcast, which is furnishing feeds back
14 to the team, that the league is then selling in competition
15 with Comcast in Philadelphia. Is that correct?

16 A. That is true, but the amount of money that Comcast paid for
17 that kind of limited rights will reflect the fact that the team
18 or somebody can be selling those rights in competition. So I
19 would have to go back to these contracts, look at the
20 arrangements and understand the transfers of funds that will
21 reflect the kind of relaxations or changes in the competitive
22 environment that you are talking about.

23 Q. Look at Exhibit 13. This is the American Hockey League.
24 Do you see that?

25 A. Yes.

F3I7LAU2

Ordoover - cross

1 Q. Their website. And they advertise every game, every team,
2 if it's on, it's on AHL live. And they charge for that, right?

3 A. That is true.

4 Q. No blackouts.

5 A. I guess no, at least not based on this document.

6 Q. OK. You selected Indy racing, and you selected NASCAR
7 racing, but you did not show motorcycle racing, did you?

8 A. That is true, I did not show motorcycle racing.

9 Q. Because you knew that motorcycle racing is available on a
10 non-blacked out basis in the very same markets that Fox
11 broadcasts on television, didn't you?

12 A. No, I didn't know that.

13 Q. You didn't know that? Well, you can look at Exhibit 14 in
14 your spare time. OK? I don't want to waste our time here
15 today. And exhibit 15 shows that it's on Fox on television.
16 And because I didn't know much about the sport myself, I
17 attached some further documents explaining.

18 OK. Now, your assumption -- well, let's get to that.
19 You say just what you said, that people would negotiate a lower
20 arrangement in the event that the rights were not exclusive in
21 the same fashion. Is that right?

22 A. That's true, I do believe that the fees or the other
23 payments that the parties would negotiate would reflect the
24 scope of the rights that is being conveyed. I think that's
25 straightforward.

F3I7LAU2

Ordoover - cross

1 Q. I have summarized, because time is running short -- I have
2 summarized on Exhibit 23 the content of Exhibits 22 and 24.
3 OK? And this is highly confidential, so I'm going to speak
4 about it in the abstract.

5 A. OK. That's in the black book?

6 Q. Yes. But I represent to you that the back-up for these two
7 charts are Exhibits 22 and 23.

8 THE COURT: Which exhibit am I looking at?

9 MR. LANGER: 23, your Honor.

10 THE COURT: 23 is the summary of two others?

11 MR. LANGER: Yes.

12 THE COURT: Which is 23 the summary of?

13 MR. LANGER: It's the summary of the combination of 22
14 and 24.

15 THE COURT: Oh, 22 and 24.

16 MR. LANGER: And 25.

17 THE COURT: OK.

18 Q. Do you see that it shows what the cost of producing a
19 baseball or hockey game is? Do you see that?

20 A. Yes, it gives sets and figures.

21 Q. \$40,000 to \$50,000.

22 THE COURT: I don't see that.

23 MR. LANGER: Sorry. My pages are out of order here.

24 They tell me it's 22. OK, it's 22, your Honor.

25 THE COURT: I should be looking at 22.

F3I7LAU2

Ordover - cross

1 MR. LANGER: My book is out of order.

2 THE COURT: That's OK. So 22 is the summary chart.

3 MR. LANGER: Yes. May I approach the witness?

4 MR. LECKMAN: It's the last page on Exhibit 22.

5 THE COURT: OK, I see it. It's called "Cost to
6 Produce Sports Telecast." Got it.

7 MR. LANGER: It should have been part of Exhibit 23.

8 THE COURT: That's OK, we have it now, both of us.

9 Q. It says it costs \$40,000 to \$50,000 to produce the game.
10 Do you see that?

11 A. Yes.

12 Q. And it gives the support for that, OK?

13 A. Yes.

14 Q. Something from hockey, something from baseball. And you
15 can see it's comparable if you look at the documents. OK?

16 A. OK.

17 Q. And that's the cost of what it costs just to produce the
18 game, OK?

19 A. OK.

20 Q. Then the next page is entitled "RSN Payment For Right to
21 Telecast." Do you see that?

22 THE COURT: Yeah, and that's in our books under
23 Exhibit 23. OK.

24 THE WITNESS: OK, I don't see it yet.

25 THE COURT: Just turn to Exhibit 23, and you will see

F3I7LAU2

Ordoover - cross

1 it. "RSN Payment For Right" --

2 THE WITNESS: OK.

3 THE COURT: We're there. We're both there. "RSN
4 Payment For Right To Telecast." OK.

5 Q. And do you see that it shows that for one team, the first
6 one, the RSN is willing to pay \$280 million over a period of
7 years, which comes to \$1.87 million per game to broadcast that
8 team's games? Do you see that?

9 A. I see that, yes, sir.

10 Q. And do you see that even for a small team that has
11 negotiated a small package in terms ever dollars it comes to
12 \$18 million a year and \$120,000 per game? Is that right?

13 A. That's true.

14 Q. So don't you think -- then if look at hockey you will see
15 similar stuff. OK? Do you see that?

16 A. Yes.

17 Q. Don't you think if her Honor granted the relief plaintiffs
18 sought here, that the first thing that would happen is just
19 what you described that would happen in these other sports,
20 that the RSNs would negotiate down these exorbitant fees for
21 the games that they're paying, these blanket fees, because
22 they're getting fewer rights? Isn't that the most likely
23 event?

24 A. I would expect all kinds of negotiations to take place to
25 account for the changed competitive environment.

F3I7LAU2

Ordoover - cross

1 Q. OK. And that's how these negotiations occur, individually
2 between teams and RSNs, right? They each negotiate separately.

3 A. That is true, those are one-on-one negotiations.

4 Q. Now, you did a model, is that right, that you described
5 before, this one cent, one cent, one cent business. Do you
6 recall that?

7 A. Yes, I constructed an approach for the purpose at hand.
8 It's not necessarily the approach one needs in the context of
9 what you are telling me now.

10 Q. And in that context her Honor asked you a question. She
11 said wouldn't the Yankees negotiate for a higher fee for their
12 feed than the poor Mets will?

13 A. I would expect, yes, that those prices would be higher,
14 reflecting the attractiveness of the team. However -- and here
15 is the reason why I didn't do it this way -- because I had no
16 ability to calculate exactly the fee that would be agreed above
17 the base level of 17 cents between the Yankees and the league.

18 Q. But when her Honor asked you, you told her there wouldn't
19 be a difference, that the Yankees would not be able to get more
20 for that fee, that everybody would pay the same fee.

21 A. In this particular set-up that I have introduced I was
22 limited to being able to do certain type of calculations, not
23 all kind of calculations. I could not tell you based on the
24 information I had what it is that the Yankees and the Major
25 League Baseball would negotiate out. I can simply tell you,

F3I7LAU2

Ordoover - cross

1 and I can stand by it -- and Dr. Noll has not dented that
2 calculation one iota -- that the minimum amount they would
3 negotiate for is 17 cents per view, per subscriber.

4 Q. But when her Honor asked you, she asked you whether the
5 Yankees could realize their value, and you told her, no, all
6 the teams were going to get the same thing, you didn't tell her
7 it was limited it in this way.

8 A. I think I was fully explaining my reason. And I thank you
9 for your question, because it only gives me a chance to make it
10 even clearer. I was always saying that this is not -- I
11 repeat, this is not the fee that actually would necessarily
12 emerge, but I can tell you the basis of my calculations remain
13 unchallenged.

14 Q. You say that your model -- you said in your direct
15 testimony that your model was based on the Crawford Yurukoglu
16 model, is that right?

17 A. Well, actually there are preceding papers to that as well
18 that I cite.

19 Q. In fact you don't cite the Yurukoglu model, you cite a
20 different model in support of this, if you look at footnote 50
21 to your report.

22 A. Right. But that is then cited again in C&Y. If I were
23 submitting this paper for publication, I would probably be more
24 detailed with the bibliographic citation. That's what people
25 do when they send the articles to the American Economic Review.

F3I7LAU2

Ordover - cross

1 Q. You say you based it on this article by -- I really can't
2 pronounce the first name, so I will call it Nevo and Karim. Is
3 that right?

4 A. Yes, but that's the later article. That's not the --

5 Q. This article that you have as footnote 50 is the support
6 for your model, isn't it?

7 A. Yes.

8 Q. It's the only support you cite.

9 A. Yes. Sorry to interrupt. Yes, that's the support. But if
10 you go back to that article, it cites a number of other papers
11 that discuss the issue of bargaining in the multi-party
12 context.

13 (Continued on next page)

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Ordoover - cross

1 BY MR. LANGER:

2 Q. You tell me how you followed this article, this approach,
3 do you do all of the same things that the people in the Karim
4 article do in your model or do you depart from it?

5 A. I believe I follow the basic issue -- basic approach
6 relating to bargaining. That paper covers a lot of other
7 things that are irrelevant to my task at hand. All I wanted to
8 do was to figure out how to calculate out the minimum fee that
9 the league would be paying to the teams.

10 Q. Tell us how you did it in terms of what did you draw from
11 the article? What specifically did you draw from that article
12 for your model? Can you tell us.

13 A. Yes. Sure. Absolutely. I'll be happy to do that. I
14 don't have a chance first time around.

15 So what I drew from it is that the -- you have a
16 context or circumstance, your Honor, in which there's one party
17 called the league that has to bargain for the rights fee with a
18 number of counterparties. In a straightforward bargaining
19 model, it's I and Mr. Burke bargaining over my fee, and we do
20 it one and one. But how do we approach the circumstance in
21 which I have to bargain with all the lawyers in some fashion
22 that is coherent, that makes economic sense that is
23 implementable in terms of understanding what the outcome is
24 going to be? And that's not a trivial question. It turns out
25 to be a very difficult question.

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Ordover - cross

1 Economists have developed a technique of dealing with
2 this, game theorists, bargaining theorists, to develop a
3 technique to deal with it and they deal with it in the
4 following way: The negotiations starts with between me and a
5 Lawyer 1. In the background, all the other negotiations are
6 held constant and we bargain for the fee. After I get -- after
7 that gets done, in my paper actually we bargain for an
8 agreement whether to increase my fee by a penny, okay. We
9 don't bargain for the end result of the fee. We are bargaining
10 starting from some baseline, let's say \$5 an hour. We are
11 bargaining whether or not the lawyer or his client will be
12 willing to pay me \$5 and a penny.

13 And if there's agreement is struck or simultaneous
14 with that agreement there are 29 other agreements going on --
15 taking place exactly the same time, there is no communication
16 between the lawyers. And the only thing that is being decided
17 is whether or not they're all going to agree to a penny
18 increase.

19 If everybody says okay, we willing to pay Ordover \$5
20 and a penny, then the negotiation moves to the next phase. And
21 the next phase we start everybody paying me \$5 and a penny and
22 we go up by a penny. And we keep on going up by a penny up
23 until such time that some lawyer/Ordover team or pair will say
24 no, I'm not willing to pay him more than \$5.15 or \$5.17 as we
25 had it on the board, and that's how it works.

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Ordover - cross

1 That's the sort of, I don't know, gold standard. At
2 the moment it is, I believe, the standard approach to a
3 negotiation in which I, the single person, am bargaining
4 simultaneously with a number of counterparties.

5 Q. Dr. Ordover, I had not asked you that. I asked you - and
6 I'm not going to press it again - I asked you what you took
7 from this article and what you didn't take from the article,
8 but I'm going to move on now, okay?

9 A. Okay.

10 Q. Are you aware of any negotiation at all where a sports
11 league negotiates with its individual teams to pay those teams
12 for any kind of intellectual property? Can you cite me to any
13 example in any sport in which that occurs?

14 A. I believe that there are contracts in which the league or
15 anybody on the other bargaining side of the table who is going
16 to be negotiating with the sport teams or the league that's
17 going to be negotiating with the distributors for the access to
18 the intellectual property; there's nothing different between
19 the league and the team as between the league and an MVPD for
20 example.

21 Q. I asked you whether there was any circumstance you could
22 cite to her honor where what you say occurs; where the league
23 negotiates with a team to obtain any form whatsoever of
24 intellectual property. Can you give her Honor any specific
25 example in any sport in the world?

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Ordover - cross

1 THE COURT: And stick with the league and the teams.
2 Don't bring in any distributors because that was not in his
3 question.

4 Do you know of any example of the leagues and the
5 teams negotiating for intellectual property?

6 THE WITNESS: I cannot name a specific instance of
7 that because I am not privy to what happens between the teams
8 and the leagues. I just don't have access to those kinds of
9 documents. But I do believe and there is evidence that the
10 league will negotiate with teams for rights, and those rights
11 may include intellectual property and other things as well.
12 Somehow those payments are made and those payments are
13 generally a result of bargaining or negotiation.

14 Q. You can cite no example to the Court; is that right?

15 A. As I sit here, I cannot.

16 Q. Okay. So there's no example that you can cite in which the
17 kind of negotiation you claim will occur has ever occurred in
18 sport before?

19 A. That is not what I said. I cannot tell you of off the top
20 of my head that --

21 THE COURT: I heard your answer. You said you can't
22 come up with one example but you believe it's so. That's the
23 answer. He believes it's so but has no example today.

24 Q. Now, you do a study that purports to show the
25 cross-elasticity of demand among people between teams. Do you

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Ordoover - cross

1 recall that?

2 A. Yes. I looked at the peoples' viewing times. And I also
3 looked at people's -- the number of teams that they actually
4 count the number of teams that they watch; yes.

5 Q. Now, but in selecting the group that you studied, you
6 limited the number of people that you looked at. Am I correct?

7 A. I looked at the people, the size of the population that I
8 worked with, what was available to me in order to be able to
9 implement this econometric regression models that I have
10 developed.

11 Q. I don't want to waste time looking for the document, but
12 let me just ask you, you used in this survey of yours, this
13 study of yours -- the population you used was subscribers with
14 a strong favorite team preference, isn't that correct, those
15 were the only people you looked at?

16 A. That is true.

17 Q. If you look back in your exhibits, that excluded the 40
18 percent of the market that didn't have that strong preference;
19 is that correct?

20 A. That is true, but it included 60 percent that did.

21 Q. Right. So it only included those people who already wanted
22 to watch a favorite team and it excluded those people who might
23 watch a different team; isn't that correct?

24 A. That is true, but the question arises what are the
25 implications of that for the conclusions which I have drawn.

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Ordover - cross

1 THE COURT: The problem, Mr. Langer, is that your time
2 is up.

3 MR. LANGER: Okay. Thank you, your Honor.

4 THE COURT: Sorry about that. So we have a
5 five-minute redirect.

6 REDIRECT EXAMINATION

7 BY MR. BURKE:

8 Q. Just a few things, Dr. Ordover. You were asked about
9 whether you can think of any examples of situations where
10 leagues charge teams a fee for their content.

11 Are you aware of any circumstances where a league
12 appropriates the intellectual property of teams and uses it to
13 compete with teams without providing any compensation to those
14 teams?

15 A. I am certainly not aware of such a circumstance because I
16 believe it would be totally inconsistent with the interest of
17 the team.

18 MR. LANGER: I'm going to object to that question for
19 a total lack of foundation. It's clear this witness does not
20 know anything about sports and to ask that question of him is
21 ridiculous.

22 THE COURT: I understand your objection, I do. I
23 don't know that he has a basis to answer that other than
24 instinct. If he can't give one example of it, I don't think he
25 should be able to testify as to what he believes to be so or

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Ordover - redirect

1 his instinct as to what is so because that is speculative.

2 MR. BURKE: I think I was just asking whether he was
3 aware of anything.

4 THE COURT: Tell him to name one. I don't think he
5 can. I think his testimony has been quite clear that he
6 believes but has no evidence, so I'm going to sustain the
7 objection and strike the testimony.

8 MR. BURKE: So, just to be clear, again, the question
9 was whether he's aware of any situation.

10 THE COURT: Tell us one that you're aware of, any one.

11 THE WITNESS: I'm not.

12 THE COURT: I thought so. Then that's that.

13 MR. BURKE: Okay.

14 THE COURT: Okay. No more redirect?

15 MR. BURKE: No. Thanks.

16 THE COURT: So, look, the schedule you wrote doesn't
17 comport with my dietary habits. I'd like to do the direct of
18 Dr. Pakes for an hour now and then take the luncheon recess;
19 otherwise it throws off the eating day. Don't tell me he's not
20 here. He is here?

21 MR. PARIS: He is.

22 THE COURT: Good. We do need a minute to close
23 notebooks and change notebooks. Thank you, Dr. Ordover.

24 THE WITNESS: Thank you, your Honor.

25 (Witness excused)

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1 THE COURT: You need to collect notebooks from
2 Dr. Ordover and from the Court. Where are the young, strong
3 ones: There they are. Young and strong.

4 According to the schedule, this direct is scheduled
5 for one hour -- no, 50 minutes. It was scheduled for 1:00 to
6 2:00, so we'll do it from now until 1:05, fifty minutes, now
7 until 1:05. Who is conducting this direct? Who is the lawyer
8 conducting it?

9 MR. PARIS: I am, your Honor, Andre Paris.

10 THE COURT: Mr. Paris, thank you. While you're doing
11 that, I'll swear the witness.

12 ARIEL PAKES,

13 called as a witness by the Defendants,

14 having been duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. PARIS:

17 Q. Good morning, Dr. Pakes. I know we have to reorient that.
18 First, did you prepare some slides to help you with your
19 testimony?

20 A. Yes, I did.

21 Q. Can we have the first slide up.

22 Dr. Pakes, I'd like to start by reviewing your
23 credentials. What is your current position?

24 A. I'm a professor of economics at Harvard University.

25 Q. Have you been awarded any prizes in the field of economics?

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Pakes - direct

1 A. Yes, I've been awarded - some of them are up there - I've
2 been awarded the Frisch Medal from the Econometric Society; the
3 Distinguished Fellow of the Industrial Organizational Society
4 one year; and the fellow of the American Academy of Arts and
5 Sciences and other things.

6 Q. What is your field of expertise in economics?

7 A. Mostly, I study industrial organization, which is the study
8 of markets. And I do -- I also teach econometrics sometimes,
9 statistical methods for economics.

10 Q. Does that specialty also include structural models?

11 A. Yes.

12 Q. How long have you been working with structural modeling?

13 A. Since my thesis.

14 Q. Have you authored papers on the field of structural
15 modeling?

16 A. Yes. Many.

17 Q. I understand that you're the author or coauthor of an
18 article called BLP for short, that's an approach to demand
19 estimation.

20 A. Correct.

21 Q. Is that correct?

22 A. That's correct.

23 Q. What's the significance of the BLP article in the
24 profession?

25 A. It showed how to analyze market demand and differentiate

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Pakes - direct

1 product markets. That's a basic -- input demand systems are a
2 basic input into the study of markets.

3 Q. Did Dr. Noll rely on that in his analysis in this case?

4 A. Yes.

5 Q. Has that article been relied on by other economists in the
6 profession?

7 A. Yes. It has thousands of cites.

8 Q. Have you ever served as an editor or a referee for articles
9 submitted to publication?

10 A. Referee all journals and I was an editor of the RAND
11 Journal of Economics for about ten years which was at least at
12 the time the premier journal in industrial organization.

13 Q. What role do you play when you are the editor or referee
14 for an article?

15 A. Typically I would get the article. You do a reasonably
16 quick reading. You can throw out half the article right away
17 because there's something wrong with them that you see. If
18 not, you send it to referees, usually one that's very
19 knowledgeable of the industry of interest and one that's
20 knowledgeable of the techniques. Get back the referee reports.
21 If they're positive, you go over it very seriously and decide
22 whether you want the paper, you want revisions on the paper,
23 but you're the final gatekeeper. You decide whether the paper
24 gets published or not.

25 Q. How did you familiarize yourself with the facts at issue in

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Pakes - direct

1 this case?

2 A. In a very similar manner. I read articles. I read
3 declarations. I asked questions. Very similar to what I would
4 do in that case.

5 Q. Last question: Have you ever testified in court before as
6 an expert?

7 A. Never.

8 THE COURT: Poor guy.

9 MR. PARIS: First time for everything.

10 Q. I'm just going to reorient this board up here so the most
11 important people can see it. Sir, can you tell me what this
12 represents.

13 A. I was asked to examine the article for whether the results
14 from it would be robust or would be reliable in some sense or
15 there was some methodological flaws. So what I did, I
16 investigated the issues that are on this slide. You're going
17 to get to them.

18 Q. We're going to go through them one by one. Were you asked
19 to create a model of the but-for-world?

20 A. No, no. My only -- the only thing I was asked to do was to
21 find out whether Dr. Noll's model was reliable or not, whether
22 its estimates were reliable for the major things of interest.

23 Q. And what methodology did you follow to determine that?

24 A. What I always do in these kinds of situations, which is,
25 you ask -- there's a situation -- there are things in the

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Pakes - direct

1 article they don't conform -- they aren't like reality. So
2 what you do is relax them. No model is perfect, but you relax
3 the things that you know are not like reality. You see if a
4 major result of interest changes. If it does, it's not robust;
5 if it doesn't --

6 Q. In your analysis here, did you relax all the assumptions at
7 one time or did you do them --

8 A. No. I just did them one at a time.

9 Q. So, let's get to your first item up there and talk about
10 C&Y. Does Dr. Noll rely on the C&Y model as a basis for his
11 analysis?

12 A. Well, when I read his report, it said he did, but in fact
13 it doesn't. It relies on part of it, which is the part that's
14 BLP and it doesn't rely on the rest of it, which is the
15 innovation of the model.

16 Q. Before we get into the C&Y model in detail, before this
17 litigation, did you have familiarity with the analysis that
18 became the C&Y article that was published in the American
19 Economic Review?

20 A. Yeah. I was the thesis adviser for Yurukoglu, and the
21 basis of that article is his thesis, and then they took it --

22 Q. What was the question that C&Y studied in that article?

23 A. At the time that the article was written there was an issue
24 both at the FCC and in Congress actually about whether we
25 should debundle the tiers or make the tiers that cables have à

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Pakes - direct

1 *la carte*; so you would force them to be sold *à la carte* and
2 what would be the impact of that on consumers.

3 Q. Let's look at the supply-side bargaining issue. What does
4 the left side of the graphic represent?

5 A. It represents C&Y's model.

6 Q. And what does the reference at the bottom two mark-up and
7 multiproduct pricing?

8 A. So that's what the -- so there are two levels, maybe I
9 should go through it. Is that okay?

10 Q. Yes.

11 A. There are two levels. First is the networks who add
12 content, okay? They set a per-subscriber fee to the MVPDs.
13 And that per-subscriber fee covers their marginal cost and
14 their mark-up, their mark-up, which covers their investments,
15 their returns to their investments.

16 The MVPDs then get these -- they get the
17 per-subscriber fee which are their costs for the network
18 material; they add whatever is their marginal cost to it. And
19 then they mark it up and sell it to consumers. And in the
20 Bertrand pricing game, their mark-up covers their fixed cost,
21 their satellites or their cable networks, cable in the ground,
22 stuff like that.

23 THE COURT: Two quick questions. This has nothing to
24 do with sports or it's not all sports anyway, right?

25 THE WITNESS: Yes. It's a general model.

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1 THE COURT: The C&Y model is not sports network?

2 THE WITNESS: Not only the sports network.

3 THE COURT: Sports was in there, but it wasn't only
4 sports.

5 THE WITNESS: Correct.

6 THE COURT: Also, this model was mixed content; is
7 that true? In other words, it was sports, it was films, it was
8 news?

9 THE WITNESS: Yes, it was mixed content. It was all
10 content.

11 THE COURT: And it was various content providers?

12 THE WITNESS: Correct.

13 THE COURT: I just wanted to understand.

14 THE WITNESS: Fine. No, that's fine.

15 Q. So, the bundling refers to the MVPDs selling as a package
16 to the consumers?

17 A. Correct. They put it in tiers and sold it.

18 Q. How did C&Y analyze the effects of unbundling?

19 A. They did it in two ways. The first way they did it was
20 they held the costs of the networks of the per-subscriber fee
21 that the networks charged the MVPDs is constant, made the MVPDs
22 split everything up into *à la carte* offerings, and redid the
23 demand and saw what the Bertrand pricing model again or
24 Nash-on-pricing model -- Bertrand is really Nash on prices,
25 Nash is the "Beautiful Mind" Nash, actually; it's that guy --

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1 so, Nash-on-pricing model and consumers reoptimize. And they
2 ask the question are consumers better off or worse off.

3 Q. And the first time when they did that analysis, what
4 happened?

5 A. Consumers were significantly better off.

6 Q. Was that the end of their analysis?

7 A. No. What happens is if in that case when they debundle,
8 the amount of money that goes back to each of the component
9 networks is much smaller because people only buy a little bit.
10 So the networks essentially would go out of business if they
11 did that, so they allowed for bargaining, a bargaining
12 situation between the networks and the MVPDs.

13 They recalculated what's called a Nash and Nash
14 bargaining solution, which you don't need to know what it is
15 but it's a negotiation, it gives us a bargain. That sets new
16 per-subscriber fees to the MVPDs. And with the new subscriber
17 fees, the MVPDs did an *à la carte* offering to the consumers.

18 The results of that were that the fees went up
19 dramatically, they would have to for the networks to stay in
20 business. And the consumers actually ended up slightly worse
21 off maybe -- you couldn't tell really, but they certainly
22 weren't better off maybe slightly worse off, it wasn't
23 significantly significant. So that was the major finding of
24 the paper and the major contribution of the paper was this
25 innovation of modeling where they went upstream and did the

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1 bargaining to determine the per-subscriber fee when an
2 institution changed.

3 Q. So you already talked about the fact that the C&Y did this
4 Bertrand pricing analysis. And at what point in the analysis
5 did they do the Bertrand pricing analysis, the Nash's pricing
6 analysis?

7 A. From -- the MVPDs sold their products, they now have a set
8 of products that they sell at a multiproduct way to the
9 consumers.

10 Q. How important was the supply-side bargaining analysis to
11 C&Y's model?

12 A. Again, two things: One, it flipped the major result of
13 interest, okay? So it's important, and it was the
14 methodological, that's the reason the paper is important.

15 Q. Did Dr. Noll apply the teachings of C&Y in his analysis
16 here?

17 A. Certainly not this part; no.

18 Q. Is Dr. Noll's model depicted on the right side of the
19 slide?

20 A. I have it here. Yes, that's it.

21 Q. First, why is the MVPD box grayed out in Dr. Noll's
22 analysis?

23 A. Dr. Noll assumes -- it doesn't assume anything. The MVPDs
24 don't enter Dr. Noll's model at all. They're just not there.

25 Q. Putting up the rest of this, is it correct that Dr. Noll

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1 does not model bargaining between the MVPDs and the RSNs in his
2 model?

3 A. No. There is no MVPDs, so there's nobody bargaining on it.
4 They're not there.

5 Q. Is there bargaining in Dr. Noll's model between RSNs and
6 the teams?

7 A. No. He talks about a team RSN. Sometimes he has some
8 narrative about it, but there's no actual model of how they
9 interact.

10 Q. Given what Dr. Noll was analyzing, was it a methodological
11 flaw to not model the supply-side bargaining?

12 A. Yes. It's a methodological flaw. The reason it's an
13 important methodological flaw is the closest paper to it, which
14 is this C&Y article, but there was a subsequent paper that I've
15 seen now at two conferences, and it's up on our website, which
16 is just the RSNs, it's just both the RSNs; and they show that
17 there in fact is bargaining. And all the results from the
18 bargaining model go through it in that paper, including the
19 double marginalization results.

20 So the double marginalization result is on the left
21 side here. So the first mark-up was the mark-up from the
22 networks to the MVPDs; and the second mark-up is the mark-up
23 from the MVPDs to the consumer. So one covers the production
24 cost of the content, one covers the investment cost of the
25 firm. And the new paper actually estimates these mark-ups and

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1 it's about whether these mark-ups stick around even after you
2 vertically integrate. The mark-ups are there definitely. They
3 do examples of divesting, of separating the RSN from the MVPD
4 and the examples of the RSN being combined with the MVPD. Both
5 times they find there was double marginalization. And the sort
6 of -- to an economist, to an IO economist, that's not
7 surprising. The surprising part was, even when they did
8 vertically integrated, there was still double marginalization
9 because the profit center still looked out for itself in some
10 sense.

11 Q. What does that finding in that second C&Y tell you about
12 the need to do supply-side bargaining analysis?

13 A. It just -- it's a structure of the industry. And when you
14 do it, things change quite dramatically. Dramatically depends
15 on what you mean by -- substantively I guess is the right word.

16 Q. On the slide it says that there's no MVPD cost mark-up or
17 multiproduct pricing between MVPDs and consumers.

18 Is that consistent with the real world?

19 A. In the real world, the RSNs do not have the power to price
20 anything, okay, to the consumer, that is. They have to go
21 through an MVPD. So in the actual world, the RSNs are not
22 setting prices. It's the MVPD is setting prices. The MVPD has
23 to cover its costs. It's marketing many products at the same
24 time, okay. And it has to have a mark-up or it can't sustain
25 its investment activities.

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1 Q. Did Dr. Noll do a Bertrand pricing analysis in this model?

2 A. Yeah, but it was the Bertrand -- Dr. Noll doesn't have
3 MVPDs, okay. So in that model, each RSN is pricing directly to
4 the consumer. And they're all -- they're pricing just one
5 product directly to the consumer, so there's 30 of them, so
6 there are 30 prices being set, and there's another bundle
7 market also.

8 Q. Is there any problem with what Dr. Noll did with respect to
9 his Bertrand pricing analysis?

10 A. It's just not -- it's -- it doesn't conform with reality.
11 The RSNs don't set prices, don't have the power to set prices,
12 so the prices are now going to be set by the MVPD, and it's not
13 pricing a single product; it's pricing a bundle of products and
14 it will take that into account when it's pricing.

15 Q. In your opinion, was it a methodological flaw to do the
16 Bertrand pricing analysis at the RSN level and ignore the MVPD?

17 A. Yes. I haven't seen a paper that does this at least since
18 BLP. There are many papers that have firms that sell multiple
19 products, including BLP. There was -- there's General Motors
20 that sells 30 cars. I have not seen a paper that does -- at
21 least since there which is 20 years ago, everybody takes into
22 account the multiproduct pricing incentives.

23 Q. Dr. Noll said you don't need to do a bargaining analysis
24 because double marginalization will occur. I think you just
25 explained -- let me ask you: Does double marginalization occur

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1 in RSN distribution by MVPDs in the actual world?

2 A. The answer is yes, at least if you believe Yurukoglu and
3 Crawford. I believe they do. There's definitely negotiations.
4 They negotiate between themselves and barter a contract. The
5 way that -- whether that contract has in it a mark-up -- I
6 don't imagine how it could not have it in it. And Yurukoglu
7 and Crawford show that it does. So yes, I guess that's a long
8 way of saying yes.

9 Q. Is it your understanding that Crawford and Yurukoglu are
10 working with plaintiffs in this litigation according to Dr.
11 Noll?

12 A. The report said that, so Dr. Noll's report said that, so I
13 assume it's right.

14 Q. Do you recall from Dr. Noll's testimony yesterday that
15 there were a number of hypothetical contract forms you said
16 might be adopted in the but-for-world between RSNs and the
17 MVPDs that would avoid double marginalization.

18 Has Dr. Noll given any reasons for RSNs to change
19 their current per-subscriber fee contract structure in the
20 but-for-world?

21 A. No. Indeed, in the but-for-world there are many more
22 reasons to have double marginalization than in the current
23 world.

24 All of Dr. Noll's reasons for getting around the
25 double marginalization issue, they're based on the following

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1 thing: If there's a producer of a product or a service who is
2 selling it to an intermediary, like an MVPD who then remarkets
3 it, if there's only one good that the producer is producing and
4 there's only one good that the MVPD is marketing, then it makes
5 sense sometimes, okay, to devise a contract where we maximize
6 the joint profits from the endeavor and split it somehow
7 between the two.

8 So the way he was going to split it one way was he was
9 going to say, well, just give a fixed fee to the producer of
10 the service, and then let -- and then the marginal cost, and
11 let the retailer remarket it at marginal cost, because that's
12 one way of doing it, he had other ways of doing it, he had
13 other ways on the board. That presumes that each side of this
14 contract only markets one good. If the MVPD is marketing 30
15 goods, it's not in his interest to maximize the profits from
16 this -- just this set of -- this contract unit, single RSN. He
17 just will not do it. It's just not in his interest. And the
18 RSN knows he won't do it.

19 As a result, he won't accept this kind of contract
20 because it lets the MVPD price any way it wants, which will
21 maximize its total profits and not the profits from this
22 endeavor, so though there will be a per-subscribe fee which
23 limits the MVPD can do.

24 Similarly, on the RSN side, the RSN is selling both to
25 the MVPD and to the Internet. So if it let the -- if the price

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1 goes too low on its MVPD product, it cannibalizes its Internet
2 product, people will move from -- and it doesn't -- so it will
3 not do that; it has an interest in a different thing than the
4 MVPD does.

5 So what Dr. Noll's assumptions for getting rid of
6 double marginalization are based on are this issue that there's
7 only one good that both of them are marketing. So the producer
8 and the retailer or the distributor each only have one good.
9 That's fundamental to doing it that way. And this is not the
10 case in this industry.

11 Q. Thank you. Let's turn to issue number two, which is the
12 multiproduct pricing. We heard some testimony about that. But
13 can you briefly explain the multiproduct pricing principle.

14 A. Yeah. It's easy to understand actually. This is one
15 that's really easy. Let's assume there's two goods and each
16 good is owned by one firm. So we divest Pontiac and Chevy from
17 GM and we say they're pricing alone. How do you set the
18 Bertrand price? You increase -- you keep increasing the price
19 by a dollar. For every dollar increase price for all the
20 people who stick around and don't leave, you earn another
21 dollar; and then some people leave because it's more pricey and
22 you lose the mark-up on those people.

23 So what Bertrand pricing does or Nash on prices does,
24 is it keep on increasing the price until that just equalizes,
25 and that's the equilibrium.

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1 So now what happens if Chevy and Pontiac are combined
2 in GM? So now GM is setting the price for both. They own both
3 products. They get the profits from both products. So we do
4 the same exercise again, say, for Pontiac. We increase the
5 price of the Pontiac by one dollar. It gets a dollar from
6 everybody who stays, and some people leave, but they don't lose
7 the mark-up on everybody who leaves. Why? Because some of the
8 people who leave go to the Chevy because it's also a
9 family-sized car. So they'll keep increasing the price more
10 until that equilibrium is established again. So that's what's
11 going on in multiproduct pricing. You can -- it's pretty easy
12 to understand.

13 Q. Is there agreement among economists on the impact of
14 multiproduct pricing?

15 A. Yes. You can -- the argument I just gave you, you can do
16 that formally mathematically to show it has to increase
17 pricing.

18 Q. Does Dr. Noll incorporate multiproduct pricing into his
19 analysis?

20 A. No. That was rather striking to me that he didn't.

21 Q. Did you analyze what would happen to Dr. Noll's prices if
22 you incorporated multiproduct pricing?

23 A. Yeah. I did what I'm going to do on every one of these
24 things, which is, I left all the other assumptions exactly like
25 Dr. Noll had them. So I took his demand system. I assumed the

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1 RSN give their feeds at cost to the MVPD. And the only thing I
2 changed was the MVPD now prices the group of products instead
3 of one product.

4 Q. I'm putting up on the board slide number three. This is
5 your multiproduct pricing analysis?

6 A. It's both mine and it compares it to Dr. Noll's single
7 product pricing analysis.

8 Q. Column A is Dr. Noll's work and column B is your adjustment
9 for multiproduct pricing. Is that correct?

10 A. It's what you get from Dr. Noll's model if you just shift
11 his assumption from each individual RSN price to one
12 multi -- one MVPD pricing. I hesitate to say this is my model.

13 Q. Does the adjustment in column B, does that reflect an RSN
14 margin or mark-up?

15 A. It reflects one mark-up still. There's only one mark-up in
16 this game because it's just the RSN gives it a cost of the MVPD
17 and the MVPD prices. So again, I tried to just do one of the
18 assumptions at time.

19 THE COURT: When you did the first one, you told us
20 Dr. Noll's justification and you said why you didn't accept it.

21 Did he justify his decision not to engage in
22 multiproduct pricing? I don't recall. Do you?

23 THE WITNESS: I can't -- I don't recall him doing
24 that, okay.

25 THE COURT: You don't recall any justification?

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1 THE WITNESS: No.

2 THE COURT: Okay. Okay.

3 Q. How does the adjustment for multiproduct pricing for the
4 MVPD affect the price of the bundle?

5 A. So you see that in the bottom of the table. So on the
6 left-hand side column, at the very bottom, there's a
7 but-for-world league bundle price, which is \$25 -- \$24.59 for
8 Dr. Noll, which is about \$9 less than the current existing
9 price on the market. When you do the multiproduct pricing,
10 that goes up to 40 -- almost \$41, okay, which is \$7 more
11 than -- over \$7 more than the current but-for-world league
12 package.

13 THE COURT: What are these multiproducts, just as a
14 reminder?

15 THE WITNESS: They're just the RSNs. So what the MVPD
16 is marketing are the 30 standalone RSNs and the league bundle.

17 THE COURT: The multiproducts, 30 standalone and the
18 one league?

19 THE WITNESS: Yes. And this is exactly --

20 Q. Is the assumption that the MVPD is going to have 30
21 standalone products, is that your assumption or is that Dr.
22 Noll's assumption?

23 A. No. All these assumptions are Dr. Noll's. The only change
24 is who is pricing them.

25 Q. I note that the -- with that adjustment, the package price

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1 is now actually lower than the standalone prices that you've
2 calculated in many instances.

3 What does that tell you?

4 A. It tells you there's something seriously wrong with the
5 demand system. So the package price, the package includes all
6 the games. It includes all the teams. So if the package price
7 is less than the price of the individual -- one individual
8 team, nobody will buy that individual team because they get it
9 anyway on the package and they could get other things that they
10 want and they don't need to watch it if they don't want it.

11 If this was handed me by a student in a seminar to get
12 a thesis, I would send him back to the computer. This is -- it
13 can't happen. I mean, it shouldn't happen. There's something
14 wrong with the model.

15 Q. Was it an error for Dr. Noll not to consider multiproduct
16 pricing with respect to the MVPD sale of these products?

17 A. Again, multiproduct pricing is what happens in the real
18 world, and he's trying to approximate what would happen in a
19 but for -- in a world with a different assumption. So yes, an
20 error. It's an methodological flaw, and it's one that people
21 don't make anymore.

22 Q. Does it affect the reliability of the model?

23 A. Well, the price goes up \$16 over 24, so that's 60 percent,
24 so -- and that's the price of the but-for-world league bundle
25 and that's the price of interest, so 60 percent is huge.

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1 THE COURT: Let me ask you one question. You gave an
2 example of the Pontiac and Chevy being sold by GM and those
3 were the multiproducts, and you had to figure that the dollar
4 wasn't necessarily lost because the other was a family car and
5 you might prefer it.

6 THE WITNESS: Right.

7 THE COURT: For two standalones, standalone Yankees,
8 standalone Giants, do you see that as similar to the Chevy and
9 the Pontiac?

10 THE WITNESS: So, the demand system that Dr. Noll is
11 using, implicit in that demand system is what would happen if
12 the price of, say, the Angels went up, how many people would go
13 to another team.

14 THE COURT: That's what I'm sort of asking you.

15 THE WITNESS: Do I see it? I'm taking Dr.
16 Nolls -- this is what the implications of Dr. Noll's estimates
17 are.

18 THE COURT: Okay.

19 THE WITNESS: There probably is some substitutability,
20 and I don't know exactly how much. I've not undergone my own
21 demand estimation. But this is what he's using to make
22 predictions with.

23 THE COURT: But is it possible -- I'm asking you to
24 speculate why he didn't do that multiproduct pricing is it
25 because really the standalone Yankee person wouldn't ever buy a

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1 standalone Angels. The whole reason you do standalone is you
2 want to watch that team and that's it, that's your favorite
3 team, that's who you want to watch. You'd never go from the
4 Yankees to the Angels if that was your goal.

5 THE WITNESS: I think there are people who like
6 several teams.

7 THE COURT: But then they'd go to the package and I
8 can see those are the two -- you said there were two products,
9 but you said his model has 31 products.

10 THE WITNESS: So they might go to the package and
11 that's in here also, by the way.

12 THE COURT: I get that.

13 THE WITNESS: But I'm not going to try and justify his
14 demand model, but I do think there probably are people who
15 would switch, but we may disagree. I don't -- I don't know
16 enough to argue this with you.

17 THE COURT: Right, nor do I really, but it didn't seem
18 like a Pontiac and a Chevy to me.

19 THE WITNESS: I used that because everybody knows
20 General Motors.

21 THE COURT: For sure, but I also saw the similarities
22 there, but I didn't see it with respect to the Yankees and the
23 Angels. But you're saying, look, if he did, you're not going
24 to quarrel with that. He saw 31 products.

25 THE WITNESS: Yes.

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1 Q. Does the multiproduct pricing also impact an RSN sale of an
2 Internet and TV product in the but-for-world in Dr. Noll's
3 model?

4 A. Yeah. In Dr. Noll's model, no, the Internet and the TV are
5 totally separate in Dr. Noll's model.

6 Q. Should he have taken that into account in your opinion?

7 A. Yes.

8 Q. If he had, how would it affect prices?

9 A. Well, the RSN would then price -- it has an incentive to
10 price each a little higher because, again, it's not their
11 multiproduct pricing on the RSN side. So the cost to the MVPD
12 would go up a little bit and the price of the Internet would go
13 up a little bit for exactly the same reason that if it didn't
14 go up a little bit, if the Internet was too low, it would lose
15 money from its MVPD product and vice versa, so that's just
16 multiproduct pricing.

17 THE COURT: I'm sorry. The MVPD distributes both the
18 Internet and the television?

19 THE WITNESS: Currently I believe --

20 THE COURT: I thought they were out of the Internet.

21 THE WITNESS: No. The MVPD is out of the Internet.

22 THE COURT: That's what I thought. It's not part of
23 their --

24 THE WITNESS: We're talking about the RSN now who is
25 selling to both of them.

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1 THE COURT: So it's their multipricing; it's the
2 RSN's?

3 THE WITNESS: Both of them are multiproduct pricing,
4 the MVPD --

5 THE COURT: We did that.

6 THE WITNESS: And then the RSN is doing the Internet
7 and the MVPD.

8 Q. Let's turn to the next part of your analysis, which is the
9 joint venture incentive for the teams in the leagues and let me
10 put up a slide number four to illustrate your analysis.

11 What did you do in your joint venture analysis and how
12 does that differ from what Dr. Noll did?

13 A. This is related to the multiproduct pricing but it's not
14 the same thing. So the RSN in Dr. Noll's model, he actually
15 earns profits from two products. He earns his own product and
16 the other product, 1/30th of the league bundle, so that's not
17 in Dr. Noll's model.

18 The RSN only sets prices -- it only sets its own
19 price, but when it sets its own price, it realizes that if
20 somebody -- if it increases its price, somebody leaves, it gets
21 1/30th of the mark-up on the other one, so I put that back in.
22 So that was the pricing of the RSN.

23 And then the other side is the pricing of the league
24 bundle. So I assume that the league would hire somebody to do
25 the pricing and that person would be interested in maximizing

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1 the profits of the owners of the assets, which, in this case,
2 those are the teams. So I let that person price -- he was just
3 pricing one product against others. And then I just solved for
4 the Bertrand equilibrium or the Nash equilibrium for that. Is
5 that clear?

6 Q. In your analysis, are the teams setting the prices for
7 their RSNs together or separately?

8 A. No. Each team sets one price separately without
9 communicating with any other team, and then there's this person
10 that the league hires who sets one price without communicating
11 with anybody.

12 Q. Does slide five reflect the joint venture pricing incentive
13 impact on Dr. Noll's analysis?

14 A. Yes. Again, I did exactly the same thing as I did before.
15 I took exactly Dr. Noll's model, so the RSNs are now pricing
16 again, there's no MVPD pricing now, there's no multiproduct
17 pricing except for to the extent that the RSN is pricing this
18 and understanding that it gets profits from the other one, from
19 the league bundle. So this is all just Dr. Noll's assumptions
20 again. And I lifted this one assumption. I said, look, the
21 league and going to try and maximize the profits of the league
22 and the RSN is going to maximize the profits it gets from the
23 standalone and the 1/30th it gets from the other products, left
24 everything else alone, and what you get in column B is what you
25 get.

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Pakes - direct

1 Q. And column B reflects your analysis. What is the impact on
2 the pricing?

3 A. Now the price goes up again. And now the price goes up \$9
4 about over what Dr. Noll goes -- went up 35, 40 percent, which
5 indicates that incentive the monetary incentives to the
6 people -- that you put into the model.

7 Q. Would a result in interest, in this case the package price
8 goes up 35, 40 percent, what does that tell you about the
9 reliability of the model?

10 A. It says it's sensitive to these monetary incentives, which
11 I believe Dr. Noll didn't specify correctly; and the result of
12 interest changes pretty substantially when you do do that.

13 THE COURT: Again, I have the same question I had for
14 the last criticism. Did he have a justification and did
15 you -- can you tell why he rejected it or did he not have one?

16 THE WITNESS: If he had one, I don't recall, and I did
17 read it pretty carefully.

18 THE COURT: Okay.

19 Q. In column B, it shows that the -- on this adjustment, it
20 shows that the package price is about 19 cents lower than the
21 actual world package prices.

22 Is that a statistically significant result?

23 A. No, it isn't. It's not statistically different from zero,
24 which means we don't have any confidence that it's one
25 direction or the other, whether it's higher or lower than the

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1 actual price today.

2 Q. So does that show whether or not there's an overcharge
3 for -- does Dr. Noll's model show whether there's an overcharge
4 for baseball package purchasers in the actual world?

5 A. So this is another case where if I just make this one
6 adjustment, the overcharge essentially goes away. In the other
7 case, in the multiproduct pricing, it not only goes away, it
8 gets much bigger.

9 Q. Did you do the same joint venture pricing and same analysis
10 for the NHL Internet package?

11 A. Yes, I did.

12 THE COURT: I'm sorry. For the what?

13 MR. PARIS: For the NHL Internet package.

14 THE COURT: Right. Thank you.

15 A. This is exactly the same analysis so we don't need to go
16 over it again and this is the result. And the price this time
17 goes up by I guess seven over 18 again, about 40 percent.
18 Again, there's 55 -- we're now predicting just using this --
19 that it's 55 cents less than the actual price today and, again,
20 that wasn't statistically different from zero, so it's very
21 similar results.

22 Q. In his declaration, Dr. Noll suggested that the profit
23 maximizing analysis that you've done here suggested collusion
24 by the teams. Is that right in your opinion?

25 A. I really didn't understand that. Each team is pricing to

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1 maximize its own product, its own returns, okay? The league is
2 hiring somebody to maximize the returns of the owners of the
3 assets. This has nothing to do with collusion. Indeed, we can
4 talk about models of collusion, but they don't look anything
5 like this, so I just didn't understand that complaint.

6 Q. Are aware of any principles of economics that would
7 preclude a joint venture from maximizing its pricing in profits
8 in this situation?

9 A. I'm not a lawyer. There's no principle of economics. And
10 I'm not a lawyer; I don't know joint venture lawyers, so I
11 don't want to proclaim on that.

12 Q. Let's turn our attention to the fourth point, which is the
13 equilibrium analysis. First, what is the concept of
14 equilibrium in structural modeling?

15 A. Equilibrium is used mostly when you're trying to do a
16 counterfactual. So what happens, the concept works something
17 like this. Each agent has things it can do, okay. So in an
18 equilibrium, each agent, among the things it can do, is
19 choosing the thing that maximizes its profits given what
20 everybody else is doing. And the reason we look at that for
21 counterfactual is it's a rest point. Nobody has an incentive
22 to change their behavior. So we don't think it gets there
23 right away, but we think if it's going to stop somewhere, it's
24 going to stop there where nobody has an incentive to change, so
25 that's what an equilibrium is. That's what you asked me.

F3iglau3

Pakes - direct

1 Q. Is it important for a structural model to do equilibrium
2 for price predictions?

3 A. When you're doing counterfactuals, yes. There's no other
4 way.

5 Q. How did you assess whether Dr. Noll's model is at an
6 equilibrium point?

7 A. I asked the question whether any of the actors had an
8 incentive to leave the bundle or to deviate; that one option
9 that an agent has is to leave the bundle. And so in
10 particular, we first chose the Yankees and we asked what would
11 happen if the Yankees left the league bundle? So now the
12 options to the consumer are the league bundle without the
13 Yankees, the Yankees are their favorite team, or some
14 combination.

15 Q. What did you conclude?

16 A. Not only did the Yankees' profits go up, but so did
17 everybody else's profits. And why that's important is the
18 league might have to vote on this to let the Yankees leave, but
19 if everybody's profits go up, there's nobody with an incentive
20 not to let the Yankees leave.

21 Q. I put up slide seven. What does this show?

22 A. Am I getting -- is this -- this is the profits before I
23 believe --

24 Q. Yes.

25 A. -- before the Yankees leave the bundle.

F3iglau3

Pakes - direct

1 Q. And if Dr. Noll's model was in equilibrium, would you
2 expect any RSN or club to deviate, pull out of the bundle?

3 A. No. The definition of equilibrium is nobody has an
4 incentive to pull out of the bundle. So that's just the
5 definition of the Nash equilibrium.

6 Q. And how did you determine if there was an incentive to
7 deviate again?

8 A. I asked what would happen to everybody's profits if the
9 Yankees went out? They're still -- they're a but-for-world
10 league bundle, but it didn't have the Yankees in it and
11 everybody Nashed-priced -- Nashed the prices after the Yankees
12 leave, so you have to find out the pricing assumption. So I
13 did the same pricing assumption that Dr. Noll did, actually
14 that we're all doing.

15 Q. And what happened to the Yankees profits?

16 A. It went up.

17 Q. What happened to everybody else's profits?

18 A. They also all went up. Each one went up.

19 Q. And whose data did you use to determine this?

20 A. It's all Dr. -- this is all -- everything is done just as
21 Dr. Noll did it. The only change I made was I let the Yankees
22 leave the bundle.

23 Q. Is this type of deviation analysis unique to the facts of
24 this case?

25 A. No. You want to establish that there is an equilibrium, so

F3iglau3

Pakes - direct

1 whenever you do a counterfactual, you ask questions about can
2 people, we call it, deviate. That's the formal word in
3 economics.

4 Q. Did you also do an equilibrium analysis from the
5 perspective of the package price?

6 A. Yes, and this is it.

7 Q. Okay.

8 A. Here's what would happen. Do you want me to explain it?

9 Q. Yes. Please.

10 A. So Dr. Noll's but-for-world league package price was 24.59.
11 That's the left-hand side. And once we take the Yankees out of
12 the league bundle and everybody reprices optimally or in a Nash
13 equilibrium, the but-for league package, which now doesn't
14 include the Yankees, goes up to 26.22. The Yankees by itself,
15 because the demand for the Yankees is so large, goes up to
16 23.18. So now, if I want to buy the whole bundle, which would
17 be the 29 teams and the Yankees, I would have to pay 49.40 for
18 it, which is \$15 higher than the current league price. It's
19 fully -- almost 50 percent higher than the current league
20 price. So there's that -- so there's an incentive to deviate.

21 If they did deviate, and I'm not saying this is the
22 end, there could be more deviations after this, but if just
23 this deviation occurred and everything else stayed the same,
24 people who will have wanted the whole league would just have to
25 pay close to \$50 for it. Some people wouldn't pay that and

F3iglau3

Pakes - direct

1 would go to the standalone things and people would distribute
2 like that.

3 Q. With respect to Dr. Noll's second model, did you also do
4 the equilibrium analysis for individual baseball teams besides
5 the Yankees?

6 A. Yes.

7 Q. What did you find?

8 A. For the second model, everybody had an incentive to
9 deviate, so that's another reason why I say this is probably
10 not the end of the movement.

11 Q. Did you also do that for the NHL?

12 A. Yeah. Same thing happened in the NHL.

13 Q. And was the same true for baseball and hockey in Dr. Noll's
14 third model?

15 A. No, it wasn't actually. So we just figured this out
16 finally just last couple of days. But in -- when you used Dr.
17 Noll's third model, when the Yankees deviate, we get similar
18 results; that is, everybody's profits go up. But when the
19 other teams deviate, not everybody's profits go up now, so they
20 don't have the incentive to deviate.

21 MR. DIVER: I'd like to object.

22 THE COURT: I understand it, you haven't seen what
23 he's talking about that he did in the last couple of days.
24 It's not in his report. You have never seen it, correct?

25 MR. DIVER: Exactly.

F3iglau3

Pakes - direct

1 THE COURT: I have to strike that portion. It's not
2 in the report. He can't testify about it, okay.

3 THE WITNESS: I apologize.

4 THE COURT: You didn't know. He knew. The lawyer
5 knew.

6 MR. PARIS: We were just explaining the withdrawal of
7 the exhibits yesterday.

8 THE COURT: I have stricken it.

9 BY MR. PARIS:

10 Q. Does this -- move on.

11 What is your opinion of the equilibrium of Dr. Noll's
12 third model? Let me rephrase the question. Is Dr. Noll's
13 third model in equilibrium?

14 A. No. If the Yankees have an incentive to deviate, all you
15 need is one firm having an incentive to deviate, to do
16 something different than what's presumed for there not to be an
17 equilibrium. Then things start changing.

18 Q. And what do the equilibrium analyses tell you about the
19 reliability of Dr. Noll's models?

20 A. So again, as an IO, an industrial organization economist,
21 we generally do counterfactuals as an equilibrium, as a rest
22 point, this is not a rest point, so it's not an equilibrium.

23 Q. And Dr. Noll criticizes your equilibrium analysis in your
24 declaration as, quote, economically meaningless because you
25 failed to consider in-market revenues in determining if teams

F3iglau3

Pakes - direct

1 and RSNs would deviate.

2 How does this issue of in-market revenues impact your
3 analysis?

4 A. The answer is I wasn't -- I was just taking Dr. Noll's
5 model and then adjusting it. So he didn't think of in-market
6 revenues. So if my model is wrong because of in-market
7 revenues, his model is wrong because of absence -- and I
8 actually think it is wrong, both of them, for an absence of
9 in-market revenue, but I didn't -- I didn't try to address
10 that.

11 Q. Are there economic reasons in the actual world why the
12 Yankees do not deviate and pull out of the package?

13 A. Currently?

14 Q. Why is this?

15 A. In the actual world today?

16 Q. In the actual world?

17 A. Yes, because in the actual world today, they won't deviate
18 even though they might earn more profits because this slice of
19 profits, the out-of-market bundle, is only a very small part of
20 media profits, okay? And if they actually did change and
21 deviate, they would change -- there would be no content
22 exclusivity for the national telecasts, which are five times as
23 important as the market -- the bundle, okay? And so they would
24 be putting at risk -- the exclusivity of those contracts would
25 go away, those contracts would have to be renegotiated, and

F3iglau3

Pakes - direct

1 that's a lot to risk.

2 Similarly, the home market --

3 THE COURT: The in-market?

4 THE WITNESS: The home territory market.

5 THE COURT: In-market?

6 THE WITNESS: In-market. I'm sorry.

7 THE COURT: Okay.

8 THE WITNESS: There would be this partial
9 nonexclusivity that was explained yesterday also, and you have
10 territorial now. In that territory, there's going to be 29
11 baseball teams, so those returns would go away, so they'd be
12 risking --

13 THE COURT: It would be reduced.

14 THE WITNESS: It would be reduced. Right. I'm sorry.
15 I didn't mean that.

16 So they would be risking a lot currently, but in the
17 but-for-world, there's already going to be no exclusivity on
18 the national market at all, and there's going to be only
19 partial -- so they're not risking those contracts. They're
20 already being at risk.

21 So actually today it makes sense that they don't do
22 this, that the league prohibits this, but what would happen in
23 the but-for-world, so much is changing in that world that I
24 don't want to make -- I've now analyzed it and I really can't
25 tell you what would happen in the but-for-world.

F3iglau3

Pakes - direct

1 Q. Just a couple more questions. Considering the issues we
2 have discussed, does the model reliably show that purchasers of
3 either the baseball or hockey package will pay lower prices in
4 the but-for-world?

5 A. No. Each one of these deviations -- so these are just
6 simple things that I think anybody who is refereeing an article
7 would do, okay, each time we do this, the price changes
8 dramatically. It's very sensitive to the assumptions.

9 THE COURT: For any one of these four?

10 THE WITNESS: For any one of these four. For some of
11 them, it gets much higher; for some, it stays about the same,
12 but they all change rather substantively.

13 THE COURT: If you had all four areas, it would be
14 even more so.

15 THE WITNESS: Exactly.

16 THE COURT: Okay.

17 THE WITNESS: It's not reliable, his model doesn't
18 generate reliable estimates in the but-for package.

19 Q. To wrap up, to the extent that you have anything further,
20 can you tell the Court your overall conclusions about the
21 model?

22 THE COURT: I think I got that. It's not reliable.

23 THE WITNESS: It's not reliable. Do you want me to do
24 it in pieces? Do you want --

25 THE COURT: No, I don't think so. Your overall

F3iglau3

Pakes - direct

1 conclusion is it's not reliable.

2 THE WITNESS: Can I say two things.

3 THE COURT: Sure.

4 THE WITNESS: I think again when I started, I said I
5 would send it out to two referees, one who knew the
6 institutions and one who -- so the referee that knew the
7 institutions came back and said, look, this is going to change
8 the returns in all these media markets and he's analyzing only
9 eight percent of it, that would be a reason to reject the
10 article, because it's just not commonsensical to make major
11 changes that only look at a very small impact of it when 92
12 percent of the market is where -- and if the person who did the
13 structural part came back with these kind of results, I would
14 say there's something fundamentally flawed methodologically.
15 You cannot accept a paper like this. It's just not -- you
16 don't believe the results, so that would be my final
17 conclusion.

18 THE COURT: We're now going to have lunch from now
19 until about two minutes after 2:00 or so. We'll pick up with
20 cross at that time.

21 (Luncheon recess)

22 (Continued on next page)

23

24

25

F3I7LAU4

Pakes - cross

- 1 Q. You had an opportunity to review the transcript?
- 2 A. Yes, I did.
- 3 Q. Did you make any changes you thought needed to be made?
- 4 A. We made some changes, yes.
- 5 Q. Now, you are an expert econometrician, correct?
- 6 A. Some people would think that.
- 7 Q. And you describe your experience, your expertise, with
- 8 respect to the BLP method, correct?
- 9 A. Yes, I'm one of the coauthors.
- 10 Q. And that's an analysis of the demand side of structural
- 11 models, or demand functions of structural models?
- 12 A. It's an analysis of the demand system for differentiated
- 13 product models.
- 14 Q. Now, an application of BLP was used in this case, correct?
- 15 A. Yeah, it had two parts. One part was the viewership model,
- 16 and the second part was more like BLP, it was a demand model.
- 17 Q. And you are not here testifying on the demand model; you
- 18 are here to testify on the simulated counterfactual world part
- 19 of the model, correct?
- 20 A. Yeah, Professor McFadden will do that quite ably, I'm sure.
- 21 Q. Now, you are not an expert in sports economics, correct?
- 22 A. That's correct.
- 23 Q. And you are not an expert in broadcast economics.
- 24 A. No, though it's true I have edited a journal which has had
- 25 articles on these topics.

F3I7LAU4

Pakes - cross

1 Q. Do you know the mechanisms for revenue sharing in the NHL
2 and Major League Baseball?

3 A. I know some of them, to the extent I needed to know for
4 this.

5 Q. And can you describe them.

6 A. The one for the out-of-market packages, 1/30th of the
7 revenues generated by the out-of-market package goes back to
8 the team, to each of the teams. I believe it's similar for the
9 NHL. And I believe the other thing I checked was for the
10 national contracts, I believe it's the same.

11 Q. And do you know about sharing of revenues generated by
12 local teams selling products?

13 A. No, I do not.

14 Q. Do you know why some revenue is shared and other revenue is
15 not shared?

16 A. No.

17 Q. Do you know why some revenue is generated through the
18 league centrally and why some is generated through the teams?

19 A. No.

20 Q. You do know, do you not, that the NHL and Major League
21 Baseball both have national television contracts, correct?

22 A. Correct.

23 Q. Do you know which teams participate in those contracts?

24 A. No. I imagine all of them. I'm not sure.

25 Q. Do you know how teams are compensated for those national

F3I7LAU4

Pakes - cross

1 television contracts?

2 A. My understanding is that the national revenues are
3 generated 1/30th also.

4 Q. Do you know whether it's profitable for each team to
5 participate in those contracts?

6 A. I have not analyzed that.

7 Q. Do you have an opinion about whether the Yankees would
8 continue to participate in some national contracts if
9 determined it was not profitable for it to do that?

10 A. Do I have an opinion on it?

11 Q. Yes.

12 A. I would have to know more about the Yankees before I had an
13 opinion on that.

14 Q. Now in the BLP papers you wrote about the automobile
15 industry, correct?

16 A. Correct.

17 Q. And there is a series of articles about the automobile
18 industry, correct?

19 A. Yes.

20 Q. And each one of those you cowrote with an expert in the
21 automobile industry, correct?

22 A. Well, Jim Levinsohn is more of an expert than me. I've
23 learned a lot.

24 Q. And in fact whenever you produce a structure model in a
25 particular industry, you work with an expert in that industry,

F3I7LAU4

Pakes - cross

1 is that correct?

2 A. I'm trying to think if that's correct. So, Steve Olley was
3 a student of mine, and we wrote this paper which is equally
4 famous called Olley Pakes, and at least when he started I don't
5 think he had any more knowledge than I did, but by the time we
6 finished he probably did.

7 Q. But would you say it's virtually the case that every
8 structural model you have written you have written with an
9 expert in the industry?

10 A. Close to that at least. Even, by the way, other
11 methodological articles I try and write with somebody who is --
12 so, I have written on the consumer price index, and I wrote
13 with somebody from the BLS.

14 Q. But you have not worked with an expert in the industry for
15 this report, correct?

16 A. I wasn't asked to build a model; I was asked to consider
17 the robustness of the findings in a given model. That's a
18 methodological question. I also had people to ask questions
19 to.

20 Q. So, you aren't here to give an opinion on what the correct
21 design for a structural model for this industry is.

22 A. No, I was here to assess the robustness of Dr. Noll's
23 model.

24 Q. Now, I want to turn to the Yankees deviation example you
25 discussed right before lunch. You testified that this implies

F3I7LAU4

Pakes - cross

1 that Dr. Noll has not defined an equilibrium, correct?

2 A. In the "but for" world model.

3 Q. In the "but for" world model, correct.

4 A. Yes.

5 Q. Now, you understand that any deviation by the Yankees would
6 require a change to league rules, correct?

7 A. Yes. Require, yes, some change.

8 Q. If I held the league rule constant, and I ran the model,
9 that would be an equilibrium, wouldn't it be?

10 A. If you forbid the Yankees from deviating, OK, so then Dr.
11 Noll's prices under his assumptions at the RSN prices, and
12 under his demand system, and all of that, no double
13 marginalization, it's an equilibrium. But that forces firms
14 not to deviate when it might not be in their interest to not
15 deviate.

16 Q. But you testified you don't know whether the Yankees would
17 have an incentive to withdraw from the national television
18 contract, correct?

19 A. So, again, in the "but for" world are you asking me?

20 Q. In both.

21 A. So, I did ask the question of the people, my consultants
22 and lawyers in this group, of why they wouldn't deviate now,
23 and we discussed that, and there was a worry about exclusivity
24 of the national contracts would be gone, territorial
25 exclusivity of the home market contracts would be gone, and

F3I7LAU4

Pakes - cross

1 there would be partial content exclusivity gone. That's a lot
2 up at risk; that's 92 percent of the media revenues.

3 Q. But you're addressing not the Yankees' interests but the
4 league's interests, right?

5 A. You know, the Yankees' share of the national contracts is
6 more than it makes in the out-of-market bundle. We checked
7 that.

8 Q. But you understand that the Yankees contribute more than
9 1/30th of the value to the national contracts.

10 A. I don't see why that's relevant. If the national contracts
11 go away, they lose 1/30th of the value of the national
12 contract.

13 Q. I'm not asking if the national contracts go away. I'm
14 asking if the Yankees withdraw from the national contract and
15 have their own national contract.

16 A. I have not analyzed that, so I don't have an opinion on it.

17 Q. And you don't think it's obvious that the Yankees would
18 earn more money by having their own national contract?

19 A. Do I think it's --

20 THE COURT: Well, in other words, they would do better
21 than 1/30th.

22 THE WITNESS: Yeah, they would probably do better than
23 1/30. But do I know that for a fact? No.

24 Q. So, the issue isn't whether the Yankees have an incentive
25 to deviate, correct? The question is whether this is a

F3I7LAU4

Pakes - cross

1 realistic rule, is it not?

2 A. Whether it's a what rule?

3 Q. Realistic league rule.

4 A. It is a rule currently.

5 THE COURT: I think he is just saying if it was only
6 about money, and they could make more than 1/30th by deviating,
7 and there were no rule, they would deviate if it was only about
8 money. That seems to be the question.

9 THE WITNESS: That might well be true.

10 THE COURT: OK.

11 Q. Now, your model of the Yankees deviation is not an
12 equilibrium, is it?

13 A. No.

14 Q. In fact you have suggested -- I guess until ten o'clock
15 last night -- that all teams would have an incentive to
16 deviate.

17 A. What I suggested -- and I think I said this in my direct --
18 is that --

19 MR. PARIS: Objection, your Honor. This is the
20 testimony that Mr. Diver asked.

21 THE COURT: No, he's saying prior to any change at 10
22 o'clock last night what was his view, and I think that's fair
23 ground.

24 OK, go ahead.

25 THE WITNESS: Can you just repeat the question just so

F3I7LAU4

Pakes - cross

1 I make sure I answer the right thing?

2 Q. You showed, did you not, that many or all of the teams in
3 Major League Baseball would have an incentive to deviate from
4 the package.

5 A. In Model 2. Can I say one more thing? I said that none of
6 this, even after the deviation, it wouldn't be an equilibrium.
7 Everybody else could move also. I never checked that.

8 Q. So you don't know what the ultimate result would be.

9 A. No, I don't. I don't think you do either. Or your --

10 Q. But it's true, is it not, that if all 30 teams deviated,
11 there would be no teams left in the bundle, correct?

12 A. Yes.

13 Q. So there would be no bundle.

14 A. That's correct.

15 Q. OK. And if that were the equilibrium, then all of the
16 teams would be worse off, would they not?

17 A. I believe Dr. Noll made that calculation.

18 Q. And you never challenged it, did you? You never challenged
19 that calculation?

20 A. It doesn't mean anything with respect to an equilibrium.

21 All it means is that -- all I need is one deviation, one firm
22 that's -- that's an equilibrium. So you have to define another
23 notion of equilibrium for that to be a reasonable assumption.

24 Q. You agree that in deciding whether to change the rule the
25 league could take into account whether the bundle would

F3I7LAU4

Pakes - cross

1 disappear or not, do you not?

2 A. I imagine that's true, yeah.

3 Q. So I want to -- actually, before I get to that -- no.

4 MR. LECKMAN: May I approach?

5 THE COURT: Sure.

6 Q. Can you turn to page 682 of the C&Y slide?

7 A. Yes.

8 Q. Do you recognize this chart?

9 A. Actually I don't remember it, but I imagine I have seen it
10 before.

11 Q. OK. Well, I think you were just handed a copy of the C&Y
12 paper.

13 A. Yes.

14 Q. And this is the diagram of the industry in C&Y. OK?

15 A. OK.

16 Q. Do you see at the top left it discusses content providers
17 including sports leagues.

18 A. Yes.

19 Q. And there is an arrow to the programming networks?

20 A. Correct.

21 Q. Does C&Y discuss the vertical relationship between sports
22 leagues and broadcasting networks?

23 A. Not directly. Do you want to know why?

24 Q. Yes.

25 A. OK. Because when they do their counterfactual, the amount

F3I7LAU4

Pakes - cross

1 of income that goes to the program networks doesn't change very
2 much, so there was not a real reason to change any of the
3 relationships between the program networks and the content
4 providers.

5 I mean it was exactly the opposite of what happened
6 when you went the other direction. So, when you went the other
7 direction and you changed everything, OK, so, you know, you
8 needed to change what the networks got. But now after you make
9 that change to what the networks got, they were getting
10 approximately the same as before, so there was no reason to
11 think they could have to change their contracts with the
12 content providers.

13 Q. Is that discussed in the paper?

14 A. I have discussed this with him. I know them both. I mean
15 I had to advise his thesis; I had to know what was going on.

16 Q. Now, you understand, do you not, that if the change was
17 made to a la carte, there would be renegotiation of contracts
18 at all these levels?

19 A. As I said, they thought -- and I think they were probably
20 right -- that they might have changed. I'm not saying they
21 wouldn't. I really don't know. But they thought that the
22 networks, you know, were getting both the same amount of money,
23 and as a result there is no reason to change the contracts
24 upstream.

25 Q. Now, even leaving that issue aside, is it true that just

F3I7LAU4

Pakes - cross

1 because these contracts would be renegotiated there would need
2 to be a bargaining analysis done?

3 A. So, there are two aspects of this question. If you are
4 really trying to mimick the real world, so they do bargain,
5 they sign contracts, they negotiate, that's what happens in the
6 real world.

7 You know, there are times when you can circumvent this
8 kind of analysis by something that sort of bounds it or gives
9 us a reasonable approximation to it. So, there is stuff like
10 that in the literature also.

11 This is not an easy thing to do, I understand that.
12 What Crawford and Yurukoglu did is not an easy thing to do.
13 So, for example, prior to Crawford and Yurukoglu there were
14 papers that tried to do this in different ways. So, I could go
15 further and explain these to you if you want. If you don't
16 want, I'll stop.

17 Q. Let me ask you this. If the leagues sell their rights to a
18 programming network through a flat fee, and then they were
19 renegotiated, would there be any purpose in running the
20 bargaining model that they ran?

21 A. If the leagues again sell their programming -- the league
22 bundle? What do you mean by the leagues?

23 Q. I am talking about the national contracts here.

24 A. So, I'm not an expert on the national contracts, but you
25 mean the contracts that go all over the country. You know,

F3I7LAU4

Pakes - cross

1 ESPN's contract, for example?

2 Q. Sure.

3 A. OK, so ask again.

4 Q. In renegotiating the fee, OK, they currently pay \$100
5 million, and they have to renegotiate that fee to take on a la
6 carte.

7 A. If they would have went a la carte, I believe that -- and I
8 looked to a couple of these contracts, and they all had a
9 clause in them that if the content exclusivity wasn't abided
10 by, that was a major change, and you had to renegotiate.

11 Q. And isn't it true that it wouldn't make a difference, Dr.
12 Pakes, because it wouldn't be a marginal cost for the network?

13 A. You know, you keep on saying this, and you say it in the
14 report about marginal cost. I never understood this.

15 You know, these companies have to cover their fixed
16 costs. The big costs are the programming costs, satellites,
17 the cable network underground. Without a mark-up you can't
18 cover that. So, you know, there is an equilibrium in this
19 market where people can cover those investments.

20 Q. Now, did you tell Dr. Yurukoglu that he should analyze this
21 level in the paper?

22 A. Which level?

23 Q. The league programming network.

24 A. Dr. Yurukoglu's thesis was his idea. He is a rather
25 amazing guy.

F3I7LAU4

Pakes - cross

1 Q. And you testified, did you not, that Dr. Yurukoglu knows
2 much more about the sports industry and about the content
3 providers in this industry than you do, correct?

4 A. Dr. Yurukoglu has been working on this industry for five or
5 six years. Yes, I would hope so.

6 Q. And you would have relied on him for that analysis.

7 A. I didn't rely on him at all; I didn't talk to him at all.

8 Q. Can you open your deposition, please, page 66.

9 THE COURT: Where is his deposition?

10 THE WITNESS: Good question.

11 MR. LECKMAN: In the joint binder.

12 THE COURT: Tab 4? What page in tab 4? It's the big
13 fat book.

14 THE WITNESS: They are both. This one?

15 THE COURT: Yes, page 66.

16 THE WITNESS: 66?

17 Q. Starting at line 3 and finishing at line 14 is what I'm
18 focusing on.

19 A. Page 66, OK, I'm on.

20 Q. OK. Did you or did you not testify that you would have
21 relied on him for that judgment?

22 A. When he was writing his thesis? When he was working on
23 this? Certainly. I mean he had been working on it for two
24 years. I had not studied it. What's the question?

25 Q. Now, you have stated that the C&Y is an "industry standard"

F3I7LAU4

Pakes - cross

1 now or "generally accepted analysis"?

2 A. I think it's at the forefront of analyzing these kinds of
3 relationships, vertical relationships.

4 Q. Now, are there any other papers not written by Dr.
5 Yurukoglu as proffered that use this analysis?

6 A. Yeah, there is one by --

7 Q. In this industry?

8 A. There is one in the hospital industry. The hospital
9 industry is an industry that's very similar.

10 Q. The hospital industry is very similar to the MVPD?

11 A. In the following sense. OK? So, you have to let me say
12 it. So, there is a bunch of health care providers just like
13 there is a bunch of RSNs. There is an intermediary, which is
14 an HMO or an insurance company, which contracts with the
15 various healthcare providers and then provides a bundle to the
16 consumers, which is an ability to access any of these different
17 healthcare providers. In that sense it's similar. And that's
18 the reason that there are papers using this in that context.

19 Q. There is nobody who has written about how widely this
20 applies to other broadcasting situations.

21 A. I don't know that there is. By the way, this is a
22 reasonably new paper, and there are several people working on
23 applications of it.

24 Q. Now, you understand that the model that they have produced
25 is built on the assumption that the programming providers price

F3I7LAU4

Pakes - cross

1 linearly, correct?

2 A. That's my recollection, yes.

3 Q. And you recall that they said that linear input costs above
4 production marginal costs -- in this case zero -- are often
5 considered unrealistic. Do you recall that?

6 A. So, I don't -- you want to point me to it? Because my
7 recollection is --

8 Q. Sure, page 658, footnote 23.

9 A. It's in a footnote, so let me look at why they footnoted it
10 and never put it in the text.

11 THE COURT: 658 you said in the paper?

12 MR. DIVER: Yeah.

13 THE COURT: 658, footnote 23.

14 THE WITNESS: If I may, I would like to look at the
15 text to know why they footnoted it first. I don't remember the
16 whole paper.

17 A. So, they're saying -- well, let's see where they are doing
18 it. "We assume that the agreements between ... in reality
19 payments are linear but contain other provisions as well.
20 Descriptions of the service to be provided by each side
21 standards technical... Few contain monetary transfers,
22 however, and if they do, they are negligible with respect to
23 the contract's total value. The model of the contract is only
24 a linear fee for each distributor and channel." So, they are
25 telling you there anything other than a linear fee is small.

F3I7LAU4

Pakes - cross

1 Down below, if you go to the next sentence after the
2 one that you just quoted, it says, "When there is downstream
3 competition, however, commitment to linear contracts is one way
4 of avoiding the dissipation of profits due to such
5 competition."

6 That's essentially what I was saying when I was
7 explaining this earlier on today.

8 Q. But you agree that other economists view this as
9 unrealistic.

10 A. They would view it as unrealistic in a model where there is
11 only -- each agent in this model is only marketing one product.
12 That's where the theory comes from. And that's also where the
13 theory falls apart.

14 Q. Now actually in your report you provided a justification
15 for linear pricing, did you not?

16 A. I think I just assumed it. But we can look back if you
17 like.

18 Q. You just assumed it, OK.

19 A. Actually, you know, when you think about what I did, I
20 assumed -- except for the one change I made at a time to Dr.
21 Noll's model -- so I'm not making assumptions, I'm just taking
22 Dr. Noll's assumptions and changing them one at a time.

23 Q. You're assuming linear pricing, are you not?

24 A. Of the consumer? To the consumer?

25 Q. No, to the MVPD.

F3I7LAU4

Pakes - cross

1 A. I don't actually analyze that. There is one part of my
2 report I believe where we looked at RSN pricing, and just to
3 get an approximation to what is going on we added on the
4 mark-up, the MVPD mark-up that the Federal Communication
5 Commission had estimated. So, that's one way around this
6 problem if you don't want to do everything. If someone knows
7 one of the mark-ups, you just add on it. So, there is a part
8 of my report that does that, and in that part of my report I
9 believe they are pricing linearly.

10 Q. And your contention that Dr. Noll should have applied the
11 bargaining model for the C&Y would only apply, correct, if
12 there were linear pricing.

13 A. I don't know what -- there is all sorts of negotiated
14 contracts. All I'm saying, I never made any contention of any
15 form. I'm taking Dr. Noll's contentions and changing them one
16 at a time to find out if it's robust. So, when you say my
17 contention, I never quite understand what you are saying.

18 Q. Are you saying that Dr. Noll did or did not need to use the
19 C&Y bargaining analysis in his model?

20 A. So, what I did say is one needs to model the process
21 setting marginal costs correctly -- or a get correct
22 approximation to them -- and Yurukoglu and Crawford show that
23 in this industry, especially in the second paper, show that in
24 this particular industry the bargaining model was very
25 important, in fact switched results for them. So, you know, I

F3I7LAU4

Pakes - cross

1 would be worried if we didn't do something that reflected that
2 in a model.

3 THE COURT: Look, so the short answer to his short
4 question is you are saying that Dr. Noll should have used the
5 C&Y model.

6 THE WITNESS: He could have done -- that's one way of
7 doing it. If he did something else that approximated it, you
8 know, or sort of got a bound, an upper bound to what could have
9 happened, I would have been happy with that. He did nothing.
10 That's what bothered me.

11 Q. You are not saying that he needed to do this bargaining
12 model that is reflected in the C&Y paper.

13 A. I don't think I ever said that either in my report or in
14 your deposition.

15 THE COURT: Well then, if not, what would have
16 satisfied you?

17 THE WITNESS: So here is one thing that I thought of
18 trying, and we just didn't have enough time to try it. What we
19 do is the RSN would linear price to the MVPD, and the FCC has a
20 measure of what the mark-ups of the MVPD are. It's about 56
21 percent I think, something on that order. We looked it up.

22 If I would have had a little more time, I would have
23 said, OK, the RSN is going to price knowing that the MVPD is
24 going to put on an additional thing and see what would have
25 happened. So, that's the kind of thing I would have tried just

F3I7LAU4

Pakes - cross

1 to get an idea of whether it matters or not.

2 THE COURT: Now that really wasn't my question. If
3 you never said that he had to use the C&Y bargaining model,
4 then what would have satisfied you with respect to that aspect
5 of the pricing?

6 THE WITNESS: So, this is what I wanted go back to
7 before. There were papers on vertical markets before C&Y, so,
8 for example, there was one by Aviv Nevo, it's in one of our
9 best journals, and what he did, so he was doing what works out
10 to be cereal prices, but he was selling them to supermarkets,
11 and the supermarkets were then selling them to consumers. So
12 he found out what were the mark-ups. He didn't know how to do
13 C&Y; nobody knew how to do C&Y. So he found out what the
14 markups were at the supermarket, and he said, OK, my assumption
15 is they price knowing that the supermarkets will add on another
16 five percent.

17 THE COURT: So, had he done that, that would have been
18 --

19 THE WITNESS: At least it would have been an attempt,
20 I would have had some idea of what's going on, or something
21 like that.

22 THE COURT: OK.

23 Q. Let me ask you, do you know how a la carte channels are
24 currently priced on DirectTV?

25 A. No.

F3I7LAU4

Pakes - cross

1 Q. Do you know how pay-per-view channels are currently priced?

2 A. No.

3 Q. Now, you said you are not a trained lawyer, correct?

4 A. Correct.

5 Q. And you don't have an opinion on what behavior would be an
6 antitrust violation or not, correct?

7 A. Every industry I know something about that, but I'm not a
8 lawyer.

9 Q. Now you agree that Dr. Noll's model shows that all of the
10 products would be profitable, correct?

11 A. In the "but for" world?

12 Q. Yes.

13 A. I think that's right.

14 Q. You don't have any dispute with that, do you?

15 A. Except for it's not an equilibrium.

16 Q. But you don't have any dispute with his contention that
17 those prices would be profitable.

18 A. So, again, I'm going to assume that his marginal costs -- I
19 guess I never checked whether they would covered the fixed
20 costs of production or not. If you assume his marginal costs,
21 they're profitable. He showed that.

22 Q. And your changes to the model increased prices by 30 or 40
23 percent over his already profitable prices, correct?

24 A. It depended on -- you know, some of them -- yeah, they all
25 increased somewhat, and the amount of increase depended on the

F3I7LAU4

Pakes - cross

1 change.

2 Q. And that's a lot of market power, is it not?

3 A. I don't know. Again, you keep on using these words like
4 markup and market power. Again firms need to cover their fixed
5 costs; they don't exist without fixed costs. This is not a
6 world where price equals marginal cost makes any sense at all.

7 Q. Do you have any notion of what the fixed costs are for --

8 A. No, I don't.

9 Q. Do you have any reason to believe that the fixed costs are
10 a major component?

11 A. Yeah, I think satellites are expensive, I think cable
12 networks underground are expensive. Yeah, I think they are
13 very expensive.

14 Q. Relative to the rights fees that are being paid?

15 A. My guess is satellites, yeah, and cable networks
16 underground, yeah, even relative to the rights fees. By the
17 way, that's pure guessing on my part. OK?

18 THE COURT: Right.

19 A. But you think about a satellite, and it's expensive. I
20 don't know what else to say.

21 Q. But the satellite is carrying all kinds of programming,
22 correct?

23 A. Yeah, that's true, but DirectTV has it pay for their
24 satellites.

25 Q. We are talking about the profitability of programming at

F3I7LAU4

Pakes - cross

1 issue here, correct?

2 A. Excuse me?

3 Q. We are talking about the profitability of the sports
4 programming here.

5 A. DirectTV has to pay for their satellites, you know, and
6 from RSN programming as well as other things, and we have
7 already heard by Dr. Noll the bigger subscription mover is the
8 sports channels.

9 Q. And we have also heard that the biggest cost is the rights
10 fees, have we not?

11 A. The biggest cost of the RSNs.

12 Q. The programmers.

13 A. I thought the rights fees were paid by the RSNs.

14 Q. Now, in your modeling when the price increases over Dr.
15 Noll's model, the output drops significantly, does it not?

16 A. Yes, but the output -- I don't think the output ever
17 dropped below what it is in the current world. In fact I think
18 it's substantially higher than that in every case.

19 Q. So allowing these additional products would increase
20 output, correct?

21 A. Yeah, I think that's the case. The funny thing about it
22 for me at least as an economist is the increase in output was
23 substantial, it was like 90 percent or 9/10ths, and for these
24 90 percent there is no data, it's all manufactured data from a
25 distribution assumed on the 10 percent, or about 10 percent who

F3I7LAU4

Pakes - cross

1 watch out-of-market channel. 90 percent of the people who are
2 buying in Dr. Noll's model you have no real data on.

3 Q. Now, your claim that joint venture pricing is necessary
4 here is not something that's specific to the sports
5 broadcasting aspect of this case, correct? It arises simply
6 from the fact that the leagues have joint ventures?

7 A. I don't know what you mean by not specific. If you tell me
8 what you're referring to, then maybe I can answer better.

9 Q. You understand that the leagues offer other joint products,
10 correct?

11 A. Yes, I understand that.

12 Q. You understand that these are sometimes sold in competition
13 with the clubs?

14 A. I believe you. I would like to know the products you are
15 talking about. It would be easier for me to understand what's
16 going on.

17 Q. And you would want to know whether the leagues use your
18 pricing strategy now, would you not?

19 A. I'm not sure why. I mean we are talking about a very
20 particular market. These are not my models, they are Dr.
21 Noll's models. In this model in this framework it makes sense
22 to do what I did.

23 Q. Now, at your deposition you testified in fact that you
24 don't know whether they used joint venture pricing strategies
25 for the out-of-market packages they sell now, didn't you?

F3I7LAU4

Pakes - cross

1 A. So, we don't know -- neither I, nor Dr. Noll, nor you --
2 know exactly the strategy they use now. In Dr. Noll's paper,
3 when he uses the prices that are now, he just assumes that
4 they're maximizing their profits on this small bundle. And I
5 just assumed that they're maximizing profit on the larger
6 bundle. There is no knowledge of this.

7 Q. So, you're not basing this on any understanding you have
8 about the leagues themselves.

9 A. I'm basing it on the same understanding that Dr. Noll had.

10 Q. Do you believe that you have the same level of
11 understanding of the function of sports leagues as Dr. Noll
12 does?

13 A. No, I didn't say that. I say I took my assumptions from
14 Dr. Noll other than this perturbation to them.

15 Q. Now, you read Robert Bowman's declaration, did you not?

16 A. You know, I read a lot of declarations, so I probably did,
17 but you'd have to direct me to it.

18 Q. Do you know who Mr. Bowman is?

19 A. My recollection is he is from baseball, but you should --
20 you know, there was about 25 declarations.

21 Q. Would you believe me if I told you that he is the CEO of
22 Major League Baseball and Advanced Media, which is the entity
23 that sells the MLB.tv package?

24 A. I have no reason not to believe you, so --

25 Q. He may have gotten a promotion since then. Do you know

F3I7LAU4

Pakes - cross

1 what NHL Interactive Cyberenterprises is?

2 A. NHL what?

3 Q. Interactive Cyberenterprises.

4 A. No, I'm sorry, I don't.

5 Q. Do you know how the league subsidiaries are structured with
6 respect to the league itself?

7 A. No, I don't.

8 Q. And you don't know how they price the products they sell.

9 A. Well, I -- yeah, no, I don't.

10 Q. You recall though that Mr. Bowman testified that he sets
11 the price for MLB.tv less than net profit maximizing, correct?

12 A. I do recall that. But, you know, I'm just following Dr.
13 Noll on that.

14 Let me say, by the way, that if I had all my time and
15 all the data I needed, I would think of doing it as maximizing
16 the expected discount of value of future net cash flow to the
17 league. But that requires -- Dr. Noll probably would do the
18 same thing though in a different way than I did it. But that
19 requires, you know, a much more intensive model. And this is
20 an approximation we use often in economics. Dr. Noll used it
21 in a more limited way than I did, but he used it.

22 Q. Do you know what the NHL's national branding strategy is?

23 A. No.

24 Q. Do you know of any reasons why the NHL would prefer to sell
25 products through the league than through individual clubs?

F3I7LAU4

Pakes - cross

1 A. What kind of products?

2 Q. If the answer is no, then say you don't know.

3 A. Well, if you don't tell me what products, I certainly don't
4 know.

5 Q. Now, let me ask you, do you have any reason to believe that
6 the price that would be set by the leagues for the
7 out-of-market packages would not apply to everybody?

8 A. You mean to all consumers?

9 Q. That's right.

10 A. I have no reason to believe that.

11 Q. Do you believe it would be rational for an RSN to agree to
12 allow a club to stream its games over the Internet in its local
13 territories?

14 A. It could be, definitely.

15 Q. Do you believe it would be rational for an RSN to allow the
16 league to stream the games over the Internet in its local
17 territory?

18 A. Again, it could be. It depends on all the relationships.
19 So, you know, I hesitate to say what would be rational and what
20 wouldn't unless I sort of wrote down a model and thought it
21 through.

22 Q. Do you know why the Internet streams of NHL and MLB games
23 are not currently available in local markets?

24 A. No, I don't.

25 Q. Now, in your DirectTV pricing model is there any

F3I7LAU4

Pakes - cross

1 competitive product being offered that's represented in the
2 market that's constraining DirectTV's pricing?

3 A. No.

4 Q. So, DirectTV is being modeled as though --

5 A. Just one second. This is not my model; this is Dr. Noll's
6 model. You keep on saying my model. It's bothersome to me.
7 It's Dr. Noll's model, and I modified assumptions. But he
8 assumed that there was no direct competition.

9 Q. Your modification is no different than if Major League
10 Baseball simply decided to price all 31 products as monopolist
11 with no competition in the market, is that right?

12 A. This is Dr. Noll's model, yeah.

13 Q. Your variant of it.

14 A. Yes.

15 Q. But you do --

16 A. By the way, that's not what -- OK, go ahead.

17 Q. Do you know if DirectTV is permitted to set the price of
18 the out-of-market packages without prior consultation with the
19 leagues?

20 A. There is something in the contract that talks about a fair
21 price. I can't remember the exact phrase, but there is a
22 phrase in the contract.

23 Q. And do you know whether there are discussions with the
24 league over price?

25 A. I have asked that question, and the answer is, yes, there

F3I7LAU4

Pakes - cross

1 are discussions. It's only a limit price in the sense that it
2 shouldn't be lower than that, is my understanding.

3 Q. Do you know that?

4 A. That's what I was told.

5 Q. But you don't know that independently.

6 A. Well, the structure -- either the NHL or Major League
7 Baseball, the structure of it was that if you price below that
8 you still have to pay the league that price, so that's an
9 incentive to pay at least that price and more -- or more. And
10 I can't remember if that's Major League Baseball or National
11 Hockey League.

12 Q. Now, you agree, do you not, that DirectTV faces competitive
13 pressure from other distributors.

14 A. You mean from Comcast or --

15 Q. Yeah.

16 A. Yeah, certainly.

17 Q. So, if it set the prices in your model --

18 A. It's not my model.

19 Q. -- in your modification -- in your modification --

20 A. There would definitely be a difference.

21 Q. -- they wouldn't really be able to do that, correct?

22 A. Definitely it would be more complicated than that. But Dr.
23 Noll didn't do that.

24 Q. And you also agree that DirectTV faces pressure from
25 Internet products.

F3I7LAU4

Pakes - cross

1 A. Yeah. Dr. Noll didn't do that. That one I really didn't
2 understand why he didn't do it.

3 Q. We will let him explain it.

4 In fact if teams' games were on the Internet, people
5 could keep their cable subscription and simply switch to the
6 team's package, correct?

7 A. So, my understanding -- I have limited understanding. Why
8 don't you say it again. I know a little bit; I don't know a
9 lot.

10 Q. If you don't have anything to say, that's fine.

11 A. I never said I didn't have anything to say. I just said I
12 didn't understand the question.

13 Q. No, I'm just suggesting that DirectTV customers wouldn't
14 have to switch to Comcast to be able to get these products,
15 right? They could buy them on the Internet, correct?

16 A. If they were Comcast subscribers already, I believe that's
17 correct.

18 Q. And if they -- well, we will leave that.

19 Now, again, your joint venture pricing modification in
20 which you show the leagues setting of prices -- incidentally,
21 in order for the league to set the price to maximize the
22 profits of all the teams, it would have to know what the profit
23 of the teams were, correct?

24 A. No, it would have to know -- so this is the equilibrium
25 assumption again. It's a rest point. So, let me do it again.

F3I7LAU4

Pakes - cross

1 OK? It's a rest point. So, they are playing this repeatedly,
2 and all I have it know is the prices that everybody else is
3 charging, which if this is played repeatedly, I can observe
4 from last period. That's the whole idea of a rest point.

5 Q. You have to understand what their profits are, correct?

6 A. No, I have to understand what my profits are as a function
7 of my price and their prices, that's all.

8 Q. I thought you said that the leagues were maximizing the
9 total of their profits and the teams' profits?

10 A. Oh, the league. I'm sorry, I thought were you referring to
11 the team. No, the league would have to know the profits of the
12 various agents. But to do that -- can I just say -- all they
13 need to know is what Dr. Noll has estimated and the marginal
14 costs. So that demand system -- marginal cost and picking up
15 prices from what happened before -- will give you all of that
16 information.

17 Q. Now, going back to your joint venture pricing modification,
18 you stated that the prices really wouldn't be any different
19 under that modification, correct?

20 A. Different from what?

21 Q. From the current prices.

22 A. The "but for" world league price would be very close. If I
23 did that modification, accepted the rest of Dr. Noll's
24 assumption, the "but for" world league price would be almost
25 the same as the current price. It wasn't quite the same, I

F3I7LAU4

Pakes - cross

1 think.

2 Q. So, under that modification nobody would be harmed. No
3 consumer would be harmed, correct?

4 A. If that was the only modification, that may well be true.

5 Q. Because they would have additional choices, correct?

6 A. Yes.

7 Q. And they would pay the same price for the same product,
8 correct?

9 A. I think that's correct under that modification alone, but
10 --

11 Q. There would be no losers from that particular modification.

12 A. That particular modification, that's correct.

13 MR. DIVER: OK, that's all I have.

14 MR. PARIS: I have no questions, your Honor.

15 THE COURT: Then you're all set. Thank you.

16 THE WITNESS: Thank you. Thank you.

17 (Witness excused)

18 THE COURT: All right. So we are ready to turn to Dr.
19 McFadden.

20 (Witness sworn)

21 THE COURT: Please be seated. When you are seated,
22 please state your full name, first and last, spelling both
23 names for the record.

24 THE WITNESS: My name is Daniel McFadden.

25 THE COURT: And remind me which lawyer you are.

F3I7LAU4

Pakes - cross

1 MR. ECKLES: Paul Eckles, your Honor, counsel for the
2 National Hockey League.

3 THE COURT: You weren't even on the seating chart
4 yesterday. All right, Mr. Eckles.

5 DANIEL MCFADDEN,

6 called as a witness by the Defendants,

7 having been duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY MR. ECKLES:

10 Q. Good afternoon, Dr. McFadden. There are some slides to
11 help with your testimony today.

12 A. I have.

13 Q. And could you please summarize for the court your
14 educational history.

15 A. Yes. I have a Bachelors of Science in physics and a Ph.D.
16 in behavioral science with specialization in economics, both
17 degrees from the University of Minnesota.

18 Q. And how are you currently employed?

19 A. I'm currently a presidential professor of public policy and
20 economics at the University of Southern California. I'm also a
21 principal in the Brattle Group, a management consulting and a
22 litigation support firm.

23 Q. Now, I understand that you won the Nobel Prize for
24 economics in 2000. What in laymen's terms, if possible, did
25 you win that prize for?

F3I7LAU4

McFadden - direct

1 A. Yes, I won it for developing methods to study discrete
2 choice, such as when people have to make choices between the
3 mode they use to commute, or what brand of automobile they buy,
4 or other situations where they have to choose one product or
5 another.

6 Q. Could you briefly explain for the court how your
7 developments in discrete choice modeling have been used in the
8 real world.

9 A. Yes, they are used widely in public policy and market
10 research. And I will mention market research because it's
11 perhaps closest to this case. There firms often want to know
12 what will happen if they introduce a new product or change the
13 features of existing products, how that will influence demand,
14 and they use these discrete choice methods to do that analysis.

15 Q. Have you remained active in this area since you won the
16 Nobel Prize back in 2000?

17 A. Yes, very active.

18 Q. And how does discrete choice modeling relate to the work
19 that Dr. Noll has done in this case?

20 A. Dr. Noll has a discrete choice problem in the sense that he
21 is trying to explain people's choices between a league bundle
22 and a la carte team packages, and that's a discrete choice for
23 consumers, and he is using discrete choice models and analysis
24 at the core of his demand analysis.

25 Q. I would like to start with an overview of your opinions in

F3I7LAU4

McFadden - direct

1 this case. Did you prepare a slide summarizing your opinions
2 in the case?

3 A. I did.

4 Q. Dr. McFadden, can you briefly just summarize your opinions
5 for the court.

6 A. Yes. In summary there are four major opinions. One is
7 that I find his modeling of demand elasticities to be
8 scientifically unreliable.

9 Secondly, my opinion is that he fails to follow a
10 standard scientific procedure in testing and validating his
11 models.

12 Thirdly, with respect to his second model, in my
13 opinion it fails a basic falsifiability test for scientific
14 reliability.

15 Finally, in his third model he fails to replicate key
16 and critical features of the observed consumer behavior.

17 Q. Before we get to your critiques about Dr. Noll's model, I
18 would like to cover for the court some basic principles
19 regarding structural modeling on the demand side. Did you
20 prepare a slide describing the essential principles of
21 structural modeling from the advanced side?

22 A. I did.

23 Q. And can you just briefly explain to the court each of the
24 points you have on this slide?

25 A. There are three. These are general principles. The first

F3I7LAU4

McFadden - direct

1 is that if you're modeling demand, you should be using data on
2 consumer behavior rather than say, for example, mathematical
3 assumptions.

4 Secondly, the prediction of the model must be
5 falsifiable. That is, there are situations in which the model
6 should not give certain kinds of results, and you should be
7 able to see that in the model.

8 And, finally, the model should be consistent with
9 observed consumer behavior particularly on dimensions that are
10 important for the application.

11 Q. And are these principles an integral part of methodology
12 when it comes to structural modeling?

13 A. I would say they are integral, and they are the minimum
14 conditions that you need to meet to have a scientifically
15 reliable demand analysis.

16 Q. Now, applying these principles to Dr. Noll's model, the
17 first thing I'd like to ask you about is how Dr. Noll modeled
18 demand elasticities. Have you prepared a slide on that issue?

19 A. Yes, I have.

20 Q. Now, we are going to cover the first point a little bit
21 later dealing with consumer data, so I'd like to talk about the
22 second two points.

23 With respect to Dr. Noll's use of market shares, are
24 market shares traditionally used in calculating elasticities?

25 A. They don't have to be. They're often used to check or

F3I7LAU4

McFadden - direct

1 validate estimates of demand elasticities.

2 The methodological complaint that I have here about
3 Dr. Noll's work is that he has not, I think, followed
4 scientific due diligence in collecting data and assuring that
5 it's the appropriate data in his market share calculations.

6 Q. He testified yesterday on that issue that he used the
7 average number of viewers of the championship series of each of
8 the sports, baseball and hockey. Is that a reliable way to
9 calculate market share for the analysis being done in this
10 case?

11 A. In my opinion it would be appropriate, scientifically
12 appropriate, to dig deeper for two pretty obvious reasons: One
13 is that the people who are watching these championship games
14 include people who live in the home territories of the teams
15 playing. And Dr. Noll is assuming that all those people would
16 be potential customers for out-of-market packages as well. If
17 that's true, he has not established it. Secondly, it's not
18 clear that people who are interested in championship games are
19 sufficiently interested to be potential fans during the league
20 season as well.

21 So, I think that in terms of scientific methodology
22 what he has done is failed to go to any best source of evidence
23 on this, which would be some kind of data from the general
24 population on what they're fans of and what they watch and what
25 their interests are.

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McFadden - direct

1 Q. On your third slide there was some testimony about the
2 Lerner Index yesterday. Can you just again very briefly
3 explain what the Lerner Index is.

4 A. Yes, the Lerner Index is a logical relationship between the
5 demand elasticity, the incremental cost of production and the
6 price that would be set by a profit-maximizing firm that's
7 producing a single good.

8 Q. Now, given Dr. Noll's testimony that we heard yesterday
9 regarding the league's long-term collective interest in pricing
10 for multiple products, is the Lerner Index something that he
11 should have used in this case?

12 A. I think by his -- certainly by his declarations, and in
13 combination with his testimony, he has essentially indicated
14 that long-run considerations are something that are important
15 for the league. And as soon as you admit the possibility that
16 the league would care about the fan base and what they do this
17 year would affect the market next year, you are no longer in a
18 simple world where the logical relationship of the Lerner Index
19 would hold, so applying it in that situation would be
20 inappropriate, incorrect.

21 Q. And how does Dr. Noll's use of market shares and the Lerner
22 Index rather than consumer data, as was done in C&Y, impact the
23 reliability of his model on the demand side?

24 A. I would say that his analysis of price sensitivity is only
25 as good as the quality of these assumptions on what the price

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McFadden - direct

1 relationships are in the as-is world in terms of the league
2 bundle and in terms of what the total size of the market is.
3 So, it's only as good as those weakest links.

4 It's quite a contrast with the C&Y case where there is
5 good data in their analysis of people making choices under
6 different pricing situations, and you can get -- they do get
7 quite an accurate estimate of the price sensitivity.

8 Q. I'd now like to take a look at Dr. Noll's overall approach
9 to modeling demand. Did you prepare a slide on this issue?

10 A. I did.

11 Q. And I know there is a lot going on in this slide, so I
12 would like to try to break it into some understandable pieces.

13 You start by just -- you mentioned simulated fans and
14 avatars. Can you just describe to the court what is meant by
15 that.

16 A. Yes. First of all, Dr. Noll starts with real demand data
17 on people who are league bundle subscribers. By his own
18 calculations there is a very large set of nonsubscribers out
19 there, and he has no data on the rest of these people.

20 In building his model what he is doing is creating a
21 simulated population -- here I've called them avatars, because
22 the idea is that they are supposed to be very much like the
23 real people in the real data -- and he is essentially assigning
24 a mathematical DNA to these avatars which is going to have the
25 following properties: First of all, on certain features he is

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McFadden - direct

1 going to do this in a way so that it matches the real people,
2 and in other areas he is going to use mathematical assumptions
3 to essentially fill out the DNA which will determine how these
4 people make choices and how they behave.

5 It's very important I think just in terms of
6 understanding the general structure of what he does to
7 understand that his demand analysis and its features in the end
8 is based on this simulated population, and there is really
9 nothing you can say about what is going on there that doesn't
10 come into it either by mathematical assumption or by the
11 selected features on which he is matching.

12 Q. I would like to follow up with a few different points that
13 you raised there.

14 First, on the slide you've got the four percent and
15 the 96 percent, and I think this relates to Dr. Noll's
16 testimony yesterday that he is extrapolating from what he knows
17 about the current league subscribers to try and predict
18 behavior from nonsubscribers, all those other viewers of the
19 league championship series. Is there any problem with the type
20 of extrapolating that he is doing here?

21 A. Yes, I think this is quite an extreme extrapolation, and if
22 the probability model, the mathematical model he is using to
23 make this extreme extrapolation, is not exactly right, then any
24 problems with it are going to tend to be amplified, and the
25 extrapolation itself will be unreliable.

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McFadden - direct

1 (Continued on next page)

1 Q. To be clear, does Noll have any data for the 96 percent of
2 the nonsubscribers for whom he's trying to predict their
3 behavior?

4 A. That's right; he has no data. The situation here, if I can
5 use an analogy, would be if you wanted to get the distribution
6 of heights of people in the general population, you could start
7 with a special group, say, the professional players in the NBA.
8 And what you're now doing is making a statistical probability
9 model of the distribution in NBA heights and using that to
10 extrapolate to the heights of people in the rest of the
11 population. That's not necessarily wrong, but it's quite --
12 scientifically I think quite risky that you may not have the
13 sort of the biology of heights exactly right. It's a situation
14 in which there would be a tremendous scientific advantage to
15 having some more data and being able to validate that
16 extrapolation.

17 Q. I think Dr. Noll admitted yesterday that he wished he had
18 more data like C&Y did. When an economist is missing data on
19 potentially important features like Dr. Noll concedes is the
20 case here, what, say, what's an economist supposed to do?

21 A. The standard procedure would be to try to get data on --
22 from the entire population, certainly first to go look and see
23 if someone else has already collected it. But if you can't
24 find that, it would -- common procedure would be to collect
25 your own data, do your own survey, find out who is, for

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McFadden - direct

1 example, in this case who's a fan and who is not, and perhaps
2 also find out more about what their tastes are, whether they
3 would consider buying or not at various suggested prices.

4 By the way, that last technique is the technique which
5 is almost a standard in market research where this problem of
6 estimating demand for new product is something that firms have
7 to deal with all the time, and there is now a long tradition
8 and a long history of using survey techniques to understand
9 what's going on and make predictions.

10 Q. You also indicate on this slide that he did match on
11 selected features. Did Dr. Noll match on all the features that
12 he should have?

13 A. No, he did not in my opinion. He has omitted matching on
14 some very important features that are particularly important,
15 actually critical, for trying to estimate the shares of people
16 that will be diverted from the league bundle to *à la carte*
17 packages at various price differentials.

18 Q. Are all of the features that he did include on those
19 avatars that he created, do those all flow from the actual data
20 in the case?

21 A. On the items in which he does match, those do flow from the
22 actual data; yes.

23 Q. Does he create any additional features that don't flow from
24 the actual data?

25 A. Well, he's creating properties of these avatars. I

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1 described it before as saying he's filling out the DNA, the
2 mathematical DNA of these avatars with mathematical
3 assumptions. And those are coming by assumption, not from
4 anything in the real data that he has.

5 Q. Just to finish on this slide, in this context, when you're
6 extrapolating to the degree that Dr. Noll admits that he is and
7 that you're missing data on important issues like Dr. Noll
8 admits that he is, is it important to then test your model or
9 validate it in some way for reliability?

10 A. I would say for reliability, validation is very important.
11 Getting any kind of data which tells you what -- you're either
12 correct or incorrect is very important; yes.

13 Q. And did you test Dr. Noll's second model for reliability?

14 A. I did.

15 Q. And did you prepare a slide on one of those tests?

16 A. Yes.

17 Q. Before we get into the details of the slide, can you just
18 explain for the Court what is a falsifiability test?

19 A. Yes. Let me do it by using a simple example. Suppose that
20 a scale is to produce the -- is purported to be able to measure
21 weights and you have a box that you're interested in and it
22 weighs five pounds on this scale, the question is, is the scale
23 working?

24 If I now take a ten-pound or a heavier box something
25 in the order of ten pounds and put it on the scale and it still

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1 reads five or nearly five, then that is a -- you'd say that
2 model -- that scale fails a falsifiability test.

3 If you put on an empty box and instead of reading zero
4 it reads nearly five, that scale is giving you a false
5 positive, and you'd say it's failing a falsifiability test.

6 So that's what a falsifiability test is in situations
7 where you give this thing data which should have known
8 properties, the model -- the scale is failing to give you the
9 results that it should.

10 Q. Could you describe the test that's reflected in slide
11 number six here?

12 A. Yes. What I did was something like subjecting the scale in
13 my little analogy to heavy weight or a light weight. What I
14 did was take the actual data and modify it in two ways which
15 should have moved the results of this model substantially. One
16 extreme was that all the people currently buying the league
17 package really were fans of only one team, a very extreme
18 assumption. The other was that they are fans of a variety,
19 fans of the game and have essentially equal preferences for
20 each -- for increment of hours spent watching any single team.
21 At least if they started watching each team five hours and the
22 next hour would give them the same weight, whether it was one
23 team or another.

24 In these circumstances, I would expect when everyone
25 is a fan of only one team, Dr. Noll's model should find that

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1 those people are all switching to an ad hoc package for that
2 team. And the demand for the bundle would essentially drop out
3 unless the price fell substantially down to the level of that
4 ad hoc bundle.

5 In fact, Dr. Noll's models prices for the league
6 bundle don't hardly change at all. It's like the scale
7 effectively not moving its value when you go from the box
8 that -- the real data -- of real data to these counterfactual
9 data where you would expect it to move. The same thing on the
10 last row where you have introduced this case where people have
11 a great taste for diversity, and you would expect them to be
12 quite resistant to leaving the league bundle.

13 Q. Just so everyone is clear on exactly how you performed this
14 test, in the second to -- in the second and third rows, rather
15 than using the actual data in the case that Dr. Noll used in
16 his model, you created a completely different fictitious set of
17 data representing two different extremes of fan behavior to see
18 how you would get different results?

19 A. I did. I essentially created two counterfactual
20 alternatives at -- quite extreme. It's like taking your scale,
21 taking something that -- you have your box, your real data, and
22 you're now putting -- testing it against two other boxes which
23 are at two extremes and seeing whether the scale responds to
24 weights -- to things of clearly of different weights, exactly
25 the idea.

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1 Q. What does the result of this test tell you about the
2 scientific reliability of Dr. Noll's model?

3 A. I think it shows that the second model was not
4 scientifically reliable. It was not responding the way it
5 should if it were to be a reliable model, its purpose.

6 Q. In fact, after you prepared this test, Dr. Noll then
7 created a third model on the demand side; is that right?

8 A. He did.

9 Q. Understanding in that third model he added four additional
10 equations on the demand side so you would then have 66
11 equations rather than 62 equations?

12 A. He did. They're called moments.

13 THE COURT: Called what?

14 THE WITNESS: Called moments.

15 THE COURT: Moments?

16 THE WITNESS: In his analogy, that's his terminology,
17 four additional equations or moments; yes.

18 Q. Dr. Noll testified yesterday about that, and he had some
19 slides he put up indicating that he tested his model against
20 the actual data relating to those 66 features or moments.

21 Do you recall that testimony?

22 A. I do recall that.

23 Q. And he found that it did match well on those 66 moments.
24 Does that change your opinion in this case at all about the
25 validity of his model?

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1 A. No. It certainly would have been alarming had those not
2 matched because that was essentially what the analysis set out
3 to do, but I think that was not enough. There are dimensions
4 which are critical to the question of how sensitive people are
5 to price and to the content and how easily they would move from
6 the league bundle to *à la carte* packages; and those are the
7 dimensions -- some of those dimensions are ones in which he has
8 failed to -- failed to match the real data.

9 Q. And did you then conduct tests on his third model to see
10 whether it's capable of matching on those other important
11 features that you're talking about such as diversity?

12 A. Yes. I tested it on one which is essentially people's
13 tastes for diversity.

14 Q. And you prepared a slide -- there are some slides on this
15 issue?

16 A. I did.

17 Q. Could you just describe for the Court what was the
18 experiment you conducted that's reflected in slide number
19 seven.

20 A. Yes. In this case, you could say this is a simple fitting
21 or calibration test. What I'm doing is looking at the share of
22 the people in the actual league subscriber data who only ever
23 watch a single RSN or two or more than two. And I'm comparing
24 those percentages with what Dr. Noll's avatars do. And what I
25 find, for example, and this is the case of DirecTV, that 6.8

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1 percent of people actually watch a single RSN; in Dr. Noll's
2 avatar population, 40.5 percent watch a single RSN. So, his
3 model is getting a much larger share of the people that are --
4 focus their attention on a single RSN than is true in reality.
5 And vice versa on the "two or more," 87 percent of people in
6 the actual data watch more than two; whereas in his avatars,
7 only 38 percent do.

8 MR. DUBNER: We have an objection to this. This was
9 never disclosed. Dr. McFadden did produce analogous data for
10 NHL, but this is the first time we have ever seen this
11 information.

12 MR. ECKLES: This is the essence of his opinion of his
13 reply model. We have a slide on the NHL that we'd be happy to
14 do the testimony off of.

15 THE COURT: You would substitute it. It's going to
16 make the same point. So I'll strike the testimony on the
17 baseball and just use the NHL, but it makes the same point,
18 right?

19 MR. ECKLES: That's correct; it's the same point.
20 Q. To be clear, you have done this test on all three data sets
21 and you reached the same result?

22 A. Yes, I have.

23 Q. And just so it's clear again, what does this test show us
24 about the ability of Noll's model to replicate the actual
25 world?

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1 A. Again, what you're comparing is the share in the actual
2 data who watch a single RSN versus what Dr. Noll's avatar
3 population share is. If Dr. Noll's model were working
4 reliability, these should be reasonably close. In fact, they
5 differ substantially. For example, for a single RSN in the
6 actual data, 22 percent watch a single RSN; whereas in Dr.
7 Noll's avatar, more than 50 percent watch a single RSN. Again,
8 his population are far more focused on watching one, single RSN
9 than is true in the actual population; and vice versa for
10 people who seem to like diversity because they watch more than
11 two RSNs, 66 percent versus 30 percent.

12 Q. In terms of Dr. Noll's ultimate conclusions in this case,
13 what's the significance of the fact that he's significantly
14 understating the number of fans who watch more than two RSNs?

15 A. I think this makes the model scientifically unreliable for
16 its intended purpose, which is to determine how these people
17 who hold the league bundle now will stick to it or move to an *à*
18 *la carte* package.

19 Q. And again, what do these results tell us about the overall
20 reliability of Dr. Noll's model?

21 A. In my opinion, they show that it's not scientifically
22 reliable.

23 Q. Did you also conduct a test to see whether Dr. Noll's third
24 model is capable of replicating the percentage of viewers that
25 watch particular RSNs?

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1 A. I did.

2 Q. Did you prepare some slides on this issue as well?

3 A. Yes, I did.

4 Q. Okay. Can you describe for the Court what this test
5 represents.

6 MR. DUBNER: Again, we have to object. This was never
7 disclosed to us. I don't think even the underlying information
8 was disclosed to us, certainly not as to DirecTV.

9 MR. ECKLES: This is just a demonstrative of data
10 opinions that were in his reply declaration.

11 THE COURT: That's the issue. Show him where in the
12 reply declaration this material is found. Take a minute and
13 show him. If it's really there, show it to him. If it's not,
14 let's move on. You got it? We're going to take a minute to
15 find it in the reply declaration.

16 MR. ECKLES: For now, let me just continue because we
17 have this slide for NHL, which is clearly something that he did
18 testify about.

19 THE COURT: All right.

20 Q. Can you walk us through slide number 12 relating to NHL
21 data.

22 A. Yes. What this shows team by team is what proportion of
23 the people who buy the league package watch each team, that's
24 in red, compared with what Dr. Noll's model predicts, that's in
25 blue. And the pattern is that for in almost every team, Dr.

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1 Noll does not predict as high a share as occurs in actuality.
2 In fact, people in actuality watch teams -- watch a lot more
3 teams and a lot higher share of them watch every team, any team
4 than Dr. Noll's model predicts.

5 Q. Is this --

6 THE COURT: Why are there no actual figures for two of
7 the teams? Do you know?

8 THE WITNESS: There are two teams in this case where
9 the prediction is quite close.

10 THE COURT: No. I didn't ask that. I said why are
11 there two teams where there's no actual figure?

12 THE WITNESS: Oh, it's just over -- the blue
13 overwrites the red.

14 THE COURT: I see. In other words, they merged?

15 THE WITNESS: Yes.

16 Q. Is this test similar to a test that C&Y performed in
17 connection with their model?

18 A. Well, in the C&Y model, they actually imposed as part of
19 their moments the condition that these actual and predicted
20 shares had to match. That was one of the conditions on which
21 they matched. Dr. Noll did not use those moments in his
22 analysis. So in C&Y, these things line up exactly by the
23 construction of the moment fitting, or almost exactly.

24 Q. This is a significant deviation from how C&Y performed --
25 devised their demand model?

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1 A. I would say it's a significant deviation on a dimension
2 which is, I think, very important to this application, which is
3 to determine what the taste for diversity are in the population
4 of subscribers.

5 Q. Again, what is the significance of this in terms of the
6 reliability of Dr. Noll's model for the purposes he's offering
7 it?

8 A. In my opinion, this makes the model scientifically
9 unreliable.

10 Q. Dr. Noll, there's one last thing I'd like to cover. You
11 were here yesterday for Dr. Noll's testimony.

12 A. I was.

13 Q. Dr. Noll testified yesterday about why the results of his
14 third model would create some seemingly counterintuitive
15 results in that it's predicting that 99 percent of multiteam
16 fans would prefer the single-team package rather than the
17 league bundle?

18 A. Yes.

19 Q. Does the explanation he offered yesterday relate to any of
20 the opinions that you're offering in this case?

21 A. Yes. His explanations yesterday essentially go to the
22 heart of how he specifies his model and the assumptions that
23 he's making.

24 If I could go to the slide from yesterday, that's just
25 what he was shown and he was responding to. His response to

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1 the numbers 32 percent, 19 percent and 1 percent where the more
2 teams you were fans of, the lower likelihood you bought the
3 league package versus a standalone *à la carte* package. This
4 slide I think was produced because the defendants thought it
5 was implausible. Dr. Noll said he thought it was plausible.

6 MR. DUBNER: I'm sorry to object again, but this is
7 Dr. Ordover's supplemental declaration and Dr. Ordover was on
8 the stand testifying to this.

9 THE COURT: No, I understand, but Dr. Noll I think was
10 shown this and did give testimony with regard to this slide.

11 MR. DUBNER: Oh, absolutely, but then Dr. Ordover had
12 the chance to respond to it and did, in fact, respond to it.
13 This is just entirely duplicative of his testimony.

14 THE COURT: I don't think that's right. I'll allow
15 this witness to testify because he is talking about how this
16 relates to his criticism of the demand side of Dr. Noll's
17 opinion, so I'm going to allow it.

18 Go ahead.

19 A. I would like to explain in terms of Dr. Noll's assumptions
20 that have gone into his model construction what's causing this
21 and show -- show you that this is an artifact of his
22 mathematical assumptions. It's not anything about real
23 behavior. To the extent it's something about real behavior,
24 that's actually false; it's illogical. And in fact, what's
25 going on here is something that is a characteristic of a logit

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1 model. And in this case, I think it's a consequence of using
2 the logit model in a situation where it is quite inappropriate
3 to use it.

4 And let me say, first of all, what this property of
5 the logit is that he's using. There's a problem of that model
6 called the red bus/blue bus problem that has the following
7 nature: If you use this model to predict whether a person is
8 going to drive or take a bus, it will often do a very good job
9 of that. But if you now add on another bus, which happens to
10 be almost the same, maybe just a different color, this model
11 will tend to overpredict how many people will take the bus.
12 And if you put in five buses of different colors, it will
13 grossly overpredict how many people will take the bus. That is
14 a problem with the logit model.

15 And ever since its invention back in the early 70's,
16 it's -- all these people are always warned if they're applying
17 this model, you have to test for that; you have to make sure
18 that this is not a problem in your application, and if it is,
19 you don't use this model in its original form. You have to do
20 something different.

21 What this property does, it's like having a coin and
22 if you're choosing between the league bundle and single channel
23 RSNs, it's like flipping a coin 30 times. So even if you have
24 a very high probability in one coin toss -- it's not a 50/50
25 coin -- a very high probability in one coin toss of taking the

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1 league bundle if it comes up heads, you'd still have a very
2 good chance of getting 30 heads in a row. See, as soon as you
3 fail to get a head, this model is saying you're going to switch
4 to a single sub -- a single team subscription. And the
5 problem -- and what will happen is the more you -- the more of
6 these flips you have, the more the probability of staying with
7 the league bundle goes down.

8 And these probabilities that Dr. Noll was responding
9 to, that pattern is due simply and mechanically to this
10 business of multiple flipping of coins and how many are being
11 flipped. It's a limitation of the model which people are
12 warned against and Dr. Noll has, well -- well, has not tested
13 for it because there are tests for it, but he's I think not
14 recognized the source of this pattern or that it is essentially
15 a consequence of something that he is wired into.

16 THE COURT: He's what?

17 THE WITNESS: It's a consequence of something he wired
18 in mathematically to his avatars; not anything that comes at
19 all from any real demand data.

20 Q. Dr. Noll testified yesterday he had a couple potential
21 explanations, one of which was that maybe the multiteam fans
22 are more price-sensitive; that's why they prefer the single
23 team package.

24 Could that be a valid explanation for what's going on
25 here?

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1 A. That absolutely cannot be an explanation, and one thing
2 that's important to understand, the properties of these people
3 are making choices. These people are not real people. These
4 people are a simulated avatars. The properties they have are
5 determined solely by matching on 60 or 66 things plus
6 mathematical assumptions. All this behavior is coming not from
7 anything in the real data but only from a mathematical
8 assumption.

9 So all -- this whole pattern is forced by a
10 mathematical assumption and the idea that price intensity would
11 be different here, it's logically impossible within Dr. Noll's
12 model construction. It cannot possibly be the explanation.

13 Q. I think you covered this, but just to be clear, in this
14 pattern that we see here with the number of fans preferring the
15 league package going down on the right column, could that be
16 driven by any real data in the case?

17 A. There's no data that's been introduced by Dr. Noll that has
18 anything to do with this pattern. This is entirely due to an
19 assumption that he has added on his own without any reference
20 back to the real world.

21 Q. And what does this red bus/blue bus problem that you
22 testified about here, what does this mean with respect to the
23 methodological soundness of Dr. Noll's model?

24 A. I think this is a, from a scientific point of view, a very
25 badly specified model. It's one which I think flagrantly

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1 violates common sense. And in my opinion, it pushes this whole
2 model over the line from something that is perhaps fixable to
3 what's really junk science.

4 Q. I think you already covered probably everything that's on
5 this slide, but, again, this is something that he could have
6 tested for and should have been able to figure out was an
7 issue?

8 A. Well, I'm not going to say that he could have tested for
9 it, but I would say that it is certainly unreliable to use an
10 assumption like this under these fairly extreme conditions
11 without data on actual choice behavior. So he's making a
12 mathematical inference on how choice behavior is going to look
13 without going into any real data on it and that is itself
14 simply unreliable.

15 It's a situation where I would say a prudent scientist
16 should say if I can't get -- if you can't find me any better
17 data than that, I shouldn't be trying to make this prediction,
18 certainly should not represent it as something which is
19 accurate for the real world.

20 Q. Just to sort of conclude now, given all the opinions that
21 you offered in this case, in your expert opinion, is Dr. Noll's
22 model reliable economic science?

23 A. In my opinion it is not.

24 THE COURT: You're right on time to the minute. Thank
25 you, Mr. Eckles. Here is my thought. We should, according to

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1 your schedule, be able to complete Dr. McFadden today. We have
2 a one-hour window for cross, which would take us from 3:30 to
3 4:30, and 15 minutes for redirect. If everybody uses all that
4 time, we'd be 15 minutes over, but we'd be done with
5 Dr. McFadden, which gives you much better preparation for
6 summation. You'll be done with all the evidence. And then we
7 can either -- we have the rebuttal, of course. So we could
8 either take that from 10:00 to 11:30 and have a two-hour break
9 before the cross or we can start at 11:00 instead of 10:00, so
10 we have options.

11 Speaking of choice, we have options. We can either
12 start at 11:00 or we can end at 11:30 and have a two-hour
13 break. Whichever one you prefer: Either starting an hour
14 later or having two hours to prepare.

15 MR. DUBNER: Our preference would be to take the time
16 from today instead and keep the schedule as is.

17 THE COURT: No, no. Let's finish with Dr. McFadden.
18 I didn't even give you that choice. Speaking of choice, the
19 only choice I gave you was whether to start at 10:00 and have a
20 two-hour break or start at 11:00 and have a one-hour break.

21 MR. DUBNER: I thought I would add a blue bus.

22 MS. WILKINSON: We choose 10:00, your Honor.

23 THE COURT: I think you prefer that, too.

24 MR. DIVER: Ten is fine.

25 THE COURT: Let's now take the hour and get the cross

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1 done. You're doing the cross, Mr. Dubner?

2 MR. DUBNER: Do you know approximately when you'll
3 want to take the five-minute break?

4 THE COURT: No. Do you have a preference on that?

5 MR. DUBNER: No.

6 THE COURT: If you did, I'd be happy to honor it.

7 MR. DUBNER: Actually, your Honor, could we take that
8 five minutes now?

9 THE COURT: Sure. That's your preference?

10 MR. DUBNER: Yes.

11 THE COURT: Now we have this odd little time, 3:32,
12 let's try to reconvene at 3:37 so we can really stick with only
13 going over by 15 minutes.

14 MR. DUBNER: Sure thing.

15 (Recess)

16 (In open court)

17 THE COURT: Please be seated. We're ready to get
18 started.

19 Mr. Dubner.

20 CROSS-EXAMINATION

21 BY MR. DUBNER:

22 Q. Dr. McFadden, we're mostly going to focus on your reply
23 declaration, but first, I'd like to talk about a couple of
24 things you said a moment ago before the break.

25 First, you compared Dr. Noll's model to a scale, is

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1 that correct, a physical scale?

2 A. I used a scale, physical scale as an example of a
3 scientific instrument that you would want to test whether it's
4 working properly. And I would say that Dr. Noll's demand model
5 is a scientific instrument. In the same way you would test the
6 scale that's working properly, you would test this model to see
7 if it's working properly.

8 Q. So a scale measures in a single observable physical
9 characteristic, isn't that right? It measures the weight of
10 things?

11 A. Yes.

12 Q. A discrete choice model doesn't measure an observable
13 physical characteristic, does it?

14 A. The bottom line of Dr. Noll's model is -- are observable
15 characteristics, such as the share of current league bundle
16 subscribers who would end up switching by his calculation to an
17 *à la carte* package.

18 Q. And it measures many other characteristics as well, some of
19 which -- 66 of which you said that he matches well. Isn't that
20 correct?

21 A. It does measure other things, it's true; yes.

22 Q. And you can buy a mass-produced scale off the shelf in a
23 store, right?

24 A. Would you explain the question.

25 Q. A scale like you describe, like you compared Dr. Noll's

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1 model to, you can just buy that in a store and it would be the
2 same as the same scale sold somewhere else, right?

3 A. If we're talking about a scientific scale, not necessarily
4 off of any shelf, no, but I don't see why that's germane.

5 Q. But I still, whether it's germane or not, would like an
6 answer to that. A scale used to measure weight, you can buy
7 some of those just off the shelf and they're mass-produced,
8 they're the same thing; isn't that correct?

9 A. I would say that there are -- there are a variety of
10 scientific scales available from various scientific warehouses
11 used for various purposes. And you would -- you would -- if
12 you're a scientist, you'd be well advised if you buy one of
13 those scales to test it and make sure it's working.

14 Q. Dr. McFadden, I didn't ask about testing it, did I? I
15 didn't ask about what scientists would do. I asked whether it
16 was possible to buy a scale that measures weights in a store.

17 A. From a scientific supply house, yes.

18 Q. You can't buy a discrete choice model mass produced off the
19 shelf at a store, can you?

20 A. You could certainly buy a discrete choice model. You
21 simply have to hire someone to produce it for you.

22 Q. Right. And it wouldn't be mass produced the same for a
23 wide range of things -- strike the question.

24 If you use a scale to measure something so extremely
25 heavy that it broke the scale, you wouldn't expect it to

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1 produce reliable results necessarily, would you?

2 A. It's certainly possible that you could do a falsification
3 test which would be off-scale, but even so, the idea is that if
4 there's some range that this scale is represented to be able to
5 weigh, it should show some degree of responsiveness over that
6 range.

7 Q. And then Dr. Noll, you said earlier that Dr. Noll failed
8 scientific due diligence, he didn't collect data by doing a
9 survey. Is that right?

10 A. Could you provide a context for your question.

11 Q. Earlier in your testimony today, you said that Dr. Noll's
12 model was scientifically wrong and unreliable because he didn't
13 conduct a survey; isn't that right?

14 A. I said that it was scientifically unreliable and that a
15 customary way a demand analyst would proceed in a situation
16 like this would be to try to find additional data.

17 THE COURT: Suggested by survey.

18 THE WITNESS: Either finding or collecting a survey.

19 Q. You were deposed in this case a few months ago. Isn't that
20 right, Doctor?

21 A. That's correct.

22 Q. During that deposition, you were asked what you believe the
23 differences are between bundle purchases and other customers.
24 And you said at line 13 "If I'm led to believe they're not any
25 different then I would use that, but the thing is, I think it's

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1 -- "

2 THE COURT: You have to read much slower.

3 MR. DUBNER: Yes, much slower.

4 Q. Just for time, let's focus on the last line. You said
5 "that would be not necessarily scientifically wrong but
6 certainly a less reliable than I think you could accomplish
7 with a well very small investment in additional data."

8 Was that your testimony, Doctor?

9 A. Yes.

10 Q. Do you stand by that testimony?

11 A. Yes.

12 Q. Then one other thing on your testimony today, you raised
13 the fan of the game and superfan example, is that right?

14 A. I'm sorry. Are you switching away from this now to
15 something else?

16 Q. Yes. I'm switching away from that.

17 A. Please repeat your question.

18 Q. Sure. You mentioned the fan of the game and superfan
19 examples today?

20 A. Yes. I mentioned those tests, yes.

21 Q. You tested Dr. Noll's second model, too?

22 A. "Too"?

23 Q. That you ran against Dr. Noll's second model?

24 A. I did.

25 Q. Those tests no longer produce the results you claim are

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1 implausible with Dr. Noll's third model; is that correct?

2 A. The third model was effectively designed -- built to pass
3 those tests; that's true.

4 Q. So that's a "yes"?

5 A. Well, if you -- I'm not sure -- I think it's a "yes," but
6 please repeat your question if you want a "yes" or "no" answer.

7 Q. We'll move on to your reply declaration, Doctor. Your
8 first criticism in your reply declaration is that but-for-world
9 outcomes are not driven by the intensity of viewership, is that
10 right?

11 A. You're referring -- I'm sorry. I want to make sure I have
12 the right context. In my first declaration, that was the
13 conclusion of my falsifiability tests. I concluded that model
14 was not --

15 Q. I'm speaking about your reply declaration.

16 A. Oh. The reply declaration. I'm losing track. Sorry.

17 Q. You have next to you a binder of declarations, a smaller
18 white binder.

19 THE COURT: What?

20 MR. DUBNER: The smaller white binder.

21 THE COURT: Smaller white binder. I don't have that,
22 the smaller white binder. I have it this way.

23 Q. If you can look at tab 14 --

24 THE COURT: Is that the reply declaration?

25 Q. That's Dr. McFadden's reply declaration. I just want to

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1 focus you on page three.

2 A. I have that page.

3 Q. Page three?

4 A. Yes. I have it in front of me.

5 Q. Your first criticism is the but-for-world outcomes are not
6 driven by intensity of viewerships, is that right? That's the
7 large header, number three.

8 A. Yes. You're referring to paragraph seven?

9 Q. Yes.

10 A. Yes.

11 Q. And to show this, you changed the actual data by cutting
12 the hours people viewed in half and then running the model with
13 those fictitious customers; is that right?

14 A. That was one of the tests of fit or reliability that we
15 made; yes.

16 Q. That's for this criticism in your reply declaration, that's
17 the only test you report, right, for the criticism that
18 but-for-world outcomes are not driven by the intensity of
19 viewership, you don't report any other tests?

20 A. This criticism is not based solely on those tests. It's
21 based on the mathematical properties of Dr. Noll's third model.

22 Q. And this is the only test that you report to demonstrate
23 it, correct?

24 A. Well, I'm sorry. Now I have to go back and review this. I
25 haven't looked at it for a while.

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1 Q. We'll move on. Doctor, again, what this test consists of
2 is you changed the actual data by cutting the hours people
3 viewed in half and then running the model with those fictitious
4 customers; is that right?

5 A. That was the test that we did; yes.

6 Q. And you're concerned about Dr. Noll's model because the
7 prices stay relatively similar when you run these new consumers
8 through it; yes?

9 A. That's my recollection.

10 Q. Whereas in the real world, you'd expect prices to change
11 significantly if people only wanted to watch half as many
12 hours. Is that your point?

13 A. I would have to re-read the -- re-read my own declaration.
14 It's been a while. I didn't review it last night, so now I
15 don't remember.

16 Q. The point that I take you to be making, and you reference
17 this in response to -- the point I take you to be making, and
18 tell me if you think this is wrong, is that you would expect
19 prices to change significantly if consumers watched half as
20 many hours as they do in the real world. Is that right?

21 A. I would expect some effect, but I would have to review my
22 own experiment at this point to recall the details.

23 Q. Do you recall, Dr. McFadden, when you made your modified
24 dataset, you changed one thing in the data, right, you changed
25 the number of hours people viewed and nothing else, right?

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McFadden - cross

1 A. That's my memory now, but I haven't reviewed that for seven
2 weeks, so I have -- I simply don't remember the details.

3 Q. Did you review your declarations before coming in to
4 testify today?

5 A. Review my reply declaration? I did not go back and read
6 it. No.

7 Q. Did you review your first declaration?

8 A. No.

9 Q. Did you review any of Dr. Noll's declarations?

10 A. I looked through Dr. Noll's reply declaration.

11 Q. Okay. We are going to continue with this. I'm sorry, if
12 you need help jogging your memory, let me know. But so you
13 changed -- you just said you think you remember -- you changed
14 the number of hours people viewed, right, and nothing else?

15 A. As I sit here, that I do remember doing something like
16 that, yes.

17 THE COURT: Look at paragraph eight right in front of
18 you. It says "I run Dr. Noll's model on these halved data and
19 calculate but-for-world outcomes."

20 Q. And the first sentence of that paragraph as well, your
21 Honor, "As a new test for the relationship between damages and
22 the data used in Dr. Noll's model, I take the estimated RSN
23 viewing times for each subscriber and divide them in half."

24 That's the only change you made, right?

25 A. That is the change; yes.

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McFadden - cross

1 Q. So in your artificial dataset, every viewer pays the exact
2 same price as actual consumers, don't they?

3 A. I think that's not correct because what's happening here is
4 that, once again, like my tests on his second model, you're
5 giving his model a different dataset and it goes through its
6 own machinations to produce prices. So the prices that prevail
7 with this modified viewership data would reflect what Dr. Noll
8 says the equilibrium would look like.

9 Q. Right. Doctor, I'm asking about the data that you input.
10 In the data you input, the viewing time was half of the real
11 world but the price was identical to the real world, wasn't it?

12 A. There is no price -- the price is determined within Dr.
13 Noll's model.

14 Q. Is that not an input into Dr. Noll's model, Dr. McFadden,
15 the price that the actual viewers are paying, that's not
16 something his model looks at at all?

17 A. In his model which -- in his equilibrium, price is
18 determined by the -- by the balancing, by the equilibrium.

19 THE COURT: That wasn't the question. Was one of the
20 input somewhere in his analysis the actual price paid, did he
21 use that at any point as a baseline?

22 THE WITNESS: Well, he uses actual price in his Lerner
23 calculation, which is one of the conditions he matches to.

24 Q. So, the data that Dr. Noll uses and the modified data that
25 you ran through his model for this test, they include the price

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McFadden - cross

1 that people are paying, yes, in some form?

2 A. Well, the answer is that in constructing tastes, he is
3 using information on actual price --

4 Q. Thank you. I think that answers the question.

5 A. -- via the Lerner index, but that now has nothing to do
6 with the prices that are -- that would be paid by the consumers
7 in the equilibrium of the model which is what's reported in
8 this table.

9 Q. We haven't gotten to the table yet, Doctor. I'm just
10 asking about the data inputs that you used when you ran this.

11 So you kept the Lerner index the same as Dr. Noll had,
12 so the same actual price but half viewing time; yes?

13 A. That's correct.

14 Q. So your hypothetical consumers in this test watch half as
15 many hours, but as far as the data can show, the dataset that
16 you entered with that Lerner index, they're happy to pay the
17 exact same amount of money for the bundle as real consumers,
18 aren't they?

19 A. This is a hypothetical exercise. It's saying that if
20 people -- the subscribers were -- continued to be subscribers
21 but did not view the things as intensely, then you would get
22 a -- certain results.

23 Q. And you don't say what in your -- you don't say in your
24 declaration what you think the results should be, right?

25 A. My recollection is that it does not.

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McFadden - cross

1 Q. You just say that whatever the results should be, Dr.
2 Noll's results probably aren't them, is that right?

3 A. I'm sorry?

4 Q. You don't say what you think the results should be when you
5 run this test; you just say Dr. Noll's results probably aren't
6 right. Is that right?

7 A. What I say is that what's going on here is the viewership
8 data seems to make very little difference to the price that
9 comes out as equilibrium in his model; what seems to be driving
10 that is the Lerner index, that particular moment, not the
11 viewership patterns, not the intensity of viewership. This is
12 essentially another kind of a falsification test.

13 It's saying if the Lerner index moments stayed the
14 same and other data from consumers changed a lot, would you get
15 any different result? And the answer is you do not
16 get -- almost no different result which suggests that it's
17 really hanging on that Lerner index.

18 Q. And the Lerner index, as you said, reflects the price that
19 people are paying - it may reflect other things - but it
20 reflects the price that people are paying in the actual world,
21 right?

22 A. It reflects the price they're paying and it reflects an
23 assumption about the relationship between that and the demand
24 sensitivity of people.

25 Q. We'll get to that as well. But Dr. McFadden, you would

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1 agree that your modified data, the consumers through the Lerner
2 index, the consumers are being reflected to being willing to
3 pay the exact same amount that actual consumers are and then
4 you run those fictitious consumers through the data; isn't that
5 right?

6 A. This is a hypothetical exercise in which in this
7 counterfactual world consumers are paying exactly what they
8 have paid before, but instead of having their TV on for 12
9 hours, they have it on for six hours.

10 Q. So they pay exactly the same amount. Thank you. Let's
11 move on to your next criticism.

12 Your next criticism is that Dr. Noll's model
13 underpredicts the variety in RSN viewing and doesn't actually
14 predict the distribution of favorite teams viewing times. Is
15 that right?

16 A. That's correct.

17 Q. So let's look at table two. I think your counsel put up a
18 different version of this but the same data earlier. Let me
19 make sure I understand this. The first number, for example,
20 the 22 percent, that's the percentage of people in the data who
21 didn't watch anything on a second RSN in 2012; is that right?

22 A. Excuse me. I'm going to -- yes. I'm just comparing your
23 numbers with mine. Yes, that's correct.

24 Q. Okay. And to come up with that number, you excluded
25 everybody who watched even a single game on another RSN, right?

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McFadden - cross

1 A. That's correct.

2 Q. You excluded everybody who watched a single hour or even a
3 single minute on another RSN, right?

4 A. That's correct.

5 Q. So your number excludes everybody who just flipped through
6 a different channel on the way to the favorite channel, right?

7 A. That's true.

8 Q. And these are people who you are saying should be
9 considered as two or even "more than two" RSN viewers, right?

10 A. Yeah. This particular experiment says that if someone
11 watches any RSN for any amount of time, they had some interest
12 in it.

13 Q. Right. So somebody who clicked over to another game for a
14 minute during a commercial break, they had some interest,
15 right?

16 A. Certainly the spirit of this experiment is that they did
17 that because they had some interest in doing that.

18 Q. Right. This would be somebody like Mr. Keyte who said
19 yesterday he's a Yankees fan but he likes to check the scores
20 in rival team's games. You're saying that even though he's
21 predominantly a Yankees fan, he gets some utility from access
22 to other channels in some idiosyncratic way and that should be
23 modeled, right?

24 A. I'm saying that in the real data, which is all the data
25 that Dr. Noll starts from, the indications you have about

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1 tastes for diversity come from what people actually do. And if
2 a person watches more than one RSN, that's an indication, for
3 whatever reason, that they have a more diverse interest in
4 teams than a person who watches a single RSN. That's my view.

5 Q. You're saying they have some interest in getting access to
6 other channels, and we may not know why, but we know they have
7 some -- we believe they have some interest. Yes?

8 A. Yes.

9 Q. Dr. Noll does allow simulated consumers in the one favorite
10 team category to get utility from having the bundle, doesn't
11 it?

12 A. That's true, but that utility from having the bundle all
13 comes from the disturbance or error in the logit model. And
14 that in itself is essentially a term which is there because
15 there's no data, there's nothing in the real data that explains
16 behavior. That's -- and the role of that error in a
17 well-estimated logit model would be to account for the fact to
18 pick up on some people who are idiosyncratic.

19 Q. And just to be clear, when you say "error," you don't mean
20 a mistake. You mean a logit error term, which is in any model
21 of this sort?

22 A. Yes. Sorry. I would call it a disturbance rather than an
23 error; yes.

24 Q. Okay. You said that the purpose of that is to pick up on
25 things that we can't observe from the data, right?

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McFadden - cross

1 A. That's correct.

2 Q. So we can't observe just from the data the difference
3 between Mr. Keyte checking the Red Socks' scores just to find
4 out how the Yankees' rival is doing and me just happening to
5 flip through the Yankees game on the way to my Red Socks game?
6 We have no way to know which consumer is which or what's really
7 driving that choice, do we?

8 A. That's true. And in ordinary logit estimation, you would
9 allow the estimates to tell you how important those kinds of
10 idiosyncratic terms have to be in order to explain the choices.
11 That's actually not what Dr. Noll does.

12 What Dr. Noll does is pick a number, nothing from the
13 real world, he picks a number and that establishes the weight
14 of that logit disturbance as opposed to everything that's
15 observed. And Dr. Noll happens to pick a number which gives
16 that term an outsized weight.

17 Q. Dr. McFadden, let's go back to this chart for a moment.
18 The 22 percent who watch a single RSN, do you know what that
19 number would have been if you hadn't excluded people who you
20 say watch one game on another RSN?

21 A. I have run that, but I don't have it in front of me.

22 Q. Does it roughly double? Does that sound about right to
23 you?

24 A. It goes up by -- whether it's double, what I can tell you
25 is these differences are less dramatic, but they're still

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McFadden - cross

1 there; and they're sufficiently large so that I would still
2 reach the bottom-line conclusion that it's not a reliable
3 model.

4 Q. How close would it have to come to Dr. Noll's numbers for
5 you to be convinced it was a reliable model?

6 A. I think there are statistical tests for that. You would
7 take into account the number of avatars you have here, and you
8 could do this calculation, but I can tell you with 30,000
9 avatars, it has to be pretty close.

10 Q. Now, in your declaration, you didn't report a sensitivity
11 analysis for this critique, did you?

12 A. In my -- did I report a sensitivity analysis of what?

13 Q. Of -- if you used your number, for example, instead of Dr.
14 Noll's, you don't know whether the predicted prices would
15 change in any material way, do you?

16 A. Well, I'm not sure what exactly the experiment would be.

17 Do you mean if I assigned people to his bin 1, the
18 one-team fan in the proportion 22 percent rather than what he
19 actually does, would that fit differently? Is that the
20 question?

21 Q. If you force the model to match your numbers, sure.

22 A. No. I haven't done that calculation.

23 Q. So the second part of this criticism I think was that you
24 said that rather than model people who watch one RSN, people
25 who watch two RSNs, and then people who watch three or more,

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McFadden - cross

1 Dr. Noll should have modeled people who watch one RSN, people
2 who watch 2, 3, 4, 5, 6, all the way up to 29, 30; is that
3 right?

4 A. I don't believe I said that.

5 Q. If you can look at paragraph 20 in your declaration?

6 THE COURT: Reply declaration?

7 MR. DUBNER: Yes. I'm sorry. The reply declaration.

8 THE COURT: Paragraph 20?

9 MR. DUBNER: Yes.

10 Q. If you look at the second sentence, Doctor, it says
11 "Instead of these equations, Dr. Noll should have matched the
12 proportions of consumers that he predicts will watch a single
13 RSN, two RSNs, three RSNs, etc. to the actual data."

14 Do you stand by that suggestion?

15 A. Yes, I don't -- I don't necessarily mean by "etc." that he
16 would match every one, but I would say that I think it would be
17 reasonable to -- it would be reasonable in general to try to
18 take account of the actual pattern of diversity in the real
19 data. And to the extent that this model fails to match
20 reasonable measures of diversity in the real data, then I think
21 it's unreliable.

22 Q. So you're not saying that only a model that has all 30 of
23 those parameters can be reliable, right?

24 A. I'm not saying that. I'm saying that what he does to this
25 point with the conditions he actually matches using his moment

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McFadden - cross

1 method leave out ones which I think are very important for
2 determining the bottom line, which is, how easily are people
3 moved from the league package to *à la carte* channels and to
4 what extent does that put pressure on the price of the league
5 package.

6 Q. Right, right. Dr. Noll matched his set of moments. You're
7 saying there's a somewhat different set of moments that he
8 should have used instead. Is that fair?

9 A. I would say there are additional moments, particularly on
10 the important dimension of taste for diversity, which I believe
11 in any reasonable model of consumer demand here will be closely
12 tied to the sensitivity of people to content and price and
13 their ability for new *à la carte* products to steal market share
14 from the league bundle.

15 Q. Now, back on the question of whether you need all 30
16 parameters, which you said you don't, in deciding how many
17 parameters you need, how complex your model is going to be, you
18 can make tradeoffs between improvements to the model's
19 performance and the complexity, the computational difficulty of
20 the model; is that right?

21 A. Yes.

22 (Continued on next page)

23

24

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McFadden - cross

1 Q. For example, Dr. Noll's model might have been more precise
2 if it had analyzed team pairs instead of individual teams, but
3 you are not criticizing Dr. Noll for not doing that, right?

4 A. I'm not sure. This question is that a follow-up question
5 to the previous question, or are you changing subjects?

6 Q. I thought I was using a slightly different subject to
7 follow up. But we can pass that. I think we've already -- we
8 have agreed that you have to look at whether the improvements
9 will be worth the added complexity, right?

10 A. The way an empirical econometrician would ordinarily do
11 this is it you would fit the model to some what you consider to
12 be leading and important moments, and then you would have
13 additional moments, and you would then test whether the model
14 in fact fits those. And there are statistical procedures for
15 doing that. In fact that's pretty much a standard technique.
16 Dr. Noll has not done those kinds of tests, so whether
17 additional moments in fact are needed, whether the model is
18 consistent with the possible additional moments.

19 Those, by the way, are not complicated to do. It's
20 not the case that by considering whether additional moments are
21 consistent with the model that you have to do all kinds of
22 equilibration and things like that to do that analysis. That's
23 pretty straightforward second year graduate level econometrics.

24 Q. And you haven't run those tests either, right?

25 A. I have not done any affirmative estimation, that's correct.

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McFadden - cross

1 Q. So, you don't know whether Dr. Noll's model actually
2 performs quite well on those tests, do you?

3 A. Well, I do know, because I've looked at one. I looked at
4 the one that we just had a slide up on.

5 Q. Is that a statistical test?

6 A. Well, that's not a statistical test, but I can tell you
7 that if it were a statistical test it would clearly reject the
8 hypothesis that Dr. Noll's model is consistent with reality.

9 Q. But when we are talking about statistical tests, a model
10 doesn't -- let me restart the question.

11 A model doesn't need to exactly predict the actual
12 data to be reliable, right?

13 A. Not exactly, but the statistical standard would be if it's
14 a reliable model, then by statistical criteria it should fit it
15 within a certain level of tolerance, a few standard deviations
16 in the usual terminology of econometrics.

17 Q. Right. And those are objective standards you could have
18 presented to show that Dr. Noll's model is outside the range of
19 tolerance, right?

20 A. I could have done that. The numbers on the slide, I can
21 tell you that if you did that it would be far outside the
22 range.

23 Q. If you did that on that particular slide. But there are
24 many other things that you could have run those statistical
25 tests on in Dr. Noll's model, correct?

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McFadden - cross

1 A. That's true.

2 Q. And you didn't cite any of those in your declaration,
3 right?

4 A. I did not run those tests, that's correct.

5 Q. And you haven't proposed any objective standard that the
6 court can use in deciding whether Dr. Noll's fit to the actual
7 data is close enough, have you?

8 A. Well, I have not set out myself to do Dr. Noll's model in
9 an econometrically satisfactory way. I would hope that Dr.
10 Noll could do that for himself.

11 Q. Well, let's go on to your next criticism. Your next
12 criticism is that Dr. Noll estimates missing RSN viewing times
13 in a biased manner. Is that right?

14 A. Again, repeat the question and give me some context.

15 Q. Sure thing. If you look at page 8, the heading B in your
16 reply declaration.

17 A. Yes, I have reread the paragraph.

18 Q. OK. So, this criticism is that Dr. Noll estimates missing
19 RSN viewing times in a biased manner, right?

20 A. Let me give a little background.

21 Q. Just because we're short on time, doctor, I think it's a
22 yes or no question, and if we could get a yes or no, I would
23 appreciate that. Unless your Honor thinks that the background
24 is necessary.

25 A. Then please repeat the question, because I didn't hear it

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McFadden - cross

1 as a question requiring yes or no.

2 Q. Sure. This criticism is that Dr. Noll estimates missing
3 RSN viewing times in a biased manner, is that right?

4 THE COURT: That's what the criticism says, right?

5 THE WITNESS: For the National Hockey League, yes.

6 Q. OK. First tell me if this is an accurate summary of what
7 Dr. Noll did. So I want to know if this is an accurate
8 summary. It will be on your screen if that's too far.

9 "After the first most-viewed team is identified, the
10 games played by this team are ignored for the purpose of
11 identifying the second most-viewed team; then the games of the
12 first and second most-viewed teams are ignored when identifying
13 the third most-viewed team and so on. Therefore, when a game
14 is played between a more frequently viewed team and a less
15 frequently viewed team, the viewership is always assigned
16 solely to the more frequently viewed team."

17 Dr. McFadden, is that an accurate description of Dr.
18 Noll's method of estimating missing RSN viewing times?

19 A. That's my language, and that's my understanding of how he
20 allocated subscribers to RSNs for the National Hockey League.

21 Q. Dr. McFadden, that's not actually your language, is it?
22 It's Dr. Ordover's language, isn't it?

23 A. No. Oh, is it? If it is, I thought you were taking a
24 quote from my report.

25 Q. Not this time, doctor. Sorry. If you go to Exhibit 5,

F3I7LAU6

McFadden - cross

1 Joint Exhibit 5 in that declarations binder. We can put it up
2 on the screen.

3 A. First of all, I thought you were simply quoting from my
4 report. Now, if you are saying this, I have to reread this. I
5 don't know where it came from.

6 THE COURT: He is telling you.

7 A. I've never read Dr. Ordover's declaration.

8 Q. Well, let me rephrase it. Looking at it a moment ago, and
9 not knowing what the source was, you said this was an accurate
10 description of what Dr. Noll did to estimate missing RSN
11 viewing times, right?

12 A. I believe that that's the same as is in my report, that is,
13 that's the description of what he did.

14 Q. OK. And if you could go to the next letter. That's
15 actually a description of exactly what Dr. Ordover did in his
16 first declaration, isn't it? If you look at note 59 in his
17 declaration.

18 A. As I recall between these two slides, the language here in
19 this Ordover declaration is the same as in the other Ordover
20 declaration.

21 Q. So, as far as you know, Dr. Noll used the exact same method
22 Dr. Ordover used, yes?

23 A. I'm sorry? Dr. Ordover, as far as I know, did not do this
24 calculation himself. This is Dr. Noll.

25 Q. But he did try to estimate missing RSN viewing times, which

F3I7LAU6

McFadden - cross

1 is what you are saying Dr. Noll did wrong. Right?

2 MR. ECKLES: Your Honor, I just want to interpose an
3 objection. He has now examined Dr. McFadden about something
4 another expert did, that he has never reviewed before, and it's
5 not what he was testifying about.

6 MR. DUBNER: We can move on, your Honor.

7 Q. In your declaration you don't propose a different way for
8 assigning RSNs, do you?

9 A. For the National Hockey League?

10 Q. For anybody, for where the data is missing.

11 A. For the other leagues the feed or the RSN is identified in
12 the data, so there is no need to make this assignment.

13 Q. Just to clarify that, doctor, it's identified for some of
14 the observations but not all of the observations, right?

15 A. Well, I do understand that's correct.

16 Q. So you haven't -- whether it's for hockey -- we can stick
17 with hockey for right now -- you don't propose a different way
18 for assigning the missing RSN data, do you?

19 A. No. I simply point out that it produces results which are
20 then inconsistent with the data in terms of patterns of viewing
21 times.

22 Q. And you don't know whether it's possible to predict it any
23 more accurately than that, do you?

24 A. Do I know for a fact? Have I sat down to build a model of
25 allocation? No, I have not built a model to allocate people to

F3I7LAU6

McFadden - cross

1 RSNs.

2 Q. And like we discussed, there are objective measures
3 economists use to assess the degree to which a prediction
4 varies from a perfect fit. You don't report any of those here
5 either, do you?

6 A. You are now referring to my --

7 Q. I'm sorry, yes, I'm talking about your critique that Dr.
8 Noll estimates RSN viewing times in a biased manner.

9 A. My recollection is that I did not do any tests, that it was
10 clear from the data and the number of people we're dealing with
11 here that these would be different.

12 Q. And one of the tests you didn't do is you could have done a
13 sensitivity analysis, right? You could have dropped this data
14 because the DirectTV and MLB.tv data, some of the observations
15 needed this method, some of the observations were fully
16 specified. You could have dropped the observations where Dr.
17 Noll used this method and seen if the results changed
18 significantly, right?

19 A. Yes, you could have done that. I did not do that.

20 Q. Right. Your concern is that using this method may have
21 caused Dr. Noll to overestimate damages in all three models,
22 right?

23 A. Well, I think my primary concern is simply that this is a
24 particular allocation method which does not match up well with
25 the real data.

F3I7LAU6

McFadden - cross

1 Q. The ultimate prediction Dr. Noll is making is the price of
2 the bundle, is that correct?

3 A. I think the feature of this particular allocation method is
4 that it will tend to concentrate viewership on the most-viewed
5 team basically for the reasons described. To the extent that
6 it concentrates preferences, that's part of the pattern where I
7 previously said that Dr. Noll seems to underestimate the taste
8 for diversity that are present in the real data.

9 Q. Well, you said in your declaration, "As a result, the
10 league bundle will appear less valuable than it actually is,
11 lowering its price in the "but for" world." That's paragraph
12 25, right? I'm sorry, your reply declaration, page 10,
13 paragraph 25. Actually, doctor, in the interest of time, don't
14 worry about it.

15 Would it reassure you that this wasn't biasing Dr.
16 Noll's results if when you dropped the data where he used the
17 algorithm from DirectTV and MLB.tv, damages for MLB.tv went
18 down a tiny bit but damages for DirectTV went up a tiny bit?

19 A. I would be encouraged by that result. Whether that has any
20 impact for any implication for what was done for the NHL is
21 quite unclear. You could get this result simply because a
22 large share of the people in the baseball data did in fact have
23 an identified RSN, and that was enough people like that to get
24 this pinned down well.

25 Q. All right. Well, let's go on to your next critique. Your

F3I7LAU6

McFadden - cross

1 next critique is that Dr. Noll used too big a number when he
2 estimated the size of the potential market for the bundles. Is
3 that right?

4 A. Yes, as I stated in my direct.

5 Q. You said it on direct.

6 A. Yes.

7 Q. And this isn't challenging the design of the model; it's
8 just changing the particular data input that Dr. Noll put into
9 it, right?

10 A. Well, let me step back a second and say that my criticism
11 is not that it's too big -- although I think it's too big --
12 but, rather, that he hasn't done the due diligence that I think
13 a scientist should do to try to make sure he is comparing
14 apples and apples. Because the league championship viewership
15 includes people who watch championship games but not regular
16 season games; it includes people who are literally home-town
17 fans of the teams playing in the championship game who have no
18 interest in watching out-of-market teams. And due diligence
19 would say you should at least be worrying about that and doing
20 some careful calculation to make sure that you're not
21 improperly classifying people.

22 Q. Now, Dr. McFadden, you don't hold yourself out as an expert
23 on sports economics, right?

24 A. I do not.

25 Q. And you are not an expert on sports broadcasting or sports

F3I7LAU6

McFadden - cross

1 viewership, right?

2 A. I am not.

3 Q. And you agree that Dr. Noll is one of the country's leading
4 sports economists and in particular one of the country's
5 leading sports broadcasting experts, right?

6 A. I agree that he is a leading figure in these two subjects,
7 yes.

8 Q. Now, for your claim that he assumed too big a market and
9 didn't do his due diligence, the evidence you relied on was a
10 DirectTV study that reported a smaller market, right?

11 A. That is one that I reported in my declaration, yes.

12 Q. Right, that's the only fact that you reported in your
13 declaration, right?

14 A. Yes, that's the only direct fact that I have access to
15 myself.

16 Q. Now, DirectTV wasn't estimating the same market Dr. Noll
17 was, was it?

18 A. Well, I think that DirectTV number, it was not one that he
19 should have used without due diligence either. I think the
20 whole point -- my point from a methodological point of view is
21 that if you are going to be a careful scientist about this you
22 should be more careful about pulling up numbers, moments like
23 this, which are actually quite critical to the analysis. He
24 just needs to be more careful. He has been very casual about
25 this up to this point.

F3I7LAU6

McFadden - cross

1 Q. Dr. McFadden, your point isn't just that he has been too
2 casual -- I take it that's your point -- but you also think
3 that the larger the number he uses, the lower the predicted
4 prices and the higher the predicted damages. Right? That's
5 part of your problem with this.

6 A. Well, I know from testing his model with different
7 assumptions on what the market share is, that is, essentially
8 different assumptions from what the number of possible fans is,
9 does change the results of his model. Yes, I have run that
10 comparison.

11 Q. And so you have run, say, the smallest number that you
12 reported, the number for DirectTV, out-of-market fans in that
13 survey?

14 A. Yes, I did that for the second model. I don't recall doing
15 it for the third model.

16 Q. And it still showed damages to all consumers even when you
17 used the smallest number you recommended, didn't it?

18 A. Well, I think Dr. Noll's model is going to produce damages
19 for consumers for some of the reasons that I have stated. As I
20 said, they're done in the second model. Like the scale that
21 always reads five pounds, Dr. Noll's model is always going to
22 read some damages no matter what is going on with any real-word
23 consumer behavior.

24 MR. DUBNER: Permission to approach, your Honor?

25 Q. Dr. McFadden, I'm going to hand you two exhibits. These

F3I7LAU6

McFadden - cross

1 are internal estimates from MLB and NHL discussing the
2 viewership for the World Series in 2012, the year Dr. Noll is
3 using. I'm going to ask you not to say any of the numbers in
4 them because counsel has designated them highly confidential.
5 If you could just turn to page 2 in Exhibit 2, which is the MLB
6 study.

7 THE COURT: I'm sorry. This is marked as Exhibit 2?

8 MR. DUBNER: Not on your copy, sorry, just on his.

9 THE COURT: But it is.

10 MR. DUBNER: Yes, Plaintiff's Exhibit 2.

11 THE COURT: OK.

12 Q. If you could read that third bullet point to yourself.

13 That estimate is five times bigger than the estimate Dr. Noll
14 used, right?

15 A. The third bullet point? It starts with nine. Is that the
16 one you're referring to?

17 THE COURT: The four games?

18 MR. DUBNER: Yes.

19 THE COURT: Are you in the baseball one? Give him one
20 second.

21 THE WITNESS: Sorry. You said page 2. I turned to
22 the real page 2.

23 THE COURT: The third bullet point says the four
24 games.

25 THE WITNESS: I'm back to the four games.

F3I7LAU6

McFadden - cross

1 THE COURT: OK. He's saying that figure which we're
2 not going to say in court was four times bigger than what Dr.
3 Noll used.

4 MR. DUBNER: Five times bigger.

5 THE COURT: Five times bigger than what Dr. Noll used,
6 right?

7 Q. Yes. Is that your recollection?

8 A. First of all, could you explain what that number is? Is
9 that the cumulative viewership for each of the games?

10 Q. Over the four games, the audience, the number of viewers of
11 unduplicated, different.

12 A. And now the statement is that's four times the number --

13 THE COURT: Five times bigger than the number used by
14 Dr. Noll.

15 A. Actually I don't know what the relationship is between this
16 number and the number used by Dr. Noll.

17 Q. That's fine. I'll also direct you -- and your answer may
18 be the same, which is fine -- if you could look at Exhibit 3,
19 the other one, which is 2012 playoff reach analysis.

20 THE COURT: What page?

21 MR. DUBNER: This is also the second page, the first
22 page after the cover sheet.

23 Q. If you could look, doctor, at the second bullet point below
24 Stanley Cup. I can't read the first two words, but it's then
25 "unduplicated viewers who watched the Stanley Cup".

F3I7LAU6

McFadden - cross

1 THE COURT: Unduplicated North American viewers?

2 MR. DUBNER: Just below that.

3 THE COURT: Oh, OK. The one that says total season?

4 MR. DUBNER: I'm sorry, the sub bullet, the line -- do
5 you have a problem?

6 THE COURT: The line as opposed to the bullet.

7 MR. DUBNER: The line as opposed to the bullet.

8 THE COURT: OK. The line as opposed to the bullet
9 says XX people unduplicated U.S. viewers watch this year's
10 Stanley Cup.

11 MR. DUBNER: Yes, thank you.

12 Q. Dr. McFadden, do you recall -- this estimate is ten times
13 bigger than the estimate Dr. Noll used, isn't it?

14 A. Again, can you explain? By unduplicated viewers do you
15 mean you are actually keeping track of individuals, so even if
16 they watched three games or one game they still are counted as
17 one? Is that what you mean?

18 Q. Right, unduplicated.

19 A. OK. Where do numbers like this come from?

20 Q. You may have to ask NHL, but if you look at the source at
21 the bottom it says Nielsen, doctor.

22 A. OK.

23 Q. Regardless, we are running short on time, so ...

24 THE COURT: He's just saying that number which we are
25 not reading out was ten times larger than what Dr. Noll used.

F3I7LAU6

McFadden - cross

1 Do you know that?

2 THE WITNESS: I don't have Dr. Noll's number in front
3 of me, but I accept your arithmetic.

4 THE COURT: You accept, OK.

5 Q. And if that's correct, and you are correct that larger
6 market sizes mean higher damages, then Dr. Noll's estimates
7 could be extremely conservative, couldn't they?

8 A. The number that he is using? Then I have to ask what his
9 number is, because it's represented in his declaration as the
10 viewership or the average viewership. So you're telling me his
11 declaration states this incorrectly?

12 Q. I'm now talking about the predicted damages, doctor.

13 A. No, I understand you are talking about the denominator and
14 the share that Dr. Noll is using, and you are saying that
15 despite his declaration says it's the World Series viewership
16 or the Stanley Cup viewership, it's in fact not, it's some
17 small fraction of that?

18 Q. It could be a lower bound, yes, of the viewership.

19 A. Well, I don't recall his saying that he was doing something
20 conservative there in taking one tenth of the actual number. I
21 don't recall his saying that.

22 Q. He did say repeatedly in his declaration he was attempting
23 to say lower bound, a conservative estimate of damage, right?

24 A. I don't remember it specifically, but if you say it's
25 there, fine.

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McFadden - cross

1 Q. Dr. McFadden, let's go to your last criticism. Your last
2 criticism is that Dr. Noll blacked out home teams but not
3 visiting teams, is that right?

4 A. You're again referring back to my --

5 Q. Your reply declaration, yes. It's going to be page 12 of
6 your reply declaration, which again is the last thing in that
7 binder. It's the criticism with the heading six: Dr. Noll
8 does not correctly account for in-market blackouts. Right?

9 A. Yes.

10 Q. You agree that the steps he took to black out teams were
11 correct, right? You just don't think they're sufficient.

12 A. Oh, I think the primary issue that I originally raised as a
13 question was that in his analysis of utility maximization his
14 model fit to the data. He was not taking into account that if
15 you bought the league bundle there were still certain games you
16 were not going to be able to see because they were blacked out.

17 Q. Yes, Dr. McFadden. That was your original --

18 A. He did not correct for that, and I believe he has not still
19 in the third model corrected for that in the estimation states.
20 So my original criticism is one to which he has not yet
21 responded.

22 Q. And in paragraph 31, that last sentence, when you said,
23 "While these steps are correct, they are not sufficient,
24 leading Dr. Noll to incompletely account for in-market
25 blackouts," you stand by that statement, right?

F3I7LAU6

McFadden - cross

1 A. Yes, I do.

2 Q. OK. You say that the correct approach to accounting for
3 in-market blackouts would cap the possible viewing time for
4 each team based on the actual number of games that can be
5 viewed within a particular HTT. Yes?

6 A. Yes.

7 Q. This would affect the results only to the extent that there
8 are consumers who would watch enough games to reach that cap,
9 right?

10 A. No. Well, yes, but --

11 Q. OK, that's a yes.

12 A. -- but it's important in the sense that if you can never
13 watch -- if you can never watch your favorite team watching a
14 local team because that's always blacked out, then that's
15 something that may be very valuable to you that you can't get.

16 Q. But following what you say is the correct approach, the
17 only difference the model would show is to the extent that some
18 people watch more games than the cap, right?

19 A. Well, that would be the primary place where it would come
20 into play in the mathematical model as Dr. Noll has set it up,
21 that's correct.

22 Q. OK. Would it surprise you if only less than half a percent
23 of people in hockey reached that cap?

24 A. I don't recall doing that calculation myself, at least I
25 don't recall the numbers, but, yes, it's a very small share.

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McFadden - cross

1 Q. OK. And it's the same with baseball, a very small share.

2 A. That's my recollection.

3 Q. And you don't report any sensitivity analysis about this
4 critique, do you?

5 A. No, I have not done that.

6 Q. OK. Dr. McFadden, this isn't the first time you have
7 rendered an opinion that the plaintiffs' expert in a class
8 action or antitrust case failed to meet scientific standards,
9 is it?

10 A. It's not the first time -- please say it again.

11 Q. Sure thing. This isn't the first time you have rendered an
12 opinion that the plaintiffs' expert in a class action or an
13 antitrust case failed to meet scientific standards, right?

14 A. Please remind me of what you're thinking of, because I
15 don't recall being involved in any class action before.

16 THE COURT: In some other case where you were
17 retained, did you find that the plaintiffs' expert did not meet
18 the scientific standard in his or her report? In some other
19 case that you were retained in did you ever say that?

20 THE WITNESS: I have certainly objected to the
21 scientific standards of opposing witnesses. Not in a class
22 action. Because I don't recall that I have ever testified in a
23 class certification phase.

24 Q. Let me give you some examples. In Comwood Company v. U.S.
25 New York Tobacco -- which was not a class action but it was an

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McFadden - cross

1 antitrust case -- you filed an amicus brief claiming the report
2 of the plaintiffs' expert was unscientific and should have been
3 excluded under Daubert. Right?

4 A. Yes. That was not testimony, but of course it was part of
5 an amicus brief.

6 Q. Yes. And in Natchitoches Parish Hospital Service District
7 v. Tyco International -- an antitrust class action -- you filed
8 a declaration claiming the report of the plaintiffs' expert was
9 unscientific and should be excluded under Daubert. Right?

10 A. I don't recall whether it was relative to Daubert, but I do
11 remember testifying in that case, and I don't remember the
12 details of what part of the proceeding that was.

13 Q. And in Cook v. Rockwell International -- another class
14 action -- you filed another declaration claiming the report of
15 the plaintiffs' expert was unscientific and should be excluded
16 under Daubert. Right?

17 A. Again, I don't recall the "under Daubert" part. I did
18 testify in that trial.

19 Q. And in In Re Pharmaceutical Industry Average Wholesale
20 Price Litigation -- another class action -- you filed another
21 declaration claiming the report of the plaintiffs' expert was
22 unscientific and should be excluded. Right?

23 A. Can you say the name again of the case?

24 Q. Sure thing. In Re Pharmaceutical Industry Average
25 Wholesale Price Litigation.

F3I7LAU6

McFadden - cross

1 A. Again, I'm sorry, I'm hearing the words, and I'm not
2 connecting it to a case I remember.

3 THE COURT: In Re pharmaceutical --

4 Q. Pharmaceutical Industry Average Wholesale Price Litigation.

5 A. Oh, AWP? Is that the one?

6 Q. That sounds right.

7 A. I testified in that. I actually don't remember now what I
8 testified about.

9 Q. In every one of those cases, doctor, you said the
10 plaintiffs' expert report was unscientific, was fundamentally
11 flawed, made technical or mathematical or statistical errors,
12 things along those lines. Yes?

13 A. That's the kind of thing that I look for. I'm an
14 econometric methodologist, and I tend to be retained in cases
15 where there is an issue of econometric methodology, and so,
16 yes, those are the kinds of things I look at.

17 Q. And in every one of those cases the court rejected your
18 position and found that plaintiffs' expert testimony
19 sufficiently reliable to satisfy Daubert and be admitted,
20 right?

21 A. Oh, that I don't know. I do not follow the legal case.
22 This is only about my fifth or sixth time in court in the last
23 50 years. I don't have much dealings with lawyers.

24 Q. So, when you give an opinion -- I don't blame you. So,
25 when you give an opinion that something is unreliable and

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McFadden - cross

1 should be excluded, you don't then check to see if judges
2 disagree with you and your standard is maybe not the same as
3 the standards court apply, is that right?

4 A. Oh, my standards for scientific reliability are the same as
5 I would use for academic work. How that plays out in the legal
6 system is your guys' problem, it's not my problem.

7 MR. DUBNER: Thank you, doctor. No further questions.

8 THE COURT: All right. Redirect?

9 MR. EKLES: No redirect.

10 THE COURT: Thank you, Mr. Eckles.

11 Thank you, doctor, we are done for the day.

12 We are reconvening tomorrow morning at 10 o'clock with
13 Dr. Noll on rebuttal, and we have an hour and five minutes on
14 direct and then 30 minutes on cross, and then we break until
15 1:30. OK?

16 MS. WILKINSON: Your Honor, may I ask one question?

17 THE COURT: Yes.

18 MS. WILKINSON: I think it was yesterday -- I can't
19 keep track of the days. You noted to plaintiff --

20 THE COURT: You can start down, doctor.

21 Doctor, yeah, carefully.

22 Go ahead.

23 MS. WILKINSON: You noted to plaintiffs I think during
24 the opening a question you wanted them to address in closing.

25 THE COURT: Oh, I was just making a careful point.

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McFadden - cross

1 MS. WILKINSON: We just want to make sure since we
2 don't have a jury here, and we are only addressing you, is
3 there anything you want us to be prepared to discuss at
4 closing.

5 THE COURT: Not in particular. I'm sure you will
6 cover all the bases, no pun intended.

7 OK. See you tomorrow.

8 (Adjourned to March 19, 2015 at 10:00 a.m.)
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