UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FERNANDA GARBER, MARC LERNER, DEREK RASMUSSEN, ROBERT SILVER, GARRETT TRAUB, and PETER HERMAN representing themselves and all others similarly situated, Plaintiffs, v. OFFICE OF THE COMMISSIONER OF BASEBALL et al., Defendants.	12-cv-3704 (SAS) ECF Case Electronically Filed

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION *IN LIMINE* # 1

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PRELIMINARY STATEMENT

Several months ago, Plaintiffs agreed to forego a summary judgment motion in order to expedite the trial of this action. Now, however, Plaintiffs advance an *in limine* motion that essentially amounts to a "quick look" summary judgment motion. In particular, Plaintiffs seek a ruling that core procompetitive justifications for the challenged territorial rules are "not cognizable," and an order excluding evidence in support of those justifications. (Pls. Mem. at 4; *see also id.* at 1.) When combined with Plaintiffs' claim that the Court should *presume* anticompetitive effects, this motion amounts to an attempt to evade a full trial on the merits and instead try the case "on the papers." The Court should reject this gambit.

Plaintiffs' argument that evidence of certain well-recognized procompetitive benefits should be excluded as irrelevant under Rule 402 of the Federal Rules of Evidence rests on mischaracterizations of that evidence and is wrong as a matter of law. And contrary to Plaintiffs' argument that the evidence should be excluded under Rule 403, there is no "danger" that the evidence of procompetitive benefits will somehow confuse or mislead the Court or unfairly prejudice Plaintiffs in the upcoming bench trial. (*See* Pls. Mem. at 4–5.)

Plaintiffs' attack on certain investment incentives as a procompetitive justification mischaracterizes the nature of those incentives. As they have throughout the case, Plaintiffs continue to conflate the *territorial* exclusivity associated with home television territories ("HTTs"), which Plaintiffs are challenging in this action, with the *game* exclusivity and *content* exclusivity that allow RSNs to have the exclusive right to exhibit the games of a particular team and to control the distribution of the live game programming content that they created. As this Court already has recognized, such game and content exclusivity is not subject to antitrust

attack.[1] *See Laumann v. NHL*, __ F. Supp. 3d __, 2015 WL 2330107, at *3 (S.D.N.Y. May 14, 2015). As the evidence will show, the incentives for "greater investment by both teams and RSNs in programming" (Pls. Mem. at 2) are created by game exclusivity and content exclusivity.[2] Because Plaintiffs' but-for world ("BFW") would destroy both in-market game exclusivity and out-of-market content exclusivity, those investment incentives must be considered in any weighing of the procompetitive benefits of the League's allocation of telecast rights against any anticompetitive effects proved by Plaintiffs.

Plaintiffs' attempt to exclude evidence that the League rules are necessary to preserve competitive balance likewise confuses the facts and evidence in this case and contradicts Plaintiffs' position regarding the anticompetitive harm allegedly caused by the territorial rules. Courts, including the Second Circuit, explicitly have recognized the importance of competitive balance between individual teams in a sports league, and none of the cases Plaintiffs cite even suggest that promoting competitive balance is not a valid procompetitive justification. Further, this Court certified a class under Rule 23(b)(2) on the basis of an antitrust injury of lack of "choice" and, in particular, Plaintiffs' argument that consumers have fewer product options in the actual world than they would in the BFW. *See Laumann*, 2015 WL 2330107, at *11. It is

[1] Although Plaintiffs' motion is vague about the specific evidence that it seeks to exclude, there is no indication that the motion seeks to exclude evidence regarding other incentives for investment—for example, incentives for the League to invest in technology that arise from the allocation of out-of-market rights and Internet rights to the League (Defs. Trial Mem. at 13-15). Nor is there any basis for excluding that evidence. Accordingly, Defendants do not address the admissibility of evidence regarding those other incentives in this memorandum.

[2] *See, e.g.*, 5/14/15 Litner Decl. ¶ 17 (Dkt. 295) ("The *exclusive right to exhibit the games of a particular MLB or NHL team* incentivizes the Comcast RSNs to spend money on creating a superior product . . . . *Absent such exclusivity*, the Comcast RSNs would have much less incentive to produce a high quality product or create other original ancillary programming in the first instance." (emphases added)).

therefore nonsensical for Plaintiffs to argue that evidence demonstrating that changes to the territorial rules would cause a reduction in output or the elimination of clubs is somehow irrelevant to this analysis. Of course, the elimination of clubs would *reduce* choice.

ARGUMENT

A. The Interdependent Nature of the MLB and Its Clubs Requires a Full Rule of Reason Assessment of the League Rules

The Second Circuit has recognized that "the MLB Clubs exist as members of a sports league, and their interests are interdependent." *MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 323 (2d Cir. 2008). In *Salvino*, the Second Circuit relied on "[t]hat interdependence and Major League Baseball's need for competitive balance among the Clubs" to reject the argument that the clubs' failure to offer their intellectual property ("IP") in competition with one another was a basis to condemn their bundled IP arrangement under a *per se* or "quick look" analysis. *See id.*[3]

Here, as in *Salvino*, the Court cannot simply *assume* that the "interdependent" MLB clubs must compete in offering their IP, nor should the Court condemn any particular limit on competition among MLB clubs under a "quick look" analysis. Instead, MLB's broadcast licensing system should be assessed under the full Rule of Reason, which requires the Court to consider "'whether under *all the circumstances of the case* the restrictive practice imposes an unreasonable restraint on competition,'" including by weighing any anticompetitive effects against the procompetitive benefits. *Id.* at 316-17 (emphasis added) (quoting *Arizona v.*

[3] In *Salvino*, the antitrust claimant attempted to distinguish the Supreme Court's decision in *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 24 (1979) ("*BMI*")—which applied the Rule of Reason—because, among other grounds, in *BMI*, individual music copyright owners whose IP rights were bundled also competed with one another. *See* 542 F.3d at 322. The Second Circuit rejected that distinction by observing that the MLB clubs' interdependence and need for competitive balance "distinguish the Clubs from the individual composers and publishers of music who were the subject of *Broadcast Music*" because "those factors are not characteristic of the music industry." *Id.* at 323.

Maricopa Cty. Med. Soc'y, 457 U.S. 332, 343 (1982)). The Rule of Reason analysis cannot be pretermitted on an *in limine* motion.

B. Plaintiffs Mischaracterize Defendants' Evidence

Plaintiffs' request that the Court exclude certain categories of evidence of procompetitive benefits rests on a mischaracterization of that evidence. Plaintiffs incorrectly argue that Defendants are offering evidence that "protection from competition" safeguarded by the antitrust laws increases incentives for clubs and RSNs to invest in live game programming. (*See* Pls. Mem. at 2). In making this argument, Plaintiffs conflate the *territorial* exclusivity that they challenge with unchallenged *game* exclusivity and *content* exclusivity. Most, if not all, of Defendants' evidence regarding investment incentives concerns incentives created by unchallenged game exclusivity and content exclusivity that would "evaporate" in Plaintiffs' BFW.[4] Specifically, in-market game exclusivity and out-of-market content exclusivity provide valuable incentives to invest in quality live game telecasts and the marketing of those telecasts. Losing this valuable game exclusivity and content exclusivity would decrease the incentives for RSNs to invest in and market their products, because other distributors could free ride off those investments. It is well-established that enhancing incentives for investment by preventing free-riding is procompetitive, and falls squarely within "all the circumstances" of the territorial rules that the Court must consider in this Rule of Reason case. *See Salvino*, 542 F.3d at 340

[4] *See Laumann*, 2015 WL 2330107, at *3 ("Of these forms of exclusivity, plaintiffs are challenging territorial exclusivity, but they are *not* challenging content exclusivity. Furthermore, as a result of plaintiffs' challenge to territorial exclusivity, game exclusivity would also evaporate in the BFW—not because plaintiffs directly challenge it, but because its existence depends on the existence of territorial exclusivity."); *id.* at *5 (explaining that in Plaintiffs' BFW, an out-of-market Yankees fan would be able to purchase the YES Network through an MVPD or over the Internet, and if she purchases an out-of-market package, she would be able to watch the YES Network feed on the out-of-market package even when the Yankees are playing against a team from her HTT).

(Sotomayor, J., concurring) (citing *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 228 (D.C. Cir. 1986)); *cf. Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 190 (2d Cir. 1992); *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 825-26, 833 (3d Cir. 2010); *State of New York by Abrams v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 876-77 (E.D.N.Y. 1993).

C. The Court Should Consider the Effect of The Territorial Rules on Competitive Balance

Plaintiffs' motion also seeks to exclude certain evidence that the challenged territorial rules foster competitive balance among the thirty MLB clubs. Plaintiffs argue that any evidence that the territorial rules "insulate" smaller market clubs "from the full spectrum of competition" among MLB clubs must be excluded because "the antitrust laws do not recognize a defense based on the vulnerability of a competitor to competition." (Pls. Mem. at 2, 3.)

Plaintiffs mischaracterize Defendants' competitive balance argument. Defendants' position, which will be substantiated at trial, is that the territorial rules enhance the overall quality of MLB live telecasts, which in turn enhances the ability of these telecasts to compete with other programming. (*See* Defs. Trial Mem. at 12-13.) The evidence will also show that eliminating the territorial rules would reduce the ability of certain small-market teams to invest in players and other resources, hampering their ability to compete *on the field*—and could, over time, prevent certain clubs from remaining viable. (*See id.*) The Second Circuit recognized in *Salvino* that MLB is "an integrated professional sports league in which the competitors are not independent but interdependent" and "competitive balance among the teams is essential to both the viability of the Clubs and public interest in the sport." 542 F.3d at 331-32; *see also*, *e.g.*, *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1339 (Fed. Cir. 2010) (en banc) ("[A]n agreement among joint venturers not to compete against the joint venture is not a naked restraint,

because it provides assurance that the resources invested by one joint venturer will not be undermined or competitively exploited to the sole benefit of the other.") (citing *Salvino*, 542 F.3d at 340).

Further, Plaintiffs' argument for excluding evidence regarding competitive balance ignores that the *sole* alleged antitrust injury the Court permitted Plaintiffs to pursue on a class basis is "lack of choice"—*i.e.*, that the territorial rules allegedly reduce the live baseball programming options available to consumers. *See Laumann*, 2015 WL 2330107, at *10-11, 17-18. Whether all thirty clubs continue to exist has a *direct* impact on the number of choices available to consumers. Indeed, if eliminating the territorial rules causes individual clubs to fail, by definition consumers will have a reduction, not an increase, in choice. Competitive balance and the viability of individual clubs are therefore highly relevant to the only alleged antitrust injury certified for trial.

Plaintiffs' claim that competitive balance is irrelevant also contradicts their position regarding game exclusivity. In their Pretrial Memorandum, Plaintiffs insist that the antitrust laws require that the opposing club's feed be available in-market, even though the local club's feed of the same game is available. (*See* Pls. Pretrial Mem. at 9.) In contrast, Plaintiffs argue in their motion *in limine* that it is irrelevant whether the opposing club even exists. (*See* Pls. Mem. at 3-4.) Both of Plaintiffs' contradictory positions are wrong. The existence of thirty competitively balanced clubs is essential to the competitiveness of the entertainment product produced by the MLB joint venture, and there is no legal basis for the Court to exclude this central evidence.

D. *NCAA* and *Apple* Are Inapposite

Plaintiffs' reliance on the Supreme Court's decision in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), and the Second Circuit's decision in *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015), for the proposition that competitive balance is not a valid procompetitive justification is unavailing. (*See* Pls. Mem. at 2-4.) In *Salvino*, which involved a challenge to MLB's centralization of intellectual property licensing, the Second Circuit distinguished *NCAA*'s holding regarding procompetitive efficiencies at significant length. First, the Second Circuit observed that in *NCAA*, output was "restricted, not enhanced," by NCAA telecast rules, 542 F.3d at 327, which "set an absolute maximum on the number of games that could be broadcast" and "fixed" the "per-telecast prices paid by the networks," *id.* at 324. Second, the Second Circuit observed that in *NCAA* "there was no real interdependence among the college teams, nor indeed 'any readily identifiable group of competitors,' such as to require steps to maintain a competitive balance," and "the NCAA restrictions on televising games . . . were 'not even arguably tailored to serve' an interest in competitive balance." *Id.* at 327-28 (quoting *NCAA*, 468 U.S. at 118-19) (internal citation omitted). "[I]n contrast, Major League Baseball is a highly integrated professional sports entity comprising two Leagues, in which all of the Clubs compete. . . . [T]here is no dispute that competitive balance is a necessary ingredient in the continuing popularity of the MLB Entertainment Product." *Id.* at 328. Third, although the Supreme Court recognized in *NCAA* that "'[i]f the NCAA faced "interbrand" competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete,'" the Supreme Court concluded, on the record before it, that

college football telecasts "constitute 'a separate market.'" *Id.* (quoting *NCAA*, 468 U.S. at 112, 115 n.55).[5]

All of the distinctions with *NCAA* that the Second Circuit identified in *Salvino* apply equally here. As shown in Defendants' Trial Memorandum, MLB live-game output has skyrocketed under the League's territorial rules, with virtually every MLB game being made available for viewing nationwide. (Defs. Trial Mem. at 15.) Those rules foster competitive balance among the clubs, which strengthens the ability of MLB live games to compete against a variety of other programming. (*Id.* at 10-13.)

Apple is likewise inapposite. *Apple* involved a horizontal conspiracy to eliminate interbrand price competition among unrelated rivals, not limits on intrabrand competition among interdependent teams in a sports league. In *Apple*, the Second Circuit rejected the asserted justification that the challenged conduct facilitated entry by Apple (the alleged organizer of the conspiracy) into a market with a "dominant" incumbent, reasoning that "the antitrust laws were passed for the protection of competition, not competitors." *See* 791 F.3d at 332 (quotation omitted). Fostering competitive balance among interdependent teams in order to stimulate interbrand competition is not the sort of "protection of . . . competitors" rejected in *Apple*, but instead is a well-established procompetitive justification. *See, e.g.*, *Salvino*, 542 F.3d at 328. *See generally Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-59 (1977) (recognizing that positive effects on *inter*brand competition can justify restrictions on *intra*brand competition). In

[5] Plaintiffs alter a passage from *NCAA* regarding the NCAA's efforts to protect ticket sales against competition from televised games to suggest that those efforts were aimed at promoting competitive balance. (Pls. Mem. at 3-4 (characterizing NCAA's challenged television rules as "seeking to insulate [less appealing clubs] from the full spectrum of competition") (quoting *NCAA*, 468 U.S. at 117, but adding the bracketed language).) In fact, the Supreme Court found that the NCAA's efforts were not intended to foster competitive balance among teams or to make college football a more "attractive product." *See* 468 U.S. at 116-118.

short, nothing in *NCAA* or *Apple* suggests that competitive balance is not a valid procompetitive justification.

E. The Court Should Not Exclude Evidence Relating to Sales of Tickets and Other Products

Finally, Plaintiffs seek to exclude evidence that the territorial rules "protect[] the ability of teams to sell tickets or other products," claiming that that argument was "squarely rejected" by the Supreme Court in *NCAA*. (*See* Pls. Mem. at 4.) Plaintiffs' analogy to *NCAA* rests on a fundamental misunderstanding of the way in which the MLB's broadcast licensing system increases ticket sales. In *NCAA*, the Supreme Court explained that suppressing output of televised games in order to protect ticket sales for live games was not a valid procompetitive justification. *See* 468 U.S. at 115-17. But the League's rules here do exactly the *opposite*. As Defendants have explained, the territorial rules *increase* the quality and quantity of game telecasts by encouraging club and RSN investments in live game programming, which in turn increases fan interest in the game and promotes higher game attendance. (*See* Defs. Trial Mem. at 4-6.) Thus, the territorial rules do not suppress broadcast viewership in favor of increasing ticket sales, as in *NCAA*, but instead increase the demand for *both* ticket sales *and* broadcast viewership—which is fully in line with the Supreme Court's ruling in *NCAA*. *See, e.g.*, *NCAA*, 468 U.S. at 116-17.

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Respectfully submitted,

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