No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FERNANDA GARBER ET AL.,

Plaintiffs-Respondents,

v.

OFFICE OF THE COMMISSIONER OF BASEBALL, ET AL.,

Defendants-Petitioners.

On Petition for Permission to Appeal from the
United States District Court for the Southern District of
New York, No. 12 Civ. 3704 (SAS)

PETITION PURSUANT TO 28 U.S.C. § 1292(e) AND RULE 23(f) FOR PERMISSION TO APPEAL ORDER CERTIFYING CLASS

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May 28, 2015

CORPORATE DISCLOSURE STATEMENTS

Comcast Corporation hereby states that it is a publicly held corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Comcast SportsNet Philadelphia, L.P. hereby states that it is a limited partnership owned indirectly and in part by NBCUniversal Media, LLC, which is owned by Comcast Corporation. Comcast Corporation is a publicly held corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Comcast SportsNet Mid-Atlantic, L.P. hereby states that it is a limited partnership and a wholly-owned, indirect subsidiary of NBCUniversal Media, LLC, which is owned by Comcast Corporation. Comcast Corporation is a publicly held corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Comcast SportsNet California, LLC hereby states that it is a limited liability company and a wholly-owned subsidiary of NBCUniversal Media, LLC, which is owned by Comcast Corporation. Comcast Corporation is a publicly held corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Comcast SportsNet Chicago, LLC hereby states that it is a limited liability company owned indirectly and in part by NBCUniversal Media, LLC, which is owned by Comcast Corporation. Comcast Corporation is a publicly held corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

* * *

DIRECTV, LLC, is a California limited liability company. It is a wholly-owned, direct subsidiary of DIRECTV Holdings LLC, a Delaware limited liability company that is not publicly traded. It is also a wholly-owned, indirect subsidiary of DIRECTV, a Delaware corporation that is publicly traded on NASDAQ as "DTV." No publicly-held corporation owns more than 10% of DIRECTV's stock.

DIRECTV Sports Networks, LLC, is a Delaware limited liability company. It is a wholly-owned, direct subsidiary of Greenlady Corp., a Delaware corporation that is not publicly traded. It is also a wholly-owned, indirect subsidiary of DIRECTV, a Delaware corporation that is publicly traded on NASDAQ as "DTV."

DIRECTV Sports Net Pittsburgh, LLC (a/k/a ROOT Sports Pittsburgh) and DIRECTV Sports Net Rocky Mountain, LLC (a/k/a ROOT Sports Rocky Mountain) are both Delaware limited liability companies. Each of them is a wholly-owned direct subsidiary of defendant DIRECTV Sports Networks, LLC, which is not publicly traded. Each of them is also a wholly-owned, indirect

subsidiary of DIRECTV, a Delaware corporation that is publicly traded on NASDAQ as "DTV."

DIRECTV Sports Net Northwest, LLC (a/k/a ROOT Sports Northwest) is a Delaware limited liability company, and is a wholly-owned subsidiary of NW Sports Net LLC, a Delaware limited liability company, which is not publicly traded. More than 10% of DIRECTV Sports Net Northwest, LLC is indirectly owned by DIRECTV, a Delaware corporation that is publicly traded on NASDAQ as "DTV." More than 10% of DIRECTV Sports Net Northwest is also indirectly owned by Nintendo Co. Ltd., a Japanese company that is publicly traded on the Tokyo stock exchange. No other publicly-held corporation owns 10% or more of DIRECTV Sports Net Northwest, LLC.

* * *

Pursuant to Federal Rules of Appellate Procedure 26.1, the undersigned counsel for Yankees Entertainment & Sports Network, LLC ("YES Network") hereby certifies that YES Network is not a publicly held corporation and has not issued stock that is traded on a public exchange; and that YES Network has a parent entity named YES Network Holding Company, LLC, which is not publicly held; and that an entity affiliated with Twenty-First Century Fox, Inc. (which is publicly traded) owns ten percent or more of the interests in YES Network Holding Company, LLC, which is the corporate parent of YES Network.

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PRELIMINARY STATEMENT

The district court certified an injunctive class pursuant to Rule 23(b)(2) in separate antitrust actions respectively challenging certain rules of the National Hockey League ("NHL") and Major League Baseball ("MLB"),[1] after excluding under *Daubert* the only evidence Plaintiffs proffered to satisfy critical elements of Rule 23. As demonstrated below, that certification decision is contrary to fundamental principles of modern class action jurisprudence and substantive antitrust law. Accordingly, this Court should grant interlocutory review under 28 U.S.C § 1292(e) and Rule 23(f) of the Federal Rules of Civil Procedure.

Under the challenged rules, which have been in effect for decades, a League (i.e., NHL or MLB) assigns a home television territory to each of its member teams—within which the team has the exclusive right to telecast its live games. Outside that home territory, only the League has the right to telecast live games, which the League does by bundling all teams' games in "out-of-market" packages. The bundle is limited to "out-of-market" games by excluding from it (through so-called "blackouts") each team's live games in that team's home territory. The result is that fans of a given team who live in the team's home territory can watch their team's live games on the team's Regional Sports Network ("RSN"), and fans

[1] Plaintiffs have brought two separate actions, which are not consolidated before the district court. *Laumann* challenges NHL rules, and *Garber* challenges MLB rules. Identical petitions for permission to appeal are being submitted to this Court in each action.

who live outside the team's home territory can watch the team's live games (and the live games of all other non-local teams) on the League bundle. The revenues generated from the out-of-market bundle are shared equally among all teams, regardless of whether the team is a small-market team or a large-market team, thereby promoting competitive balance among the teams and a more competitive product for fans to watch.

Plaintiffs are fans who live outside their favorite team's home territory and who therefore purchased a League bundle to watch that team's live games. Plaintiffs contend that the League rules are anticompetitive because they restrain competition among the teams (and RSNs that broadcast the teams' games), each of which allegedly would otherwise telecast its live games nationwide in competition with other teams' telecasts. Plaintiffs do not contend that the League rules and practices violate the antitrust laws *per se*. Rather, Plaintiffs argue that the rules violate the rule of reason, which requires them to prove that any anticompetitive effects of the rules outweigh their procompetitive justifications.[2]

In each action, Plaintiffs moved to certify a class of all purchasers of a League bundle under both Rule 23(b)(2) and Rule 23(b)(3). Plaintiffs attempted to

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[2] The record contains numerous procompetitive justifications proffered by Defendants, including the broadest availability of games telecast and the sharing of revenue generated by the League bundle equally among all teams, as well as ensuring that all teams (especially small-market teams) are able to generate revenue and fan support sufficient to remain viable and compete effectively—competition that is essential to producing an attractive product for consumers.

show classwide antitrust impact and damages through a complex economic model purporting to show that in a counterfactual "but for" world ("BFW") in which each League bundle competes against its unbundled components, those bundles would cost less than in the actual world. That model was Plaintiffs' sole evidentiary basis for proving liability (including antitrust injury) and damages. The district court properly excluded that model under *Daubert*, and therefore denied certification under Rule 23(b)(3) because without that model, Plaintiffs were unable to "prove, through common evidence, that all class members were injured by the alleged conspiracy." *See* Cert. Op. at 28 (quoting *Sykes v. Mel S. Harris & Assocs.*, 780 F.3d 70, 82 (2d Cir. 2015) (internal quotation marks and alterations omitted)).[3]

Notwithstanding this ruling, the district court certified a Rule 23(b)(2) injunction-only class—consisting of the same purchasers of the League bundle—on the grounds that there was an antitrust injury that "unites the class." Cert Op. at 35. According to the district court, each purchaser of the League bundle was deprived of the choice between the League bundle and unbundled (or a la carte) telecasts of her favorite team's live games. That lack of choice, the district court

[3] "Cert. Op." refers to the Opinion and Order dated May 14, 2015 (*Laumann* Dkt. 346, *Garber* Dkt. 430), in which the district court declined to certify a Rule 23(b)(3) class and certified a Rule 23(b)(2) class in each matter, and "Daubert Op." refers to the Opinion and Order of the same date (*Laumann* Dkt. 347, *Garber* Dkt. 431) in which the district court excluded Plaintiffs' expert Dr. Roger Noll's impact and damages model under *Daubert*.

held, constituted a cognizable antitrust injury that the court could assess in a bench trial.

Certifying a Rule 23(b)(2) class on the grounds that asserted lack of choice between the League bundle and its unbundled components constituted ***classwide*** antitrust injury is legally erroneous for at least two reasons.

First, as a matter of law, it is not antitrust injury to deprive a consumer of the choice of purchasing a product that the consumer would not buy. Here, it is undisputed that purchasers of the League bundle have diverse preferences. Some fans want to purchase the games of only a single team. As the district court recognized, however, many other fans purchase the League bundle to watch the games of multiple teams. There is no antitrust injury to these multi-team fans from lack of choice between the League bundle and an unbundled component that they would not purchase. To the contrary, Defendants demonstrated that these multi-team fans would be ***worse off*** (losers, rather than winners) in a BFW in which not all games of the teams are likely to be available, and in which the League bundle either would not exist or would cost more. Because the injunctions sought by Plaintiffs therefore would not benefit (and would, in fact, harm) a significant portion of the class, it was legal error to certify a Rule 23(b)(2) class. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011) ("The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy

warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.") (internal quotation marks omitted).

Second, having properly excluded the economic model that was the only purported evidence of classwide impact and damages, the district court improperly certified an injunction-only class. Absent any admissible economic methodology for determining whether, or to what extent, class members would be better off if the League rules were enjoined, there is no record evidence on which the district court could find that those rules caused classwide antitrust injury. Plaintiffs relied ***solely on their expert's model*** to predict that the bundle would exist in the BFW because it purportedly would be profitable. But that model was properly excluded under *Daubert*. Thus, there was no admissible evidence that the unbundled package would exist at all or that every team's unbundled (or a la carte) offering would be offered nationwide to every class member. In fact, Defendants offered unrebutted evidence that the bundle would not exist (or would be priced higher than it is in the actual world) and that many teams likely would not obtain nationwide distribution of their unbundled live game telecasts. And there is no evidence in the record supporting the classwide lack of choice assumed by the district court.

In light of these fundamental legal errors, which are subject to *de novo* review, *see Sykes v. Mel S. Harris & Assocs.*, 780 F.3d 70, 79 (2d Cir. 2015), this Court should exercise its broad discretion to grant interlocutory review under Section 1292(e) and Rule 23(f).

BACKGROUND

A. Plaintiffs' Allegations

Plaintiffs brought separate antitrust cases against the NHL and MLB, a number of teams within these Leagues, RSNs that televise NHL and MLB games, and television distributors Comcast and DIRECTV. Different RSNs produce particular teams' games and then sell the programming to distributors. Plaintiffs allege that the decades-old League territorial rules that prevent each team from telecasting its live games outside of its assigned home territory are unlawful, arguing that those rules unreasonably restrain competition among teams (and among the RSNs that telecast their live games). *See* Cert. Op. at 3-5.

B. Class Certification Proceedings Below

In each action, Plaintiffs sought to certify a class of all purchasers of the Leagues' bundled packages since 2008 under both Rule 23(b)(2) and Rule 23(b)(3). The parties disputed the product offerings and prices that would exist in the BFW without the allegedly anticompetitive aspects of the League territorial rules. Defendants put forth fact and expert testimony that individual teams and the

League would not distribute competing nationwide telecasts of the exact same live game content.[4] Instead, the teams would either decline to contribute their live game content to the League bundle (leading to the demise of the League bundle) or would do so only for a per subscriber fee (raising the price of the League bundle, because in the actual world the teams do not charge for including their live games in the League bundle). If the League bundle were unavailable or more expensive, multi-team fans who prefer purchasing a League bundle would be worse off in the BFW, while single-team fans may be better off by virtue of being able to purchase unbundled team telecasts. In other words, there would be "winners" and "losers" in the BFW. Defendants argued that these diverging interests among the putative class members defeat the threshold criteria under Rule 23(a), predominance under Rule 23(b)(3), and cohesion under Rule 23(b)(2). *See* Def. Corr. Class Cert. Opp. (*Laumann* Dkt. 288, *Garber* Dkt. 361).

Plaintiffs' sole evidence supporting their hypothesized BFW—in which each and every team would distribute its unbundled live games nationally in competition with the League bundles—was the expert testimony of Dr. Roger Noll. *See* Cert. Op. at 28-29. Dr. Noll constructed an economic model that purported to predict

[4] *See, e.g.*, Ordover Decl. ¶ 9; Bettman Decl. ¶¶ 10-11; Bowman Decl. ¶¶ 10, 12; Rigdon Decl. ¶¶ 19-20; Feeney Decl. ¶¶ 5-6 (*Laumann* Dkt. 287, *Garber* Dkt. 360); Pakes Decl. ¶¶ 42-43, 53, 62-67, 74-75, 79 (*Laumann* Dkt. 283, *Garber* Dkt. 359); *see also* Def. Corr. Class Cert. Opp. at 9-14 (*Laumann* Dkt. 288, *Garber* Dkt. 361) (arguing that Plaintiffs' theorized BFW product offerings would not emerge).

consumer demand and prices for the bundled and unbundled games in the BFW. His model predicted that the teams (offering unbundled telecasts) and the Leagues (offering bundled telecasts) would each distribute the same game content nationally, and that each of these products would be available for less than the price of the League bundle in the actual world. Defendants disputed the plausibility of Dr. Noll's BFW, as well as the admissibility under *Daubert* of the economic model on which it rested. Defendants argued, among other things, that Dr. Noll's model was unreliable because it vastly overestimated consumer demand for out-of-market baseball and hockey games (so-called "demand side" problems), and that it was implausible that all of the products would be available for the prices predicted in the BFW ("supply side" problems). *See generally* Daubert Op.

C. <u>The District Court's Decisions</u>

The district court excluded Dr. Noll's model under *Daubert* because its "[d]emand [s]ide" was methodologically flawed, generated "seemingly nonsensical results," and was "largely untethered from the actual facts of this case." Daubert Op. at 33, 41. While the district court held that the "[s]upply [s]ide" of Dr. Noll's model was admissible, it expressly acknowledged that his supply side analysis "may end up being unconvincing." Daubert Op. at 66. The district court held that without the model Plaintiffs had no evidence of classwide antitrust damages. Because Plaintiffs must be able to "prove, through common evidence, that all class

members were injured by the alleged conspiracy," and because "Dr. Noll's model ***was*** the common evidence—and the model has been excluded," the district court declined to certify a damages class under Rule 23(b)(3). Cert. Op. at 28-29 (emphasis in original, internal quotation marks and alteration omitted).

Despite the absence of classwide evidence that could prove impact or damages, the district court certified an injunction-only class under Rule 23(b)(2). The district court held that "every class member has suffered an injury, because every class member . . . has been deprived of an option—a la carte channels—that would have been available absent the territorial restraints." Cert. Op. at 34. Even though it had excluded Dr. Noll's model, which predicted the League bundle would cost less in the BFW, the district court concluded that every class member suffered antitrust injury because "[t]he restriction of consumer options is an *ispo facto* antitrust harm . . . for ***all*** consumers—even consumers, like league-wide fans, who are not interested in new options." *Id.* at 35-36 (emphasis in original).

QUESTIONS PRESENTED

1. Whether the district court erred in certifying a Rule 23(b)(2) class based on a theory of antitrust injury grounded in an alleged deprivation of product choice that necessarily cannot harm a significant portion of the class, with the result that the requested injunctive relief would not benefit the class as a whole, as required by *Wal-Mart v. Dukes*.

2. Whether the district court erred in certifying a Rule 23(b)(2) class based on a theory of deprivation of product choice that, after the district court properly excluded the only evidence proffered by Plaintiffs to prove product choice in the BFW, lacks any support in the record evidence.

LEGAL STANDARD

This Court has broad discretion under 28 U.S.C. § 1292(e) and Rule 23(f) to grant a petition for interlocutory review of a class certification order. *See, e.g., Hevesi v. Citigroup, Inc.*, 366 F.3d 70, 76-77 (2d Cir. 2004). "Petitioners seeking leave to appeal pursuant to Rule 23(f) must demonstrate either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution." *Id.* at 76 (internal quotation marks, emphasis, and alterations omitted). The second prong of this "flexible" standard, *id.* at 76 n.4, provides the Court with "an opportunity to intervene early to correct lower-court errors in class certification, which, if not corrected at that stage, would result in wasteful proceedings, often requiring re-litigation." *Weber v. United States Tr.*, 484 F.3d 154, 160 (2d Cir. 2007).

ARGUMENT

IT WAS LEGAL ERROR FOR THE DISTRICT COURT TO CERTIFY A CLASS WITHOUT COMMON ANTITRUST INJURY

A Rule 23(b)(2) class may be certified only if an injunction would benefit each member of the class. *Wal-Mart*, 131 S. Ct. at 2557; *see also, e.g., Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 97 (2d Cir. 2015) ("[C]ertification of a class for injunctive relief is only appropriate where 'a single injunction . . . would provide relief to each member of the class,'" and that relief must be "beneficial.") (quoting *Wal-Mart*, 131 S. Ct. at 2557-58); *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 263-64 (3d Cir. 2011) (same).

The class certified here—all purchasers of a League bundle from 2008 to present—lacks the cohesiveness that is required under Rule 23(b)(2). The parties agree that a significant portion of the class would prefer to purchase the League bundle even if unbundled (a la carte) products were available. In the face of this undisputed fact, Plaintiffs attempted to show cohesiveness by relying on Dr. Noll's model, which predicted that in the BFW the League bundle would exist and cost less than in the actual world. Only if that were true would fans who prefer the League bundle potentially benefit in the BFW. In response, Defendants submitted fact and expert testimony that the League bundle either would not be offered in the BFW or would cost more than in the actual world (i.e., that there would be

"winners" and "losers" in the BFW).[5] The district court excluded Dr. Noll's model, which was necessary to any showing of cohesiveness, and acknowledged that many class members might not benefit from an injunction. *See* Cert. Op. at 1-2, 27-28, 41.

Absent any evidence that all class members would benefit in the BFW, and despite evidence that many class members would be "losers" in the BFW, the district court nonetheless held that the class is sufficiently cohesive merely because each class member allegedly was "deprived of an option" to purchase unbundled telecasts, which the district court held constituted antitrust injury. *See* Cert. Op. at 21, 34.

Certifying a class based on the conclusion that every member of the class incurred the "injury" of lack of choice under the facts of this case constitutes reversible legal error for at least two reasons, as set forth below. Reversal of these legal errors would substantially influence the outcome of this litigation, either by terminating it or by assuring that the appropriate legal standards are applied and significantly impacting the relief that the named Plaintiffs would be allowed to seek.

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[5] *See, e.g.*, Ordover Decl. ¶ 9; Bettman Decl. ¶¶ 12-13; Bowman Decl. ¶¶ 9-10 (*Laumann* Dkt. 287, *Garber* Dkt. 360).

I. There Is No Common Antitrust Injury

The district court's decision is premised on an erroneous conclusion of law: that the unavailability of unbundled products constitutes an antitrust injury to ***each and every*** purchaser of a bundle of those products, even where it is undisputed that (1) a significant portion of those purchasers have no interest in purchasing an unbundled product and (2) those purchasers would actually be ***worse off*** (losers, rather than winners) in the BFW because their preferred product would either be more expensive or not exist at all. Further, no consumer is deprived of the ability to see the games of her favorite team, which are available on the League bundle. Thus, what the district court characterized as a "choice" injury is simply a matter of product packaging, and no class member lacks the choice to watch her favorite team.

As a matter of law, it is not an Article III injury—much less antitrust injury—to fail to provide a choice to purchase a product that a consumer would not buy. In a case seeking to certify a class of all cell phone purchasers, for example, the plaintiffs argued that all class members suffered antitrust injury from being forced to purchase phones with features unwanted by some purchasers. *See Freeland v. AT&T Corp.*, 238 F.R.D. 130, 151-52 (S.D.N.Y. 2006). The court held that putative class members who desired phones with added features were not injured by the lack of choice of purchasing a phone lacking those features, and

therefore declined to certify a class because classwide injury-in-fact could not be proved. *See id.* Similarly here, class members who do not wish to purchase unbundled products were not injured by their absence, so it was legal error to certify a class. *See, e.g.*, *Brown v. Kelly*, 609 F.3d 467, 482 (2d Cir. 2010) (where proposed class included members who were not at risk of injury from certain defendants, injunctive relief against those defendants was not appropriate and "certification under Rule 23(b)(2) [was] improper").[6]

The district court attempted to distinguish cases "where courts have embraced a winners and losers argument against class certification" on the ground that here all class members were injured by the inability to choose an unbundled (or a la carte) product. *See* Cert. Op. at 32-34 & n.65 (collecting and distinguishing cases). That distinction fails. An alleged restraint may result in less choice, but courts have found that some class members can be uninjured (and even benefitted) despite an absence of choice where the BFW would put them in a worse position than in the actual world.

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[6] The district court's reliance on *Freeland v. AT&T Corp.* to support certification in this case is misplaced. In that case, the court rejected the plaintiffs' economic model for proving antitrust injury on a classwide basis and, just as here, denied certification of a Rule 23(b)(3) damages class in light of the exclusion of plaintiffs' expert. However, unlike the present case, the court in *Freeland* also refused to certify a Rule 23(b)(2) class, concluding that plaintiffs' failure to provide a methodology for proving antitrust injury on a classwide basis similarly prevented certification of a Rule 23(b)(2) class. *See* 238 F.R.D. 130, 149, 156-57.

For example, in *Valley Drug*, the plaintiffs alleged that the defendants unlawfully conspired to keep a less expensive rival generic off the market, thereby allegedly depriving a class of pharmaceutical distributors of a choice to sell the generic product. *See Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1186 (11th Cir. 2003). Some members of the putative class did not want to sell the generic product, and benefitted from instead reselling the more expensive branded version of the same drug, and thus were not harmed by the absence of the generic choice. *See id.* at 1190-91. The district court's attempt to distinguish winners and losers cases by claiming that here all class members were injured by lack of choice is inconsistent with the reasoning in those cases.

The cases cited by the district court for the proposition that "anticompetitive conduct is injurious if it limits consumer options," Cert. Op. at 24, do not stand for the proposition that a class action can be certified under Rule 23(b)(2) where some class members ***benefit*** from the restraint at issue. Neither *Ross v. Bank of America, N.A.*, 524 F.3d 217 (2d Cir. 2008), nor *United States v. Visa U.S.A.*, 344 F.3d 229 (2d Cir. 2003), concerned class certification, much less whether lack of choice is a ***classwide*** antitrust injury. Instead, those cases involved lack of choice that forced consumers to accept an objectively inferior or more expensive product.[7] Other

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[7] In *Ross*, for example, the defendants allegedly colluded to offer credit cards with arbitration provisions, resulting in cardholders receiving "objectively less valuable cards than would have otherwise been the case." 524 F.3d at 220-21, 224. The

authority confirms that lack of choice does not, by itself, give rise to antitrust injury. *See, e.g.*, *Coniglio v. Highwood Services, Inc.*, 495 F.2d 1286, 1293 (2d Cir. 1974) (mere interference with a "consumer's freedom of choice" does not constitute antitrust impact).

Regardless, there can be no dispute here that, at a minimum, a significant portion of the class certified by the district court was not deprived of a preferred choice. The district court found (1) the unbundled product would not be appealing to all consumers, and (2) without Dr. Noll's model, there is no evidence that the unbundled product would reduce prices for bundle purchasers. Cert. Op. at 28-29, 36. Therefore, this alleged lack of choice cannot harm class members who prefer to purchase the bundle, as it does not impact the quality or price of their preferred product. Indeed, the district court acknowledged that some consumers would be, or at least may be, worse off in the BFW, stating that "[i]t is possible, as defendants suggest, that many baseball and hockey fans would prefer for the complained-of restraints to be deemed lawful rather than unlawful. Indeed, it is

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plaintiffs argued that the alleged agreement was illegal *per se*, and the defendants denied the existence of any agreement rather than arguing that it had procompetitive effects that outweighed any anticompetitive effects. In *Visa U.S.A.*—a government enforcement action rather than a private class action—card companies that may have offered superior or less expensive alternative products were excluded from the market, forcing consumers to accept inferior products and higher prices. *See* 344 F.3d at 240.

even possible that many such fans would have preferred that the instant lawsuit not be brought." *See* Cert. Op. at 41.

Under these circumstances, even if the proposed injunctive relief would result in all class members having the choice of unbundled live game programming, that choice would be of no benefit to the large number of class members who are interested only in the League bundle. To the contrary, enjoining the territorial rules likely would result in the League bundle either not existing or costing more, thereby harming those class members. Because the proposed class necessarily consists of some persons who may prefer "choice," but many others who have no interest in any such choice and who likely would be harmed by the requested injunctive relief, *Wal-Mart* and its progeny preclude certification of a Rule 23(b)(2) class.

II. The Record Is Devoid of Any Proof of Classwide Lack of Choice

There is no record evidence showing that the challenged rules have caused classwide lack of choice between the League bundle and unbundled products. To the contrary, Defendants put in significant fact and expert testimony that teams' unbundled live game channels would not be offered nationwide alongside League

bundles with the same live game content, and that if the bundles were available in the BFW, they would cost more than in the actual world.[8]

Plaintiffs' assertion that there would be more product choice in the BFW—in the form of unbundled telecasts in addition to the League bundle—depended on Dr. Noll's economic model. Based on his model's predictions that certain profits in the BFW would be higher if there were a League bundle than if there were no League bundle—which necessarily rested on the model's estimation of demand—Dr. Noll opined that the League bundle would be offered alongside unbundled offerings by the teams. But absent the demand side of Dr. Noll's model, which the district court properly excluded as methodologically unreliable, there is no basis to find more product choice in the BFW.

In the absence of Dr. Noll's model, there is no admissible evidence that any particular class member—let alone all class members—would be able to choose between the League bundle and unbundled products (including at lower prices) in the BFW. Indeed, there is no admissible evidence that the bundled product would be offered in the BFW at all if the unbundled products were offered (or that the bundled product, if offered, would cost less than in the actual world).

[8] *See supra* n.4, n.5. Further, Defendants expressly argued that the product choices hypothesized by Plaintiffs likely would not exist in the BFW. *See* Def. Corr. Class Cert. Opp. at 9-14, 26 (*Laumann* Dkt. 288, *Garber* Dkt. 361). Thus, it is not correct that Defendants "concede—as they must—that the complained-of restraints limit consumer choice." Cert. Op. at 5.

The district court reasoned that examining issues that overlap with the merits at class certification "would hobble the ability of federal courts to effectively enforce the antitrust laws." *See* Cert. Op. at 43 n.76. That reasoning cannot be reconciled with recent Supreme Court precedent holding that district courts must inquire into factual issues that overlap with the merits if those issues are relevant to whether or not plaintiffs have met their burden of demonstrating by a preponderance of the evidence that they meet every requirement of Rule 23. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *see also Comcast v. Behrend*, 133 S. Ct. 1426, 1432 (2013). The district court's ruling to the contrary is erroneous. *See id.*

Without any admissible evidence from Plaintiffs about the availability or pricing of bundled or unbundled live game offerings, the district court had no factual or legal basis for concluding that Plaintiffs could prove that all putative class members were injured or otherwise shared an interest in pursuing injunctive relief on a classwide basis. Because Plaintiffs therefore did not prove that the entire class was deprived of any choices, they have not met their burden under Rule 23 of showing that the class was united by this alleged lack of choice injury.[9]

[9] Finding that all class members in this case were harmed by a lack of an unwanted choice would be particularly ironic, as many class members would be harmed by a change in the supply chain that leads to new unwanted "choice." Consumers currently have the choice of any game they wish to view, whether in the League bundle, on a local RSN, or on a national broadcast. The uncontroverted evidence

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court grant them permission pursuant to Section 1292(e) and Rule 23(f) to appeal the order below certifying an injunction-only class pursuant to Rule 23(b)(2).

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shows that in the BFW, class members would be less likely to have access to the League bundle or would have to pay more for it. *See supra* n.4, n.5, n.8. The only cognizable injury is not lack of choice, but rather allegedly higher prices. In excluding Dr. Noll's model, however, the district court rejected the only evidence proffered by Plaintiffs of potentially higher prices in the BFW.

Dated: May 28, 2015

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CERTIFICATE OF SERVICE

This is to certify that on May 28, 2015, I caused the foregoing Petition Pursuant to 28 U.S.C. § 1292(e) and Rule 23(f) for Permission to Appeal Order Certifying Class to be filed with the Clerk of Court of the United States Court of Appeals for the Second Circuit via electronic mail at the following address: newcases@ca2.uscourts.gov, and I caused the foregoing to be served upon the following via electronic mail and first-class mail:

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