

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 - - - - -

4 August Term, 2006

5 (Argued: January 23, 2007 Decided: September 12, 2008)

6 Docket No. 06-1867-cv

7
8 MAJOR LEAGUE BASEBALL PROPERTIES, INC.,

9 Plaintiff-Counterclaim-Defendant-
10 Appellee,

11 - v. -

12 SALVINO, INC.,

13 Defendant-Counterclaimant-Appellant.
14

15 Before: KEARSE and SOTOMAYOR, Circuit Judges, and CEDARBAUM,
16 District Judge*.

17 Appeal by defendant from so much of a judgment of the
18 United States District Court for the Southern District of New
19 York, Richard Conway Casey, Judge, as dismissed its counterclaim
20 alleging that the organization and activities of plaintiff as the
21 exclusive licensing agent for Major League Baseball intellectual
22 property constitute a per se or "quick-look" violation of the
23 Sherman Act, 15 U.S.C. § 1. See 420 F.Supp.2d 212 (2005).

24 Affirmed.

* Honorable Miriam Goldman Cedarbaum, of the United States District Court for the Southern District of New York, sitting by designation.

1 Judge Sotomayor concurs, in a separate opinion.

2 JAMES T. McKEOWN, Milwaukee, Wisconsin (G.
3 Michael Halfenger, Foley & Lardner,
4 Milwaukee, Wisconsin, Gary A. Adler,
5 Bingham McCutchen, New York, New York,
6 on the brief), for Plaintiff-
7 Counterclaim-Defendant-Appellee.

8 MAXWELL M. BLECHER, Los Angeles, California
9 (John E. Andrews, Blecher & Collins,
10 Los Angeles, California, on the
11 brief), for Defendant-Counterclaimant-
12 Appellant.

13 KEARSE, Circuit Judge:

14 Defendant Salvino, Inc. ("Salvino"), appeals from so much
15 of a final judgment of the United States District Court for the
16 Southern District of New York, Richard Conway Casey, Judge, as
17 dismissed its counterclaims alleging that the organization and
18 activities of plaintiff Major League Baseball Properties, Inc.
19 ("MLBP"), as the exclusive licensing agent for Major League
20 Baseball (or "MLB") clubs' intellectual property, violate § 1 of the
21 Sherman Act, 15 U.S.C. § 1, and asserting "related state law
22 claims" (Salvino brief on appeal at 2). The district court
23 granted MLBP's motion for summary judgment dismissing those claims
24 on the grounds that MLBP's operations should be analyzed under the
25 rule of reason, and Salvino (a) failed to adduce evidence to show
26 that the challenged organization and activities have an actual
27 adverse effect on competition or that MLBP has sufficient market
28 power to inhibit competition market-wide, and (b) failed to offer

1 any evidence to support its state-law claims. On appeal, Salvino
2 challenges the dismissal of its § 1 antitrust claim, contending
3 that the court should not have required evidence with regard to
4 market power or actual adverse effect on competition but should
5 instead have held MLB's activities either illegal per se or
6 illegal under a "quick-look" analysis. With regard to Salvino's
7 state-law claims, its brief on appeal contains no argument as to
8 why the district court's dismissal was incorrect, and we therefore
9 regard any challenge to the dismissal of those claims as
10 abandoned, see generally Hobbs v. County of Westchester, 397 F.3d
11 133, 147 (2d Cir.), cert. denied, 546 U.S. 815 (2005); Day v.
12 Morgenthau, 909 F.2d 75, 76 (2d Cir. 1990); Fed. R. App. P.
13 28(a)(9). For the reasons that follow, we reject Salvino's
14 contentions and affirm the dismissal of its antitrust claim.

15 I. BACKGROUND

16 Viewed in the light most favorable to Salvino, as the
17 party against which summary judgment was granted on the claim at
18 issue on this appeal, the following facts are not in dispute.

19 A. The Parties and the Licensing Dispute

20 MLB is a wholly-owned subsidiary of Major League Baseball
21 Enterprises, Inc. ("MLBE"), an entity in which each of the 30

1 current MLB clubs (the "Clubs") owns an equal interest. MLBP is,
2 with limited exceptions, the exclusive worldwide agent for
3 licensing the use of all names, logos, trademarks, service marks,
4 trade dress, and other intellectual property owned or controlled
5 by the MLB Clubs, MLB's Office of the Commissioner ("BOC"), and
6 MLBP (collectively "MLB Intellectual Property"), on retail
7 products. MLBP also acts as agent for the Clubs with respect to,
8 inter alia, trademark protection, quality control, design
9 services, royalty accounting, and auditing.

10 Salvino is a California corporation that produces, sells,
11 and distributes sports collectibles, including stuffed plush
12 animals that are usually identified with sports celebrities.
13 Between 1989 and 2001, Salvino obtained licenses from MLBP to use
14 Club marks and other MLB marks on figurines of baseball players in
15 uniform. In the license agreements, Salvino promised not to use
16 the marks in any manner other than as licensed.

17 In the spring of 1998, Salvino developed a line of plush,
18 bean-filled bears that it called "Bammers." Salvino obtained
19 licenses for sports-personality Bammers from, inter alia, National
20 Football League ("NFL") Properties, Inc., National Basketball
21 Association ("NBA") Properties, Inc., National Hockey League
22 ("NHL") Enterprises, L.P., the NHL Players' Association, and
23 companies representing several professional figure skaters, as well
24 as from various individual NBA players, retired NFL players,

1 current and retired MLB players, and drivers in the National
2 Association for Stock Car Auto Racing ("NASCAR").

3 Salvino produced baseball Bammers without Club logos for
4 sale to commercial outlets such as hobby shops, Hallmark stores,
5 and other retail chains. In 1998 and/or 1999, it sold Bammers in
6 uniforms bearing Club logos to at least seven MLB Clubs, and sold
7 Bammers with Club logos only on the sales tags to two MLB Clubs,
8 for retail sale in their stadia or for free stadium giveaways.
9 Salvino obtained licenses to use baseball player names and
10 numbers from the Major League Baseball Players' Association, Inc.
11 ("MLB Players' Association"). However, despite discussing a
12 possible license from MLBP for the use of MLB Club logos on
13 Bammers in early 1999, the only license for a Bammer that Salvino
14 obtained from MLBP was an April 1999 license for a Hank Aaron
15 Bammer commemorating the 25th anniversary of Aaron's breaking Babe
16 Ruth's home run record.

17 In October 1999, MLBP learned that Salvino had sold
18 Bammers to the Arizona Diamondbacks baseball club with the
19 Diamondbacks logo on them; Salvino had not obtained an MLBP
20 license to use that logo. MLBP sent Salvino a cease-and-desist
21 letter stating that Salvino was in violation of its existing
22 license agreement with MLBP, in which "Salvino[had] represent[ed]
23 and warrant[ed] that it would not, during the license period or
24 any license period thereafter, use the Logos except as licensed

1 under the [license agreement]" (Letter from MLBP to Salvino dated
2 November 3, 1999, at 1). The letter stated that

3 [i]n addition, the unauthorized use of the
4 trademark constitutes trademark infringement. The
5 Arizona Diamondbacks have informed [MLBP] that,
6 although they reviewed artwork demonstrating the
7 appearance of the proposed product, they never gave
8 express consent to use the Arizona Diamondbacks' logo
9 featured thereon, nor are they being compensated by
10 Salvino (in the form of a royalty or otherwise) for
11 the use of the Logo.

12 (Id. at 1-2.)

13 Salvino responded by commencing an action against MLBP and
14 MLBE in federal court in California (the "California action"),
15 alleging that MLBP's activities violated §§ 1 and 2 of the Sherman
16 Act, 15 U.S.C. §§ 1 and 2, as well as § 7 of the Clayton Act,
17 15 U.S.C. § 18, and various state laws. As it related to the § 1
18 claim, Salvino's complaint in that action alleged principally that

19 [b]ecause [MLBP] distributes the income from its
20 exploitation of trademarks equally to each member
21 club--even though a relatively small number of clubs
22 generate[s] the bulk of the revenue--the incentive
23 of many major league clubs to invest in and promote
24 and compete through its [sic] trademark has been
25 diminished and suppressed. As a result, the
26 [agreement between MLBP and the Clubs] . . . has
27 reduced output, diminished the quality of product
28 offered to the public, diminished the choice of
29 product offered to the public, reduced and
30 suppressed price competition leading to higher
31 prices to the public and reduced market efficiency
32 to the detriment of the public.

33 (Salvino's California action complaint ¶ 13.)

34 In April 2000, MLBP commenced the present action against
35 Salvino, asserting claims under federal and state law for, inter

1 alia, trademark and trade dress infringement arising out of
2 Salvino's unauthorized use of MLB marks. Salvino's California
3 action was transferred to the Southern District of New York, where
4 it was consolidated with the present action, with Salvino's
5 California action claims becoming counterclaims in the present
6 action.

7 B. MLBP's Motion To Dismiss Salvino's § 1 Counterclaim

8 Eventually, all of the parties' respective claims, except
9 Salvino's counterclaims against MLBP for alleged violation of § 1 of
10 the Sherman Act and for alleged unfair competition and tortious
11 interference with contract under California and New York law,
12 respectively, were either abandoned or settled. In the meantime,
13 to the extent pertinent to this appeal from the district court's
14 dismissal of Salvino's § 1 counterclaim, MLBP moved, following
15 some three years of discovery, for summary judgment dismissing
16 that claim.

17 In support of its summary judgment motion, MLBP submitted,
18 pursuant to Rule 56.1 of the Local Rules for the Southern
19 District of New York ("Rule 56.1" or "Local Rule 56.1"), a
20 statement of facts that it contended were undisputed ("MLBP Rule
21 56.1 Statement"). MLBP contended that the undisputed facts,
22 analyzed under the rule of reason, revealed that its conduct did
23 not violate the Sherman Act. In support of its factual

1 assertions, MLBP generally cited documents (filed under seal, and
2 hereby deemed unsealed to the extent described in this opinion),
3 and submitted deposition testimony or sworn declarations to show
4 the admissibility of the cited documents.

5 Salvino, in its response pursuant to Rule 56.1 ("Salvino
6 Response"), principally took the position that many of the facts
7 set out by MLBP, while expressly "undisputed," were "not
8 material," apparently on the theory that rule-of-reason analysis
9 was inappropriate. (Salvino also contended that some of the
10 documents cited by MLBP were objectionable on grounds of hearsay
11 and lack of foundation, objections that are unmeritorious (see
12 Part II.A.3. below).) The following facts, in addition to those
13 described in Part I.A. above, are among those that are undisputed.

14 1. Major League Baseball

15 The Major League Baseball teams together produce an
16 entertainment product--the "MLB Entertainment Product"--that
17 consists of approximately 2,400 interrelated, professional
18 baseball games per year played by the 30 MLB Clubs, leading to
19 separate playoff games for the American and National Leagues and
20 culminating each season with the World Series between the
21 champion Clubs from the two Leagues. This entertainment product
22 can be produced only by the Clubs operating together in the form of

1 a league; it cannot be produced by any one individual Club, or
2 even a few Clubs. While squads of players from a single Club
3 could play each other, the organization of the Clubs into a
4 nationwide league with geographic diversity and a common
5 championship goal, pursued in a structured manner employing
6 uniform rules of play, has created a vastly different and more
7 marketable product than is created by scrimmages between squads of
8 players from a single Club or even by ad hoc "barnstorming" games
9 between Clubs outside of a large league structure. (See Salvino
10 Responses to MLBP Rule 56.1 Statement ¶¶ 41, 42.)

11 The MLB Entertainment Product, for which cooperation among
12 the Clubs is essential, affects the value of MLB Intellectual
13 Property. For example, during the baseball players' strike in
14 1994 and 1995, revenues generated by sales of MLBP-licensed
15 products decreased; after the strike ended and MLB games resumed,
16 those revenues increased. (See Salvino Responses to MLBP Rule
17 56.1 Statement ¶¶ 44, 45.)

18 2. MLBP's Licensing and Policing Activities

19 MLBP was incorporated in 1966 by the then-existing MLB
20 Clubs (under the name Major League Baseball Promotion Corporation)
21 as a wholly-owned subsidiary of MLBE. Each of the current MLB
22 Clubs owns an equal interest in MLBE and shares equally in its
23 profits. Prior to the formation of MLBP in 1966, there had been no

1 centralized source for the licensing of MLB Intellectual Property,
2 a fact that was cited to MLBP by potential licensees as the reason
3 for baseball's exclusion from certain marketing programs. (See
4 Salvino Response to MLBP Rule 56.1 Statement ¶ 20.) For example, at
5 a December 1966 meeting of the executive committee of MLBP's board
6 of directors, representatives of the Coca-Cola Company described a
7 football-related under-the-cap promotion that Coca-Cola had begun
8 three years earlier with the NFL. The representatives stated that
9 Coca-Cola had been unwilling to consider such a promotion using
10 baseball team logos because MLB's structure, on a nationwide basis,
11 was "'entirely too cumbersome.'" (Id. ¶ 22.) According to the
12 minutes of that meeting, the representatives stated that Coca-Cola
13 became willing to consider an under-the-cap promotion using MLB
14 Intellectual Property once the company learned that the Clubs were
15 creating an entity that could negotiate an agreement on behalf of
16 all of the Clubs.

17 When created in 1966, MLBP was given (a) the exclusive
18 right to market and promote the official name and logo of Major
19 League Baseball, (b) a non-exclusive right to license the names and
20 logos of the National and American Leagues, and (c) the right to
21 submit licensing proposals for Club marks to the Clubs for their
22 approval. (See Salvino Response to MLBP Rule 56.1 Statement ¶ 16.)
23 Since 1984, MLBP's operations and the relationships between MLBP and
24 the Clubs have been governed by a series of three-to-five-year

1 agency agreements, collectively called the "Agency Agreement." In
2 1984, the Agency Agreement increased MLB's authority by giving it
3 the exclusive right--subject to limited exceptions--to license Club
4 names and logos for use on retail products for national and
5 international (i.e., not merely local) distribution. (See id.
6 ¶ 17.) In 1987, the Agency Agreement further expanded MLB's
7 authority, granting it the exclusive right (again with limited
8 exceptions) to license Club names and logos for use on products to
9 be sold at retail within the Clubs' respective local markets. (See
10 id. ¶ 18.) Thus, since 1987, the retail sale of any products
11 bearing an MLB Club's name or logos must be licensed by MLB, even
12 if the products are sold at a concession stand inside the Club's
13 stadium. (See id. ¶ 11.)

14 From 1966 until 1987, MLB had relied on the Licensing
15 Corporation of America ("LCA") as its subagent to license MLB
16 Intellectual Property. LCA, however, also marketed the intellectual
17 property of a number of other groups, including the NHL and NHL
18 teams. And, in addition, as a division of Warner Communications,
19 LCA licensed intellectual property relating to numerous cartoon and
20 comic book characters. (See Salvino Responses to MLB Rule 56.1
21 Statement ¶¶ 23, 24.) In 1987, when MLB's exclusive right to grant
22 licenses for use of the Clubs' intellectual property on retail
23 products was expanded to encompass the Clubs' respective local
24 markets, MLB ceased to grant licenses through LCA and began

1 licensing MLB Intellectual Property directly. (See id. ¶ 25.) In
2 that year, total revenues from the licensing of MLB Intellectual
3 Property more than doubled; and between January 1, 1987, and October
4 24, 1988, MLB increased the number of its licensees from 100 to
5 250. (See id. ¶¶ 26, 28.) By August 2003, when it filed its Rule
6 56.1 Statement, MLB had outstanding more than 300 licenses for the
7 production of some 4,000 different products for retail sale in the
8 United States bearing or reflecting MLB Intellectual Property (see
9 id. ¶ 35), and had issued licenses to some 170 licensees for such
10 products to be sold outside of the United States (see id. ¶ 36).

11 The Agency Agreement and the Operating Guidelines that are
12 incorporated in it leave the Clubs free to grant licenses with
13 respect to their own intellectual property to a limited extent. For
14 example, a Club is allowed to issue licenses for the use of its
15 intellectual property on products that it gives away at a home game;
16 intellectual property of the visiting Club in such a game may also
17 be used on the "giveaway" product with the approval of the visiting
18 Club and MLB. (See Salvino Responses to MLB Rule 56.1 Statement
19 ¶¶ 12, 14.) No other MLB license or approval is required for such
20 giveaways so long as they do not include the marks of another MLB
21 Club, MLB, or the BOC. (See id.)

22 In addition, a Club may use its own marks or license
23 others to use its marks to create home video products about the
24 individual Club, to be sold or given away within the Club's home

1 broadcasting territory (as defined for each Club in the Operating
2 Guidelines). MLB licenses the use of BOC and MLB marks for use in
3 such home videos at the request of the Club. The Operating
4 Guidelines also provide that a Club may license the use of its marks
5 on hot dogs and similar items distributed or sold within its home
6 broadcasting territory; MLB has no authority to grant licenses for
7 such items without obtaining the Club's prior approval. A Club also
8 has the right, within its home broadcasting territory, to use and
9 license others to use its marks to advertise and promote the Club's
10 cruises and fantasy, educational, or summer camps.

11 Under the Agency Agreement, MLB is also responsible for,
12 inter alia, protecting and licensing logos and trademarks owned by
13 the MLB Clubs, such as the "SF" logo of the San Francisco Giants,
14 and protecting and licensing logos and trademarks owned by the BOC
15 and MLB itself, such as the "Major League Baseball" word mark, the
16 World Series logos, and the famous silhouetted batter logo. (See
17 Salvino Response to MLB Rule 56.1 Statement ¶ 3.) The Agency
18 Agreement provides that, as the exclusive licensor of the Clubs'
19 intellectual property for use on products to be sold at retail, MLB
20 guarantees to the Clubs that all licenses will impose quality
21 controls and will enhance the image of MLB, and that MLB will
22 protect and preserve the intellectual property of the Clubs and the
23 goodwill that that property represents.

24 Infringing parties often use the trademarks of multiple

1 Clubs, with the result that more than one Club's intellectual
2 property rights are infringed simultaneously. (See Salvino Response
3 to MLBP Rule 56.1 Statement ¶ 66.) As a centralized licensing
4 agent, MLBP is able to identify from its own records whether a
5 particular product bearing MLB Intellectual Property is licensed and
6 thus to determine efficiently whether or not it infringes on MLB
7 Intellectual Property. (See id. ¶ 71.) In order to protect that
8 property, MLBP sends or causes to be sent more than 100 cease-and-
9 desist letters every year. (See id. ¶ 67.)

10 3. The Market in Which MLBP Licenses Compete

11 MLBP asserted the view, which Salvino criticized as "a
12 self-serving view," that other sports leagues such as the NBA, the
13 NFL, the NHL, and the Women's National Basketball Association, as
14 well as non-sports entertainment purveyors such as Nickelodeon and
15 Disney, are among MLBP's competitors in the licensing of
16 intellectual property for use on retail products. (See Salvino
17 Responses to MLBP Rule 56.1 Statement ¶¶ 50, 52.) For example, Team
18 Beans, a competitor of Salvino that obtained licenses for MLB
19 Intellectual Property from MLBP for use on plush toys, also held
20 licenses to use trademarks from a variety of other licensors,
21 including the Olympics, the NFL, the NHL, the MLB Players'
22 Association, and NASCAR. (See id. ¶ 57.)

23 A market research study conducted for MLBP, whose goals

1 included increasing game attendance, media audiences, and sales of
2 MLB Intellectual Property, found that baseball does not compete with
3 just one sport, or even only with sports. It found that the
4 competitive arena for baseball is "'a wide range of leisure and
5 entertainment options that vary with target group and lifestyle.'" (Salvino Response to MLB Rule 56.1 Statement ¶ 55.) Thus, the MLB
6 1996 Business Plans' list of MLB's major competitors for
7 intellectual property licensing included the following: branded
8 apparel manufacturers such as Nike, Reebok, Russell, Champion, Big
9 Dog, and No Fear; other sports entities such as the NBA, the NFL,
10 the NHL, NASCAR, collegiate groups, and the 1996 Summer Olympics;
11 and entities, such as Warner Brothers and Disney, that offered
12 licenses to use intellectual property relating to, e.g., Looney
13 Tunes, Power Rangers, Peanuts, Nickelodeon, Batman, SpaceJam, and
14 Goosebumps. (See id. ¶ 56.)

16 In 1998, Salvino himself sold Bammers that were licensed
17 by, among others, the MLB Players' Association, NFL Properties, Inc.
18 ("NFL Properties"), and the NHL Players' Association. (See Salvino
19 Response to MLB Rule 56.1 Statement ¶ 101.) Salvino, which had had
20 total sales of less than \$1 million in 1997, developed the Bammer in
21 the spring of 1998 and had revenues of \$17 million from the sale of
22 Bammers in 1998; in 1999, Salvino had revenues of \$30 million. (See
23 id. ¶¶ 100, 101, 102.)

24 In a September 1999 marketing plan that Salvino submitted

1 to MLBP, Salvino stated that it had sold Bammers licensed by the
2 above sports organizations, as well as "Muhammad Ali" Bammers, Ice
3 Bammers, and Basketball Bammers, and various other individually
4 licensed Bammers. Seeking an MLBP license for MLB Intellectual
5 Property for use on a photo ball and photo bat, Salvino stated that
6 it proposed to sell those items in the same target market in which
7 it sold Bammers. (See Salvino Response to MLBP Rule 56.1 Statement
8 ¶ 107.) Salvino described its target market as retailers that have
9 the potential to carry "sports licensed products." (Id.) Salvino
10 stated that its primary targets included stadium concessionaires and
11 sporting goods retailers and that its secondary targets were
12 "retailers of licensed sport products who have the capacity to
13 purchase in volume"; it stated that "'our most important competition
14 comes from companies that currently distribute sports licensed
15 products. These products compete directly for limited shelf space
16 devoted to this product category.'" (Id.)

17 Thus, in addition to selling its Bammers to MLB Clubs and
18 stadium concessionaires (see Salvino Response to MLBP Rule 56.1
19 Statement ¶ 112), Salvino sold Bammers to "hobby shops, sports
20 collectible shops, Hallmark stores and retail chains" (id. ¶ 111).
21 Rick Salvino, Salvino's president since 1988, testified that the
22 Bammers competed with everything in the store for shelf space (see
23 id. ¶¶ 93, 113): "'Everybody is a competitor. Anybody in a gift
24 store that sells a product is a competitor of mine, because we're

1 all fighting for shelf space, for any store for that matter
2" (Id. ¶ 114.) Wayne Salvino, Salvino's vice president
3 from at least early 1989 until December 2001, testified that Salvino
4 competed with numerous other producers of plush items, as well as
5 "'anybody who produces sports licensed products; anybody who
6 produces, you know, signed products, collectibles, memorabilia;
7 anybody who produces licensed key chains, zipper pulls, non-licensed
8 key chains, zipper pulls.'" (Id. ¶¶ 94, 116.) Similarly, in its
9 sales presentations to the MLB Players' Association, NFL Properties,
10 and NBA Properties, Inc. ("NBA Properties"), Salvino stated that the
11 market for Bammers licensed by those sports organizations would be
12 the "'sports collectibles hobby'" market. (Id. ¶¶ 117, 118, 119.)
13 In its proposal to the MLB Players' Association, for example, it
14 stated that "'[a]n additional market which would be targeted for
15 distribution would be the general collectibles market. This market
16 is represented by thousands of gift stores, specialty stores, major
17 department stores, catalogs, and other forms of direct marketing
18 through the mass media that currently market this category of
19 product.'" (Id. ¶ 117.) The business plan that Salvino submitted
20 to NFL Properties described Salvino's Bammers as falling within the
21 "'novelty and memorabilia market.'" (Id. ¶ 118.) And in the plan
22 it submitted to NBA Properties, Salvino stated that its products,
23 including Bammers, were in both the "'sports collectibles hobby'"
24 market and the "'general retail market.'" (Id. ¶ 119.) Salvino's

1 Bammers brochure declared Bammers to be "'America's Number 1 Sports
2 Collectible'" with respect to its entire product line of Bammers,
3 e.g., baseball, football, boxing, basketball, ice skating, hockey,
4 and NASCAR. (Id. ¶ 120.)

5 MLBP also asserted, without meaningful disagreement from
6 Salvino, that other professional sports groups, like MLB, employ
7 centralized marketing entities. For example, Salvino did not
8 dispute that the MLB Players' Association, the union that represents
9 MLB players, states that it is the exclusive holder of all right,
10 title, and interest in the group licensing of names, nicknames,
11 likenesses, and signatures of any group of three or more active MLB
12 players. (See Salvino Response to MLBP Rule 56.1 Statement ¶ 4.)
13 Nor did Salvino dispute that, according to their respective standard
14 licenses, (a) NFL Properties has the exclusive right to license for
15 commercial purposes the trademarks of the NFL and its member teams;
16 (b) NBA Properties has the exclusive right to license for commercial
17 purposes the use of certain names, logos, symbols, emblems, designs,
18 and uniforms, etc., of the NBA, along with the names, nicknames,
19 photographs, likenesses, signatures, and other identifiable features
20 of current NBA players; and (c) NHL Enterprises, L.P. ("NHL
21 Enterprises"), has the exclusive right to license for commercial
22 purposes the names, nicknames, logos, colors, and uniform designs,
23 etc., of the member teams of the NHL, the numbers appearing on NHL
24 players' uniforms, the name, initials, insignia, and other indicia

1 of the NHL itself, and the name and likeness of the Stanley Cup.
2 (See id. ¶¶ 5, 6, 7.)

3 Wayne Salvino testified at his deposition that one
4 advantage to Salvino of the NFL's centralized licensing structure
5 was that NFL Properties offered a package of certain players and all
6 team logos, allowing that entity to serve as a "'one-stop shop.'"
7 (Salvino Response to MLB Rule 56.1 Statement ¶ 49.)

8 4. The Views of the Parties' Respective Economists

9 Toward the end of the discovery period, MLB had taken the
10 deposition of Salvino's expert economist, Louis A. Guth, who had
11 prepared a report in which he opined that MLB functions as an
12 "economic cartel" (Expert Report of Louis A. Guth dated February 27,
13 2003 ("Guth Report"), ¶ 6; see, e.g., id. ¶¶ 17-19). The Guth
14 Report stated that "MLB quite likely exercises sufficient control
15 over pricing licenses for use of club marks for plush toys and
16 similar products so that these constitute a relevant market." (Id.
17 ¶ 23.) In his deposition testimony, discussed in greater detail in
18 Part II.C.4.c. below, Guth stated that MLB limits output and sets
19 prices (see generally Deposition of Louis A. Guth, March 26, 2003
20 ("Guth Dep."), at 140), and he opined that efficient licensing of
21 MLB Intellectual Property could be accomplished through the use of
22 less restrictive alternatives (see id. at 78-79). He testified that
23 the relevant market could be determined by conducting a "discrete

1 choice survey" of consumers to determine whether changes in the
2 prices of various products would affect the consumers' product
3 preferences (id. at 25-27); however, Guth had conducted no empirical
4 studies of any kind (see id. at 23-24, 34-36, 46, 50, 137-38).

5 MLBP, in support of its motion for summary judgment,
6 presented the April 11, 2003 report of its expert economist,
7 Professor Franklin M. Fisher ("Fisher Report"), analyzing MLBP's
8 functions and the product market within which MLBP operates, and
9 disputing the views of Guth. Fisher opined, inter alia, that MLBP
10 is not a cartel and should instead be viewed as a joint venture;
11 that the relevant product market consists at the very least of
12 licenses for all sports and entertainment intellectual property,
13 rather than just for MLB Intellectual Property; and that the
14 centralization of MLB Intellectual Property licensing and other
15 functions in MLBP produces procompetitive efficiencies.

16 Fisher pointed out that "[t]he customers [for] MLB
17 Intellectual Property are prospective licensees that use MLB
18 Intellectual Property to sell products." (Fisher Report ¶ 8.)
19 Although Guth had suggested that the relevant market could be
20 determined by conducting a survey to ascertain whether the product
21 preferences of consumers were responsive to retail price variations,
22 Fisher stated that "it is important to be clear that the relevant
23 customers for MLB Intellectual Property are the prospective
24 licensees of intellectual property and it is their demand and the

1 alternatives that they face that determine the boundaries of the
2 relevant market" (id. ¶ 18 (emphases in original)). "The demand of
3 ultimate consumers for goods such as plush toys . . . that use
4 intellectual property . . . is relevant only because such demand
5 influences the derived demand of direct customers, the licensees."
6 (Id.)

7 Fisher stated that "[a]vailable to these customers [i.e.,
8 potential licensees] is a wide array of intellectual property
9 licensors, ranging from the different sports leagues, to
10 entertainment companies like Warner Brothers and Disney, to clothing
11 designers like Calvin Klein and Tommy Hilfiger, to name a few."
12 (Fisher Report ¶ 8.) He opined that MLB competes with numerous
13 other entertainment entities, including the NFL, the NHL, the NBA,
14 and NASCAR, as well as Major League Soccer, the Professional Golfers
15 Association, the Ladies Professional Golf Association, the
16 Association of Tennis Professionals, the Olympics, motion pictures,
17 television and radio programming, and a host of other sports and
18 entertainment producers with respect to the licensing of
19 intellectual property for retail products. (See id. ¶ 15.) He
20 stated that "[t]he relevant antitrust market in which MLBP competes
21 is the worldwide market for the licensing of intellectual property
22 for use in the production of consumer goods and services"; but even
23 if the market were defined "as only the licensing of the
24 intellectual property related to sports and certain entertainment

1 products," MLBPA lacks power in this relevant market. (Id. ¶ 10.)

2 Within the relevant market, Fisher opined that the
3 interdependence of the MLB Clubs and the way in which MLBPA operates
4 reveal that MLBPA functions as a joint venture, not a cartel:

5 Despite Mr. Guth's assertion to the contrary, MLBPA
6 is not a cartel. Rather, it functions as a joint
7 venture. Mr. Guth bases his conclusion that MLBPA is
8 a cartel on the observation that a cartel would seek
9 authority over many of the same activities over
10 which MLBPA has authority. However, as Mr. Guth
11 acknowledged at his deposition, this observation (or
12 his characterization of MLBPA as a "cartel") is an
13 insufficient basis for concluding that MLBPA is
14 acting anticompetitively. This is because
15 legitimate joint ventures need to have control over
16 the very activities identified by Mr. Guth. Here,
17 such control is necessary in order for the Clubs and
18 the league as a whole to compete adequately against
19 other sports and entertainment products. The MLB
20 Clubs jointly produce their product and jointly
21 create and enhance the value of MLB Intellectual
22 Property. It is entirely natural and, indeed,
23 procompetitive that they should exploit that value
24 together

25 22. Mr. Guth states in his report that
26 otherwise independent firms become "members of a
27 cartel [and choose to] forego individual benefits
28 [or their independence] in order to reduce
29 competition among the members." By contrast, a
30 joint venture consists of a group of interdependent
31 firms that could not otherwise function as
32 productively. Indeed, an important difference
33 between a legitimate joint venture comprised [*sic*]
34 of constituent parts and a cartel among competitors
35 stems, in part, from the degree of integration among
36 the constituent parts of the organization. Where
37 the constituent parts of an organization are highly
38 integrated and interdependent, it is appropriate to
39 view the organization as a joint venture. Only
40 where the constituent members of an organization are
41 not highly integrated, but are independent sources
42 of economic power with respect to the business of
43 the entity, could it be appropriate to view the

1 organization as a cartel.

2 (Fisher Report ¶¶ 21, 22 (footnotes omitted) (emphases added).)

3 Here, the Clubs are interdependent, even in relation to MLB
4 Intellectual Property:

5 [T]he value of MLB Intellectual Property is derived
6 in large part from the value of the MLB
7 Entertainment Product created jointly by Major
8 League Baseball. As a result, the popularity, and
9 hence any economic power, of a particular Club stems
10 from, and is dependent on, the Club's membership in
11 MLB and the marketing efforts of MLB. For example,
12 no matter how successful the Yankees have been, the
13 Yankees marks would have little value over time if
14 the Yankees no longer competed with other Clubs in
15 Major League Baseball. Indeed, the drop in
16 popularity of former Club names, such as the
17 Washington Senators, the Houston Colt 45s, and the
18 St. Louis Browns, demonstrates this fact. The
19 individual trademarks, trade dress, service marks,
20 and other intellectual property that make up MLB
21 Intellectual Property would have little or no value
22 in the absence of their association with the MLB
23 Entertainment Product. Thus, unlike a collection of
24 otherwise independent firms that join together to
25 form an anticompetitive cartel, MLB Clubs are highly
26 interdependent.

27 (Id. ¶ 24.)

28 Fisher noted further that a cartel would seek to maximize
29 its profits by charging high prices to some licensees and low prices
30 to others, depending on the ease with which a particular licensee
31 could substitute another product for that offered by the cartel. He
32 pointed out that MLBP, in contrast, sets a standard royalty
33 percentage for a product using a given type of any Club's
34 intellectual property, irrespective of variations in the Clubs'
35 popularity as reflected by their respective fan bases. (See Fisher

1 Report ¶ 29.)

2 In this context, it is important to note that Major
3 League Baseball fans are separable based on their
4 loyalty to a particular Club. In this situation, a
5 monopoly or cartel would surely set separate royalty
6 rates to maximize profits. Contrary to the
7 assertions of Mr. Guth, the very fact that MLBP does
8 not do this indicates that it faces competition from
9 other entertainment products and is not a cartel.

10 (Id. ¶ 30 (emphasis added).) In addition, while "a cartel serves to
11 decrease output," MLBP had instead increased, not decreased, the
12 retail sales of MLB-licensed consumer products. (Id. ¶ 27.) Fisher
13 noted that MLBP business records showed that "[p]rior to the
14 creation of MLBP, MLB had only limited commercial development and
15 protection of its intellectual property." (Id.)

16 Fisher opined that the Clubs' use of MLBP "achieve[s]
17 numerous efficiencies and procompetitive benefits that would not
18 exist if each Club managed and licensed its intellectual property
19 independently." (Fisher Report ¶ 31.) For example, benefiting the
20 Clubs, MLBP negotiates and signs licenses on their behalf and
21 manages the day-to-day relationships with the licensees. (See id.
22 ¶¶ 33, 52.) Among the efficiencies benefiting licensees is the
23 availability of "one-stop shopping," for no individual Club could
24 grant a license to use the intellectual property of another Club or
25 of MLBP or the BOC; in contrast, MLBP can grant a license for any
26 one, or any combination, or all of those entities' intellectual
27 property. (Id. ¶ 32.) Fisher stated that

28 [i]n the absence of one-stop shopping, licensees

1 would incur substantial additional transaction
2 costs; for some, these additional costs would be
3 sufficiently large so as to prevent the licensees
4 from producing some or all of the MLB-related
5 products that they currently produce. Clubs would
6 also incur greater expenses in the form of
7 additional personnel costs to handle the added
8 licensing functions for which they currently rely on
9 MLB and its centralized administration. Thus, the
10 absence of one-stop shopping may well reduce output
11 in the markets in which those licensees compete.

12 (Id. ¶ 34 (footnote omitted) (emphasis added).) In consequence, he
13 concluded,

14 one-stop shopping helps broaden the product
15 offerings of MLB Intellectual Property, both to
16 include products that require the use of
17 intellectual property of all 30 MLB Clubs as well as
18 to include product lines that Clubs would normally
19 not spend the money to develop or license. Because
20 it has centralized control over all consumer product
21 licenses, MLB can ensure that MLB Intellectual
22 Property is licensed for use on a broad array of
23 consumer products. Over the years, this has meant
24 that MLB has licensed MLB Intellectual Property for
25 use in products such as video games, women's
26 apparel, and household goods. Given the
27 difficulties associated with product licensing and
28 administration, absent MLB, it is unlikely that the
29 Clubs would ensure such a broad product offering.

30 (Id. ¶ 37.)

31 Fisher also opined that centralization of MLB Intellectual
32 Property licensing tasks in MLB also creates efficiencies in
33 quality control and in the effective protection of the Clubs'
34 trademarks. For example,

35 [s]tate, federal and international laws require
36 trademark owners to police and enforce their marks
37 in order to retain them. The centralization of MLB
38 Intellectual Property licensing enables MLB to
39 undertake extensive enforcement activities that the

1 individual Clubs would not have the capacity to
2 undertake if left to protect their intellectual
3 property o[]n their own. If the Clubs could not
4 protect all of their intellectual property, they
5 would risk losing some, if not a great deal, of
6 those rights. Moreover, if those rights were not
7 protected, the licenses for those rights would have
8 much less value, if any value at all.

9 (Fisher Report ¶ 38; see also id. ¶ 39 (protection of MLB
10 Intellectual Property against infringers also benefits MLBP's
11 licensees, who would otherwise fear that their promotional efforts
12 would be eroded by unfair competition from products that were
13 unlicensed or counterfeit).) Having MLBP carry out the enforcement
14 function avoids a multiplicity of overlapping efforts by the 30
15 Clubs to, for example, register all of their trademarks in each
16 country in which such intellectual property might be used, and
17 enforce their respective intellectual property rights throughout the
18 United States and around the world. (See id. ¶¶ 41, 43.)

19 Fisher took issue with Guth's less-restrictive-
20 alternatives hypothesis--referred to as a "but-for" world--in which
21 Guth proposed that each of the 30 Clubs would negotiate its own
22 licensing agreements, set its own royalty rates, and perform its own
23 quality control, and MLBP would be responsible only for enforcement,
24 maintaining a centralized database of royalty rates and payments,
25 and acting essentially as a referral service for prospective
26 licensees. (See Fisher Report ¶ 76.) Fisher stated that
27 centralized licensing

28 simplifies the task of determining whether a

1 potentially infringing product is in fact licensed
2 by MLBPA or the Clubs. Responsible for retail
3 product licensing, MLBPA knows from its own records
4 and history whether or not a particular product is
5 licensed. In the apparent "but-for" world
6 envisioned by Mr. Guth, where MLBPA would retain only
7 certain of its functions, MLBPA would either need to
8 track all licenses entered into by any Club or to
9 contact every Club in order to determine whether
10 products bearing Club marks are licensed or
11 counterfeit. This significantly adds to the cost of
12 enforcement. In addition, Mr. Guth's scenario
13 ignores that time is often of the essence when
14 dealing with enforcement activities, in that there
15 is often a need to respond immediately to a call or
16 complaint about counterfeit goods.

17 (Id. ¶ 42.)

18 Further, as to quality control, Fisher maintains that
19 centralization of licensing in MLBPA benefits the licensees of MLB
20 Intellectual Property because they are, inter alia, able to obtain
21 the necessary quality approvals from a single source, rather than
22 having to obtain approvals from myriad separate control centers,
23 including from some Clubs that may take lengthy periods of time to
24 respond. (See Fisher Report ¶ 49.) In addition, licensees can be
25 confident that all MLBPA licensees will be held to the same standard,
26 thereby eliminating the possibility that competitors who are less
27 quality-oriented will free-ride on the efforts and investments of
28 licensees who are conscientious. (See id.) Centralized quality
29 monitoring also benefits the Clubs and MLB because it assures a
30 uniform standard of excellence that will reflect appropriately on
31 the image of Major League Baseball and each of the MLB Clubs. (See
32 id. ¶ 46.)

1 According to Fisher, use of MLBPA for centralized licensing
2 also provides other efficiencies, administrative and creative. For
3 example, having developed substantial expertise as to how well
4 various product lines are likely to succeed in the marketplace, MLBPA
5 spends substantial time working with its licensees to help them
6 develop new products and determine how best to market their existing
7 products. (See Fisher Report ¶ 52.) Centralization in MLBPA avoids
8 the necessity for each of the 30 individual Clubs to spend the time
9 and money that would be needed to develop its own sales and
10 marketing expertise in order to provide sales and marketing support
11 to licensees of Club intellectual property. (See id. ¶ 58.) The
12 use of a central repository where licensees report sales and pay
13 royalties also avoids the need for each Club to develop and maintain
14 its own collection system, as well as the need for licensees to
15 learn varied reporting requirements that would likely be entailed by
16 different royalty rates for each Club and to keep track of the
17 multiple royalties required for products that use more than one
18 mark. (See id. ¶ 60.)

19 Fisher opines that all of the efficiencies gained by the
20 centralization in MLBPA of the licensing, enforcement, monitoring,
21 and administrative functions with respect to MLB Intellectual
22 Property

23 translate directly into cost savings that can be
24 passed on to licensees and, in turn, consumers of
25 MLBPA licensed merchandise. If Clubs were to handle
26 these functions separately, their costs would

1 increase and, consequently, so too would the royalty
2 rates needed to recoup these costs. Indeed, higher
3 costs would force Clubs to either raise their
4 royalty rates or simply decide not to license
5 certain products out of concern for covering costs.

6 (Fisher Report ¶ 31; see also id. ¶¶ 41, 50.)

7 Finally, Fisher also opined that because the value of MLB
8 Intellectual Property is dependent on the popularity of the MLB
9 Entertainment Product, and the popularity of the MLB Entertainment
10 Product depends in turn on the integrated efforts of the Clubs, the
11 absence of centralized licensing could lead to various occurrences
12 of what economists refer to as the "free-rider" problem, i.e., one
13 entity's cashing in on the efforts of another. For example, if the
14 Clubs granted licenses directly, a Club that was popular because of
15 its on-field success could cash in on its popularity even though its
16 victories obviously could not have been achieved without the
17 participation of other Clubs. Or if a Club granted a license to one
18 entity to use its logo on a certain product and MLB granted such a
19 license to a competing entity for the same product, and only one of
20 the licensees invested in the promotion of that product, the non-
21 promoting licensee would gain sales based on the conscientious
22 licensee's efforts. (See Fisher Report ¶¶ 67-70.)

23 Fisher concluded that Guth's view that individual Clubs
24 should set their own royalty rates, thereby allowing the more
25 popular Clubs to set higher rates than the less popular Clubs,
26 ignored the interdependence of the Clubs in providing the MLB

1 Entertainment Product and the need for

2 competitive balance, which reflects the expected
3 equality of opportunity to compete and prevail on
4 the field. Competitive balance also relates to the
5 fans' expectations that each team is a potential
6 champion--i.e. that each Club has a reasonable
7 opportunity to win each game and also to compete for
8 a championship.

9 (Fisher Report ¶ 14.) "Mr. Guth's preferred distribution of
10 licensing royalties would foster a competitive imbalance by over-
11 compensating the popular team for the joint efforts of all Clubs."
12 (Id. ¶ 81.) The resulting imbalance would "ultimately harm all
13 Clubs by leading to a less interesting MLB Entertainment Product,
14 which would make it difficult for MLB to compete against other
15 sports and entertainment products." (Id.)

16 Salvino, in opposition to MLBP's summary judgment motion,
17 submitted a rebuttal report and declaration by Guth in response to
18 the Fisher Report (see Expert Rebuttal Report of Louis A. Guth dated
19 May 8, 2003 ("Guth Rebuttal Report"); Declaration of Louis A. Guth
20 dated September 22, 2003 ("Guth Decl.")), reiterating views set out
21 in the initial Guth Report (see, e.g., Guth Decl. ¶¶ 2, 6). Guth
22 argued that the efficiencies and procompetitive effects that the
23 Fisher Report opined resulted from centralization of MLB
24 Intellectual Property licensing in MLBP could be achieved by less
25 restrictive means. (See, e.g., id. ¶¶ 8-18.)

26 Salvino presented no factual evidence to refute the
27 evidence cited in MLBP's summary judgment motion. For example,

1 while Salvino posited that any increased licensing by MLBP was
2 caused simply by a boom in consumer demand (see, e.g., Salvino
3 Responses to MLBP Rule 56.1 Statement ¶¶ 34-36), citing paragraph 4
4 of the Guth Declaration, the Declaration cited no facts, did not
5 opine as to causation, and was equivocal as to whether there had
6 even been such an increase in demand. That paragraph stated only
7 that the increases in the number of licenses granted by MLBP over
8 the years "would appear to be more consistent with a general
9 increase in consumer interest in licensed retail merchandise of all
10 sorts" (Guth Decl. ¶ 4 (emphasis added)), and then stated that
11 MLBP's increase in revenues "may well not reflect higher demand,"
12 but might instead reflect higher prices resulting from "an overall
13 shift out in demand for such merchandise" (id. (first emphasis in
14 original; second emphasis ours)).

15 Instead of attempting to show that there were genuine
16 disputes of material fact, Salvino took the position that MLBP's
17 factual evidence, submitted in support of rule-of-reason analysis,
18 was largely irrelevant. It urged the court, instead of applying the
19 rule of reason, to apply the per se or "quick-look" standard of
20 liability.

21 C. The Decision of the District Court

22 In an Opinion and Order dated November 16, 2005, reported
23 at 420 F.Supp.2d 212, the district court granted MLBP's motion for

1 summary judgment dismissing Salvino's § 1 counterclaim. The court
2 noted that on a motion for summary judgment, once the moving party
3 has proffered facts to show that there is no genuine issue as to any
4 material fact and that that party is entitled to judgment as a
5 matter of law, "the opposing party must present 'specific facts
6 showing [that] there is a genuine issue for trial.'" 420 F.Supp.2d
7 at 218 (quoting Fed. R. Civ. P. 56(e)). "[T]he non-moving party
8 'may not rely on conclusory allegations or unsubstantiated
9 speculation.'" 420 F.Supp.2d at 218 (quoting Scotto v. Almenas, 143
10 F.3d 105, 114 (2d Cir. 1998)).

11 As a matter of substance, the court began by rejecting
12 Salvino's contentions that the operations of MLBP as centralized
13 licensor should be ruled illegal per se. It noted that "[f]or
14 conduct to be illegal per se, it must fall within the narrow range
15 of behavior that is considered so plainly anti-competitive and so
16 lacking in redeeming pro-competitive value that it is presumed
17 illegal without further examination." 420 F.Supp.2d at 219
18 (internal quotation marks omitted). "Restraints such as price
19 fixing, market divisions, tying arrangements, and group boycotts
20 have all been found to be unreasonable in and of themselves." Id.
21 (internal quotation marks omitted). The district court noted that
22 the Supreme Court in Broadcast Music, Inc. v. Columbia Broadcasting
23 System, Inc., 441 U.S. 1 (1979) ("Broadcast Music"), had "found that
24 the [defendants'] blanket licensing arrangement was not per se

1 unlawful because it was 'not a naked [restraint] o[f] trade with no
2 purpose except stifling of competition, but rather accompanies the
3 integration of sales, monitoring, and enforcement against
4 unauthorized copyright use.'" 420 F.Supp.2d at 219 (quoting
5 Broadcast Music, 441 U.S. at 20) (other internal quotation marks
6 omitted). The district court stated,

7 [s]imilarly, this Court finds that MLB's role in
8 licensing MLB intellectual property is not a naked
9 restraint on trade. Like the license agreement in
10 Broadcast Music, it also facilitates the efficient
11 protection and quality control of MLB intellectual
12 property.

13 420 F.Supp.2d at 219. The district court noted in addition that
14 courts have refused to apply the per se rule of liability to sports
15 leagues because cooperation among teams, in addition to any
16 anticompetitive effects, can have legitimate purposes, such as
17 enabling and coordinating the contests. See id.

18 The district court also rejected Salvino's contention that
19 the centralization of licensing in MLB should be held illegal on a
20 quick-look analysis. Under quick-look analysis, a practice may be
21 held illegal

22 "[if] an observer with even a rudimentary
23 understanding of economics could conclude that the
24 arrangements in question would have an
25 anticompetitive effect on customers and
26 markets." . . . The "quick-look analysis carries
27 the day when the great likelihood of anticompetitive
28 effects can easily be ascertained." . . . It is
29 not appropriate, however, where the anticompetitive
30 effects of an agreement are not obvious or [the
31 agreement] may "have a net procompetitive effect, or
32 possibly no effect at all on competition."

1 Id. at 220 (quoting California Dental Ass'n v. FTC, 526 U.S. 756,
2 770, 771 (1999)). The court found quick-look analysis inappropriate
3 in the present case.

4 MLBP's expert identifies several procompetitive
5 justifications for MLBP's arrangement, including the
6 benefits of one-stop shopping for MLB intellectual
7 property . . . and the efficiencies of enforcement,
8 quality control, and coordinated promotion, design,
9 sales, and marketing support While
10 Salvino's expert conclusorily disagrees with MLBP's
11 expert's opinion . . . , MLBP's proffer demonstrates
12 that the quick look doctrine is inappropriate here
13 since the casual observer could not summarily
14 conclude that MLBP's arrangement has an
15 anticompetitive effect on customers.

16 420 F.Supp.2d at 220.

17 Rather, the court concluded that MLBP should be evaluated
18 "[u]nder a rule of reason analysis, which is applied 'where[] the
19 economic impact of certain practices is not immediately obvious.'"

20 Id. at 219 (quoting FTC v. Indiana Federation of Dentists, 476 U.S.
21 447, 459 (1986)). Under this analysis, "conduct will be deemed
22 illegal only if it unreasonably restrains competition." 420
23 F.Supp.2d at 219 (internal quotation marks omitted).

24 The district court noted that when a challenged practice
25 is subject to rule-of-reason analysis, the antitrust claimant bears
26 the initial burden of showing an actual adverse effect on
27 competition in the relevant market. See id. If the plaintiff meets
28 that burden--which cannot be met merely by a showing that the
29 plaintiff has been harmed as an individual competitor--the burden
30 shifts to the defendant to offer evidence of the procompetitive

1 effects of its agreement; if the defendant offers such evidence, the
2 burden then shifts back to the plaintiff to prove that any
3 legitimate competitive benefits provided by the defendant could have
4 been achieved through less restrictive means. See id. at 220.
5 "'Ultimately, the factfinder must engage in a careful weighing of
6 the competitive effects of the agreement--both pro and con--to
7 determine if the effects of the challenged restraint tend to promote
8 or destroy competition.'" Id. (quoting Geneva Pharmaceuticals
9 Technology Corp. v. Barr Laboratories Inc., 386 F.3d 485, 507 (2d
10 Cir. 2004)).

11 The court found that Salvino had not met its initial
12 burden under rule-of-reason analysis, noting first that Salvino had
13 pointed to no evidence to indicate that MLBP's licensing authority
14 had an adverse effect on competition:

15 The mere fact that Salvino did not receive an MLBP
16 license for its Bammers is not sufficient. [K.M.B.
17 Warehouse Distributors, Inc. v. Walker Manufacturing
18 Co., 61 F.3d 123, 127 (2d Cir. 1995)] (explaining
19 "the plaintiff must show more than just that he was
20 harmed by defendants' conduct"). Salvino has not
21 offered any evidence of an adverse effect on
22 competition resulting from MLBP's licensing
23 authority. Indeed, Salvino did not respond to
24 MLBP's arguments regarding the rule of reason
25 analysis and instead urged the Court to analyze its
26 claims under the per se rule or quick look doctrine,
27 neither of which would require Salvino to make a
28 showing of adverse effect on the market. Further,
29 Salvino does not dispute MLBP's stated increase in
30 MLBP-licensed products since MLBP took over
31 licensing authority for MLB intellectual property.
32 (MLBP 56.1 Stmt. ¶¶ 26-36.) Salvino only takes
33 issue with MLBP's proffered reasons for the
34 increase, i.e., it claims the increase is a product

1 of the "licensing boom" and not a result of MLBP's
2 centralized process. (Salvino Resp. to MLBP 56.1
3 Stmt. ¶ 29.)

4 420 F.Supp.2d at 220-21 (emphases added).

5 The court observed that "'[w]here the plaintiff is unable
6 to demonstrate such actual effects . . . it must at least establish
7 that defendants possess the requisite market power and thus the
8 capacity to inhibit competition market-wide.'" Id. at 221 (quoting
9 K.M.B. Warehouse Distributors, Inc. v. Walker Manufacturing Co., 61
10 F.3d at 129) (other internal quotation marks omitted). However, the
11 court found that Salvino had also failed to adduce any evidence as
12 to MLBP's market power or the relevant market, and it rejected
13 Salvino's contention that such evidence was not required:

14 Salvino argues that a showing of market power is
15 unnecessary . . . and dismisses as immaterial MLBP's
16 attempts to define the relevant market
17 Salvino cannot escape its burden of demonstrating
18 MLBP's market power in light of its inability to
19 demonstrate an actual adverse effect on
20 competition. . . . The Court finds that Salvino has
21 failed to offer any evidence of MLBP's actual
22 adverse effect on the market or its sufficient
23 market power. Accordingly, Salvino cannot
24 demonstrate under the rule of reason that MLBP
25 places unreasonable restraints on trade. MLBP's
26 motion for summary judgment on Salvino's § 1 Sherman
27 Act claim is granted.

28 420 F.Supp.2d at 221 (emphasis added).

29 A consent judgment was entered in March 2006, reflecting,
30 inter alia, the dismissal of all of Salvino's claims and Salvino's
31 reservation of the right to appeal the entry of summary judgment
32 dismissing its antitrust counterclaim under § 1 of the Sherman Act.

1 II. DISCUSSION

2 On appeal, Salvino contends that the district court erred
3 in ruling that the centralization in MLBP of the licensing of MLB
4 Intellectual Property for use on retail products is to be analyzed
5 under the rule of reason. Salvino principally adheres to the
6 contention on which it relied in the district court, i.e., that
7 MLBP's operations should be evaluated only under a stricter
8 standard--either the per se standard or the "quick-look"
9 standard--and that under those stricter standards, summary judgment
10 was inappropriate. In support of this contention, it characterizes
11 the Clubs' agreement to make MLBP their exclusive licensor as "naked
12 horizontal price and output restrictions [that] traditionally fall[]
13 within the per se proscriptions." (Salvino brief on appeal at 20.)

14 Given that what Salvino refers to as "price" fixing is in
15 fact profit sharing by interdependent entities (see Part II.C.2.
16 below), and that Salvino adduced no evidence of any reduction of or
17 agreement to reduce "output" (see Part II.C.1. below), we conclude,
18 for the reasons that follow, that the district court properly
19 applied the rule-of-reason standard and that under that standard
20 Salvino failed to show any genuine issues to be tried.

21 A. Summary Judgment Principles

22 Summary judgment is appropriate when the pleadings and

1 admissible evidence proffered to the district court show that there
2 is "no genuine issue as to any material fact and that the moving
3 party is entitled to a judgment as a matter of law," Fed. R. Civ. P.
4 56(c). In ruling on a motion for summary judgment, the district
5 court may rely on "'any material that would be admissible or usable
6 at trial.'" Azrielli v. Cohen Law Offices, 21 F.3d 512, 517 (2d
7 Cir. 1994) (quoting 10A C. Wright & A. Miller, Federal Practice and
8 Procedure: Civil § 2721 at 40 (2d ed. 1983)); see, e.g., Raskin v.
9 Wyatt Co., 125 F.3d 55, 66 (2d Cir. 1997). In determining whether
10 the moving party is entitled to judgment as a matter of law, the
11 court must resolve all ambiguities and draw all justifiable factual
12 inferences in favor of the party against whom summary judgment is
13 sought. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
14 255 (1986).

15 We review a district court's summary judgment decision de
16 novo "to ensure," in an antitrust case, "that the substantive
17 antitrust law was correctly applied." Tops Markets, Inc. v. Quality
18 Markets, Inc., 142 F.3d 90, 95 (2d Cir. 1998). Summary judgment is
19 of particular importance in the area of antitrust law, because it
20 helps to "avoid[] wasteful trials and prevent[] lengthy litigation
21 that may have a chilling effect on pro-competitive market forces."
22 Id.; see also Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1966
23 (2007) (reversing denial of motion to dismiss antitrust complaint
24 pursuant to Fed. R. Civ. P. 12(b)(6) and stating that "when the

1 allegations in a complaint, however true, could not raise a claim of
2 entitlement to relief, this basic deficiency should . . . be exposed
3 at the point of minimum expenditure of time and money by the parties
4 and the court" (internal quotation marks omitted)).

5 1. Facts, Personal Knowledge, and Expert Opinions

6 Where a summary judgment motion is supported or opposed by
7 affidavits, those "affidavits shall be made on personal knowledge,
8 shall set forth such facts as would be admissible in evidence, and
9 shall show affirmatively that the affiant is competent to testify to
10 the matters stated therein." Fed. R. Civ. P. 56(e). "'[H]earsay
11 testimony . . . that would not be admissible if testified to at the
12 trial may not properly be set forth in [the Rule 56(e)] affidavit.'" Beyah v. Coughlin, 789 F.2d 986, 989 (2d Cir. 1986) (quoting 6
13 Moore's Federal Practice ¶ 56.22[1], at 56-1312 to 56-1316 (2d ed.
14 1985)); see, e.g., Sarno v. Douglas Elliman-Gibbons & Ives, Inc.,
15 183 F.3d 155, 160 (2d Cir. 1999); Contemporary Mission, Inc. v.
16 United States Postal Service, 648 F.2d 97, 105 n.11 (2d Cir. 1981).

17 In order to defeat a properly supported summary judgment
18 motion, the opposing party must proffer admissible evidence that
19 "set[s] forth specific facts" showing a genuinely disputed factual
20 issue that is material under the applicable legal principles. Fed.
21 R. Civ. P. 56(e); see, e.g., Patterson v. County of Oneida, 375 F.3d
22 206, 219 (2d Cir. 2004); Meiri v. Dacon, 759 F.2d 989, 998 (2d
23

1 Cir.), cert. denied, 474 U.S. 829 (1985); 10B C. Wright, A. Miller
2 & M. Kane, Federal Practice and Procedure § 2738, at 346-56 (3d ed.
3 2006). A party opposing summary judgment does not show the
4 existence of a genuine issue of fact to be tried merely by making
5 assertions that are conclusory, see, e.g., Kulak v. City of New
6 York, 88 F.3d 63, 71 (2d Cir. 1996), or based on speculation, see,
7 e.g., id. ("Though we must accept as true the allegations of the
8 party defending against the summary judgment motion, drawing all
9 reasonable inferences in his favor, . . . conclusory statements,
10 conjecture, or speculation by the party resisting the motion will
11 not defeat summary judgment."); ITC Ltd. v. Punchgini, Inc., 482
12 F.3d 135, 151 (2d Cir.) ("conclusory statements, conjecture, and
13 inadmissible evidence are insufficient to defeat summary judgment"),
14 cert. denied, 128 S. Ct. 288 (2007); McPherson v. New York City
15 Department of Education, 457 F.3d 211, 215 n.4 (2d Cir. 2006)
16 ("speculation alone is insufficient to defeat a motion for summary
17 judgment"); Bickerstaff v. Vassar College, 196 F.3d 435, 452 (2d
18 Cir. 1999) ("Statements that are devoid of any specifics, but
19 replete with conclusions, are insufficient to defeat a properly
20 supported motion for summary judgment."), cert. denied, 530 U.S.
21 1242 (2000).

22 Under Fed. R. Evid. 702, an expert witness, unlike a lay
23 witness, is "permitted wide latitude to offer opinions, including
24 those that are not based on firsthand knowledge or observation."

1 Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592
2 (1993). "Faced with a proffer of expert scientific testimony,
3 . . . [a] trial judge must determine at the outset . . . whether the
4 expert is proposing to testify to (1) scientific knowledge that (2)
5 will assist the trier of fact to understand or determine a fact in
6 issue." Id. (footnote omitted). "The subject of an expert's
7 testimony must be 'scientific . . . knowledge.' The adjective
8 'scientific' implies a grounding in the methods and procedures of
9 science." Id. at 589-90 (quoting Fed. R. Evid. 702) (footnote
10 omitted). The Daubert principles apply not only to testimony based
11 on "'scientific' knowledge, but also to testimony based on
12 'technical' and 'other specialized' knowledge. See Fed. Rule Evid.
13 702." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999).

14 Under Daubert, "the district court functions as the
15 gatekeeper for expert testimony," Raskin v. Wyatt Co., 125 F.3d at
16 66, whether proffered at trial or in connection with a motion for
17 summary judgment, see, e.g., Boucher v. U.S. Suzuki Motor Corp., 73
18 F.3d 18, 22 (2d Cir. 1996). At trial, proffered "expert testimony
19 should be excluded if it is speculative or conjectural," id. at 21;
20 the "[a]dmission of expert testimony based on speculative
21 assumptions is an abuse of discretion," id. at 22. An expert's
22 opinions that are without factual basis and are based on speculation
23 or conjecture are similarly inappropriate material for consideration
24 on a motion for summary judgment. See, e.g., Raskin v. Wyatt Co.,

1 125 F.3d at 66 ("[A]n expert's report is not a talisman against
2 summary judgment."). An expert's conclusory opinions are similarly
3 inappropriate. See, e.g., Bridgeway Corp. v. Citibank, 201 F.3d
4 134, 142 (2d Cir. 2000) (where the issue was the fairness of
5 Liberian proceedings leading to a judgment, an expert's statement
6 that "'Liberia's judicial system was and is structured and
7 administered to afford party-litigants therein impartial justice"
8 was "purely conclusory" and hence insufficient to defeat summary
9 judgment).

10 In the present case, Salvino contends that summary
11 judgment should not have been granted because "there is a triable
12 factual dispute as evidenced by the conflicting conclusions of the
13 two economists"--i.e., MLB's Fisher and Salvino's Guth--with
14 respect to whether the agreement to use MLB as the exclusive
15 licensor of the Clubs' intellectual property "produced
16 procompetitive efficiencies." (Salvino brief on appeal at 24
17 (internal quotation marks omitted).) Salvino offers no citation,
18 however, to any statement by Guth indicating that centralization of
19 licensing in MLB does not provide procompetitive efficiencies, and
20 we see only the following Guth statement on this question: "I
21 conclude that the transaction cost efficiency argument advanced by
22 MLB is unsupported by the facts as I understand them and ought to
23 be dismissed." (Guth Report ¶ 8.) This statement, which is
24 entirely conclusory, was neither accompanied by any evidentiary

1 citation nor followed by any elaboration as to the procompetitive
2 efficiencies described in the Fisher Report. Indeed, Guth testified
3 that he had performed no empirical studies relating to "the possible
4 extent of economic benefits." (Guth Dep. at 23-24.)

5 Instead, the Guth Report proceeded to hypothesize solely
6 about direct licensing. And even as to direct licensing by the
7 Clubs, which the Report opined would not "be overly burdensome"
8 (Guth Report ¶ 8), Guth did not cite either (a) any evidence
9 indicating that a prospective licensee could nearly as easily deal
10 with 30 Clubs as with one centralized agency, a proposition that not
11 only is counterintuitive but also ignores the testimony of Salvino
12 itself that it is an advantage to be able to obtain sports
13 intellectual property licenses for different team logos from a "one-
14 stop shop" (Salvino Response to MLB Rule 56.1 Statement ¶ 49
15 (internal quotation marks omitted)); or (b) any evidence that each
16 MLB Club could, without incurring significantly greater expense,
17 develop the staff and expertise necessary to negotiate with and
18 monitor the performances of the hundreds of licensees now dealt with
19 by MLB.

20 The Fisher Report, which described at length several
21 procompetitive efficiencies resulting from the centralization of
22 licensing in MLB (see Part I.B.4. above), was annotated with
23 citations to documents and interviews of MLB Clubs' personnel who
24 had firsthand knowledge. The district court found in Guth's

1 assertions no basis for denying summary judgment, stating that Guth
2 "conclusorily disagree[d] with" Fisher, 420 F.Supp.2d at 220. The
3 district court did not err in this assessment.

4 2. Local Rule 56.1

5 In aid of the district court's determination as to whether
6 there exist any genuine disputes as to facts that are material, Rule
7 56.1 requires the party moving for summary judgment to submit a
8 statement of the material facts that it contends are not genuinely
9 in dispute, see Local Rule 56.1(a), and requires that the opposing
10 party submit a statement showing which of the moving party's factual
11 assertions it disputes, see Local Rule 56.1(b). Subsection (c) of
12 Rule 56.1 provides that

13 [e]ach numbered paragraph in the statement of
14 material facts set forth in the statement required
15 to be served by the moving party will be deemed to
16 be admitted for purposes of the motion unless
17 specifically controverted by a correspondingly
18 numbered paragraph in the statement required to be
19 served by the opposing party.

20 Local Rule 56.1(c).

21 Under Rule 56, it is the court's responsibility to
22 determine whether the opposing party's response to the assertion of
23 a material fact presents a dispute that is genuine. See generally
24 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure
25 § 2725, at 423 (3d ed. 2006). In the present case, Salvino's
26 responses to the MLBP Rule 56.1 Statement require attention to

1 questions of admissibility of evidence and genuineness of dispute.

2 3. Salvino's Objections to Admissibility

3 Many of Salvino's responses to the MLB Rule 56.1
4 Statement, while admitting that the facts asserted by MLB were
5 "undisputed," suggested that the evidence cited to support those
6 facts was inadmissible, stating that MLB's assertions were "not
7 material" and that those assertions (or the documents cited to
8 support them) were hearsay, speculative, or lacked foundation. Its
9 objections were implicitly overruled by the district court. We see
10 no error.

11 Most of the documents cited by MLB in support of its Rule
12 56.1 assertions are MLB business records. Contemporaneous business
13 records made "by, or from information transmitted by, a person with
14 knowledge," and "kept in the course of a regularly conducted
15 business activity" by a business whose "regular practice" it was to
16 make and keep such records, Fed. R. Evid. 803(6), are admissible as
17 an exception to the hearsay rule, see id. The foundation for the
18 admission of the MLB business records was laid in several sworn
19 declarations submitted by MLB with its summary judgment motion.

20 For example, MLB, citing the minutes of a meeting of MLB
21 Club owners and an MLB financial record, stated that in 1987, i.e.,
22 the year in which MLB ceased to rely on LCA as a subagent for
23 purposes of licensing MLB Intellectual Property, MLB's total

1 licensing revenue from sales of products bearing MLB Intellectual
2 Property more than doubled. Salvino responded, "**UNDISPUTED** that the
3 memos and minutes so state. The cited evidence is hearsay and lacks
4 foundation." (Salvino Response to MLBP Rule 56.1 Statement ¶ 26.)
5 However, MLBP's summary judgment motion was accompanied by, inter
6 alia, the sworn declaration of its Senior Vice President and General
7 Counsel Ethan G. Orlinsky ("Orlinsky Declaration"), stating, "of
8 [his] own personal knowledge," that those documents were "true and
9 correct copies of documents that were maintained as records at MLBP.
10 These documents were created and/or received in the ordinary course
11 of MLBP's business, and were retained as part of MLBP's standard
12 business practice" (Orlinsky Declaration dated August 22, 2003,
13 ¶¶ 1, 21). Hence, Salvino's objections lacked merit.

14 The Orlinsky Declaration likewise identified as such a
15 business record an October 24, 1988 memorandum from an MLBP vice
16 president to MLB Commissioner-elect Bart Giamatti, attaching a
17 status summary ("October 24, 1988 Status Summary" or "Status
18 Summary") with respect to MLBP licensing and the progress achieved
19 since "[r]etail [p]roduct [l]icensing was brought 'in-house' in
20 January 1987" after "17 years [of licensing through] Licensing
21 Company of America (Division of Warner Communications)." (October
22 24, 1988 Status Summary at 2.) The Status Summary stated, inter
23 alia, that since January 1, 1987, MLBP's licensees had increased
24 from 100 to 250 and that the number of licensee audits had increased

1 from 4 to 36 per year. (See id.) In response to an assertion in
2 the MLBP Rule 56.1 Statement, citing the Status Summary, that
3 "[b]etween January 1, 1987 and October 24, 1988, MLBP increased the
4 number of its licensees from 100 to 250," Salvino stated as follows:

5 **UNDISPUTED** that the documents so state, but not
6 material. Any increase was caused in large part by
7 the logo licensing boom that was prevalent at the
8 time, not by the pooling arrangement, and MLBP does
9 not point to any evidence that increases came at the
10 expense of competitive rivals in a relevant market.
11 See Guth Decl. ¶ 4. Moreover, even if it is
12 economical to streamline some functions, it does not
13 justify an agreement by MLB teams to forego their
14 own output and to divide profits rather than
15 compete. (Id. ¶¶ 8-11.)[] The cited evidence is
16 hearsay, speculation and lacks foundation.

17 (Salvino Response to MLBP Rule 56.1 Statement ¶ 28.) These
18 objections fail in light of the Orlinsky Declaration and the nature
19 of the document.

20 Similarly, in response to MLBP's quotation from a 1984
21 MLBP memorandum describing the early licensing experiences of MLBP
22 and its predecessor, stating that prior to centralization of
23 licensing, Club marks were largely unprotected and had little
24 commercial value, Salvino stated that it was "**UNDISPUTED** that the
25 memo so states. The memo, however, is hearsay and lacks
26 foundation." (Salvino Response to MLBP Rule 56.1 Statement ¶ 19.)
27 However, MLBP's summary judgment motion was accompanied by the sworn
28 declaration of Joseph L. Podesta, who had been an employee of MLBP
29 from November 1972 until October 1985, serving as its president from
30 1975 to October 1985. (See Declaration of Joseph L. Podesta dated

1 August 21, 2003, ¶ 2.) In his declaration, Podesta stated that as
2 MLB's president, he had helped to prepare the memorandum "in the
3 ordinary course of MLB's business" for the purpose of helping to
4 "educate Mr. Peter Ueberroth, the incoming Commissioner of Baseball,
5 about the operations and history of MLB"; Podesta had "signed the
6 report . . . and kept a copy in [his] files at MLB." (Id. ¶ 7.)

7 The Orlinsky Declaration also provided the foundation for
8 the admission of other MLB business records, including the minutes
9 of the 1966 MLB executive committee meeting at which
10 representatives of the Coca-Cola Company stated that that company's
11 earlier under-the-cap promotion with the NFL had excluded baseball
12 because MLB lacked centralized licensing capability (see Part I.B.2.
13 above). Although Salvino objected on hearsay and foundation grounds
14 to these minutes (see Salvino Response to MLB Rule 56.1 Statement
15 ¶ 22), the minutes themselves plainly are admissible as a business
16 record under Rule 803(6). Further, considering the minutes'
17 description of the Coca-Cola representatives' statements solely as
18 proof of what the MLB executive committee was told, we note that
19 those statements do not fall within the definition of hearsay, see
20 Fed. R. Evid. 801(c).

21 Finally, we note that Salvino's responses to nearly all of
22 MLB's Rule 56.1 assertions were accompanied by the statement that
23 the fact asserted was "not material," a characterization reflecting
24 Salvino's contention that the challenged practice should not be the

1 subject of rule-of-reason analysis. Because we conclude, for the
2 reasons discussed in Part II.C. below, that the rule of reason
3 provided the appropriate analytical framework, Salvino's materiality
4 objection also lacks merit.

5 4. Genuineness of Dispute

6 While a district court, in considering a motion for
7 summary judgment, is not to resolve factual issues, the court must
8 determine whether a Rule 56.1 response does in actuality present a
9 dispute that is genuine. An objection to the admissibility of a
10 document is not the equivalent of a contention that the document's
11 contents are untrue. Thus, as to the "undisputed" MLBP assertions
12 to which Salvino made objections, which as noted in the previous
13 section were properly rejected, Salvino's responses were clearly
14 insufficient to show a genuine issue to be tried as to the matters
15 described in the documents.

16 In addition, the district court found that Salvino's
17 responses to several other MLBP assertions, although commencing with
18 the word "disputed," did not evince a dispute that was genuine.
19 Those responses often were followed by statements that in effect
20 admitted all or most of the MLBP assertion. For example, MLBP
21 asserted that

22 [i]n the late 1970's, MLBP began the process of
23 clearing the rights to the MLB Club logos and other
24 trademarks in various countries so that they could
25 be licensed for use on retail products sold in those

1 countries.
2 (MLBP Rule 56.1 Statement ¶ 32.) Salvino's response--in addition to
3 objecting on grounds that the document cited by MLBP for that
4 proposition was hearsay, speculative, and lacked foundation--was as
5 follows:

6 **DISPUTED** and not material. While the cited
7 declarations so state, even if the cited economies
8 can be achieved by collectivizing certain
9 activities, it does not justify an agreement by MLB
10 teams to forego their own output and to divide
11 profits rather than compete. (See Guth Decl.
12 ¶ 8-11.)

13 (Salvino Response to MLBP Rule 56.1 Statement ¶ 32.) Similarly, as
14 to MLBP's assertion that "[w]ithin a few years after 1986, MLBP
15 caused the amount of revenues generated by MLB-licensed product to
16 triple" (MLBP Rule 56.1 Statement ¶ 29), Salvino's response, in
17 addition to making hearsay and foundation objections, stated:

18 **DISPUTED** and not material. Any increase was
19 caused in large part by the logo licensing boom that
20 was prevalent at the time, not by the pooling
21 arrangement, and MLBP does not point to any evidence
22 that increases came at the expense of competitive
23 rivals in a relevant market. See Guth Decl. ¶ 4.
24 Moreover, even if it is economical to streamline
25 some functions, it does not justify an agreement by
26 MLB teams to forego their own output and to divide
27 profits rather than compete. (Id. ¶¶ 8-11.)

28 (See Salvino Response to MLBP Rule 56.1 Statement ¶ 29.)

29 The district court considered these responses, as well as
30 certain other similar responses relating to the substantial increase
31 in the number of licenses granted for MLB Intellectual Property, not
32 to present a factual dispute that was genuine. The court stated
33 that

1 Salvino does not dispute MLBPA's stated increase in
2 MLBPA-licensed products since MLBPA took over
3 licensing authority for MLB intellectual property.
4 (MLBPA 56.1 Stmt. ¶¶ 26-36.) Salvino only takes
5 issue with MLBPA's proffered reasons for the
6 increase, i.e., it claims the increase is a product
7 of the "licensing boom" and not a result of MLBPA's
8 centralized process. (Salvino Resp. to MLBPA 56.1
9 Stmt. ¶ 29.)

10 420 F.Supp.2d at 220-21. The district court's view that Salvino did
11 not genuinely dispute the assertion that there was an increase in
12 MLBPA-licensed products after MLBPA became the Clubs' exclusive
13 licensing agent for MLB Intellectual Property to be used on all
14 retail products was a reasonable interpretation of Salvino's
15 responses. In any event, Salvino does not challenge that ruling in
16 its briefs on appeal.

17 B. Modes of Analysis Under the Sherman Act

18 By its terms, § 1 of the Sherman Act prohibits "[e]very
19 contract, combination in the form of trust or otherwise, or
20 conspiracy, in restraint of trade or commerce among the several
21 States." 15 U.S.C. § 1. The Supreme "Court has not taken a literal
22 approach to this language, however," but instead "has long
23 recognized that Congress intended to outlaw only unreasonable
24 restraints." Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) ("Dagher")
25 (internal quotation marks omitted) (emphasis in Dagher). Thus,
26 "th[e] Court presumptively applies rule of reason analysis, under
27 which antitrust plaintiffs must demonstrate that a particular

1 contract or combination is in fact unreasonable and anticompetitive
2 before it will be found unlawful." Id.

3 There are, however, "certain agreements or practices which
4 because of their pernicious effect on competition and lack of any
5 redeeming virtue are conclusively presumed to be unreasonable and
6 therefore illegal without elaborate inquiry as to the precise harm
7 they have caused or the business excuse for their use." Northern
8 Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958); see, e.g.,
9 State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("Some types of
10 restraints . . . have such predictable and pernicious
11 anticompetitive effect, and such limited potential for
12 procompetitive benefit, that they are deemed unlawful per se.").
13 Among the practices that have been held to be per se illegal are
14 geographic division of markets, see, e.g., United States v. Topco
15 Associates, Inc., 405 U.S. 596 (1972), and horizontal price fixing,
16 see, e.g., Arizona v. Maricopa County Medical Society, 457 U.S. 332
17 (1982) ("Maricopa County Medical Society"); see also Leegin Creative
18 Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2717-18, 2725
19 (2007) (vertical agreements setting minimum resale prices are to be
20 analyzed under the rule of reason), overruling Dr. Miles Medical Co.
21 v. John D. Park & Sons Co., 220 U.S. 373 (1911). Such "[p]er se
22 treatment is appropriate '[o]nce experience with a particular kind
23 of restraint enables the Court to predict with confidence that the
24 rule of reason will condemn it.'" State Oil Co., 522 U.S. at 10
25 (quoting Maricopa County Medical Society, 457 U.S. at 344).

1 Per se treatment is not appropriate, however, where the
2 economic and competitive effects of the challenged practice are
3 unclear. "To justify a per se prohibition a restraint must have
4 manifestly anticompetitive effects, . . . and lack . . . any
5 redeeming virtue" Leegin Creative Leather Products, Inc.,
6 127 S. Ct. at 2713 (internal quotation marks omitted). Accordingly,
7 the Supreme Court has repeatedly "'expressed reluctance to adopt per
8 se rules . . . "where the economic impact of certain practices is
9 not immediately obvious.'" Dagher, 547 U.S. at 5 (quoting State
10 Oil Co., 522 U.S. at 10 (quoting FTC v. Indiana Federation of
11 Dentists, 476 U.S. 447, 458-59 (1986) ("Indiana Federation of
12 Dentists"))). "[A] departure from the rule-of-reason standard must
13 be based upon demonstrable economic effect rather than . . . upon
14 formalistic line drawing." Leegin Creative Leather Products, Inc.,
15 127 S. Ct. at 2713 (internal quotation marks omitted) (emphasis
16 added). Thus, "[p]er se liability is reserved for only those
17 agreements that are 'so plainly anticompetitive that no elaborate
18 study of the industry is needed to establish their illegality.'" Dagher,
19 547 U.S. at 5 (quoting National Society of Professional
20 Engineers v. United States, 435 U.S. 679, 692 (1978)); see, e.g.,
21 Broadcast Music, 441 U.S. at 9 ("[i]t is only after considerable
22 experience with certain business relationships that courts classify
23 them as per se violations" (internal quotation marks omitted)).

24 [C]ombinations[] such as . . . joint ventures . . .
25 hold the promise of increasing a firm's efficiency
26 and enabling it to compete more effectively.

1 Accordingly, such combinations are judged under a
2 rule of reason, an inquiry into market power and
3 market structure designed to assess the
4 combination's actual effect.

5 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768
6 (1984).

7 Under rule-of-reason analysis, as described originally in
8 Chicago Board of Trade v. United States, 246 U.S. 231 (1918), and
9 reiterated by the Supreme Court many times since, see, e.g.,
10 Maricopa County Medical Society, 457 U.S. at 343 n.13,

11 [t]he true test of legality is whether the restraint
12 imposed is such as merely regulates and perhaps
13 thereby promotes competition or whether it is such
14 as may suppress or even destroy competition. To
15 determine that question the court must ordinarily
16 consider the facts peculiar to the business to which
17 the restraint is applied; its condition before and
18 after the restraint was imposed; the nature of the
19 restraint and its effect, actual or probable. The
20 history of the restraint, the evil believed to
21 exist, the reason for adopting the particular
22 remedy, the purpose or end sought to be attained,
23 are all relevant facts. This is not because a good
24 intention will save an otherwise objectionable
25 regulation or the reverse; but because knowledge of
26 intent may help the court to interpret facts and to
27 predict consequences.

28 Chicago Board of Trade, 246 U.S. at 238. Thus, "[a]s its name
29 suggests, the rule of reason requires the factfinder to decide
30 whether under all the circumstances of the case the restrictive
31 practice imposes an unreasonable restraint on competition," Maricopa
32 County Medical Society, 457 U.S. at 343, i.e., "whether the
33 challenged agreement is one that promotes competition or one that
34 suppresses competition," National Society of Professional Engineers,

1 435 U.S. at 691; see, e.g., Continental T.V., Inc. v. GTE Sylvania
2 Inc., 433 U.S. 36, 49 (1977) ("Under this rule, the factfinder
3 weighs all of the circumstances of a case . . .").

4 Under the rule of reason, the plaintiffs bear
5 an initial burden to demonstrate the defendants'
6 challenged behavior had an actual adverse effect on
7 competition as a whole in the relevant market. . . .
8 Because the antitrust laws protect competition as a
9 whole, evidence that plaintiffs have been harmed as
10 individual competitors will not suffice. . . . If
11 the plaintiffs satisfy their initial burden, the
12 burden shifts to the defendants to offer evidence of
13 the pro-competitive effects of their
14 agreement. . . . Assuming defendants can provide
15 such proof, the burden shifts back to the plaintiffs
16 to prove that any legitimate competitive benefits
17 offered by defendants could have been achieved
18 through less restrictive means. . . . Ultimately,
19 the factfinder must engage in a careful weighing of
20 the competitive effects of the agreement--both pro
21 and con--to determine if the effects of the
22 challenged restraint tend to promote or destroy
23 competition.

24 Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.,
25 386 F.3d 485, 506-07 (2d Cir. 2004) (internal quotation marks
26 omitted) (emphasis in original).

27 In a few cases, the Supreme Court has ruled that the
28 challenged practice should neither be held a per se violation of the
29 Sherman Act nor be subjected to full-blown rule-of-reason analysis,
30 but rather should be held illegal on the basis of an "abbreviated or
31 'quick-look' [rule-of-reason] analysis" because "the great
32 likelihood of anticompetitive effects can easily be ascertained."
33 California Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999)
34 ("California Dental"). Thus, in National Society of Professional

1 Engineers, the Court, faced with the society's absolute ban on
2 competitive bidding, ruled that "no elaborate industry analysis
3 [wa]s required to demonstrate the anticompetitive character of such
4 an agreement." 435 U.S. at 692. The Court reached the same
5 conclusion with respect to a plan that expressly limited the number
6 of college football games that could be televised and fixed a
7 minimum price for those games, see National Collegiate Athletic
8 Ass'n v. Board of Regents of the University of Oklahoma, 468 U.S.
9 85, 109-10 (1984) ("NCAA"), and with respect to a horizontal
10 agreement among dentists to "withhold from their customers a
11 particular service that they desire[d]," Indiana Federation of
12 Dentists, 476 U.S. at 459. The California Dental Court noted that
13 [i]n each of these cases, which have formed the
14 basis for what has come to be called abbreviated or
15 "quick-look" analysis under the rule of reason, an
16 observer with even a rudimentary understanding of
17 economics could conclude that the arrangements in
18 question would have an anticompetitive effect on
19 customers and markets.

20 California Dental, 526 U.S. at 770.

21 The Court has applied quick-look analysis only "to
22 business activities that are so plainly anticompetitive that courts
23 need undertake only a cursory examination before imposing antitrust
24 liability." Dagher, 547 U.S. at 7 n.3. The fact that a practice
25 may have a tangential relationship to the price of the commodity in
26 question does not mean that a court should dispense with a full
27 rule-of-reason analysis. In California Dental itself, the Court
28 considered an association rule that required member dentists to make

1 certain disclosures in any advertising of discount prices, and it
2 found that quick-look analysis was inappropriate. While accepting
3 the propositions "that price advertising is fundamental to price
4 competition" and that "[r]estrictions on the ability to advertise
5 prices normally make it more difficult for consumers to find a lower
6 price and for dentists to compete on the basis of price," 526 U.S.
7 at 773 (internal quotation marks omitted), the Court found that "any
8 anticompetitive effects of [these] restraints are far from
9 intuitively obvious," and, therefore, "the rule of reason demands a
10 more thorough enquiry into the consequences of those restraints,"
11 id. at 759. If an arrangement "might plausibly be thought to have
12 a net procompetitive effect, or possibly no effect at all on
13 competition," more than a "quick look" is required. Id. at 771.

14 C. The Record in the Present Case

15 In the present case, the district court, as described in
16 Part I.C. above, viewed the centralization in MLBP of MLB
17 Intellectual Property licensing as similar to the practice of
18 blanket licensing the rights to perform copyrighted music, which the
19 Supreme Court in Broadcast Music ruled was not per se unlawful but
20 was to be subjected to rule-of-reason analysis. Salvino contends
21 that the district court should instead have used NCAA as its
22 analytical guide (see Salvino brief on appeal at 19-28), arguing
23 that "[t]he conduct at issue here [constitutes] naked horizontal
24 price and output restrictions [that] traditionally fall[] within the

1 per se proscriptions" (id. at 20).

2 We reject all of Salvino's contentions. We discuss the
3 comparisons with Broadcast Music and NCAA in sections 3 and 4 below,
4 but we begin by examining the nature of Salvino's contentions as to
5 "output" and "price."

6 1. Salvino's "naked output . . . restrictions" Contention

7 By "output," Salvino refers to licenses for the use of the
8 MLB Clubs' intellectual property. (See, e.g., Salvino Response to
9 MLBP Rule 56.1 Statement ¶ 46 (in making MLBP their exclusive
10 licensor, the Clubs "forego their own output"); id. ¶¶ 27-43, 47-50,
11 52-53 (same).) But while Salvino calls the Clubs' exclusivity
12 agreement a "naked output . . . restriction[]" (Salvino brief on
13 appeal at 6)--asserting that there is an "express agreement to
14 reduce output" (id. at 12 (emphasis added)) and that the agreement
15 "restricts output by its terms" (id. at 11 (emphasis added))--and
16 repeatedly characterizes the Clubs' agreement as one to reduce the
17 number of licenses (see, e.g., id. at 6, 8-9, 20, 28), Salvino has
18 pointed to no evidence to support its characterizations. It has not
19 cited to any term of the Agency Agreement or to any other agreement.
20 Nor is a reduction in output implicit in the Agency Agreement. The
21 Clubs' agreement to make MLBP their exclusive licensor does not by
22 its express terms restrict or necessarily reduce the number of
23 licenses to be issued; it merely alters the identity of the
24 licenses' issuer.

1 There is an assertion that Salvino himself was denied an
2 MLBP license in 1999. (See Salvino Response to MLBP Rule 56.1
3 Statement ¶ 127.) But even assuming that Salvino completed the
4 application for that license (a matter as to which there is
5 dispute), a mere refusal to grant a license to Salvino would not
6 suffice to support a claim of antitrust violation. "The antitrust
7 laws were enacted for 'the protection of competition, not
8 competitors.'" Atlantic Richfield Co. v. USA Petroleum Co., 495
9 U.S. 328, 338 (1990) (quoting Brown Shoe Co. v. United States, 370
10 U.S. 294, 320 (1962) (emphases in Brown Shoe)); see, e.g., Brunswick
11 Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

12 Moreover, as set out in Part I.B.2. above, the record in
13 this case does not show any reduction in the licensing of the Clubs'
14 intellectual property; rather MLBP presented evidence that there
15 were sizeable increases. According to this evidence, when MLBP
16 became the Clubs' exclusive licensor in 1987, there were
17 approximately 100 licensees; in the first year thereafter, the
18 number of licensees more than doubled. And in the years since, the
19 number has continued to grow, with MLBP having, at the time of its
20 summary judgment motion in this case, more than 300 licenses
21 outstanding for some 4,000 products in the United States, along with
22 licenses to some 170 licensees for sales of products outside of the
23 United States. As discussed in Part II.A.4. above, the district
24 court permissibly found that, while Salvino took issue with the
25 reasons for the increase in the number of licenses for MLB

1 Intellectual Property, Salvino did not genuinely dispute that these
2 increases had actually occurred.

3 Further, Salvino's disputation as to the reason for the
4 increases in MLB Intellectual Property licenses--it posits that
5 there was simply a boom in consumer demand--is unsupported. The
6 only citation offered by Salvino for its contention was paragraph 4
7 of the Guth Declaration. That paragraph, however, did not state
8 that an increase in demand was the cause of MLB's increased
9 revenues, or indeed that there was in fact an increase in demand.
10 Rather, Guth stated that MLB's "evidence of substantial increases
11 in output of number of license arrangements and in MLB revenues
12 over a period of years would appear to be more consistent
13 with a general increase in consumer interest in licensed retail
14 merchandise of all sorts." (Guth Decl. ¶ 4 (emphasis added).) This
15 statement is vague and conclusory. And even if "more consistent
16 with" an increase in consumer interest is interpreted as "more
17 likely caused by" such an increase in demand, Salvino failed to
18 adduce any evidence to support such a hypothesis as to causation.
19 Indeed, Guth also suggested, alternatively, that MLB's increase in
20 revenues "may well not reflect higher demand," but may instead
21 reflect higher prices resulting from "an overall shift out in demand
22 for such merchandise" (id. (first emphasis in original; second
23 emphasis ours)). Guth's Declaration was necessarily equivocal
24 because he had not performed any analyses or empirical studies (see,
25 e.g., Guth Dep. at 23-24, 34-36, 46, 50, 137-38). Guth stated in

1 his deposition that he thought it would be "appropriate" to conduct
2 an empirical study of "the possible extent of economic benefits" of
3 the MLBP arrangement (id. at 23) and that "empirical analysis of the
4 relevan[t] market would at some point be a crucial element in
5 reaching economic opinions about the ultimate cost and benefits of
6 the arrangements at issue in this proceeding" (id. at 24). But
7 because no such studies or analyses were ever performed, Guth's
8 opinions were not supported by evidence and were conjectural.
9 Conclusory statements, conjecture, and speculation are insufficient
10 to create a genuine factual dispute. See, e.g., Bridgeway Corp. v.
11 Citibank, 201 F.3d at 142.

12 In sum, Salvino has pointed to no evidence in the record
13 to support its contention that there has been a horizontal agreement
14 to limit "output," and the only evidence of record--which Salvino
15 has not genuinely disputed--is that output has greatly increased.
16 We turn now to Salvino's contention that there has been a horizontal
17 agreement on "price."

18 2. The Nature of the "Price" Agreement Challenged By Salvino

19 While Salvino contends that its challenge concerns "naked
20 . . . price restrictions" (Salvino brief on appeal at 6; see, e.g.,
21 id. at 8-9, 20, 28), it is important to focus on precisely what
22 conduct Salvino characterizes as "price" restrictions. Although
23 price usually refers to the amount of money a seller charges a buyer
24 for the product, Salvino has made no assertions that there is an

1 agreement as to the fees that the licensees of the MLB Intellectual
2 Property are required to pay MLB. Instead, throughout this
3 litigation, the conduct that Salvino has contended is per se illegal
4 price fixing is the Clubs' agreement to share equally in the profits
5 from MLB's licensing of the Clubs' intellectual property.

6 Thus, Salvino's complaint in the California action, which
7 became its counterclaims in the present action, alleged that the
8 Agency Agreement "reduced and suppressed price competition"

9 [b]ecause [MLBP] distributes the income from its
10 exploitation of trademarks equally to each member
11 club--even though a relatively small number of clubs
12 generate the bulk of the revenue

13 (Salvino's California action complaint ¶ 13 (emphasis added).)
14 Similarly, Salvino's responses to MLB's Rule 56.1 Statement
15 contended that most of MLB's factual assertions (as to, e.g.,
16 MLB's operations, competition in the market for licensing of
17 intellectual property, and the need for Major League Baseball to
18 have a centralized licensing agent) were "not material" because the
19 Clubs had entered into an agreement for the equal "sharing [of] all
20 revenues." (Salvino Responses to MLB Rule 56.1 Statement ¶¶ 55,
21 64, 65, 70-81, 87-91; see also id. ¶¶ 27-43, 50, 52, 53 ("an
22 agreement . . . to divide profits"); id. ¶¶ 20-22 (an agreement "for
23 an equal fixed share of revenues generated").)

24 And in this Court, Salvino's briefs likewise challenge the
25 Clubs' agreement to receive the proceeds of MLB's licensing in
26 equal shares:

1 [T]he Agency Agreement among the MLB teams and
2 MLB[P] is a horizontal agreement to restrict output
3 of MLB teams and fix the compensation they
4 receive. . . . Presumptively, this raises the issue
5 of per se liability, for "[h]orizontal agreements
6 among competing sellers to fix prices or restrict
7 output are, absent more, per se violations of
8 Section 1 of the Sherman Act."

9 (Salvino reply brief on appeal at 6 (quoting Freedom Holdings Inc.
10 v. Spitzer, 357 F.3d 205, 225 (2d Cir. 2004)) (emphasis ours); see
11 also Salvino brief on appeal at 25 ("MLBP, like the NCAA
12 'has fixed the minimum, maximum and actual price which will be paid
13 to [its member teams]'" (quoting NCAA, 468 U.S. at 106 n.30)
14 (brackets in Salvino brief)); Salvino brief on appeal at 25-26 (the
15 Clubs have agreed to make MLBP their exclusive licensor "in exchange
16 for a uniform fixed price--an equal share of the revenues generated
17 by MLBP, regardless of contribution" (emphasis added)).)

18 Thus, it is clear that what Salvino means by "a uniform
19 fixed price" is in actuality "an equal share of the [licensing]
20 revenues" (id.). As there is no claim by Salvino of an agreement
21 with respect to the prices to be charged to licensees, the so-called
22 "price" restriction is not in fact an agreement on "price" but
23 rather an agreement for the sharing of profits.

24 With the recognition that what Salvino calls a "price"
25 restriction is in actuality an agreement for profit sharing, and
26 bearing in mind that, as discussed in the preceding section, there
27 is no genuine dispute that "output" since MLBP became the Clubs'
28 exclusive licensing agent with respect to all retail products

1 bearing Club intellectual property has increased rather than
2 decreased, we turn to Salvino's contention that the district court
3 erred in finding this case similar to Broadcast Music, instead of
4 finding the present arrangement per se illegal, or illegal after a
5 quick look, based on NCAA.

6 3. The Broadcast Music Comparison

7 In Broadcast Music, the Supreme Court considered antitrust
8 claims by Columbia Broadcasting System, Inc. ("CBS"), against
9 Broadcast Music, Inc., and the American Society of Composers,
10 Authors and Publishers (collectively the "organizations"), with
11 respect to the organizations' respective issuance of blanket
12 performance licenses to the CBS television network, i.e., licenses
13 to perform any, some, or all of the copyrighted musical compositions
14 owned by that organization's members or affiliates. CBS asserted
15 that the issuance of blanket licenses in exchange for fees
16 negotiated by the respective organizations was price fixing, and
17 hence per se illegal. The district court, following a trial on
18 issues of liability, ruled that blanket licensing did not fall
19 within the per se rule; the court of appeals reversed, holding that
20 blanket licensing was a form of price fixing and thus was per se
21 illegal. The Supreme Court reversed the court of appeals, holding
22 that blanket licensing is not per se illegal, but rather "should be
23 subjected to a more discriminating examination under the rule of
24 reason," 441 U.S. at 24, because it cannot be said that "the

1 practice facially appears to be one that would always or almost
2 always tend to restrict competition and decrease output," rather
3 than "one designed to increase economic efficiency and render
4 markets more, rather than less, competitive," id. at 19-20 (internal
5 quotation marks omitted). The Supreme Court stated:

6 The blanket license, as we see it, is not a
7 "naked restrain[t] of trade with no purpose except
8 stifling of competition," . . . but rather
9 accompanies the integration of sales, monitoring,
10 and enforcement against unauthorized copyright
11 use. . . . [The organizations] and the blanket
12 license developed together out of the practical
13 situation in the marketplace: thousands of users,
14 thousands of copyright owners, and millions of
15 compositions. Most users want unplanned, rapid, and
16 indemnified access to any and all of the repertory
17 of compositions, and the owners want a reliable
18 method of collecting for the use of their
19 copyrights. Individual sales transactions in this
20 industry are quite expensive, as would be individual
21 monitoring and enforcement, especially in light of
22 the resources of single composers. Indeed, as both
23 the Court of Appeals and CBS recognize, the costs
24 are prohibitive for licenses with individual radio
25 stations, nightclubs, and restaurants, . . . and it
26 was in that milieu that the blanket license arose.

27 A middleman with a blanket license was an
28 obvious necessity if the thousands of individual
29 negotiations, a virtual impossibility, were to be
30 avoided. Also, individual fees for the use of
31 individual compositions would presuppose an
32 intricate schedule of fees and uses, as well as a
33 difficult and expensive reporting problem for the
34 user and policing task for the copyright owner.

35 441 U.S. at 20 (quoting White Motor Co. v. United States, 372 U.S.
36 253, 263 (1963)).

37 Although individual copyright owners remained free to
38 grant direct licenses for the performance of their works, the

1 organizations

2 reduce[d] costs absolutely by creating a blanket
3 license that is sold only a few, instead of
4 thousands, of times, and that obviates the need for
5 closely monitoring the networks to see that they do
6 not use more than they pay for. [The organizations]
7 also provide[d] the necessary resources for blanket
8 sales and enforcement, resources unavailable to the
9 vast majority of composers and publishing houses.

10 441 U.S. at 21 (footnotes omitted). The Court stated that

11 [t]his substantial lowering of costs, which is
12 of course potentially beneficial to both sellers and
13 buyers, differentiates the blanket license from
14 individual use licenses. The blanket license is
15 composed of the individual compositions plus the
16 aggregating service. Here, the whole is truly
17 greater than the sum of its parts; it is, to some
18 extent, a different product.

19 Id. at 21-22. The Court concluded,

20 we have some doubt--enough to counsel against
21 application of the per se rule--about the extent to
22 which this practice threatens the "central nervous
23 system of the economy," . . . that is, competitive
24 pricing as the free market's means of allocating
25 resources. Not all arrangements among actual or
26 potential competitors that have an impact on price
27 are per se violations of the Sherman Act or even
28 unreasonable restraints. Mergers among competitors
29 eliminate competition, including price competition,
30 but they are not per se illegal, and many of them
31 withstand attack under any existing antitrust
32 standard. Joint ventures and other cooperative
33 arrangements are also not usually unlawful, at least
34 not as price-fixing schemes, where the agreement on
35 price is necessary to market the product at all.

36 Id. at 23 (quoting United States v. Socony-Vacuum Oil Co., 310 U.S.
37 150, 226 n.59 (1940)) (emphases added).

38 Salvino seeks to distinguish Broadcast Music on the basis
39 that (1) the individual copyright owners granted the organizations

1 only nonexclusive rights to license the performance of their works
2 and remained free to grant performing rights licenses directly to
3 users; (2) the blanket license granted by the organizations was a
4 package product that no individual copyright owner could offer; and
5 (3) in Broadcast Music, "[i]t was found that the arrangement
6 actually increased output and facilitated competition" (Salvino
7 brief on appeal at 18). Only the first of these factors provides a
8 distinction, but it is a distinction that loses significance in the
9 context of the differences between the music and sports industries.

10 Taking the three factors in reverse order, we note first
11 that Salvino's statement that the Broadcast Music Court found that
12 blanket licensing "increased output and facilitated competition"
13 finds little support in the Supreme Court's opinion. If by
14 "increased output," Salvino means that there were in fact more music
15 performance licenses, the opinion squarely contradicts Salvino's
16 statement. Although "there [we]re no practical impediments
17 preventing direct dealing by the television networks if they so
18 desire[d, h]istorically they ha[d] not done so." Broadcast Music,
19 441 U.S. at 12. Indeed, until the Broadcast Music lawsuit, CBS had
20 never sought any kind of performance license other than blanket
21 licenses from the organizations. Accordingly, there was no
22 "increased output" in the sense of the number of licenses granted.
23 The Court itself used the term "output" in the music industry to
24 refer to the creation of musical compositions and merely noted that
25 blanket licensing was unlikely to cause composers to cease producing

1 compositions. See id. at 22 n.40.

2 Further, in the present case, as discussed in Part II.C.1.
3 above, there has been no evidence of any reduction in output.
4 Instead, since MLBP became the Clubs' exclusive licensing agent for
5 all retail products bearing Club intellectual property, the number
6 of licenses granted has multiplied.

7 Nor do we see either (a) support for Salvino's suggestion
8 that the Broadcast Music Court held blanket licensing to have
9 "facilitated competition" (Salvino brief on appeal at 18) or (b) a
10 meaningful distinction between Broadcast Music and the present case
11 with respect to what in fact was "facilitated." The availability of
12 blanket licenses had not led to direct licensing by individual
13 copyright owners; indeed, the Broadcast Music Court stated that to
14 the extent that the blanket license is a different product, the
15 organizations had created "a market in which individual composers
16 are inherently unable to compete fully effectively," 441 U.S. at 23.
17 What the blanket license was held to have facilitated was "dealings
18 between copyright owners and those who desire[d] to use their
19 music," id. at 10--much in the same way that MLBP's licensing
20 activities facilitate the use of the Clubs' intellectual property by
21 those who desire to use it on products they wish to market.

22 The second distinction urged by Salvino is the fact that
23 the blanket license at issue in Broadcast Music was a product that
24 no single copyright owner could offer. But this fact reveals not a
25 difference but a similarity. MLBP can offer a license that covers

1 all of the intellectual property of all of the MLB Clubs; no one
2 Club could offer such a license, for no Club has the right to
3 license the intellectual property of any other. Accordingly, even
4 if direct licensing for retail products were available from each
5 Club, any purveyor of memorabilia who wanted to offer products
6 bearing the intellectual property of more than one Club could not
7 obtain the necessary authorization from a single Club. Only MLB
8 can offer licenses to use the intellectual property of more than one
9 Club, and it can grant a license to use any, some, or all of the
10 Clubs' intellectual property. Accordingly, MLB offers a large
11 number of products that the individual intellectual property owners
12 cannot match.

13 Finally, as discussed in Part I.B.2. above, the Clubs
14 retain only limited rights to grant licenses directly, e.g., with
15 respect to product giveaways in their home stadia and activities
16 such as cruises and fantasy camps; they have given up the right to
17 license products using their intellectual property for retail sales,
18 making MLB their exclusive licensing agent with respect to those
19 products. Thus, it is true, as Salvino argues, that the rights of
20 the individual MLB Clubs to license their own respective
21 intellectual property are more limited than the unfettered direct
22 licensing rights of the copyright owners in Broadcast Music. We
23 conclude that this distinction is insignificant, however, in light
24 of the fact that the MLB Clubs exist as members of a sports league,
25 and their interests are interdependent. That interdependence and

1 Major League Baseball's need for competitive balance among the Clubs
2 distinguish the Clubs from the individual composers and publishers
3 of music who were the subject of Broadcast Music; those factors are
4 not characteristic of the music industry. And those factors, among
5 others, discussed in Part II.C.5. below, plainly foreclose the
6 imposition of per se or quick-look liability.

7 4. The NCAA Comparison

8 Salvino contends that "NCAA . . . is . . . the yardstick
9 that should have been used by the court to evaluate the arrangement
10 at issue" in the present case. (Salvino brief on appeal at 19.) We
11 disagree, as we find the circumstances in NCAA to be different from
12 those here in every meaningful respect.

13 In NCAA, the Supreme Court considered rules of the
14 National Collegiate Athletic Association ("NCAA") with respect to
15 the televising of college football games. The NCAA had entered into
16 contracts with American Broadcasting Companies ("ABC") and CBS,
17 permitting those networks to broadcast such games, and had entered
18 into a contract with Turner Broadcasting System, Inc. ("TBS"), for
19 the cablecasting of such games. The NCAA did not license any other
20 network, and the NCAA plan forbade its member colleges to enter into
21 agreements for the televising of their games on any other network or
22 any local station. See NCAA, 468 U.S. at 91-93, 105 n.29.

23 The NCAA plan set an absolute maximum on the number of
24 games that could be broadcast. It also contained "appearance

1 limitations" with respect to each two-year period covered by the
2 network contracts. The number of times that a given college could
3 have its football games televised was limited to six, of which no
4 more than four could be televised nationally. Thus, the NCAA plan
5 limited both the total amount of televised intercollegiate football
6 and the number of games that could be televised for any one team.
7 See generally id. at 92-94.

8 The per-telecast prices paid by the networks to the NCAA
9 were fixed. For example, the ABC television network paid fees of
10 \$600,000 for each of the 12 national games it telecast during the
11 1981 regular fall season, and \$426,779 for each of the 46 regional
12 telecasts in 1980. Id. at 93 n.10. Except for the price
13 differences between national and regional telecasts, the colleges
14 whose games were televised received equal payments for those
15 telecasts.

16 The district court, after a full trial, found that the
17 NCAA plan violated § 1 of the Sherman Act by, inter alia, fixing the
18 prices for particular telecasts and placing artificial limits on the
19 televising of college football. It found that but for the NCAA
20 plan, more college football games would be televised. The court of
21 appeals affirmed, ruling that the NCAA plan constituted price fixing
22 and hence was per se illegal.

23 The Supreme Court affirmed, but it ruled that the plan
24 should not have been held illegal per se; it should have been
25 analyzed under the rule of reason. The Court stated that

1 [t]here can be no doubt that the challenged
2 practices of the NCAA constitute a "restraint of
3 trade" in the sense that they limit members' freedom
4 to negotiate and enter into their own television
5 contracts. In that sense, however, every contract
6 is a restraint of trade, and as we have repeatedly
7 recognized, the Sherman Act was intended to prohibit
8 only unreasonable restraints of trade.

9 NCAA, 468 U.S. at 98. Noting that Continental T.V., Inc., 433 U.S.
10 at 51-57, indicated that "a restraint in a limited aspect of a
11 market may actually enhance marketwide competition," and that
12 "Broadcast Music squarely holds that a joint selling arrangement may
13 be so efficient that it will increase sellers' aggregate output and
14 thus be procompetitive," the NCAA Court stated that

15 [t]hus, despite the fact that this case involves
16 restraints on the ability of member institutions to
17 compete in terms of price and output, a fair
18 evaluation of their competitive character requires
19 consideration of the NCAA's justifications for the
20 restraints.

21 NCAA, 468 U.S. at 103.

22 Accordingly, the Supreme Court proceeded to analyze the
23 NCAA plan under the rule of reason. In so doing, it concluded that
24 the plan unreasonably restrained competition; however, few of the
25 factors relied on by the Court to reach that conclusion are present
26 with respect to Salvino's claim against MLBP.

27 The Supreme Court found that the NCAA plan was
28 anticompetitive under rule-of-reason analysis because, inter alia,
29 that plan deprived the individual colleges of their freedom to
30 compete for television appearances. Rejecting the NCAA's contention
31 that its plan produced procompetitive efficiencies (see Part

1 II.C.4.c. below), the Court noted that "[t]he NCAA does not . . .
2 act as a selling agent for any school or for any conference of
3 schools"; rather,

4 [t]he essential contribution made by the NCAA's
5 arrangement is to define the number of games that
6 may be televised, to establish the price for each
7 exposure, and to define the basic terms of each
8 contract between the network and a home team.

9 Id. at 113; see id. at 99 (The NCAA plan "places a ceiling on the
10 number of games member institutions may televise," thereby
11 "plac[ing] an artificial limit on the quantity of televised football
12 that is available to broadcasters and consumers."). As a
13 consequence, the Court concluded, "[p]rice is higher and output
14 lower than they would otherwise be, and both are unresponsive to
15 consumer preference." Id. at 107.

16 Except for the fact of revenue sharing, none of the
17 factors emphasized by the Supreme Court in NCAA finds even a
18 superficial parallel in the present case.

19 a. Agency and Output

20 Whereas the Supreme Court noted that the NCAA did not act
21 as a selling agent for those whose product was being sold, precisely
22 the opposite is true of MLBP. A college that wished to have more
23 than six of its games televised within a two-year period was
24 forbidden, rather than helped, to do so by the NCAA. MLBP, in
25 contrast, is the licensing agent for the MLB Clubs; it assists the
26 Clubs in the licensing of their intellectual property.

1 Further, whereas the NCAA plan "create[d] a limitation
2 on output" by limiting the total number of televised games and the
3 number of times any one college's games could be televised, NCAA,
4 468 U.S. at 99, Salvino has not adduced any evidence of a limitation
5 on the number of Club intellectual property licenses available here.
6 MLB does not limit the number of products that may be licensed
7 (although it would doubtless refuse to license a product that it
8 believed would reflect badly on Major League Baseball); indeed, MLB
9 presented evidence that it works with existing and prospective
10 licensees to attempt to develop new products that would use MLB
11 Intellectual Property. Salvino has not adduced any evidence that
12 there is any agreement to limit the number of products that can be
13 licensed or the number of entities to which licenses may be granted.

14 Nor has Salvino pointed to any evidence from which it
15 could reasonably be inferred that any limitation on the number of
16 licenses, licensees, or products bearing MLB Intellectual Property
17 is intended. Rather, as discussed in Parts I.B.2. and II.C.1.
18 above, the business records presented by MLB show precisely the
19 opposite, the desire to increase the business of licensing MLB
20 Intellectual Property.

21 The NCAA Court also noted that output was reduced by the
22 NCAA plan because "only those broadcasters able to bid on television
23 rights covering the entire NCAA can compete." NCAA, 468 U.S. at
24 108. In effect, the NCAA offered only bulk licenses. That fact has
25 no analogy here. Here, a prospective licensee can request and

1 obtain from MLBP a license to use the intellectual property of some
2 or all of the Clubs, or of any single Club.

3 b. Prices and Preferences

4 In finding the NCAA's restrictive television plan
5 anticompetitive because of its restraints on price, the Supreme
6 Court stated that the

7 NCAA has commandeered the rights of its members and
8 sold those rights for a sum certain. In so doing,
9 it has fixed the minimum, maximum and actual price
10 which will be paid to the schools appearing on ABC,
11 CBS and TBS. NCAA has created the mechanism which
12 produces a uniform price for each national telecast,
13 and a uniform price for each regional telecast.
14 Because of the NCAA controls, the price which is
15 paid for the right to televise any particular game
16 is responsive neither to the relative quality of the
17 teams playing the game nor to viewer preference.

18 NCAA, 468 U.S. at 106 n.30 (internal quotation marks omitted)
19 (emphases added). The NCAA Court stated that the fact that, under
20 the conditions imposed by the NCAA, "the market is not responsive to
21 viewer preference," with the result that "[m]any games for which
22 there is a large viewer demand are kept from the viewers, and many
23 games for which there is little if any demand are nonetheless
24 televised," was "[p]erhaps the most pernicious aspect" of the NCAA
25 plan. Id. at 107 n.34 (internal quotation marks omitted).

26 The NCAA price controls and lack of responsiveness to
27 demand find no parallels in the present record. First, a license to
28 use MLB Intellectual Property is not sold "for a sum certain"; the
29 licensing agreements call for licensees to pay MLBP a percentage of

1 the moneys they receive from the sale of their products bearing MLB
2 Intellectual Property. Thus, although the royalty percentages for
3 various types of products may be standardized, the dollar amounts to
4 be paid to MLBP by the licensees are not uniform but instead vary
5 with the licensees' sales.

6 Second, Salvino has presented no evidence to suggest that
7 the licensing of MLB Intellectual Property is not entirely
8 responsive to demand. MLBP does not issue licenses that are not
9 requested; there is no evidence that an entity that wishes to obtain
10 a license for particular intellectual property is required to accept
11 or pay for a license that encompasses other intellectual property as
12 well.

13 Moreover, it may be presumed that a prospective licensee,
14 acting in its own economic self-interest, requests licenses only
15 with respect to products that it believes will be purchased. Thus,
16 MLBP grants licenses that are responsive to the licensees'
17 anticipation of consumer demand.

18 Further, a licensee's actual sales of products bearing MLB
19 Intellectual Property are, by definition, responsive to consumer
20 demand. Assuming that the licensees assess consumer demand
21 correctly, they will sell more products bearing logos of a Club that
22 is more popular--more popular either because of its success on the
23 playing field or because of a dedicated fan base--than products
24 bearing logos of a less popular Club. Accordingly, because the
25 license requires the licensee to pay a percentage of its sales

1 prices, the licensee will pay MLBPA higher dollar amounts with
2 respect to the intellectual property of the more popular Clubs.
3 Thus, the dollar amounts of the license fees received by MLBPA with
4 respect to the intellectual property of the various Clubs are not
5 uniform from Club to Club, but instead are plainly responsive both
6 to the relative quality of the various Major League Baseball teams
7 and to the preferences of the buyers. Indeed, the fact that MLBPA
8 receives proportionately higher revenues with respect to some Clubs
9 than others is the cornerstone of what Salvino complains of as
10 "price" restrictions, i.e., the Clubs' agreement to share the
11 profits equally.

12 Finally, MLBPA-licensed products that are not desired by
13 the consumer are not purchased. And because the licenses granted by
14 MLBPA require payments of percentages of the licensee's sales,
15 products left behind by the consumer do not result in payments to
16 MLBPA or to the Clubs.

17 In sum, unlike the "sum[s] certain" payable in NCAA, the
18 dollar sums payable for licenses to use the Clubs' intellectual
19 property are not uniform and are entirely responsive to the
20 preferences of licensees and retail product consumers.

21 c. Procompetitive Efficiencies

22 The NCAA Court rejected the NCAA's contention that its
23 restrictive television plan produced procompetitive efficiencies.
24 The Court stated several reasons, none of which has been shown to

1 have any applicability here.

2 As a general matter, the Court found that the NCAA's
3 procompetitive-efficiencies contention was not supported by the
4 record because production was restricted, not enhanced, by the plan.
5 "If the NCAA's television plan produced procompetitive efficiencies,
6 the plan would increase output and reduce the price of televised
7 games." NCAA, 468 U.S. at 114.

8 In the present case, as described in Parts I.B.2.,
9 II.C.1., and II.C.3. above, the record shows that, similarly to the
10 blanket licensing at issue in Broadcast Music, centralization of the
11 licensing and protection of MLB Intellectual Property has produced
12 many cost-savings and efficiencies. And, in contrast to the effect
13 of the NCAA plan, as discussed in Parts I.B.2. and II.C.1. above,
14 since the Clubs made MLBP their exclusive licensing agent for all
15 retail products bearing MLB Intellectual Property, the number of
16 licenses and licensees has multiplied.

17 Moreover, unlike the record in NCAA, the present record
18 contains no facts to support Salvino's hypothesis that if MLBP were
19 not the Clubs' exclusive licensor with respect to retail products,
20 even more licenses would be granted. When Salvino's economist,
21 Guth, was asked at his deposition whether in his opinion there would
22 be more licenses if the Clubs were allowed to license directly (see
23 Guth Dep. at 136-37), he stated, "I can't give you a straight yes or
24 no answer," because "that's a question that needs to be explored
25 with some empirical analysis" (id. at 137). Guth, however, had

1 conducted no empirical analyses. (See id. at 137-38.)

2 The NCAA Court also rejected, for two reasons, the NCAA's
3 procompetitive-efficiencies contention that rested on the
4 proposition that the NCAA had a legitimate and important interest in
5 "maintaining a competitive balance among amateur athletic teams."
6 NCAA, 468 U.S. at 117. First, the Court noted that there was no
7 real interdependence among the college teams, nor indeed "any
8 readily identifiable group of competitors," id. at 118, such as to
9 require steps to maintain a competitive balance.

10 The NCAA does not claim that its television
11 plan has equalized or is intended to equalize
12 competition within any one league. The plan is
13 nationwide in scope and there is no single league or
14 tournament in which all college football teams
15 compete.

16 Id. at 117-18 (footnote omitted). Second, the Court noted that even
17 if the NCAA had an interest in maintaining competitive balance among
18 the college football teams, "[t]he television plan is not even
19 arguably tailored to serve such an interest," id. at 119, given that
20 but for the NCAA plan, more college football games would be
21 televised, see id. at 108, 118 n.62. The Court stated that

22 [t]he hypothesis that legitimates the maintenance of
23 competitive balance as a procompetitive
24 justification under the Rule of Reason is that equal
25 competition will maximize consumer demand for the
26 product. The finding that consumption will
27 materially increase if the controls are removed is a
28 compelling demonstration that they do not in fact
29 serve any such legitimate purpose.

30 Id. at 119-20 (footnote omitted).

31 In the present case, in contrast, Major League Baseball is

1 a highly integrated professional sports entity comprising two
2 Leagues, in which all of the Clubs compete. Each season constitutes
3 a single tournament, leading to playoffs among the League leaders,
4 and ultimately to the World Series. As discussed in Part II.C.5.
5 below, there is no dispute that competitive balance is a necessary
6 ingredient in the continuing popularity of the MLB Entertainment
7 Product. And unlike the NCAA restrictions on televising games,
8 which were "not even arguably tailored to serve" an interest in
9 competitive balance, 468 U.S. at 119, the Clubs' agreement that
10 MLBP's profits from licensing MLB Intellectual Property will be
11 distributed equally among the 30 Clubs is a precisely tailored
12 attempt to achieve, or at least increase, competitive balance.

13 Finally, the NCAA contended that its television plan was
14 procompetitive because it was necessary to permit college football
15 games to compete in the market for sports programming, a market in
16 which the NCAA claimed to lack power. The Supreme Court rejected
17 this contention as well. See NCAA, 468 U.S. at 111-15. The Court
18 stated that "[i]f the NCAA faced 'interbrand' competition from
19 available substitutes, then certain forms of collective action might
20 be appropriate in order to enhance its ability to compete," id. at
21 115 n.55; but college football is "unique," id. at 115. The Court
22 found it "evident" that the NCAA in fact "does possess market power"
23 because intercollegiate college football telecasts are uniquely
24 attractive to fans, "football telecasts generate an audience
25 uniquely attractive to advertisers[,] and . . . competitors are

1 unable to offer programming that can attract a similar audience."
2 Id. at 111. Because college football telecasts are unique, they
3 constitute "a separate market"; and it follows "inexorably . . .
4 that the NCAA possesses market power with respect to those
5 broadcasts. 'When a product is controlled by one interest, without
6 substitutes available in the market, there is monopoly power.'" Id.
7 at 112 (quoting United States v. E.I. du Pont de Nemours & Co., 351
8 U.S. 377, 394 (1956)).

9 In the present case, the only evidence of record shows
10 that product uniqueness is absent. Although Salvino suggests that
11 "the bundle of . . . rights licensed by MLBIP is . . . highly
12 differentiated from other bundles with which MLBIP apparently
13 believes it competes" (Guth Decl. ¶ 6; see Salvino brief on appeal
14 at 12 n.5 (contending that Guth Decl. ¶¶ 5-6 "define[s] a relevant
15 market")), no factual support was offered for the suggestion that
16 there are no available substitutes for MLB Intellectual Property
17 because Guth had not conducted any factual studies (see, e.g., Guth
18 Dep. at 23-24). Thus, after Guth, in his deposition, reiterated an
19 opinion given in his initial Report that "'MLBIP quite likely
20 exercises sufficient control over pricing licenses for use of club
21 marks for plush toys and similar products so that these constitute
22 a relevant market'" (id. at 33 (quoting Guth Report ¶ 23)), the
23 ensuing questioning revealed that that opinion was based not on
24 factual evidence but on "guess[es]":

25 Q. So that's a market for club marks or market

1 for plush toys and similar products?

2 A. It's a market for club marks used in
3 conjunction with plush toys and similar products.

4 Q. Do you have any understanding of what Team
5 Beans is?

6 A. Not specifically. My recollection is Major
7 League Baseball had or has licenses for one, maybe
8 several entities for similar kind[s] of plush toys.

9 Q. What is your understanding as to whether or
10 not Team Beans product is within or outside the
11 relevant market [in] your opinion?

12 A. Sitting here today, I would think it's
13 probably within the relevant market.

14 Q. Why?

15 A. It's my guess that those products defined
16 in the framework of the discrete choice survey would
17 likely show up as having price sensitivity vis-a-vis
18 the Salvino products. I don't know that, but
19 that's, you know, sitting here today, that would be
20 my guess.

21 Q. Are you aware that Salvino made some
22 Bammers that did not have a club mark, but had a
23 player name and number only on it?

24 A. That's my recollection, yes.

25 Q. Do you consider those products to be inside
26 or outside of the relevant product market?

27 A. Again, that's an empirical question.
28 Sitting here today, I'd be[] less confident opining
29 one way or the other, but it's entirely possible
30 that they could be in the relevant part [sic;
31 market?].

32 Q. Are you familiar with Salvino Bammers that
33 carried NFL team logos?

34 A. Not specifically.

35 Q. Let's assume for the moment that Salvino

1 made some Bammers.

2 A. Sure.

3 Q. The same size plush bear that carried a NFL
4 team logo, New York Giants. For example, would you
5 consider those to be in or outside the relevant
6 market?

7 A. I think that that's what a[n] empirical
8 analysis really let[s] you focus on. I mean, that's
9 where you're getting to the meaningful empirical
10 questions, in my opinion. Whether you know
11 baseball, given its seasonality and given its--the
12 way in which its products are made available to
13 public competes with club marks license for a
14 similar product or indeed other products that are
15 sports or non-sports and made in different seasons
16 or the same season. Those are the issues that an
17 empirical analysis ought to address.

18 Q. Sitting here today, do you have any opinion
19 as to whether Bammers with NFL marks would be within
20 or outside the market?

21 A. No. Frankly, I really don't. I mean,
22 you're asking me whether an increase in the price
23 on, you know, an NFL Bammer would lead people to buy
24 a Major League Baseball Bammer instead of the NFL
25 Bammer, and just listening to those words, I'm not
26 sure I see a basis for concluding that it would, but
27 I'm going to leave that to an empirical analysis.

28 Q. But you haven't undertaken that empirical
29 analysis yet either?

30 A. That's correct.

31 (Guth Dep. at 33-36 (emphases added); see also id. at 60 (Guth
32 stating that to identify the relevant market, empirical studies
33 would be needed not only with respect to the NFL, but also with
34 respect to the "NHL, NBA, Major Soccer League, et cetera," as well
35 as popular cartoon items).) (We think Guth's views could also
36 benefit from an empirical study that included regard for fan

1 preferences. He indicated that "[f]or purposes of [his deposition]
2 testimony without having done empirical analysis," he supposed that
3 a consumer who is unable to purchase an MLBP New York Yankee Bammer
4 would eschew an NFL Jets Bammer and would substitute instead an MLBP
5 Bammer representing the Boston Red Sox. (Id. at 50, 58.)

6 While Guth had not conducted the empirical studies that he
7 testified were needed before he could do more than make guesses as
8 to what might be substitutable for MLB Intellectual Property
9 licenses, there was ample evidence in the record that prospective
10 licensees of MLB Intellectual Property displayed interest in using
11 intellectual property of, inter alia, other sports entities and
12 leagues. For example, as set out in Part I.B.2. above,
13 representatives of Coca-Cola told the MLBP executive committee in
14 1966 that, a few years earlier, Coca-Cola had chosen to use NFL
15 intellectual property for a nationwide promotional campaign, rather
16 than MLB Intellectual Property, because of ease of licensing.
17 Further, as set out in greater detail in Part I.B.3. above, when
18 Salvino sought an MLBP license in 1999, Salvino stated that it had
19 sold Bammers bearing the intellectual property of the MLB Players'
20 Association, the NFL, the NBA, the NHL, "Muhammad Ali," and other
21 individuals. Indeed, a Salvino brochure declared that Bammers were
22 "'America's Number 1 Sports Collectible'" in baseball, football,
23 boxing, basketball, ice skating, hockey, and NASCAR. (See Salvino
24 Response to MLBP Rule 56.1 Statement ¶ 120.) In addition, Salvino's
25 vice president testified, inter alia, that Salvino competed with

1 "anybody who produces sports licensed products; anybody who
2 produces, you know, signed products, collectibles, memorabilia;
3 anybody who produces licensed key chains, zipper pulls, non-licensed
4 key chains, zipper pulls.'" (Salvino Response to MLBP Rule 56.1
5 Statement ¶ 116.)

6 Plainly, then, the only evidence presented to the district
7 court indicates that, unlike the NCAA's unique product, college
8 football, there are available substitutes for MLB Intellectual
9 Property. Based in part on the above facts, Fisher opined that MLBP
10 lacked power in the relevant market, which he defined as no narrower
11 than the market for the licensing of intellectual property related
12 to sports and certain entertainment products.

13 Finally, there seems to be no genuine dispute that the
14 market level that is at issue in this case is the licensing level,
15 with demand at that level being influenced by demand at the consumer
16 level (see, e.g., Fisher Report ¶ 18; Guth Report ¶ 23), and that
17 other professional sports entities have centralized licensing
18 operations, e.g., NFL Properties, NBA Properties, and NHL
19 Enterprises (see Part I.A.3. above). Although Salvino purported to
20 contest the assertion that MLBP competes with these other entities,
21 Salvino's challenge does not present a genuine dispute, given the
22 evidence (a) that Salvino has not disputed that the standard license
23 issued by each of these other sports entities states that the entity
24 has the exclusive right to license the names, initials, emblems,
25 uniforms, and other intellectual property of each team within that

1 professional sports league; (b) that Salvino obtained licenses for
2 its Bammers using intellectual property of baseball, football,
3 boxing, basketball, ice skating, hockey, and NASCAR; (c) that
4 Salvino itself stated that being able to deal with NFL Properties
5 provided the advantage of "one-stop shop[ping]"; and (d) that MLBP
6 was informed by the Coca-Cola representatives that the NFL had a
7 competitive advantage over MLB in the mid-1960s because the NFL had
8 a centralized licensing entity and MLB did not.

9 Further, when Guth was asked whether the fact that such
10 sports leagues as the NFL, NBA, and NHL use centralized licensing
11 entities would affect his analysis as to whether or not MLB needed
12 a centralized licensing organization, Guth stated that although he
13 did not think it would, he "wouldn't dismiss [that factor] out of
14 hand." (Guth Dep. at 115.) We consider this a telling response in
15 the face of Salvino's contention that centralization of licensing in
16 MLBP should be declared illegal per se or on a quick look--treatment
17 that is inappropriate unless the anticompetitive nature of the
18 practice is intuitively obvious.

19 d. Revenue Sharing

20 The only aspect of the Supreme Court's criticisms of the
21 NCAA plan that is even superficially similar to the present case is
22 the Court's observation that the NCAA plan was

23 "a price restraint that tends to provide the same
24 economic rewards to all practitioners regardless of
25 their skill, their experience, their training, or

1 their willingness to employ innovative and difficult
2 procedures."

3 NCAA, 468 U.S. at 107 n.33 (quoting Maricopa County Medical Society,
4 457 U.S. at 348). However, the circumstances of both NCAA and
5 Maricopa County Medical Society differ significantly from those
6 here.

7 In Maricopa County Medical Society, the Court was
8 concerned with a plan that involved the fixing of maximum prices
9 that physicians could charge for health services to policyholders
10 under specified insurance plans. The physicians were "independent
11 competing entrepreneurs." 457 U.S. at 357. In the present case, in
12 contrast, the Clubs are professional baseball teams that are
13 interdependent members of the Major Leagues. Further, as discussed
14 in Part II.C.5. below, the need for competitive balance among the
15 Clubs is essential to the well-being of the Leagues.

16 NCAA, which, like the present case, involved sports teams,
17 is significantly different from the present case because it involved
18 a sport at the college level. Colleges exist primarily to provide
19 an education for their students; indeed, some colleges have no
20 football program at all. In contrast, the present case involves a
21 sport at the professional level. Providing baseball entertainment
22 in their respective Leagues is the Clubs' raison d'être; if a Club
23 cannot compete sufficiently to attract fans, it ceases to exist
24 (i.e., moves to another geographic location and becomes a different
25 Club). The professional baseball entertainment product is enhanced

1 and protected by fostering competitive balance among the Clubs.
2 Colleges with sports teams that are competitively weak nonetheless
3 continue to exist and pursue their primary goal, education.

4 In sum, unlike Maricopa County Medical Society and NCAA,
5 this case involves an integrated professional sports league in which
6 the competitors are not independent but interdependent, competitive
7 balance among the teams is essential to both the viability of the
8 Clubs and public interest in the sport, and profit sharing is a
9 legitimate means--approved by both of the economists in this case,
10 see Part II.C.5. below--of maintaining some measure of competitive
11 balance.

12 5. Professional Sports Ventures

13 In the present case, the district court observed that
14 antitrust challenges to the operations of sports leagues have
15 generally been analyzed by the courts under the rule of reason,
16 rather than being held illegal per se, because competition among the
17 teams in their fields of play is to an extent dependent upon the
18 teams' cooperation with each other in various other respects.
19 Salvino contends that this was error, arguing that the licensing of
20 intellectual property is only "collaterally related to professional
21 sports" and that "[t]he conduct at issue here, naked horizontal
22 price and output restrictions, traditionally falls within the per se
23 proscriptions." (Salvino brief on appeal at 20 (emphasis added).)

1 Given that the record shows only increases, not decreases, in output
2 (see Parts I.B.2. and II.C.1. above), and that the so-called "price"
3 restriction challenged by Salvino is simply the Clubs' equal sharing
4 of MLB Intellectual Property licensing profits (see Part II.C.2.
5 above), Salvino's contention that the district court erred in not
6 applying per se or quick-look analysis is meritless.

7 As discussed in Part I.B.1. above, the MLB Entertainment
8 Product comprises some 2,400 interrelated regular-season Major
9 League Baseball games played each year, followed by playoff games
10 for the American and National League championships, and culminating
11 in the World Series. The production of this entertainment requires
12 the joint efforts of the 30 Clubs; it cannot be produced by any one
13 Club individually or even by a few Clubs. In creating the MLB
14 Entertainment Product, the Clubs plainly do not operate separately
15 or independently but rather are interdependent entities in an
16 organization that is highly integrated.

17 It is undisputed that the production and value of the MLB
18 Entertainment Product affect the value of MLB Intellectual Property.
19 For example, when the Major League Baseball players were on strike
20 in 1994 and 1995, sales of products bearing MLB Intellectual
21 Property decreased; when the strike ended, sales of those products
22 increased. Further, the value of the intellectual property of a
23 particular Club is dependent in part on that Club's membership in
24 MLB (for example, Fisher pointed to the decline in value of the
25 intellectual property of such former Clubs as the Houston Colt 45s

1 and the St. Louis Browns), and in part on the Club's popularity.
2 Although every Club no doubt has a core of die-hard fans, a Club's
3 popularity is affected principally by its success on the baseball
4 field and by how the play of each game relates to the season as a
5 whole.

6 Moreover, it cannot be disputed that the performance
7 aspect of a Club's popularity is related to the Clubs'
8 interdependence. Obviously, a team cannot win games or
9 championships unless it has opponents. Thus, even Clubs that fail
10 to achieve winning records, and that have only small steadfast fan
11 bases, contribute to the popularity of the more successful Clubs.
12 Direct licensing by the Clubs, as recommended by Salvino and Guth,
13 would result in the more popular Clubs granting more licenses and
14 receiving more income for their intellectual property than the less
15 popular Clubs would grant and receive. (See, e.g., Salvino brief on
16 appeal at 30 ("If an organization is successful in . . .
17 competition, then it should be entitled to reap the fruits of its
18 acumen."); Guth Report ¶ 32 (describing "an alternative role for
19 MLBPA" in which Clubs' "ability to generate revenues from their
20 licensing would be dependent on the value of their mark[s]").) This
21 inequality in licensing income, however, would "over-compensat[e]
22 the popular team for the joint efforts of all Clubs." (Fisher
23 Report ¶ 81.)

24 Further, the disproportionate distribution of licensing
25 income would foster a competitive imbalance among the Clubs. The

1 concept of "competitive balance"

2 reflects the expected equality of opportunity to
3 compete and prevail on the field. Competitive
4 balance also relates to the fans' expectations that
5 each team is a potential champion--i.e. that each
6 Club has a reasonable opportunity to win each game
7 and also to compete for a championship.

8 (Id. ¶ 14.)

9 There is no genuine dispute here that maintaining the
10 value of the MLB Entertainment Product requires competitive balance
11 among the Clubs. Fisher calls "competitive balance . . . critical
12 to the success of MLB." (Id. ¶ 68.) And Salvino acknowledges that

13 MLB teams, like all teams in sports leagues, need to
14 cooperate in terms of scheduling, rulemaking, league
15 format, competitive balance and both the live
16 performance and televising of games, in order to
17 create and market the product, which is baseball
18 games.

19 (Salvino brief on appeal at 27 (emphases added); see also Salvino's
20 California action complaint ¶ 14 (citing "on-field competitive
21 balance" as a "legitimate or procompetitive goal").)

22 Accordingly, Fisher opined that "all the Clubs must be
23 rewarded in order to ensure continued league-wide efforts as well as
24 to foster competitive balance." (Fisher Report ¶ 68 (emphasis in
25 original).) And while Salvino argues that MLBP's equal distribution
26 of licensing income to the Clubs is illegal per se or upon quick-
27 look analysis, it is telling that precisely such a distribution was
28 ultimately approved by Salvino's own expert. In his initial Report,
29 Guth stated that the goal of equalizing the Clubs' competitiveness
30 could be achieved by "sharing ticket revenues and broadcast

1 revenues" and the imposition of "team salary cap rules." (Guth
2 Report ¶ 10.) We find it difficult, as a logical matter, to fathom
3 why the sharing of revenues from the licensing of intellectual
4 property should be any less valid than the Guth-recommended sharing
5 of revenues from other sources. And in fact, Guth himself
6 ultimately suggested that the free-rider problems, which could occur
7 if Clubs licensed directly, should be solved by "the revenue sharing
8 aspect of the MLBP," i.e., the equal distributions of the licensing
9 profits to the Clubs:

10 [T]he solution to these problems as analyzed in the
11 economics literature has to do with modifying the
12 pay-offs to the Clubs individually so that their
13 incentives are consistent with capturing prevailing
14 externalities. . . . Thus, for example, MLBP
15 currently sets pay-offs to the clubs based on a one-
16 thirtieth proportionate share to each club.
17 Moreover, Major League Baseball generally has a
18 variety of tools available to it to deal with "too
19 large a slice" of overall revenue going to one Club
20 or another. These include sharing ticket revenues,
21 national TV contract revenues, MLB intellectual
22 property licensing, and excessive payroll
23 adjustments. In this case, the revenue sharing
24 aspect of the MLBP, or something similar, is likely
25 sufficient to solve an externality problem, if such
26 a problem actually exists.

27 (Guth Decl. ¶ 17 (footnote omitted) (emphases added).) Indeed,
28 Guth's view is that equal distributions of profits--which is the
29 only conduct that Salvino challenges as "price restrictions"--would
30 in fact be procompetitive: "Revenue sharing in which teams' payoffs
31 are based on the total figure would encourage teams to maximize
32 total revenues in order to maximize their own, even if this would
33 otherwise be inconsistent with their individual interests." (Guth

1 Decl. ¶ 17 (emphases added).)

2 In sum, given Salvino's own view that "MLB teams, like all
3 teams in sports leagues, need to cooperate in terms of . . .
4 competitive balance" (Salvino brief on appeal at 27), and Salvino's
5 expert's view that "[r]evenue sharing . . . encourage[s] teams to
6 maximize" output and revenues (Guth Decl. ¶ 17), it would defy
7 reason for this Court to accept Salvino's contention that any
8 anticompetitive aspects of the Clubs' agreement on the equal
9 division of MLB's licensing profit are at all apparent, much less
10 so obvious that that agreement should have been held illegal per se
11 or upon a quick look.

12 D. Rule of Reason

13 Finally, given the present record, we see no error in the
14 district court's analysis of Salvino's claim under the rule of
15 reason. The court noted that Salvino had proffered no evidence that
16 the centralization of licensing in MLB caused any actual injury to
17 competition or any evidence that MLB possessed power in the
18 relevant market. The court stated that, "[i]ndeed, Salvino did not
19 respond to MLB's arguments regarding the rule of reason analysis
20 and instead urged the Court to analyze its claims under the per se
21 rule or quick look doctrine, neither of which would require Salvino
22 to make a showing of adverse effect on the market." 420 F.Supp.2d
23 at 220.

24 On this appeal, Salvino has again argued solely that the

1 court should have applied the per se or quick-look rule and has
2 presented no basis for a ruling that, if rule-of-reason analysis was
3 applicable, the district court erred in the conduct of that
4 analysis. Our own examination persuades us that, on this record,
5 the district court's analysis was correct. We express no view as to
6 what the outcome would be of a case in which a plaintiff challenging
7 the Clubs' centralization of licensing functions in MLB as their
8 exclusive licensing agent adduced admissible evidence as to the
9 reasonableness of that practice.

10 CONCLUSION

11 We have considered all of Salvino's arguments on this
12 appeal and have found them to be without merit. The judgment of the
13 district court is affirmed.

SOTOMAYOR, *Circuit Judge*, concurring in the judgment:

I concur fully in the judgment. I write separately because I believe the majority endorses an overly formalistic view of price fixing and in so doing avoids addressing directly the central contention of appellant Salvino, Inc. (“Salvino”) that the exclusive arrangement between the Major League Baseball clubs (the “Clubs”) and Major League Baseball Properties, Inc. (“MLBP”) removes all price competition between the Clubs on the licensing of intellectual property in violation of the Sherman Act, 15 U.S.C. § 1. Further, while I agree with the ultimate outcome of this appeal, I reach my conclusion using a different framework than the majority, applying the doctrine of ancillary restraints, which I believe more efficiently addresses the issues presented here.

Before applying this framework, however, I address the majority’s flawed view that the Clubs have made no agreement on price.¹ It is undisputed that the Clubs have agreed through the exclusivity and profit-sharing clauses in the MLBP agreement not to compete with each other on the sale of trademark licenses. Instead, they have agreed to give MLBP the sole authority to set prices for all Major League Baseball licenses and to share equally in the proceeds from those licensing sales.² While the MLBP agreement does not specify a price to be charged, the effect of the agreement clearly

¹ It is unclear how much weight the majority places on the lack of any explicit price or output restrictions, *see* Maj. Op. at 55-61 (Parts II.C.1-2), or whether it ultimately relies on the distinctions it draws between this case and *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), and *NCAA v. Board of Regents*, 468 U.S. 85 (1984), *see* Maj. Op. at 61-85 (Parts II.C.3-4), in reaching its conclusion that the rule of reason should apply.

² As noted by the majority, there are a few limited exceptions to the exclusivity agreement, including, for example, allowing Clubs to license their own trademarks on hot dogs and similar items sold within their home broadcasting territory. *See* Maj. Op. at 11-12. Notwithstanding these narrow exceptions, nearly all retail products containing the intellectual property of Major League Baseball or the Clubs must be licensed through MLBP.

eliminates price competition between the Clubs for trademark licenses. An agreement to eliminate price competition from the market is the essence of price fixing. *See, e.g., United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969).

Nevertheless, the majority contends that this “so-called ‘price’ restriction is not in fact an agreement on ‘price’ but rather an agreement for the sharing of profits.” Maj. Op. at 60; *see also id.* at 58-61 (Part II.C.2). Were the majority correct, competing companies could evade the antitrust laws simply by creating a “joint venture” to serve as the exclusive seller of their competing products. So long as no agreement explicitly listed the prices to be charged, the companies could act as monopolists through the “joint venture,” setting prices together for their competing products, because the majority would categorize these actions formalistically as only an agreement to share profits. The antitrust laws are not so rigid as to permit such easy evasion.

Explicit price agreements have long been unnecessary for a price restraint to be *per se* unlawful. *See, e.g., United States v. Gen. Motors Corp.*, 384 U.S. 127, 142-43 (1966); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946). Indeed, the mere agreement among competitors to exchange price information is a *per se* price-fixing violation. *See Container Corp.*, 393 U.S. at 334-38; *see also, e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 650 (1980) (per curiam) (holding agreement among wholesale beer sellers to make retailers pay in cash was *per se* illegal); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692-93 (1978) (holding agreement among engineers to refuse to discuss prices with potential customers until after the initial selection of an engineer was *per se* illegal); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-24 (1940) (holding agreement among competitors to buy surplus gasoline was *per se* illegal). The majority’s analysis is at odds with this precedent because the majority appears to require an agreement explicitly indicating

a price before that agreement may be considered a *per se* illegal price restraint.³ No such rigid requirement is necessary.

The law remains that any “combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.” *Socony-Vacuum Oil Co.*, 310 U.S. at 223. Thus, the antitrust laws prohibit two companies A and B, producers of X, from agreeing to set the price of X. Likewise, A and B cannot

³ The majority also implies that MLBP’s choice to set a royalty rate rather than a uniform price or “sum certain” is somehow less problematic for antitrust purposes, believing that MLBP’s licensing fees are “entirely responsive to the preferences of licensees and retail product consumers.” Maj. Op. at 72-74. Such a distinction between royalty rates and uniform prices is meaningless. First, for purposes of the Sherman Act, prices “are fixed because they are agreed upon,” whether it be in the form of a uniform price or a price set by formula. *Socony-Vacuum Oil Co.*, 310 U.S. at 222. Competitors who agree to fix royalty rates, no less than competitors who agree to fix a single uniform price, violate the Sherman Act. MLBP’s expert does not even contest that it has fixed a single price in this case. See Fisher Report ¶ 29-30 (“MLBP has chosen to set a single price (or royalty rate) irrespective of the popularity of a Club . . .”). Second, whether or not an agreed upon price is responsive to consumer demand is irrelevant. See *Socony-Vacuum Oil Co.*, 310 U.S. at 222-23 (“[T]he fact that, as here, [prices] are fixed at the fair going market price is immaterial. For purchases at or under the market are one species of price-fixing.”). The antitrust laws seek to ensure that the determination of price is by free competition alone; the reasonableness of an agreed upon price is not a defense. See *id.* at 223; *Catalano, Inc.*, 446 U.S. at 647.

Furthermore, the majority incorrectly believes that the licensing fees are “entirely responsive” to demand. A simple example displays the majority’s fallacy. Take Club C, a Club that has two fans A and B. A is willing to pay \$15 for a Club C hat while B is willing to pay \$12 for the same hat. Assume that Producer P will sell Club C hats at its marginal cost to produce them of \$10 and assume that MLBP charges a 20% license fee. Under this scenario, the price for a licensed hat would be \$12.50 (price = $\$10 / (1 - 0.20)$), and only A would be willing to buy a Club C hat. However, if Club C was pricing its own licenses, it could drop the license fee to 15%, in which case both A and B would be willing to buy Club C hats for \$11.76, and licensing revenue for Club C would increase from \$2.50 to \$3.52. As this example shows, the licensing fees here are not totally responsive to consumer demand. Basic principles of economics teach us that as royalty rates increase, the price for licensed goods will increase, and output will decline as fewer consumers are willing to purchase licensed goods at higher prices. This is Salvino’s central contention—that if the Clubs were forced to compete with each other for licensing fees, they would offer licenses at lower rates, thereby resulting in lower prices (and increased output) for licensed goods.

simply get around this rule by agreeing to set the price of X through a third-party intermediary or “joint venture” if the purpose and effect of that agreement is to raise, depress, fix, peg, or stabilize the price of X. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951) (“Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a ‘joint venture.’”), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 469 U.S. 752 (1984); see also Federal Trade Comm’n & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 9 (2000) (“[L]abeling an arrangement a ‘joint venture’ will not protect what is merely a device to raise price or restrict output”). In other words, an agreement between competitors to “share profits” or to make a third party the exclusive seller of their competing products that has the *purpose* and *effect* of fixing, stabilizing, or raising prices may be a *per se* violation of the Sherman Act, even if no explicit price is referenced in the agreement.

The present dispute is significantly more complex than two competitors creating a “joint venture” for the sole purpose of fixing prices. Here, the MLBP joint venture offers substantial efficiency-enhancing benefits that the individual Clubs could not offer on their own, including decreased transaction costs on the sale of licenses, lower enforcement and monitoring costs, and the ability to one-stop shop (i.e., to purchase licenses from more than one Club in a central location). These procompetitive benefits, MLBP maintains, could not exist without the exclusivity and profit-sharing agreements, the two provisions challenged by Salvino as price fixing. In other words, MLBP argues that even if the effect of the exclusivity and profit-sharing agreements is to eliminate price competition between the Clubs, the purpose of these agreements is to achieve other significant

procompetitive benefits, which outweigh any harm from the price restraint.⁴ We must decide then whether the Clubs’ agreement not to compete with each other on price, which is price fixing in a literal sense, should nevertheless be reviewed under a rule of reason in light of MLB’s other efficiency-enhancing benefits. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8-9 (1979) (rejecting application of the *per se* rule to every situation where there is literal price fixing because “[l]iteralness is overly simplistic and often overbroad” and explaining that “‘price fixing’ is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable”). For the reasons described below, I join with the majority in concluding that neither a *per se* nor a quick-look approach is appropriate here, but I apply a substantially different framework than the majority in reaching my conclusion.⁵

Recognizing that joint ventures “hold the promise of increasing a firm’s efficiency and enabling it to compete more effectively,” the Supreme Court has concluded that joint ventures should normally be analyzed under a rule of reason, requiring an inquiry into market power and structure and the actual effects of any restraints on trade. *Copperweld Corp.*, 467 U.S. at 768; *see also Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295-98 (1985) (same). “While joint ventures have no immunity from the antitrust laws . . . , a joint selling arrangement may ‘mak[e] possible a new product by reaping otherwise unattainable efficiencies.’” *NCAA v. Bd. of Regents*, 468 U.S. 85, 113 (1984). Accordingly, competitors engaged in joint ventures may be

⁴ MLB further argues that eliminating price competition between the Clubs causes no harm to the market because the Clubs must compete with a wide array of entertainment entities, including other sports leagues and entertainment companies, in the licensing of intellectual property, and therefore lack the market power necessary to affect prices.

⁵ For a detailed explanation of the *per se*, quick look, and rule of reason methods of analysis under the Sherman Act, see Part II.B of the majority opinion. *See Maj. Op.* at 48-54.

permitted to engage in a variety of activities that would normally be illegal under a *per se* rule when such activities are necessary to achieve the significant efficiency-enhancing purposes of the venture. For example, price fixing between competitors—generally a *per se* illegal restraint—may be justifiable in certain circumstances when done as part of a joint venture. *See Broad. Music*, 441 U.S. at 23. In short, to protect the efficiency-enhancing potential of joint ventures and cooperatives, the rule of reason is the favored method of analysis for these ventures, preventing courts from intervening before a full market analysis is completed.

Nevertheless, a *per se* or quick-look approach may apply to joint ventures in at least two situations: (1) where a joint venture is essentially a sham, offering no reasonable prospect of any efficiency-enhancing benefit to society, *see Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 52 (1st Cir. 1998); and (2) where a particular challenged restraint is not reasonably necessary to achieve any of the efficiency-enhancing benefits of a joint venture and serves only as naked restraint against competition, *see Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985). In such cases, a court may conclude that a joint venture or a challenged restraint is *per se* illegal where it has “manifestly anticompetitive effects.” *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2713 (2007) (internal quotation marks omitted).

Because MLBP offers significant procompetitive benefits, Salvino does not seriously contend that MLBP as a whole is so manifestly anticompetitive that it should be considered a sham cartel. *Cf. Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990) (per curiam) (holding an agreement between bar review course providers dividing market territories and sharing revenue was a *per se* violation). Rather, Salvino argues for a *per se* or quick-look approach under the second scenario, maintaining that the exclusivity and profit-sharing provisions of the MLBP agreement are not necessary to achieve any of MLBP’s procompetitive advantages and serve no purpose but to stifle competition. As Salvino

explains, “Without the exclusivity requirement, potential licensees would have the freedom to either seek out each team for individualized arrangements or deal with all teams through the centralized agency of MLBP.” Accordingly, Salvino asks us to separate these two provisions from the rest of the joint venture and to conclude that they are so plainly anticompetitive as to be *per se* illegal. Because the provisions are reasonably necessary to achieve MLBP’s efficiency-enhancing objectives, I conclude that they should be analyzed as part of the joint venture using a rule-of-reason analysis.

Joint ventures are typically evaluated as a whole under the rule of reason because the competitive effects of an individual restraint are intertwined with the effects of the remainder of the venture. However, under the doctrine of ancillary restraints, when a challenged restraint is not reasonably necessary to achieve any of the efficiency-enhancing purposes of a joint venture, it will be evaluated apart from the rest of the venture. *See, e.g., Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1151 (9th Cir. 2003); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 970 (10th Cir. 1994); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986); *Polk Bros.*, 776 F.2d at 189; *In re Polygram Holding, Inc.*, Docket No. 9298, 2003 WL 21770765 (F.T.C. 2003). *See generally* Federal Trade Comm’n & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000); Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 *Antitrust L.J.* 701 (1998). This doctrine seeks to distinguish between those restraints that are intended to promote the efficiencies of a joint venture and those that are simply unrelated.⁶ As the Seventh Circuit explained:

A court must distinguish between “naked” restraints, those in which the restriction on

⁶ The doctrine of ancillary restraints has its roots in an 1898 opinion by then-Judge Taft. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280-83 (6th Cir. 1898), *aff’d*, 172 U.S. 211 (1899). The principle has been adapted over the last few decades to the context of joint ventures, as noted in the cases cited above.

competition is unaccompanied by new production or products, and “ancillary” restraints, those that are part of a larger endeavor whose success they promote. If two people meet one day and decide not to compete, the restraint is “naked”; it does nothing but suppress competition. If A hires B as a salesman and passes customer lists to B, then B’s reciprocal covenant not to compete with A is “ancillary.” At the time A and B strike their bargain, the enterprise (viewed as a whole) expands output and competition by putting B to work. The covenant not to compete means that A may trust B with broader responsibilities, the better to compete against third parties. Covenants of this type are evaluated under the Rule of Reason as ancillary restraints, and unless they bring a large market share under a single firm’s control they are lawful.

Polk Bros., 776 F.2d at 188-89 (internal citation omitted). The doctrine recognizes that a restraint that is unnecessary to achieve a joint venture’s efficiency-enhancing benefits may not be justified based on those benefits. Accordingly, a challenged restraint must have a reasonable procompetitive justification, related to the efficiency-enhancing purposes of the joint venture, before that restraint will be analyzed as part of the venture. If none exists, the challenged restraint must be evaluated on its own and may be *per se* illegal even if the remainder of the joint venture is entirely lawful.⁷ *Cf. Blackburn v. Sweeney*, 53 F.3d 825, 828-29 (7th Cir. 1995) (applying the *per se* rule to a provision in a law partnership dissolution agreement that restrained the territories where former partners could advertise after finding the provision to be non-ancillary to the rest of the agreement). In contrast, where a restraint *is* reasonably necessary to achieve a joint venture’s efficiency-enhancing purposes (i.e., ancillary), it will be analyzed under the rule of reason as part of the joint venture because the effects of that restraint are not so plainly anticompetitive as to make a *per se* or quick-look approach

⁷ However, a non-ancillary restraint is not necessarily unlawful or evaluated under a *per se* rule; rather, it is simply evaluated independent of the joint venture because its competitive effects are irrelevant to the joint venture and vice versa. Conversely, an ancillary restraint is not necessarily lawful. Its competitive benefits and harms must still be weighed, as part of the joint venture, under a rule-of-reason analysis. *See Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1102 (1st Cir. 1994).

appropriate.⁸

In this case, the exclusivity and profit-sharing provisions of the MLBP agreement are reasonably necessary to achieve MLBP's efficiency-enhancing purposes because they eliminate several potential externalities that may otherwise distort the incentives of individual Clubs and limit the potential efficiency gains of MLBP. *See* Fisher Report at 31-37. Most notable of these externalities is the so-called free-rider problem. Because of the interdependence of the Clubs within the setting of a sports league, free riding would occur if one of the Clubs is able to benefit disproportionately from the actions of Major League Baseball or other Clubs in the licensing of products. *Id.* at 32-35. This may lead to inefficiencies because the Clubs' incentive to invest in the promotion and development of their intellectual property and other licensed products may be distorted. *Id.* Both MLBP and Salvino recognize that without the exclusivity and profit-sharing provisions, these externalities could diminish MLBP's efficiency gains.⁹ Indeed, Salvino's own expert, Louis Guth, admitted in his deposition, when asked whether there would be more or less licenses without the

⁸ Several courts and commentators have—I believe correctly—viewed *Broadcast Music* and *NCAA*, the two cases primarily relied upon by the majority, as implicit applications of the ancillary restraints analysis. *See, e.g., Sullivan*, 34 F.3d at 1102; *Polk Bros.*, 776 F.2d at 189; *see also* XI Herbert Hovenkamp, *Antitrust Law* ¶¶ 1908b, 1908d, 1908e, at 253-58, 261-65 (2d ed. 2005). In *Broadcast Music*, the need to reach some pricing agreement was necessary in order to sell a blanket license; otherwise, the product would not have been possible at all. *See* 441 U.S. at 20-23. Consequently, the Court examined the venture as a whole, implicitly viewing the pricing restraint as ancillary. In contrast, the Court reviewed the television agreement in *NCAA* as a non-ancillary naked restraint, apart from the rest of the joint venture, because the Court could not find any reason for the agreement that would be reasonably necessary to achieve any of the efficiency-enhancing objectives of the NCAA. *See* 468 U.S. at 113-15; *see also Texaco Inc.*, 547 U.S. at 7 (citing *NCAA* as an application of the ancillary restraints doctrine).

⁹ Salvino argues that “there are better ways to address” the externalities than these two challenged provisions. Whether the externalities could be eliminated in a substantially less restrictive manner is an inquiry that should generally be part of a rule-of-reason analysis rather than part of a *per se* or quick-look approach. *See, e.g., Care Heating & Cooling, Inc. v. Am. Standard, Inc.*, 427 F.3d 1008, 1012 (6th Cir. 2005).

centralized control of MLBP, that he could not give a straight yes or no answer without empirical analysis because of these potential externalities. *See* Guth Dep. at 135-37. In other words, Guth conceded that the challenged provisions could have a procompetitive impact related to the efficiency-enhancing purposes of MLBP.¹⁰ Under such circumstances, the challenged restraints must be viewed as ancillary to the joint venture and reviewed under the rule of reason in the context of the joint venture as a whole.¹¹ *See Rothery Storage*, 792 F.2d at 228 (“[E]limination of the free ride is an efficiency justification available to horizontal restraints that are ancillary to a contract integration.”).

The majority spends considerable time analyzing the similarities and differences between this case and *Broadcast Music* and *NCAA*, some of which I agree with and some of which I do not. However, I believe the ancillary restraints framework is a superior method for analyzing the challenged restraints here because it effectively isolates when an exclusive arrangement should be reviewed under the rule of reason, as a reasonably necessary part of a joint venture, and when it should be reviewed as a naked restraint. Neither *Broadcast Music* nor *NCAA* offer much direct insight into

¹⁰ Empirical analysis could ultimately show that the anticompetitive harms from the challenged provisions outweigh any procompetitive benefits. The point is simply that Salvino’s expert recognized that empirical analysis is necessary to determine whether these provisions have a positive or negative competitive effect. When empirical analysis is required to determine a challenged restraint’s net competitive effect, neither a *per se* nor a quick-look approach is appropriate because those methods of analysis are reserved for practices that “facially appear[] to be one[s] that would always or almost always tend to restrict competition and decrease output.” *Broad. Music*, 441 U.S. at 19-20; *see also Texaco Inc.*, 547 U.S. at 7 n.3 (explaining that a quick-look analysis applies only where “business activities are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability”).

¹¹ Salvino argues that the exclusivity and profit-sharing provisions are not essential to the success of MLBP. Even if true—one certainly could imagine MLBP prospering without these provisions—the analysis here is not altered. Under the ancillary restraints doctrine, a challenged restraint need not be essential, but rather only “reasonably ancillary to the legitimate cooperative aspects of the venture.” *Freeman*, 322 F.3d at 1151; *see also Polk Bros.*, 776 F.2d at 189 (explaining that a restraint is ancillary if it *may* promote the success of the more extensive cooperation and will then be scrutinized under the rule of reason).

the treatment of exclusivity agreements, except to emphasize the anticompetitive dangers of exclusive arrangements. *See Broad. Music*, 441 U.S. at 23-24 (emphasizing that “individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets”); *NCAA*, 468 U.S. at 114 n.54 (“Ensuring that individual members of a joint venture are free to increase output has been viewed as central in evaluating the competitive character of joint ventures.”). In my view, the exclusivity provision is the single most important distinguishing factor between this case and *Broadcast Music*, yet the majority offers little analysis of this distinction and no explanation as to how such an arrangement should be analyzed. Accordingly, while I ultimately agree with the majority that the rule of reason applies here, I reach my conclusion through a different path.

Having concluded that the rule of reason is appropriate in this case, I concur fully with the majority’s rule-of-reason analysis and agree that summary judgment was properly awarded to MLBP. *See* Maj. Op. at 89-90. On the present record, Salvino has adduced no evidence of an “actual adverse effect on competition as a whole in the relevant market,” *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 506-07 (2d Cir. 2004) (internal quotation marks omitted). As such, its Sherman Act claims must fail. As noted by the majority, we need not and do not decide whether a successful Sherman Act claim could have been brought against MLBP with a properly supported record, including whether the procompetitive justifications for the two challenged provisions could be achieved in a substantially less restrictive manner.