IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	
	)	Chapter 11
HOUSTON REGIONAL SPORTS NETWORK, L.P.	)	Case No. 13-35998
Debtor.	)	

THE TEAMS' SUPPLEMENTAL BRIEF
IN SUPPORT OF THEIR MOTION TO COMPEL

Houston Astros, LLC and Rocket Ball, Ltd. (collectively, the Teams) by and through undersigned counsel, respectfully submit this supplemental brief in support of their motion to compel production of documents and information from Defendants Comcast Lender; Comcast Services; NBCUniversal Media LLC; Houston SportsNet Holdings LLC; and Comcast Cable (collectively, Comcast) filed December 6, 2019. This brief is being submitted pursuant to the Court's request at the December 20, 2019 hearing for simultaneous briefing on the issue of valuation methodology.

INTRODUCTION

On December 6, 2019, the Teams filed a motion to compel Comcast to produce certain specified documents and information. *See generally* Dec. 6, 2019 Mot. to Compel [ECF 1085]. At a subsequent hearing on December 20, 2019, this Court asked the parties to submit supplemental briefing on the issue of the appropriate perspective for the replacement valuation methodology. *See* Dec. 20, 2019 Hr'g [ECF 1102] at 22:24-24:6. In response to that request, the Teams respectfully maintain that it is unnecessary for the Court to resolve issues surrounding the proper perspective for this valuation methodology in order to rule on the pending motion to compel. As explained below, the motion may be resolved simply on the principle that relevance is broadly defined in the discovery context. If the Court reaches the methodology issue, however,

the Teams urge the Court to grant the motion to compel and to confirm that any calculation of the replacement value of the Comcast Cable Affiliation Agreement should be based on the perspective of a reasonable marketplace participant, with access to the best and fullest information available. The valuation method should not be limited by actual, subjective analyses Comcast conducted at or around the time of the confirmation of the plan of reorganization.

ARGUMENT

I. THE COURT NEED NOT DECIDE THE ISSUE OF PROPER PERSPECTIVE FOR THE REPLACEMENT VALUE THEORY IN ORDER TO RESOLVE THE MOTION TO COMPEL.

A. The Federal Rules Permit Broad, Liberal Discovery.

Under Federal Rule of Civil Procedure 26(b), the scope of permissible discovery is intentionally broad: "Parties may obtain discovery regarding ***any*** nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case," and "[i]nformation within this scope of discovery ***need not be admissible in evidence*** to be discoverable." Fed. R. Civ. P. 26(b)(1) (emphases added); *see also, e.g.*, *In re LeBlanc*, 559 F. App'x 389, 392 (5th Cir. 2014) ("Federal Rule of Civil Procedure 26(b) sets the scope of discovery broadly, allowing parties to obtain discovery regarding 'any nonprivileged matter that is relevant to any party's claim or defense.'") (citation omitted).

Indeed, "discovery itself is designed to ***help define and clarify*** the issues." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (emphasis added). That is why, consistent with the broad language of the rules, discovery is not "limited to issues raised by the pleadings." *Id.* Nor is it "limited to the merits of a case," because "a variety of fact-oriented issues may arise during litigation that are not related to the merits." *Id.* And the Supreme Court has long emphasized the "liberal atmosphere" surrounding the discovery rules, emphasizing that such rules "are to be accorded a broad and liberal treatment," since "[m]utual knowledge of all the relevant

facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 505, 507 (1947); *see also, e.g.*, *Harris v. Nelson*, 394 U.S. 286, 295, 297 (1969) (referring to "the broad discovery provisions" of the Federal Rules of Civil Procedure and recognizing that "Rule 26(b) … has been generously construed to provide a great deal of latitude for discovery"); *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964) (invoking "the basic premise" that discovery rules "are to be accorded a broad and liberal treatment"); *cf. Burns v. Thiokol Chem. Corp.*, 483 F.2d 300, 304 (5th Cir. 1973) (discussing "[t]he discovery provisions of the Federal Rules of Civil Procedure" and acknowledging "[t]he United States Supreme Court has said that they are to be broadly and liberally construed"). This Court has likewise recognized "the liberal discovery procedures available in bankruptcy litigation." *See, e.g.*, *In re Piperi*, 137 B.R. 644, 646 (Bankr. S.D. Tex. 1991).

Of course, "discovery, like all matters of procedure, has ultimate and necessary boundaries." *Oppenheimer Fund*, 437 U.S. at 351 (quoting *Hickman*, 329 U.S. at 507). In particular, discovery under Rule 26(b)(1) must be "relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). "Relevance," however, is a low bar and "***broadly defined*** in the context of discovery." *Wyatt v. Kaplan*, 686 F.2d 276, 284 (5th Cir. 1982) (emphasis added). As a bankruptcy court stated in *In re Adkins Supply, Inc.*: "Th[e] definition [of relevance] is broadly construed, especially in the context of discovery requests, which 'should be considered relevant if there is *any possibility* that the information sought may be relevant to the claim or defense of any party.'" 555 B.R. 579, 589

(Bankr. N.D. Tex. 2016) (emphasis in original) (quoting *Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 470 (N.D. Tex. 2005)). Under this lenient standard of relevance, "[i]nformation sought only fails the relevance test if it is clear that it could have 'no possible bearing on the claim.'" *Id.*; *see also, e.g.*, *Oppenheimer Fund*, 437 U.S. at 351 (relevance "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case"); *In re LeBlanc*, 559 F. App'x at 392 (information is relevant and discoverable "if it 'appears reasonably calculated to lead to the discovery of admissible evidence'") (quoting Fed. R. Civ. P. 26(b)); *NLRB v. Leonard B. Hebert, Jr. & Co.*, 696 F.2d 1120, 1124 (5th Cir. 1983) (applying "a liberal, discovery-type standard by which relevancy of requested information is to be judged"); *Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 766 (S.D. Tex. 2011) ("Even if Defendants and Movants do not believe the Council members will not provide any testimony to support Plaintiffs' argument, Plaintiffs are entitled to discover any information that 'appears reasonably calculated to lead to the discovery of admissible evidence.'") (citation omitted), *appeal dismissed*, 502 F. App'x 348 (5th Cir. 2014); *Rangel v. Gonzalez Mascorro*, 274 F.R.D. 585, 590 (S.D. Tex. 2011) ("[T]he threshold for relevance at the discovery stage is lower than at the trial stage."); *Enron Corp. Savs. Plan v. Hewitt Assocs., L.L.C.*, 258 F.R.D. 149, 159 (S.D. Tex. 2009) ("Relevancy is broadly construed, and a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the claim or defense of any party.") (citation omitted).[1]

[1] This remains true even after the 2015 amendments to Rule 26(b). *See, e.g.*, *Rivera v. Robinson*, 2019 U.S. Dist. LEXIS 83827, at *7-8 (E.D. La. May 17, 2019) ("Relevance is still to be 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on' any party's claim or defense.") (quoting *Oppenheimer Fund*, 437 U.S. at 351); *In re Adkins Supply, Inc.*, 555 B.R. at 589 (overruling relevance objections, explaining that the definition of relevance "is broadly construed, especially in the context of discovery requests, which 'should be considered relevant if there is *any possibility* that the information sought may be relevant to the claim or defense of any party'" and "only fails the relevance test if it is clear that it could have 'no possible bearing on the claim'") (quoting *Merrill*, 227 F.R.D. at 470); *Fed. Nat'l Mortg. Ass'n v. SFR Invs. Pool 1, LLC*, 2016 WL 778368,

In determining whether evidence is discoverable, there is no temporal limitation. *See* Fed. R. Civ. P. 26. Instead, "courts routinely hold that it is the relevance of the information contained in the requested documents—***not*** the timing of events in relation to their creation—that determines discoverability." *Favors v. Cuomo*, 2013 WL 12358269, at *4-5 (E.D.N.Y. Aug. 27, 2013) (emphasis added) (collecting cases).[2] As those courts have recognized, documents created after the challenged conduct may "relate[] to relevant discoverable information." *Midland Inv.*, 59 F.R.D. at 138; *see also, e.g.*, *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 697-99 (1933) (endorsing reference to subsequent events to value a patent as of a historical date); *Couzens v. Comm'r*, 11 B.T.A. 1040, 1165 (1928) (admitting post-measuring date evidence over the objection of the IRS because, although the value was "not to be judged by subsequent

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at *2 n.16 (D. Nev. Feb. 25, 2016) (reaffirming that the scope of relevance remains broad even after 2015 amendments); *Townsend v. Nestle Healthcare Nutrition, Corp.*, 2016 WL 1629363, at *3 (S.D. W. Va. Apr. 22, 2016) ("[I]t remains true that 'relevancy in discovery is broader than relevancy for purposes of admissibility at trial.'") (citation omitted).

[2] *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 2013 WL 690496, at *2 (E.D. Wis. Feb. 25, 2013) (granting plaintiffs post-trial access to materials created after enactment of the challenged redistricting plan, finding that "[t]here [was] no temporal limit in the [discovery] request, nor is there any logic to an argument that items post-dating [enactment] … necessarily lack relevance," and "it is entirely logical to believe that emails and other materials circulated after [enactment] could relate to the objectives or motives of the legislators and others involved"); *see also, e.g.*, *Pershing Pac. W., LLC v. MarineMax, Inc.*, 2013 WL 941617, at *5 (S.D. Cal. Mar. 11, 2013) (rejecting argument that documents created after filing of complaint are categorically irrelevant: "post-complaint documents may reflect on events or statements that occurred prior to the lawsuit[,] which may bear on Defendants' liability")), *on reconsideration in part*, 2013 WL 1628938 (S.D. Cal. Apr. 16, 2013); *Zaloga v. Borough of Moosic*, 2012 WL 1899665, at *3 (M.D. Pa. May 24, 2012) (similar); *NLRB v. Greif Bros., Inc.*, 2011 WL 2637078, at *4 (S.D. Ohio May 26, 2011) (ordering production of documents created after termination of employment, because "[e]ven documents that post-date … discharge …. may nevertheless shed light on the motivation underlying [the] termination"); *Paolo v. Amco Ins. Co.*, 2003 WL 24027878, at *2 (N.D. Cal. Dec. 16, 2003) ("the filing date of [plaintiff's] lawsuit does not control the relevance of the information sought"); *Trzeciak v. Apple Computers, Inc.*, 1995 WL 20329, at *1-2 (S.D.N. Y Jan. 19, 1995) (rejecting relevance challenge to production of documents created after onset of plaintiff's symptoms related to condition at issue, because there was "no reason to assume that documents postdating [the injury] d[id] not contain evidence" relevant to plaintiff's claims); *Midland Inv. Co. v. Van Alstyne, Noel & Co.*, 59 F.R.D. 134, 137-38 (S.D.N.Y. 1973) (ordering production over objection that documents created after last act complained of by plaintiff were "ipso facto irrelevant": "Merely because the document is dated after the last act complained of … does not make it immune from discovery if it relates to relevant discoverable information"); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 297-98 (1968) ("In a proper case, … a party might well have the right to demand discovery of documents from an opposing party dealing with activities during a period outside that covered by the subject matter of the lawsuit in order [to] provide some indication of the ramifications of the actions forming the basis of the complaint.").

events" but instead based on "the reasonable expectations entertained on that date," it was proper to consider evidence of events after the measuring date "to establish both that the expectations were entertained [on that date] and also that such expectations were reasonable and intelligent"); *VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 631 (3d Cir. 2007) ("A company's actual subsequent performance is something to consider when determining *ex post* the reasonableness of a valuation….") (citing *Moody v. Sec. Pac. Bus. Credit, Inc.*, 971 F.2d 1056, 1074 (3d Cir. 1992)); *In re Mama D'Angelo, Inc.*, 55 F.3d 552, 556 (10th Cir. 1995) (explaining that courts "may consider information originating subsequent to the transfer date if it tends to shed light on a fair and accurate assessment of the asset or liability as of the pertinent date") (citation omitted); *In re Sierra Steel, Inc.*, 96 B.R. 275, 279 n.6 (9th Cir. BAP 1989) ("[T]here is no policy reason why bankruptcy judges should not be allowed to consider subsequent events in valuing assets or determining liabilities."); *Ga.-Pac. Corp. v. United States*, 640 F.2d 328, 337 n.5, 351-52, 359-60 (Fed. Cl. 1980) (referring to subsequent events to reconcile competing expert views on what a hypothetical reasonable buyer and seller of timberland as of 1968 taking date would have considered in negotiating hypothetical sale); *United States v. Brooklyn Union Gas Co.*, 168 F.2d 391, 395-97 (2d Cir. 1948) (admitting evidence of events subsequent to valuation date in reviewing fair market value analysis of Takings Clause claim); *Schuh Trading Co. v. Comm'r*, 95 F.2d 404, 412 (7th Cir. 1938) ("As we have shown, evidence as to subsequent events is material in testing the propriety of the valuation….").

B. At This Stage, It Is Unnecessary To Resolve The Proper Perspective For The Replacement Value Methodology.

The Teams' motion to compel seeks relevant, nonprivileged material that is plainly discoverable under Federal Rule of Civil Procedure 26(b). Comcast maintains that "documents that post-date the effective date" are "entirely irrelevant to the issue to be decided on remand."

Dec. 19, 2019 Comcast's Opp'n to the Teams' Mot. to Compel [ECF 1093] ¶ 1. But Comcast's reliance on the supposed "well-settled rule that 'subsequent events are not considered in fixing fair market value,'" *id.* at ¶ 15 (quoting *First Nat'l Bank of Kenosha v. United States*, 763 F.2d 891, 894 (7th Cir. 1985)), is misplaced. Again, this is a ***discovery dispute***. As outlined above, Federal Rule of Procedure 26(b)(1) contemplates an intentionally broad scope of discovery, and the Supreme Court, Fifth Circuit, and this Court have all repeatedly recognized that the discovery rules are to be broadly and liberally construed. Discovery requests "should be considered relevant if there is *any possibility* that the information sought may be relevant to the claim or defense of any party," *In re Adkins Supply, Inc.*, 555 B.R. at 589 (emphasis in original; citation omitted), and the Teams are entitled to seek "any information that 'appears reasonably calculated to lead to the discovery of admissible evidence,'" *Hobart*, 784 F. Supp. 2d at 766 (citation omitted). "Information sought ***only fails*** the relevance test if it is clear that it could have '***no possible bearing*** on the claim.'" *In re Adkins Supply, Inc.*, 555 B.R. at 589 (emphases added; citation omitted). Thus, for the purposes of resolving the motion to compel, it is not necessary to establish exactly how any particular, yet-to-be-produced post-2016 documents may inform the valuation methodology. Comcast's protestations about the propriety of relying on the information that may or may not be contained in such documents are thus woefully premature and ignore the posture of this mine-run discovery dispute.

The proper question is not whether all of the requested information is necessary to a particular valuation theory or may be ultimately relied upon by the parties or the Court. Instead, the proper question is whether "there is *any possibility* that the information sought may be relevant to the claim or defense of any party." *Id.* (emphasis in original; citation omitted). The answer to that question is plainly "yes."

The materials the Teams seek in their motion to compel satisfy these broad, liberal discovery standards. As explained in the Teams' motion, the documents and information sought are "germane to their potential valuation methodologies, including both an updated DCF analysis and a replacement value theory." Mot. ¶ 4. In particular, the Teams requested the materials after learning that "Comcast's EBI function prepares drop analyses as part of Comcast's effort to assess whether to continue carrying certain programming or to drop carriage altogether," which is precisely the "sort of information [that] is central to a replacement value analysis." *Id.* at ¶ 11. "Indeed, whether Comcast would enter an agreement to carry the New Network or drop carriage, in the hypothetical scenario where the Debtor had rejected the existing Affiliation Agreement, is ***fundamental*** to the analysis." *Id.* (emphasis added). And this relevance is not limited by an artificial date cutoff; instead, "[i]f Comcast performed a drop analysis of one or more of these RSNs—regardless whether it occurred after December 31, 2016—that analysis is relevant to, for example, an assessment of whether Comcast would carry or drop the New Network (AT&T SportsNet Southwest)." *Id.* at ¶ 12.

The requested information is particularly relevant and necessary here, as noted by this Court's previous statements. In October 2014, for example, the Court recognized that the ultimate valuation methodology employed may need to value the Affiliation Agreement "as of the petition date with hindsight from today … taking into account ***all of the facts that we now know***." Oct. 8, 2014 Hr'g [ECF 715] at 79:23-80:2 (emphasis added). These facts may well include post-confirmation evidence or subsequent developments relevant to the Court's assumptions. And there is no reason to prematurely and categorically exclude some of the facts that Comcast may now know about the market value of RSNs. At a minimum, even if the documents are not ultimately used in the valuation methodology, they are certainly of potential value enough to satisfy Rule

26(b)(1)'s lenient discovery standards. That is all that is necessary to resolve the pending motion to compel.

* * *

At bottom, the Teams respectfully maintain that it is unnecessary for the Court to resolve the proper perspective for a replacement value methodology in order to rule on the pending motion to compel. This Court has already recognized that the questions to be answered at the valuation hearing "do[] not dictate the methodology for determining fair market value." *See* July 31, 2019 Mem. Op. [ECF 1070] at 11 n.5. Because the analysis the Court will rely on is still undetermined, it is reasonable also to leave open for now the decision on which perspective to take for that analysis. For purposes of the motion to compel, it is enough that the Teams seek materials that may well assist the Court in conducting a valuation. As a result, the Court should grant the motion to compel and order Comcast to promptly produce all responsive, nonprivileged materials.

In the interest of fully responding to the Court's interest in resolving the issues raised during the December 20, 2019 hearing, however, the Teams also offer a response on the merits.

II. AN OBJECTIVE VALUATION METHODOLOGY IS THE PROPER AND BEST WAY TO DETERMINE REPLACEMENT VALUE.

Although the Teams maintain that the Court does not need to resolve the issue of the proper perspective for the replacement value methodology at this time, if the Court decides to reach the issue, the Teams submit that the proper and best way to determine replacement value is to use an objective valuation methodology to determine a ***reasonable*** value. Thus, Comcast's drop analyses conducted after 2016 and related communications are relevant to this analysis. These documents are relevant and likely to provide information on what a rational marketplace actor, relying on the best and most complete information available, would have reasonably viewed as the

appropriateness of entering into a hypothetical replacement affiliation agreement with the Network, given Comcast's footprint in the Houston area, and the terms of any such agreement.

In short, the Teams agree with this Court's suggestion that the question is not "what Comcast would have done, but what was the replacement value in a more universal way of asking it," Dec. 20, 2019 Hr'g at 23:13-15—*i.e.*, what a rational marketplace participant in Comcast's position reasonably would have done. This framework takes into account the objective facts and circumstances as they existed at the time, but properly ignores the potential biases that may be introduced by limiting an analysis to Comcast's (potentially idiosyncratic) view of the Network's utility or (potentially self-serving) theories about "what Comcast would have done on the confirmation date," *id.* at 23:5-8, or what "would have been Comcast's beliefs at that date," *id.* at 23:24-24:4. It focuses the inquiry on what would have been a rational, reasonable, market-based decision.

Indeed, this Court has already recognized the importance of an analysis unclouded by Comcast's actual anticompetitive motives and gamesmanship. As the Court noted in 2014, just months after Comcast reneged on its earlier announcements that it planned to make a bid for the Network, "Comcast's 1111(b) election is not designed to preserve value, or even to obtain value for Comcast in the traditional sense, but rather, it is to defeat the efforts of certain of its competitors, AT&T and DirecTV, to enter into this marketplace…. [E]quity … ***demands a different motive***, when I … figure out what date to … choose [for the valuation]." Oct. 8, 2014 Hr'g at 81:11-20 (emphasis added). For the same reasons, post-2016 drop analyses, prepared and kept in the ordinary course of Comcast's business, are less likely to be skewed by any bias contemporaneous to the dispute and will likely provide more objective, reliable information.

Even aside from the compelling circumstances demanding an objective approach in this particular case, using an objective approach here is consistent with general guidance supporting an objective perspective in the context of bankruptcy proceedings. Crucially, the Supreme Court's decision in *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), used an objective formula when it described the replacement value standard applicable in this case.

In *Rash*, the Court addressed "the proper application of § 506(a) of the Bankruptcy Code when a bankrupt debtor has exercised the 'cram down' option for which Code § 1325(a)(5)(B) provides." *Rash*, 520 U.S. at 955.[3] The Court held that a "'replacement-value' standard" applies "when a debtor, over a secured creditor's objection, seeks to retain and use the creditor's collateral in a Chapter 13 plan." *Rash*, 520 U.S. at 955. That "'replacement-value' standard" requires an objective measurement: "the value of the property (and thus the amount of the secured claim under § 506(a)) is the price a ***willing buyer in the debtor's trade, business or situation*** would pay to obtain like property from a ***willing seller***." *Id.* at 960 (emphases added). Notably absent from this formula is any consideration of the subjective motives, assumptions, or knowledge of the actual seller or buyer at a given time.

In its 2018 decision remanding on the valuation question in this case, the Fifth Circuit quoted repeatedly from *Rash* and explained that "its language provides guidance on the proper interpretation of § 506(a) as applied to plan-confirmation valuations when the debtor proposes to retain property." *In re Houston Reg'l Sports Network, L.P.*, 886 F.3d at 529 (footnote omitted). Indeed, the Teams found no case in which a subjective standard was used to calculate replacement value. *See, e.g.*, *United Air Lines, Inc. v. Reg'l Airports Imp. Corp.*, 564 F.3d 873, 875 (7th Cir.

[3] 11 U.S.C. § 506(a) is the valuation provision applicable in this case. *See In re Houston Reg'l Sports Network, L.P.*, 886 F.3d 523, 528 (5th Cir. 2018). And although *Rash* was a Chapter 13 case, the Fifth Circuit applied its principles in analyzing the proper valuation date in this case. *See id.* at 529.

2009) ("An asset's value depends on the price that could be agreed by willing buyers and sellers negotiating for a replacement.") (citing *Rash*); *UMB Bank, N.A. v. United Air Lines, Inc.*, 2008 WL 4866188, at *3 (N.D. Ill. June 13, 2008) ("*Rash* held that determination of replacement value was an objective one, and not what a specific debtor might subjectively feel was necessary."), *rev'd on other grounds*, 564 F.3d 873 (7th Cir. 2009).

And the same objective principles discussed in *Rash* resonate throughout many other aspects of bankruptcy proceedings as well. For example, for purposes of the Bankruptcy Code's constructive fraud transfer provision, 11 U.S.C. § 548, the "determination of reasonably equivalent value is fundamentally one of common sense, measured against market reality." *In re McMartin*, 599 B.R. 622, 627 (Bankr. D.N.D. 2019) (citation omitted). The most "important elements to consider are (1) fair market value, and (2) whether there was an arm's length transaction." *Id.* (citation omitted). Moreover, an individual debtor's subjective "intent or his plan (or lack of a plan) ... ***is not relevant*** to the reasonably equivalent value analysis because section 548(a)(1)(B) ***requires the application of an objective standard***." *Id.* at 629 (emphases added); *see also, e.g.*, *id.* at 629 n.7 (collecting cases); *In re Think Retail Solutions, LLC*, 2019 WL 2912717, at *14-17 (Bankr. N.D. Ga. July 5, 2019); *In re Caribbean Fuels Am., Inc.*, 688 F. App'x 890, 894-95 (11th Cir. 2017). This Court also explained in *In re TTC Plaza Ltd. Partnership* that "the fair value of property is determined '… by estimating what the debtor's assets would realize ***if sold in a prudent manner in current market conditions***.'" 2014 WL 3057555, at *3 (Bankr. S.D. Tex. July 7, 2014) (emphasis added; citation omitted). Other bankruptcy courts across the country have likewise recognized that fair market value "assumes a sale of the property between a willing buyer and seller in which both parties are ***fully informed, acting reasonably, and unaffected by undue stimulus***." *In re Stockbridge Props. I, Ltd.*, 141 B.R. 469, 472 (N.D. Ga. 1992) (emphasis added);

see also, e.g., *In re Brown*, 2010 WL 4052941, at *4 (Bankr. D. Mont. Oct. 14, 2010) ("Market value is '[t]he most probable price which a Residence should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably and assuming the price is not affected by undue stimulus.'") (alteration in original; citation omitted).

The principles supporting an objective approach in the bankruptcy context apply more broadly, too. Legal standards across many non-bankruptcy contexts further support using an objective approach. For example, the Supreme Court has long recognized the benefits of objective standards in its Takings Clause jurisprudence. In *United States v. 50 Acres of Land*, the Court reaffirmed the "principle that just compensation ***must be measured by an objective standard that disregards subjective values*** which are only of significance to an individual owner." 469 U.S. 24, 35 (1984) (emphasis added). It also explained the reasoning behind this general principle: "As opposed to such personal and variant standards as value to the particular owner whose property has been taken," it is better to calculate the value of just compensation using an objective, "transferable value," which "has an external validity [that] makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use." *Id.* at 35-36 (quoting *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949)). And including idiosyncratic, "subjective elements in the formula for determining the cost of reasonable substitute facilities ***would enhance the risk of error and prejudice***." *Id.* at 36 (emphasis added).

These principles apply more broadly, too. There are countless additional examples of areas in the law in which objective valuation methodologies prevail. For example:

- The Texas Uniform Fraudulent Transfer Act's "***reasonably equivalent value***" requirement requires "objective value at the time of the transaction," and emphasizes "objective value and utility from a reasonable creditor's perspective, … regardless of [subjective considerations]." *Janvey v. Golf Channel, Inc.*, 834 F.3d 570, 572 (5th Cir. 2016); *see also Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560 (Tex. 2016).
- A "***bona fide offer***" for purposes of the Petroleum Marketing Practices Act, 15 U.S.C. § 2802(b)(3), "is measured by an objective standard" under which, "[t]o be objectively reasonable, an offer must 'approach[] fair market value.'" *Anand v. BP W. Coast Prods. LLC*, 484 F. Supp. 2d 1086, 1096 (C.D. Cal. 2007) (citation omitted; second alternation in original); *see also, e.g.*, *Rhodes v. Amoco Oil Co.*, 143 F.3d 1369, 1372-73 (10th Cir. 1998); *LCA Corp. v. Shell Oil Co.*, 916 F.2d 434, 437 (8th Cir. 1990); *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 480-86 (3d Cir. 1987).
- Regarding standards for determining "***fair value***" of shares in corporate transactions giving rise to appraisal rights, ALI's Principles of Corporate Governance incorporate customary industry valuation standards to ensure an objective valuation. In particular, Section 7.22 indicates that "fair value should be determined using the customary valuation concepts and techniques generally employed in the relevant securities and financial markets for similar businesses in the context of the transaction giving rise to appraisal." ALI Principles of Corp. Governance § 7.22(a) (Oct. 2019 update).
- In contract law, a party's "[***e***]***xpectation interest***"—which, "[i]n principle, at least, … represents the actual worth of the contract to him rather than to some reasonable third person" and may "therefore take account of any special circumstances that are peculiar to the situation of the injured party, including his personal values and even his

idiosyncrasies, as well as his own needs and opportunities"—is limited in practice by a "more objective valuation of his expectation interest." *Restatement (Second) of Contracts*, § 344 cmt. b (Oct. 2019 update). For example, the injured party "may be barred from recovering for loss resulting from such special circumstances on the ground that it was not foreseeable or cannot be shown with sufficient certainty," *id.* (cross-referencing §§ 351-352), and "since he cannot recover for loss that he could have avoided by arranging a substitute transaction on the market (§ 350), his recovery is often limited by the objective standard of market price," *id.* (cross-referencing § 352).

- A plaintiff's allegation that her vehicle is a "lemon" with a "cognizable 'nonconformity,' that is, a 'defect or condition that substantially impairs the use, value, or safety of a motor vehicle to the consumer,'" must be supported by "***objective evidence***." *Sirlouis v. Four Winds Int'l Corp.*, 2014 WL 3532900, at *2 (N.D. Ohio July 15, 2014) (emphasis added) (quoting Ohio Rev. Code § 1345.71(E)). The plaintiff's "subjective assertion that the vehicle was so affected does not meet the standard." *Id.*; *see also id.* at *4-6.

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The Supreme Court has specifically required an objective perspective when employing a "'replacement-value' standard" in the bankruptcy context. *Rash*, 520 U.S. at 955. And the underlying rationale in favor of "an objective standard that disregards subjective values," *50 Acres of Land*, 469 U.S. at 35, which is mirrored throughout the bankruptcy context and myriad other areas of the law requiring objective legal standards, applies with full force here. An objective valuation method best avoids the risk of subjectivity that may "enhance the risk of error and prejudice." *Id.* at 36. This is a case in point. A subjective standard would invite all manner of error and prejudice based on theories regarding "what Comcast would have done on the

confirmation date," Dec. 20, 2019 Hr'g at 23:5-8, or what "would have been Comcast's beliefs at that date," *id.* at 23:24-24:4. But there is good reason to believe that Comcast's motives at that time were less than pure. *See supra* p. 10 (citing Oct. 8, 2014 Hr'g at 81:11-20). And anticompetitive, idiosyncratic values based on a skewed subjective perspective cannot provide the basis for a reasonable replacement value. The best and most accurate analysis is viewed from an objective perspective, focusing on the value (or lack thereof) demonstrated by a hypothetical "willing buyer and seller in which both parties are ***fully informed, acting reasonably, and unaffected by undue stimulus***." *In re Stockbridge*, 141 B.R. at 472 (emphasis added). In this case, that means determining what a rational marketplace participant in Comcast's position reasonably would have done.

CONCLUSION

For the foregoing reasons, the Teams ultimately maintain that the Court does not need to resolve the issue of valuation methodology at this juncture. If the Court decides to reach the issue, however, the Teams urge the Court to confirm that any "replacement value" calculation should be based on an objective valuation methodology.

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Respectfully Submitted,

/s/ Judson Brown, P.C.

Joshua A. Sussberg, P.C. (*pro hac vice*)
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Telephone: 212-446-4800
Facsimile: 212-446-4900
joshua.sussberg@kirkland.com

Judson Brown, P.C. (*pro hac vice*)
Mike Kilgarriff (*pro hac vice forthcoming*)
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 389-5000
Facsimile: (202) 389-5200
jdbrown@kirkland.com

Attorneys for Houston Astros, LLC

/s/ Roberto J. Kampfner

Roberto J. Kampfner (*pro hac vice*)
WHITE & CASE LLP
555 South Flower Street, Suite 2700
Los Angeles, California 90071
Telephone: (213) 620-7700
Facsimile: (213) 452-2329
rkampfner@whitecase.com

Douglas Baumstein (*pro hac vice*)
Samuel P. Hershey (*pro hac vice* pending)
WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 819-8200
Facsimile: (212) 354-8113
dbaumstein@whitecase.com
sam.hershey@whitecase.com

Attorneys for Rocket Ball, Ltd.

Harry Perrin
VINSON & ELKINS LLP
1001 Fannin Suite 2500
Houston, Texas 77002
Telephone: (713) 758-2548
Facsimile: (713) 615-5016
hperrin@velaw.com

CERTIFICATE OF SERVICE

On the date hereof, I, Roberto J. Kampfner, caused the foregoing document to be filed through the Court's CM/ECF filing system. As a result of such filing, a "Notice of Electronic Filing" or "Daily Summary Report of Bankruptcy Filings" was sent to the registered ECF users of record in this case.

/s/ Roberto J. Kampfner
Roberto J. Kampfner