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Level the Playing Field: Advocating for the removal of Major League Baseball's prohibition on the admissibility of Statcast-generated sabermetrics as evidence in salary arbitration hearings

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I. Introduction

Since the 1970s, Major League Baseball ("MLB") has used "final offer" arbitration ("FOA") to resolve disputes arising under the Collective Bargaining Agreement ("CBA") which manages labor relations between the players' union and ballclub owners.[1] The MLB's system of FOA permits certain players seeking a higher salary to prove their value to a team by submitting evidence of their performance over the course of the most recent season to a panel of arbitrators for consideration.[2] The process pits a player against his team in a hearing where each side puts forth its most compelling argument possible to the panel.[3] In the end, the arbitration panel determines the more reasonable of the two offers in light of the evidence presented and awards a one-year, non-negotiable salary figure in the amount tendered by the victorious party.[4]

The CBA enumerates specific evidentiary rules that each party to a FOA hearing must abide by in the presentation of its case.[5] Traditional statistics such as a player's batting average, on-base percentage, and runs batted in are allowed to be presented for consideration before the arbitration panel.[6] The CBA permits the presentation of these statistics in no uncertain terms.[7] However, sabermetrics and next-generation statistics, specifically those gathered and produced by the MLB's Statcast system, are considered inadmissible evidence per the plain language

[1] Benjamin A. Tulis, *Final-Offer "Baseball" Arbitration: Contexts, Mechanics & Applications*, 20 SETON HALL J. SPORTS & ENT. L. 85, 90–91 (2010).
[2] Tulis, *supra* note 1.
[3] Tulis, *supra* note 1.
[4] Tulis, *supra* note 1.
[5] *Basic Agreement 2017–2021*, MAJOR LEAGUE BASEBALL PLAYERS' ASSOC. (Dec. 1, 2016), https://d39ba378-ae47-4003-86d3-147e4fa6e51b.filesusr.com/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf.
[6] *Basic Agreement 2017–2021*, *supra* note 5.
[7] *Basic Agreement 2017–2021*, *supra* note 5.

of the CBA.[8] These figures cannot be considered in the determination of a panel's award.[9]

This paper argues that Major League Baseball should amend its Collective Bargaining Agreement (CBA) to remove the outright ban on certain types of statistical evidence to help prove a player's value. First, the paper briefly describes the history of the compensation system in the MLB and its evolution. Then, it details how final offer arbitration became the default mechanism for resolving compensation disputes between teams and players. The paper subsequently focuses on the Collective Bargaining Agreement's carve-out of statistical evidence and notes the similarities and differences between Major League Baseball's evidentiary standards governing salary arbitration hearings and the Federal Rules of Evidence ("FED. R. EVID."). Finally, the paper argues why this rule should be changed in light of the fact that Statcast data meet the federal standard for admissibility per the Federal Rules of Evidence, which will result in financial gain for players going through the salary arbitration process.

Implementing final offer salary arbitration system to the Major League Baseball Collective Bargaining Agreement was a monumental victory for players' rights and has led to a sharp increase in compensation for players across the MLB.[10] For many decades in MLB history, players were shortchanged by ballclub owners and felt that they were not being paid the amounts they deserved.[11] The ability of team owners to underpay players was facilitated by the MLB's reserve system,[12] which, at one point, allowed owners to

[8] *Basic Agreement 2017–2021*, *supra* note 5.
[9] *Basic Agreement 2017–2021*, *supra* note 5.
[10] Ethan Lock & Allan DeSerpa, *Salary Increases Under Major League Baseball's System of Final Offer Arbitration*, 2 LAB. LAW 801, 803–04 (1986).
[11] Edward Silverman, *Dick Woodson's Revenge: The Evolution of Salary Arbitration in Major League Baseball,* 2013 PEPP. L. REV. 21, 21–22, (2013).
[12] Professional baseball's reserve system was a scheme whereby ballclub owners essentially prohibited modern-day free agency amongst players for a large part of the sport's history. It is explained in greater detail herein, but for

have absolute control over player contracts without any negotiation whatsoever.[13] A player had two options: accept the contract terms imposed on him, or cease playing professional baseball.[14] The reserve system was gradually weakened over time, but its existence was both legitimized and elongated, in large part, due to Supreme Court decisions that uniquely granted professional baseball an exemption from antitrust claims.[15] Tensions between players and owners grew tremendously, and eventually, league owners decided to scale back the reserve system.[16] Simultaneously, owners and the players' union representatives agreed on the implementation of a final offer arbitration system to determine certain players' salaries depending on service time accrued at the major league level.[17] The rules governing FOA hearings are found in the league's Collective Bargaining Agreement.[18] These rules affirmatively state certain evidence that is and is not admissible in FOA hearings.[19] One broad category of evidence that is deemed inadmissible under the agreement is sabermetrics derived from the league's Statcast system, which produces an

more information, *see* Roger I. Abrams, *Arbitrator Seitz Sets the Players Free*, SOCIETY FOR AMERICAN BASEBALL RESEARCH (2009), available at https://sabr.org/research/arbitrator-seitz-sets-players-free; *see also* Walter T. Champion Jr., *"Mixed Metaphors," Revisionist Theory and Post-Hypnotic Suggestions on the Interpreatation of Sports Antitrust Exemptions: The Second Circuit's Use in Clarett of a Piazza-Like "Innovative Reinterpretation of Supreme Court Dogma*," 20 MARQ. SPORTS L. REV. 55, 62–63 (2009); Anthony Sica, *Baseball's Antitrust Exemption: Out of the Pennant Race Since 1972*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 295, 306–07 (1996).

[13] Champion, *supra* note 12, at 62–63; Sica, *supra*, note 12, at 306–07.

[14] Marc Chalpin, *It Ain't Over 'Til It's Over: The Century Long Conflict Between the Owners and the Players in Major League Baseball*, 60 ALB. L. REV. 205, 208 (1996).

[15] Sica, *supra* note 12, at 319.

[16] Chalpin, *supra*, note 14, at 217-18.

[17] FOA is explained summarily herein. However, for an in-depth description of FOA as a dispute resolution process also used in many other contexts, *see* Tulis, *supra,* note 1.

[18] *Basic Agreement 2017–2021*, *supra* note 5.

[19] *Basic Agreement 2017–2021*, *supra* note 5.

incredible amount of next-generation statistics that fans, knowingly or unknowingly, consume on a regular basis.[20] Whether it is the exit velocity of a homerun ball, the spin rate of any given pitch, or the precise speed in which an outfielder runs while tracking a fly ball; this data is all produced by the league's Statcast system, which the average fan has become accustomed to throughout the past few seasons.[21] The league, through its representatives, affiliates, intellectual property holding subsidiaries, and broadcast partners, fully endorses Statcast data as accurate, precise, and highly exact in peddling the information to fans, ballclubs, and players.[22] As a result, it is only appropriate that the evidentiary standards of the Collective Bargaining Agreement be amended to deem admissible sabermetrics produced by the Statcast system, so that a player slated for a FOA hearing can incorporate this data into his argument and stand to gain financially from it.

The evidence rules used by the MLB's final offer salary arbitration system must be relaxed to better suit players' financial interests. Using sabermetrics, specifically Statcast, as evidence to support a player's case would lead to more favorable awards for players. Statcast-derived sabermetrics should be made admissible in Major League Baseball final offer salary arbitration hearings.

II. The Rise of the Reserve System

Over 135 years ago, baseball and arbitration existed wholly separate and apart from one another; in fact, there was no indication that the two would one day intersect.[23] At that point in time, Major League Baseball did not exist in its

[20] Paul Casella, *Statcast Primer: Baseball Will Never Be the Same*, MLB.COM (Apr. 24, 2015), available at https://www.mlb.com/news/statcast-primer-baseball-will-never-be-the-same/c-119234412.
[21] Casella, *supra* note 20.
[22] Casella, *supra* note 20.
[23] *Cf.* Edward Silverman, *Dick Woodson's Revenge: The Evolution of Salary Arbitration in Major League Baseball,* 2013 PEPP. L. REV. 21, 23, (2013) (indicating a player tried to initiate arbitration as early as 1908).

present form. Instead, the MLB's National League ("NL" or "the NL") was an independent powerhouse that rose to prominence above a number of smaller, competing professional baseball leagues.[24] Nonetheless, many teams from these smaller, less competitive leagues sought to attract NL players to defect and play for their own ballclubs.[25] In large part, the appeal of playing outside of the NL was to escape the reserve system that some alternate leagues chose not to employ.[26] By definition, the reserve system significantly impeded a player's freedom of contract; it allowed owners to deny certain players the right to sign with any other team upon the expiration of their contract.[27] In essence, the reserve system granted NL owners the ability to single-handedly renew players' contracts at a price of the owners' choosing each year until the player retired.[28]

In its infancy, the NL's reserve system was installed in 1879 as a league-wide policy that afforded each team the privilege of "protecting" (unilaterally deciding to retain) the rights to five players' contracts upon expiration, to be renewed at a price determined by team owners.[29] For obvious reasons, NL ballclub owners favored this system greatly, and as such, it was soon expanded to cover each team's entire roster.[30] Due to the influence and power amassed by the NL as the United States' top-tier baseball league by the late nineteenth century, it was able to strongarm many competitor leagues into signing agreements whereby the NL's reserve system would be honored and

[24] For a very detailed history on the National League, and more generally, professional baseball in the United States beginning around 1839, *see* Joseph J. McMahon, Jr. & John P. Rossi, *A History and Analysis of Baseball's Three Antitrust Exemptions*, 2 VILL. SPORTS & ENT. L.F. 213 (1995).
[25] Jonathan B. Goldberg, *Player Mobility in Professional Sports: From the Reserve System to Free Agency*, 15 SPORTS LAW. J. 21, 22 (2008).
[26] McMahon & Rossi, *supra* note 24, at 225–27.
[27] Abrams, *supra* note 12.
[28] Chalpin, *supra*, note 14, at 208.
[29] Chalpin, *supra* note 14, at 207–08.
[30] Chalpin, *supra* note 14, at 208.

undisturbed.[31] In doing so, the NL not only insulated its talent pool from competitors, but also granted its clubs' owners a complete and total monopoly over *all* players' contracts. As the NL progressively morphed into the MLB of today through a series of mergers that continued through the 1920s, it appeared, much to the dismay of players, that the reserve system had become cemented as a core principle of player compensation in professional baseball.[32]

III. Baseball's Antitrust Exemption and Its Effect on the Reserve System

By 1922, frustration with the MLB's[33] reserve system, and the monopoly that it created, had been mounting for years amongst players and some competitor leagues

[31] Goldberg, *supra* note 25, at 23.

[32] The two-league structure of today's MLB can be traced back to around the year 1900. McMahon & Rossi, *infra.* At this time, the Western League, which subsequently rebranded itself as the American League (the "AL"), expanded to a number of East Coast markets and became a major threat to the NL's already-established supremacy. McMahon & Rossi, *infra.* The AL was successful in plundering a number of athletes from the NL by offering salary increases, and more importantly, an incentive to play under a reserve-clause-free contract system. McMahon & Rossi, *infra.* After enduring a couple seasons of declining revenue, due in part to the AL's successes, the NL called its counterpart to the bargaining table. McMahon & Rossi, *infra.* Representatives from the two leagues negotiated the terms of the 1903 National Agreement, whereby a uniform reserve system was implemented across the two leagues and a minor league network with its own reserve system was created under the NL and the AL as well; all of which was encompassed under a new brand called Organized Baseball. McMahon & Rossi, *infra.* For a complete history of professional baseball's roots, see McMahon & Rossi, *supra* note 24, at 230–31; 1 Sports Law Practice § 1.06 (2019), available at https://plus.lexis.com/api/document/collection/analytical-materials/id/557F-RJ70-R03M-H0KH-00000-00?cite=1%20Sports%20Law%20Practice%20%C2%A7%201.06&context=1530671.

[33] The conglomerate of AL, NL, and minor league teams that came together under the 1903 National Agreement was known as "Organized Baseball" at the time, but it is now commonly regarded as the earliest embodiment of today's MLB. McMahon & Rossi, *infra.* For the purposes of this paper, the term MLB encompasses Organized Baseball. McMahon & Rossi, *supra* note 24, at 230–31.

alike.[34] This frustration culminated in an antitrust lawsuit that progressed all the way to the United States Supreme Court.[35] In *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, the Supreme Court applied a very narrow evaluation of whether professional baseball games were considered a "trade" or "commerce . . . among the States".[36] If it were found to be such, then federal law would govern, thereby triggering the application of the Sherman Antitrust Act, which was likely to kill the MLB's reserve system; however, this was not the case.[37]

Justice Oliver Wendell Holmes Jr., writing for the majority, held that the MLB—as it existed in its early twentieth century form—was exempt from federal law and the Sherman Antitrust Act because the MLB's "business is giving exhibitions of baseball, which are purely state affairs" and not "interstate commerce" as the Court interpreted the latter phrase at that time.[38] Although this was a major

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[34] McMahon & Rossi, *supra* note 24, at 225.
[35] *Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).
[36] *Fed. Baseball Club,* 259 U.S., at 209.
[37] 5 U.S.C.S. § 1; McMahon & Rossi, *supra* note 24, at 234-35 (describing the United States Supreme Court's decision to affirm the United States Court of Appeals for the District of Columbia's holding that baseball "exhibitions" were intrastate in nature, precluding the application of federal antitrust law).
[38] *Fed. Baseball Club, Inc.*, 259 U.S. at 208. There were major constitutional undertones to the *Federal Baseball* decision, which were consistent with the Supreme Court's interpretation and application of the Constitution at the time. *Fed. Baseball Club, Inc.*, 259 U.S. at 208. In sum, for federal antitrust law to apply to professional baseball, the Court must have found that the Constitution's Commerce Clause—codified at U.S. Const. art. I, section 8, cl. 3—applied to the sport. *Fed. Baseball Club, Inc.*, 259 U.S. at 208. While it may seem questionable today that professional baseball does not qualify as "interstate commerce" under that clause, the early twentieth–century Supreme Court preferred to apply an extremely narrow definition to the phrase "interstate commerce." *Fed. Baseball Club, Inc.*, 259 U.S. at 208. At that time, the Court was very hesitant to find that many activities, schemes, programs, businesses, etc. met the requisite threshold to fall into the category of "interstate commerce," and in turn, be regulated by federal law. *Fed. Baseball Club, Inc.*, 259 U.S. at 208. However, the Court's Commerce Clause ideology changed dramatically during the New Deal era, and again towards the close of the

victory for the league's reserve system, the *Federal Baseball* decision remains a point of contention amongst many baseball fans, scholars, attorneys, and judges alike to this day.[39] Some resent the opinion as inherently flawed as it was silent to the scope and/or duration of professional baseball's antitrust exemption and was grounded in almost no precedent whatsoever.[40] Others, including current Supreme Court Justice Samuel Alito, feel it was rightly decided and chalk the decision up as one of many products of its environment in light of the Supreme Court's then-existing preference to defer many questions of purported "interstate commerce" to the States.[41] Notwithstanding modern day commentary on the case, the MLB was, in fact, granted an exemption from federal antitrust law based on this premise.[42]

As the MLB evolved throughout the decades following *Federal Baseball*, the sport became more regularly and heavily engaged in what can only be defined

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twentieth century. *Fed. Baseball Club, Inc.*, 259 U.S. at 208. For a complete history of the Supreme Court's evolving interpretation of the Commerce Clause, *see* Molly E. Homan, *United States v. Lopez*: *Supreme Court Guns Down Commerce Clause*, 73 DENV. U. L. REV. 237 (1995); Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398 (2004).

[39] Craig Calcaterra, *Happy birthday to baseball's antitrust exemption*, NBC SPORTS, (May 29, 2019, 10:54 AM), https://mlb.nbcsports.com/2019/05/29/happy-birthday-to-baseballs-antitrust-exemption/ (criticizing *Federal Baseball* on the grounds that the federal district court, circuit court, and Supreme Court judges deciding it had flawed reasoning and ulterior, nationalistic motives to aid professional baseball's success in light of the sport being "America's pastime").

[40] Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption*, SOCIETY FOR AMERICAN BASEBALL RESEARCH, (2009) https://sabr.org/research/alito-origin-baseball-antitrust-exemption (quoting a number of commentators and judges that detest *Federal Baseball* as "one of the worst decisions ever handed down," "clearly wrong," "willfully ignorant," an "impotent zombie void of vitality in light of the Court's more recent decisions," and more).

[41] Alito, *supra* note 40 (supporting *Federal Baseball* as being in line with the Supreme Court's deferential attitude toward questions of "interstate commerce" at the time, and more specifically, being on point with the Court's interpretation of the Constitution's Commerce Clause, as it understood the clause in 1922).

[42] Alito, *supra* note 40.

as "interstate commerce."[43] As a result, this created a ripe opportunity to challenge professional baseball's antitrust exemption after it appeared that the sport subsequently fell into the category of interstate commerce. *Toolson v. New York Yankees, Inc.* was just that.[44] In that case, the Supreme Court held that *Federal Baseball* remained good law and that professional baseball still enjoyed an antitrust exemption, primarily relying on the absence of a Congressional act to the contrary as justification.[45] Then, almost twenty years later, a subsequent challenge wound up before the Supreme Court in *Flood v. Kuhn*.[46] Yet again, the Supreme Court reaffirmed its position that professional baseball is exempt from antitrust law.[47] In reaching its conclusion, the *Flood* Court again relied heavily on Congressional silence related to the issue.[48] Finally, after seeing numerous legal challenges to baseball's antitrust exemption repeatedly fail in courts across the nation over a seven-decade time span, Congress decided to take up the issue in its passage of the Curt-Flood Act in 1998.[49] However, the Act is limited in scope; it revokes baseball's antitrust exemption *only* as it relates to players' contracts.[50] To this day, the league is vested with a unique authority to monopolistically control certain aspects of the sport such as franchise relocation, media and broadcasting rights, and more because of the antitrust exemption.[51]

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[43] McMahon & Rossi, *supra* note 24, at 237–39.
[44] *Toolson v. N.Y. Yankees*, 346 U.S. 356 (1953).
[45] Mitchell Nathanson, *The Irrelevance of Baseball's Antitrust Exemption: A Historical Review*, 58 RUTGERS L. REV. 1, 5 (2005); *Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).
[46] *Flood v. Kuhn*, 407 U.S. 258 (1972); *see also* McMahon & Rossi, *supra* note 24, at 242.
[47] *Flood v. Kuhn*, 407 U.S. at 285.
[48] *Flood v. Kuhn*, 407 U.S. at 273–81.
[49] 15 U.S.C. § 26(b) (1998).
[50] Joseph Citelli, *Baseball's Antitrust Exemption and the Rule of Reason*, 3 ARIZ. ST. SPORTS & ENT. L.J. 244, 289–94 (2014) (emphasis added).
[51] Calcaterra, *supra* note 39.

IV. Final Offer Arbitration in the MLB

On the heels of the Supreme Court's decision in *Flood*, it became apparent that the Court did not wish to rethink the MLB's antitrust exemption, and in turn, the validity of the reserve system.[52] In response, the MLB Players' Association (MLBPA) took up an aggressive agenda following the 1974 season by successfully using the newly-implemented grievance arbitration system to weaken and nearly eliminate the reserve system.[53] This was carried out by counseling certain athletes to play out their contracts without resigning, and requesting they subsequently file a request for a grievance arbitration hearing seeking a declaration that the player was not bound by the terms of his expired contract.[54] In the end, the MLBPA's plan was a success and accomplished by way of arbitration what *Federal Baseball*, *Toolson*, and *Flood* could not in the courts: The reserve system had been crippled.[55] This, in essence, opened the door to free agency for the first time in MLB history. However, both the ballclub owners and the MLBPA had oversight and due diligence concerns before swiftly commencing an unregulated free agency system.[56] As a result of compromise between the two sides, FOA was introduced in professional baseball for all players with less than six years of service time, beginning in the mid-1970s.[57] Mandating FOA for all players with less than six years'

[52] *Flood v. Kuhn*, 407 U.S. 258 (1972).
[53] Michael Carrell & Richard Bales, *Considering Final Offer Arbitration Resolve Public Sector Impasses in Times of Concession Bargaining*, 28 OHIO ST. J. ON DISP. RESOL. 1, 17 (2013) (detailing changes brought about by professional baseball's first collective bargaining agreement, which included a grievance arbitration provision).
[54] Carrell & Bales, *supra* note 53, at 18.
[55] Carrell & Bales, *supra* note 53, 18.
[56] Carrell & Bales, *supra* note 53, at 18.
[57] Carrell & Bales, *supra* note 53, at 18.

service time acted as a buffer to a system of unregulated free agency feared by both sides of the CBA negotiating table.[58]

To fully comprehend the way in which the MLBPA was able to achieve such a massive labor victory on behalf of the players through the grievance arbitration process, one must know some background information. In 1968, the MLBPA was able to negotiate the first ever collective bargaining agreement between owners and players in any sport nationwide.[59] The agreement included a dispute resolution provision which mandated grievance arbitration for any and all issues arising between owners and players, among other issues.[60] Utilizing this tool, and knowing that courts had been hesitant to interfere with the MLB's internal affairs, players Andy Messersmith and Dave McNally challenged the reserve clauses in their contracts through the new grievance arbitration process in 1975.[61] The Messersmith and McNally cases then wound up before the league-appointed grievance arbitrator, Peter Seitz, who found that the reserve clause did not renew in perpetuity, but expired after one invocation—a crippling blow to the MLB's reserve system.[62] As one may expect, Seitz was immediately fired by the owners and his decision appealed in both federal district and, subsequently, federal circuit court; this proved fruitless as both courts affirmed Seitz's arbitration award in favor of Messersmith and McNally.[63] By the 1976 season, players' financial prospects had never

[58] For a detailed account on this period of baseball's history and the birth of the modern-day free agent system in the MLB, *see* Jordan I. Kobritz & Jeffrey F. Levine, *Trying his Luck at Puck: Examining the MLBPA's History to Determine Don Fehr's Motivation for Agreeing to Lead the NHLPA and Predicting How He Will Fare*, 12 U. DENV. SPORTS & ENT. L. J. 3, 23-26 (2012).
[59] Garrett R. Broshuis, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 HARV. J. SPORTS & ENT. L. 51, 70 (2013).
[60] Broshuis, *supra* note 59, at 70.
[61] Broshuis, *supra* note 59, at 71.
[62] Broshuis, *supra* note 59, at 71.
[63] Kobritz & Levine, *supra* note 58, at 25.

been brighter; the MLBPA significantly dismantled baseball's reserve system and a number of players were slated for FOA.[64] Due in large part to these feats and, specifically, the implementation of FOA, the average MLB player's salary exploded from $51,000.00 in 1976 to $143,756.00 by 1980.[65]

The FOA dispute resolution process utilized by professional baseball is used to determine salaries in a number of other contexts as well, including professional hockey, per the National Hockey League's CBA, and public sector employees such as police and firemen.[66] In a general context, the FOA system is best used by two parties that are in position to negotiate a price or salary, but would likely not reach a middle ground that each side finds acceptable through traditional good faith negotiation. The system affords both sides a period of time to negotiate pre-hearing, at which point the parties are free to reach a deal and cancel the arbitration.[67] If no agreement is reached before the hearing, the arbitration commences, whereby each side has the opportunity to make a single offer to its counterpart before an arbitration panel.[68] Each side must convince the arbitration panel that its own offer is more appropriate and reasonable than its adversary's.[69] The arbitration panel must then select one party's offer as the arbitration award, which is aimed at promoting reasonableness in offers made at the hearing as well as a negotiation-friendly pre-hearing environment for parties to resolve their issues on their own accord.[70]

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[64] Kobritz & Levine, *supra* note 58, at 26.
[65] Kobritz & Levine, *supra* note 58, at 26.
[66] Tulis, *supra* note 1, at 85.
[67] Eric Lamm, *Keeping Consumers Out of the Crossfire: Final-Offer Arbitration in the Pharmaceutical Market*, 65 UCLA L. REV. 926, 930 (2018).
[68] *See* Lamm, *supra* note 67, at 957.
[69] *See* Lamm, *supra* note 67, at 957.
[70] Lamm, *supra* note 67, at 957.

The FOA system employed by the MLB, per the league's CBA, has a number of advantages over other dispute resolution processes; namely, traditional arbitration.[71] Chiefly, FOA provides an avenue to circumvent the "chilling effect" that parties to a traditional arbitration may experience.[72] This "chilling effect" is described as a situation where one or more parties are more likely to refrain from good faith negotiation before arbitration because the parties feel that the claim will be fairly and justly adjudicated by a qualified professional without the need to work out a deal beforehand.[73] In other words, the "chilling effect" potentially elongates a transaction by almost entirely ruling out the possibility that good faith negotiations can be had before the arbitration hearing itself.[74] Moreover, many parties involved in traditional arbitration proceedings often times walk away from the process feeling that the arbitrator or panel of arbitrators simply compromised down the middle and did not reach a fair result that resonated with one side over the other.[75] In FOA, this predicament is avoided because only one side can win; a compromise is impossible absent a negotiated agreement made by the parties before an arbitration award is rendered.[76] Another advantage is that FOA, by its nature, encourages and facilitates good faith bargaining because making an unreasonable or bad faith offer could easily result in losing the FOA hearing.[77] Again,

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[71] *See* Josh Chetwynd, *Play Ball? An Analysis of Final-Offer Arbitration, Its Use in Major League Baseball and Its Potential Applicability to European Football Wage and Transfer Disputes*, 20 MARQ. SPORTS L. REV. 109, 111 (2009).
[72] Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INT'L ARB. 383, 386 (1999).
[73] Meth, *supra* note 72, at 386.
[74] *See* Meth, *supra* note 72, at 386.
[75] *See* Meth, *supra* note 72, at 387.
[76] Lamm, *supra* note 67, at 930.
[77] Meth, *supra* note 72, at 388.

because the arbitrator or panel must side with one party or the other, making an unreasonable offer is highly risky.[78]

Additionally, the FOA system fosters an immense percentage of pre-hearing settlements regarding claims slated for FOA.[79] A number of studies have affirmed this premise.[80] Furthermore, the majority of players that file paperwork to compel FOA hearings typically settle with their ballclub after filing a FOA application but before parties submit their proposed salaries, or after submitting proposals but before the hearing itself commences.[81] In fact, some studies estimate that for every ten FOA filings submitted at the beginning of the offseason, only one actually ends up being arbitrated.[82] For example, prior to the 2009 MLB season, 111 players filed for a FOA hearing.[83] Of those 111, sixty-five players came to an agreement with their team before the two sides exchanged their proposed salary figures, thereby voiding the prior FOA application.[84] The remaining forty-six players exchanged proposed salaries with front office staff, and of those forty-six, there were forty-three more agreements reached before a single FOA hearing took place in MLB that year.[85] In other words, the FOA process facilitated 108 settlements and resulted in only three FOA hearings prior to the 2009 MLB season.[86] Another way to quantify this success is that FOA was used to settle over ninety-seven percent of cases that year.[87] More recently, there were 162 players eligible for FOA during the

[78] Lamm, *supra* note 67, at 930.
[79] Meth, *supra* note 72, at 388 (asserting that FOA facilitates bargaining and settlement); Tulis, *supra* note 1, at 90 (citing to factual evidence that FOA lends itself to settlement, generally, in the context of MLB).
[80] *See* Jason Micah Ross, *"Baseball Litigation": A New Calculus for Awarding Damages in Torts Trials*, 78 TEX. L. REV. 439, 448 (1999).
[81] Ross, *supra* note 80, at 448.
[82] Ross, *supra* note 80, at 448.
[83] Tulis, *supra* note 1, at 90.
[84] Tulis, *supra* note 1, at 90.
[85] Tulis, *supra* note 1, at 90.
[86] Tulis, *supra* note 1, at 93.
[87] Tulis, *supra* note 1, at 93.

2020 MLB offseason.[88] Of that number, only a mere twenty players exchanged proposed salaries with his team, and twelve of those resulted in a FOA hearing.[89] That means that, in the 2020 offseason, roughly three in four cases slated for FOA settled during the pre-hearing stage.

Despite the high rate of pre-hearing settlements, a number of professional baseball players go forward with a FOA hearing against their ballclub each year with millions of dollars at stake.[90] The hearing itself is governed by the salary arbitration rules codified in the league's CBA.[91] Pursuant to this section of the agreement, in a salary arbitration proceeding, the arbitration panel is expected to factor in the player's contributions during the prior season (including overall performance, special qualities of leadership and public appeal), the length and consistency of his career, the amount of money he has made from past contracts, yearly salaries for players at the same position, the existence of any physical/mental injuries he has, and his team's record over the more recent seasons.[92] Conversely, the arbitration panel is expressly prohibited from considering evidence regarding the financial situation of the player or team, media buzz related to the performance of either the player or team (except annual player awards such as Most Valuable Player or Gold Glove awards), previous offers of settlement made by either the player or team prior to arbitration, the cost of either side's representatives at the hearing, and salaries in other sports or occupations.[93]

The CBA then transitions to the statistics admissible in a salary arbitration proceeding.[94] According to its terms,

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[88] *See Bradley Wins Last Arbitration Case, Teams Have 7-5 Margin*, WIPROUD.COM, https://www.wiproud.com/sports/mlb/bradley-wins-last-arbitration-case-teams-have-7-5-margin-2/ (updated Feb. 21, 2020).
[89] *Bradley wins last arbitration case, teams have 7-5 margin*, *supra* note 88.
[90] *See* Josh Chetwynd*, supra*, note 71, at 111.
[91] *2017–2021 Basic Agreement*, *supra* note 5, at Art. VI(E)(1).
[92] *2017–2021 Basic Agreement*, *supra* note 5, at Art. VI(E)(10)(a).
[93] *2017–2021 Basic Agreement*, *supra* note 5, at Art. VI(E)(10)(b)(i)-(v).
[94] *2017–2021 Basic Agreement*, *supra* note 5, at Art. VI(E)(10)(c).

the CBA states that only "publicly available" statistics are admissible, which includes data published through "subscription-only websites."[95] Up to this point, the CBA imposes logical evidentiary restrictions that actually mirror the Federal Rules of Evidence in many respects—*i.e.* making inadmissible offers of compromise,[96] excluding media-generated hearsay about the team or the player,[97] or simply prohibiting data of salaries in other sports or occupations seemingly on relevancy grounds.[98] But the CBA states in the very next sentence that any statistic or metric "generated through the use of performance technology, wearable technology, or STATCAST, whether publicly available or not . . . " is inadmissible.[99] Unlike the above-mentioned portions of the CBA that are in harmony with the Federal Rules of Evidence, this section finds itself in direct conflict with FED. R. EVID. 702(a), which deems admissible "scientific, technical, or other specialized knowledge."[100]

Although there is virtually no literature as to why the CBA expressly disavows Statcast data from being considered in MLB salary arbitration hearings, it can be inferred that there is one main reason why this is the case.[101] League ownership is likely skeptical as to the exact accuracy and reliability of Statcast data because the system is relatively new.[102] Driving this skepticism, perhaps

[95] *2017–2021 Basic Agreement*, *supra* note 5, at Art. VI(E)(10)(c).
[96] *See* FED. R. EVID. 408.
[97] *See* FED. R. EVID. 802.
[98] *See* FED. R. EVID. 402.
[99] *2017–2021 Basic Agreement*, *supra* note 5, at Art. VI(E)(10)(c).
[100] FED. R. EVID. 702.
[101] *But see* Sheryl Ring, *Let's Fix MLB's Salary Arbitration System: Evidence and Admissibility*, FANGRAPHS, (Jan. 29, 2019), https://blogs.fangraphs.com/lets-fix-mlbs-salary-arbitration-system-evidence-and-admissibility/.
[102] *See* R.J. Anderson, *How Statcast has changed MLB and why not everybody seems all that happy about it,* CBSSPORTS.COM, (June 6, 2017), https://www.cbssports.com/mlb/news/how-statcast-has-changed-mlb-and-why-not-everybody-seems-all-that-happy-about-it/.

subconsciously, is the fact that owners realize an inclusion of Statcast sabermetrics into the category of admissible evidence will give players and agents more ammunition to sway the arbitration panel in the players' favor in FOA hearings.[103] From a financial standpoint, it is logical that owners would seek to limit the types of evidence that may be considered in a FOA hearing because repressing certain sabermetrics will seemingly give teams a higher probability of winning the hearing.[104] However, this exclusion of Statcast data from admissible evidence is not in line with the other evidentiary rules contained in the CBA, which follow federal evidentiary standards; Federal Rule of Evidence 702 is essentially ignored by the CBA.[105] In light of language contained in Federal Rule of Evidence 702 and the Supreme Court's subsequent interpretation of Federal Rule of Evidence 702, the CBA should be amended to make admissible sabermetrics and certain advanced statistics, specifically those derived from Statcast, in player salary FOA proceedings.[106] The following sections of this paper explain why.

V. Statcast Data Qualifies as Scientific, Technical, or Other Advanced Information under FED. R. EVID. 702

During the 2015 season, the MLB debuted Statcast league-wide and advertised it as "a state-of-the-art tracking technology" that is "capable of gathering and displaying previously immeasurable aspects of the game."[107] However,

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[103] Anderson, *supra* note 102.
[104] *See* Ring, *supra* note 101.
[105] *See 2017–2021 Basic Agreement*, *supra* note 5.
[106] *See generally* Duabert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); FED. R. EVID. 702.
[107] Casella, *supra* note 20 (defining MLB's Statcast system and providing relevant background information); Richard Sandomir, *Statcast Arrives, Offering Way to Quantify Nearly Every Move in Game*, N. Y. TIMES (Apr. 21, 2015), https://www.nytimes.com/2015/04/22/sports/baseball/statcast-offers-a-way-to-quantify-baseballs-every-move.html (articulating the types of information Statcast can provide).

from a more technical standpoint, the league defined Statcast as "a series of high-resolution optical cameras along with radar equipment" installed in each ballpark that can "precisely track[] the location and movements of the ball and every player on the field at any given time."[108] These cameras, in conjunction with the aforementioned radar equipment, produce an inordinate amount of data as a result of one single baseball game.[109] Previously, statistics have never before been available to quantify certain scenarios of a baseball game that can now be computed and broken down by the Statcast system.[110] For example, Statcast is able to measure the perceived velocity of each pitch by measuring each pitch's actual velocity and factoring in the exact release point of how many inches a pitcher is standing from the rubber at the time each pitch is delivered.[111] For context, this is a significant sabermetric because "a 90 [mile per hour] pitch delivered from a 54-inch release point will seem faster to a hitter than a pitch of the same velocity released from two inches closer to the mound."[112] Moreover, Statcast is capable of measuring the exit velocity, launch angle, vector, hang time, distance, and projected landing point of each ball that comes off of a player's bat.[113] In short, one MLB representative begged the question "what *can't* Statcast measure?"[114]

Although Statcast was only implemented about five years ago, the underlying technology is not, itself, novel.[115] The MLB's Statcast system found in each major league ballpark is currently made up of two parts: one Trackman

[108] Casella, *supra* note 20.
[109] Casella, *supra* note 20.
[110] Casella, *supra* note 20.
[111] Casella, *supra* note 20.
[112] Casella, *supra* note 20.
[113] Casella, *supra* note 20.
[114] Casella, *supra* note 20.
[115] *Statcast*, MLB, http://m.mlb.com/glossary/statcast (last visited Oct. 14, 2020).

Doppler radar and six Chyron Hego cameras.[116] Statcast's two components have also proven to be reliable for uses outside of baseball.[117]

For instance, the National Weather Service, which operates countless Doppler radars nationwide for weather prediction purposes, generally defines these radars as being able to "provide information regarding the movement of targets as well as their position" with specificity.[118] Doppler radars are further used in speed guns, security systems, motion detectors, and even military-grade landmine location technology—to name a few uses.[119] Regarding Statcast's second component, Chyron Hego cameras and broadcast graphics creation technology are incorporated into a vast number of sports worldwide.[120] Aside from the MLB, Chyron Hego camera systems are used to produce sabermetrics for a number of highly competitive sports leagues and competitions worldwide, including England's Premier League, Germany's Bundesliga, Spain's La Liga, the UEFA Champions League, and the FIFA World Cup.[121] It is an understatement to say that these technologies are

[116] *Statcast*, supra note 115 (noting the components to the Statcast system). Also note that there were reports that the MLB seeks to replace Statcast's current components with Hawk-Eye optical cameras sometime around the 2020 season, but it is unclear exactly how or when this change will take place. *Statcast*, supra note 115. The MLB's official website makes no mention of Hawk-Eye camera technology in its current definition of Statcast as of March 2020. *Statcast*, supra note 115

[117] *Doppler Radar Applications*, PEARSON EDUC. (Sept. 2001), http://www.pearsoned.ca/school/science11/physics11/waves&sound/doppler/index.htm.

[118] *How Radar Works*, NAT'L WEATHER SERV., https://www.weather.gov/jetstream/how (last visited Oct. 14, 2020).

[119] *Doppler Radar Applications*, *supra* note 117.

[120] *Sports Tracking*, CHYRON HEGO, https://chyronhego.com/products/sports-tracking/ (last visited Oct. 14, 2020).

[121] *Sports Tracking*, *supra* note 120.

highly regarded as reliable sources of advanced statistics and data derivation.[122]

The statistics derived from the Statcast system should be admissible at salary arbitration proceedings on the grounds that Statcast-produced sabermetrics not only fall into the category of "publicly available statistics" already admissible in the CBA, but also that of "scientific, technical, or other specialized knowledge" held admissible under Federal Rule of Evidence 702.[123] The argument for the latter rests on the premise that Statcast sabermetrics meet the requisite criteria under Federal Rule of Evidence 702, as enumerated by the Supreme Court, for admitting scientific, technical, and/or specialized materials into evidence.[124]

Presently, the threshold for admitting scientific, technical, or other specialized knowledge into evidence in federal court is found in Federal Rule of Evidence 702—which was enacted in 1975 and amended several times thereafter (most recently in 2011).[125] Prior to congressional approval of Federal Rule of Evidence 702, the admission of scientific, technical, or other specialized knowledge was governed by the *Frye* Test, which has its roots in a "short and citation-free 1923 decision" from the United States Court of Appeals for the District of Columbia.[126] In *Frye v. United States*,[127] the Court developed the now-infamous *Frye* Test, also known as the "general acceptance" test, where scientific evidence is admissible if the evidence being offered has gained "general acceptance in the particular field

[122] Joe Lemire, *MLB's Statcast Earns Technology Emmy Award*, CHYRONHEGO (Sept. 21, 2017), https://chyronhego.com/mlbs-statcast-earns-technology-emmy-award/.
[123] *Basic Agreement 2017–2021*, *supra* note 5, at Art. VI(E)(10)(c); FED. R. EVID. 702.
[124] *See generally* Duabert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).
[125] FED. R. EVID. 702.
[126] *Daubert*, 509 U.S. at 585.
[127] 293 F. 1013 (D.C. Cir. 1923).

in which it belongs."[128] In other words, the specific scientific field to which the proffered evidence belongs (*i.e.* psychology, cardiology, etc.) must "generally accept" what is being offered as a standard in the field for it to be admitted into evidence.[129]

The "scientific, technical, or other specialized knowledge" issue in *Frye* revolved around the admission of evidence regarding an early precursor to a polygraph machine called a systolic blood pressure deception test.[130] There, the defendant took the test and wanted the court to preclude any evidence relating to the test itself and its results from being admitted into evidence.[131] In ruling on the issue, the *Frye* court held that the test "has not yet gained such standing and scientific recognition among physiological and psychological authorities" to be considered "generally accepted" and therefore admissible.[132] In the nearly fifty years before the codification of Federal Rule of Evidence 702, *Frye* was the universal standard for admitting "scientific, technical, or other specialized knowledge" into evidence in all federal courts.[133]

With the enactment of the Federal Rules of Evidence in 1975, a great deal of confusion arose as to

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[128] *Daubert*, 509 U.S. at 585–86 (citing Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).
[129] *Frye*, 293 F. at 1014.
[130] *Frye*, 293 F. at 1013.
[131] *Frye*, 293 F. at 1014.
[132] *Frye*, 293 F. at 1014.
[133] Leslie Morsek, *Get on Board for the Ride of Your Life! The Ups, the Downs, the Twists, and the Turns of the Applicability of the "Gatekeeper" Function to Scientific and Non-Scientific Expert Evidence: Kumho's Expansion of Daubert,* 34 AKRON L. REV. 689, 694–700 (2001) (giving context to *Frye* and comparing it with admissibility standards under FED. R. EVID. 702); Simon A. Cole, *Out of the Daubert Fire and Into the Fryeing Pan? Self-Validation, Meta-Expertise and the Admissibility of Latent Print Evidence in Frye Jurisdictions*, 9 MINN. J.L. SCI. & TECH. 453, 462–63 (2008) (noting that, while the federal standard changed for admitting "scientific, technical, or other specialized knowledge" with the enactment of FED. R. EVID. 702, California, New York, Florida, Illinois, Pennsylvania, and others still follow the *Frye* standard in state court).

whether Federal Rule of Evidence 702 or *Frye*, and its now-voluminous progeny of caselaw, controlled regarding the admissibility of scientific evidence.[134] This question persisted for some time and created a split in the federal circuit courts where some followed Federal Rule of Evidence 702 and others continued to apply the *Frye* Test.[135] The discrepancy was finally addressed by the Supreme Court in the monumental case of *Daubert v. Merrell Dow Pharms., Inc*.[136] In its decision, the *Daubert* Court held that Federal Rule of Evidence 702 superseded the *Frye* Test, which effectively killed the *Frye* doctrine at the federal level.[137] Specifically, *Daubert* states that the "rigid 'general acceptance' requirement" imposed by *Frye* is completely at odds with Federal Rule of Evidence 702, and the two cannot coexist because the rule favors a more liberal approach toward the admission of scientific, technical, or other advanced evidence that includes a "relaxing [of] the traditional barriers to 'opinion' testimony."[138]

Furthermore, in *Daubert*, the Supreme Court held that federal district court judges have the responsibility of "gatekeeping" proposed scientific, technical, or other advanced evidence by determining whether or not it meets a baseline threshold of relevance and reliability.[139] This responsibility actually incorporates Federal Rule of Evidence 104(a) as well because the judge must find it more likely than not that the evidence is relevant to the facts at hand and reliably sourced.[140] Then, if the proposed evidence passes muster regarding relevance and reliability, *Daubert* enumerates four non-exclusive factors to aid trial judges in the potential admission of the evidence: "(1) whether the

[134] Morsek, *supra* note 133, at 700–03.
[135] Morsek, *supra* note 133, at 703.
[136] 509 U.S. 579 (1993).
[137] *Daubert*, 509 U.S. at 586–87.
[138] *Daubert*, 509 U.S. at 588.
[139] *Daubert*, 509 U.S. at 589.
[140] FED. R. EVID. 104.

theory or scientific technique has been tested; (2) whether it has been subjected to peer review or publication; (3) the known or potential rate of error; and (4) whether the principle was generally accepted in the relevant scientific community."[141] This standard applies to any scientific, technical, or other advanced evidence proffered in federal court across the United States. [142]

In applying the *Daubert* standard to the admission of sabermetrics into evidence, it is apparent that the threshold consideration of "gatekeeping" is met.[143] Per this requirement, the judge must ensure that the scientific, technical, or specialized information pending admission into evidence is truly that—scientific, technical, or specialized in nature.[144] Surely sabermetrics produced by the Statcast system meet these criteria. This is because all figures generated by Statcast are the product of highly technical electronics that are able to record measurements, speed, and movement at an incredibly fine scale—a scale that would otherwise be nearly incalculable.[145] By its very nature, sabermetrics produced by the Statcast system exceed the gatekeeping requirement.[146] In regard to the four factors for admissibility enumerated in *Daubert*, Statcast-produced sabermetrics meet and exceed these as well.[147]

The first *Daubert* factor requires that the scientific, technical, or specialized information pending admission has been tested, which Statcast certainly has.[148] The MLB conducted a full year of Statcast trial runs and tests

[141] Morsek, *supra* note 133, at 708-10. Also, note that the fourth *Daubert* factor is, essentially, the *Frye* Test. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).
[142] *Daubert*, 509 U.S. at 589.
[143] *Daubert*, 509 U.S. at 589.
[144] *Daubert*, 509 U.S. at 589.
[145] Casella, *supra* note 20 (detailing the otherwise-immeasurable novel statistics that Statcast is able to generate).
[146] FED. R. EVID. 104.
[147] *Daubert*, 509 U.S. at 593–95.
[148] *Daubert*, 509 U.S. at 593.

throughout the year 2014 by selectively implementing the system in a number of ballparks for testing.[149] The fact that Statcast was implemented league-wide one year later is evidence that the system was tested and approved by league officials.[150] Next, *Daubert* considers whether or not the evidence offered be peer-reviewed—a requirement that does not apply to Statcast data.[151] Certain subsets of scientific, technical, or specialized information are such that they do not require peer review to be admissible under the *Daubert* standard.[152] The third factor indicated in *Daubert* is the known or potential rate of error of the evidence being offered.[153] While the MLB or its subsidiaries that officially retain and manage the game's intellectual property holdings do not offer rate of error measurements surrounding Statcast, a number of respected baseball statisticians have previously recorded slight glitches with measurements and detailed their findings.[154] These statisticians' indications of minor errors by the Statcast system drew a reaction from the MLB, which acknowledged the problem and reported that it was addressed.[155] Finally, the fourth non-exclusive requirement

[149] Sandomir, *supra* note 107 (describing the MLB's testing of Statcast in 2014).
[150] Sandomir, *supra* note 107.
[151] *Daubert*, 509 U.S. at 593.
[152] Peerless Ins. Co. v. Broan-Nutone LLC, No. 3:10-CV-0868 (JCH), 2012 U.S. Dist. LEXIS 52977, at *5–*6 (D. Conn. Apr. 16, 2012) (citing Astra Aktiebolag v. Andrx Pharms., Inc., 222 F. Supp. 2d 423, 489 (S.D.N.Y. 2002) (holding "[t]he mere fact that an expert's findings have not been peer-reviewed or published is not a sufficient reason to exclude it. Particularly in areas raising issues that may never have interested any scientist, the absence of peer review may not be surprising.").
[153] *Daubert*, 509 U.S. at 594.
[154] Rob Arthur, *Baseball's New Pitch-Tracking System Is Just A Bit Outside,* FIVETHIRTYEIGHT (Apr. 28, 2017), https://fivethirtyeight.com/features/baseballs-new-pitch-tracking-system-is-just-a-bit-outside/ (illustrating slightly inflated pitch velocity figures in early 2017, which, as noted, drew a reaction from the MLB and a subsequent fix of the system); Dave Cameron, *About All These Velocity Spikes*, FANGRAPHS (Apr. 4, 2017), https://blogs.fangraphs.com/about-all-these-velocity-spikes/ (further noting slight discrepancies in reported pitch velocity sabermetrics).
[155] Arthur, *supra* note 149.

outlined by the *Daubert* Court is that the scientific, technical, or specialized information being offered is generally accepted in its relevant community. [156] The argument on behalf of Statcast here is that, as previously indicated, the underlying apparatuses of the Statcast system are both widely used in a number of other contexts—including by other major professional sports leagues and tournaments.[157] This serves as proof that the greater world of professional sports generally accepts the measurements produced by Statcast's core components to be true, accurate, fair, and reliable. As a result, Statcast data exceeds the applicable requirements set forth by the Supreme Court in *Daubert* as being admissible evidence in federal court.[158]

VI. A Comparative Look at Statcast's Admissibility Under the Rules of Major American Arbitral Organizations

Founded in 1926, the American Arbitration Association (the "AAA") is regarded as the "the oldest provider of [alternative dispute resolution services] worldwide."[159] The institution oversees and facilitates the adjudication of an enormous number of cases each year.[160] For reference, the AAA administered roughly 1,170,000 cases from 1990 to 2001—with that number increasing for each subsequent decade.[161] Governing these proceedings is a set of rules that vary depending on the nature of the dispute.[162] Turning to the AAA's Labor Arbitration Rules

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[156] *Daubert*, 509 U.S. at 594.
[157] *See supra* notes 118, 119, 120.
[158] FED. R. EVID. 702
[159] David McLean, *US arbitral institutions and their rules*, LEXIS PSL ARBITRATION, https://www.lw.com/thoughtLeadership/us-arbitral-institutions-and-their-rules (last visited Oct. 11, 2020).
[160] Chul-Gyoo Park, *A Comparative Analysis of Arbitral Institutions and Their Achievements in the United States and Korea*, 15 AM. REV. INT'L ARB. 475, 480 (2004).
[161] Park, *supra*, note 160, at 480-81.
[162] *See Rules, Forms & Fees*, AM. ARB. ASS'N (last visited Oct. 11, 2020), https://www.adr.org/Rules. The AAA has specific rules for different types of

and Mediation Procedures, an analysis reveals that the AAA proscribes very lax evidentiary requirements in labor arbitrations.[163] Specifically, in arbitrations governed by these rules, the AAA mandates that "[t]he parties may offer such evidence as is relevant and material to the dispute, and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute."[164] Under the AAA's very broad evidentiary standard, Statcast data would be admissible in an arbitration proceeding.[165] Similarly, an evaluation of employment arbitration rules codified by the Judicial Arbitration and Mediation Service ("JAMS") and the International Institute for Conflict Prevention and Resolution ("CPR") show that these entities impose very similar, broad evidence rules on parties to an employment arbitration.[166] If baseball's FOA were conducted pursuant to the rules of any of the major American arbitral associations, Statcast sabermetrics would be admissible evidence, which could better assist the players in securing higher financial gains.

Turning to real-world examples of how Statcast data would aid players in securing better financial terms in FOA salary hearings, the first example that comes to mind centers on Chicago Cubs shortstop Javier Baez.[167] To his credit, Baez is widely considered one of the best defensive infielders in the MLB.[168] He was also arbitration-eligible

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disputes such as commercial arbitrations, labor arbitrations, international dispute arbitrations, and more. *Rules, Forms & Fees, supra.*

[163] Am. Arb. Ass'n, Labor Arb. Rules and Mediation Procs., art. 27-28.

[164] Am. Arb. Ass'n, *supra* note 163, at art. 27.

[165] *See* Am. Arb. Ass'n, *supra* note 163, at art. 27-28.

[166] *See* Jud. Arb. & Med. Serv. Emp. Arb. Rules & Procs., Rule 22(d); Int'l Inst. Of Conflict Prevention & Resol. Emp. Disp. Arb. Proc., art. 15 (neither JAMS nor CPR proscribe labor arbitration rules, but both organizations publish employment arbitration rules).

[167] Tony Andracki, *Javy Baez is the Top Defensive Infielder in the Game*, NBC SPORTS CHICAGO (Jan. 8, 2020), https://www.nbcsports.com/chicago/cubs/javy-baez-top-defensive-infielder-game-arenado-mlb-gold-glove-bryant-rizzo.

[168] Andracki & *Baez*, *supra* note 167.

heading into the 2020 MLB season due to his accrued professional service time of 4.089 years to date.[169] Had Baez won the NL's Gold Glove Award for shortstops for his excellent defensive performance over the course of the 2019 season, that would have been admissible evidence he could have used to bolster his FOA case; however, he did not win it.[170] This is despite the fact that Statcast's Outs Above Average sabermetric, which the MLB itself advertises as a statistical measure of baseball's best defenders, lists Baez atop all other infielders in the league as being the best defensive infielder.[171] Unfortunately for Baez, the CBA leaves him no way to boast this achievement to an arbitration panel, and the panel is not permitted to consider the MLB's own statistical proof that Baez ranked first out of all infielders for his defensive prowess.[172] Although Baez and the Cubs preempted an arbitration hearing for the two-time All Star shortstop by signing a one-year extension before any hearing occurred, had Statcast's Outs Above Average sabermetric been deemed admissible evidence, Baez would have been armed with ammunition to negotiate in the pre-hearing phase and support his claim in arbitration.[173]

Similarly, Baltimore Orioles' right-handed pitcher Miguel Castro and first baseman/outfielder Trey Mancini were arbitration-eligible in the 2020 offseason and would have been better suited financially by deeming Statcast

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[169] *Javier Baez Player Profile*, FANGRAPHS, https://www.fangraphs.com/players/javier-baez/12979/stats?position=2B/SS, (Oct. 11, 2020, 12:24 P.M.); *2017–2021 Basic Agreement*, *supra* note 5, at Art. VI(E)(1)(a).

[170] Mike Petriello, *A New Way to Measure MLB's Best Infield Defenders*, MLB.COM (Feb. 4, 2020), https://www.mlb.com/news/statcast-introduces-outs-above-average-for-infield-defense.

[171] Petriello, *supra* note 170.

[172] *Basic Agreement 2017–2021*, *supra* note 5, at Art. VI(E)(10)(c)

[173] Jeff Todd, *Cubs Avoid Arbitration With Kris Bryant, Javier Baez*, MLB TRADE RUMORS, (Jan. 10, 2020, 3:00 P.M.), https://www.mlbtraderumors.com/2020/01/cubs-avoid-arbitration-with-kris-bryant-2.html.

evidence admissible as well.[174] Castro, eligible for arbitration for the first time in his career this past year, showed modest improvements in most pitching statistics across the board this past season as compared to the prior year.[175] Notably though, Castro saw a significant improvement in his Statcast-produced Expected Weighted On-Base Average, which is a sabermetric "formulated using exit velocity, launch angle and, on certain types of batted balls, sprint speed."[176] Again, Castro would have been unable to pose this argument in an FOA hearing, and although he settled with the Orioles in the pre-hearing stage,[177] his greatly improved Expected Weighted On-Base Average likely carried little-to-no weight in negotiations seeing as the team knew such evidence would be inadmissible if an agreement between both sides could not be reached.[178] Regarding Mancini, Statcast recorded a career-high in fly ball percentage and average launch angle of balls in play, an uptick in average exit velocity and hard-hit percentage, and other sabermetrics in 2019.[179] Similar to Javier Baez and Miguel Castro though, these advanced statistics could not be considered in an arbitration and again, likely were not considered by the Orioles in pre-hearing

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[174] Mark Polishuk, *Orioles Avoid Arbitration With Miguel Castro*, MLB TRADE RUMORS, (Jan. 9, 2020, 3:38 P.M.), https://www.mlbtraderumors.com/2020/01/orioles-avoid-arbitration-with-miguel-castro.html.; Matt Kremnitzer, *After Career Year, Is Trey Mancini A Building Block Or Trade Chip For Orioles?*, PRESSBOX ONLINE (November 15, 2019), https://pressboxonline.com/2019/11/15/after-career-year-is-trey-mancini-a-building-block-or-trade-chip-for-orioles/.

[175] Polishuk, *supra* note 174.

[176] Polishuk, *supra* note 174 (noting Castro's improved Expected Weighted On-Base Average); *Expected Weighted On-base Average (xwOBA)*, MLB.COM, http://m.mlb.com/glossary/statcast/expected-woba (defining Expected Weighted On-Base Average).

[177] *See* Polishuk, *supra* note 174.

[178] *See Basic Agreement 2017–2021*, *supra* note 5, at Art. VI(E)(10)(c).

[179] Matt Kremnitzer, *After Career Year, Is Trey Mancini A Building Block Or Trade Chip For Orioles?*, PRESSBOX ONLINE (November 15, 2019), https://pressboxonline.com/2019/11/15/after-career-year-is-trey-mancini-a-building-block-or-trade-chip-for-orioles/.

negotiations since the team was aware they could not be used in an FOA hearing.[180]

These examples are only a few out of countless scenarios each year in which a player would otherwise have the ability to make a stronger case for himself in an FOA hearing or pre-hearing negotiations if Statcast data were admissible evidence per the league's CBA.[181] As previously indicated, the vast majority of salary arbitration cases each year in the MLB are settled in the pre-hearing phase where, admittedly, there are no rules of evidence governing what may be considered during negotiations.[182] However, these negotiations take place in the shadow of the inevitable salary arbitration hearing that will take place—complete with its evidentiary rules contained in the CBA—if the two sides do not reach an agreement before arbitration hearing take place.[183] Because of this, it is logical to surmise that teams and owners do not give Statcast data significant weight in negotiations because there is no incentive to reach an agreement with a player at a higher salary figure in light of his impressive Statcast sabermetrics; owners know that they can simply proceed to arbitration and essentially throw Statcast out the window.[184] In order to level the playing field in both the hearing and pre-hearing negotiation phases, Statcast data must be made admissible to allow players to pose stronger arguments in support of greater financial gain.[185]

VII. Conclusion

Making the MLB's Statcast system admissible in FOA hearings would be a massive victory for players and would lead to increased financial gains for players in the

[180] *See Basic Agreement 2017–2021*, *supra* note 5, at Art. VI(E)(10)(c).
[181] *See Basic Agreement 2017–2021*, *supra* note 5, at Art. VI(E)(10)(c).
[182] Meth, *supra* note 72, at 391.
[183] *See* Jill I. Gross, *Bargaining in the (Murky) Shadow of Arbitration*, 24 HARV. NEGOT. L. REV. 185, 201 (2019).
[184] *See Basic Agreement 2017–2021*, *supra* note 5, at Art. VI(E)(10)(c).
[185] *See Basic Agreement 2017–2021*, *supra* note 5, at Art. VI(E)(10)(c).

arbitration-period of their major league service time. It seems as though the players have been financially repressed by ownership since professional baseball's inception, and while that has improved immensely in more recent decades, it is only fair to even the playing field in a sense and allow players to benefit financially from the same sabermetrics by which coaches, management, front office staff, the league's broadcast affiliates, and fans alike already judge players.

Furthermore, it is hypocritical of the MLB to endorse Statcast as accurate and trustworthy as well as host and advertise a publicly-accessible database containing every Statcast metric produced while posing the argument that Statcast data cannot be considered in salary arbitration hearings because it is not proven to be reliable yet; the league cannot have it both ways.[186] In the coming years, the Statcast system will only grow to become more advanced, and it should only be a matter of time before this issue is addressed in CBA negotiations between ownership and the MLBPA.[187] The union must step up to the plate for players and demand that Statcast be made admissible.

[186] Casella, *supra* note 20.
[187] Casella, *supra* note 20.