Testimony of

The Honorable Lori Swanson

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I. INTRODUCTION

Mr. Chairman, members of the committee, it is a privilege to be asked to appear before you to discuss baseball and antitrust. As you know, the Minnesota Twins have been the focus of a lot of attention this off-season, and it has not been because of the team's young talent that some predict could win the American League Central Division this year. Rather, ever since Major League Baseball's owners gathered together in Chicago last November and decided to eliminate two of their own, the future existence of this team--along with that of the Montreal Expos--has been in doubt. While the League says in public that it has not settled on which teams would be targeted for contraction under its plan, recent media stories indicate that in fact consideration has not been given to contracting any team other than the Twins or Expos. And from day one, the Twins and Major League Baseball have been fighting tooth and nail to get out of the team's lease in the Metrodome for the 2002 season. That is not the conduct one would expect from a team planning on being around much longer.

After a series of battles in the Minnesota state courts, the Twins will continue to play through the 2002 season. But after that, the team's continued existence remains up in the air.

How is it that multi-millionaire owners of thirty independent businesses--and mind you, these are big businesses--could so brazenly and openly get together and eliminate two of their own in order to benefit the remaining teams? How can they threaten the existence of a franchise that has a forty-plus year history in Minnesota (and a one-hundred year history overall) and deprive millions of fans in Minnesota of their team, just for their own profit? The answer is that the owners believe that unlike other businesses--including all of the other professional sports leagues--they are not subject to the antitrust laws.

We disagree with Major League Baseball and believe that the baseball antitrust exemption, created by the U.S. Supreme Court back in a different era--both of baseball and of antitrust law--has since been narrowed by the courts so that the owners' contraction ploy is not immune from challenge under the antitrust laws. That said, there is some disagreement among courts as to whether that is in fact the case. Just recently, for example, a federal court in Florida agreed with the League that contraction fell within the scope of the antitrust exemption. But Major League Baseball's recent contraction plans demonstrate that, if the League does in fact have an exemption, it no longer can be entrusted with that privilege. If Major League Baseball wants to conduct itself as just another for-profit business, in total disregard for the game and its fans, then it should not be treated differently under the antitrust laws than any other private business.

Therefore, I would support legislation clarifying that issues such as franchise contraction are subject to scrutiny under the Sherman Act.

II. MAJOR LEAGUE BASEBALL'S NARROW ANTITRUST EXEMPTION POST-FLOOD V. KUHN.

Major League Baseball's antitrust exemption originates in the so-called "baseball trilogy," three U.S. Supreme Court decisions dating back to 1922. In Federal Baseball , the first of these cases, the Supreme Court decided that the business of giving exhibitions of baseball did not amount to interstate commerce. Rather, the Court said, baseball was a purely state affair, notwithstanding the fact that in order to put on these exhibitions teams regularly crossed states lines. Because baseball was not interstate commerce, the Sherman Act did not apply to the sport.

By the time the Supreme Court last considered Major League Baseball's antitrust exemption, in the 1972 Flood v. Kuhn case, the Court's take on interstate commerce had changed significantly, expanding to encompass a much broader range of economic activities. Furthermore, the game of baseball itself had changed, becoming less a pastime and more a business. The Supreme Court at last recognized the obvious in Flood--that baseball by the early 1970's was engaged in interstate commerce.

What was left of Major League Baseball's antitrust exemption after Flood v. Kuhn? Not much, we believe. And at least one federal district court agrees with this position. In a case known as Piazza v. Major League Baseball , an investment group challenged Major League Baseball's refusal to allow it to buy the San Francisco Giants and move the team to Florida. The League argued that decisions concerning franchise relocations were exempt from the antitrust laws. The district court conducted an extremely thorough analysis of the origins and evolution of the antitrust exemption and concluded that the Supreme Court's decision in Flood effectively limited the exemption to the so-called reserve clause. The district court reasoned--correctly we believe--that because Flood rejected Federal Baseball's rationale that Major League Baseball was not engaged in interstate commerce, the proper application of stare decisis meant that the only aspect of Federal Baseball that remained to be followed was its result, which was the exemption of the reserve system from the antitrust laws.

Obviously, Major League Baseball disagrees with us as to the scope of the antitrust exemption. If the League didn't, I doubt the owners would be engaging in coordinated conduct that, in almost any other industry, would at least raise some eyebrows. And unfortunately, a federal judge in Florida recently agreed with Major League Baseball that contraction falls within the scope of their antitrust exemption. Given these different interpretations about the scope of the exemption, particularly concerning contraction, clarification by Congress is in order.

III. MAJOR LEAGUE BASEBALL DOES NOT DESERVE ANY EXEMPTION FROM THE ANTITRUST LAWS.

Whatever the present scope of the exemption, Major League Baseball has proven that it is undeserving of any privileged status under the antitrust laws. If the League wants to conduct itself simply as a for-profit business in disregard for the game and its fans, then it should not be treated any differently under the antitrust laws than any other private enterprise.

The League isn't shy about acknowledging the reasons motivating its push for contraction. It openly contends that contraction is necessary because certain "small market" teams like the Twins do not generate enough revenue to satisfy the League. And Major League Baseball is now using its antitrust exemption as a shield to accomplish the elimination of franchises with impunity. This is quite a turnaround from the past, when Major League Baseball has come before Congress to state its case for retaining whatever exemption it might have from the antitrust laws and argued that the exemption allows the League to protect small market franchises.
In a 1993 appearance before a subcommittee of the House Judiciary Committee, Commissioner Selig asserted that "the most immediate consequence of the elimination of Baseball's antitrust exemption would be that a number of teams in small markets would attempt to abandon some of Baseball's existing cities for what they think are better economic conditions elsewhere." But now Major League Baseball would use its supposed antitrust exemption (as the League would have it) to abandon at least two cities. Commissioner Selig, in announcing the postponement of contraction until the 2003 season, reiterated that as many as four cities might be abandoned as a result of the League's contraction plans.

When Commissioner Selig invoked Baseball's antitrust exemption to prevent the San Francisco Giants from moving to Florida, he testified that "the National League's decision to keep the Giants in San Francisco, where they have successfully operated with loyal support from millions of fans for the past 35 years, was simply a reaffirmation of Baseball's longstanding policy against the relocation of franchises that have not been abandoned by their local communities." Now, though, the League would use its supposed exemption to eliminate a franchise that has enjoyed loyal support from the people of Minnesota for over forty years. In fact, the Twins were the first American League team to draw more than 3 million fans in a single season. And to say that the community has abandoned the team ignores the fact that the team drew over 1.7 million fans last season, more than attended home games for five other teams.
During the 2001 World Series, Commissioner Selig declared in a message to fans: "[B]aseball is an important social institution and a part of our national fabric. Baseball has a responsibility to those who look to the game not only for fun and entertainment, but also for a sense of stability and unification." Major League Baseball has used this imagery to justify whatever antitrust exemption it might have. The Commissioner, for example, has testified: "Congress has often looked at Baseball's position with respect to the antitrust laws and it has always reaffirmed Baseball's antitrust status because Baseball's conduct has always been consistent with the public interest." He went on to say: "Baseball has continued to uphold its unique covenant with its fans and it deserves to retain its current status under the antitrust laws. Contraction, however, has nothing to do with the public interest; rather, it has only to do with the owners' bottom lines.

I cannot conceive of any greater breach of Baseball's "unique covenant with its fans," as the

Commissioner put it, than to forsake the people of Minnesota, who have supported their team for so long. Commissioner Selig himself has eloquently described the blow a community feels when it is abandoned and how he was "personally heartbroken" when the Braves left Milwaukee after the 1965 season. As the Commissioner recalls: "The city of Milwaukee and the state of Wisconsin were traumatized by the loss of that franchise. The people in my home town felt hostility, bitterness and a deep sense of betrayal towards Major League Baseball for allowing the Braves to abandon us. The years of drawing more than 2 million fans per season were forgotten." Commissioner Selig referred to there being a "void" in the community after the Braves' departure. And I am certain that the same void and sense of betrayal would be felt in Minnesota and any other community Major League Baseball targets for contraction. If Major League Baseball can so callously abandon communities in the name of profits--and do so just days after piously proclaiming Baseball's role "in the recovery of our nation" --then there is no longer any "unique covenant" to justify a privileged status under the antitrust laws.

According Major League Baseball favored treatment under the antitrust laws also means entrusting the League with a weighty responsibility to make certain that its privileged status is not abused. Revelations that have occurred since contraction was announced last November, though, raise serious doubts as to whether Major League Baseball is deserving of that trust. As many of you are probably aware, it came to light recently that Commissioner Selig had arranged a $3 million loan for the Milwaukee Brewers from a financial institution controlled by Carl Pohlad, the owner of the Minnesota Twins. In addition to the Brewers loan, there have been reports of a Pohlad loan to Colorado Rockies owner Jerry McMorris. Major League Rule 20 (c) prohibits loans made directly or indirectly between owners without the approval of other owners, and according to press reports neither loan was approved by the other owners. Mr. Selig's reported response to a question as to why the possible violation of League rules was not discussed at a recent owners' meeting: "We decided it was an antiquated rule." Well, the baseball antitrust exemption is also an "antiquated rule" from a time when Major League Baseball was more a pastime, not just a business. If the owners are willing to ignore their own internal governance structure when an "antiquated" rule gets in the way of doing business, that certainly calls into question whether Major League Baseball can be trusted to conduct itself in a responsible manner with an antiquated antitrust exemption (if such an exemption exists).

IV. CONCLUSION

The baseball antitrust exemption has been described as "a derelict in the stream of the law." The Supreme Court itself has acknowledged that the exemption is "unrealistic, inconsistent and illogical." It is, to borrow Commissioner Selig's words, antiquated. Modern antitrust doctrine can deal with issues like contraction without throwing professional sports leagues into chaos, contrary to what Major League Baseball suggests would happen if it lost whatever antitrust exemption it might currently have. And given that the League, through its contraction scheme, has broken whatever "covenant" it may have had with its fans, there is certainly no basis to allow it to enjoy a privileged status under the antitrust laws. The notion that the Major League Baseball is deserving of any exemption is far more antiquated than any of the League's own rules that the owners refuse to follow.

I thank you for the opportunity to appear before you today.

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