UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

2311 RACING LLC d/b/a 23XI RACING, and FRONT ROW MOTORSPORTS, INC., Plaintiffs, v. NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING, LLC, NASCAR HOLDINGS, LLC, NASCAR EVENT MANAGEMENT, LLC, and JAMES FRANCE, Defendants.	Civil Action No. 3:24-cv-886-KDB-SCR **ORAL ARGUMENT REQUESTED** **PUBLIC REDACTED VERSION**
NASCAR EVENT MANAGEMENT, LLC, Counter-Plaintiff, v. 2311 RACING LLC d/b/a 23XI RACING, FRONT ROW MOTORSPORTS, INC., and CURTIS POLK, Counter-Defendants.	

2311 RACING LLC, FRONT ROW MOTORSPORTS, INC., AND CURTIS POLK'S MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AGAINST COUNTER-PLAINTIFF'S AMENDED COUNTERCLAIM

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INTRODUCTION

This Court previously found that NASCAR's amended counterclaim barely survived the "low bar" for a motion to dismiss and that the counterclaim's defects "are best addressed at Summary Judgment, with a more developed factual record." Dkt. 162 ("MTD Order") at 1, 10. That moment has now arrived for NASCAR to "put up or shut up" at summary judgment. *Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir. 2000).

The discovery record confirms what Counterclaim-Defendants (23XI, Front Row, and Curtis Polk) have asserted from the outset: NASCAR's counterclaim lacks legal and factual merit. It is, instead, another example of NASCAR's litigation gamesmanship, designed to retaliate against Plaintiffs. Summary judgment should be granted now, so that the parties can plan for the December 1, 2025 trial with the knowledge that NASCAR's baseless counterclaim is not going to distract from the purpose of those proceedings, which is to expose NASCAR's track record of monopolistic practices and restore competition so that teams, drivers, sponsors, and fans all benefit from a sport built for long-term growth.[1]

There are three fundamental defects which each warrant summary judgment and apply equally to all Counterclaim-Defendants.

First, the discovery record demonstrates that NASCAR cannot raise a genuine issue of material fact in support of its assertion that the Counterclaim-Defendants participated in any conspiracy in unreasonable restraint of trade through joint negotiations for the 2025 Charter Agreement. On the contrary, the undisputed evidence (including NASCAR admissions) shows

[1] Alternatively, if the Court does not grant summary judgment, Counterclaim-Defendants intend to file a Rule 42 motion to sever NASCAR's counterclaim for a separate trial in 2026, when it will not needlessly complicate, confuse, and prolong the December trial, which has been scheduled for only ten trial days.

there was never any agreement among the racing teams to prevent NASCAR from pursuing *individual* negotiations. In fact, NASCAR employed such individual negotiations to obtain the one-sided 2025 Charter Agreement terms that NASCAR itself has repeatedly declared to be good for both NASCAR and the entire sport of stock car racing.

Moreover, there is no dispute that NASCAR voluntarily agreed to the joint negotiations through the Team Negotiating Committee ("TNC"). And the undisputed evidence demonstrates that NASCAR voluntarily engaged in joint negotiations with the racing teams over charter terms for over a decade. It cannot now credibly claim that it viewed those negotiations, which it supported, as an unlawful restraint of trade all along.

When NASCAR wanted one-on-one negotiations, every team (including 23XI and Front Row) agreed. Ultimately, 13 of the 15 chartered teams signed the 2025 Charter Agreement on the terms NASCAR demanded. Summary judgment is warranted on the ground that the joint negotiations NASCAR voluntarily agreed to—without any restriction on individual negotiations, and without any "boycott" of NASCAR events—did not restrain trade as a matter of law. *Broad. Music, Inc. v. Columbia Broad. Sys. Inc.*, 441 U.S. 1, 22 (1979) ("*BMI*"); *Columbia Broad. Sys., Inc. v. Am. Soc. Composers, Authors & Publishers*, 620 F.2d 930, 936 (2d Cir. 1980).

Second, NASCAR cannot raise a trial dispute that the chartered teams exercised market power in the 2025 Charter Agreement negotiations. Proof of such market power is required, as the Court has already held that the counterclaim must be analyzed under a full rule-of-reason analysis. MTD Order at 7–9. The undisputed evidence shows that NASCAR—not the teams—dictated the terms of the 2025 Charter Agreement. And NASCAR's own executives and experts have asserted there are *more than 150 teams* with licenses to compete in Cup Series events, which negates any claim that the 15 chartered teams had the market power necessary to force NASCAR to overpay the teams relative to the compensation that would prevail in a competitive market.

Third, summary judgment is warranted because NASCAR cannot raise a genuine issue of material fact showing the required harm to competition or antitrust injury. *See Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977). NASCAR has failed to put forth a coherent theory of antitrust injury. Its expert contends that the charter system has reduced the number of entrants on the track. Ex. 2, July 15, 2025 Expert Rep. of Thomas N. Hubbard ("Hubbard Rep.") ¶¶ 47–51. But this describes the effect not of the joint negotiations for the 2025 Charter Agreement, but of the charter system itself, which NASCAR has repeatedly averred is good for the sport and not anticompetitive. *See, e.g.*, Aug. 28 PI Hr'g Tr. 27:13–14; 28:21–22 (Mr. Yates: "We think the charter system is good. We think it's good for all teams. . . . I don't believe the charter system harms competition.").

The undisputed facts show that NASCAR created the charter system in 2016 because the teams were hemorrhaging money under the open system where they had no guaranteed race entry nor a portion of league revenues. NASCAR hired outside consultants and determined that this highly challenged economic model imperiled the longevity of the sport. Ex. 3 at -892. NASCAR therefore decided to pivot to a new model and voluntarily entered into joint negotiations with the members of the Race Team Alliance ("RTA"), which led to an agreement establishing the charter system in 2016. NASCAR's expert, Dr. Hubbard, now condemns the charter system as causing purported harm to competition.

Whatever the dubious merits of the claim that the charter system itself harms competition, it cannot support a counterclaim directed at the joint negotiations for the 2025 Charter Agreement. Those negotiations did not begin until 2022, *more than six years* after NASCAR created the charter system. It is undisputed that NASCAR did not seek to eliminate the charter system in the negotiations for the 2025 Charter Agreement. On the contrary, NASCAR praised the charter system as being good for NASCAR and for the sport of stock car racing. The only change in the 2025 Charter Agreement that NASCAR cites as a purported source of antitrust injury and damages is the increase in the percentage of domestic media revenues shared with the teams. But NASCAR cannot show that this modest change in revenue sharing—made *necessary* by the continued dire economic condition of most chartered racing teams, 75% of whom lost money in 2024—resulted from any harm to competition. It thus cannot be a source of antitrust injury to NASCAR.

Nor can any antitrust injury be shown by the mere fact that NASCAR agreed to pay the teams a modest increase in media revenue sharing in the 2025 Charter Agreement. The undisputed evidence establishes that NASCAR's first media share proposal in the negotiations for the 2025 Charter Agreements on October 2, 2022 was to pay the teams an average annual value of $[redacted] million per charter. Dkt. 31-3 ¶ 30; Ex. 4 at slide 10. During the subsequent negotiations, NASCAR ***lowered*** the amount it was willing to pay the teams to an average annual value of $[redacted] million per charter. *See* Ex. 5 at -743. And, NASCAR's own internal assessment was that the 2025 Charter Agreement terms dictated by NASCAR contained "no wins" for the teams. *See* Ex. 6; Ex. 1. It is thus impossible for NASCAR to prove that it suffered any injury from the 2025 Charter Agreement—an agreement that NASCAR has loudly praised—let alone an antitrust injury.

NASCAR's counterclaim also fails as to Curtis Polk and Front Row for additional reasons.

As for Mr. Polk, NASCAR's retaliatory effort to single him out for potential individual antitrust liability is disproven by NASCAR's own allegations. NASCAR alleges that the harm to competition stems from the Charter system itself, which was created in 2016—i.e., *four years* before Mr. Polk became involved in the sport. The racing teams then began to have new joint negotiations with NASCAR over the charter system in 2019—i.e., *a year* before Mr. Polk became involved in the sport. NASCAR's tirade is thus misplaced. There is no factual basis for NASCAR's allegation that Mr. Polk was somehow the individual orchestrator of the teams' joint efforts to negotiate the charter system, which predate his participation by many years. Indeed, even after Mr. Polk joined the teams' joint negotiation efforts in 2022, and eventually became one of four members of the TNC, the undisputed evidence shows that the other teams often did not agree with Mr. Polk's views and took individual positions in the negotiations that preclude as a matter of law any inference of an "agreement" with him. This is best illustrated by the fact that 13 of the 15 teams individually agreed to the 2025 Charter Agreement despite Mr. Polk's objection to its terms. There is thus no evidence to allow a reasonable jury to find that Mr. Polk had the power, or exerted the influence, to inflict anticompetitive harm on NASCAR from any agreement with other teams.

As for Front Row, there is no evidence that the team engaged in any conduct challenged in the amended counterclaim other than participation in RTA's lawful trade association activities. Front Row did not have a representative on the TNC; it did not participate in any media activities concerning the negotiations; and it did not take any active role in joint negotiations through the TNC. This does not suffice to establish the knowing participation of Front Row in any Section 1 conspiracy. *See Carpet Grp. Int'l v. Oriental Rug Importers Ass'n*, 256 F. Supp. 2d. 249, 273–77 (D.N.J. 2003) (granting summary judgment where a "vast majority" of the plaintiff's evidence against the defendant relied upon the defendant's membership in a trade organization). The undisputed fact is that Front Row did individually negotiate with NASCAR, and never refused an individual meeting request from NASCAR regarding the charter negotiations. NASCAR's experts do nothing to create a factual dispute concerning Front Row's participation in any conspiracy —

in fact, they barely even *mention* Front Row. On this sparse factual record, no reasonable jury could find that Front Row was a willful participant in any conspiracy.

SUMMARY OF INDISPUTABLE RECORD FACTS

A. In the pre-charter era, the "open racing" model for NASCAR teams was broken.

In 2014 and 2015, NASCAR conducted an in-depth review of the economics for its racing teams—which showed a "[redacted]." Ex. 3 at -892. At that time, teams competed in the Cup Series under year-to-year "open" contracts, with neither guaranteed entry into races nor guaranteed revenue. Ex. 7, Kauffman Tr. 46:16–47:2. NASCAR's analysis, prepared by outside consultants, showed that, under this system, teams [redacted] Ex. 3 at -898, with the lack of guaranteed entry or revenue split making it difficult for the teams to [redacted] and attract investors, *id.* at -894 [redacted]). Under this system, racing teams frequently went bankrupt or out of business. Ex. 8 at -555 (footnote 14) (between 2008 and 2018, "57 owners/Cup teams [] went out of business").

As a result, NASCAR concluded that the [redacted] Ex. 9 at slide 1. NASCAR hired the consulting giant McKinsey to study the plight of the teams; NASCAR executives and McKinsey then met with the teams to [redacted] *Id.* at slide 3; Ex. 10, Prime Tr. 12:16–20. NASCAR (with McKinsey's input) and the RTA—a trade association formed by the racing teams—then negotiated a new financial model for the sport, which culminated in the creation of the charter system in 2016. Ex. 11 at -019; Ex. 10, Prime Tr. 21:5–17. NASCAR voluntarily engaged in joint negotiations with the teams through the RTA to reach the terms of the 2016 charter agreement. Ex. 2, Hubbard Rep. ¶ 24; Ex. 12, July 15, 2025 Expert Rep. of John L. Hansen ("Hansen Rep.") ¶ 22; Ex. 10, Prime Tr. 23:6–20. NASCAR has repeatedly acknowledged that the charter system has benefited not only teams, but also NASCAR itself and the sport of stock car racing overall.[2] As Mr. Prime testified, the charter system helped address the [redacted] that undermined [redacted] Ex. 10, Prime. Tr. 56:21–57:19, and has been a [redacted] *Id.* 19:22–25. And since 2016, NASCAR's revenues and profits have [redacted]. *See* Exs. 72–76 [redacted]

B. Even under the 2016 charter system, teams continued to struggle financially.

Teams still struggled financially under the charter system, with many going out of business or leaving the sport. Ex. 15, Marshall Tr. 151:19–152:3 (by 2018, "the vast majority of teams were losing money"); *id.* at 162:4–15 ("[B]etween 2016 and 2025, there have been 16 NASCAR Cup teams that are no longer in business.").[3] With the five-year "Initial Term" of the charter agreements expiring on December 31, 2020, Ex. 19 § 2, and following [redacted] one team, Roush Fenway, sent NASCAR a letter in March 2019 proposing a new model addressing the [redacted] that continued to exist under the 2016 Charter, *see* Ex. 20 at -498. The proposed new model sought [redacted] *Id.* [redacted] *Id.*

After receiving the letter, NASCAR convened a strategy session. The PowerPoint for that

[2] *See, e.g.*, Dkt. 136 ¶¶ 2–3; Aug. 28 PI Hr'g Tr. 27:13–14; 28:21–22 (Mr. Yates: "We think the charter system is good. We think it's good for all teams. . . . I don't believe the charter system harms competition"). NASCAR's media expert, Mr. Desser, also describes the benefits of the charter system to NASCAR and its media companies. Ex. 13, July 15, 2025 Countercl. Expert Rep. of Edwin S. Desser ("Desser Rep.") §§ 20–21 ("[redacted]").

[3] Although the charter system made some improvements, NASCAR itself recognized that the teams still received a fa[redacted] than teams and players in other major sports leagues. Ex. 16 at slide 5; Ex. 17 at -229; Ex. 18 at -302 [redacted]

meeting, prepared by Scott Prime and reviewed in advance by Steve Phelps, Steve O'Donnell and other executives, observed that the [redacted] Ex. 21 at slide 16. NASCAR's executives [redacted] *Id.* at slide 6. It also noted an upcoming [redacted] *Id.* at slide 3. In planning for a May 2019 meeting with NASCAR, the RTA's hope was that "the Team Principals can be reasonably consistent in their message . . . . We don't need to agree on everything, and in fact we never will. We just need to be clear the current deal isn't fair, and we just want a fair deal." Ex. 22 at -862.

Eventually, all teams signed the renewal of the 2016 Charter Agreement through the end of 2024, with no concessions from NASCAR. *See* Ex. 23.

C. NASCAR negotiated the 2025 Charter Agreements jointly with the TNC and with individual teams.

NASCAR's internal preparation for negotiating the 2025 Charter Agreements began prior to October 2021. The first meeting of NASCAR executives with Jim France and the Board took place on October 14, 2021, with the plan that [redacted] but the negotiations were "[redacted]." Ex. 24 at -485–86; *see* Ex. 25 at -769 [redacted]). The negotiations began in early 2022 and continued through September 2024 through a combination of joint negotiations with the TNC, to which NASCAR consented, and individual negotiations, which were never precluded. *See, e.g.*, Ex. 26 at -096–98 ([redacted]

[redacted]); Ex. 79, L. France Kennedy Tr. 99:14–102:23 [redacted]

1. NASCAR voluntarily engaged in joint negotiations with the TNC.

In early 2022, the teams nominated a group of team executives to negotiate with NASCAR, known as the TNC. Ex. 27, Polk Vol. 2 Tr. 29:13–19. The TNC consisted of four team representatives: (1) Dave Alpern (President of Joe Gibbs Racing); (2) Marshall Carlson (President of Hendrick Motorsports); (3) Steve Newmark (President of Roush Fenway Keselowski Racing); and (4) Mr. Polk, one of the owners of 23XI and a Counterclaim-Defendant. Ex. 28 at -489. In March 2022, Mr. Polk reached out to Mr. Phelps about starting negotiations between NASCAR and the TNC—with the TNC accommodating Mr. Phelps's request that Jeff Gordon (Executive Vice Chairman of Hendrick Motorsports) replace Mr. Carlson as a TNC member. Ex. 29, Polk Vol. 1 Tr. 243:24–247:10.

The record contains no evidence that NASCAR objected to the TNC negotiating on behalf of all the chartered racing teams with respect to the 2025 Charter Agreement. On the contrary, NASCAR Commissioner (then-President) Steve Phelps admitted that NASCAR proceeded to negotiate [redacted]. Ex. 30, Phelps Tr. 40:3–19 ([redacted]; *see also* Ex. 31, J. France Tr. 95:5–96:12. Indeed, internally, Mr. Phelps expressed his desire to negotiate with the [redacted]. Ex. 32 at -409 [redacted]

[redacted]) (emphasis added); *see also* Ex. 33 ([redacted]

In connection with the joint negotiations, the TNC and NASCAR executives worked together in the spring of 2022 on a project to model the "baseline costs" associated with running an average NASCAR team, which was calculated to be around $[redacted] million per car annually (not including driver salaries and corporate overhead). Ex. 29, Polk Vol. 1 Tr. 252:11–256:13; Ex. 34 at -705–07. This calculation served as the basis for the teams' request that NASCAR's annual payments to the teams out of domestic media revenue total $[redacted] million—enough to cover the average $[redacted] million costs for each of the 36 chartered cars. *See* Ex. 29, Polk Vol. 1 Tr. 252:11–254:13.

Although NASCAR refused to cover the teams' base costs to race, it continued to voluntarily engage in joint negotiations and was "willing to restructure the revenue model to increase the Race Teams' share of media rights revenue." Ex. 89 at -726. NASCAR requested meetings with the TNC to present NASCAR's counterproposals and invited the TNC to present the teams' counterproposals. Ex. 35 at -786 ([redacted]); Ex. 36 at -975 ([redacted]). NASCAR also suggested [redacted] Ex. 55 at -660.

Later in the process, NASCAR even agreed to negotiate directly with the law firm of Covington & Burling, which was jointly representing all teams through the RTA. Ex. 38 at -355; Ex. 15, Marshall Tr. 134:20–21. Just as with the TNC—and before that with the RTA—NASCAR never objected to these joint negotiations. Ex. 30, Phelps Tr. 50:10–14; Ex. 15, Marshall Tr. 226:17–21.

2. Teams engaged in individual negotiations with NASCAR throughout the 2025 Charter Agreement negotiations.

There is no evidence in the record of any agreement among teams to preclude individual negotiations with NASCAR. Far from it: individual negotiations took place throughout the negotiations for the 2025 Charter Agreement.

In September 2022, all charter teams signed a letter to NASCAR stating that [redacted] Ex. 28 at -489–90. Consistent with the September 2022 letter, team representatives testified that there was never any agreement to avoid or reject individual negotiations. Ex. 7, Kauffman Tr. 139:15–21; Ex. 27, Polk Vol. 2 Tr. 26:15–28:8; Ex. 15, Marshall Tr. 219:18–20. Despite extensive discovery, NASCAR has come forward with no contrary evidence showing that individual negotiations were foreclosed. For example, NASCAR's expert on harm to competition makes no claim that any such agreement to preclude or restrict individual negotiations existed. *See generally* Ex. 2, Hubbard Rep.

On the contrary, individual negotiations for the 2025 Charter Agreement occurred throughout the 2022-2024 time period. Mr. Phelps testified [redacted] Ex. 30, Phelps Tr. 175:15–176:3; Dkt. 58 ¶ 107 (NASCAR admitting individual negotiations in its First Answer).

The discovery record is replete with evidence of individual team negotiations from 2022 through 2024, including *inter alia*:

Individual Negotiations Occurred Throughout Alleged Conspiracy Period	
Date	**Event**
October 2022	Individual team meetings. Ex. 26 at -097.
May 9, 2023	NASCAR letter to charter teams saying, [redacted] and requesting individual meetings between teams and NASCAR senior management. Ex. 39 at -488.
May/June 2023	Individual team meetings. Ex. 26 at -098.
November 1, 2023	NASCAR provides [redacted] x. 40 at -649–52.
February 14, 2024	Letter sent to each individual Team Owner to clarify position and ask for individual meetings. Ex. 26 at -098; Ex. 41.
February 22, 2024	NASCAR executives share information [redacted] Mr. Prime adds, [redacted] Ex. 42, at -312, -313, -314.
February 2024	Individual team meetings. Ex. 26 at -098.
April 8, 2024	Letter from Jim France sent to individual team [redacted] Ex. 43 at -332.
Mid-April 2024 to late May 2024	Individual team meetings between Mr. France and all charter teams. Ex. 26 at -098.
April 18, 2024	Individual team meetings with [redacted] Ex. 44 at -490.
April 19, 2024	Individual team meetings with [redacted] *Id.*
April 25, 2024	Individual team meetings with [redacted] *Id.*
May 2, 2024	Individual team meetings with [redacted] *Id.* at -491.
May 3, 2024	Letter from Heather Gibbs to Jim France, Ben Kennedy, and Lesa Kennedy [redacted]. Ex. 46 at -416.
May 10, 2024	Individual team meeting with 23XI. Ex. 47.
June 19, 2024	Individual discussions with [redacted]. Ex. 48.

Individual Negotiations Occurred Throughout Alleged Conspiracy Period	
Date	**Event**
August 6, 2024	Individual meeting between Jim France and [redacted]. Ex. 49 at -151–52.
August 8, 2024	Individual meetings between Mr. France and the "[redacted]," [redacted]. Ex. 50 at -883.
August 24, 2024	Individual meeting between Jim France and [redacted] Ex. 26 at -099.
August 28, 2024	Internal NASCAR email describing changes made based on individual team requests, including [redacted] Ex. 51.

Mr. France admitted he met individually with teams but claimed that he could not remember what was discussed. Ex. 31, J. France Tr. 198:15–21.[4] NASCAR continued to meet individually with team owners through the remainder of the negotiations, a fact that Mr. Phelps documented in a September 11, 2024 letter to 23XI. *See* Ex. 26 at -097–100.

D. NASCAR used its "leverage" and individual negotiations to dictate the terms of the 2025 Charter Agreement—including the financial terms, which declined from NASCAR's first offer during the joint negotiation process.

NASCAR used its power over teams to dictate the terms of the 2025 charter renewal. As Mr. Prime put it: [redacted] Ex. 52 at -908 (emphasis added); Ex. 53, at -199 (Mr. Phelps: [redacted]).

[4] At his deposition, Mr. France repeatedly claimed [redacted] His deposition denials of any relevant recollections render him incapable of raising any issues of fact in opposition to this summary judgment motion. *See* Ex. 31, J. France Tr. 66:7–20; *id.* 19:8–10; *id.* 119:13–16; *id.* 32:15–19; *id.* 32:21–24; *id.* 35:12–16; *id.* 36:10–15; *id*. 167:12–19; *id*. 168:12–19; *id*. 170:13–16.

The TNC made its first proposal to NASCAR for the 2025 charter renewal in June 2022, after concluding the baseline cost analysis in conjunction with NASCAR executives. Ex. 34 at -710–12; Ex. 54 at slide 2. Among other things, the teams requested: (1) $[redacted] million per charter in average annual value (for a total of $[redacted] million for 36 cars)—which would cover the baseline costs of operating a car and would reflect [redacted] of overall revenues from the sport; (2) a portion of new sources of revenue that include team IP; (3) permanent charters; and (4) greater say in league governance. Ex. 34 at -712.

In response, in its initial offer in October 2022, NASCAR proposed media share payments of $[redacted] million in average annual value ("AAV") per charter. Ex. 4 at slide 10; Dkt. 31-3 ¶ 30. NASCAR's second proposal to the teams in February 2023 increased the proposal to $[redacted] million AAV per charter. Ex. 55 at -655. But during subsequent joint negotiations, NASCAR's offers decreased from there in November and December 2023. Ex. 56 at -781; Ex. 57 at -445. And when NASCAR sent its first full draft of the 2025 Charter Agreement to the teams on December 23, 2023, it lowered its revenue share offer to $[redacted] million[5] AAV, and would not budge from that position throughout the remainder of the negotiations. *See* Ex. 57 at -445; Ex. 58 at -364; Ex. 59 at -161. This amount was, as noted above, significantly less than the $[redacted] million AAV that NASCAR initially proposed in October 2022 before the joint negotiations ran their course.[6]

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[5] In the signed agreement, there is a range for the final year of the term, which would make the AAV between $[redacted] and $[redacted] million. *See* Ex. 5 at -743. On the eve of the recent August 28, 2025 preliminary injunction hearing, NASCAR sent a letter to the teams agreeing to provide the higher end of the range for the final year of the deal.

[6] NASCAR has focused on the fact that its proposal in October 2022 included $[redacted] million in team payments for 2025 ($[redacted] million per charter for 2025), compared to the $[redacted] million in team payments for 2025 in the final agreement. Its myopic comparison, focused on a single year, 2025, obscures the fact that the teams are receiving significantly less in average annual payments over the seven years of the 2025 Charter Agreement than NASCAR's first offer, and that NASCAR increased its offer for the 2025 season to $[redacted] million in February 2023, before decreasing it to $[redacted] million in November 2023, and then further decreasing it to $[redacted] million in the consummated

On May 28, 2024, NASCAR circulated another draft of the 2025 Charter Agreement that included the same core economic terms as its December 2023 draft. Ex. 61 at -121–22; Ex. 60 at -279 (updated Fixed Owner's Plan payouts after "[redacted]"). In a private chat, NASCAR senior executives (Mr. Phelps, Mr. Prime, and Mr. O'Donnell) discussed the fact that the May 2024 proposal contained "zero wins for the teams." Ex. 1 at -213; *id.* (Mr. Prime: "'[H]ere's a bit more money, fuck off everywhere else,' is a bold strategy."). The "zero wins" were based on an internal NASCAR chart with a term-by-term assessment of the negotiating positions that NASCAR was imposing on the teams. Ex. 6 at -678–79. Mr. O'Donnell internally described NASCAR's position as "fuck the teams," reflecting a NASCAR "dictatorship" that would limit NASCAR to a "redneck, southern, tiny sport." Ex. 1 at -213. As explained by NASCAR executive Brian Herbst in a separate text thread, Jim France was "[redacted]." Ex. 62 at -772. NASCAR also rolled back the teams' role in league governance and required them to accept a slew of new "wins" that benefited NASCAR and its owners, such as a provision allowing the France family to own charters. Ex. 63 at -609–10; Ex. 29, Polk Vol. 1 Tr. 261:14–25.

On September 6, 2024, after business hours on a Friday evening, NASCAR gave the individual teams seven hours to accept NASCAR's final offer for the 2025 Charter Agreement or lose their charter rights altogether. Ex. 30, Phelps Tr. 229:20–230:22. Mr. Prime described the threat of losing charters as a [redacted] for the teams. Ex. 10, Prime Tr. 300:3–25. The material economic terms in NASCAR's final offer, including the revenue share payments, were nearly identical to NASCAR's first written offer in December 2023. *Compare* Ex. 57 at -445, *with* Ex. 58 at -364; Ex. 15, Marshall Tr. 234:14–19.

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agreement. These undisputed facts show that the joint negotiations did not result in NASCAR making any additional economic concessions to the teams—to the contrary, NASCAR used its power to reduce its economic offer even further during the joint negotiation process.

Despite NASCAR's imposition of these one-sided terms, most teams concluded for their own reasons that they had no choice but to sign. Ex. 15, Marshall Tr. 234:14–235:25 ("[T]he teams had to accept the terms that [we]re being proposed" as "there are no substitutes for stock car racing . . . at the top level in North America or in the world."); Ex. 27, Polk Vol. 2 Tr. 229:8–17. Despite the contrary views expressed by Mr. Polk, 13 of the 15 charter teams—all but 23XI and Front Row—signed the 2025 Charter Agreement. The signing teams made this decision even though, on average, they had lost money every single year since 2021, with 75 percent of them losing money in 2024. Ex. 64, 2020–2024 Team Financial Information.

As with the 2016 Charter Agreement, [redacted] Ex. 30, Phelps Tr. 36:1–6. No NASCAR expert disputes that the need for identical economic terms with the racing teams created efficiencies for NASCAR to jointly negotiate with the teams.

E. There is no evidence of any group boycott.

Despite repeated conclusory assertions in the counterclaim about "boycotts" of NASCAR races, exhibitions, and other commercial activities, there is nothing in the discovery record to support these boycott allegations. *See* Ex. 31, J. France Tr. 245:18–20; Ex. 10, Prime Tr. 99:19–25; Ex. 30, Phelps Tr. 150:19–22. Indeed, the allegations about "boycotts" of NASCAR races or other commercial events have effectively been abandoned by NASCAR, as the only "boycott" NASCAR continues to allege is the claim that the racing teams did not attend one quarterly meeting of the Team Owner Council ("TOC") in April 2023. *See* Dkt. 136 ¶¶ 50, 74–76; Dkt. 120 at 6, 10, 17; Dkt. 121 at 6, 7. But, NASCAR's experts do not identify the failure of the teams to attend this single TOC meeting as the source of any harm to competition or antitrust injury to NASCAR, nor could they. *See* Ex. 12, Hansen Rep. ¶¶ 43–70; Ex. 2, Hubbard Rep. ¶¶ 59–75; Ex. 13, Desser Rep. §§ 12–12.13.

LEGAL STANDARDS

This Court should grant summary judgment if "there is no genuine dispute as to any material fact," so that 23XI, Front Row, and Curtis Polk are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Counterclaim-Defendants must come forward with evidence to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once that initial burden is met, NASCAR has the burden to affirmatively demonstrate the presence of a genuine issue of material fact that requires trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

As the party opposing summary judgment, NASCAR may not rest on mere allegations or denials, and the Court should not consider "unsupported assertions" or "self-serving opinions without objective corroboration." *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). Rather, to stave off summary judgment, NASCAR must come forward with probative evidence that gives rise to a genuine dispute that must be resolved by the jury. *Blackwell v. Warden of Lee Corr. Inst.*, 2025 WL 1879372, at *2 (D.S.C. July 8, 2025).

ARGUMENT

To establish a Sherman Act Section 1 violation, NASCAR must prove, among other things, that the teams conspired to unreasonably restrain trade and that the conspiracy harmed competition and caused antitrust injury to NASCAR. *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202–03 (4th Cir. 2002). This Court already held that the full rule-of-reason analysis applies to NASCAR's amended counterclaim. Specifically, "[t]he circumstances here make clear that joint negotiations by all or some of the chartered Teams with NASCAR, the sole owner of the Cup Series (as well as most of the racing tracks), is not inherently 'pernicious,' lacking 'any redeeming virtue,' or 'always or almost always tend[ing] to restrict competition,'" so the *per se* rule and "quick look" rule do not apply. MTD Order at 7–9.

I. NASCAR Cannot Show The Teams' Concerted Action Restrained Trade

A. An agreement to conduct voluntary joint negotiations that did not preclude individual negotiations could not be an unreasonable "restraint" of trade.

Under Section 1, "a plaintiff must prove (1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade." *N.C. State Bd. of Dental Examiners v. FTC*, 717 F.3d 359, 371 (4th Cir. 2013) (quotations and citation omitted). An agreement to participate in voluntary joint negotiations, which does not foreclose individual negotiations, cannot be an unreasonable restraint of trade under Section 1 of the Sherman Act.

In *BMI*, the Supreme Court explained that "[n]ot all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints." 441 U.S. 1, 23 (1979). The Court then held that composers and authors agreeing to offer their works through a joint license did not constitute a restraint of trade, where "[t]he individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets." *Id.* at 23–24; *Columbia Broad. Sys.*, 620 F.2d at 936 ("[I]f that opportunity is fully available, and if copyright owners retain unimpaired independence to set competitive prices for individual licenses to a licensee willing to deal with them, the blanket license is not a restraint of trade."). Other courts have likewise held it is not a restraint of trade for competitors to offer jointly negotiated terms as an option when they also remain free to negotiate terms individually. *Buffalo Broad. Co. v. ASCAP*, 744 F. 2d 917, 933 (2d Cir. 1984) ("Since the blanket license restrains no one from bargaining over the purchase and sale of music performance rights, it is not a restraint unless it were proven that there are no realistically available alternatives. As we have discussed, the plaintiffs did not present evidence to establish the absence of realistic alternatives. . . . Not having been proven to be a restraint, it cannot be a violation of section 1.").

The *BMI* principle forecloses NASCAR's Section 1 claim here. It is undisputed that individual negotiations between racing teams and NASCAR were not only a "realistically available" alternative—they were an option that NASCAR exercised throughout the alleged conspiracy period. *See supra* pp. 11–13. As Mr. Phelps testified, NASCAR "[redacted]" negotiated with teams individually over the 2025 charter renewal. Ex. 30, Phelps Tr. 175:15–176:3. In short, the undisputed evidence shows that the Counterclaim-Defendants and the other racing teams did not engage in any concerted action that precluded the ability of the teams to also engage in any individual negotiations that NASCAR desired. Because there is no evidence of any collusive behavior precluding the ability of NASCAR to engage in individual negotiations, the agreement to engage in joint negotiations by the teams with NASCAR was merely an additional competitive option—not a restraint on competition. *See Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 397 (7th Cir. 1989) ("There can be no restraint of trade without a restraint.").

For example, in *Matsushita Elec. Indus. Co. v. Cinram Int'l, Inc.*, 299 F. Supp. 2d 370 (D. Del. 2004), the court granted summary judgment against a Section 1 challenge to an agreement by competitors to offer a joint license to DVD patents, where the record showed that "individual licenses present[ed] a realistic alternative" to the joint licenses being offered. *Id.* at 379. Because individual bargaining was a realistic alternative for purchasers, the court held that also offering joint terms "does not violate antitrust laws." *Id.* Here, individual negotiations were not only a "realistic" alternative—they were an alternative that NASCAR in fact exercised and that led to 13 teams individually deciding to sign the 2025 charter terms demanded by NASCAR. *See supra* pp. 11–13; *compare with New York ex rel. Spitzer v. Saint Francis Hosp.*, 94 F. Supp. 2d 399, 414

(S.D.N.Y. 2009) (holding hospitals violated Section 1 by forcing insurers to jointly negotiate fee schedules with them, with the court emphasizing that "***despite requests to defendants to negotiate on an individual basis, defendants have refused to do so***.") (emphasis added).

The conclusion that voluntary, non-exclusive joint negotiations are not a restraint of trade in violation of Section 1 applies even more forcefully in the context of teams in a sports league like NASCAR. The Court has already noted the "inherent 'joint' nature of Cup Series racing," given that the "NASCAR Cup Series is in all respects a collective, not an individual sport," requiring common rules for a fair competition. MTD Order at 7–8; *id.* at 8 ("NASCAR and each Charter holder needed to reach the same agreement in all the Charters on many issues, whether or not NASCAR negotiated the Charters individually or collectively."); *see In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1066 (N.D. Cal. 2019) ("[B]ecause 'a certain degree of cooperation' is necessary to market athletics competition, the Court applies the Rule of Reason.") (citation omitted), *aff'd*, 594 U.S. 69 (2021).[7] It thus did not restrain trade for the racing teams to offer joint negotiations to NASCAR as an efficient option for achieving common rules for an inherently collective sport, even though those common negotiations required that the participants agree on a proposed price for purposes of the joint negotiations. *See BMI*, 441 U.S. at 9, 23–24 (participants may set common price for joint negotiation); *Five Smiths, Inc. v. NFLPA*, 788 F. Supp. 1042, 1049 (D. Minn. 1992) (joint "negotiating tactics" by NFLPA and player-agents insufficient to state a Section 1 claim).

Indeed, the undisputed evidence demonstrates that NASCAR voluntarily engaged in joint negotiations with the racing teams over charter terms for over a decade without any complaint that

[7] *Accord* Ex. 30, Phelps Tr. 36:1–6 (all charter language is identical); Ex. 10, Prime Tr. 150–51 (teams should be treated "[redacted]" under the charter system); Ex. 15, Marshall Tr. 222:18–223:10 (common rules are necessary for a level playing field).

such joint negotiations restrained trade. *See supra* pp. 6–7, 9–11. NASCAR always willingly participated in these joint negotiations, which first began prior to 2016. *Id.*; Ex. 30, Phelps Tr. 40:3–19. NASCAR cannot now credibly claim that it viewed those negotiations, which it supported, as an unlawful restraint of trade all along. *See Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 701 (7th Cir. 2011) (dismissing conspiracy claim where the plaintiff "was the party that made overtures toward [one of the alleged conspirators]," and there was "no evidence or even allegation that [the alleged conspirators] were steering [plaintiff]'s behavior").

B. Evidence of purported attempts to "discourage" teams from certain individual meetings or to "encourage" a boycott of NASCAR racing events—which did not take place—cannot establish a Section 1 violation.

The evidence NASCAR cites to argue that Mr. Polk and many others allegedly "discouraged" individual negotiations or "encouraged" a boycott of NASCAR events cannot salvage NASCAR's sole Section 1 claim. Even taking NASCAR's characterizations of the evidence as true for purposes of summary judgment (and they are not), the challenged conduct at most shows a non-actionable ***attempt*** to persuade the teams to either refuse certain individual meetings or boycott NASCAR events. Dkt. 135 ¶ 64 (alleging Counterclaim Defendants "discourage[d] NASCAR from seeking to negotiate with teams individually"). But "Section 1 proscribes only actual combinations, contracts and conspiracies; it does not reach attempts." *United States v. Am. Airlines, Inc.*, 570 F. Supp. 654, 657 (N.D. Tex. 1983).

As shown above, the record conclusively demonstrates that there was no actual agreement between the teams not to negotiate individually with NASCAR—the teams (including 23XI and Front Row) did in fact meet and negotiate individually with NASCAR throughout the relevant period. *See supra* pp. 11–13. Nor is there any evidence of an actual boycott of any NASCAR commercial events. *See supra* p. 16. By the plain language of the statute, an attempted agreement is not a Section 1 violation. *See, e.g.*, *Liu v. Amerco*, 677 F.3d 489, 493–94 (1st Cir. 2012).

NASCAR has produced no evidence that the teams boycotted any NASCAR race, exhibition, or other commercial event such as the Netflix documentary. On the contrary, NASCAR executives admitted that they did not know of any such boycott occurring. Ex. 10, Prime Tr. 99:19–25 (Q. [redacted]). Indeed, because of the absence of any evidence of an actual boycott, NASCAR's economic expert, Dr. Hubbard, does not mention, let alone analyze, such a boycott claim. Ex. 2, Hubbard Rep. ¶¶ 60–64.

While NASCAR has pointed to evidence that the racing teams did not attend one quarterly business meeting of the TOC, there is no evidence presented that this alleged boycott of a TOC meeting—where NASCAR executives admitted [redacted]—could impose any restraint on competition. Ex. 30, Phelps Tr. 83:9–14 (testifying that "[redacted]"). Indeed, NASCAR's experts do not identify the teams' failure to attend this one meeting as causing any restraint on competition or antitrust injury to NASCAR.

II. There Is No Evidence That the Teams Possessed Market Power

NASCAR's Section 1 claim also fails because NASCAR has not created any triable issue on the "threshold inquiry in any Rule of Reason case"—namely, whether Counterclaim-Defendants have market power in the "market for entry of cars into NASCAR Cup Series races," Dkt. 136 ¶ 126. *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524, 528 (4th Cir. 1989); *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991).[8]

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[8] *See also, e.g.*, *Carolina Rest. Grp., Inc. v. Pepsico Sales, Inc.*, 2015 WL 4250395, at *7 (W.D.N.C. July 13, 2015) ("[A] plaintiff must allege facts sufficient to show that the defendant has market power."); *MacDermid Printing Sols. LLC v. Cortron Corp.*, 833 F.3d 172, 182 (2d Cir. 2016) (market power required for Section 1 rule of reason claim).

Here, NASCAR has not created any triable issue that the 15 chartered racing teams had or exercised market power when negotiating the 2025 Charter Agreement. Instead, NASCAR's own documents show that NASCAR had "all the leverage" over the teams and could and did dictate the terms of the 2025 Charter Agreement. *See supra* pp. 13–16. Indeed, in its "Gold Codes" documents, NASCAR considered exploiting its market power over the input market to unilaterally change its model to eliminate the teams entirely and dominate the sport completely by entering its own cars and drivers in the Cup Series. Ex. 77 at -837. NASCAR's expert, Dr. Hubbard, fails to fully consider this fact in discussing the teams' purported market power over NASCAR.

Moreover, NASCAR's own expert and executives have stated that there were at least 150 teams with licenses to participate in Cup Series events who could have competed in the input market with the chartered racing teams. Dkt. 31-4 ¶ 14 ("[redacted]"); Ex. 2, Hubbard Rep. ¶ 20 ("[redacted]"). And NASCAR's preliminary injunction filings represented to the Court that there are "organizations eager to enter the Cup Series," which NASCAR described as "aspiring entrants that have a passion for motorsports, have infrastructural support behind them, and have histories of on-the-track success." Dkt. 196 at 3, 25. NASCAR Commissioner Steve Phelps declared that he has "[redacted]. Dkt. 196-1 ¶ 31; *see also* Dkt. 198, 198-1. NASCAR's own submissions thus establish that the 15 chartered teams lacked any semblance of market power because, as NASCAR tells it, there were over 150 other licensed teams and other "eager" "aspiring entrants" to which NASCAR could turn. *E.g.*, *Endsley v. City of Chicago*, 230 F.3d 276, 282–83 (7th Cir. 2000).

As a matter of antitrust law, no reasonable jury could find that 15 out of at least 150 licensed teams—or at most 10% of potential entrants—have market power over NASCAR and neither NASCAR nor its experts estimate any greater market share for the RTA members. *See, e.g.*, *Shafi v. St. Francis Hosp. of Charleston, W. Va.*, 937 F.2d 603, 603 (4th Cir. 1991) (affirming summary judgment, finding 11% market share insufficient to show market power); *HCI Techs., Inc. v. Avaya, Inc.*, 241 F. App'x 115, 124 (4th Cir. 2007) (affirming denial of preliminary injunction in part because it found 24% market share insufficient to show market power); *Ultrasound Imaging Corp. v. Am. Soc'y of Breast Surgeons*, 358 F. Supp. 2d 475, 484 (D. Md. 2005) (plaintiff's "failure to produce evidence (in the form of expert reports or empirical data) concerning [d]efendants' market share compel[ed] th[e] [c]ourt to enter summary judgment in favor the [d]efendants" on Section 1 claim) (collecting cases).

Nor can NASCAR rely on its expert, Dr. Hubbard, who offers the inadmissible *ipse dixit* opinion that the RTA members collectively had market power because NASCAR agreed to a higher domestic media revenue-share for the 2025 Charter Agreement than the domestic media revenue-share in the 2016 Charter Agreement, such that "[redacted]" Ex. 2, Hubbard Rep. ¶ 35. That unscientific opinion is based on Dr. Hubbard's unreasoned assertion that the market is "[redacted]" (*id.*)—which is contrary to NASCAR's representation to the Court that the relevant market for its counterclaim "includes all kinds of other competitors" such as "open cars" and "teams from other motorsports." Aug. 28 PI Hr'g Tr. 44:4–23.

Further, it makes no economic sense for Dr. Hubbard to assume the RTA member teams collectively had market power merely because NASCAR agreed to provide a higher media share payment in the 2025 Charter Agreement in comparison to the 2016 Charter Agreement. Rather, the undisputed facts show that NASCAR knew that the payments under the 2016 Charter Agreement were insufficient to provide a sustainable business model for the sport, and that NASCAR was able to exercise its power to lower the amount of this payment through the joint negotiation process. *See supra* pp. 7–16.

At most, the evidence shows that NASCAR preferred purchasing the services of the RTA members at the lower domestic media revenue-share and other onerous terms it demanded of them, rather than turning to the more than 150 other racing teams that were licensed to compete in Cup Series races, or pursuing other options available to NASCAR (such as a vertical integration in which NASCAR would hire the drivers and only have its own teams race). *See* Dkt. 31-4 ¶ 14 [redacted] Ex. 77 (NASCAR Gold Codes presentation discussing vertical integration option). But NASCAR's preference for the RTA members at a below competitive market price does not provide any evidence that the racing teams which belonged to the RTA had any market power. *See Oksanen*, 945 F.2d at 709 (plaintiff's "preference" for defendants did "not justify excluding" alternatives or assuming "defendants possess the market power necessary to significantly restrain trade").

NASCAR has completely failed to prove the requisite element of market power.

III. <u>NASCAR Has Not Shown Any Harm to Competition or Antitrust Injury</u>

To succeed on its Section 1 claim, NASCAR must also show both harm to competition and resulting antitrust injury to NASCAR. *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, 988 F.3d 690, 710 (4th Cir. 2021). "Antitrust injury encompasses two concepts: (1) the causal connection between the plaintiff's injury and an antitrust violation, and (2) whether the plaintiff's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws."

Id. (cleaned up). Proof of harm to competition is first required to then show an antitrust injury caused by such a reduction in competition. *Brunswick*, 429 U.S. at 489.

A. There is no evidence that the racing teams' joint negotiations with NASCAR for the 2025 Charter Agreement harmed competition.

NASCAR fails at the threshold, because it has not produced any evidence that the joint negotiations for the 2025 Charter Agreement caused any harm to competition. Specifically, NASCAR's economic expert, Dr. Hubbard, only opines that [redacted]. Ex. 2, Hubbard Rep. ¶¶ 47–51. But that alleged harm to competition, whatever its questionable merits, cannot be attributed to the joint negotiations for the 2025 Charter Agreement. *See supra* pp. 6–11; *Gibson v. Cendyn Grp., LLC*, 2025 WL 2371948, at *6 (9th Cir. Aug. 15, 2025) ("Section 1 requires a causal link between the contested agreement and an anticompetitive restraint of trade in the relevant market.").

Nor did NASCAR behave as if it believed the charter system harmed competition. Instead, it repeatedly and publicly declared that the charter system benefited NASCAR and the sport. *See supra* pp. 6–7. It admitted—as far back as its genesis in 2016—that the charter system was necessary to the economic sustainability of the teams and the future of the sport. *See id.* And it admitted that it did not seek to eliminate the charter system in the 2025 Charter Agreement negotiations. Ex. 10, Prime Tr. 187:8–11. There is thus no basis for a reasonable jury to conclude that, absent the joint negotiations from 2022 to 2024, NASCAR would have eliminated the charter system to remedy any purported harm to competition. NASCAR cannot now contradict its admissions to manufacture a genuine issue of material fact to the contrary. *Keith v. Volvo Grp. N. Am., LLC*, 2024 WL 1193096, at *2 (4th Cir. Mar. 20, 2024) ("A plaintiff cannot create a genuine dispute of material fact by contradicting his own statements.").

Moreover, there is no evidence that the teams competed with each other for the common economic terms that they jointly negotiated with NASCAR. Instead, the undisputed facts are that the terms of the charter agreements have always been identical for all the teams because it was necessary for them to compete on equal terms in this "collective" sports competition to maintain competitive integrity. *See supra* p. 16. The joint negotiations could not cause an injury to a purported economic competition between the teams that did not actually exist.

B. The record does not show any antitrust injury to NASCAR caused by the challenged joint negotiations or other concerted conduct.

In addition to NASCAR's failure to offer proof of harm to competition and resulting antitrust injury caused by any claimed anticompetitive effects of the joint negotiations, NASCAR has not raised a genuine issue that it suffered any economic injury from the joint negotiations at all. *Somers v. Apple, Inc.*, 729 F.3d 953, 964 (9th Cir. 2013) (finding no causal antitrust injury where plaintiff failed to show the purportedly anticompetitive conduct "affected [] prices"); *In re Online DVD Rental Antitrust Litig*., 2009 WL 4572070, at *7–8 (N.D. Cal. Dec. 1, 2009) (holding that "plaintiffs' injury is unduly speculative" because it failed to show a "direct causal link" between artificially inflated prices they purportedly paid and the alleged conspiracy).

Instead, senior NASCAR executives admitted that NASCAR had "all the leverage [so that] the Teams will almost have to sign whatever Charter terms we put in front of them." Ex. 52 at -908; *see supra* pp. 13–16. The undisputed evidence shows that the TNC did not achieve any of the four core demands that it made to NASCAR in February 2022, when the joint negotiations for the 2025 Charter Agreement began. *See supra* pp. 14–16. Rather, NASCAR and the France family dictated the teams in a deal that senior NASCAR executives recognized to be all "wins" for NASCAR—a deal that these senior executives described internally as a "fuck the teams" proposal. Ex. 1 at -213.

Further, the undisputed evidence establishes that NASCAR is paying the teams a smaller domestic media revenue share in the 2025 agreement ($[redacted] million AAV) than its initial October 2022 offer ($[redacted] million AAV). *See supra* p. 14. NASCAR first increased its offer in February of 2023 to $[redacted] million AAV per charter before proceeding to repeatedly lower the amount it was willing to share as the joint negotiations continued. NASCAR ultimately forced the teams to agree to an even lower revenue share of $[redacted] million AAV per charter for the duration of the agreement. *Id.* There is thus no evidence that the joint negotiations caused NASCAR to increase the amount of media revenues it would pay. Instead, just the opposite occurred, as NASCAR continued to lower the amount of revenue it would share, the TNC could not even persuade NASCAR to restore its February 2023 offer. Ex. 66 at -322 (Feb. 9, 2024) (teams requesting, unsuccessfully, that NASCAR restore the February 2023 offer while noting that, even at that amount, teams would "[redacted]"); *see supra* n. 6.

Indeed, the indisputable evidence shows that NASCAR used its own market power and individual negotiations to obtain the charter agreement terms that it desired. *See supra* pp. 13–16. NASCAR's damages expert, Mr. Hansen, opines that NASCAR would have been able [redacted] for the 2025 season if it did not face the joint negotiations and other concerted actions by the racing teams. *See* Ex. 12, Hansen Rep. ¶¶ 52–60 & Attachs. 4, 10 (citing Ex. 4 at slide 10). But, as shown in the concurrently filed motion to exclude his testimony under *Daubert*, Hansen offers no reliable expert analysis or methodology to show such an injury or damages to NASCAR. He does not use any "before and after," "yardstick," or other accepted form of economic analysis to determine what the media share outcome would have been absent the challenged conduct by the Counterclaim-Defendants. He instead offers nothing more than the *ipse dixit* assertion that a lower media share payment would have been made to the teams simply because he says so—no methodology required. Such inadmissible expert testimony cannot create a genuine issue of fact to stave off summary judgment. *EMG Tech., LLC v. Vanguard Grp., Inc.*, 2014 WL 12597428, at *3 (E.D. Tex. June 24, 2014) ("[A]n expert's *ipse dixit* statements are not sufficient to avoid summary judgment.") (cleaned up); *Parallel Networks, LLC v. Abercrombie & Fitch Co.*, 704 F.3d 958, 970 (Fed. Cir. 2013) (same).

Finally, NASCAR has abandoned—and has not created any triable issue to support—its counterclaim allegation that the teams injured NASCAR by engaging in concerted actions that depressed its media rights fees. NASCAR's media expert, Mr. Desser, has not offered any supported opinion that NASCAR's media deals were undervalued. Ex. 13, Desser Rep. §§ 12–13. [redacted]. Ex. 65, Bazant Tr. 66:20–25. Further, as shown in the concurrently filed Motion to Exclude the Testimony of Defendants' and Counter-Plaintiff's Expert Edwin S. Desser, all of his opinions are inadmissible because they are either far outside of his expertise, employ no expert analysis, or do not fit the theories of the case. On this record, NASCAR cannot raise a genuine issue that it suffered any injury from the joint conduct challenged in the counterclaim, let alone an antitrust injury.

IV. NASCAR Cannot Show That Mr. Polk Actively and Knowingly Participated in, Let Alone Led, Any Agreement to Restrain Competition

NASCAR's retaliatory efforts to cast Mr. Polk as the ringleader of a conspiracy among the teams to restrain competition fails for the additional reason that it is belied by the record. The undisputed evidence shows that the teams worked together through joint negotiations with NASCAR in an effort to transform NASCAR's economically perilous team model long before Mr. Polk had any affiliation with NASCAR. The evidence further shows that the teams *individually* negotiated with NASCAR to advance positions that frequently diverged from Mr. Polk's own positions once he joined the negotiations in 2022. In light of these undisputed facts, there is no basis to ascribe individual Section 1 liability to Mr. Polk. *See Brown v. Donco Enters., Inc.*, 783 F.2d 644, 646 (6th Cir. 1986) (individual liability requires a showing that the individual defendant "actively and knowingly engaged in a scheme designed to achieve anticompetitive ends").

For starters, Mr. Polk has no nexus whatsoever to NASCAR's claimed competitive harm as a result of the joint negotiations that created the charter system in 2016. As previously discussed, NASCAR's alleged harm to competition, as identified by Dr. Hubbard, is caused by the charter system itself, which dates back to 2016. *See supra* pp. 26–27; *see also* Ex. 2, Hubbard Rep. ¶¶ 47–51. Mr. Polk did not get involved in NASCAR until *2020*—i.e., four years *after* the 2016 Charter Agreement was adopted. He thus had nothing to do with the joint negotiations that created the charter system. Further, he also had nothing to do with the RTA's joint efforts to improve the charter system in the lead-up to the renewal of the five-year "Initial Term" of the 2016 Charter Agreement in December of 2020. *See* Ex. 19 § 2.1. For example, in March 2019, Roush Fenway sent NASCAR a proposed "[redacted]" designed to address "[redacted]" Ex. 20. That model—formulated [redacted]—included a [redacted] to cover the costs of [redacted] *Id.* at -498. Likewise, RTA began planning for joint negotiations with NASCAR to improve the charter system in 2020, long before Mr. Polk became involved. Ex. 22.

When the joint negotiations for the 2025 Charter Agreement began in 2022 with Mr. Polk's involvement, the charter system had already been in place for more than six years and NASCAR had no proposal to eliminate it in the 2025 Charter Agreement. *See supra* pp. 6–7, 26. There is thus no basis for a reasonable jury to find a causal link between Mr. Polk's conduct in the 2025

Charter Agreement negotiations and NASCAR’s claimed competitive harm from establishing the charter system. *See Spanish Broad. Sys. of Fla. v. Clear Channel Commc’ns*, 376 F.3d 1065, 1076 (11th Cir. 2004) (defendant’s practices “do not give rise to a federal antitrust claim without factual allegations specifically addressing how the[] practices have harmed competition”).

Further, there is no evidence presented that the teams entered into any agreement with Mr. Polk during the negotiations for the 2025 Charter Agreement to adhere to the positions that he advocated for, as opposed to acting independently. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 588 (“To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence *‘that tends to exclude the possibility’ that the alleged conspirators acted independently.*”) (citation omitted and emphasis added); *Am. Chiropractic Ass’n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 227 (4th Cir. 2004) (affirming grant of summary judgment and finding “mere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence [of] an anticompetitive conspiracy”) (internal citation omitted); *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 236 (2d Cir. 1999) (similar). The evidence shows that the 2025 Charter Agreement was the culmination of negotiations between NASCAR and each of the individual teams, and that those individual negotiations often departed from the positions that Mr. Polk advocated the teams adopt. *See, e.g.*, Ex. 51 at -039 (“[redacted].”); Ex. 67 at -987 [redacted] Ex. 78 at -934 (“[redacted].”).

Most significantly, *13 of the 15* chartered teams made their own *independent* decisions to sign the 2025 Charter Agreement on the terms NASCAR imposed even though Mr. Polk’s position was that the offer should be rejected as it did not achieve any of the four core negotiating objectives the TNC presented. Dkt. 111 ¶ 1; Ex. 15, Marshall Tr. 234:14–235:25. And, as shown below, the evidence is undisputed that Front Row, the other alleged co-conspirator, made its decision to reject the 2025 Charter Agreement terms demanded by NASCAR independent of 23XI and Mr. Polk.[9] This undisputed reality—that Mr. Polk did not have any agreement with the teams to adhere to his positions or the positions presented by the TNC—makes it impossible for a reasonable jury to find that he personally participated in, let alone led, any such agreement with the other teams.

V. <u>There Is No Evidence Front Row Participated in Any Conspiracy</u>

The Court should grant summary judgment on NASCAR's amended counterclaim against Front Row for the additional reason that the record is bereft of any evidence that Front Row actively participated in any joint conduct beyond being a member of the RTA trade association and permitting the TNC to represent it along with all of the other RTA members in presenting common positions to NASCAR. The case law is clear that such trade association participation, by itself, is insufficient to establish a company's participation in a Section 1 violation. *See N.C. State Bd. Dental Examiners*, 717 F.3d at 371. While a group may "have the capacity to conspire among themselves[,] [that] does not mean . . . that every action taken by the [group] satisfies the contract, combination, or conspiracy requirement of section one." *Oksanen*, 945 F.2d at 706. "There must be some evidence of actual knowledge of, and participation in, an illegal scheme in order to establish an antitrust violation." *Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652, 664 (E.D.N.C.

[9] It is black letter law that Mr. Polk and 23XI cannot conspire with each other because they are not separate economic actors for purposes of Section 1 of the Sherman Act. *See Am. Needle, Inc. v. NFL*, 560 U.S. 183, 194 (2010) ("[A]n internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police.") (internal citation omitted); *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 179 (4th Cir. 2002) ("[C]orporate employees cannot conspire with each other or with the corporation.").

2003) (cleaned up); *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 832 F.3d 1, 14 (1st Cir. 2016) (defendant's participation in a trade association did not create a triable issue of fact for purposes of Section 1); *Consol. Metal Prods., Inc. v. Am. Petrol. Institute*, 846 F.2d 284, 293–94 (5th Cir. 1988) (affirming district court's grant of summary judgment where defendant was found only to have been part of a trade association).

The undisputed evidence shows that the TNC did not include a representative from Front Row. Ex. 28 at -489. Instead, Front Row's owner, Mr. Jenkins, only signed the TNC's announcement letter, which expressly stated that the TNC negotiations did not preclude teams from individually negotiating with NASCAR. Ex. 28 at -490. There is no evidence presented that Front Row was actively involved in any of the joint negotiations with NASCAR or that it played any role in media appearances by the TNC members. Nor is there any evidence that Front Row met with NASCAR's media partners, or that Front Row took any steps to urge other teams to take particular negotiating positions. Front Row was just a member of the RTA.

Further, the undisputed evidence shows that Front Row engaged in individual negotiations with NASCAR over the terms of the 2025 Charter Agreement whenever NASCAR asked for such individual negotiations. As Front Row's General Manager, Jerry Freeze, wrote in an email to NASCAR: [redacted] Ex. 68. NASCAR's then-COO Steve O'Donnell confirmed the same to Mr. France in February 2024: "[redacted]" Ex. 69 at -814 (emphasis added). On April 18, 2024, NASCAR CEO Jim France, Chief Strategy Officer Scott Prime, and then-COO Steve O'Donnell met with Front Row owner Bob Jenkins and Mr. Freeze. *See* Ex. 44 at -490; Ex. 31, J. France Tr. 234:1–10 [redacted]

[redacted]

In addition, Mr. Jenkins and Mr. Freeze have provided unrebutted testimony that Front Row did not enter into any agreement to preclude individual negotiations. Ex. 70, Jenkins Tr. 287:24–288:11 (Jenkins noting NASCAR decided to stop meeting with the TNC in favor of individual negotiations); Ex. 71, Freeze Tr. 234:19–22 (Q: "Did the TNC encourage teams not to speak with NASCAR individually?" A: "I don't have a recollection of that. I don't really have a recollection of that."). NASCAR has no evidence to the contrary.

And, NASCAR's counterclaim expert reports do not cite any specific allegedly anticompetitive conduct by Front Row—in fact, Front Row is barely mentioned at all. *See, e.g.*, Ex. 13, Desser Rep. §§ 11, 12.1 [redacted]); Ex. 12, Hansen Rep. ¶¶ 18–19, 21 ([redacted] *id.* ¶ 36 [redacted]); Ex. 2, Hubbard Rep. ¶¶ 53, 55 (references to Front Row unrelated to showing its participation in any conspiracy).

The undisputed evidence further shows that Front Row ultimately made a unilateral decision not to sign the 2025 Charter Agreement under the terms demanded by NASCAR (while 13 out of 15 teams signed the agreement). Ex. 70, Jenkins Tr. 286:7–18 (Q: "Did Mr. Polk or 23XI try to convince you, at any point in time, to not sign the 2025 Charter agreement?" A: "No." Q: "You don't believe that?" A: "I have my own beliefs. I'm a fairly independent guy."); Ex. 7, Kauffman Tr. 191:20–192:6.

In sum, the absence of any evidence to tie Front Row to active participation in the alleged conspiracy presents exactly the type of situation in which courts routinely grant summary judgment for a defendant in a Section 1 case. *See, e.g.*, *Carpet Grp.*, 256 F. Supp. 2d. at 273–77 (granting summary judgment where a "vast majority" of the plaintiff's evidence against the defendant relied upon the defendant's participation in a trade organization); *Dahl v. Bain Cap. Partners, LLC*, 963 F. Supp. 2d 38, 48–49 (D. Mass. 2013) (dismissing a defendant in part because there was insufficient evidence to support the defendants' connection to the alleged conspiracy); *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 683–84 (9th Cir. 1985) (affirming a grant of summary judgment for one defendant, finding insufficient evidence to support the claim that a "tangential defendant" participated in the conspiracy).

For example, in *Carpet Group*, the plaintiffs alleged a conspiracy among members of a trade association to "sabotage" the plaintiffs' efforts to bypass traditional wholesalers in the market for oriental rugs. 256 F. Supp. 2d. at 259. But the only evidence that the plaintiffs presented against certain defendants was their involvement in the trade association (*id*. at 273), "'provocative letters" (*id.* at 274), "threats" (*id*.), and a refusal to attend a trade exhibition (*id*. at 275–76). The court found such evidence was insufficient to hold those specific defendants liable under Section 1 and granted summary judgment as to those defendants. *Id*. at 277. The same analysis requires that summary judgment be granted in Front Row's favor here, where there is even less evidence of Front Row's involvement in any alleged conspiracy than there was for the defendants who obtained summary judgment in *Carpet Group*.

<u>CONCLUSION</u>

For all the above reasons, the motion for summary judgment against the amended counterclaim should be granted.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

No artificial intelligence was employed in doing the research for the preparation of this document, with the exception of such artificial intelligence embedded in the standard on-line legal research sources Westlaw, Lexis, FastCase, and Bloomberg. Every statement and every citation to an authority in this document has been checked by an attorney in this case and/or a paralegal working at his/her direction (or the party making the filing if acting pro se) as to the accuracy of the proposition for which it is offered, and the citation to authority provided.

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I hereby certify that the foregoing **2311 RACING LLC, FRONT ROW MOTORSPORTS, INC., AND CURTIS POLK'S MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AGAINST COUNTER-PLAINTIFF'S AMENDED COUNTERCLAIM** was electronically filed using the Court's CM/ECF system, which will automatically send notice of filing to all parties of record as follows:

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