Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
beIN Sports, LLC,	)	MB Docket No. 18-384
Complainant,	)	File No. CSR-8972-P
	)	
v.	)	
	)	
COMCAST CABLE COMMUNICATIONS, LLC,	)	
and	)	
COMCAST CORPORATION,	)	
Defendants.	)	
	)	
	)	
TO: Chief, Media Bureau	)	

beIN OPPOSITION TO COMCAST'S MOTION TO STRIKE

beIN Sports, LLC ("beIN") hereby opposes the Motion to Strike filed by Comcast Corporation and Comcast Cable Communications, LLC (together, "Comcast").

Summary. By moving to strike the program carriage complaint filed by beIN on February 5, 2019 alleging Comcast refused to deal with beIN (the "refusal-to-deal complaint"), Comcast misstates the law. This case is controlled by the Bureau's decision in *MASN*,[1] precedent ignored by Comcast. Under *MASN*, the discriminatory refusal-to-deal claim that is the subject of this complaint is different than the discriminatory offer claim that beIN has made in the complaint filed against Comcast on December 13, 2018 (the "discriminatory offer complaint").

[1] TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network v. Comcast Corp., *Memorandum Opinion and Hearing Designation Order*, 23 FCC Rcd. 14787, 14835 ¶¶ 106-07 (2008) ("*MASN*").

Comcast's position is especially unreasonable because it has argued beIN's discriminatory offer complaint is itself precluded. *See* February 11, 2019 Comcast Answer ¶ 13. In other words, Comcast argues that this complaint is foreclosed because it should have been filed together with another complaint, which is itself foreclosed. The Bureau would be in an untenable position if it were to strike a claim Comcast wants struck because it was not filed together with a claim Comcast wants precluded. Had beIN not filed its discriminatory offer complaint, none of the arguments made by Comcast would apply even theoretically to block the refusal-to-deal complaint. This is really not a motion to strike a pleading, but a motion to dismiss beIN's refusal-to-deal claim with prejudice. beIN's right to complain about Comcast's discriminatory refusal to deal may not be abridged in this manner.

Background. As beIN has explained to Comcast, beIN focused its first complaint on Comcast's discriminatory offer for two reasons. First, the purpose of the discriminatory offer complaint was to address squarely the questions identified in the Bureau's dismissal order, without complicating the refiling with an additional cause of action. Second, beIN believed that including the refusal to deal claim in the discriminatory offer complaint would be counterproductive, as it would detract from beIN's attempt to overcome Comcast's refusal to resume negotiations. beIN's pre-filing letter for the discriminatory offer complaint pled with Comcast to return to the negotiating table, which would obviate the need for a refusal-to-deal action on beIN's part. Letter from Pantelis Michalopoulos, Steptoe & Johnson LLP, Counsel for beIN, to Francis Buono et al., Comcast (Jan. 10, 2019) (attached to discriminatory offer complaint as Ex. 19).

Analysis. Comcast does not explain what "game" it believes beIN is playing or what supposedly illicit profit beIN hopes to reap by filing the two claims separately. Motion to

Dismiss ¶¶ 3, 6. In fact, while Comcast goes so far as to mention "abuse of process," it is Comcast that, whether deliberately or not, has contravened its duty to inform the Commission of the most directly applicable legal authority to Comcast's own "claim-splitting" argument. *See* 47 C.F.R. § 76.6 ("Opposing authorities must be distinguished.")

The standard for claim-splitting has been articulated by the federal courts: "[t]o determine whether a plaintiff is claim-splitting, '[t]he proper question is whether, assuming the first suit was already final, the second suit would be precluded under res judicata analysis.'" *Clayton v. District of Columbia*, 36 F.Supp.3d 91, 94 (D.D.C. 2014) (quoting *Katz v. Gerardi*, 655 F.3d 1212, 1219 (10th Cir. 2011)). That question has in turn been resolved on indistinguishable facts in *MASN*. The answer, here as there, is no: there is no claim-splitting, since there would have been no claim preclusion had the Bureau entered a final judgment on the first complaint.

Like the claims in MASN's two prior program carriage complaints against Comcast, beIN's claims in the discriminatory offer complaint and refusal-to-deal complaint do not share a "common nucleus of operative facts."[2] The second complaints for both beIN and MASN arose from separate, different instances of discrimination that occurred at substantially later dates—approximately a year later in both cases; they are not simply extensions of arguments already made in each party's prior complaint. *MASN*, 23 FCC Rcd. at 14835 ¶ 106.

The two claims evaluated by the Commission in *MASN* arose in the reverse sequence from those here, but otherwise were their exact equivalent. The claims in MASN's second complaint and beIN's discriminatory offer complaint both focused on facts relating to Comcast's

[2] In re Applications of Mid Atlantic Network, Inc., Assignor, and Centennial Licensing II, L.L.C., Assignee, *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, 23 FCC Rcd. 7582, 7586 ¶ 8 (2008); *see also MASN*, 23 FCC Rcd. at 14835 ¶ 106.

relegation of the independent programmer to a placement inferior to that reserved for the affiliate. Thus, both MASN and beIN alleged that Comcast discriminatorily refused to give them wider distribution. *Id.* at 107. Likewise, MASN's first complaint was indistinguishable from beIN's refusal-to-deal complaint. Specifically, MASN alleged that Comcast discriminated by refusing to carry it altogether, *id.* at 106, and so did beIN.

Other considerations also show that the two actions do not share a "common nucleus of operative fact."[3] The discriminatory offer and refusal-to-deal complaints require different evidence to sustain a judgment (evidence of Comcast's discriminatory offers for carriage versus Comcast's subsequent refusal to negotiate), and allege separate wrongs (discriminatory offers for carriage versus discriminatory refusal to deal). Put simply, to make a carriage offer that places an independent programmer in a worse position than the distributor's programming affiliate is one thing; to decline carriage altogether and disadvantage the independent programmer by totally denying access to over 20% of the multichannel video market in that manner, another. The fact that Comcast did both cannot be used as an extenuating circumstance excusing Comcast from both. Two wrongs do not add up to zero.

Contrary to Comcast's assertion, Part 76 of the Commission's rules does not require beIN to have pled its refusal-to-deal claims in the discriminatory offer complaint. While "[a]ll matters

[3] Teleservices Industry Ass'n v. AT&T Corp., *Memorandum Opinion and Order*, 15 FCC Rcd. 21454, 21457-58 ¶ 9 (2000) (courts have asked: "Is the same right allegedly being infringed by the same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments?"); *see also* MCI Telecommunications Corp. v. AT&T, *Order*, 13 FCC Rcd. 4663 n.1 (1998) (second complaint about a separate instance of similar behavior would constitute a new cause of action).

concerning *a claim*…should be pleaded fully and with specificity,"[4] beIN fully pled each claim and stated fully all considerations applicable in each complaint.[5]

beIN still believes it makes sense for the Bureau to consolidate the two complaints. Had Comcast been reasonable instead of making specious arguments, this is what would have happened already. But, whether or not the two complaints are consolidated, *MASN* makes clear that the refusal-to-deal claim should not be foreclosed. And, regardless of consolidation, beIN consents to the issuance of one decision in this matter 60 days from completion of the pleading cycle for the later-filed complaint, if the Bureau finds this course more efficient.

Respectfully submitted,

/s/

Antonio Briceño
Deputy Managing Director, US & Canada
beIN Sports, LLC
7291 Northwest 74 Street
Miami, FL 33166
(305) 777-1900

Pantelis Michalopoulos
Markham C. Erickson
Matthew R. Friedman
STEPTOE & JOHNSON LLP
1330 Connecticut Ave, NW
Washington, DC 20036
(202) 429-3000
Counsel to beIN Sports, LLC

February 22, 2019

[4] 76 C.F.R. § 76.6(a)(1) (emphasis added). Comcast is also wrong that the refusal-to-deal complaint is an "additional pleading." *See* 47 C.F.R. § 76.7(d). Rather than an "additional pleading," it is itself a new and separate complaint, filed in a separate docket, which initiates a new pleading cycle. Unlike the "motions to dismiss or motions for summary judgment" that the Commission has identified as "additional pleadings" requiring approval of Commission staff, the refusal-to-deal complaint does not detract from the Commission's obligation to "handle program carriage complaints expeditiously." *See* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, *Second Report and Order*, 9 FCC Rcd. 2642, 2654-55 ¶ 30 n.51 (1993).

[5] *See* 76 C.F.R. § 76.7(a)(4). Moreover, Comcast is wrong that the discriminatory offer and refusal-to-deal complaints request the exact same substantive remedies. Motion to Dismiss ¶ 2. The discriminatory offer complaint raises conduct arising while the *Comcast-NBCU Order* was in effect, and seeks relief under that order, unlike the refusal-to-deal complaint.

VERIFICATION OF MATTHEW R. FRIEDMAN

I, Matthew R. Friedman, have read beIN's Opposition to Comcast's Motion to Strike in this matter, and state that, to the best of my knowledge, information, and belief formed after reasonable inquiry, the it is well grounded in fact and is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law. It is not interposed for any improper purpose.

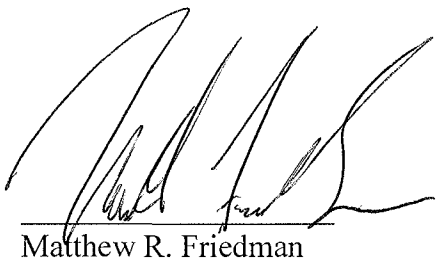
Matthew R. Friedman
Counsel to beIN Sports, LLC

Dated: February 22, 2019

CERTIFICATE OF SERVICE

I, Matthew R. Friedman, hereby certify that on February 22, 2019, I caused a copy of the foregoing Opposition to Motion to Strike to be served by electronic and overnight delivery upon the following:

Michael D. Hurwitz
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006-1238
Counsel to Comcast Corp.



Matthew R. Friedman