

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

701 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

DOCKET FILE COPY ORIGINAL

One Financial Center  
Boston, Massachusetts 02111  
Telephone: 617/542-6000  
Fax: 617/542-2241

Telephone: 202/434-7300  
Fax: 202/434-7400  
www.mintz.com

William A. Davis

Direct Dial Number  
202/434-7315  
Internet Address  
wdavis@mintz.com

November 5, 1997

VIA MESSENGER

Mr. William Caton  
Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, DC 20554

97-171

Re: Classic Sports Network, Inc. v. Cablevision Systems Corp., CSR-4975-P

Dear Mr. Caton:

Enclosed is one original and three copies of Defendant Cablevision's Opposition to Complainant Classic Sports' Motion for a Protective Order.

Please call me if you have any questions.

Sincerely,



William A. Davis

Enclosures

DCDOCS: 118173.1 (2j6l01!.doc)

62 of Copies rec'd  
by ABCDE

05-3

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
CLASSIC SPORTS NETWORK, INC.,	)	
	)	CS Docket No. 97-171
Complainant,	)	
	)	
v.	)	CSR-4975-P
	)	
CABLEVISION SYSTEMS CORPORATION,	)	
	)	Judge Joseph Chachkin
Defendant.	)	

**DEFENDANT CABLEVISION’S OPPOSITION TO  
COMPLAINANT CLASSIC SPORTS’ MOTION  
FOR A PROTECTIVE ORDER**

Defendant Cablevision Systems Corporation (“Cablevision”), by counsel, submits this memorandum in opposition to Complainant Classic Sports Network, Inc.’s (“CSN’s”) motion for a protective order dated October 29, 1997 (“Motion”).

CSN’s Motion requests entry of a protective order ensuring the confidentiality of discovery materials in this case. Cablevision agrees that a confidentiality order should be entered. The parties disagree, however, concerning the terms of the confidentiality order.

Attached as Exhibit 2 to CSN’s Motion is a copy of Cablevision’s proposed confidentiality order. CSN requests entry of Cablevision’s proposed confidentiality order with two changes: (1) adding CSN’s in-house counsel to the list of persons who may receive copies of Cablevision’s highly proprietary trade secrets; and (2) deleting Cablevision’s proposed

procedure governing the disclosure of confidential material to a party's consultants and expert witnesses. See CSN Motion at p. 4, ¶ 8.

CSN's proposed changes to Cablevision's proposed confidentiality order are not well founded. Accordingly, the Tribunal should enter Cablevision's proposed confidentiality order attached as Exhibit 2 to CSN's Motion without the changes sought by CSN.

**I. CSN's In-House Counsel Should Not Have Access to Cablevision's Trade Secrets**

It is not uncommon during the discovery phase of civil litigation for a dispute to arise concerning whether a party's in-house counsel may have access to a competitor's trade secrets. The general rule is that, except in unusual circumstances not present here, in-house counsel is not entitled to have access to a competitor's trade secrets.

"It has been noted that in-house counsel stand in a unique relationship to the corporation in which they are employed. Although in-house counsel serve as legal advocates and advisors for their client, their continuing employment often intimately involves them in the management and operation of the corporation of which they are a part." Federal Trade Commission v. Exxon Corp., 636 F.2d 1336, 1350 (D.C. Cir. 1980). Because of in-house counsel's dual role as business advisor and lawyer, there is a substantial risk that in-house counsel, assuming even the highest level of integrity and good faith, may inadvertently disclose or misuse a competitor's trade secrets and confidential information. Id.; accord Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1471 (9th Cir.) ("The Magistrate had to consider, however, not only whether the documents could be locked-up in cabinets, but also whether Brown Bag's counsel could lock-up trade secrets in his mind, safe from inadvertent disclosure to his employer once he had read the

documents.”), cert. denied, 506 U.S. 869 (1992). Accordingly, under circumstances similar to this case, courts do not allow in-house counsel to review a competitor’s trade secrets. See, e.g., Brown Bag Software, 960 F.2d at 1471; Exxon Corp., 636 F.2d at 1350.

The prospect that in-house counsel may inadvertently misuse or disclose trade secrets is heightened considerably where, as here, the parties are direct competitors. “Courts have presumed that disclosure [during pre-trial discovery] to a competitor is more harmful than disclosure to a noncompetitor.” Am. Standard Inc. v. Pfizer, Inc., 828 F.2d 734, 741 (Fed. Cir. 1987) (citing cases); accord Safe Flight Instrument Corp. v. Sundstrand Data Control Inc., 682 F. Supp. 20, 21-22 (D. Del. 1988). There is no dispute that the parties are direct competitors in cable sports programming.

CSN contends that, unless its outside counsel are permitted to share Cablevision’s trade secrets with CSN’s in-house counsel, outside counsel’s ability to “advise their client could be impeded severely” because outside counsel may not be able to articulate fully to the client “the basis for legal judgments made in the course of the litigation.” Not only is this concern completely speculative, but it also vastly overstates the potential for any problem to arise. CSN’s outside counsel will have access to Cablevision’s trade secrets. Outside counsel for CSN are experienced attorneys who are more than capable of providing vigorous representation to their client, without the need to disclose Cablevision’s trade secrets to their client.

In order to further gauge the risk whether CSN’s in-house counsel might advertently or inadvertently misuse or disclose Cablevision’s trade secrets, counsel for Cablevision inquired whether CSN’s in-house counsel, Ms. Barbara Shulman, is screened from participating in CSN’s

competitive business activities. CSN failed to provide any indication that Ms. Shulman is screened from participating in CSN's competitive business activities, implicitly admitting that Ms. Shulman does, in fact, participate in CSN's competitive business activities.

Cablevision does not question the integrity or good faith of CSN's in-house counsel, Ms. Shulman. There simply is too great a risk that CSN's in-house counsel may advertently or inadvertently misuse or disclose the trade secrets of its direct competitor in cable sports programming. Moreover, in addition to this unacceptable risk, CSN has demonstrated no need for its in-house counsel to review these sensitive documents. Accordingly, CSN's proposed change to the confidentiality order concerning in-house counsel's access to an opposing party's trade secrets should be denied.

## **II. Disclosure of Trade Secrets to Experts**

Cablevision has not retained any potential expert witnesses. As far as Cablevision knows, CSN has not retained any potential expert witnesses. Accordingly, Cablevision proposed to CSN that the parties forego arguing about the procedure for disclosing confidential material to experts unless and until it became a real issue in the case. CSN rejected this proposal, requesting instead that the confidentiality order include a provision permitting a party to disclose an opposing party's trade secrets to virtually any potential expert witness.

Cablevision continues to believe that there is no need to include in the confidentiality order a provision governing disclosure of an opposing party's confidential material to a potential expert witness. Nonetheless, Cablevision was and is willing to include in the confidentiality order a provision permitting CSN to disclose Cablevision's trade secrets to a potential expert

witness, as long as Cablevision can ensure that the potential expert witness truly is independent and does not otherwise present an undue risk of advertently or inadvertently misusing or disclosing Cablevision's trade secrets. In order to ensure the independence of any potential expert witness, paragraph seven of Cablevision's proposed confidentiality order requires a party to notify opposing counsel of its intent to disclose its opponent's confidential material to a potential expert, and affords opposing counsel a five-day period to object to the disclosure of its confidential material to that particular identified expert, if good cause exists to do so ("Five Day Objection Period"). Cablevision's proposed Five Day Objection Period is a clause used frequently in confidentiality orders of this type to prevent a party from disclosing an opposing party's trade secrets to an expert who is not truly independent, or who might have an incentive to misuse or disclose the opposing party's trade secrets.

CSN objects to Cablevision's proposed Five Day Objection Period, contending that the proposal "gives each party a veto power over the other party's designation of an expert." CSN is incorrect. The Five Day Objection Period does not give veto power to any party. Rather, the Five Day Objection Period merely permits a party to raise a good faith objection to the disclosure of its trade secrets to an opposing party's proposed expert before any irreversible harm is done. If the confidentiality order does not include a Five Day Objection Period, the parties are left with no mechanism to object to the disclosure of their trade secrets to an opposing party's expert until the harm already is done.

A party is unlikely, for a number of reasons, to raise a frivolous objection concerning the independence of an opposing party's proposed expert. First, if the parties are unable to agree whether the expert truly is independent, the dispute is referred to the Tribunal for final

determination. Second, and perhaps most important, there is ample case law describing the circumstances under which an expert should be considered “independent” or not. In Digital Equipment Corp. v. Micro Technology, Inc., 142 F.R.D. 488, 490-492 (D. Col. 1992), for example, the court discussed the extensive case law in this area and described five factors that courts generally use to determine whether an expert is “independent.” The five factors are: (1) whether the proposed expert works for the receiving party; (2) whether the proposed expert regularly is hired as a consultant for the receiving party; (3) the extent of the proposed expert’s involvement in the receiving party’s business activities; (4) the potential future involvement of the proposed expert in the receiving party’s business activities; and (5) the proposed expert’s willingness to curtail or forego future business activity with the receiving party. Id. at 491.

Far from creating unilateral veto power over an opposing party’s choice of potential experts, the five factors discussed above provide a fair and objective basis for raising and resolving good faith objections. Accordingly, for all of the above reasons, CSN’s proposed change to the confidentiality order concerning disclosure of an opposing party’s confidential material to a proposed expert should be denied.

### **III. Miscellaneous**

Attached as Exhibit 3 to CSN’s Motion is CSN’s proposed confidentiality order. CSN’s Motion states that Exhibit 3 contains only the above-described two changes to Cablevision’s proposed confidentiality order. See CSN Motion at p. 4, ¶ 8. CSN did not provide a blacklined version of its proposed order indicating the changes from Cablevision’s proposed confidentiality order. However, based on undersigned counsel’s review of CSN’s proposed order, it appears that

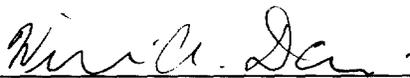
CSN's proposed order contains changes beyond the two changes described above. Accordingly, irrespective of the resolution of the two issues discussed in CSN's Motion, the Tribunal should use as its reference Cablevision's proposed confidentiality order (Exhibit 2 to CSN's Motion).

After CSN filed its Motion, counsel for Cablevision and the Cable Services Bureau of the Federal Communications Commission conferred regarding the Cable Services Bureau's request that paragraph 4(c) of Cablevision's proposed protective order (governing the Cable Services Bureau's access to "Confidential Restricted" material) be modified. Based on these discussions, Cablevision has agreed to modify paragraph 4(c) to make it consistent with paragraph 4(a) (governing outside counsel's access to "Confidential Restricted" material). This change to paragraph 4(c) has no bearing on the resolution of CSN's Motion.

For all of the above reasons, Cablevision respectfully requests that the Tribunal enter its proposed confidentiality order, a copy of which is attached as Exhibit 2 to CSN's Motion.

Dated: November 5, 1997

Respectfully submitted,



Howard J. Symons  
William A. Davis  
Michael B. Bressman  
Gregory R. Firehock  
Mintz, Levin, Cohn, Ferris,  
Glovsky and Popeo, P.C.  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004  
202/434-7300

Counsel for Cablevision Systems Corporation

**CERTIFICATE OF SERVICE**

I, William A. Davis, hereby certify that on this 5th day of November, 1997, I caused a copy of the foregoing Defendant Cablevision's Opposition to Complainant Classic Sports' Motion for a Protective Order to be served upon the following persons by hand delivery:

Robert Alan Garrett  
Philip W. Horton  
Richard L. Rosen  
Robert M. Cooper  
Arnold & Porter  
555 12th Street, N.W.  
Washington, D.C. 20004-1202

Meredith L. Jones  
Chief  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Room 918  
Washington, D.C. 20554

Deborah E. Klein  
Allan K. Manuel  
Cable Services Bureau  
Consumer Protection and Competition Division  
Federal Communications Commission  
2033 M Street, N.W., Room 700  
Washington, D.C. 20554

  
\_\_\_\_\_  
William A. Davis