

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
GAME SHOW NETWORK, LLC,) MB Docket No. 12-122
Complainant,) File No. CSR-8529-P
)
v.)
)
CABLEVISION SYSTEMS CORP.,)
Defendant)

To: Chief Administrative Law Judge Richard L. Sippel

**GAME SHOW NETWORK, LLC'S OPPOSITION TO
CABLEVISION SYSTEMS CORPORATION'S MOTION FOR SUMMARY DECISION**

C. William Phillips
Jonathan M. Sperling
COVINGTON & BURLING LLP
620 Eighth Avenue
New York, NY 10018-1405
(212) 841-1000

Stephen A. Weiswasser
Paul W. Schmidt
Elizabeth H. Canter
Laura Flahive Wu
Stephen Kiehl
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
(202) 662-6000

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Pursuant to 47 C.F.R. § 1.251, complainant Game Show Network, LLC (“GSN”) respectfully submits this opposition to the motion for summary decision brought by defendant Cablevision Systems Corporation (“Cablevision”).

PRELIMINARY STATEMENT

Cablevision does not dispute that it dominates its marketplace. Nor does it dispute that it caused material harm to GSN in that marketplace by action that, on this motion, Cablevision does not contest was discriminatory. Nonetheless, Cablevision seeks summary decision on the grounds that Section 616 of the Communications Act permits such conduct and that Cablevision cannot be liable under the statute unless it permanently cripples GSN on a nationwide basis.

Cablevision is wrong. As the Commission and the courts have made clear, Section 616 prohibits discrimination that “unreasonably restrains” an unaffiliated network’s ability to compete fairly in the market where the MVPD operates. Under this standard, there can be no genuine dispute that Cablevision has “unreasonably restrained” GSN, given Cablevision’s power in its local market and the incontestable harm that its discriminatory conduct has caused GSN. Cablevision’s contrary, toothless reading of Section 616 would essentially immunize all MVPDs from liability and render the statute a dead letter.

In fact, even if the Presiding Judge were to look to national harm as Cablevision erroneously urges, triable questions exist about the magnitude of the harm GSN suffered. The concrete financial harms that GSN has documented plainly represent an unreasonable restraint. In addition, at trial GSN will introduce proof of a range of other national harms that flow directly from Cablevision’s impairment of GSN in the New York market that Cablevision itself boasts has unique national influence. On these facts, Cablevision’s last-minute request for summary decision should be denied.

BACKGROUND

This case arises from Cablevision's decision in 2011 to move GSN from a widely-distributed, expanded basic tier—where Cablevision had carried GSN for 14 years, and where its competitor MVPDs continue to carry GSN—to a narrowly penetrated sports tier reaching [REDACTED] of Cablevision subscribers.¹ This action gutted GSN's exposure in Cablevision's marketplace and isolated the female-oriented network with such networks as the MLB Network and the NHL Network.² At the same time, [REDACTED]

[REDACTED]³ Cablevision made this unilateral decision without warning to GSN and in the face of [REDACTED] of customer complaints.⁴

The facts established through discovery provide both direct and circumstantial evidence that Cablevision violated the program carriage rules in its zeal to promote its affiliated networks at the expense of a competitor. Cablevision treated WE tv, Wedding Central, and GSN fundamentally differently based on their affiliation,⁵ despite the networks being similarly

¹ See Cablevision System Corporation's Mot. Summ. Decision, at 4-5 (Apr. 29, 2015) ("Cablevision Motion") (stating that, after the retiering, approximately [REDACTED] Cablevision customers received GSN through the sports tier, compared to more than [REDACTED] before the retiering).

² See Exh. 1, CV-GSN 0434077, at 0434083 [REDACTED]. Evidence in support of GSN's opposition is in the accompanying Declaration of Elizabeth H. Canter. Exhibits to the Declaration are referred to as "Exh. ___."

³ Exh. 2, Montemagno Direct Test., ¶¶ 71, 77.

⁴ See Exh. 3, CV-GSN 0427896, at 0427897 [REDACTED]; Exh. 4, CV-GSN 0290522 [REDACTED].

⁵ Cablevision, for instance, [REDACTED]

situated.⁶ This conduct goes to the heart of Section 616, which prohibits vertically integrated cable operators from discriminating on the basis of affiliation and non-affiliation.

GSN was directly harmed by Cablevision's discriminatory conduct.⁷ In the first month of the retiering, GSN lost nearly [REDACTED] in license fees.⁸ In all, GSN's subscriber base was reduced by more than [REDACTED], which translates to a loss of [REDACTED] in annual license fee revenues.⁹ The loss in subscribers impacts GSN's ability to generate advertising revenue; GSN estimates the resulting loss in advertising revenue at [REDACTED] annually.¹⁰ In turn, this aggregate direct loss of [REDACTED] each year significantly impacts GSN's ability to invest in programming, marketing, and talent, and thus to compete with networks such as WE tv.¹¹ This and other material harms are amplified by Cablevision's position as the dominant cable operator in New York, home to most of the top advertising agencies and media buyers.¹²

[REDACTED]

⁶ The evidence shows GSN, WE tv and Wedding Central are similarly situated on the basis of ratings, genre, license fee, target audience, target advertisers, target programming, and other factors. Exh. 11, Brooks Direct Test., ¶¶ 20, 34, 48, 87, Exh. 12, CV-GSN 0427144, CV-GSN 0427152, Exh. 13, Goldhill Direct Test., ¶ 6, Exh. 14, Goode Direct Test., ¶ 4, Exh. 15, Zaccario Direct Test., ¶ 4.

⁷ Exh. 13, Goldhill Direct Test., ¶¶ 30-31.

⁸ *Game Show Network, LLC v. Cablevision Systems Corp.*, Hr'g Designation Order & Notice of Opportunity for Hearing for Forfeiture, 27 FCC Rcd. 5113, 5117-18, 5133 (MB 2012); Cablevision Motion, at 5 (stating that in February 2011, immediately after the retiering, approximately [REDACTED] Cablevision subscribers received GSN through the sports tier, down from more than [REDACTED]).

⁹ See Cablevision Motion, at 5; Exh. 16, GSN_CVC_00168067 (stating Cablevision paid GSN a license fee of [REDACTED] per subscriber; annualized, the loss of [REDACTED] subscribers equals a loss in license fee revenue of [REDACTED]).

¹⁰ Exh. 17, Goldhill Supp. Dep. Tr. 118:8-17 (Mar. 3, 2015); Exh. 15, Zaccario Direct Test., ¶ 8.

¹¹ Exh. 17, Goldhill Supp. Dep. Tr. 122:17-18 & 120:25-121:2 (stating that [REDACTED])

¹² Exh. 11, Brooks Direct Test., ¶ 100; Exh. 18, Dolan Dep. Tr. 11:3-18.

GSN attempted to negotiate with Cablevision as soon as it learned of the retiring, offering a [REDACTED] to return to broad distribution. Rather than reconsider its decision on the merits, Cablevision sought to extract value from DIRECTV, one of GSN's parents, by insisting that DIRECTV give carriage to the fledgling Wedding Central, a network viewed as [REDACTED].¹³ Cablevision's attempt to leverage its power over GSN's distribution to benefit its affiliated Wedding Central is a separate, independent violation of Section 616.

STANDARD OF REVIEW

The Commission has stated that summary decision is an "extraordinary procedure" that is appropriate only when the parties "are in agreement regarding material factual inferences that may be properly drawn from the record."¹⁴ The Commission has held that "critical and stringent standards must be applied in reviewing the papers of the party moving for summary decision."¹⁵ The pleadings of the party opposing summary decision "should be treated with considerable indulgence,"¹⁶ and if the opposing party raises a "substantial or material question of fact," a hearing must be held.¹⁷

The Presiding Judge has cautioned Cablevision specifically that "it is difficult to succeed on a motion for summary decision in a complex case."¹⁸ As the moving party, Cablevision has

¹³ Exh. 18, Dolan Dep. Tr. 17:12-22.

¹⁴ *In re James A. Kay, Jr.*, Mem. Op. & Order, 12 FCC Rcd. 2898, 2903 (1997) (quoting *Summary Decision Procedures*, 34 FCC 2d 485, 487-88 (1972)).

¹⁵ *Id.* at 2904.

¹⁶ *Summary Decision Procedures*, 34 FCC 2d at 488 (citation omitted).

¹⁷ *In re James A. Kay, Jr.*, 12 FCC Rcd. at 2904.

¹⁸ *Game Show Network, LLC v. Cablevision Systems Corp.*, Order, MB Docket No. 12-122, at 1 (Mar. 12, 2014) (citing *Summary Decision Procedures*, 34 FCC 2d at 488 ¶ 6).

the burden of establishing that “no triable issue exists,” and it has this burden “even with respect to issues upon which the opposing party would have the burden at the hearing.”¹⁹

ARGUMENT

Cablevision has moved only on the question of harm, presumably due to the volume of evidence on the similarities between GSN, WE and Wedding Central, the net benefits GSN provided to Cablevision, and Cablevision’s discriminatory treatment of its affiliated networks to the detriment of GSN. As to the one question on which it moves, Cablevision argues that this discrimination on the basis of affiliation violates Section 616 only if the harm “amounts to an unreasonable restraint under antitrust law”²⁰ and affects GSN’s “market-wide ability to be a viable competitor”²¹ in the “national marketplace.”²²

But the legal standard that Cablevision’s motion advocates is based on a minority opinion that a D.C. Circuit panel *declined* to adopt.²³ To establish that it suffered an unreasonable restraint on its ability to compete fairly, GSN is not required to show that Cablevision exercises nationwide market power under antitrust doctrine.²⁴ Rather, GSN must show only that it has been restrained from competing fairly within the communities served by Cablevision’s cable systems.

¹⁹ *Summary Decision Procedures*, 34 FCC 2d at 488 (citation omitted).

²⁰ Cablevision Motion, at 13 (quoting *Comcast Cable Commc’ns LLC v. FCC*, 717 F.3d 982, 992 (D.C. Cir. 2013). (Kavanaugh, J., concurring)).

²¹ *Id.*

²² *Id.*; *see also id.* at 17 (“Cablevision’s size, coupled with the broad distribution that GSN enjoys in that national market, means that Cablevision’s carriage decision cannot, as a matter of law, unreasonably restrain GSN’s ability to compete as a national network.”).

²³ *See, e.g., id.* at 3, 12, 13, 17 (citing *Comcast Cable Commc’ns LLC*, 717 F.3d 982 (Kavanaugh, J., concurring)).

²⁴ *Id.* at 13.

There cannot be a dispute that GSN meets that standard. Not only has Cablevision's conduct significantly inhibited GSN's ability to reach viewers in Cablevision's coverage area, but the conduct has had a significant impact on GSN's license fee revenues, advertising revenues, and ability to compete for advertisers.

I. Section 616 Prohibits Harm to an Unaffiliated Network's Ability to Compete Fairly in the MVPD's Local Market, Which GSN Indisputably Has Suffered Here.

A. The Legal Standard Requires Harm to an Unaffiliated Network's Ability to Compete Fairly *in the MVPD's Local Market*.

Cablevision's focus on a national distribution market misstates the focus of Section 616, under which the key question is whether GSN is able to compete fairly within Cablevision's local coverage area (*i.e.*, the "discrete geographic areas defined by the boundaries of [Cablevision's] individual [cable] systems"²⁵). As the Presiding Judge has made clear, Section 616 should not be construed in a way that "would permit MVPDs to discriminate against unaffiliated video programming vendors . . . simply by showing that they have a relatively small percentage of overall subscribers or that a large proportion of viewers subscribe to MVPDs that are not vertically integrated. Such a construction undermines the very purpose underlying Section 616 and 76.1301(c)."²⁶

In upholding the FCC's program carriage rules against a facial challenge, the Second Circuit likewise has repudiated Cablevision's suggestion that Section 616 requires program carriage complainants to show that they are restrained from competing fairly in a *national* video programming market. The Second Circuit has explained, "If a vertically integrated cable operator . . . has the ability to prevent an unaffiliated network from reaching a substantial portion

²⁵ *Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 144 (2d Cir. 2013).

²⁶ *Herring Broadcasting, Inc. v. Time Warner Cable, Inc.*, 24 FCC Rcd. 12967, 13001 (ALJ 2009).

of consumers in [the local MVPD] market[,] [i]t thereby may significantly inhibit the unaffiliated network's ability to compete fairly in *that area's* video programming market.”²⁷

Further, both the Presiding Judge and the Commission previously have rejected Cablevision's assertion that the “unreasonable restraint” standard and analysis under Section 616 tracks antitrust doctrine.²⁸ In the Commission's words, “Section 616 would serve no function if it existed simply as a redundant analogue to antitrust law. Nothing in the text of Section 616 indicates an intent to mimic existing antitrust law or the ‘essential facilities’ doctrine.”²⁹

In evaluating whether a program carriage complainant is unreasonably restrained in its ability to compete fairly, the Commission instead looks to the impact of the vertically integrated MVPD's conduct “on the programming vendor's subscribership, license[] fee revenues, advertising revenues, ability to compete for advertisers and programming, and ability to realize economies of scale.”³⁰ The Commission has said that “the discrimination must be unreasonable

²⁷ *Time Warner Cable, Inc.*, 729 F.3d at 162-63 (emphasis added); *see also id.* at 146 (explaining that Section 616 was motivated by Congress' concern that “a cable operator would be able to ‘abuse its *locally-derived market power* to the detriment of programmers”) (quoting S. Rep. No. 102-92, at 24). The legislative history of Section 616 makes clear that the statute was adopted to address concerns about the ability of vertically integrated MVPDs to abuse *locally* derived market power to the detriment of diversity in programming. *See* S. Rep. No. 102-92 at 1157 (1991), available at 1991 WL 125145 (“[T]he Committee continues to believe that the operator in certain instances can abuse its *locally-derived market power* to the detriment of programmers and competitors.”); *id.* at 1156-57 (“The Committee received much testimony about cable operators exercising their *market power derived from their de facto exclusive franchises and lack of local competition.*”); *id.* at 1157 (“[I]n most cities, the cable system is a *local monopoly*, [and so] they have total control of content, on their terms, both as to the procedures and in choices presented to the cable audience.”); *id.* (“Programmers either deal with operators of such systems on their terms or face the threat of not being carried in that market.”) (all emphases added).

²⁸ *Tennis Channel Inc. v. Comcast Cable Commc'ns, LLC*, 27 FCC Rcd. 8508, 8523-24 (2012) (rejecting argument that Section 616 incorporates the antitrust “essential facilities” doctrine); *Herring Broadcasting, Inc.* 24 FCC Rcd. at 13001 (“Defendants' arguments that antitrust standards are encased in sections 616 and 76.1301(c) are unpersuasive.”).

²⁹ *Tennis Channel Inc.*, 27 FCC Rcd. at 8523.

³⁰ *In re Revision of the Commission's Program Carriage Rules*, 26 FCC Rcd. 11494, 11505 n.60 (2011), vacated in part on other grounds, *Time Warner Cable, Inc.*, 729 F.3d 137.

and have a restraining effect on the programmer's ability to compete fairly in the MVPD distribution marketplace."³¹ Of course, the FCC also is free to consider market power when evaluating program carriage complaints, as well as other "detrimental effects on an unaffiliated network [that] may serve as a proxy for . . . market power."³² The Commission has specifically concluded, however, that program carriage complainants are not required to show that a defendant MVPD holds a "bottleneck" monopoly or local market power.³³

Cablevision's attempt to shoehorn antitrust principles into a program carriage analysis ignores this precedent and overlooks the explicit intentions of Congress in passing the 1992 Cable Act. Congress sought not only to "provide new remedies' separate from those available under the antitrust laws"³⁴ and to foster competition in the video programming market, but also

³¹ *Tennis Channel Inc.*, 27 FCC Rcd. at 8524.

³² *Time Warner Cable, Inc.*, 729 F.3d at 165-66. The Second Circuit did not decide whether a Section 616 violation required a showing of market power, although it noted that, "[i]f a vertically integrated cable operator possesses market power in a local MVPD market, by virtue of its bottleneck control, it has the ability to prevent an unaffiliated network from reaching a substantial portion of consumers in that market. It thereby may significantly inhibit the unaffiliated network's ability to compete fairly in that video programming market, potentially driving it from that market altogether." *Id.* at 162-163. Thus, such a showing of market power or bottleneck control may create a strong inference of unreasonably restraint on fair competition and therefore be sufficient—although not necessary—to establish harm for purposes of Section 616.

³³ *Tennis Channel Inc.* 27 FCC Rcd. at 8523 ("We find no support for this standard or for the notion that Congress's concern in passing Section 616 was, as Comcast argues, cable operators' 'then-bottleneck power.' Congress applied Section 616 to all MVPDs, not just cable operators. Furthermore, Congress provided only that, in order to be prohibited, discrimination must unreasonably restrain the ability of an unaffiliated programming vendor to fairly compete; Congress did not incorporate standards borrowed from . . . antitrust doctrine"); Final Form Br. of FCC, at 16-17, *Time Warner Cable, Inc. v. FCC*, 729 F.3d 137 (2d. Cir. 2013) ("Congress's concerns in enacting the 1992 Cable Act were not limited to addressing . . . 'bottleneck' market power."); *id.* at 34 (rejecting "mistaken assumption that Congress adopted the program carriage statute solely to restrain the 'bottleneck' power that cable operators possessed in 1992" and noting that "[t]he principal factor motivating Congress to regulate program carriage was not the cable 'bottleneck,' but the potential for affiliation-based discrimination created by vertical integration").

³⁴ *Herring Broadcasting, Inc.*, 24 FCC Rcd. 12967, 13001-02 (quoting H.R. Rep. No. 102-628, at 111 (1992), available at 1992 WL 166238).

to promote “‘diversity’ in the available sources of video programming.”³⁵ Cablevision’s extreme interpretation of Section 616’s harm requirement, under which an MVPD cannot be liable absent nationwide bottleneck power, would essentially immunize every MVPD in the country from liability under Section 616: not even Comcast, the largest cable operator and MVPD in the country, has national market power based on the Commission’s estimate that control of more than 30 percent of the national MVPD distribution market affords a cable operator market power.³⁶ Cablevision’s implicit argument that *no* MVPD is capable of violating the statute as a matter of law is untenable, especially considering that the largest MVPD today, Comcast, “is almost two and a half times larger than the cable operator (TCI), whose conduct was the focus of Congressional debate leading up to adoption of the 1992 Act.”³⁷

In support of its position, Cablevision cites extensively to the concurring opinion of Judge Kavanaugh in the *Tennis Channel* case. But the D.C. Circuit panel declined to adopt Judge Kavanaugh’s minority opinion, which would have gutted the program carriage rules, and instead the panel left intact the Presiding Judge’s and Commission’s interpretation of the rules.³⁸ The Commission has clearly stated the applicable legal standard of harm under Section 616—a

³⁵ Final Form Br. of FCC, *supra* note 33, at 32; H.R. Rep. No. 102-628, at 42 (“[T]raditional antitrust analysis has not been, and should not be, the sole measure of concentration in media industries. Both Congress and the Commission have historically recognized that diversity of information sources can only be assured by imposing limits on the ownership of media outlets that are substantially below those that a traditional antitrust analysis would support.”).

³⁶ See *Commission’s Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order, 23 FCC Rcd. 2134, paras. 68-73 (2008), *rev’d by Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009) (reversing 30 percent horizontal ownership cap in part on basis that Commission failed to take account adequately of potential competition from DBS operators).

³⁷ *Tennis Channel*, 27 FCC Rcd. at n.330.

³⁸ *Comcast Cable Commc’ns, LLC*, 717 F.3d at 984.

standard that remains intact after the *Tennis Channel* decision. That standard requires a focus on the MVPD's local market and the measure of harm it has caused the network in that market.

B. There Is No Dispute That Cablevision's Discriminatory Conduct Has Restrained GSN's Ability to Compete Fairly within Cablevision's Coverage Area.

Cablevision maintains a significant share of the market for video programming in New York— [REDACTED] — that allows Cablevision to foreclose GSN from reaching millions of viewers within Cablevision's footprint.³⁹ As the Second Circuit has found, it is reasonable to infer that "a vertically integrated cable operator with a significant share of an MVPD market will have the incentive and ability to prevent unaffiliated networks from competing fairly in a video programming market."⁴⁰ It is self-evident that this massive market share gives Cablevision ample ability to restrain a network like GSN.

Cablevision executives admit the serious harms that result to a program service when it is tiered by a major distributor. In discussing a [REDACTED]

³⁹ Exh. 19, Singer Supp. Report, ¶ 25. [REDACTED]

⁴⁰ *Time Warner Cable, Inc.*, 729 F.3d at 163.

[REDACTED]

[REDACTED]

[REDACTED]⁴¹ She added that when other operators repositioned WE tv, the effect was

[REDACTED]⁴²

Consistent with this understanding, and with the “incentive and ability” created by Cablevision’s market share, Cablevision’s discriminatory decision to move GSN to a narrowly-distributed tier oriented around male-focused sports networks has harmed GSN’s ability to compete in a number of quantifiable ways.

First, GSN’s overall subscriber base was reduced by more than [REDACTED], which translates to a loss of [REDACTED] in annual license fee revenues. This is reflected in a [REDACTED] in GSN’s ratings in New York following the tiering. GSN household ratings in the New York market [REDACTED]

[REDACTED]⁴³.

Second, GSN’s diminished access to viewers impacts its ability to generate advertising revenue. GSN estimates it has lost approximately [REDACTED] [REDACTED] in advertising revenues annually.⁴⁴

Third, GSN relies heavily on subscriber license fees and advertising revenue to develop itself as a network. A loss that has grown to [REDACTED] each year—about [REDACTED] [REDACTED]—directly impacts GSN’s ability to make sufficient

⁴¹ Exh. 20, CV-GSN 0242550.

⁴² *Id.*

⁴³ Exh. 11, Brooks Direct Test., ¶ 39.

⁴⁴ Exh. 17, Goldhill Supp. Dep. Tr. 118:8-17.

investments in programming, marketing, and talent.⁴⁵ These, in turn, affect GSN's ability to compete, including with WE tv, which enjoys a competitive advantage from superior tier placement.⁴⁶

Cablevision's tiering was particularly harmful because of the inappropriate nature of the tier to which GSN was moved. GSN now resides on a sports tier along with networks of interest primarily to a male audience, making it much harder for GSN to reach Cablevision's female viewers.⁴⁷ At the same time, GSN's inaccessibility advantages its competitors: [REDACTED]

[REDACTED]⁴⁸ These concrete harms establish that Cablevision has unreasonably restrained GSN from competing fairly in Cablevision's video programming market.

II. Even Under Cablevision's Erroneous National Focus, Triable Issues of Fact Remain as to Whether Cablevision Has Harmed GSN's Ability to Compete Fairly.

Even accepting Cablevision's mistaken argument that the relevant market is national, Cablevision's motion for summary decision should be denied. Triable issues of fact remain as to the magnitude of harm GSN has suffered within the national market for video programming distribution. As discussed above, GSN's lost subscribers, license fees, and advertisements, and handicaps in obtaining other carriage agreements, combined with Cablevision's dominance in the New York market, limit GSN's ability to compete for advertisers and viewers nationally. GSN's continued growth does not negate the harm caused by Cablevision's discriminatory conduct or

⁴⁵ *Id.*

⁴⁶ *See* Exh. 18, Dolan Dep. Tr. 45:8-15.

⁴⁷ Exh. 11, Brooks Direct Test., ¶ 97; Exh. 13, Goldhill Direct Test., ¶ 29. Indeed, WE tv's senior programming executive confirmed [REDACTED]

[REDACTED]. Exh. 21, Dorée Dep. Tr. 148:20-149:9, 150:10-151:15.

⁴⁸ Exh. 11, Brooks Direct Test., ¶ 98.

that conduct's impact on GSN's ability to compete fairly against Cablevision's affiliated networks.

To start, Cablevision mistakes what it means for a network to be restrained in its ability to compete *fairly*. Cablevision makes much of the fact that its discriminatory re-tiering did not destroy GSN's financial viability, and that GSN has managed to improve its performance relative to pre-tiering measurements. But GSN's performance has *declined* relative to what GSN would have achieved absent the tiering—and that is the relevant benchmark. The Commission has explained, "There is nothing inconsistent about a network attracting viewers, programming, and advertising to become similarly situated to other networks and yet being unreasonably restrained from finding greater success . . . due to discrimination by an MVPD."⁴⁹ GSN's hard-won growth does not annul the significant concrete harms identified above.

GSN has also suffered additional harms, which are harder to quantify but no less real than those discussed above, including (a) impaired ability to secure other carriage agreements, (b) inability to compete for advertisers, and (c) inability to compete for viewers. For example:

(a)

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(b)

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⁴⁹ *Tennis Channel Inc.*, 27 FCC Rcd. at 8532-33.

⁵⁰ Exh. 17, Goldhill Supp. Dep. Tr. 54-55; Exh. 22, GSN Interrog. Resp. No. 8 (Jun. 6, 2014).

⁵¹ Exh. 17, Goldhill Supp. Dep. Tr. 20:20-21:2.

[REDACTED]

- (c) Tiering also eliminated the opportunity for GSN to benefit from casual viewers. It is impossible for Cablevision Optimum Value, Silver, or Preferred viewers to gain a “taste” of GSN when it is available only on the sparsely penetrated Optimum Gold and Sports Pak; in contrast, the majority of Cablevision subscribers can gain experience with WE tv casually, as that network is available to them without the need to subscribe to a sports tier.⁵³

The harm suffered by GSN is amplified because Cablevision is a dominant cable operator in New York, home to most of the top advertising agencies and media buyers. Distribution in the New York market is “considered in the industry to be important for a network to remain familiar to and front-of-mind among those making buying decisions.”⁵⁴ GSN’s decreased visibility in that market significantly impacts its ability to sell advertising and depresses its advertising rates. Moreover, the impact of the retiering appears to extend beyond the New York market. A simple regression model shows that [REDACTED]

[REDACTED].⁵⁵

Cablevision’s own personnel confirm the special importance of New York.

Cablevision’s Chief Executive boasts that [REDACTED]

⁵² Exh. 15, Zaccario Direct Test., ¶ 13.

⁵³ Exh. 11, Brooks Direct Test., ¶ 96.

⁵⁴ Exh. 11, Brooks Direct Test., ¶ 100.

⁵⁵ Exh. 23, Singer Direct Test., ¶¶ 14, 87-88. Cablevision’s arguments also ignore the impact of the instant program carriage litigation on the distribution and advertising marketplaces. Consistent with the record evidence in this case, the full impact of Cablevision’s discriminatory conduct would not reasonably be expected to manifest until Cablevision’s peer distributions and other marketplace participants know the resolution of the instant proceeding and whether Cablevision will be ordered to resume carriage of GSN on marketplace terms and conditions. Exh. 17, Goldhill Supp. Dep. Tr. 51:23-52:5.

[REDACTED]

[REDACTED]

[REDACTED]⁵⁷ In

discussing the value of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁹ And the CEO of Cablevision's

Rainbow Networks [REDACTED]

[REDACTED]⁶⁰

There is thus ample evidence of concrete quantifiable national harm that GSN has suffered from Cablevision's discrimination, in addition to a range of other harms that are equally real but more difficult to quantify precisely. These harms plainly present a triable issue under any reading of Section 616 other than Cablevision's unfounded effort to limit the statute to discrimination that nationally cripples a network.

⁵⁶ Exh. 18, Dolan Dep. Tr. 11:3-18.

⁵⁷ Exh. 18, Dolan Dep. Tr. 11:21-12:4.

⁵⁸ Exh. 24, CV-GSN 0257095.

⁵⁹ Exh. 25, CV-GSN 0269427.

⁶⁰ Exh. 26, Sapan Dep. Tr. 198:5-7 & 200:10-18.

CONCLUSION

For the foregoing reasons, Cablevisions motion for summary judgment should be denied in all respects.

Respectfully submitted,



Stephen A. Weiswasser
Paul W. Schmidt
Elizabeth H. Canter
Laura Flahive Wu
Stephen Kiehl
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
(202) 662-6000

C. William Phillips
Jonathan M. Sperling
COVINGTON & BURLING LLP
620 Eighth Avenue
New York, NY 10018-1405
(212) 841-1000

CERTIFICATE OF SERVICE

I, Stephen Kiehl, hereby certify that on May 13, 2015, copies of the foregoing were served by electronic mail, hand and/or overnight delivery upon:

Tara M. Corvo
Ernest C. Cooper
Robert G. Kidwell
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY
AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.,
Suite 900
Washington, D.C. 20004
(202) 434-7300

Scott A. Rader
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY
AND POPEO, P.C.
Chrysler Center
666 Third Avenue
New York, NY 10017
(212) 935-3000

Jay Cohen
Andrew G. Gordon
Gary R. Carney
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

*Counsel to Cablevision Systems
Corporation*

Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Austin K. Randazzo
Attorney-Advisor/Law Clerk
Federal Communications Commission
Office of Administrative Law Judges
445 12th St. S.W.
Washington, D.C. 20554

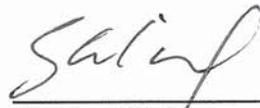
Travis LeBlanc
Chief
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mary L. Gosse
Administrative Officer
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

William Knowles-Kellett
Investigations and Hearings Division,
Enforcement Bureau
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325

Counsel to the Enforcement Bureau

Pamela Kane
Special Counsel
Investigations and Hearings Division,
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554



Stephen Kiehl

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Game Show Network, LLC,) MB Docket No. 12-122
Complainant,) File No. CSR-8529-P
)
v.)
)
Cablevision Systems Corp.,)
Defendant)

**DECLARATION OF ELIZABETH H. CANTER
IN SUPPORT OF COMPLAINANT GAME SHOW NETWORK, LLC'S
OPPOSITION TO MOTION FOR SUMMARY DECISION**

Elizabeth H. Canter declares:

1. I am an attorney at the law firm of Covington & Burling LLP, counsel for complainant Game Show Network, LLC ("GSN") in the above-captioned case. I respectfully submit this declaration in support of GSN's Opposition to Cablevision's Motion for Summary Decision, dated May 13, 2015.

2. Attached as Exhibit 1 is a copy of a presentation titled, [REDACTED] and produced in this action with Bates number CV-GSN 0434077.

3. Attached as Exhibit 2 is a copy of excerpts from Thomas Montemagno's Written Direct Testimony, dated March 11, 2013 and marked for identification as Cablevision Trial Exhibit 234.

4. Attached as Exhibit 3 is a copy of chain of emails between [REDACTED] produced in this action with Bates number CV-GSN 0427896.

5. Attached as Exhibit 4 is a copy of a chain of emails between [REDACTED]

[REDACTED] produced in this action with Bates number CV-GSN 0290522.

6. Attached as Exhibit 5 is a copy of an email from [REDACTED]

[REDACTED] produced in this action with Bates numbers CV-GSN 0137825 to 0137831.

7. Attached as Exhibit 6 is a chart titled, [REDACTED]

[REDACTED] produced in this action with Bates number CV-GSN 0433961.

8. Attached as Exhibit 7 is a chart titled, [REDACTED]

[REDACTED] produced in this action with Bates number CV-GSN 0433977.

9. Attached as Exhibit 8 is a chart titled, [REDACTED]

[REDACTED] produced in this action with Bates number CV-GSN 0433981.

10. Attached as Exhibit 9 is a chart titled, [REDACTED]

[REDACTED] produced in this action with Bates number CV-GSN 0433004.

11. Attached as Exhibit 10 are charts beginning with the title, [REDACTED]

[REDACTED] produced in this action with Bates numbers CV-GSN 0434074 to 0434075.

12. Attached as Exhibit 11 is a copy of excerpts from Timothy Brooks'

Written Direct Testimony, dated March 12, 2013 and marked for identification as GSN Trial Exhibit 222.

13. Attached as Exhibit 12 is a copy of the GSN 2011 Programming Budget, dated October 6, 2010, produced in this action with Bates numbers CV-GSN 0427141 to 0427161.

14. Attached as Exhibit 13 is a copy of excerpts from David Goldhill's Written Direct Testimony, dated March 11, 2013 and marked for identification as GSN Trial Exhibit 218.

15. Attached as Exhibit 14 is a copy of excerpts from Kelly Goode's Written Direct Testimony, dated March 11, 2013 and marked for identification as GSN Trial Exhibit 219.

16. Attached as Exhibit 15 is a copy of excerpts from John Zaccario's Written Direct Testimony, dated March 11, 2013 and marked for identification as GSN Trial Exhibit 221.

17. Attached as Exhibit 16 is a copy of a summary of GSN's [REDACTED] [REDACTED] produced in this action with Bates number GSN_CVC_00168067.

18. Attached as Exhibit 17 is a copy of excerpts from the deposition of David Goldhill, taken on March 3, 2015

19. Attached as Exhibit 18 is a copy of excerpts from the deposition of James Dolan, taken on January 20, 2013.

20. Attached as Exhibit 19 is a copy of excerpts from the Supplemental Report of Dr. Hal J. Singer, dated October 29, 2014.

21. Attached as Exhibit 20 is a copy of an email from [REDACTED] [REDACTED] produced in this action with Bates number CV-GSN 0242550, and marked for identification as GSN Trial Exhibit 10.

22. Attached as Exhibit 21 is a copy of excerpts from the deposition of Elizabeth Dorée, taken on December 18, 2012.

23. Attached as Exhibit 22 is a copy of GSN's Responses and Objections to Cablevision's First Set of Interrogatories, dated June 6, 2014.

24. Attached as Exhibit 23 is a copy of excerpts from the Written Direct Testimony of Dr. Hal Singer, dated March 12, 2013 and marked for identification as GSN Trial Exhibit 223.

25. Attached as Exhibit 24 is a series of emails beginning with an email from [REDACTED] produced in this action with Bates number CV-GSN 0257095.

26. Attached as Exhibit 25 is an email from [REDACTED] [REDACTED] produced in this action with Bates number CV-GSN 0269427.

27. Attached as Exhibit 26 is a copy of excerpts from the deposition of Josh Sapan, taken on March 2, 2015.

28. I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Dated: May 13, 2015
Washington, D.C.


Elizabeth H. Canter

Exhibit 1

**Highly Confidential Exhibit
Withheld**

Exhibit 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)	
)	
Game Show Network, LLC,)	MB Docket No. 12-122
Complainant,)	File No. CSR-8529-P
)	
v.)	
)	
Cablevision Systems Corp.,)	
Defendant)	

DIRECT TESTIMONY OF THOMAS MONTEMAGNO

I, Thomas Montemagno, hereby swear and affirm as follows:

I. Background

A. Responsibilities

1. I am the Executive Vice President of Programming for Cablevision, a position I have held since October 2012. I report to Cablevision’s CEO, James Dolan. I joined Cablevision more than 23 years ago after graduating from St. John’s University, and have held a variety of positions within the company’s programming department. Prior to becoming Executive Vice President, I was Senior Vice President of Programming Acquisition. The programming department handles acquisition of all of the content that Cablevision carries on its systems—broadcast, linear, video-on-demand, and the like. As Senior Vice President, I led these acquisition efforts, and I made recommendations for carriage and non-carriage of cable programming services.

2. In my current position, I have primary negotiating and decision-making authority for all of the content Cablevision carries on its systems. In making carriage decisions, I seek input from the video product management group. The video product management group is



in 1997. We entered into agreements in [REDACTED], and every contract negotiation has been vigorous, with each side attempting to get the best deal it could for itself. (See CV Exh. 7 (Affiliation Agreements Between Women’s Entertainment LLC and Cablevision).) In each instance, I believe we secured license fees consistent with market rates, which were a good value to Cablevision.

73. Most recently, [REDACTED]

[REDACTED]. I was the primary negotiator for Cablevision, and Bob Broussard was the point person for WE tv. We had extensive negotiations, and I believe the resulting deal represented a good value for Cablevision, including market rate subscriber fees. [REDACTED]

[REDACTED]

B. Channel Placement

74. It is conventional wisdom in the industry that channel placement can impact the performance of a programming network. As a result, channel placement is sometimes the subject of carriage agreement negotiations. I understand that GSN has alleged that Cablevision gave WE tv and/or Wedding Central special treatment with respect to channel placement. This is incorrect. Cablevision positioned WE tv where we thought it belonged—in the neighborhood (that is adjacent or proximate to) of other women’s networks. When Wedding

79. I understand that GSN has suggested that [REDACTED]
[REDACTED], or done
because Wedding Central was owned by an affiliate. That is wrong. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

80. I understand that GSN has suggested that [REDACTED]
[REDACTED]
[REDACTED] is evidence that the network
received special treatment. It is not the case, however, that the [REDACTED]
[REDACTED] that somehow gave Wedding Central
an advantage over other networks. Moreover, [REDACTED]
[REDACTED]. For instance, when
we were negotiating with [REDACTED]
[REDACTED] to discuss the deal. Cable industry executives leverage the
relationships they have in order to get deals done; that is the nature of the business.

81. Wedding Central performed well on Cablevision, and in [REDACTED] we
negotiated a new carriage agreement. I understand that ultimately Wedding Central was
nonetheless unable to get broad distribution and senior management decided to shutter the
network in the summer of 2011.

82. Although GSN has apparently argued that Cablevision's concern about the
cost of carrying GSN is contradicted by its continued investment in Wedding Central. But those

Exhibit 3

**Highly Confidential Exhibit
Withheld**

Exhibit 4

**Highly Confidential Exhibit
Withheld**

Exhibit 5

**Highly Confidential Exhibit
Withheld**

Exhibit 6

**Highly Confidential Exhibit
Withheld**

Exhibit 7

**Highly Confidential Exhibit
Withheld**

Exhibit 8

**Highly Confidential Exhibit
Withheld**

Exhibit 9

**Highly Confidential Exhibit
Withheld**

Exhibit 10

**Highly Confidential Exhibit
Withheld**

Exhibit 11

March 12, 2013

Direct Testimony of Timothy Brooks

GSN Exh. 222

I. INTRODUCTION

1. I have been retained by Game Show Network, LLC to analyze data pertaining to its cable network, GSN, and competing networks affiliated with Cablevision Systems Corporation, namely WE tv and Wedding Central, as well as certain other networks.

2. Based on the data I have examined, I conclude that GSN is similar in audience appeal to WE tv, and a significant competitor to WE tv for audience and advertising, both in the New York market and nationally. I also conclude that WE tv benefited following the removal of its competitor from wide distribution on systems. These conclusions are based on national and New York-area Nielsen ratings and demographic data, including data specific to the Cablevision coverage area, as well as on data obtained from other independent third-party measurement services, including Beta Research and Gfk MRI. The data indicate that GSN and WE tv both appeal strongly to women and are very competitive in terms of their performance in standard Nielsen demographic categories (based on gender and age). GSN performs comparably to WE tv in the New York area (as well as within the Cablevision coverage area specifically) notwithstanding that Cablevision provides its affiliated networks much more favorable channel positioning. Cablevision also gave more favorable distribution to Wedding Central, a new network it owned which appears to have attracted little audience and which was discontinued after less than two years.

19. Localized Nielsen ratings provide a more objective and reliable measurement of GSN's popularity relative to WE tv and other cable networks than does the set-top box data cited by Cablevision, although I also have examined the set-top box data produced by Cablevision in this case. My review of Cablevision's set-top box data indicates that [REDACTED]

[REDACTED]

[REDACTED]

(1) Nielsen National Ratings

20. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Total Audience Summary¹⁶

	Total Day HH CVG Rating		Total Day Persons 2+ CVG Rating	
	GSN	WE	GSN	WE
<u>2009</u>				
Q1				
Q2				
Q3				
Q4				
Year				
<u>2010</u>				
Q1				
Q2				
Q3				
Q4				
Year				
<u>2011</u>				
Q1				
Q2				
Y-T-D				

21. [Redacted]

[Redacted]

[Redacted]

[Redacted] 17

16 [Redacted]

[Redacted]

17 [Redacted]

[Redacted]

32. Another Cablevision-owned network that was given preferential treatment, Wedding Central, was also [REDACTED]

[REDACTED]

[REDACTED] However in terms of overall audience acceptance, Wedding Central clearly did not perform well based on the fact that it was closed down less than two years after it was introduced and never carried on any other major MVPD besides Cablevision.

33. While Nielsen demographic data is not available for Wedding Central, the network's programming consisted of reruns from WE tv. The series that were rerun attracted a strongly adult and female-oriented audience when they aired on WE tv. Thus it is apparent that Wedding Central [REDACTED]

[REDACTED]. (See Appendix No. 2)

(2) Nielsen New York Market Ratings

34. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

32 [REDACTED]

33 CV-GSN 0277395.

34 *See, e.g.*, CV-GSN 0431685; CV-GSN 0431686.

35 *See e.g.*, CV-GSN 0431685; CV-GSN 0431686.

36 When ratings are based on the entire cable universe, the numerator (number of homes viewing) will be larger for the more widely distributed network simply because it is available in more homes. [REDACTED]

[REDACTED]

35. With these limitations in mind, I looked at the Nielsen ratings for GSN and its competitors in the New York market, which is Cablevision’s “home” market and where it repositioned GSN to a narrowly distributed tier. [REDACTED]

[REDACTED]

2010 Total Day: New York DMA³⁸

	<u>GSN</u>		<u>WE tv</u>	
	<u>Rtg</u>	<u>(00)</u>	<u>Rtg</u>	<u>(00)</u>
Households	[REDACTED]			
Women 18+	[REDACTED]			

36. [REDACTED]

³⁷ [REDACTED]

³⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

47. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

48. In my experience, a network's performance in individual demographic categories, such as women 18-49 or 25-54, would not be a key input for an MVPD making carriage decisions. That said, to evaluate the conclusions of Mr. Orszag and Mr. Egan, I also have examined how GSN and WE tv perform relative to each other in these key demographic categories in Cablevision's footprint, both nationally and within New York. The data show [REDACTED]

[REDACTED].

Total Day Ratings 2Q2010: Cablevision Households Nationwide⁵⁴

	GSN	WE tv
Women 18+	[REDACTED]	[REDACTED]
Women 18-49	[REDACTED]	[REDACTED]
Women 25-54	[REDACTED]	[REDACTED]

⁵⁴ [REDACTED]

Total Day Ratings 2Q2010: Cablevision Households in New York⁵⁵

	GSN	WE tv
Women 18+		
Women 18-49		
Women 25-54		
49.		

**Total Day Ratings 2Q2010: Cablevision Households in New York⁵⁷
(ranked on women 18+)**

	W18+	W18-49	W25-54
Bravo			
Lifetime			
GSN			
WE			
E!			
Hallmark			
Discovery Health			
Oxygen			

⁵⁵ [Redacted]

⁵⁶ OWN took over the distribution of Discovery Health at the beginning of 2011. [Redacted]

⁵⁷ [Redacted]

related) that they are attracted to both networks, which is the case with GSN and WE tv, and whether two networks in fact appeal to the same demographics, which is also the case with GSN, WE tv, and Wedding Central. By the excessive use of artificial, self-defined labels Cablevision obscures the fact that game shows as a class, both today and historically, have always appealed predominantly to women, as has the programming on WE tv (whatever one wishes to call it).¹⁰⁸

F. Implications

87. In summary, based on my experience and on a thorough examination of the forgoing data, I believe that GSN and WE tv would be considered similar by MVPDs, by advertisers, and by viewers. For MVPDs, key factors to consider (besides price) are audience size and loyalty. On a national total audience basis [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰⁸ Some of Mr. Egan’s statements regarding game shows simply do not make sense. He makes the unsupported assertion that “virtually all of the game show programs on GSN will typically be of interest to either men or women.” (*Egan Decl.*, §IV.B.1. ¶31) [REDACTED]

And later in the same paragraph he retreats from gender characterization, saying that game shows appeal to those with an “interest in game shows,” which is circular logic.

[REDACTED]

2010 Total Day Ratings

	GSN	WE
National Ratings ¹⁰⁹		
Households	[REDACTED]	[REDACTED]
Women 18+	[REDACTED]	[REDACTED]
Persons 2+	[REDACTED]	[REDACTED]
New York DMA Ratings ¹¹⁰		
Households	[REDACTED]	[REDACTED]
Women 18+	[REDACTED]	[REDACTED]
Persons 2+	[REDACTED]	[REDACTED]

88. GSN and WE tv are [REDACTED]

[REDACTED]. First, it is important to keep in mind the limitations of STB data, of which Cablevision executives should have been aware. Nielsen data represents actual viewing, not household tuning, and is based on a representative sample and on accepted calculation procedures that have been audited, accredited, and accepted by the industry at large. The set-top box data produced by Cablevision reflects only household tuning, is unaudited, unaccredited, not accepted as currency in the marketplace, and was only selectively revealed even in the context of this proceeding. For a host of reasons it is far less reliable than Nielsen data, which was readily available to Cablevision [REDACTED]. Even if one puts aside concerns about the reliability of set-top box data, however, that data shows GSN to be a much

¹⁰⁹ [REDACTED]

¹¹⁰ [REDACTED]

Whatever it chooses to call its shows, there is clearly a great deal of overlap in basic elements of appeal with much of the programming on GSN (real people, relationships, romantic entanglements, celebrities, etc.). That, in my opinion, is why there is [REDACTED]

[REDACTED].

92. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

93. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

94. Based on all of the data examined, assuming they had comparable distribution GSN and WE tv should at a minimum be able to attract comparable audiences, provide comparable audience satisfaction, and generate comparable sales revenue. [REDACTED]

[REDACTED] However, with respect to Cablevision this is not currently the case.

IV. HARM DONE

95. Based on my analysis and my experience in the industry, I believe that Cablevision has significantly harmed GSN by repositioning it from wide distribution on its New York systems to a little-seen, extra-cost sports tier, and, in my experience, these

harms will become even more material over time. Extra-cost tiers are considered the “Siberia” of cable. Uptake is generally low; in the case of Cablevision the tier in question appears to reach [REDACTED], versus the [REDACTED] that GSN reached previously via basic distribution.¹¹³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹¹⁴ Here, there was a nearly [REDACTED]

[REDACTED]. Further, networks do not want to be perceived by others in the cable ecosystem, including cable and satellite operators, advertisers, and the press, as a “tiered” network. Being perceived as a “basic network” (versus a “tiered” network) is important to the long-term distribution strategies of most networks. [REDACTED]

[REDACTED]

[REDACTED]¹¹⁵ Likewise, networks that are viewed as “tiered” rather than “basic” are not favored by advertisers.

96. In addition, positioning on a tier reduces or eliminates the opportunity for a network to benefit from casual viewers (or “surfers”). This is an important means by which networks gain viewers, by attracting viewers who happen upon the network or who tune to it for a special event or premiere. The network can then attempt to convert them

¹¹³ [REDACTED]

¹¹⁴ GSN Exh. 165.

¹¹⁵ GSN Exh. 10; *see also* GSN Exh. 9 [REDACTED]

to more regular viewership by that programming and/or by promotional advertisements for other shows. It is almost impossible for a network to attract new viewers in this manner on a limited-distribution extra-cost tier.

97. The Cablevision downgrade is particularly harmful because of the wholly inappropriate nature of the “Sports & Entertainment Pak” tier on which it was placed. All of the other networks on the tier are sports and/or male oriented. They include major league baseball, hockey, horse racing, golf, basketball, soccer, and wrestling channels. This will virtually guarantee that those few subscribers who buy this tier will be males looking for additional sports programming.¹¹⁶ The full list of channels with which GSN is now placed is as follows:

Networks on Cablevision’s iO Sports & Entertainment Pak¹¹⁷

GSN
 ESPN Classic (reruns)
 ESPNU (college sports)
 NFL Network
 NFL Redzone
 ESPN Goal Line/ESPN Buzzer Beater (college sports)
 MLB Network
 NHL Network
 TVG Network (horseracing)
 Fuel TV (extreme sports)
 FCS Pacific (college sports)
 FCS Central (college sports)
 FCS Atlantic (college sports)
 Outdoor Channel
 NBC Sports Network

¹¹⁶ MVPDs sometimes assert that they want to put a popular channel on a tier in order to drive viewers to that tier. However this only works if the popular channel so placed is appropriate to the tier; for example placing ESPN in the “Sports & Entertainment Pak” might drive subscribership to the tier. Notwithstanding GSN’s strength as a network, placing GSN amid channels with which it has nothing in common will not accomplish that goal.

¹¹⁷ GSN Exh. 178.

Versus (now NBC Sports Network)
Gol TV (soccer)
The Golf Channel
MavTV (“covers all the hot-button topics guys care about”)
Big Ten Network (college sports)
NBA TV
Fox Soccer Plus
Sportsman Channel
Neo Cricket
Fight Now TV (wrestling, mixed martial arts, boxing)
World Fishing Network

98. In the New York market the effect of the GSN downgrade has been dramatic, with declines of about [REDACTED] in households tuned and [REDACTED] in GSN’s principal demographics. This is only part of the story, however. Simultaneously,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In other words, Cablevision appears to have benefited its own WE tv network by removing a competitor from wide availability on its lineup.

99. In 2010 Cablevision’s New York systems accounted for approximately [REDACTED] GSN homes. The repositioning will obviously have a negative impact on the audience GSN has to sell to national advertisers. To the extent that revenue is lost, it is likely to impact the ability of the network to develop and market programming.

[REDACTED]

[REDACTED]¹¹⁸ Of course, GSN's viewership decreased by [REDACTED] as a result of the retiering. In my experience, the first two areas that are cut when revenue is soft are marketing and program development.

100. Additionally, based on my experience the impact may be greater than simply the number of viewers lost. New York is the media capital of the U.S., the home base of many of the top advertising agencies and buying groups. For example, [REDACTED]

[REDACTED]

[REDACTED]¹¹⁹ Distribution in New York and its suburbs (where many executives live) is considered in the industry to be important for a network to remain familiar to and front-of-mind among those making buying

decisions.¹²⁰ It appears that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹²¹ Accordingly, GSN's

¹¹⁸ See GSN Exh. 152.

¹¹⁹ GSN Exh. 140.

¹²⁰ [REDACTED]
[REDACTED] See GSN Exh. 70, at CV-GSN 0269427.

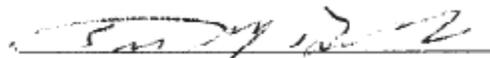
¹²¹ GSN Exh. 24; see also GSN Exh. 52 [REDACTED]
[REDACTED]

being effectively “blacked out” in a large portion of New York homes is likely to have a disproportionate effect on GSN’s national viability as an advertising medium.¹²²

¹²²

GSN Exh. 24.

I declare under penalty of perjury that, to the best of my knowledge and belief, the foregoing is true and correct. Executed on March 12, 2013.

A handwritten signature in black ink, appearing to read "Timothy Brooks", is written over a horizontal line.

TIMOTHY BROOKS

Exhibit 12

**Highly Confidential Exhibit
Withheld**

Exhibit 13

DIRECT TESTIMONY OF DAVID GOLDHILL

GSN Exh. 218

I, David Goldhill, hereby declare:

A. Background

1. I have served as the President and Chief Executive Officer of Game Show Network, LLC (“GSN”) since 2007. In this role, I oversee GSN’s distribution, guide the network’s programming strategy, and lead development of the audience and advertiser base for the network.

2. I have more than 20 years of experience in the media industry. Prior to joining GSN, I served as president and chief operating officer of Universal Television Group, where I oversaw program and asset development and distribution activities for the company’s domestic and international cable networks (including USA Network and SciFi), cable and network television studios, first-run syndication business, and worldwide television distribution. I previously was executive vice president and chief financial officer of Act III Communications, a privately-owned holding company with interests in television stations, movie theaters, magazines, and film/television production, and was chief executive officer and then chairman of the board of Independent Television Network Holdings, Ltd., which built the TV3 television network in Russia.

3. In addition to my experience running media businesses, I also have substantial experience in the finance industry. I worked as a senior advisor to Associated Partners, an investment firm specializing in media, telecommunications and technology. Previously, I was an investment banker at Morgan Stanley and Lehman Brothers.

B. The Networks

4. GSN launched on December 1, 1994 as “Game Show Network.” For years, the network has enjoyed broad distribution from multichannel video programming distributors (“MVPDs”) throughout the country, including — until the events in question — on Cablevision. Sony Pictures Entertainment, Inc. (“Sony”) and DIRECTV have indirect ownership interests in GSN. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. I joined GSN in 2007 as its Chief Executive Officer. In 2004, GSN began referring to its service as “GSN” rather than “Game Show Network” in order to present itself as a general interest network that appeals to women. To continue that effort, and recognizing that GSN’s audience was already heavily female, when I became CEO in 2007, I adopted a programming strategy that would more directly cater to the network’s female audience.

6. To that end, I hired programming and marketing executives with experience at other female-oriented networks like Lifetime and E! Entertainment Television. Together, we developed an original programming slate that was designed to capture viewers in the women 18-49 and 25-54 demographics. We updated our marketing efforts to promote our female-oriented shows and focused heavily on the female demographics in our advertising sales efforts.

7. In part as a result of these efforts, by 2009 and continuing through today, GSN is a general interest network that features (largely through reality competition and game show formats) extensive female-oriented original programming that, at the time of the events at issue in this case, accounted for more than [REDACTED] of its primetime schedule. Among other things, GSN offers reality and game programming that is relationship- and female-oriented. For

suggested to me that Cablevision had no interest in a solution that did not include a trade of carriage involving Wedding Central.

27. Indeed, Cablevision's desire to advantage its affiliated networks, including to obtain a carriage commitment for Wedding Central from DIRECTV, is the only explanation for its tiering decision that is consistent with its conduct towards GSN. Putting that motive aside, Cablevision's tiering decision strikes me contrary to GSN's broad carriage by other distributors that uniformly recognize the network's value, Cablevision's continued broad carriage of its [REDACTED] affiliated networks, and Cablevision's unwillingness to engage in any meaningful negotiations with GSN to reach a mutually-workable carriage solution.

D. Harmful Effects of the Repositioning

28. Despite GSN's continued efforts to engage Cablevision in discussions, since February 1, 2011, Cablevision has distributed GSN to New York-New Jersey-Connecticut subscribers exclusively on a sports tier that today reaches only about [REDACTED] of Cablevision's [REDACTED] New York-New Jersey-Connecticut subscribers. It is my understanding that subscribers must pay a fee of \$6.95 per month above the amount they already pay for basic digital cable service to receive this tier of service. [REDACTED]

29. Moreover, GSN's placement on the sports tier is particularly inappropriate given GSN's predominantly female viewership. Not surprisingly, aside from GSN, *every other network* on the tier offers sports programming and/or programming specifically directed at a male audience. (See GSN Exh. 179). Being on the sports tier with such networks significantly impacts our ability to reach of our core female viewership.

30. Cablevision's relegation of GSN to the sports tier has harmed GSN's ability to compete against other similarly situated cable networks, including both WE tv and, while it was

operating, Wedding Central. The tiering reduced GSN's overall subscribers by more than [REDACTED], which directly translates to significant adverse financial impacts to GSN — both with respect to subscriber fees paid to GSN by Cablevision and with respect to advertising revenues. As with virtually all non-premier services, these are GSN's two most significant sources of television revenue. Based on our financial models, GSN anticipates it will realize direct licensing and advertising losses amounting to approximately [REDACTED] annually during each year in which Cablevision continues to carry the network on the sports tier. The reduction in revenues dramatically impacts our ability to effectively operate and build our television network.

31. Cablevision's conduct has been particularly harmful because it is a dominant cable operator in the New York market, where a large number of advertising executives are based. These executives often treat a service's availability in their homes as a prerequisite to considering it as a meaningful contender for a share of their advertising budgets. Thus, GSN's loss of approximately [REDACTED] Cablevision subscribers has damaged GSN even more than the harm that it would suffer from the loss of an equal number of subscribers in a different market. Indeed, GSN has already begun to deal with media buyers who are Cablevision subscribers who have inquired about GSN's lack of availability on Cablevision.

* * *

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 11, 2013.



DAVID GOLDHILL

Exhibit 14

DIRECT TESTIMONY OF KELLY GOODE

GSN Exh. 219

I, Kelly Goode, hereby declare:

I. Background

1. From 2008 to 2011, I was the Senior Vice President of Programming for GSN. As the head of programming, I had oversight for all aspects of original programming, acquisitions, and production for the network and reported directly to David Goldhill, GSN's Chief Executive Officer. Since 2011, I have been an in-house executive producer for GSN with responsibility for developing reality, competition, and digital content for the network.

2. I have over twenty years of experience in the television industry, with particular experience in programming. My career began at Columbia Pictures Television, where, from 1984 to 1986, I was the Manager of Current Programs in the television division. I later moved to CBS as an executive in the comedy development department. At CBS, I was also Vice President, Series Programming, for CBS Productions (1991-1996), where I participated in the development of original programming content, including *Caroline in the City*, *Dave's World*, *Dr. Quinn: Medicine Woman*, and *Touched By An Angel*. I have also served as Head of Television Programming for New Deal Productions (2007-2008), which, at the time, had a production deal with Warner Brothers.

3. For nearly the last fifteen years, my work has principally focused on the development of programming for woman-oriented networks. From 1997 to 1999, I was the Head of Series Development, West Coast for Lifetime Television. From 2000 to 2005, I was Lifetime's Senior Vice President, Series Programming. In these roles, I had oversight of original programming, including development, pilot production, and current programming. While at Lifetime, I was part of the team that launched the network's first original scripted and non-

scripted series, including *Strong Medicine*, *The Division*, *Any Day Now*, and *New Attitudes*. My understanding is that this experience was a key element in GSN's interest in hiring me to lead the network's programming efforts.

II. GSN's Programming Strategy

4. When I joined GSN in 2008, it was made clear to me that all components of the network were to focus on broadening and deepening the network's appeal among women viewers in the 18 to 54 demographic. As soon as I assumed the senior programming position at GSN, Mr. Goldhill informed me that he wanted me to pursue a reinvigoration of the GSN programming lineup: to introduce new, more modern programming that would appeal to women 18 to 54; to introduce new, fresh talent to GSN's programs; to introduce new programming forms to the network; and to bring into the network the programming team necessary to implement this overarching strategy.

5. Based on my experience in programming, I understand that developing a successful catalogue of programming involves a long-term commitment and requires the consideration of a wide portfolio of programming and talent. During my time at GSN, the programming department considered hundreds of ideas for inclusion in the network's lineup and were in constant discussions internally — and with other departments at GSN — about the appropriate programming strategy for drawing a larger audience of women 18 to 54. *See* GSN Exh. 64 [REDACTED]; GSN Exh. 71 [REDACTED]; GSN Exh. 147 [REDACTED]; GSN Exh. 153 [REDACTED]; GSN Exh. 51 [REDACTED]; GSN Exh. 144 [REDACTED]; GSN Exh. 149 [REDACTED]. We also considered a wide range of programming talent we thought might be

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 11, 2013.


KELLY GOODE

Exhibit 15

DIRECT TESTIMONY OF JOHN ZACCARIO

GSN Exh. 221

I, John Zaccario, hereby declare:

I. Background

1. I am the Executive Vice President, Advertising Sales for GSN. In this role, I am responsible for overseeing the advertising sales strategy for the network's cable and on-line business and report directly to David Goldhill, GSN's Chief Executive Officer.

2. I have more than a decade of experience in the media industry, with a particular emphasis on advertising sales. Prior to joining GSN, I was the Vice President, Digital Sales and Marketing for ESPN; Vice President, Customer Marketing for ESPN ABC Sports; a Senior Account Executive for ABC Television, Entertainment and News and Late Night Sales; an Account Executive for Raycom Sports; Director of Sales for Katz Television Group; an Assistant Buyer for the Grey Group; and a Production Assistant for ABC Sports. I joined GSN in 2008 as a Senior Vice President, Advertising Sales and was later promoted to my current position.

II. GSN Advertising Strategy

3. When I arrived at GSN in 2008, I understood that under Mr. Goldhill's direction the network was implementing a multi-prong strategy to build upon GSN's historical success in attracting women to the network and to target more systematically women 18 to 54, including through the introduction of a slate of original programming. It was clear to me that Mr. Goldhill expected GSN's advertising strategy to be consistent with this overarching programming goal. Early in my time at GSN, I was provided with a presentation that laid out Mr. Goldhill's explicit mandate [REDACTED]

[REDACTED]

[REDACTED]. GSN Exh. 8 at GSN_CVC_00078175 & GSN_CVC_00078181.

4. GSN's target demographic for advertising sales is women 25 to 54 and, secondarily, persons 25 to 54. Since I arrived at GSN, the women 25 to 54 demographic has made up the [REDACTED]

[REDACTED]. *See, e.g.*, GSN Exh. 65 at GSN_CVC_00056184 & GSN Exh. 174 at 2.

5. In our advertising sales efforts, my team has emphasized GSN's focus on targeting women 25 to 54 and the programming strategy that has developed to drive greater viewership among this core audience. In our upfront presentations, we have consistently highlighted the network's slate of original programming, including *The Newlywed Game*, hosted by Sherri Shepherd, an Emmy Award winning co-host of *The View*; *Baggage*, a dating and relationship program hosted by Jerry Springer; *Love Triangle*, hosted by Wendy Williams, who was recruited [REDACTED]; *I vs. 100*, an updated version of the quiz show, hosted by Carrie Ann Inaba of *Dancing with the Stars*, who was similarly recruited to drive [REDACTED] *See* GSN Exh.142 at GSN_CVC_00138409-10; *see also* GSN Exh. 141. In trade publications, we have identified our targeted viewers as well as the network's skew toward an audience made up of women. *See* GSN Exhs 107 at GSN_CVC_00132825 & GSN Exh. 106.

6. Based upon my experience and that of my team in discussions with ad buyers, [REDACTED]

[REDACTED], GSN's competitive set from an advertising perspective typically includes [REDACTED]

[REDACTED]. See GSN Exh. 11 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. My understanding is that these networks focus on programming geared toward a female audience and attract predominantly women viewers.

III. Impact of Repositioning on GSN Advertising Sales

7. Cablevision's repositioning of GSN from the io Family Pak to the iO Sports Pak — and the resulting loss of [REDACTED] in a critical market — materially undermined GSN's ongoing efforts to increase advertising revenues arising from the network's television business.

8. Prior to Cablevision's discriminatory conduct, GSN advertising revenues totaled [REDACTED]

[REDACTED]. In the wake of the Cablevision repositioning, GSN experienced a decline in advertising revenues from [REDACTED] in 2010 to [REDACTED] in 2011. GSN expects that it eventually will realize a loss of [REDACTED]

[REDACTED]

[REDACTED]. GSN's financial models anticipate that GSN will realize [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

9. Cablevision's conduct has been particularly harmful because it is a dominant cable operator in the New York market. Without question, there is no more important marketplace for advertising purchasing than New York. Most of the major advertising agencies have their principal headquarters in New York City and, importantly, a large number of senior

advertising executives who act as decisionmakers for companies buying advertising time live in Cablevision's footprint in the New York market. These executives often treat a service's availability in their homes as a prerequisite to considering it as a meaningful contender for a share of their advertising budgets. As a consequence, GSN's loss of approximately [REDACTED] [REDACTED] Cablevision subscribers has damaged GSN even more than the harm that it would suffer from the loss of an equal number of subscribers in a different market.

10. Moreover, the timing of the repositioning was uniquely challenging because it occurred in the midst of a critical transition period for GSN, when the network's programming lineup and branding were undergoing significant changes. All of these changes were made with the goal of increasingly attracting more women 25 to 54 and increasing the network's advertising revenue in this core demographic. These developments in the network's programming line-up were key selling points for advertisers looking to buy against the women 25-54 demographic. The Cablevision repositioning effectively deprived ad buyers in a key market of access to the results of the network's ongoing programming initiatives.

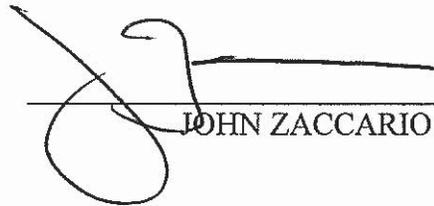
11. For example, during GSN's 2011 upfront presentation to [REDACTED], the lead advertising buyer for [REDACTED], inquired into GSN's absence from Cablevision systems. [REDACTED], which had advertised on GSN prior to 2011, has since purchased on the network only sporadically and, on that occasion, [REDACTED] has made only a small buy on GSN. Similarly, during our presentation to [REDACTED] in 2011, the lead advertising buyer for [REDACTED] expressed concern about the inaccessibility of GSN to Cablevision's basic service subscribers. In both cases, the buyer in charge of the negotiations were GSN fans — and thus promising prospects for advertising sales — but both expressed disappointment that they were not able to access the network.

12. Moreover, the setback in GSN's distribution prompted by the Cablevision rebranding has had a substantial impact on GSN's ability to compete successfully for advertising. The repositioning undercut GSN's ability to achieve the 80 million subscriber threshold that is recognized as a key benchmark for advertisers. Advertisers are particularly interested in a network's progress in increasing distribution, and the [REDACTED] loss caused by the Cablevision repositioning signaled that progress on that front had slowed. On a number of occasions, it was the subject of focused attention in our upfront presentation discussions with advertisers.

13. Indeed, certain advertisers use a perceived limitation in distribution as a negotiation tactic to insist upon a lower pricing structure. [REDACTED], for example, routinely uses a network's distribution as a leverage point to insist upon greater rate concessions. Although [REDACTED] had previously been a [REDACTED] advertiser for GSN per year, because [REDACTED] insisted on a lower price due to GSN's contracted distribution, GSN felt it could only reach agreement with [REDACTED] for a [REDACTED] advertising buy for the year. In addition, in 2012, [REDACTED], represented by [REDACTED] gave GSN an ultimatum on price lower than GSN's rate card in the context of a broader discussion about challenges in GSN's distribution growth.

* * *

I declare under penalty of perjury that the foregoing is true and correct. Executed on
March 11, 2013.



JOHN ZACCARIO

Exhibit 16

**Highly Confidential Exhibit
Withheld**

Exhibit 17

**Highly Confidential Exhibit
Withheld**

Exhibit 18

**Highly Confidential Exhibit
Withheld**

Exhibit 19

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Game Show Network, LLC)	MB Docket No. 12-122
v.)	File No. CSR-8529-P
Cablevision Systems Corp.)	

SUPPLEMENTAL REPORT OF HAL J. SINGER, PH.D.

INTRODUCTION

1. I have been asked by counsel for Game Show Network, LLC (“GSN”) to supplement my March 2013 direct testimony in light of the D.C. Circuit’s decision in *Comcast v. FCC*. I understand that plaintiffs in Section 616 discrimination complaints may bear a new evidentiary burden, which may be met by establishing that either (a) the vertically integrated cable operator (“VICO”) sacrificed downstream distribution profits by deciding to tier the independent network (the “profit-sacrifice test”);¹ or (b) that any incremental losses from carrying the independent network broadly would be the same as or less than the incremental losses the VICO incurred from carrying its affiliated networks broadly (the “net-profit-sacrifice test”).² Such proof of a profit sacrifice allows one to infer that a rational firm would not do so unless there was some offsetting gain to its affiliated (and similarly situated) network. In this

1. *Comcast v. FCC*, 717 F.3d 982, 986 (D.C. Cir. 2013) (“Comcast Opinion”).

2. *Id.* A third approach articulated in *Comcast* that entails direct evidence of discrimination does not lend itself to economic analysis, and for that reason, I have not been asked to inform that test. The court suggested that discrimination could be found if it is shown that the carriage decision was motivated by “some deeper discriminatory purpose” rather than by an “otherwise valid business consideration.” *Id.* at 987.

short-run price or output effects, which are the traditional aims of antitrust enforcement.³⁸ For example, knowing that it must surrender its equity to a cable operator to secure carriage, an independent network might abandon its plans to enter the programming industry altogether, or be less inclined to make certain investments in programming or innovate in other ways. To borrow an example from labor economics, society does not give employers a license to discriminate so long as there is no evidence of wage effects. From a policy perspective, discrimination is offensive not because it generates short-term price effects, but because it deprives candidates of an opportunity to prosper on the basis of some attribute outside of their control.

21. Notwithstanding the shortfalls of narrowly judging carriage discrimination through an antitrust lens, an assessment of Cablevision's market power may nonetheless inform whether a VICO is predisposed to discriminate against an independent network for reasons unrelated to efficiencies.

22. Any decision to discriminate in favor of an affiliated network (or against a similarly situated, independent network) is a local one, and the decision is informed, at least in part, by the VICO's degree of market power in the local distribution market.³⁹ The FCC has previously acknowledged the importance of local market analysis. For example the FCC adopted

38. See, e.g., TIM WU, *MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* (Vintage 2012) (explaining that modern antitrust law is ill-equipped to contain the "special case" of concentrated power over and vertical integration of the creation and delivery of information).

39. It bears noting that the largest cable operator that existed at the time of the Cable Act's passage, TCI, controlled only 18 percent of all video households nationwide, suggesting that any concern over "bottleneck control" must be at the local level or within the cable operator's local footprint. See FCC, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 96-133, Third Annual Report (rel. Jan. 2, 1997) (hereinafter *Third Annual MVPD Report*), available at <http://transition.fcc.gov/Bureaus/Cable/Reports/fcc96496.txt>.

incumbents' *national* market share was not of concern; the largest MVPD at the time (TCI) controlled only 18 percent of the national cable market.⁴⁶ Rather, the concern was *local*, as effective competition was assessed at the franchise level.⁴⁷ Several filings in the Comcast-Time Warner Cable proceeding this year emphasize that local markets are the relevant geographic market for studying competitive effects.⁴⁸

25. Cablevision's video penetration, or the number of video customers divided by the number of homes passed, provides a starting point from which market share can be inferred. This measure may be thought of as the lower bound to Cablevision's video market share because some households passed by its cable infrastructure forgo video services altogether or receive television over the air ("OTA"). Cablevision reported 58.1 percent video penetration in 2012.⁴⁹ SNL reports that within the New York DMA,⁵⁰ about two percent of households forgo television programming altogether, and about three percent of households receive programming OTA. Applying these percentages to Cablevision's New York footprint allows me to infer a market

46. *See Third Annual MVPD Report.*

47. *See Cable Television Consumer Protection and Competition Act of 1992*, 106 Stat. 1488, October 5, 1992 ("...the Commission shall, among other public interest objectives...take particular account of the market structure, ownership patterns, and other relationships of the cable television industry, including the nature and market power of the *local* franchise...") (emphasis added).

48. *See Comments of American Cable Association*, MB Docket No. 14-57 (Aug. 25, 2014), at 37 ("After its acquisition of TWC, Comcast will have a greater degree of control in all aspects of the spot cable advertising market, including the NCC, Interconnects, and representation services. For example, in the New York DMA, the largest media market in the country, today there are two Interconnects, a 'quasi-interconnect' managed by Cablevision that includes Comcast, and an Interconnect managed by TWC."); *Comments of Tennis Channel*, MB Docket No. 14-57 (Aug. 25, 2014), at 15-16 ("Second, post-merger, Comcast would have the ability to prevent rival programmers from reaching TWC's and Charter's existing subscribers in the New York City and Los Angeles markets, which are disproportionately important to cable networks for purposes of attracting advertisers and satisfying content rights holders assessing potential licensees.").

49. *See Cablevision SEC Form 10-K* (filed Feb. 28, 2013) at 3.

50. DMA stands for "designated market area" which is a geographic area of counties designated by Nielsen Media Research. *See Nielsen Media Research, Glossary of Terms*, available at <http://www.nielsenmedia.com/glossary/terms/D/> (accessed April 29, 2013).

share of approximately 61.4 percent.⁵¹ Indeed, Cablevision arrives at a similar number using the same calculation.⁵² Relative to the New York DMA, which is covered by other cable operators such as Time Warner Cable, the relevant foreclosure share is roughly 40.3 percent (equal to [REDACTED] Cablevision video subscribers in the New York Metropolitan area in 2012⁵³ divided by 7.16 million MVPD subs in the New York DMA in 2012⁵⁴).

26. Because market power is the ability to engage profitably in substantial and sustained supra-competitive pricing, a finding of high market share combined with evidence of barriers to entry supports a conclusion of market power. In the absence of such barriers, a price increase above the competitive level may invite entry sufficient to make that price increase unprofitable. Federal agencies, economic literature, and actual experience in the New York metropolitan area demonstrate significant barriers to rivals' entry in a fashion timely enough to allow Cablevision supra-competitive pricing flexibility.

27. Significant barriers to entry of a wireline competitor, including cable overbuilders and telcos, exist in the New York market for video programming, where Cablevision enjoys a high market share. This is highlighted by the fact that in the majority of communities that it serves, Cablevision faces *no* wireline competitors (57 percent): SNL reported that in 2012, cable

51. Because DMAs are not delimited with regard to cable infrastructure, the New York DMA overlaps largely but does not entirely coincide with Cablevision's footprint. I therefore assume that the percentage OTA households and Non-TV households are roughly the same in Cablevision's footprint as they are in the New York DMA.

52. CV-GSN 0427070.

53. *See* Cablevision SEC Form 10-K (filed Feb. 28, 2013) at 3.

54. *See also* Robin Flynn, *U.S. Multichannel Subscriber Update and Programming Cost Analysis*, SNL Kagan (June 2013), available at <http://go.snlf.com/rs/snlf/financial/c/images/SNL-Kagan-US-Multichannel-Subscriber-Update-Programming-Cost-Analysis.pdf>.

slowing or blocking the deployment of competitive services by allowing unreasonable delays in the franchising process and by imposing unnecessary costs upon new entrants.”⁶⁰

30. Another barrier is presented when an MVPD is vertically integrated with must-have programming, such as Cablevision’s long-running affiliation with the MSG networks. Cablevision has repeatedly demonstrated its ability to deny such programming to its distribution rivals, making those distributors vulnerable to defection from customers seeking that “must-have” content. As an integrated entity, Cablevision may also face the incentive and ability to extract wholesale fees in excess of what an independent content provider would charge, thereby raising a rival’s costs.⁶¹

31. The evidence presented above shows that Cablevision maintains a large share of the market for video programming in New York—61 percent within its footprint and 40 percent within the DMA—and that potential competitors in that market face significant barriers to timely entry. Successful entry into the market requires massive capital expenditure in infrastructure, dealing with legal barriers, and involves the threat of potential programming carriage disputes or burdensome programming costs. Cablevision’s maintenance of its position as the dominant MVPD in the New York market, combined with numerous barriers to entry, implies that it has market power. And Cablevision may use that market power to engender significant foreclosure of independent networks in New York.

60. See Ex Parte Submission of the Department of Justice, MB Docket No. 05-311, available at <http://www.usdoj.gov/atr/public/comments/216098.htm>.

61. See Kevin W. Caves, Chris Holt & Hal Singer, *Vertical Integration in Multichannel Television Markets: A Study of Regional Sports Networks*, 12(1) REVIEW OF NETWORK ECONOMICS 61-92 (2013) (“[W]e find that, all else equal, when an RSN is owned by a cable or satellite operator, the RSN charges rival distributors a significantly higher license fee.”); *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, MB Docket No. 10-56 (rel. Jan. 20, 2011), Appendix B, at 37.

Exhibit 20

**Highly Confidential Exhibit
Withheld**

Exhibit 21

**Highly Confidential Exhibit
Withheld**

Exhibit 22

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Game Show Network, LLC,)	MB Docket No. 12-122
Complainant,)	File No. CSR-8529-P
)	
v.)	
)	
Cablevision Systems Corp.,)	
Defendant)	

**RESPONSES AND OBJECTIONS OF GAME SHOW NETWORK, LLC
TO CABLEVISION'S FIRST SET OF INTERROGATORIES**

Pursuant to Section 1.325 of the Rules of the Federal Communications Commission, 47 C.F.R. § 1.325, and the Presiding Judge's Order, FCC 14M-13, MB Docket No. 12-122 (ALJ rel. April 17, 2014), Complainant Game Show Network, LLC ("GSN") submits these responses and objections to Defendant Cablevision Systems Corp.'s ("Cablevision's") First Set of Interrogatories (the "Interrogatories"), served May 1, 2014.

GENERAL RESPONSES AND OBJECTIONS

1. GSN objects to the Interrogatories to the extent that they are irrelevant, not reasonably calculated to lead to the discovery of admissible evidence, overly broad, vague or ambiguous, and to the extent that responding to them would impose on GSN undue burden or expense or would impose obligations that exceed those imposed by applicable law.

2. GSN objects to the Interrogatories to the extent that they call for information that contains confidential or otherwise commercially or competitively sensitive information, the probative value of which is outweighed by the interests of GSN and third parties in preserving confidentiality, or the disclosure of which would result in the violation of GSN's

without prejudice to its right to supplement or amend its written response, to produce documents, and to present evidence discovered hereafter at trial.

- 8. Identify any specific instance where GSN was unable to compete fairly because of Cablevision's repositioning of GSN, including a description of the nature of the episode, the date and the manner in which GSN was purportedly restrained.**

GSN further objects to this Interrogatory in that it calls for a legal conclusion and to the extent it seeks information that is protected by the attorney-client privilege, the work product immunity doctrine, or any other applicable privilege or immunity. Subject to and without waiving the specific and General Objections set forth above, GSN responds as follows:





GSN has not yet completed its discovery in this action, including but not limited to analysis by GSN's experts, or its preparation for trial, and GSN's written response is made without prejudice to its right to supplement or amend its written response, to produce documents, and to present evidence discovered hereafter at trial.

- 9. Identify how many viewers since December 2010 have indicated to GSN that they subscribe to a specific MVPD because of the availability of GSN on an expanded basic or other tier of service.**

GSN further objects to this Interrogatory in that it seeks material that GSN does not solicit or collect from viewers and material for which GSN does not maintain records.

Exhibit 23

**Before the
Federal Communications Commission
Washington, DC 20554**

GSN Exh. 223

In the Matter of)	
)	
Game Show Network, LLC)	MB Docket No. 12-122
v.)	File No. CSR-8529-P
Cablevision Systems Corp.)	

TESTIMONY OF HAL J. SINGER, PH.D.

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analysis,²¹ which considers not just a network's gender but other demographic data compiled by Nielsen such as age and income, reveals that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9. Although, from an economic perspective, there should be no requirement that two networks carry the same programming to be considered "similarly situated," WE tv has competed directly with GSN for certain programming rights ([REDACTED]

[REDACTED]).²² Also, [REDACTED]

[REDACTED] to WE tv and GSN.²³ In

addition, [REDACTED]

[REDACTED]

21. Distance analysis was popularized in a recent *New York Times*' bestseller on prediction models. See Nate Silver, *The Signal and The Noise: Why So Many Predictions Fail But Some Don't* 85 (2012) (explaining the use of a "nearest neighbor" analysis to project the future performance of minor-league baseball players by matching them to their closest analog in the past based on a vector of characteristics). Cablevision's economic expert, Mr. Orszag, also uses the distance analysis to determine whether WE tv and GSN are similarly situated. *Game Show Network, LLC v. Cablevision Systems Corp.*, Expert Report of Jonathan Orszag, December 14, 2012, ¶85 [hereinafter *Orszag Report*] ("Importantly, the Mahalanobis distance measure for various other network combinations show that they are close in Mahalanobis distance, as one would expect."). In contrast, Cablevision's industry expert, Mr. Blasius, criticizes my distance analysis as the stuff of pointed-headed academics: "In lieu of focusing on the more accurate measures of whether the two networks could be described as demographically similar, Dr. Singer instead offers a somewhat convoluted 'objective distance analysis' as subterfuge to draw parallels and force commonalities between the two networks that simply do not exist other than in obscure academic theory." *Game Show Network, LLC v. Cablevision Systems Corp.*, Declaration of Lawrence Blasius, Dec. 12, 2011, ¶53, *Game Show Network, LLC v. Cablevision Systems Corp.*, Declaration of Lawrence Blasius, Dec. 14, 2012, ¶57.

22. See GSN Exh. 53.

23. GSN Exh. 59; GSN Exh. 73 [REDACTED]

██████████—were pitched to both networks.²⁴ That these rightsholders perceived GSN and WE tv to be reasonably interchangeable platforms for their talents and relationship-based programming also informs the similarly-situated analysis.²⁵

10. For these reasons, I conclude that GSN is sufficiently similar to WE tv to support a finding that Cablevision discriminated in favor of its affiliated networks and against GSN. Stated differently, a cable operator with no conflict of interest arising from affiliation would likely treat these two similarly situated networks alike with respect to how broadly to distribute the networks; because the networks are similarly situated, Cablevision’s preferential treatment of WE tv (and formerly of Wedding Central) likely demonstrates discrimination in favor of its affiliated networks and against GSN. The incentive of a vertically integrated cable operator to favor its affiliated networks has been widely recognized in the economics literature²⁶ and by the FCC.²⁷ Indeed, Cablevision has acknowledged the benefits of ██████████

24. In addition, Wedding Central planned to air ██████████
██████████ GSN Exh. 76, at CV-GSN 0020343.

25. ██████████
██████████, CV-GSN 0267447.

26. *See, e.g.*, David Chen & David Waterman, “Vertical Ownership, Program Network Carriage and Tier Positioning in Cable Television: An Empirical Study,” 30(3) *Review of Industrial Organization* 227-51 (finding that integrated cable systems carry their affiliated networks more frequently and carry unaffiliated networks less frequently, and that integrated carriers that do carry rival networks often position them on tiers having more limited subscriber access); Ayako Suzuki, “Market foreclosure and vertical merger: A case study of the vertical merger between Turner Broadcasting and Time Warner,” 27 *International Journal of Industrial Organization* 532, 533-34 (2009) (“Time Warner merely shifted its portfolio of channels in the basic bundle such that it was more concentrated on Turner Broadcasting channels.”). The literature also seeks to determine whether consumers benefit from the favorable treatment. *See* Tasneem Chipty, “Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry,” 91(3) *American Economic Review* 428, 430 (2001) (finding that differences in consumer welfare across integrated and unintegrated markets—that is, local markets with and without a vertically integrated cable operator—were not statistically significant); David Waterman & Andrew Weiss, “The effects of vertical integration between cable television systems and pay cable networks,” 72 *Journal of Econometrics* 357–395 (1996) (finding that vertically integrated cable systems have carried their affiliated networks more frequently, and rival networks less frequently, than have systems without vertical ties).

27. Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, MB Docket No. 10-56, Jan. 20, 2011, ¶117 (“These conclusions are supported by the evidence set forth in the Technical Appendix that Comcast

12. Even assuming that Cablevision applied some sort of cost-benefit test when it made the decision to reposition GSN, the selective application of any such test to an unaffiliated network (particularly if an affiliated network would have failed the same test) does not provide a valid efficiency justification. Rather, the selective application of a test based on affiliation is the very essence of discrimination. Here, it is clear that [REDACTED] [REDACTED] and very low penetration among other MVPDs, it is inconceivable that Wedding Central would have passed any sort of cost-benefit test applied to evaluate network value.³¹

13. As a direct result of its tiering policy, Cablevision prevents GSN from reaching approximately [REDACTED] Cablevision subscribers in the New York-New Jersey-Connecticut area. If Cablevision were to restore GSN to a tier that reaches nearly all of its digital subscribers—where it carries WE tv³²—then GSN would be restored to approximately [REDACTED] [REDACTED]³³ Cablevision subscribers who lost access to GSN in February 2011. Failure to secure broader carriage on Cablevision’s systems causes GSN to forgo significant license fees (of [REDACTED] per month per subscriber)³⁴ and advertising revenues.

14. Further, given the importance of the coveted New York market for advertisers, the growth that would accompany access to Cablevision’s digital subscribers would materially improve GSN’s ability to compete effectively for national advertising. A simple regression

31. Yet even as it tiered GSN, Cablevision [REDACTED] [REDACTED]. See GSN Exh. 83; GSN Exh. 183.

32. Wedding Central was carried on Cablevision’s iO Package tier.

33. [REDACTED] For the purpose of estimating going-forward damages, both here and later in my report, I use more recent data than the penetration data used in paragraph 3.

34. [REDACTED] See also [REDACTED] [REDACTED], CV-GSN 0340609.

model shows that [REDACTED]
[REDACTED]

[REDACTED]. And Cablevision’s carriage decisions are monitored by other cable operators, with the consequence that the deficit in GSN’s distribution caused by Cablevision’s discrimination is likely even larger, further impairing GSN’s ability to compete for both advertisers and programming content.³⁵ Finally, I conclude that the harm to GSN owing to Cablevision’s discriminatory tiering policy will likely redound to the harm of viewers. Cablevision’s viewers are harmed by their inability to watch GSN without incurring an extra charge.

15. According to Cablevision’s own economic expert, tiering a network would be discriminatory if the tiering were unprofitable for a vertically integrated MVPD’s distribution business. The record reflects that Cablevision’s distribution arm likely [REDACTED]
[REDACTED].

That Cablevision saved roughly [REDACTED]³⁶ in license fees that would otherwise be paid to GSN is irrelevant to the cost-benefit calculus, as Cablevision would have [REDACTED]
[REDACTED]. The costs to Cablevision of retiering GSN fall into two basic categories. *First*, approximately [REDACTED] customers called Cablevision to complain in response to GSN’s retiering; by April 2011, Cablevision [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

35. [REDACTED]

36. *See* GSN Exh. 176, [REDACTED]
[REDACTED].

all television households in the United States.¹⁵³ Finally, [REDACTED]
 [REDACTED]
 [REDACTED].¹⁵⁴

87. Further, the impact of Cablevision’s retiering appears to have been felt beyond the New York market. In particular, I analyzed the effect of Cablevision’s retiering on an important subset of GSN’s advertising sales that was vulnerable—upfront and scatter sales. These “general rate” advertisements accounted for [REDACTED] of GSN’s total advertising revenue from 2004 through the tiering date; the remainder was comprised of “direct response” ads, which require viewers to dial back the advertiser to consummate a purchase, and infomercials. Unlike its data for “direct response” advertising, which combines local and national sales prior to 2010,¹⁵⁵ I understand that GSN’s data for “general rate” advertising sales include only national advertising accounts.¹⁵⁶ (GSN’s data for infomercials include only national accounts as well.) If the retiering affected GSN’s general-rate advertising sales in the New York DMA only, then one would expect GSN’s general-rate advertising to decline by at most [REDACTED] after the tiering. But the actual decline in general-rate advertising attributable to tiering appears to be much larger ([REDACTED]).¹⁵⁷

153. [REDACTED]

154. See GSN Exh. 24 [REDACTED] See also GSN Exh. 165, [REDACTED]

155. [REDACTED] See also GSN Exh. 174.

156. I am therefore limited in my ability to estimate whether the retiering affected GSN’s national, direct-response advertising sales. The tiering likely did not affect local, direct-response advertising sales outside of the New York DMA.

157. That GSN’s average advertising rates [REDACTED] is not evidence of the lack of harm from the tiering, as suggested by Mr. Orszag. The relevant question is not whether

88. To estimate the impact of the tiering on GSN's general-rate advertising revenues, I estimated a regression model, which controls for quarterly effects, a time trend (linear and squared), growth of gross domestic product (GDP), and GSN's all-day household television national ratings.¹⁵⁸ The model was fit to 34 quarters of data through the second quarter 2012. The in-sample predictive power of the model is very high; the model explains [REDACTED] of the variation in GSN's general-rate advertising over this time horizon. As expected, [REDACTED]
[REDACTED]
[REDACTED]. Table 9 shows the results.

GSN's ad rates went up (or down), but rather whether they would have gone up by more *but for the tiering*. When constructing a damages model, an economist must construct the relevant benchmark; the pre-tiering period does not serve as the proper benchmark because other factors that influence GSN's advertising rates have changed. By the same logic, that GSN's cash flow margins, income from operations, affiliated fee revenue, or net advertising revenue increased from 2010 to 2011 is not proof of lack of harm. *Orszag Report*, ¶¶146-47. For example, total advertising revenue is a function of many things not affected by the tiering, including local advertising sales outside of New York; this is why I focused on national general-rate sales. Under Mr. Orszag's test, no growing or profitable network could ever bring a discrimination claim; only networks that limp into the Commission would be eligible for protection from discrimination.

158. To control for the Gambling Control Commission's June 2011 investigation of certain online poker websites—some of which were significant purchasers of general-rate advertising on GSN—I exclude all advertising revenues related to poker throughout the entire time series. As it turns out, there were no poker-related advertisers in GSN's ad database after the third quarter of 2011.

TABLE 9: REGRESSION RESULTS - GSN GENERAL RATE (UPFRONT & SCATTER)
QUARTERLY ADVERTISING SALES, 1Q 2004 – 3Q 2012

Explanatory Variable	Coefficient	p-value
<i>Tiering Dummy</i>		
<i>Time Trend</i>		
<i>Time Trend squared</i>		
<i>GDP Growth</i>		
<i>National Ratings</i>		
<i>Quarter = 2</i>		
<i>Quarter = 3</i>		
<i>Quarter = 4</i>		
<i>Constant</i>		
<i>r2</i>		
<i>N</i>		

Note: * for p<.05, ** for p<.01, and *** for p<.001.

Sources: GSN Exh. 174,

As Table 9 shows, the coefficient on the tiering variable is [REDACTED] and statistically significant at the five-percent level (the p-value is slightly over one percent, implying that it is almost significant at the one percent level). This result demonstrates that, controlling for other things that affect GSN’s general-rate advertising, Cablevision’s tiering is associated with a

[REDACTED]

[REDACTED]

[REDACTED]. This result is robust to changes in regression specification.¹⁵⁹ The same result is obtained in an analysis of GSN’s combined generate-rate advertising and infomercials (which are also sold nationally),¹⁶⁰ and the combined results are also robust to changes in specifications. Although it possible that GSN’s direct-response advertising [REDACTED]

159. For example, I used alternative measures of ratings from specific DMAs such as Philadelphia and Los Angeles.

160. The coefficient on the tiering dummy in the combined regression is equal to [REDACTED] and is significant at the one-percent level.

161

89. Finally, because of Cablevision’s discriminatory carriage of GSN, the network also is restrained in its ability to compete effectively for viewers; cable programming is an “experience good”¹⁶² that can best be learned about while surfing the channels. It is impossible to gain that experience if a network is available only on a sports tier, to which a consumer must affirmatively subscribe. In contrast, Cablevision subscribers can gain experience with WE tv casually, as that network is available to them without the need to subscribe to a sports tier.

90. This discussion is not mean to suggest that all coverage gaps are debilitating to an independent network, as that is the wrong benchmark. As Judge Sippel explained in his recent decision:

[I]t is not necessary for a network to show that its very survival is imperiled in order to satisfy its burden of showing that an MVPD’s actions favoring affiliated networks had unreasonably restrained its ability to compete fairly.¹⁶³

Thus, the relevant benchmark is GSN’s performance in a world without the challenged conduct; here, it is clear that GSN has been impaired due to significant subscriber losses in New York and based on a broader negative impact on its performance in terms of advertising revenues.¹⁶⁴

161. Based on Feb. 21, 2013 conversation with Donna Vecchio and Marla Donna, directors of advertising pricing and planning at GSN.

162. The idea of “experience goods” dates back to a 1970 paper showing that it was more difficult to determine utility associated with quality than with price and that certain goods must be used before such a determination can be made. *See* Philip Nelson, “Information and Consumer Behavior,” 78 *J. Pol. Econ.* 311 (1970). Since then, experience goods have been formalized to be goods for which consumers do not know their preferences before consumption. This concept has been applied to a variety of industries, most notably retail goods including electronics, appliances, clothing, food, and toys. *See* Yeon-Koo Che, “Customer Return Policies for Experience Goods,” 44 *J. Ind. Econ.* 17, 18 (1996); Douglas Gale & Robert Rosenthal, “Price and Quality Cycles for Experience Goods,” 25 *Rand J. Econ.* 590 (1994); Carl Shapiro, “Optimal Pricing of Experience Goods,” 14 *Bell J. Econ.*, 497 (1983).

163. *Tennis Channel Initial Decision* ¶92.

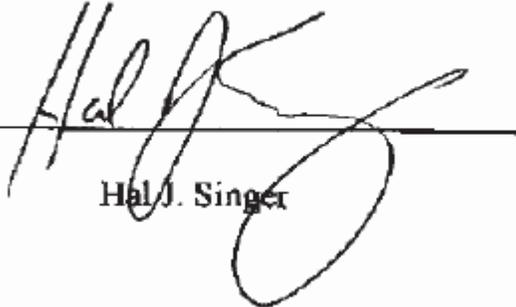
164. Mr. Orszag mischaracterizes my prior testimony in NFL. I never testified that that a firm must be foreclosed from 20 percent of a market for an action to be “presumptively anticompetitive.” Rather, I was reciting the relevant foreclosure thresholds from the antitrust literature, which are more rigorous than the thresholds needed

CONCLUSION

91. Based on the data I have reviewed to date, I conclude that Cablevision's refusal to carry GSN on a highly penetrated tier on Cablevision's cable systems likely constitutes discrimination based on affiliation. I also conclude that Cablevision's conduct has impaired GSN's ability to compete vis-à-vis Cablevision's affiliated, women's programming networks for programming, advertisers, viewers, and multi-channel video programming distributors.

* * *

I declare under penalty of perjury that, to the best of my knowledge and belief, the foregoing is true and correct. Executed on March 12, 2013.



Hal J. Singer

to show competitor harm. That those higher thresholds for consumer harm were met in NFL and are not met here is irrelevant. Similarly, Mr. Orszag claims that a "fair reading" of my Tennis Channel testimony implies that networks with more than 40 million subscribers are immunized from harm. I said no such thing. Rather, I noted that dropping below 40 million subscribers (from a tiering episode) was more debilitating for a network, all things equal. It might be the case that losing access to customers in the coveted New York market with a subscriber base of less than 40 million is more debilitating than losing access to those customers with a subscribership base of more than 40 million. But that does not imply that GSN suffered no impairment.

Exhibit 24

**Highly Confidential Exhibit
Withheld**

Exhibit 25

**Highly Confidential Exhibit
Withheld**

Exhibit 26

**Highly Confidential Exhibit
Withheld**