

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

In the Matter of	)	
	)	
<b>GAME SHOW NETWORK, LLC,</b>	)	MB Docket No. 12-122
Complainant,	)	File No. CSR-8529-P
	)	
v.	)	
	)	
<b>CABLEVISION SYSTEMS CORPORATION,</b>	)	
Defendant.	)	
	)	
Program Carriage Complaint	)	

TO: Marlene H. Dortch, Secretary  
 ATTN: Chief Administrative Law Judge Richard L. Sippel

**TRIAL BRIEF  
OF GAME SHOW NETWORK, LLC**

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

C. William Phillips  
 Jonathan M. Sperling  
 COVINGTON & BURLING LLP  
 620 Eighth Avenue  
 New York, NY 10018-1405  
 (202) 662-1000

*Counsel to Game Show Network, LLC*

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**REDACTED - FOR PUBLIC INSPECTION**

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## **INTRODUCTION**

This case arises from Cablevision's decision in 2011 to move GSN from a widely-distributed expanded basic tier—GSN's location for fourteen years—to a narrowly-penetrated sports tier reaching only [REDACTED] of Cablevision's subscribers. Cablevision took this step in the face of [REDACTED] of customer complaints, and contrary to the rest of the industry's treatment of GSN, even as it guaranteed its own similarly-situated networks, WE tv and Wedding Central, favorable carriage on widely-penetrated tiers.

While Cablevision claims that its decision to move GSN to a less penetrated tier was based on cost and ratings considerations, these purported justifications are pretextual and economically invalid. First, Cablevision's executives deny having considered these rationales in targeting GSN. Instead, the record shows that executive John Bickham initiated the decision to place GSN on the sports tier based on his [REDACTED] [REDACTED]. This admission should itself be sufficient to establish that Cablevision's proffered justifications are pretextual.

Second, the record establishes that Cablevision would have saved money by tiering WE tv or Wedding Central rather than GSN. The evidence also shows that Cablevision gave up additional benefits and incurred short-term losses by tiering GSN. In short, Cablevision would have been at least as well off moving its similarly-situated affiliated networks instead of GSN. But Cablevision never even considered it.

Cablevision's selective scrutiny of an unaffiliated network, coupled with its preferencing of its affiliated networks, goes to the heart of Section 616 of the Communications Act, which prohibits vertically-integrated cable operators from discriminating on the basis of affiliation and nonaffiliation. Cablevision's discrimination continues to this day, with James Dolan—the

ultimate owner of Cablevision—admitting that nothing would cause Cablevision to consider carrying GSN on the same terms as it carries WE tv.

Cablevision also violated Section 616 in a second way: it sought to use the tiering decision to extract value for its affiliated programming networks from DIRECTV, one of GSN's parents. Cablevision conditioned GSN's return to Cablevision's basic tier on DIRECTV's agreement to carry its affiliated channel, Wedding Central. This differential treatment of an unaffiliated network for the express purpose of benefitting an affiliate is a separate, independent violation of Section 616.

Cablevision's discriminatory decision to move GSN to an ill-fitting sports tier causes severe competitive harm to the network and has cost GSN approximately [REDACTED] per year in lost subscriber fees and advertising revenue. The tiering is particularly harmful because the network is unavailable to most Cablevision subscribers in New York, Cablevision's home market and home to advertising agencies and media buyers. As spelled out below, this substantial harm from Cablevision's discrimination warrants relief under Section 616.

## **FACTS**

### **I. The Networks**

#### **A. GSN**

GSN is a cable television network owned by Sony Pictures Entertainment, Inc. and DIRECTV. The service launched as the "Game Show Network" on December 1, 1994. In 2004, it rebranded itself "GSN."<sup>1</sup>

<sup>1</sup> GSN Exh. 297, Supplemental Written Direct Testimony of David Goldhill, ¶ 5 [hereinafter "Goldhill Supp. Written Direct"].

Beginning in 2007, under the leadership of its new CEO, David Goldhill, the network adopted a strategy aimed at deepening GSN's engagement with its predominantly female audience and broadening its appeal to women 18 to 49 and 25 to 54. The network recruited senior programming and marketing executives from other female-focused networks, and developed a slate of original programs such as *The Newlywed Game*, *Baggage*, and *Love Triangle* that focused on dating, relationships, and other themes directly geared to female viewers.<sup>2</sup> The original programs in which GSN invests its resources and that it schedules in the most important time slots continue to focus on such themes, including, for example, programs such as *Mind of a Man* and *It Takes a Church*, along with *Skin Wars*, a reality show focused on body painting that is hosted by supermodel Rebecca Romijn.<sup>3</sup> These efforts have dovetailed with GSN's advertising sales strategy, which has focused on and continues to focus on advertisers seeking primarily to reach women 25 to 54.<sup>4</sup>

By 2010, GSN's viewership skewed heavily female, with women constituting [REDACTED] of its total audience.<sup>5</sup> Today, the network's viewership is [REDACTED] female.<sup>6</sup> It offers original programming of all kinds, including revamped versions of traditional game

<sup>2</sup> *Id.*, ¶ 7; GSN Exh. 303, Supplemental Written Direct Testimony of Dale Hopkins, ¶ 6 [hereinafter "Hopkins Supp. Written Direct"]; GSN Exh. 299, Supplemental Written Direct Testimony of Kelly Goode, ¶ 6 [hereinafter "Goode Supp. Written Direct"].

<sup>3</sup> GSN Exh. 227 [REDACTED]  
[REDACTED] GSN Exh. 228 [REDACTED]  
[REDACTED] GSN Exh. 229 [REDACTED]

<sup>4</sup> GSN Exh. 300, Supplemental Written Direct Testimony of Timothy Brooks, ¶ 24 [hereinafter "Brooks Supp. Written Direct"]; GSN Exh. 298, Supplemental Written Direct Testimony of John Zaccario, ¶ 5 [hereinafter "Zaccario Supp. Written Direct"].

<sup>5</sup> GSN Exh. 297, Goldhill Supp. Written Direct, ¶ 9; GSN Exh. 300, Brooks Supp. Written Direct, ¶ 22.

<sup>6</sup> GSN Exh. 300, Brooks Supp. Written Direct, ¶ 22.

shows, non-game reality programs, and other competition-focused reality shows,<sup>7</sup> all aimed at this demographic. And it competes for advertising with other networks delivering females in key demographic categories.<sup>8</sup>

Despite being retired by Cablevision, GSN has continued to prove its value to other MVPDs and remains broadly penetrated on every major MVPD—with the exception of Cablevision.<sup>9</sup>

**B. WE tv and Wedding Central**

WE tv and Wedding Central (during its existence) occupied the same competitive space as GSN. WE tv originally launched in 1997 as “Romance Classics,” featuring primarily romantic movies and miniseries. Until 2005, the network [REDACTED]<sup>10</sup>

By 2010, WE tv’s schedule included programming that was thematically similar to GSN’s relationship and female-oriented reality programming. Today, WE tv’s viewership is [REDACTED] [REDACTED] female, almost identical to GSN’s female skew. Even when its schedule consisted largely of [REDACTED] WE tv was distributed broadly by its cable parent to approximately [REDACTED] of all Cablevision homes.<sup>11</sup>

Wedding Central, which Cablevision launched in August 2009, featured programming related to weddings, dating and relationships—content that was almost entirely recycled from

<sup>7</sup> GSN Exh. 299, Goode Supp. Written Direct, ¶¶ 6-9.

<sup>8</sup> GSN Exh. 298, Zaccario Supp. Written Direct, ¶ 6.

<sup>9</sup> GSN Exh. 297, Goldhill Supp. Written Direct, ¶ 23

<sup>10</sup> GSN Exh. 13, at CV-GSN 0248588 [REDACTED]

<sup>11</sup> *Id.*; GSN Exh. 156.



Similarly, Wedding Central was carried to [REDACTED] of its subscribers from inception to shut-down,<sup>17</sup> even though Cablevision CEO Mr. Dolan, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>18</sup> Certainly, no other major distributors (except Time Warner Cable, which Wedding Central paid \$1 million annually for carriage on a preferential channel) carried Wedding Central, much less carried it broadly.<sup>19</sup> [REDACTED]

[REDACTED]  
[REDACTED]<sup>20</sup>

This uncritical grant of broad carriage to affiliated networks is just one of a series of benefits given to the networks Cablevision viewed as part of the [REDACTED]<sup>21</sup> For instance:

- **No arms-length negotiations.** Cablevision rushed to complete its deals with the Rainbow networks in [REDACTED] including for WE tv, even though that network's contract with Cablevision was not due to expire until [REDACTED] Mr. Dolan admitted that [REDACTED]

[REDACTED] Moving WE tv to the sports tier would have saved Cablevision [REDACTED]

[REDACTED] See GSN Exh. 135, at CV-GSN 0378222. To carry WE tv at the same rate to the approximately [REDACTED] on the sports tier, see GSN Exh. 156, Cablevision would pay less than [REDACTED] in carriage fees to WE tv over that same year. See also GSN Exh. 216, Dolan Dep. Tr. 133:10-15; GSN Exh. 207, Montemagno Dep. Tr. 192:23-25; GSN Exh. 217, Bickham Dep. Tr. 64:1-8, 104:17-105:6.

<sup>17</sup> GSN Exh. 156; GSN Exh. 301, Supplemental Written Direct Testimony of Hal J. Singer, ¶ 3 [hereinafter "Singer Supp. Written Direct"].

<sup>18</sup> GSN Exh. 216, Dolan Dep. Tr. 17:12-22.

<sup>19</sup> GSN Exh. 206, ¶ 8; see also GSN Exh. 245, at CV-GSN 0434075.

<sup>20</sup> GSN Exh. 44, at CV-GSN 0225985 [REDACTED] GSN Exh. 216, Dolan Dep. Tr. 73:6-12, 129:19-25, 130:18-22.

Notably, Mr. Dolan testified that [REDACTED] GSN Exh. 216, Dolan Dep. Tr. at 122:7-25; see also GSN Exh. 207, Montemagno Dep. Tr. 192:10-193:8; GSN Exh. 217, Bickham Dep. Tr. 104:4-15, 127:8-13.

<sup>21</sup> GSN Exh. 26; see also GSN Exh. 217, Bickham Dep. Tr. 160:14-17.

[REDACTED]

- **Waiver of MFN provisions.** Cablevision [REDACTED]  
[REDACTED]
- **Marketing support.** Cablevision provide [REDACTED]  
[REDACTED]
- **Special access to decisionmakers.** Cablevision carried Wedding Central when almost no other distributor would. In gaining carriage, Rainbow [REDACTED] Mr. Montemagno admitted that [REDACTED] In the end, Wedding Central launched [REDACTED]

<sup>22</sup> GSN Exh. 216, Dolan Dep. Tr. 132:3-133:9; *see also* GSN Exhs. 199, 202.

<sup>23</sup> GSN Exh. 239; GSN Exh. 109, at CV-GSN 0375843; GSN Exh. 207, Montemagno Dep. Tr. 136:8-140:22; GSN Exh. 214, Broussard Dep. Tr. 144:14-145:9, 146:16-148:9; GSN Exh. 217, Bickham Dep. Tr. 176:21-177:24.

<sup>24</sup> GSN Exh. 31. *See also* GSN Exhs. 184-192 (listing [REDACTED]); GSN Exhs. 240, 241, 241, 243, 244 [REDACTED]

<sup>25</sup> GSN Exh. 28 [REDACTED] GSN Exh. 207, Montemagno Dep. Tr. 226:7-19. Mr. Dolan agreed there were [REDACTED] GSN Exh. 216, Dolan Dep. Tr. 33:16-19.

<sup>26</sup> GSN Exh. 33 [REDACTED] GSN Exh. 207, Montemagno Dep. Tr. 74:16-75:13.

<sup>27</sup> GSN Exh. 207, Montemagno Dep. Tr. 48:17-49:10. As Mr. Montemagno explained, [REDACTED]

- **Favorable channel placement.** Cablevision offers its affiliates prime real estate on its channel lineup. In New York, WE tv is typically carried on channel 42, within a few positions of highly-rated women’s networks like Lifetime and Bravo, giving it “excellent exposure to potential women viewers.”<sup>28</sup> [REDACTED] GSN, by contrast, has been carried on channel 88, surrounded by dissimilar premium-charge movie channels.<sup>30</sup>
- **Forced tuning.** Cablevision “force-tunes” digital set-top boxes to advantage Rainbow networks. [REDACTED]
- **Access to Cablevision’s proprietary data.** Rainbow was given [REDACTED]
- **Quid pro quo leverage.** The Rainbow networks relied on Cablevision’s leverage to [REDACTED]<sup>34</sup> For example, [REDACTED] Mr. Dolan

[REDACTED] . *Id.* at 224:18-225:15.

<sup>28</sup> Brooks Supp. Written Direct, ¶ 61.

<sup>29</sup> *See, e.g.*, GSN Exh. 16, at CV-GSN 0137825 & CV-GSN 0137830 [REDACTED]

<sup>30</sup> GSN Exh. 180, at 2; Brooks Supp. Written Direct, ¶ 61.

<sup>31</sup> GSN Exh. 212, Moraghan Dep. Tr. 112:21-114:14; GSN Exh. 146 [REDACTED]

<sup>32</sup> *See, e.g.*, GSN Exhs. 14, 35, 150; *see also* GSN Exh. 212, Moraghan Dep. Tr. 106:25-107:12, 111:13-112:20.

<sup>33</sup> GSN Exh. 214, Broussard Dep. Tr. 57:8-21, 58:16-24.

<sup>34</sup> *See* GSN Exh. 29, at CV-GSN 0005277 [REDACTED]

<sup>35</sup> GSN Exh. 39.



[REDACTED]

[REDACTED]<sup>42</sup>

On December 3, 2010, Mr. Montemagno informed GSN that Cablevision would move GSN to its iO Sports Pak, the premium sports tier, effective February 1, 2011.<sup>43</sup> The move required viewers to pay an additional \$6.95 per month to receive GSN and would result in an estimated loss of [REDACTED] in the New York area. Cablevision offered two justifications for the decision: a desire to cut programming costs, and GSN's ratings performance.<sup>44</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>45</sup>

Shortly after, Cablevision [REDACTED]  
[REDACTED].<sup>46</sup> And even as it prepared to tier GSN, Cablevision [REDACTED]

[REDACTED]

<sup>42</sup> GSN Exh. 217, Bickham Dep. Tr. 24:23-25, 49:18-50:14, 60:1-21, 76:3-17. *See also* GSN Exh. 69 (carriage assessment).

<sup>43</sup> GSN Exh. 297, Goldhill Supp. Written Direct, ¶ 15.

<sup>44</sup> *Id.*, ¶¶ 15, 22.

<sup>45</sup> GSN Exh. 217, Bickham Dep. Tr. 126:12-15; *see also* GSN Exh. 158, at CV-GSN 0424966 (in 2010, MSG Varsity, MSG Plus, and GSN all ranked in the [REDACTED] out of the approximately [REDACTED] networks carried by Cablevision).

<sup>46</sup> *See* GSN Exh. 202, at §§ 2(d)(vii), 4(b), 5(a) & Exhibit A.

[REDACTED].<sup>47</sup> Cablevision made these decisions without evaluating either network's performance, costs, or status as "must-have" content.<sup>48</sup>

#### IV. Cablevision's Efforts To Secure Wedding Central Carriage On DIRECTV

Following the December 3 notice, GSN appealed to Cablevision to discuss carriage terms that would allow GSN to remain on the tier it had occupied for fourteen years. In other cases in which Cablevision had considered moving or dropping networks, Cablevision negotiated a lower rate with the network and kept the network where it was.<sup>49</sup> But here, Cablevision refused to maintain broad distribution of GSN at any price unless DIRECTV agreed to launch Cablevision's struggling affiliate network Wedding Central.<sup>50</sup>

As part of GSN's efforts to negotiate with Cablevision, Derek Chang, at the time DIRECTV's Executive Vice President of Content Strategy and Development and a member of the GSN management committee, contacted Cablevision Chief Operating Officer Tom Rutledge to urge Cablevision to reconsider its decision.<sup>51</sup> Mr. Rutledge referred Mr. Chang to Joshua Sapan, Rainbow's Chief Executive Officer, and instructed Rainbow to come up with a list of

<sup>47</sup> GSN Exhs. 83, 89, 183; GSN Exh. 203, at §§ 2(d)(vi), 4(b); GSN Exh. 158, at CV-GSN 0424968 (2010 set-top box rankings for Wedding Central).

<sup>48</sup> GSN Exh. 217, Bickham Dep. Tr. 63:14-64:16.

<sup>49</sup> Cablevision's refusal to negotiate was inconsistent with Cablevision's treatment of other networks from which it sought rate reductions. For instance, around the same time that Cablevision retired GSN, it considered retiring [REDACTED]

[REDACTED] GSN Exh. 207, Montemagno Dep. Tr. at 83:9-11.

<sup>50</sup> GSN Exh. 305, Sapan Dep. Tr. 238:3-240:14, discussing GSN Exh. 260 [REDACTED]

<sup>51</sup> GSN Exh. 297, Goldhill Supp. Written Direct, ¶ 17; GSN Exh. 306, [REDACTED]

[REDACTED] for DIRECTV.<sup>52</sup> During the ensuing discussions, Cablevision proposed to reconsider GSN's retiering if DIRECTV would give Wedding Central carriage.<sup>53</sup> Mr. Chang declined the proposal, as he had before.<sup>54</sup> After several attempts by Rainbow executives to convince DIRECTV to carry Wedding Central, Mr. Chang conveyed his final refusal on January 31, 2011. Cablevision moved GSN to its sports tier the following day, making GSN the only network that Cablevision retiered during that period and making Cablevision the only major distributor that carries GSN on a premium sports tier. It is undisputed that had Mr. Chang agreed to launch Wedding Central on DIRECTV, GSN would have maintained broad distribution.<sup>55</sup>

**V. The Fallout From Retiering**

Immediately after moving the network, Cablevision received [REDACTED] of customer complaints—over [REDACTED] calls the first day following the reposition, a [REDACTED] by Cablevision's own admission and in [REDACTED] [REDACTED]<sup>56</sup> Indeed, Cablevision was forced to take steps to [REDACTED] the shift in GSN's tiering by [REDACTED]

<sup>52</sup> GSN Exh. 98; GSN Exh. 297, Goldhill Supp. Written Direct, ¶ 19.

<sup>53</sup> GSN Exh. 111 (reporting that [REDACTED]; [REDACTED]; GSN Exh. 297, Goldhill Supp. Written Direct, ¶ 19; GSN Exh. 306, GSN Exh. 260 [REDACTED]; [REDACTED]

<sup>54</sup> GSN Exh. 297, Goldhill Supp. Written Direct, ¶ 20; GSN Exh. 306, [REDACTED].

<sup>55</sup> GSN Exh. 305, Sapan Dep. Tr. 238:3-240:14, discussing GSN Exh. 260 [REDACTED]

<sup>56</sup> GSN Exh. 216, Dolan Dep. Tr. 127:23-128:15; GSN Exh. 116.

[REDACTED]

[REDACTED]<sup>57</sup>

GSN continued its efforts to engage Cablevision in carriage negotiations after its retiring. On February 7, 2011, GSN's CEO and Sony representatives met with James Dolan (Cablevision's CEO), Mr. Rutledge, and Mr. Montemagno. There, Cablevision made clear that it would restore GSN's carriage only if it could do so for [REDACTED]—a proposal that Cablevision knew GSN could not accept because of [REDACTED]

[REDACTED]<sup>58</sup>

Following the February 7 meeting, GSN and Sony proposed to Cablevision a further [REDACTED]. Mr. Montemagno rejected that proposal, insisting on a [REDACTED] deal.<sup>59</sup> It was obvious that Cablevision would restore GSN's carriage not on the basis of its relative merits, but only if DIRECTV would carry Wedding Central.<sup>60</sup>

The harm to GSN was significant. GSN's overall subscriber base was reduced by more than [REDACTED], which translates to a loss of [REDACTED] in annual license fee revenues. GSN has also lost advertising revenue because its ratings and viewers in the New York market [REDACTED] after the retiring.<sup>61</sup> GSN financial models estimate that

<sup>57</sup> See, e.g., GSN Exhs. 120-122, 124, 125, 127.

<sup>58</sup> GSN Exh. 297, Goldhill Supp. Written Direct, ¶ 24. Because of those [REDACTED] [REDACTED] *Id.* Cablevision was aware of these challenges. Mr. Montemagno internally acknowledged that [REDACTED] [REDACTED]. GSN Exh. 67.

<sup>59</sup> GSN Exh. 297, Goldhill Supp. Written Direct, ¶¶ 25-26; GSN Exh. 138.

<sup>60</sup> GSN Exh. 297, Goldhill Supp. Written Direct, ¶ 27.

<sup>61</sup> See GSN Exh. 300, Brooks Supp. Written Direct at ¶ 46 [REDACTED] [REDACTED].

the network lost [REDACTED]

[REDACTED]<sup>62</sup> 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.<sup>63</sup> 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. Furthermore, the retiring has weakened GSN's negotiating position as it seeks to renew contracts, add subscribers, and achieve rate increases with other MVPDs.

GSN notified Cablevision on September 26, 2011 of GSN's intent to file a program carriage complaint, and it filed its complaint on October 12, 2011. On May 9, 2012, the Media Bureau ruled that GSN had made a *prima facie* case of discrimination and designated the matter for hearing.<sup>64</sup>

### LEGAL STANDARD

Congress passed the 1992 Cable Act to address concerns that vertically-integrated cable operators "abuse [their] locally-derived market power to the detriment of programmers" and consumers.<sup>65</sup> Section 616 prohibits discrimination in video programming distribution on the basis of the affiliation or non-affiliation of vendors, which can take either of two distinct forms:

<sup>62</sup> GSN Exh. 298, Zaccario Supp. Written Direct, ¶ 8.

<sup>63</sup> GSN Exh. 297, Goldhill Supp. Dep. Tr. 122:17-18 & 120:25-121:2.

<sup>64</sup> *Game Show Network, LLC v. Cablevision Systems Corp.*, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, DA 12-739, MB Docket No. 12-122, File No. CSR-8529-P, ¶¶ 2, 36 (2012) [hereinafter "*HDO*"]. In its hearing designation order, the Media Bureau also rejected Cablevision's contention that GSN's complaint was untimely under the Commission's statute of limitations rule. The timeliness of GSN's complaint is thus not an issue designated for hearing. *Id.*, ¶¶ 12-16.

<sup>65</sup> Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, at 15 (1991).

(1) the unfavorable treatment of an unaffiliated network due to its non-affiliation or to benefit an affiliated network, or (2) the award of competitive advantages to affiliated networks over non-affiliates due to their affiliation.<sup>66</sup>

Under the Commission's regulations implementing Section 616, GSN may prove discrimination in either of two ways. The first is through direct evidence, *i.e.*, "documentary evidence or testimonial evidence . . . that supports the claim that the defendant discriminated on the basis of affiliation or non-affiliation of vendors."<sup>67</sup> Alternatively, GSN may make out a circumstantial case of discrimination by establishing the following two elements:

- **Differential treatment based on affiliation.** The defendant MVPD has treated the unaffiliated network differently than an affiliated network with respect to the selection, terms, or conditions of carriage because of its affiliation or non-affiliation.<sup>68</sup>
- **Similarly situated.**<sup>69</sup> The networks are "similarly situated," based on a combination of factors. The networks need not be "identical"; instead, the goals of the similarly-situated test are to ensure that the networks have generally comparable popularity and program offerings.<sup>70</sup>

In proving these elements, GSN can establish that the differential treatment was based on affiliation—and not "a reasonable business purpose"—by showing that Cablevision limited

<sup>66</sup> *Id.*; see also 47 C.F.R. § 76.1301(c); *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 27 FCC Rcd 8508, ¶ 44 (2012) [hereinafter "*Tennis Channel*"].

<sup>67</sup> *HDO* ¶ 12.

<sup>68</sup> *Tennis Channel* ¶ 68; *HDO* ¶¶ 10, 28; *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, Order on Review, DA 08-2441, ¶ 29 (MB Oct. 30, 2008), *rev'd on other grounds*, 25 FCC Rcd 18099, 18105 (2010) [hereinafter "*TCR*"]; *Herring Broad., Inc. v. Time Warner Cable Inc., et al.*, Mem. Op. & Hearing Designation Order, 23 FCC Rcd 14787, 14792-814, ¶ 76 (MB 2008) [hereinafter "*Omnibus HDO*"].

<sup>69</sup> *Revision of the Commission's Program Carriage Rules*, Second Report and Order, MB Docket No. 11-131, ¶ 14 (2011) [hereinafter "*Second Report and Order*"]; see also *Tennis Channel* ¶¶ 51-55 (concluding that networks were similarly situated on the basis of programming, demographics, ratings, and advertiser overlap).

<sup>70</sup> *Omnibus HDO* ¶ 75; *TCR* ¶¶ 27-28 (finding a regional sports network focused on baseball games similarly situated with a regional news channel operated by Time Warner).

distribution of GSN when (i) broader distribution of GSN would have resulted in a net benefit to Cablevision's distribution business, (ii) a net loss incurred from broader distribution would have been the same as or less than Cablevision incurred in distributing its affiliated, similarly-situated network on the broader basis, or (iii) an otherwise valid business basis for the limited distribution was pretextual.<sup>71</sup>

To violate Section 616, Cablevision's discrimination must also have harmed GSN's ability to compete fairly in the communities that Cablevision serves.<sup>72</sup> But GSN need not show that it "cannot compete at all, *i.e.*, would exit the industry, operate at a loss, or suffer some similar major disadvantage." Instead, all GSN must show is that the differential treatment "restrained [its] ability to compete fairly for viewers, advertisers, and . . . programming rights."<sup>73</sup>

## **ARGUMENT**

### **I. Cablevision's Selective Scrutiny of GSN Constitutes Discrimination in Violation of Section 616.**

Cablevision's repositioning of GSN to an ill-suited, extra-cost sports tier was discriminatory and violates Section 616. GSN is similarly situated to Cablevision's more broadly-distributed affiliated networks, WE tv and Wedding Central, but Cablevision never even

<sup>71</sup> See *Comcast Cable*, 717 F.3d at 985-86, 987.

<sup>72</sup> *Tennis Channel* ¶ 83; *HDO* ¶¶ 10, 29-34; *TCR* ¶ 30; *Omnibus HDO* ¶¶ 77-78.

<sup>73</sup> *TCR* ¶¶ 30-31; see also *Tennis Channel* ¶ 41-43 (noting that the "unreasonably restrain" language is not an analogue to antitrust standards). To establish a violation of Section 616, the complainant also must show that it is a video programming vendor as defined in Section 616(b) of the Act and 47 C.F.R. § 76.1300(e) and that the defendant is an MVPD as defined in Section 602(13) of the Communications Act and 47 C.F.R. § 76.1300(d). As the Media Bureau already has concluded, there is no dispute that GSN is a video programming vendor and Cablevision an MVPD within the meaning of the Act and Commission rules. See *HDO* ¶ 10.

considered repositioning those networks.<sup>74</sup> The economic justifications that Cablevision now invokes to justify its discriminatory decision are pretextual—the executive responsible for targeting GSN admittedly did not rely on those considerations—and in all events, Cablevision would have benefitted at least as much by retiering its affiliates rather than GSN.

**A. GSN, WE tv, and Wedding Central Are Similarly Situated.**

In assessing whether networks are similarly situated under Section 616, the Commission looks at “a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors.”<sup>75</sup> “[N]o single factor is necessarily dispositive, [but] the more factors that are found to be similar, the more likely the programming in question will be considered similarly situated to the affiliated programming.”<sup>76</sup> Here, these factors collectively establish that GSN is similarly situated to WE tv and Wedding Central.

**Target Audience.** GSN and WE tv target, and Wedding Central targeted, women 18-49 and women 25-54 with their programming.<sup>77</sup> GSN’s programming includes female-oriented original programming and reality competition and game show format programming well-understood to appeal predominantly to women.<sup>78</sup> Moreover, shortly after CEO David Goldhill

<sup>74</sup> *HDO* ¶ 28 (finding that GSN “has put forth evidence sufficient to demonstrate for purposes of establishing a prima facie case of program carriage discrimination that Cablevision has treated GSN differently ‘on the basis of affiliation or nonaffiliation’ from Cablevision’s similarly situated, affiliated networks”).

<sup>75</sup> *Second Report and Order*, ¶ 14.

<sup>76</sup> *Id.*

<sup>77</sup> See GSN Exh. 227 [REDACTED]; GSN Exh. 237 [REDACTED]; GSN Exh. 228 [REDACTED]; see also Egan Supp. Expert Report, ¶ 20 [REDACTED]

[REDACTED] GSN Exh. 299, Goode Supp. Written Direct, ¶¶ 4-6; GSN Exh. 303, Hopkins Supp. Written Direct, ¶ 6.

<sup>78</sup> GSN Exh. 297, Goldhill Supp. Written Direct, ¶¶ 6-7; Brooks Supp. Written Direct, ¶¶ 85-87.

joined the network in 2007, GSN successfully expanded its original programming slate to capture additional women 18-49 and 25-54, the two key Nielsen demographic categories for women's networks.<sup>79</sup> As a result, GSN overwhelmingly attracts women—today, [REDACTED] of its audience is female.<sup>80</sup> And its marquee programs—designed to reach women 18-49 and 25-54—increasingly have attracted attention and audience among these women viewers.<sup>81</sup>

WE tv and Wedding Central likewise target women with their programming and marketing,<sup>82</sup> and their audiences likewise skew female.<sup>83</sup> [REDACTED], the most important factor in understanding who WE tv's competitors are is whether a network is heavily female and how the network performs among women 18-49 and women 25-54.<sup>84</sup> On these metrics, GSN and WE tv are strikingly similar.

Even among women's networks, GSN and WE tv have a particularly close relationship. WE tv was [REDACTED] among 87 cable networks ranked by shared audience with GSN in fourth quarter 2010: [REDACTED] percent of the viewers that watched either GSN or WE tv watched both,

<sup>79</sup> GSN Exh. 299, Goode Supp. Written Direct, ¶¶ 4-5.

<sup>80</sup> GSN Exh. 300, Brooks Supp. Written Direct, ¶ 22; *see also* GSN Exh. 143, at GSN\_CVC\_00133066 (showing [REDACTED]; GSN Exh. 13, at CV-GSN 0248589.

<sup>81</sup> GSN Exh. 170 (noting that on HBO's *Girls*, the character Shoshanna announces that her favorite TV reality show is GSN's *Baggage*); GSN Exh. 171 (June Thomas, *Baggage Is Real, and It Is Spectacular*, Slate, Apr. 29, 2012); GSN Exh. 227 [REDACTED]; GSN Exh. 237 [REDACTED]

GSN Exh. 228 [REDACTED]

<sup>82</sup> *See* GSN Exh. 208, Martin Dep. Tr. 37:9-18, 38:6-18, 39:3-40:3.

<sup>83</sup> Brooks Supp. Written Direct, ¶ 22, Appendix 2.

<sup>84</sup> *See* GSN Exh. 208, Martin Dep. Tr. 42:15-23, 45:22-47:8; *see also* GSN Exh. 215, Dorée Dep. Tr. 60:3-9, 61:2-7 [REDACTED]

reflecting [REDACTED]<sup>85</sup> And GSN continues to share a high percentage of audience with WE tv in more recent quarters.<sup>86</sup>

**Target Advertisers.** GSN and WE tv (and presumably also Wedding Central, when it existed) target advertisers seeking to reach women 25-54, as well as women 18-49 and persons 18-49 and 25-54.<sup>87</sup> GSN and WE tv perform comparably, and are competitive, in these key advertising categories, achieving ratings [REDACTED] in each of the four categories.<sup>88</sup> These differences are so slight that advertisers consider the networks comparable in their ability to deliver the highly desired target female demographics.<sup>89</sup>

Reflecting this shared focus, the same advertisers—and same brands—advertise on WE tv and GSN. Between July 2010 and July 2011, [REDACTED] of WE tv's top 40 advertising accounts (weighted by expenditures) advertised on GSN.<sup>90</sup> Likewise, [REDACTED] of GSN's top 40 advertising accounts (weighted by expenditures) advertised on WE tv.<sup>91</sup> The degree of

<sup>85</sup> GSN Exh. 300, Brooks Supp. Written Direct, ¶¶ 33-34. Likewise, Nielsen data indicates [REDACTED]  
[REDACTED]  
[REDACTED] GSN Exh. 301, Singer Supp. Written Direct, ¶¶ 34-35.

<sup>86</sup> GSN Exh. 300, Brooks Supp. Written Direct, ¶ 34.

<sup>87</sup> GSN Exh. 300, Brooks Supp. Written Direct, ¶¶ 24-25; GSN Exh. 298, Zaccario Supp. Written Direct, ¶¶ 4-5.

<sup>88</sup> GSN Exh. 300, Brooks Supp. Written Direct, ¶ 26. The networks are within [REDACTED] of a ratings point in performance amongst persons 18-49 and persons 25-54 and WE tv slightly exceeds GSN by [REDACTED] of a rating point amongst women 18-49 and women 25-54. *Id.*

<sup>89</sup> GSN Exh. 300, Brooks Supp. Written Direct, ¶ 27.

<sup>90</sup> GSN Exh. 302, Singer Supp. Written Direct, ¶ 52, Table 6. Moreover, [REDACTED] of all of WE tv's advertising accounts (weighted by expenditures on WE tv commercials) also advertise on GSN. *Id.*

<sup>91</sup> *Id.* [REDACTED] of all of GSN's advertising accounts (weighted by expenditures on GSN commercials) also advertise on WE tv.

overlap remains highly significant even if one examines the overlap not just by corporation (*e.g.*, [REDACTED]), but also by brand (*e.g.*, [REDACTED]). Brands that advertise on GSN account for [REDACTED] of WE tv's revenue from its top 40 advertising customers.<sup>92</sup>

**Target Programming & Genre.** Cablevision has argued that GSN cannot be similar to WE tv and Wedding Central because its content fits into a different programming "genre." But genre differences—which are highly subjective and often-changing—do not prevent networks from being similarly situated, either under the law<sup>93</sup> or in the marketplace.<sup>94</sup> For example, WE tv's President Kim Martin readily admitted that [REDACTED]

[REDACTED]<sup>95</sup> And she conceded that even though WE tv's [REDACTED]

[REDACTED]<sup>96</sup>

Both WE tv and GSN offer programming designed to appeal to women through a variety of genres. For example, both networks run competition-based reality shows like *Dancing With The Stars* (which airs on GSN) and *Skating's Next Star* (which airs on WE tv).<sup>97</sup> WE tv has aired game shows, such as *Most Popular*, and GSN has aired programming in the reality/documentary genre, such as *Family Trade* and *Carnie Wilson: Unstapled*.<sup>98</sup>

<sup>92</sup> *Id.*, ¶ 52.

<sup>93</sup> *Second Report and Order*, ¶ 14 ("no single factor is . . . dispositive").

<sup>94</sup> *See* GSN Exh. 300, Brooks Supp. Written Direct, ¶ 89 (noting that genre is not a decision metric that is used widely within the cable industry or by women-oriented networks seeking to grow their audience in the women 18-49 and women 25-54 demographics).

<sup>95</sup> GSN Exh. 208, Martin Dep. Tr. 32:3-11, 33:12-15, 50:6-51:6; *see also id.* at 54:8-56:10.

<sup>96</sup> GSN Exh. 208, Martin Dep. Tr. at 49:17-50:9.

<sup>97</sup> GSN Exh. 300, Brooks Supp. Written Direct, ¶ 9.

<sup>98</sup> *Id.*, ¶¶ 8-9; *see also* GSN Exh. 25 (press release describing *Most Popular*). To the extent that WE tv seeks to differentiate itself as having a greater percentage of "reality" programming than

More broadly, there are substantial similarities in the programming on GSN, WE tv, and Wedding Central. Each network airs (or aired) female-oriented programming focused on dating, romance, and family dynamics.<sup>99</sup> For example, GSN's marquee programming includes relationship-themed programs, such as *The Newlywed Game*, *Love Connection*, and *Baggage*, and, in recent years, GSN has further increased the prominence of its relationship-based shows with such shows as *It Takes a Church* and *Mind of Man*.<sup>100</sup> Programs that air on WE tv, such as *Bridezillas*, *My Fair Wedding*, and *Match Made in Heaven* emphasize similar themes. Likewise, Wedding Central was a network devoted entirely to romantic relationships and weddings.<sup>101</sup> The networks also share female-oriented reality programming outside of the relationship genre: the GSN reality show *Carnie Wilson: Unstapled* followed the singer as she built a dessert business.<sup>102</sup> WE tv's *The Cupcake Girls* follows a group of women entrepreneurs who start a cupcake company.<sup>103</sup>

Consistent with their shared audience focus, the networks involved here have competed for programming and talent. Thus, Wedding Central considered [REDACTED]

[REDACTED].<sup>104</sup> Likewise, in 2011, [REDACTED]

GSN, that is not a particularly helpful label in the context of this proceeding. "Reality" television is a recent and particularly amorphous category of programming that overlaps with several other categories of programming, including game shows. GSN Exh. 300, Brooks Written Direct, ¶¶ 89-93.

<sup>99</sup> GSN Exh. 299, Goode Supp. Written Direct, ¶¶ 6, 10.

<sup>100</sup> *Id.*, ¶ 6; *see also, e.g.*, GSN Exhs. 64, 72, 108.

<sup>101</sup> *See, e.g.*, GSN Exh. 44, at CV-GSN 0225975 ([REDACTED]).

<sup>102</sup> GSN Exh. 299, Goode Supp. Written Direct, ¶ 7; *see also* GSN Exh. 40.

<sup>103</sup> GSN Exh. 181.

<sup>104</sup> GSN Exh. 301, Singer Supp. Written Direct, n. 17 (citing GSN Exh. 76).

██████████ And the networks have competed for programming talent.<sup>105</sup> For example, GSN has considered ██████████, a WE tv talent featured on the reality series ██████████ who has auditioned for GSN management.<sup>106</sup> GSN likewise considered titling its dating program *It Takes a Church as Match Made in Heaven*, a show that WE tv introduced shortly after the successful debut of *It Takes a Church*.<sup>107</sup>

**Ratings.** Nationally, GSN outperforms WE tv by a margin of about ██████████ in audience ratings.<sup>108</sup> Within Cablevision's home market, GSN performs comparably to WE tv: Nielsen audience ratings show that the networks are within ██████████ of a rating point in *both* households and adult women viewers.<sup>109</sup> And, even within Cablevision's footprint, GSN has a significantly ██████████ adult women audience than WE tv.<sup>110</sup> Taking into account the preferential channel placement that Cablevision provided its affiliated networks, GSN performs even more favorably compared to WE tv than is reflected in the networks' ratings for the New York market and Cablevision's footprint. As to Wedding Central, its audience was too small even to be measured by Nielsen.

**License Fee.** The networks are also similarly situated with respect to license fees. Cablevision paid ██████████ per sub for GSN from ██████████, it paid ██████████ per sub for WE tv in 2010, and it carried Wedding Central broadly when almost every other MVPD

<sup>105</sup> GSN Exh. 299, Goode Supp. Written Direct, ¶ 11; GSN Exh. 301, Singer Supp. Written Direct, ¶¶ 9, 63.

<sup>106</sup> GSN Exh. 299, Goode Supp. Written Direct, ¶ 11; *see also, e.g.*, GSN Exh. 53.

<sup>107</sup> GSN Exh. 228, at GSN\_CVC\_00165390.

<sup>108</sup> GSN Exh. 300, Brooks Supp. Written Direct, ¶ 20.

<sup>109</sup> *Id.*, ¶ 41.

<sup>110</sup> *Id.*, ¶ 44.

viewed even [REDACTED] carriage of Wedding Central as not worthwhile.<sup>111</sup> Especially in light of GSN's strong ratings and popularity, GSN presented to Cablevision an even better value proposition than WE tv or Wedding Central. Nonetheless, GSN and WE tv fell within the same tier of license fees.

**B. Cablevision's Differential Treatment of GSN Was Based on Affiliation, Not On Any Valid Business Purpose.**

The evidence shows that Cablevision's discriminatory decision to re-tier GSN was not based on "a reasonable business purpose."<sup>112</sup> First, Cablevision's executives deny having considered the rationales that Cablevision offered GSN for the re-tiering in 2011 and that its experts and attorneys have offered in this litigation. This admission should itself be sufficient to establish that Cablevision's proffered justifications are pretextual.<sup>113</sup> Second, on the merits, Cablevision's "value" rationale is economically implausible. As described below, Cablevision would have benefitted from continuing to carry GSN on the broader tier on which Cablevision carried its affiliated networks WE tv and Wedding Channel.<sup>114</sup> The record also establishes that Cablevision forewent benefits by tiering GSN and actually incurred short-term losses. Cablevision would have saved much more money if it tiered WE tv or Wedding Central. But Cablevision never even considered tiering its affiliated networks<sup>115</sup>—favorable treatment of the channels that demonstrates the pretextual nature of its explanations for tiering GSN.<sup>116</sup>

<sup>111</sup> GSN Exh. 135, at 3; GSN Exh. 80 at CV-GSN 0427144 & CV-GSN 0427152.

<sup>112</sup> *See Comcast Cable*, 717 F.3d at 985, cited by Enforcement Bureau Submission Regarding Cablevision's Motion for Summary Decision at 9 (May 27, 2015) ("Bureau Submission").

<sup>113</sup> *See id.* at 987.

<sup>114</sup> *See id.* at 985-987, cited by Bureau Submission at 9.

<sup>115</sup> *See Comcast Cable*, 717 F.3d at 985-86.

<sup>116</sup> Section 616 echoes the body of law holding that "the most commonly employed method of demonstrating that an employer's explanation is pretextual is to show that similarly situated

**1. Cablevision's Stated Reasons for Targeting GSN Are Pretextual.**

Cablevision claims that Mr. Bickham initiated its decision to place GSN on the sports tier based on his [REDACTED]

[REDACTED]. This so-called test cannot justify the repositioning, however, because it fails to explain why Cablevision tiered GSN rather than any other network. According to John Bickham, "must-have programming" is programming that will induce customer disconnects if it is lost.<sup>117</sup> But the Commission has explained, "[m]ost channels are not 'must-haves.'"<sup>118</sup> Thus, Cablevision's test cannot explain its selective targeting of GSN rather than Cablevision's affiliated, similarly-situated networks. Had Cablevision applied the same test to them, they would have failed it.<sup>119</sup> In fact, Mr. Bickham specifically testified that [REDACTED]

[REDACTED]<sup>120</sup> Cablevision's selective application of this "must-have programming" test is itself discriminatory.<sup>121</sup>

persons . . . received more favorable treatment." *Brady v. Office of the Sergeant at Arms*, 520 F.3d 490, 494-95 (D.C. Cir. 2008) (quotation marks and citation omitted); *see also Royall v. Nat'l Ass'n of Letter Carriers*, 548 F.3d 137, 144 (D.C. Cir. 2008).

<sup>117</sup> GSN Exh. 217, Bickham Dep. Tr. 75:2-6.

<sup>118</sup> *See, e.g.*, GSN Exh. 301, Singer Supp. Direct Testimony, ¶ 8.

<sup>119</sup> GSN Exh. 217, Bickham Dep. Tr. 107:14-24.

<sup>120</sup> *Id.* at 107:14-16. More broadly, there is simply no evidence in the record to indicate how [REDACTED]

<sup>121</sup> *See Tennis Channel, Inc. v. Comcast Cable Commc'ns*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, 26 FCC Rcd 17160, 17204 ¶ 74 (ALJ Dec. 20, 2011) [hereinafter "*Tennis Channel Initial Decision*"] ("When Comcast Cable renewed its affiliation agreements with Versus and Golf Channel in 2009 and 2010, respectively, however, it did *not* undertake a cost-benefit analysis as to whether it should reposition those affiliated networks to a different tier."). *See also Tennis Channel* ¶¶ 76-80; GSN Exh. 213, Orszag Dep. Tr. 33:2-19.

Cablevision now claims that it retired GSN based on two factors relating to GSN's "value": (1) GSN's license fee and (2) viewership as measured by set-top-box data. But these explanations are likewise pretextual, because Cablevision's own witnesses admit that a tiering decision ordinarily would not be—and that the decision to tier GSN was not—based on them. Cablevision's CEO concedes that [REDACTED];<sup>122</sup> it ignores the loyalty of viewers, frequency of subscriber engagement with a network, and other key factors relevant to a network's ability to help the MVPD attract and retain subscribers.<sup>123</sup> Even more importantly, Mr. Bickham, who made the ultimate decision, denies having considered these purported "value" rationales in making his decision.<sup>124</sup>

Moreover, even to the extent others at Cablevision did analyze GSN on these metrics, they failed to apply this (or any) value-based test to Cablevision's affiliated networks. Had they done so, those networks would have failed. [REDACTED]; it was over [REDACTED] more expensive than GSN on a per-rating-point basis.<sup>125</sup> [REDACTED]

<sup>122</sup> See GSN Exh. 216, Dolan Dep. Tr. 122:7-16; GSN Exh. 209, Egan Dep. Tr. 210:12-20, 212:5-13; GSN Exh. 207, Montemagno Dep. Tr. 14:9-15:25, 18:15-19:5, 19:25-26:22, 33:22-34:20.

<sup>123</sup> See *supra*, note 122.

<sup>124</sup> GSN Exh. 217, Bickham Dep. Tr. 60:1-21.

<sup>125</sup> GSN Exh. 301, Singer Supp. Written Direct, ¶ 67. GSN's price per rating point is [REDACTED] *Id.*, Table 7. Thus it is "unreasonable for Cablevision to claim that GSN is mispriced, either in an absolute sense or in a rating-adjusted sense, relative to other affiliated content it carries [on its Family cable tier]." *Id.*, ¶ 68.

<sup>126</sup> See Section II, *supra*.

[REDACTED]

[REDACTED] <sup>127</sup> Again,

Cablevision's selective application of criteria based on affiliation is *per se* discriminatory. <sup>128</sup>

**2. Cablevision's Value Rational Is Also Economically Implausible.**

**a) By Retiering GSN, Cablevision Also Disregarded The Substantial Value to Its Family Tier Product That GSN Contributes.**

Had Cablevision considered the "value" of GSN by reference to the criteria that its own executives identify as relevant, it would have been self-evident that GSN presented a strong value proposition to Cablevision and its iO Family Cable package of programming. According to Cablevision's executives, the uniqueness of a network's content, and the loyalty of its viewers and the frequency with which those viewers "visit" the network, are key considerations in assessing value. <sup>129</sup> GSN performs well on each of these metrics. <sup>130</sup> Indeed, Cablevision has

<sup>127</sup> In addition, the household tuning assessment that Mr. Montemagno's team prepared in July 2010 and to which Cablevision experts have cited in connection with this litigation was flawed on its own terms. The assessment relied on [REDACTED]

[REDACTED] *Compare* GSN Exh. 158, at CV-GSN 0424966

[REDACTED] *with* GSN Exh. 63

[REDACTED] *See also* GSN Exh. 300, Brooks Supp. Written Direct, ¶ 70.

<sup>128</sup> *See Tennis Channel Initial Decision* ¶ 74; *Tennis Channel* ¶¶ 76-80.

<sup>129</sup> Notably, Mr. Dolan testified that [REDACTED]. GSN Exh. 216, Dolan Dep. Tr. at 118:24-119:12, 122:7-25; *see also* GSN Exh. 207, Montemagno Dep. Tr. 192:10-193:8; GSN Exh. 217, Bickham Dep. Tr. 104:4-15, 127:8-13; GSN Exh. 216, Dolan Dep. Tr. 118:24-119:12, 122:7-25; GSN Exh. 300, Brooks Supp. Written Direct, ¶¶ 66, 69, 103. Mr. Dolan also explained that, in assessing networks for carriage, [REDACTED]

[REDACTED]. GSN Exh. 216, Dolan Dep. Tr. at 113:18-116:2.

observed that GSN's viewers [REDACTED]

[REDACTED]<sup>131</sup> In addition, GSN [REDACTED]

[REDACTED]<sup>132</sup>

[REDACTED]<sup>133</sup> And Cablevision tiered GSN notwithstanding warnings by its own research personnel about the extreme loyalty shown by GSN viewers.<sup>134</sup> Those warnings were, of course, prophetic with respect to subscribers' reaction to retiering—a reaction that

<sup>130</sup> See, e.g., GSN Exh. 60, at 12 [REDACTED]

[REDACTED] GSN Exh. 167, at CV-GSN 0288067.

<sup>131</sup> GSN Exh. 69, at CV-GSN 0410934; GSN Exh. 217, Bickham Dep. Tr. 88:8-14; see also GSN Exh. 63; GSN Exh. 45 (reflecting in sample week in November 2009 that [REDACTED]).

<sup>132</sup> See GSN Exh. 216, Dolan Dep. Tr. 122:18-25; GSN Exh. 60 [REDACTED]

[REDACTED] GSN Exh. 216, Dolan Dep. Tr. 116:3-118:4. GSN's national household and persons ratings currently are about 40 percent higher than those of WE tv. GSN Exh. 300, Brooks Supp. Written Direct, ¶ 100. Within the New York market and Cablevision's footprint specifically (where Cablevision inflates WE tv's performance by offering it favorable channel positioning and free marketing support), GSN and WE tv perform very closely in overall audience size. *Id.*, ¶¶ 44-45. (And, of course, Wedding Central was never even rated by Nielsen and did not achieve strong performance on any metric. *Id.*, ¶ 100.)

<sup>133</sup> GSN Exh. 300, Brooks Supp. Written Direct, ¶¶ 67-68.

<sup>134</sup> GSN Exh. 296.

included the enormous volume of [REDACTED] complaints that Cablevision received in a single day about the decision.<sup>135</sup>

The best evidence of GSN's value to MVPDs is, of course, that all the other major MVPDs carry GSN broadly and therefore appear to perceive broad carriage of GSN as attractive and valuable (notwithstanding that they also pay GSN comparable license fees to those paid by Cablevision).<sup>136</sup> Cablevision is a clear outlier compared to GSN's other affiliates. Its decision to place GSN on a tier reaching less than [REDACTED] of its New York subscribers in 2011 placed it [REDACTED] GSN's average carriage level in the 2011 marketplace of approximately [REDACTED] percent.<sup>137</sup> And in the New York market, [REDACTED]

[REDACTED].<sup>138</sup> WE tv achieved similar levels of penetration as of 2011. Wedding Central, on the other hand, was hardly carried by anyone. [REDACTED]

[REDACTED]<sup>139</sup>

**b) At a Minimum Any Losses Associated With Broad Carriage of GSN Would Have Been Equal to or Less Than Those Losses Associated with Broad Carriage of WE tv and Wedding Central.**

Cablevision would have saved more money by tiering its affiliated networks WE tv or Wedding Central. That is, Cablevision likely incurred a profit sacrifice by *not* tiering WE tv or

<sup>135</sup> GSN Exhs. 116 & 118.

<sup>136</sup> GSN Exh. 297, Goldhill Supp. Written Direct, ¶ 23.

<sup>137</sup> GSN Exh. 301, Singer Supp. Written Direct, ¶ 71; GSN Exh. 303, Hopkins Supp.. Written Direct, ¶¶ 17, 20.

<sup>138</sup> GSN Exh. 297, Goldhill Supp. Written Direct, ¶ 23.

<sup>139</sup> GSN Exh. 214, Broussard Dep. Tr. 48:24-49:4.

Wedding Central. Yet there is no evidence that Cablevision considered the potential savings from repositioning its own networks.

Maintaining GSN's carriage on the family tier would have cost Cablevision approximately [REDACTED] in 2011, a mere [REDACTED] of Cablevision's total programming budget.<sup>140</sup> In contrast, had it opted to move WE tv to the sports tier, Cablevision would have saved [REDACTED] per month in avoided license fees.<sup>141</sup>—or, nearly [REDACTED] in 2011 alone, [REDACTED] than the cost savings it achieved by tiering GSN. Yet Cablevision

[REDACTED]<sup>142</sup> To the contrary, even as it eviscerated its carriage of GSN, Cablevision [REDACTED], which was not [REDACTED]

[REDACTED] [REDACTED] [REDACTED]  
[REDACTED]<sup>144</sup> Even without moving WE tv to a different tier, Cablevision could have achieved a significant cost savings simply by [REDACTED]<sup>145</sup>

Remarkably, Cablevision chose not to save [REDACTED]  
[REDACTED]

<sup>140</sup> GSN Exh. 80, at CV-GSN 0427144.

<sup>141</sup> Part of the avoided costs reflects an overpayment by Cablevision for failure to enforce an MFN. *See* GSN Exh. 239, CV-GSN 0433041-42 [REDACTED]

<sup>142</sup> GSN Exh. 207, Montemagno Dep. Tr. 192:10-25; GSN Exh. 217, Bickham Dep. Tr. 64:1-8; 104:4-105:6; GSN Exh. 216, Dolan Dep. Tr. 133:10-15.

<sup>143</sup> GSN Exhs. 199 & 202; *see also* GSN Exh. 216, Dolan Dep. Tr. 132:3-133:9 (regarding Cablevision's [REDACTED]).

<sup>144</sup> *See* GSN Exh. 202, at §§ 2(d)(vii), 4(b), 5(a) & Exhibit A; GSN Exh. 207, Montemagno Dep. Tr. 118:6-119:3.

<sup>145</sup> GSN Exh. 109, at CV-GSN 0357843; GSN Ex. 41; GSN Exh. 217, Bickham Dep. Tr. 176:21-177:7, 177:16-24.

[REDACTED]<sup>146</sup> At the same time, Cablevision's own analysis establishes that WE tv viewers exhibited *lesser* viewing intensity and loyalty than did GSN's viewers.<sup>147</sup> Had Cablevision considered the economic impact of tiering WE tv based on its own methodology for value, it would have found greater savings on license fees, and lesser diminution to the value of its iO Family programming package, than realized as a result of the repositioning of GSN.

During the same time period, Cablevision also [REDACTED]<sup>148</sup> and unable to gain distribution.

Wedding Central consistently [REDACTED]

[REDACTED]<sup>149</sup>

Based on the characterization of Wedding Central by Cablevision's own executive<sup>150</sup> and the absence of carriage on most other MVPD systems, it seems implausible to claim that it was profitable for Cablevision to carry Wedding Central broadly. Cablevision's own CEO acknowledged that Cablevision's subscribers did not [REDACTED]<sup>151</sup> And while the license fees for Wedding Central were [REDACTED], broad carriage of Wedding Central presumably was not a positive value proposition due to the fact that no other large MVPD agreed to carry

<sup>146</sup> GSN Exh. 239, CV-GSN 433041-42.

<sup>147</sup> GSN Exh. 301, Singer Supp. Direct Testimony, ¶ 87.

<sup>148</sup> GSN Exhs. 83, 89, 183; GSN Exh. 208, Martin Dep. Tr. 276:24-277:22.

<sup>149</sup> GSN Exh. 158, at CV-GSN 0424966 & CV-GSN 0424968. In that same year, two of Cablevision's affiliated sports networks, MSG Varsity and MSG Plus, ranked [REDACTED] with GSN; yet, Cablevision never placed either of those sports networks on its sports tier. *Id.*

<sup>150</sup> GSN Exh. 216, Dolan Dep. Tr. 17:12-22.

<sup>151</sup> GSN Exh. 216, Dolan Dep. Tr. 17:12-22.

Wedding Central broadly, even for free.<sup>152</sup> The one exception to this was Time Warner Cable, which Cablevision *in fact paid \$1 million to carry* Wedding Central on a preferential channel.<sup>153</sup>

**c) Despite Its Mitigation Efforts, Cablevision's Distribution Division Incurred Direct and Immediate Economic Losses.**

While the value of a network to an MVPD cannot be reduced to such economic costs,<sup>154</sup> Cablevision incurred two types of direct and immediate economic costs by tiering GSN that are relevant to any cost-benefit analysis. First, Cablevision incurred costs associated with offering free sports tier subscriptions to customers who complained about GSN's repositioning. Second, Cablevision incurred costs associated with disconnecting customers. Even Cablevision's own economic expert agrees these harms give rise to an inference of discrimination intended to benefit Cablevision's programming business.

On the day after the GSN retiering, Cablevision received [REDACTED] complaints about the move.<sup>155</sup> This was approximately [REDACTED] more calls than Cablevision received in a single day in connection with its [REDACTED].<sup>156</sup> Within a week, Cablevision had received over [REDACTED] calls from customers complaining about Cablevision's decision to put GSN on the sports tier.<sup>157</sup> Many of the complaints focused on the

<sup>152</sup> GSN Exh. 214, Broussard Dep. Tr. 48:24-49:4.

<sup>153</sup> GSN Exh. 206, ¶ 8.

<sup>154</sup> GSN Exh. 305, Sapan Dep. Tr. 220:8-221:5 [REDACTED]

<sup>155</sup> GSN Exh. 116.

<sup>156</sup> GSN Exhs. 116 & 118

<sup>157</sup> GSN Exh. 132; *see also* GSN Exh. 127 [REDACTED]; GSN Exh. 129.

inappropriate nature of the sports tier for a network like GSN, which contains no sports programming and which appeals to viewers that would never subscribe to that tier.<sup>158</sup>

Cablevision tried to neutralize these complaints by [REDACTED] [REDACTED] a recognition that GSN was not suitable for a sports package on which *all* of the other networks carried were sports- or male-oriented.<sup>159</sup> And despite Cablevision's insistence that non-sports networks were on the tier, Cablevision did not consider [REDACTED]<sup>160</sup> In another effort to address consumer displeasure, Cablevision allowed [REDACTED] [REDACTED]<sup>161</sup> This [REDACTED] caused Cablevision quantifiable financial losses because it was obligated to pay license fees to every service carried on the sports tier for each of the roughly [REDACTED] subscribers upgraded to the tier [REDACTED] Because Cablevision [REDACTED] [REDACTED] [REDACTED]<sup>162</sup>

To the extent that some households cancelled their Cablevision subscriptions as a result of the tiering, Cablevision incurred additional losses due to customer churn or disconnects that resulted from the retiering.<sup>163</sup> Cablevision would have sacrificed profits of [REDACTED]

<sup>158</sup> See, e.g., GSN Exhs. 110, 113, 114, 115, 117, 119, 126 & 139.

<sup>159</sup> GSN Exhs. 121, 122, 125, 127.

<sup>160</sup> GSN Exh. 217, Bickham Dep. Tr. 115:23-116:2, 119:14-120:5; *see also id.* at 108:23-109:2 (explaining that [REDACTED]).

<sup>161</sup> GSN Exhs. 120, 124, 125.

<sup>162</sup> GSN Exh. 301, Singer Supp. Direct Testimony, ¶¶ 77, 80.

<sup>163</sup> Subscriber churn has been a matter of concern for Cablevision. See GSN Exh. 168 ("The new focus is on retaining subscribers. 'We want to improve our relationship with our existing

██████████ per subscriber per month due to customer churn in response to GSN's tiering.<sup>164</sup> GSN's economic expert estimates that ██████████ customers left Cablevision due to ██████████ ██████████.<sup>165</sup> In the absence of the sports tier subsidy,<sup>166</sup> that number would have been even greater. Dr. Singer calculates that absent the sports tier subsidy, as a result of the tiering of GSN, Cablevision would have monthly losses of at least ██████████ due to churning customers.<sup>167</sup> Moreover, it seems clear that relegating GSN to the sports tier would not have attracted enough new ██████████ sports tier subscribers for the tiering to be profitable. Cablevision would have had to attract more than ██████████ as many ██████████ sports tier subscribers as it lost from churn in order for the tiering to be profitable.<sup>168</sup>

There also is no reason to believe that Cablevision would have experienced a comparable degree of subscriber churn—or the resulting monthly losses—as a result of a tiering of WE tv or Wedding Central. To compare, Dr. Singer also analyzed the potential disconnects that would result from tiering WE tv. He estimated that only about ██████████ of WE tv households would have churned in response to a hypothetical tiering of WE tv.<sup>169</sup> That is far less than the

customers and ensure that they know that we value them and their business,' said Mr. Dolan, whose family controls the company, speaking to analysts on a conference call in February.”).

<sup>164</sup> GSN Exh. 301, Singer Supp. Direct Testimony, ¶¶ 80, 81.

<sup>165</sup> GSN Exh. 301, Singer Supp. Direct Testimony, ¶ 78.

<sup>166</sup> In speaking to the relevance of evidence of a sacrificed profit, the D.C. Circuit considered the relevance of a top-line measure of subscriber churn (*i.e.*, “that Y number would leave Comcast in the absence of broader carriage.” *Comcast Cable*, 717 F.3d at 986. Thus, it appears that the court understood that the costs of subscriber churn could be analyzed in the absence of other factors, including mitigation strategies.

<sup>167</sup> GSN Exh. 301, Singer Supp. Direct Testimony, ¶¶ 81-83.

<sup>168</sup> *Id.*, ¶ 77-78.

<sup>169</sup> *Id.*, ¶ 91.

1.9 percent that Dr. Singer determines would have been necessary to render the tiering of WE tv unprofitable for Cablevision due to the significant, reduced liability in WE tv's license fees. And there is no suggestion in the record that Cablevision experienced any incremental churn when it eventually dropped Wedding Central, much less that there would have been churn as a result of moving Wedding Central to a narrower tier.

In addition to these losses related to churn, a calculation of Cablevision's monthly loss must account for the loss in goodwill for the non-churning customers who called to complain about the tiering episode. [REDACTED] customer complaints imply a significant loss in goodwill. Goodwill is important to maintain because it permits Cablevision to raise its video prices each year; a dissatisfied customer is less inclined to tolerate a price increase. A reasonable measure of the diminution in goodwill is the [REDACTED]; Cablevision's [REDACTED] reveals its willingness to pay this [REDACTED] to any or all of the [REDACTED] complaining customers.<sup>170</sup> Applied across the customers who did not churn (but whom Cablevision nevertheless [REDACTED]), the incremental cost per month is [REDACTED], which brings the total monthly costs of tiering GSN to [REDACTED].<sup>171</sup>

Overall, Cablevision incurred costs due to the tiering that outweighed the savings in license fees. Even with highly conservative assumptions (including that Cablevision would have paid GSN its 2010 license fees without any offsets) and looking only at one slice of the economic costs to Cablevision of tiering GSN, *absent the* [REDACTED], Cablevision

<sup>170</sup> *Id.*, ¶ 82.

<sup>171</sup> *Id.*

would have incurred downstream monthly losses of [REDACTED].<sup>172</sup> However, Cablevision took the position that it would only carry GSN if the network agreed to *free carriage*.<sup>173</sup> Almost by definition, Cablevision therefore incurred even more significant net losses (or, said differently, forewent affirmative net benefits) in connection with its carriage decisions.

**II. Cablevision's Conditioning Continued Broad Carriage of GSN on DIRECTV's Launch of Wedding Central Constitutes Direct Evidence of Discrimination.**

Consistent with its pattern of using its distribution business for the benefit of affiliated networks, Cablevision refused to engage in good faith negotiations with GSN with respect to maintaining its broad, market-based carriage of the network. Instead, Cablevision made clear it would preserve GSN's carriage only if the network's partial owner, DIRECTV, agreed to launch Cablevision affiliate Wedding Central. This differential treatment by Cablevision in the terms of carriage of an unaffiliated network for the purpose of advantaging an affiliated network is the essence of what Section 616 prohibits.

Even though Cablevision gave Wedding Central favorable carriage from its inception in 2009, distributing the network to approximately [REDACTED] of its homes, Wedding Central failed to find a toehold in the marketplace. Beyond Cablevision, Wedding Central gained carriage only on [REDACTED]

[REDACTED]

<sup>172</sup> *Id.*

<sup>173</sup> GSN Exh. 297, Goldhill Supp. Written Direct, ¶ 24.

[REDACTED]<sup>174</sup> No other MVPD would agree to carry the network, [REDACTED].<sup>175</sup>

Thus, Wedding Central was eager to reach a distribution deal with DIRECTV—at the time, the second largest MVPD with nearly 20 million subscribers. According to the network’s President Kim Martin, [REDACTED]

[REDACTED].<sup>176</sup> At the end of 2009, [REDACTED]

[REDACTED].<sup>177</sup> DIRECTV declined to carry Wedding Central based on its view that the network did not merit distribution.<sup>178</sup>

[REDACTED]

[REDACTED]<sup>179</sup>

In December 2010, GSN management committee member and DIRECTV executive Derek Chang contacted Cablevision COO Tom Rutledge to urge Cablevision to reconsider its tiering decision with respect to GSN. Mr. Chang had never been involved in carriage negotiations on behalf of GSN prior to this point, but agreed to contact Mr. Rutledge because of the importance to GSN of Cablevision’s distribution and because he considered it unusual that Cablevision would communicate a final tiering decision without discussion.<sup>180</sup>

<sup>174</sup> GSN Exh. 206, at ¶ 8 (Nov. 1, 2010, Time Warner Cable-Wedding Central affiliation agreement, stating that Wedding Central would pay Time Warner Cable \$1 million per year for placement on Channel 94)

<sup>175</sup> GSN Exh. 214, Broussard Dep. Tr. 48:24-49:4; GSN Exh. 301, Singer Supp. Direct Testimony, ¶¶ 24.

<sup>176</sup> GSN Exh. 208, Martin Dep. Tr. 87:13-16.

<sup>177</sup> GSN Exh. 206, Chang Dep. Tr. 60:4-13;66:16-67:1

<sup>178</sup> *Id.* at 87:9-12.

<sup>179</sup> GSN Exh. 306, Chang Dep. Tr. 135:2-136:4.

<sup>180</sup> GSN Exh. 297, Goldhill Supp. Written Direct, ¶ 18.

Cablevision seized the opportunity to leverage its carriage of GSN to advantage its own programming. Mr. Rutledge instructed Rainbow to come up with a [REDACTED] [REDACTED].<sup>181</sup> In response to Mr. Rutledge's invitation, Mr. Sapan and Mr. Broussard made an [REDACTED] that DIRECTV launch Wedding Central.<sup>182</sup>

At Mr. Rutledge's urging, Mr. Chang contacted Mr. Sapan, and Mr. Sapan made clear that Cablevision would consider continuing GSN's broad distribution on Cablevision's systems if DIRECTV would consider giving distribution to Cablevision's Wedding Central.<sup>183</sup> The Wedding Central proposal was [REDACTED] [REDACTED].<sup>184</sup> Because DIRECTV had decided that Wedding Central did not merit distribution, it turned down Rainbow's offer. After several attempts to persuade DIRECTV to carry Wedding Central, Mr. Chang finally declined Rainbow's Wedding Central proposal during a conversation on January 31, 2011. The next day, Cablevision formally moved GSN to its sports tier.<sup>185</sup>

<sup>181</sup> GSN Exh. 98.

<sup>182</sup> [REDACTED]

<sup>183</sup> GSN Exh. 297, Goldhill Supp. Written Direct, ¶ 19, referencing GSN Exhs. 99 & 260.

<sup>184</sup> [REDACTED]

<sup>185</sup> Even after Cablevision tiered GSN, [REDACTED] [REDACTED].  
[REDACTED] . See GSN Exh. 128  
[REDACTED] ; GSN Exh. 130  
[REDACTED] ; GSN Exh. 137  
[REDACTED] .

It is undisputed that had Mr. Chang agreed to launch Wedding Central on DIRECTV, GSN could have maintained broad distribution.<sup>186</sup> This direct evidence that Cablevision conditioned the terms of carriage of GSN, an unaffiliated network, on providing a benefit and advantage to Cablevision's affiliate, Wedding Channel, establishes an independent violation of Section 616. Vertically-integrated MVPDs simply are not permitted to treat independent networks unfavorably in order to extract benefits for their affiliated networks.<sup>187</sup>

**III. The Retiering Has Unreasonably Restrained GSN's Ability To Compete.**

Cablevision's dominant position in New York, and its ownership of programming networks, provides it the incentive and ability to harm GSN. 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." Cablevision maintains a significant share of the market for video programming in the communities served by its New York-based systems and New York more generally—approximately 61 percent of its footprint—that allows Cablevision to foreclose GSN from reaching millions of viewers.<sup>188</sup>

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

[REDACTED]

[REDACTED]

<sup>186</sup> GSN Exh. 305, Sapan Dep. Tr. 238:3-240:14, discussing GSN Exh. 260 [REDACTED]  
[REDACTED].

<sup>187</sup> 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

<sup>188</sup> GSN Exh. 301, Singer Supp. Direct Testimony, ¶¶ 115.



marketing, and talent.<sup>194</sup> These, in turn, affect GSN's ability to compete, including with WE tv, which enjoys a competitive advantage from superior tier placement.<sup>195</sup>

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.<sup>196</sup> At the same time, GSN's inaccessibility advantages its competitors: [REDACTED]

[REDACTED]<sup>197</sup>

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

GSN has also suffered additional harms, which are harder to quantify, including (a) impaired ability to secure other carriage agreements, (b) inability to compete for advertisers, and (c) inability to compete for viewers. 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. For example:

a. [REDACTED]

<sup>194</sup> *Id.*

<sup>195</sup> See GSN Exh. 216, Dolan Dep. Tr. 45:8-15.

<sup>196</sup> GSN Exh. 300, Brooks Supp. Written Direct, ¶ 124; Goldhill Supp. Written Direct, ¶ 30. Indeed, WE tv's senior programming executive confirmed [REDACTED]

[REDACTED] GSN Exh. 215, Dorée Dep. Tr. 148:20-149:9, 150:10-151:15.

<sup>197</sup> GSN Exh. 300, Brooks Supp. Written Direct, ¶¶ 47-50.

[REDACTED]

- b. Certain advertisers have used the tiering event to justify 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 2012. 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.<sup>199</sup>
- 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.<sup>200</sup>

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."<sup>201</sup>

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]<sup>202</sup>

<sup>198</sup> GSN Exh. 297, Goldhill Supp. Written Direct, ¶ 34; GSN Interrog. Resp. No. 8 (Jun. 6, 2014).

<sup>199</sup> GSN Exh. 298, Zaccario Supp. Written Direct, ¶ 10.

<sup>200</sup> GSN Exh. 300, Brooks Supp. Written Direct, ¶ 123.

<sup>201</sup> GSN Exh. 300, Brooks Supp. Written Direct, ¶ 127-28 (citing Comments of The American Cable Association, MB Docket No. 14-57 (August 25, 2014), at 30, 37, Back9Network, Inc., Petition to Impose Conditions on Assignment and Transfer of Licenses, MB Docket No. 14-57 (August 25, 2014), at 1, Comments of The Tennis Channel, Inc., MB Docket No. 14-57 (August 25, 2014), at i).

<sup>202</sup> GSN Exh. 301, Singer Supp. Written Direct, ¶¶ 101-102, Table 9.

The record confirms the special importance of New York. Cablevision's own Chief Executive conceded that [REDACTED]

[REDACTED]

[REDACTED]<sup>204</sup> In

discussing the value of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>206</sup> And the CEO of Cablevision's

Rainbow Networks [REDACTED]

[REDACTED]<sup>207</sup>

Moreover, the impact of the retiering appears to extend beyond the New York market. A simple regression model shows that [REDACTED]

[REDACTED]<sup>208</sup>

Every day that GSN remains on Cablevision's sports tier, it incurs additional losses, not only in the form of lost subscriber and advertising revenue, but, in a larger sense, in its standing

<sup>203</sup> GSN Exh. 216, Dolan Dep. Tr. 11:3-18.

<sup>204</sup> *Id.* at 11:21-12:4.

<sup>205</sup> GSN Exh. 52.

<sup>206</sup> GSN Exh. 275.

<sup>207</sup> GSN Exh. 305, Sapan Dep. Tr. 198:5-7 & 200:10-18.

<sup>208</sup> GSN Exh. 301, Singer Supp. Written Direct, ¶¶ 101-102, Table 9.

in the marketplace. GSN must grapple with the possibility that Cablevision's tiering decision will trigger a [REDACTED]

[REDACTED]<sup>209</sup> Other distributors have inquired about the status of GSN's tiering on Cablevision and referenced the tiering in demanding lower rates from GSN.<sup>210</sup> Because distributors frequently look to their peers in making carriage decisions, and because it is particularly harmful for a network to be perceived in the industry as a "tiered" network rather than a "basic" network,<sup>211</sup> Cablevision's discrimination has the potential to have an even greater effect on GSN's carriage in the marketplace.

That GSN has not withered away—that it has added, overall, subscribers and revenue in recent years—does not negate the continuing harm to GSN from the Cablevision retiering, in its impact on GSN's subscribers, revenues, and ability to compete in the marketplace. The relevant benchmark is that GSN's performance has declined relative to what GSN would have achieved *absent* the tiering. "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."<sup>212</sup>

GSN's growth does not diminish the aggregate [REDACTED] in direct losses, [REDACTED] [REDACTED]—and growing every day—that is not available to create new shows, hire new talent, and market its programs. GSN continues to deal with advertising buyers who do not receive

<sup>209</sup> GSN Exh. 10 [REDACTED] *see also* GSN Exh. 9 [REDACTED]

<sup>210</sup> GSN Exh. 303, Hopkins Supp. Written Direct, ¶ 22.

<sup>211</sup> GSN Exh. 300, Brooks Supp. Written Direct, ¶ 122.

<sup>212</sup> *Tennis Channel* ¶ 67.

GSN on their basic cable tier at home and with distributors who ask why Cablevision saw fit to downgrade GSN. These harms persist every day that GSN remains on a narrowly penetrated sports tier with male-targeted networks.

**IV. Cablevision Is Required To Carry GSN On Non-Discriminatory Terms.**

In light of the foregoing, the Presiding Judge should require Cablevision to carry GSN at the same level of distribution that it carries its similarly situated network, WE tv. In addition, Cablevision should provide GSN with equitable treatment with respect to its channel placement. Finally, Cablevision should be required to pay the maximum forfeiture permitted by law, or \$375,000, because of its willful failure to comply with the Commission's rules.<sup>213</sup>

<sup>213</sup> 47 C.F.R. §§ 1.80(b)(1), 1.80(b)(4), 1.80(f).

CONCLUSION

For the reasons set forth above, judgment should be entered in favor of GSN and the requested relief granted.

Respectfully submitted,

/s/ Stephen A. Weiswasser  
Stephen A. Weiswasser  
Paul W. Schmidt  
Elizabeth H. Canter  
Laura Flahive Wu  
Stephen Kiehl  
COVINGTON & BURLING LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, D.C. 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

*Counsel to Game Show Network, LLC*

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APPENDIX A

**GLOSSARY OF ACRONYMS AND SPECIALIZED TERMS**

For the convenience of the Presiding Judge, Game Show Network submits the following glossary of acronyms and specialized terms that are used in this brief and that Game Show Network expects will be relevant to this litigation.

<b>Term</b>	<b>Definition</b>
<b>Ad Avails (or Advertising Availabilities)</b>	Advertising units during the programming of a network (usually 2-3 minutes per hour) that are made available for a cable or DBS distributor to sell pursuant to the affiliation agreement between the parties. The network reserves the remaining advertising time for itself to sell to advertisers.
<b>Affiliated</b>	A network is “affiliated” with an MVPD if the MVPD holds a financial interest in the network that is attributable under Section 616 of the Communications Act of 1934, as amended. WE tv, Wedding Central, and various other networks (including AMC, IFC, and Sundance Channel) are affiliated with Cablevision.
<b>Affiliation Agreement</b>	A contract used to license a programming network (such as GSN) to an MVPD (such as Cablevision) for distribution to the MVPD’s retail subscribers.
<b>AMC Networks, Inc.</b>	A publicly-traded company that operates cable programming networks, including WE tv, AMC, and IFC. These networks were formerly operated by Rainbow Media Holdings, which was spun-off from Cablevision in June 2011. AMC Networks, Inc. and Cablevision are under common control.
<b>Bandwidth</b>	The amount of capacity available for delivery of content through a cable system. In general, once a particular network is carried on a cable system in a particular format (e.g., analog or digital) it occupies a fixed amount of bandwidth on that system even if the cable operator blocks certain system subscribers from receiving it.
<b>Bresnan Communications</b>	Cable operator serving subscribers in Montana, Wyoming, Colorado, and Utah. Bresnan’s systems were acquired by Cablevision in December 2010 and rebranded as “Optimum West.”

**REDACTED - FOR PUBLIC INSPECTION**

<b>Broadcast Basic</b>	<i>See Tier.</i>
<b>Cablevision</b>	The Defendant in this proceeding. <i>See Cablevision Systems Corp.</i>
<b>Cablevision Systems Corp.</b>	Cablevision Systems Corp. is the Defendant in this case. It is a cable operator that, as of year-end 2010, served 3.3 million subscribers, approximately 3 million of whom resided in New York. Cablevision is a “multichannel video programming distributor” as defined in Section 76.1300(d) of the Commission’s rules. As of February 2011, Cablevision also owned cable programming networks through its programming arm, Rainbow Media Holdings.
<b>Carriage Agreement</b>	<i>See Affiliation Agreement.</i>
<b>Coverage Area</b>	When used in connection with a cable network, the number of homes that receive the cable network. Since very few networks are made available to 100 percent of cable and DBS subscribers, cable networks typically have a coverage area that consists of fewer than 100 percent of homes. “Coverage area” also can be used in connection with a cable or DBS distributor, and, in that context, the distributor’s coverage area or “footprint” refers to those homes served by the distributor.
<b>Demographics, or “demos”</b>	The demographic group (e.g., age and gender group) that predominates in a network’s audience, or is the predominant target of its programming and/or advertising. In addition, Nielsen Media Research publishes audience measurement information on the basis of certain standard demographic categories used in the industry, including women 18-49, men 18-49, persons 18-49, women 25-54, men 25-54, and persons 25-54, as well as other categories that are broken down by gender and age range.
<b>DBS</b>	Direct Broadcast Satellite. Examples of DBS operators include DIRECTV and EchoStar (also known as DISH Network).
<b>DMA</b>	Designated Market Area; a geographical designation of a media market created by Nielsen Media Research.
<b>Family Cable</b>	<i>See Tier.</i>

**REDACTED - FOR PUBLIC INSPECTION**

<b>Forced Tuning</b>	Setting a “default” tune for digital cable set-top boxes. Cablevision can “force tune,” <i>i.e.</i> , determine which default channel that appears whenever a cable box is switched on.
<b>Game Show Network (“GSN”)</b>	A cable television network launched in 1994, focusing on competition-based, relationship, and other female-oriented reality programming. Game Show Network is unaffiliated with Cablevision and is the complainant in this case.
<b>HH</b>	Household.
<b>iO Gold</b>	<i>See Tier.</i>
<b>iO Package</b>	<i>See Tier.</i>
<b>iO Silver</b>	<i>See Tier.</i>
<b>iO Sports Pak</b>	<i>See Tier.</i>
<b>iO Sports &amp; Entertainment Pak</b>	<i>See Tier.</i>
<b>License Fee</b>	The fee that an entity pays for the right to distribute programming. In the context of a relationship between a network and an MVPD, the license fee is typically expressed as an amount of money per subscriber per month.
<b>MFN</b>	Abbreviation for “Most Favored Nations.” A provision in affiliation agreements granting a distributor the right to be offered any more favorable rates, terms, or conditions subsequently offered or granted by a network to another distributor.
<b>MSO</b>	Multiple System Operator; a cable operator that operates multiple cable systems. Cablevision Systems Corp. is an MSO.

**REDACTED - FOR PUBLIC INSPECTION**

<b>MVPD</b>	Multichannel Video Programming Distributor; a distributor that, unlike a broadcast station, delivers more than one channel to viewers. There are various types of MVPDs, including MSOs and other cable operators; DBS operators; and telephone company (telco) video providers, such as Verizon FiOS and AT&T U-Verse.
<b>Nielsen Local Market Rating</b>	Total Market Rating published by Nielsen for a specific local market, as defined by Nielsen. There are two separate Nielsen systems that produce this local market data: the Nielsen Television Index (“NTI”) and the Nielsen Station Index (“NSI”), which have methodological differences. For example, the NSI system assigns viewership in 15 minute increments based on viewership of five minutes or more. The NTI system assigns viewership on a per minute basis. The NTI system is only available to provide local ratings in certain large markets.
<b>Nielsen National Rating</b>	Total market rating or coverage area rating published by Nielsen for the Nielsen national market.
<b>Penetration</b>	A network’s “penetration” is a percentage reflecting the proportion of a particular MVPD’s subscribers that receive a particular network.
<b>Rate Card</b>	The standard set of license fee rates offered by a programmer to MVPDs.
<b>Rainbow Media Holdings, LLC</b>	Programming arm of Cablevision Systems Corp. until June 2011, operating cable networks, including WE tv, AMC, IFC, and Wedding Central.
<b>Set-Top Box Data</b>	Data collected digitally from subscribers’ set-top cable boxes. Cablevision has a proprietary set-top box system, from which it generates [REDACTED] reports.

<p><b>Set-Top Box Measurements</b></p>	<p>Cablevision set-top boxes measure subscriber “tuning” to a particular cable channel. Cablevision’s standard reporting typically includes the following measurements:</p> <ul style="list-style-type: none"><li>█ [REDACTED]</li><li>█ [REDACTED]</li></ul>
<p><b>Subscriber (also known as a “Sub”)</b></p>	<p>A customer of an MVPD.</p>
<p><b>Telco</b></p>	<p>Telephone Company. Refers to telephone companies, such as Verizon and AT&amp;T, that provide multichannel video service and that, therefore, are MVPDs.</p>

<p><b>Tier</b></p>	<p>A package of channels on an MVPD’s system that are sold as a unit. Cable operators frequently arrange tiers in a hierarchy so that a subscriber who purchases a “higher” (<i>i.e.</i>, more expensive) tier also receives programming contained in “lower” (<i>i.e.</i>, less expensive) tiers.</p> <p>Game Show Network understands that most Cablevision cable systems made available these tiers, among others, as of February 2011, when Cablevision tiered GSN<sup>214</sup>:</p> <ul style="list-style-type: none"> <li>• <b>Broadcast Basic:</b> The most broadly penetrated tier of programming, available to all of Cablevision’s customers.</li> <li>• <b>iO Family Cable:</b> A tier of programming made available to about [REDACTED] of Cablevision’s customers. GSN was moved from this tier onto the Sports &amp; Entertainment tier. Cablevision affiliates WE tv, AMC, Fuse, and MSG were offered on this tier. Similar tiers are now offered by Cablevision</li> <li>• <b>iO Package:</b> An intermediate tier of programming, including Cablevision affiliate Wedding Central when it was on the air. The tier reached [REDACTED] of Cablevision subscribers.</li> <li>• <b>iO Silver:</b> The second “highest” tier then offered, adding certain premium movie channels HBO, Showtime, and Starz.</li> <li>• <b>iO Gold:</b> The “highest” tier then offered, adding premium movie channels like Cinemax.</li> <li>• <b>iO Sports &amp; Entertainment Pak:</b> A pay-extra tier that requires customers to pay \$6.95 each month. GSN was placed on this tier in February 2011. Prior to the addition of GSN, the package was named the “iO Sports Pak.” The tier is now distributed to about [REDACTED] of Cablevision’s customers.</li> </ul>
<p><b>Vertically Integrated MVPD</b></p>	<p>A company that has a financial interest in both an MVPD and a video program service. Cablevision is “vertically integrated” because it owns both cable systems and cable networks, such as WE tv and Wedding Central.</p>

<sup>214</sup> Cablevision modified its packaging and pricing in 2012. Several of the tiers discussed below have been rebranded or reconfigured slightly to constitute the following currently-available packages: Broadcast Basic, Optimum Economy, Optimum Value, Optimum Preferred, Optimum Silver, Optimum Gold, and Optimum Sports & Entertainment Pak.

**REDACTED - FOR PUBLIC INSPECTION**

<b>WE tv</b>	A cable television network launched in 1997 as “Romance Classics” and later rebranded as “WE: Women’s Entertainment” and then “WE tv.” It is operated by AMC Networks, Inc. (formerly by Rainbow Media Holdings) and is an affiliate of Cablevision.
<b>Wedding Central</b>	A cable television network launched in August 2009 featuring wedding-related programming. It was operated by Rainbow Media Holdings and was an affiliate of Cablevision until it was shut down in June 2011.

**APPENDIX B**

**LIST OF KEY INDIVIDUALS  
PRESENTLY OR FORMERLY AT GSN & CABLEVISION**

<b>GSN</b>	
Derek Chang	Former Executive Vice President of Content Strategy and Development, DIRECTV & Former Member of GSN Management Committee
Dennis Gillespie	Former Senior Vice President, Distribution
David Goldhill	President & Chief Executive Officer
Kelly Goode	Former Senior Vice President, Programming
Dale Hopkins	Executive Vice President, Distribution Former Chief Marketing Officer
John Zaccario	Executive Vice President, Advertising Sales
<b>CABLEVISION</b>	
John Bickham	Former President, Cable & Communications, Cablevision Systems Corp.
Robert Broussard	President, AMC Networks Distribution (formerly Rainbow Media Holdings)
James Dolan	President & Chief Executive Officer, Cablevision Systems Corp.
Kimberly Martin	President and General Manager, WE tv Former President and General Manager, Wedding Central
Thomas Montemagno	Executive Vice President, Programming, Cablevision Systems Corp.
Thomas Rutledge	Former Chief Operating Officer, Cablevision Systems Corp.

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Josh Sapan	President & Chief Executive Officer, AMC Networks, Inc. (formerly Rainbow Media Holdings)
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CERTIFICATE OF SERVICE

I, Stephen Kiehl, hereby certify that on June 2, 2015, copies of the foregoing were served by electronic mail and hand and/or overnight delivery upon:

Tara M. Corvo  
Ernest C. Cooper  
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 LLP  
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

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

**REDACTED - FOR PUBLIC INSPECTION**

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

*Counsel to the Enforcement Bureau*

/s/ Stephen Kiehl

Stephen Kiehl