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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	)	

TO: Chief Administrative Law Judge Richard L. Sippel

TRIAL BRIEF OF DEFENDANT CABLEVISION SYSTEMS CORP.

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Defendant Cablevision Systems Corporation ("Cablevision") respectfully submits this trial brief in the above-captioned program carriage complaint proceeding brought against Cablevision by Complainant Game Show Network, LLC ("GSN").[1]

PRELIMINARY STATEMENT

Under Section 616 of the Communications Act, a network claiming to have suffered discrimination with respect to the terms and conditions of carriage must show either direct evidence of discrimination or circumstantial evidence that it is similarly situated to an affiliated network that has received preferential treatment in the terms and conditions of carriage on the basis of affiliation.[2] The network has the further burden of proving that discrimination actually motivated the carriage decision. And it must also prove that the discrimination unfairly restrained its ability to compete.

GSN can do none of this. GSN will not be able to discharge its burden of proving that the 2010 decision by Cablevision to move GSN to a less broadly distributed tier of service had anything at all to do with GSN's lack of affiliation with Cablevision. To the contrary, the evidence at trial will show that Cablevision retiered GSN to eliminate [redacted] per year from its rapidly escalating programming budget and on the basis of a correct business assessment that Cablevision would benefit more from retiering GSN, which had little appeal to the overwhelming majority of Cablevision's subscribers, than from carrying it broadly.

Moreover, GSN will fail to demonstrate that it is similarly situated to any network affiliated with Cablevision. Although it now claims to have been similarly situated to WE tv and Wedding Central—women's networks run by a Cablevision affiliate—contemporaneous proof

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[1] As used herein, "GSN" refers to both Game Show Network, LLC and/or the programming network owned by that entity, GSN.

[2] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

and expert testimony will compel the conclusion that GSN was, as its name clearly states, a cable programming network that transmitted and focused on game shows, rather than women's programming. GSN's core programming of new and recycled classic game show programming bore no resemblance to the women's and wedding-centric programming carried on WE tv and Wedding Central. As a result, there is no meaningful similarity between GSN and those networks on the core metrics that the Presiding Judge has examined in prior proceedings, such as programming genre, target audience and actual audience demographics.

Finally, as we showed in our summary decision motion and will demonstrate at trial, GSN cannot show that it has been unreasonably restrained in any way in its ability to compete fairly in the marketplace by Cablevision's 2010 carriage decision. To the contrary, in the four-plus years since that decision, GSN has [redacted].

Focusing first on direct evidence of discrimination on the basis of affiliation, there is a complete absence of proof. No witness will testify and no document will demonstrate that Cablevision's decision with respect to GSN's carriage had anything to do with favoring networks affiliated with Cablevision. To the contrary, the undisputed evidence shows that Cablevision's decision to retier GSN resulted from an analysis of the cost of the network compared to its limited value to Cablevision's subscribers. Under increasing pressure from programming networks seeking higher subscriber fees and broadcast stations demanding significant payments for retransmission consent, Cablevision weighed the costs and benefits of continuing to offer GSN to all of its expanded basic cable subscribers and determined that the former outweighed the latter. The result: a savings of more than [redacted] per year.

In making its reasoned, good-faith business decision, Cablevision examined [redacted] revealing GSN to be one of the least popular

networks carried on a highly penetrated tier of service. Cablevision considered that its expired contract with GSN, in contrast to many of its programming agreements, [redacted] Weighing these factors, and the potential cost savings, Cablevision made an informed business judgment that few subscribers would disconnect as a result of the reduced carriage of GSN and that a loyal cadre of GSN viewers would, in fact, buy the tier of service where GSN was placed in order to continue to view the network. In short, the contemporaneous evidence demonstrates that Cablevision made a legitimate decision to reduce the carriage of GSN on the basis of objective business and financial considerations, not in any effort to protect its affiliated networks. Nothing in Section 616 permits GSN to challenge this informed business judgment, and for this reason alone GSN cannot prevail on its program carriage complaint.

GSN will nonetheless argue, and attempt to prove through expert testimony, that the D.C. Circuit's *Tennis Channel* decision identified "new tests" for discrimination that somehow required Cablevision to engage in an even more explicit and quantitative evaluation of the costs and benefits of its GSN carriage decision. The Commission has already rejected the argument that the D.C. Circuit did anything but apply existing law in finding that Comcast made its Tennis Chanel carriage decision on the basis of legitimate business considerations.[3] Nothing in the *Tennis Channel* decision required Cablevision to perform a specific "net benefit" test to justify its good faith business decision that it would save over [redacted] per year in license fees by retiering GSN. And, in any case, such a net benefit test bears out Cablevision's contemporaneous belief that the combination of carriage fee savings and new revenues generated

[3] *Comcast Cable Comm'ns, LLC* v. *FCC*, 717 F.3d 982 (D.C. Cir. 2013) ("*Tennis Channel*"); *see also Tennis Channel, Inc.* v. *Comcast Cable Comm'ns, LLC*, Order, 30 FCC Rcd. 849 (MB 2015) ("*Tennis Channel* Order").

by loyal GSN viewers who would subscribe to the new tier of service on which the network was carried would, in fact, "benefit" Cablevision.

Nor will GSN fare any better in its attempt to prove circumstantial evidence of discrimination. That is because GSN cannot prove that it was similarly situated to a network affiliated with Cablevision at the time of the retiering. The evidence will demonstrate that GSN bore little resemblance to WE tv and Wedding Central, the two purportedly similarly situated networks affiliated with Cablevision:

- **Genre.** Cablevision's programming expert, Michael Egan, will show that GSN and WE tv had very different programming genres. In the period leading up to and during the time of the retiering, GSN's programming consisted almost entirely of game shows and gaming programs, programming that WE tv did not carry.

- **Target Programming.** GSN's affiliation agreements with MVPDs and presentations to MVPDs and advertisers state that GSN's programming consisted of [redacted] WE tv's affiliation agreements and presentations, on the other hand, explicitly demonstrate the network's focus on [redacted]

- **Program Schedule.** [redacted] GSN overwhelmingly dedicated its actual programming schedule to game shows and gaming, focusing on original game shows, reruns of classic games shows, and two nights per week of primetime poker shows geared specifically toward men. WE tv's programming line-up during the same period consisted exclusively of shows on topics of interest to women, including original reality series and specials not found on GSN.

- **Target Audience.** GSN consistently represented itself to MVPDs and advertisers as a network that [redacted] WE tv, by contrast, consistently marketed and presented itself during the relevant time period as [redacted]

- **Actual Audience.** GSN's game show and gaming-related content attracted a broad audience of men and women, which GSN embraced. Multiple GSN presentations to advertisers and affiliates during the period in which Cablevision made its retiering decision show that [redacted]

[redacted] In the same period, women consistently made up more than [redacted] percent of the WE tv audience. And there is a significant age difference between the older women watching GSN and the younger women watching WE tv, resulting in little overlap in the audience for the two networks.

- **Target Advertising**. The significant differences in the audience demographics for GSN and WE tv resulted in little meaningful competition for advertising dollars between the networks.

In short, the absence of either direct or circumstantial evidence of discrimination dooms GSN's claim. But GSN's complaint fails for yet another reason. As we showed in our summary decision motion, GSN will be unable to prove at trial that Cablevision's carriage decision unreasonably restrained its ability to compete fairly. To succeed on a Section 616 claim, it is not enough for GSN to show it would have been better off if Cablevision had not re-tiered it; that is always the case in carriage disputes. Rather, the statute explicitly requires GSN to establish that the adverse carriage decision on the basis of non-affiliation has resulted in an unreasonable restraint on its ability to compete fairly in the video programming marketplace.

That it cannot do. Unlike fledgling networks that have brought prior carriage complaints, GSN has approximately [redacted] subscribers, and will soon grow to [redacted]. And although GSN speculated in its carriage complaint that Cablevision's decision could lead other MVPDs to follow suit, the evidence shows that [redacted] GSN also has [redacted] despite its claim that the loss of subscribers in the New York market served by Cablevision would cripple its ability to attract advertising. By every metric, GSN is competing and competing well.

Unable to dispute any of this, GSN maintains that it has been unreasonably restrained in Cablevision's footprint. As set out in our summary decision brief, there is no

language in the statute that would support a finding of inability to compete on the facts presented here. Whether one assesses the New York DMA or Cablevision's New York footprint, the evidence shows that GSN is carried broadly by Cablevision's competitors, including DIRECTV, DISH, and Verizon FiOS. The number of subscribers served by Cablevision's local competition—most notably Verizon FiOS—has grown since the date of the retiering and continues to grow, while Cablevision's subscriber base shrinks. This strong and strengthening competition restrains Cablevision and makes it impossible to conclude that Cablevision's decision to carry GSN less broadly has impeded GSN's ability to compete.

Finally, and particularly in light of the absence of competitive harm, any remedy requiring Cablevision to restore GSN to broader carriage would violate Cablevision's First Amendment rights. The prohibition on discrimination contained in Section 616 is premised on the outdated view that a cable operator such as Cablevision has market power that would allow it to exercise "bottleneck" control over the distribution of programming to consumers. Given the intensely competitive landscape in which Cablevision now operates, there is no longer any legitimate reason to impinge upon Cablevision's editorial discretion to decide which networks to carry. The decision to restrict GSN's carriage represented a legitimate exercise of that discretion and any remedy that would reverse it necessarily fails to survive constitutional scrutiny.

PROCEDURAL POSTURE AND ISSUES TO BE DETERMINED

On May 9, 2012, the Commission's Media Bureau issued a Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture referring GSN's program carriage complaint against Cablevision for a hearing before an Administrative Law Judge.[4] The Media

[4] *Game Show Network, LLC* v. *Cablevision Sys. Corp.*, Hr'g Designation Order & Notice for Opportunity for Hr'g for Forfeiture, 27 FCC Rcd. 5113 (MB 2012) (hereinafter "HDO").

Bureau specifically designated GSN's complaint for hearing on the following issues:

> (a) To determine whether Cablevision has engaged in conduct the effect of which is to unreasonably restrain the ability of GSN to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by GSN, in violation of Section 616(a)(3) of the Act and/or Section 76.1301(c) of the Commission's Rules; and
>
> (b) In light of the evidence adduced pursuant to the foregoing issue, to determine whether Cablevision should be required to carry GSN on its cable systems on a specific tier or to a specific number or percentage of Cablevision subscribers and, if so, the price, terms, and conditions thereof; and/or whether Cablevision should be required to implement such other carriage-related remedial measures as are deemed appropriate.[5]

The Media Bureau noted that it had not reached the merits of the issues designated for hearing and directed the Presiding Judge "to develop a full and complete record and to conduct a *de novo* examination of all relevant evidence in order to make an Initial Decision."[6] Between the date of the hearing designation and February 2013, the parties engaged in voluminous pre-hearing discovery, producing well over five hundred thousand pages of documents and taking nineteen fact and expert depositions. In March 2013, the parties served and filed trial exhibits, written direct testimony, deposition designations, objections to proffered evidence, and trial briefs.

On March 26, 2013, given the pendency of the D.C. Circuit's ruling in *Tennis Channel*, the Presiding Judge granted the parties' request to postpone trial until after resolution of that case.[7] Following the opinion in *Tennis Channel*, in which the D.C. Circuit reversed the

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[5] HDO at 5136-37.

[6] HDO at 5114.

[7] *Game Show Network, LLC* v. *Cablevision Sys. Corp.*, Order, FCC 13M-7 (Mar. 26, 2013).

Commission's holding that Comcast had engaged in unlawful discrimination, the Presiding Judge issued an order canceling the hearing in this case and allowing the parties to consider the potential impact of *Tennis Channel* on their respective positions.[8] In April of 2014, the Presiding Judge ordered limited supplemental discovery GSN requested to address the *Tennis Channel* decision.[9] Since then, the parties have exchanged interrogatories and responses, produced additional documents, served supplemental expert reports, and conducted an additional six expert and fact depositions. On April 29, 2015, Cablevision filed a motion for summary decision on the grounds that GSN cannot prove, under any set of facts, that Cablevision's retiering decision unreasonably restrained GSN's ability to compete. That motion is pending.

ARGUMENT

I. THE LEGAL STANDARD

The complainant in a Section 616 case bears the burden of proving by a preponderance of evidence that the defendant MVPD discriminated against it on the basis of affiliation.[10] To satisfy this burden, GSN must first present either direct evidence supporting its claim that Cablevision discriminated on the basis of affiliation or circumstantial evidence establishing that such discrimination occurred.[11] The circumstantial evidence must demonstrate

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[8] *Game Show Network, LLC* v. *Cablevision Sys. Corp.*, Order, FCC 13M-12 (June 25, 2013).

[9] *Game Show Network, LLC* v. *Cablevision Sys. Corp.*, Order, FCC 14M-13 (Apr. 17, 2014).

[10] *Tennis Channel, Inc.* v. *Comcast Cable Commc'ns*, Initial Decision, 26 FCC Rcd. 17160, 17204 (ALJ 2011) (citing *Herring Broadcast, Inc. d/b/a WealthTV* v. *Time Warner Cable, Inc.*, Recommended Decision, 24 FCC Rcd. 12967, 12995 (ALJ 2009) (hereinafter "*WealthTV*")); *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005) (noting where statute is silent, "the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims").

[11] *Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report & Order, 26 FCC Rcd. 11494, 11504 (2011) (hereinafter "Second Report & Order"). GSN's principal claim revolves around WE tv, a long-established women's programing network operated by Rainbow (now AMC Networks). Wedding Central, a spin-off of WE tv, was only on the air for a brief time [redacted].

that (i) GSN's programming is "similarly situated" to programming provided by a network affiliated with Cablevision, and (ii) Cablevision has treated the two similarly situated networks differently with respect to the selection, terms, or conditions of carriage.[12]

Even if it is able to demonstrate discrimination on the basis of non-affiliation, GSN bears the burden of proving that its unaffiliated status "actually motivated" the cable operator's decision.[13] Therefore, the presence of "legitimate reasons for" Cablevision's carriage decision "borne out by the record and not based on the programmer's affiliation or non-affiliation," preclude a finding of discrimination.[14] Examples of legitimate business reasons for an adverse carriage decision include a lack of subscriber demand and interest, the costs of carriage, unfavorable terms and conditions of carriage, lack of appeal to advertisers and better alternative options.[15]

If it can make out a showing of impermissible discrimination, GSN has the additional burden of proving that the adverse carriage decision unreasonably restrained its ability to compete fairly.[16] As the Commission has recognized in interpreting this provision, "Section

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[12] 47 C.F.R. § 76.1302(d)(3)(iii)(B); *see also* Second Report & Order at 11504. The regulations set out a list of factors relevant to the Presiding Judge's determination that GSN and Cablevision are similarly situated: genre, ratings, license fee, target audience, target advertisers, and target programming. The Commission, in an example concerning the similarity of two music channels, suggests that the use of the license fee and ratings factors are not meant to demonstrate similarity on a standalone basis, but rather can distinguish between networks in an instance where the two networks based on other factors, such as programming similarity, appear to be similarly situated. *See id*.

[13] *See WealthTV*, 24 FCC Rcd. at 12997.

[14] *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network* v. *Time Warner Cable Inc.*, Mem. Op. & Order, 25 FCC Rcd. 18099, 18104 (2010); *see also Tennis Channel*, 717 F.3d at 985 ("Thus, if the MVPD treats vendors differently based on a reasonable business purpose (obviously excluding any purpose to illegitimately hobble the competition from Tennis), there is no violation.").

[15] *See TCR Sports Broad.*, 25 FCC Rcd. at 18104, 18106, 18111-12 (noting subscriber demand, costs of carriage and bandwidth, and decisions of other cable operators as legitimate factors); *WealthTV*, 24 FCC Rcd. at 12998 (noting terms and conditions of carriage and alternative options as relevant factors).

[16] 47 C.F.R. § 76.1301(c).

616 . . . appl[ies] only where an anticompetitive impact is shown in a particular case."[17] The pertinent consideration is whether the lack of broader carriage on Cablevision limits the ability of GSN to compete over the long term.[18] In prior Section 616 cases, this assessment has been made "based on the impact of the defendant MVPD's adverse carriage action on the programming vendor's subscribership, license fee revenues, advertising revenues, ability to compete for advertising and programming, and ability to realize economies of scale."[19] Therefore, whether a national programming network's "ability to compete" is to be judged based on its performance in the national market—as the Commission has found in past carriage cases[20]—or in some undefined local market—as GSN incorrectly advocates in this case—a complainant cannot satisfy its burden "merely by showing that the defendants' individual carriage decisions adversely affected its competitive position in the marketplace."[21] Section 616 "demand[s] proof of the significant or material detrimental effect implicit in the term 'unreasonable restraint.'"[22]

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[17] Br. of Fed. Comm. Commission at 42, *Time Warner Cable Inc. v. FCC*, 729 F.3d 137 (2d Cir. 2013) No. 11-4138; *see also Time Warner Cable*, 729 F.3d at 164 (Section 616 "prohibits only affiliation-based discrimination by MVPDs and only when such discrimination is shown to have an anticompetitive effect").

[18] *See Tennis Channel, Inc.* v. *Comcast Cable Commc'ns*, Mem. Op. & Order, 27 FCC Rcd. 8508, 8539 (2012) (finding harms imposed on Tennis Channel by Comcast's tiering decision were "of such a magnitude that they clearly restrain Tennis Channel's ability to compete fairly with similarly situated networks"); *TCR Sports* v. *Comcast,* Mem. Op. & Hr'g Designation Order*,* 21 FCC Rcd. 8989, 8994 (MB 2006) ("TCR argues that without carriage by Comcast, it will be impossible for MASN to reach the necessary level of subscribership to achieve long-term financial viability, and that Comcast's refusal to carry MASN thus restrains TCR from competing fairly.").

[19] Second Report & Order at 11505 n.60 (citing decisions by Media Bureau).

[20] *See Tennis Channel*, 27 FCC Rcd. at 8539.

[21] *WealthTV*, 24 FCC Rcd. at 13002.

[22] *See Time Warner Cable*, 729 F.3d at 166; *see also Tennis Channel*, 717 F.3d at 991-92 (Kavanaugh, J., concurring) (concluding that while Section 616 "references discrimination against competitors . . . [it] does not ban such discrimination outright"). In his *Tennis Channel* concurrence, Judge Kavanaugh emphasized that Section 616 "applies only to discrimination that amounts to an unreasonable restraint under antitrust law," and thus, discrimination "become[s] potentially problematic . . . only when a video programming distributor possesses market power." *Id.* at 988, 992. Cablevision acknowledges the Presiding Judge's finding in an earlier case that "arguments that antitrust standards are encased in sections 616 and 76.1301(c) are unpersuasive," *WealthTV*, 24 FCC Rcd. at 13001, but respectfully submits that in light of *Tennis Channel*, this analysis is not

With these standards in mind, we turn to the evidence. It will show that GSN will neither be able to discharge its burden of proving discrimination nor prove that it has been unreasonably restrained in its ability to compete.

II. THERE IS NO DIRECT EVIDENCE THAT CABLEVISION DISCRIMINATED AGAINST GSN BASED ON AFFILIATION

A. Cablevision Made a Reasonable Business Decision to Retier GSN

There is no document, no testimony—no evidence at all—showing that Cablevision's repositioning of GSN in December 2010 had anything whatsoever to do with WE tv or Wedding Central. Nor is there any proof that Cablevision based its decision on the affiliation or non-affiliation of GSN.

Tom Montemagno, Executive Vice President of Programming for Cablevision, will testify about the history of Cablevision's carriage relationship with GSN. The network first launched on Cablevision's systems in [redacted] under a carriage agreement [redacted] The [redacted] Carriage Agreement [redacted] Specifically, it provided that [redacted] GSN and Cablevision subsequently

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consistent with the law of Section 616 claims. *See id.* at 991 n.1 (Kavanaugh, J., concurring) ("Cable Act provisions such as Section 616 that mirror existing antitrust proscriptions serve an important regulatory purpose, akin to adding new police officers to enforce an existing law."). In all events, under either analytical framework, GSN has suffered no unreasonable restraint.

[23] Montemagno Direct Test. ¶ 11.

[24] CV Ex. 4 at 3 (emphases added); Montemagno Direct Test. ¶¶ 11-12. GSN's claim boils down to an argument that Cablevision was not entitled to exercise its unequivocal rights under the parties' carriage agreement. As Judge Edwards explained in his *Tennis Channel* concurrence, under the Commission's regulations GSN's claim

entered into renewals that extended the term of carriage until [redacted] and [redacted] but [redacted] Beginning in 2005 the parties [redacted]

Mr. Montemagno will testify that, in the context of preparing the programming budget for 2011, and in response to a directive from the President of Cablevision, in July 2010 he and other members of Cablevision's programming and video product management teams undertook an analysis of the costs and benefits of carrying GSN.[28] The analysis revealed that, although Cablevision paid GSN [redacted] per year in license fees, very few Cablevision subscribers watched GSN: according to one analysis, in 2010 the network ranked [redacted] out of [redacted] channels on Cablevision's broadly distributed expanded basic tier, excluding those

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is time-barred because it was brought more than one year after Cablevision and GSN entered into the agreement that gave Cablevision those rights. *Tennis Channel*, 717 F.3d at 1003-1004 (Edwards, J., concurring) (statute of limitations began to run when Tennis Channel entered into a carriage agreement that gave Comcast the "unfettered right to carry Tennis Channel on a distribution tier of Comcast's own choosing"); 47 C.F.R § 76.1302(h).

[25] CV Exh. 4 at 12; Montemagno Direct Test. ¶ 16.

[26] Montemagno Direct Test. ¶¶ 17-25, 35-37.

[27] *Id.* ¶¶ 35-37.

[28] The video product management group is responsible for putting together the packages of channels, movies, and other content that are available for customers to purchase. *See id.* ¶ 2.

networks with limited availability on Cablevision systems).[29] Mr. Montemagno also considered it important that [redacted]

Mr. Montemagno will review the decision-making process that led to the re-tiering. In the summer of 2010, Cablevision faced challenges from escalating programming fees demanded by cable networks and significant retransmission consent payments sought by broadcast networks and their affiliates.[31] Earlier that year, Cablevision had been drawn into a bruising series of battles with programmers, including [redacted], each of which demanded and ultimately extracted significant increases in fees from Cablevision.[32] There can be no dispute concerning the cost pressures facing Cablevision and other MVPDs at that time; in fact, [redacted]

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29 *Id.* ¶ 47. GSN will argue that Cablevision could not have been motivated to save [redacted] out of an annual programming budget that approached [redacted] GSN's argument is simply wrong, as confirmed by Mr. Montemagno, who will testify that programming expenditures [redacted] and have been increasing throughout that period. *See id.* ¶¶ 40-43. Mr. Montemagno will further testify that, even in the context of a large programming budget such as Cablevision's, [redacted] in annual savings is material, and that his group tries to eliminate expenses where it can. *See id.* ¶¶ 45-46.

30 *See* [redacted] Montemagno Direct Test. ¶ 13-14.

31 Montemagno Direct Test. ¶ 26.

32 *Id.* ¶¶ 42-43.

33 [redacted]

Cablevision executives returned their attention to GSN in the fall of 2010, as part of the annual program budgeting process.[34] Those discussions once again brought GSN to the forefront as a candidate for deletion and cost savings, along with other networks such as [redacted] a network with a contract expiring at the end of 2010 which also had limited viewership and customer appeal.[35] Cablevision confirmed the low level of interest among its subscribers in GSN and made the judgment that removing the service from a highly penetrated tier would not lead an appreciable number of customers to disconnect from Cablevision in favor of one of its satellite or telco competitors.[36] Although [redacted], Cablevision instead made the decision to move GSN to its Sports and Entertainment tier, where it would remain available to the small number of Cablevision subscribers who watched the service with regularity.[37]

Mr. Montemagno will unambiguously confirm that neither he nor anyone else at Cablevision took into account the interests of WE tv and Wedding Central in making the GSN carriage decision.[38] No witness will contradict him. There is no document among the tens of

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[34] Montemagno Direct Test. ¶¶ 50-51.

[35] *Id.* ¶¶ 52-56. Cablevision in fact decided to drop [redacted] altogether and its product team began preparations for the move. *See* CV Exh. 141 [redacted] However [redacted] ultimately agreed to significantly reduced license fees and Cablevision was able to conclude a new carriage agreement with it. *See* Montemagno Direct Test. ¶ 58.

[36] Montemagno Direct Test. ¶ 55.

[37] *Id.* ¶ 59. GSN will argue that the decision made by Cablevision to place GSN on a tier largely populated by networks targeted at male audiences in and of itself demonstrates discriminatory treatment. That is wrong. The evidence will show simply that the sports tier was the only alternative to deleting GSN altogether, a decision, which if taken by Cablevision, would not have been discriminatory. And although GSN protests its placement in a package with sports programming, Cablevision's decision was not unique. [redacted]

[38] Montemagno Direct Test ¶¶ 60-61.

thousands produced by Cablevision showing or even suggesting that affiliation with WE tv and Wedding Central motivated Cablevision's decision to reposition GSN. And both Robert Broussard (President, AMC Networks Distribution, the distribution arm of AMC Networks, Inc., parent company of Rainbow Media Holdings) and Elizabeth Dorée (WE tv's Senior Vice President, Programming Strategy & Acquisitions) will explain that Cablevision did not consult with its programming affiliate in connection with its decision to retier GSN.[39]

Cablevision's lack of consideration of WE tv and Wedding Central is further demonstrated by its contemporaneous decision to carry another unaffiliated women's network: OWN, the Oprah Winfrey Network.[40] Had Cablevision been seeking to protect its affiliated women's networks at the expense of GSN, it would not have launched another independent network that is indisputably similar in terms of programming and target audience to WE tv and Wedding Central, and which has, [redacted] In short, the evidence will show Cablevision's carriage decision concerning GSN to be the product of precisely the type of non-discriminatory analysis that a cable operator such as Cablevision should perform in the ordinary course of its business to offer the most compelling service to its subscribers. That decision cannot support a finding of discrimination on the basis of affiliation under Section 616.[42]

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[39] Broussard Direct Test. ¶ 25; Dorée Direct Test. ¶ 7.

[40] Montemagno Direct Test. ¶ 61. Likewise, Cablevision's decision to launch Hallmark Movie Channel (another women-oriented network) and many other independent networks in the last few years was motivated by independent judgment about the value of this programming to Cablevision's customers, and not by any concern for Cablevision's affiliated networks. *See id.* ¶¶ 4-5, 61.

[41] *See* Dorée Direct Test. ¶¶ 24, 26; CV Exh. 159 at 5.

[42] In the past, relying on the Presiding Judge's decision in *Tennis Channel,* GSN has argued that Cablevision had an obligation to engage in a simultaneous cost-benefit analysis with respect to its affiliated networks. But the D.C. Circuit rejected the conclusion that Comcast's "insufficiently rigorous" cost-benefit analysis in that case was evidence of discrimination. *Tennis Channel*, 717 F.3d at 987. In any case, had Mr. Montemagno and the

GSN nonetheless attempts to reverse-engineer a claim of direct discrimination by claiming that discussions between the parties subsequent to the retiering decision show that Cablevision repositioned GSN in an effort to gain carriage for Wedding Central on DIRECTV. The evidence, however, shows that GSN and its owner, DIRECTV, not Cablevision, injected Wedding Central into the GSN carriage discussions. After Cablevision notified GSN of the repositioning on December 3, 2010, GSN Board member and DIRECTV executive Derek Chang urged Cablevision not only to reconsider the GSN carriage decision, but specifically to [redacted] [43] And although Mr. Chang had subsequent discussions with Mr. Broussard and Josh Sapan (Rainbow's president) about DIRECTV's willingness to carry Wedding Central,[44] there is no evidence at all that Cablevision made the decision to re-tier GSN in order to induce such discussions.

B. The *Tennis Channel* Decision Does Not Provide GSN with an Independent Basis for Claiming that Cablevision Discriminated on the Basis of Affiliation

In the absence of any direct evidence of discrimination by Cablevision, GSN urges the Presiding Judge to focus on the "new tests" the D.C. Circuit created in the *Tennis Channel* opinion. But the Commission put to rest any suggestion that *Tennis Channel* changed

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programming team reviewed [redacted] data concerning WE tv, they would have seen that WE tv was considerably more popular among Cablevision subscribers than GSN, ranking [redacted] *See* CV Exh. 117 (Email from Weinstein to Montemagno re: Game Show Net). Therefore, Cablevision was fully justified in maintaining broad carriage of WE tv, [redacted] while repositioning GSN, [redacted] Montemagno Direct Test. ¶ 78. Furthermore, unlike the situation with respect to GSN, [redacted]

43 Montemagno Direct Test. ¶ 65; *see also* [redacted]

44 [redacted]

the law when it rejected Tennis Channel's attempt to re-open that proceeding.[45] The law governing GSN's claim is unchanged: Cablevision's "reasonable business purpose" for retiering GSN defeats any claim that Cablevision discriminated on the basis of affiliation.[46]

Nevertheless, GSN will attempt to undermine the business justification for Cablevision's decision by mounting an *ex post* attack on the cost-savings rationale. First, GSN will argue that Cablevision did not account for the "net benefit" it would have accrued from continuing to carry GSN broadly, and that Cablevision's sacrifice of this benefit proves that Cablevision made its retiering decision with discriminatory intent. Specifically, GSN's expert, Dr. Hal Singer, will testify that he calculated the "losses" Cablevision ignored by ascribing a monetary value to Cablevision customers who called to complain *after* the retiering, customers who received a short-term promotion from Cablevision [redacted] *after* the retiering, and the small number of customers who, by his calculation, "churned" away from Cablevision *after* the retiering.[47] But neither Dr. Singer nor any other witness will contradict Mr. Montemagno's testimony that, in making his decision *before* the retiering, he and others at Cablevision both assessed the cost-savings in license fees the company would not have to pay if GSN were retiered and concluded [redacted] that GSN was a relatively unpopular network that would not cause a meaningful loss of subscribers.[48] Nor will any witness or document generated *before* the retiering contradict Mr. Montemagno's report

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[45] *See Tennis Channel* Order, 30 FCC Rcd. at 851 ("Tennis Channel claims that the court established 'new tests' for determining whether an MVPD's denial of a request for carriage is unlawfully discriminatory . . . . We disagree.").

[46] *Tennis Channel*, 717 F.3d at 985.

[47] Supplemental Report of Hal J. Singer, Ph.D., dated Oct. 29, 2014 ("Singer Supp. Report") ¶¶ 4-8.

[48] Montemagno Direct Test. ¶¶ 44-59.

to senior management [redacted]

Nevertheless, at trial GSN will attempt to make much of the fact that Cablevision received [redacted] customer complaints about the retiering. These complaints were more numerous than Cablevision expected, but they were short-lived, addressed through short-term incentives to some complaining customers, and ultimately do not undermine the business justification for the decision to retier GSN. To the extent that GSN is suggesting that a significant number of those complainants terminated their cable service, that suggestion is wholly at odds with the evidence. Nor did the incentives alter the financial calculus engaged in by Cablevision in deciding to retier GSN; the incentives [redacted] barely put a dent in the overall savings achieved by the retiering.[50] Even the model presented by GSN's own expert, Dr. Hal Singer, assumes that no more than [redacted] subscribers actually left Cablevision as a result of the retiering, an estimate that is itself unreliable because it is based on inappropriate modifications to the churn analysis of Cablevision's economics expert, Jonathan Orszag.[51]

GSN's remaining efforts to show that Cablevision suffered a loss from the retiering will fail. As Mr. Orszag shows in his rigorous analysis of the same data, Cablevision made a profitable decision when it retiered GSN. Not only did Cablevision save more than [redacted] per year in affiliate fees by moving GSN to the sports tier, Cablevision further profited

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49 CV Exh. 119 at 3.

50 *See* Montemagno Direct Test. ¶¶ 55, 70-73.

51 GSN Exh. 223 ¶¶ 75-76 & App. 3. As for the other subscribers who complained, by Dr. Singer's own calculation the vast majority—[redacted]—continued to be Cablevision customers without receiving any special incentive. *Id.* [redacted] Montemagno Direct Test. ¶ 73.

by adding over [redacted] new sports tier subscribers, which generated more than [redacted] per year in additional net revenue for Cablevision.[52] As Cablevision anticipated from its analysis [redacted] showing the limited audience that viewed GSN, it lost few, if any, subscribers as a direct result of the retiering decision.[53] As a result, the *ex post* evidence bears out Cablevision's good faith *ex ante* belief that retiering GSN would result in a net savings (i.e., benefit).

GSN will also argue that Cablevision could have saved more in license fees by moving WE tv to its sports tier, and Cablevision's failure to do so is evidence of discrimination. The D.C. Circuit rejected a similar argument in *Tennis Channel*, where it held Comcast's failure to move its affiliated networks to the sports tier along with Tennis Channel to be immaterial because "evidence that such a change would have afforded Comcast a net benefit . . . would in itself have little bearing on the lawfulness of Comcast's rejection of Tennis's actual proposal to extend distribution."[54] Moreover, GSN's contention ignores the fact that [redacted]

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[52] Orszag Direct Test. ¶¶ 214-215. Mr. Orszag estimates that [redacted] Cablevision subscribers added the Sports & Entertainment tier after the retiering. [redacted]

[53] Orszag Direct Test. ¶¶ 145-48 & App. F. Although all MVPDs, including Cablevision, have a small amount of customer churn every month for any number of reasons, Mr. Orszag's analysis accounts for this baseline churn and concludes that there was no additional subscriber churn caused by the GSN retiering. Orszag Direct Test. ¶¶ 145-148, 207. Dr. Singer reaches the contrary conclusion—that Cablevision suffered losses from the retiering—only by assuming that customers who actually stayed with Cablevision canceled their subscriptions, by including [redacted] in "goodwill" that Cablevision "lost" as a result of each customer who complained, and by ignoring evidence that Cablevision's Sports & Entertainment tier added subscribers in the wake of the retiering. His analysis will not hold up at trial. GSN's other expert, Timothy Brooks, purports to conduct a "net benefit" analysis himself, but does no more than repeat the ratings and demographic data from his "similarly situated" analysis, and has made no effort to quantify any costs or benefits to Cablevision of carrying GSN broadly.

[54] *Tennis Channel*, 717 F.3d at 986-87. In support of its argument GSN will point to a different sentence of the *Tennis Channel* opinion, one which appears in parentheses and begins with the phrase "Conceivably Tennis could have shown . . ." *Id.* at 986. This is dicta.

[redacted] And, [redacted] it would have made no sense to take WE tv off the expanded basic tier given its popularity with Cablevision's subscribers. In contrast to GSN, [redacted]

Finally, Dr. Singer's expert opinion with respect to the "benefit" that would have accrued to Cablevision if it had retiered WE tv is entitled to no weight because it is based on an unsupported assumption rather than supportable analysis. He concludes that Cablevision would have saved more money by retiering WE tv because [redacted] Although it is true that [redacted] Dr. Singer has done no rigorous analysis of the number of subscribers who would have defected had Cablevision moved WE tv to a less penetrated tier. Without such analysis, there is no basis for his opinion that retiering WE tv would have "cost" Cablevision less than retiering GSN.

In short, no analysis, whether based on the *Tennis Channel* decision or otherwise, will demonstrate that Cablevision made anything other than an informed and legitimate business decision to retier GSN.

III. THERE IS NO CIRCUMSTANTIAL EVIDENCE THAT CABLEVISION DISCRIMINATED AGAINST GSN BASED ON AFFILIATION

A. GSN and WE tv Are Not Similarly Situated

Given the complete absence of direct evidence of discrimination, GSN will devote most of its efforts at the hearing to its attempt to prove discrimination circumstantially by

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[55] Montemagno Direct Test. ¶¶ 13, 15, 46; CV Exh. 7 at 27 [redacted]

[56] Montemagno Direct Test. ¶ 78.

arguing that the network is similarly situated to one of Cablevision's affiliated networks. Similarity is necessarily a fact-intensive inquiry that turns on a detailed analysis of factors such as "genre, ratings, license fee, target audience, target advertisers [and] target programming."[57] Such an analysis, properly grounded in the evidence, cannot support a finding of substantial similarity between GSN, a game-centric network designed to have "broad appeal" to male and female viewers, and WE tv, a network indisputably programmed to attract women viewers.[58]

1. The Networks

GSN launched in 1994 as the Game Show Network.[59] In its early years, GSN's programming consisted almost exclusively of a library of 1960s and 1970s game show reruns.[60] Game Show Network changed its name to GSN in 2004 and acquired some original programming to supplement its library of re-runs; but that original programming has also focused on game shows and other competition-based programming.[61]

WE tv came into being as Romance Classics, a network showing acquired romance movies and television shows.[62] Rebranding itself as WE: Women's Entertainment and subsequently as WE tv, the network expanded its programming to include reality shows and

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[57] Second Report & Order at 11504. Although GSN asserts that the test is whether the networks "generally compete with each other and have similar levels of viewer popularity" and then evaluates its similarity to WE tv and Wedding Central under this self-created standard, the Commission has never suggested any such approach. *See Game Show Network, LLC* v. *Cablevision Systems Corporation*, Program Carriage Complaint, File No. CSR-8520-P, ¶ 35 (Oct. 12, 2011) ("Complaint").

[58] Wedding Central's dissimilarity from GSN under various metrics is discussed in section III.C, below.

[59] Complaint ¶ 15.

[60] Egan Direct Test. ¶ 45.

[61] *See* CV Exh. 12 at 20; *see also* Tim Brooks & Earle Marsh, *The Complete Directory to Prime Time Network and Cable Shows*, at 515-16 (9th ed. 2007) ("For the network's first half a dozen years its schedule consisted mostly of reruns of daytime game shows of the 1970s-1990s . . . . In 2004 the network shortened its name to simply GSN and began experimenting with reality and other nontraditional game show formats . . . . In 2005, amid viewer complaints, it began shifting back to traditional game shows . . . .").

[62] *See* Brooks & Marsh, *supra*, at 1477 ("This women's network was originally launched as a movie channel called Romance Classics . . . specializing in romantic movies, dramas and specials.").

other original programming geared for and primarily of interest to women, landing its first break-out hit in 2004 with the reality show *Bridezillas*, about the dramatic ups and downs of brides-to be and their families.[63] As Ms. Dorée will testify, throughout the relevant period WE tv acquired and produced programming designed to appeal to an audience of women 18-54.[64]

2. GSN and WE tv Have Different Programming

GSN has always focused on game shows and shows about gaming.[65] [redacted]

GSN's affiliation agreements with MVPDs [redacted]

- [redacted]
- [redacted]
- [redacted]

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[63] *See id.* at 1477 ("In 2000 the network was relaunched as WE: Women's Entertainment, a full service women's network . . . . The network's signature original series during the mid-2000s was the alternately scary and funny *Bridezillas* (2004), depicting out-of-control brides-to-be in the frantic days leading up to their weddings.").

[64] Dorée Direct Test. ¶ 12.

[65] *See* Egan Direct Test. ¶¶ 45, 51-56.

[66] *See* [redacted]

[67] CV Exh. 5 at 2.

[68] CV Exh. 3 at 1.

[69] CV Exh. 6 at 1.

- [redacted]
- [redacted]

In some cases, GSN attached "representative programming schedules" to its affiliation agreements, [redacted] Because GSN did not focus on women's programming, at the time of its move to Cablevision's Sports & Entertainment tier, GSN's Saturday and Sunday nights consisted of poker programming specifically targeting male audiences.[73]

The evidence concerning WE tv could not be more different. WE tv's affiliation agreements [redacted]

- [redacted]
- [redacted]

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70 CV Exh. 24 at 5.

71 CV Exh. 27 at 2, 26.

72 *See* [redacted]

73 CV Exh. 56 [redacted] *see also* CV Exhs. 46, 59, 66, 74, 85, 87, 102, 111, 127, 133, 137, 151, 155, 169, 181, 187 (GSN weekly programming schedules).

74 CV Exh. 13 at 33.

75 CV Exh. 14 at 1.

[redacted]

3. The Actual Programming on WE tv and GSN Was Not Similar

(a) The Genres of Programming Were Distinct and Had Almost No Overlap

A critical differentiating factor between two networks is the genre of programming each carries. Cablevision's expert, Michael Egan, has done an exhaustive genre analysis of the programming on GSN and WE tv, similar to the one he performed in the *WealthTV* proceeding. He will opine that—particularly during the relevant time period—the two networks could not have been more different in programming, both in type and breadth.

In connection with the initial trial scheduled in 2013, Mr. Egan reviewed programming presented on both networks in sample weeks over a three-year period. His analysis revealed that five genres of programming comprised [redacted] percent of WE tv's schedule: Reality, Comedy, Drama, Movie, and News. By contrast, less than [redacted] percent of GSN's programming fit into any one of those categories.[77] GSN devoted [redacted] percent of its programming hours to the Game Shows and Gaming genres; less than [redacted] percent of WE tv's programming was in those categories.[78] Subsequently, in response to the supplemental reports submitted by GSN's experts in 2014, Mr. Egan reviewed programming on GSN and WE tv for

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[76] CV Exh. 8 at 1-2; *see also* [redacted]

[77] Egan Direct Test. ¶ 30.

[78] *See id.*

2012, 2013, and the first half of 2014, and came to the same conclusions: GSN's programming was dominated by game shows ([redacted] percent), while WE tv showed no games shows at all; WE tv dedicated [redacted] percent of its broadcast hours to Reality, Comedy, Drama, Movie, and News, while GSN showed that content only [redacted] percent of the time.[79]

GSN has no direct response to Mr. Egan's expert opinion. Neither of its expert witnesses has engaged in a comprehensive review of the programming on the two networks, much less performed a genre analysis. In the end, GSN is reduced to making a few general observations about "relationship" programming transmitted by both networks. But as Mr. Egan correctly points out, relationship programming "is a vague subject matter, not a genre. It is, perhaps, the most common subject matter on television, being regularly a part of nearly all TV genres . . . [and] is so vague and encompassing that it fails to be a distinct and distinguishing measure."[80] Viewed in this light, it is crystal clear that there was virtually no overlap between the program genres on the two networks.

(b) The Look and Feel of Programming on GSN and WE tv Was Very Different

Mr. Egan has also examined the look and feel of GSN and WE tv. Based on extensive viewing of shows, clips, and "sizzle reels" of each network, he concluded that "the two networks, to varying degrees, use their visual and audio languages to create very different personalities."[81] Mr. Egan will testify that GSN's look and feel could best be described as "Traditional Game Show" with a powerful emcee, dramatic music, flashy lighting and a single

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[79] *See id.* ¶ 287.

[80] *Id.* ¶ 110.

[81] *Id.* ¶ 72.

studio set.[82] He also noted that GSN does not "attempt . . . to create a GSN personality separate from the Game Shows or a thematic umbrella to connect the shows to each other or to any specific demographic group in its audience . . . [but] lets the Game Shows speak for themselves."[83] By contrast, Mr. Egan found that "WE tv present[s] a single-minded theme and focus on 18-54 year old women, their relationships, and their families via the shows themselves and the promos in between them. It [is] articulated through the subject matter; the age, look, and gender of the show 'casts'; the graphic styles and colors; the music; and the taglines."[84] Unlike GSN, WE tv employed a theme expressed in promotional spots between shows to tie the shows together with each other and with the network's brand promise.[85]

Again, GSN has done no analysis comparable to Mr. Egan's.[86] Other than characterizing some shows as centering on relationships, GSN merely notes that a handful of shows have been pitched by third parties to both networks.[87] That evidence does not even begin to demonstrate similarity in programming between the networks. WE tv receives [redacted] show pitches each year. The fact that [redacted] shows in 2011 and 2012 were pitched to both networks does more to demonstrate difference than similarity in programming between them.[88] GSN's other throwaway piece of evidence—that on a few isolated occasions the networks engaged in cross-promotion with each other—also fails to reflect any meaningful

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82 *Id.* ¶ 67.

83 *Id.* ¶ 69.

84 *Id.* ¶ 70.

85 *Id.* ¶ 71.

86 [redacted] And Mr. Brooks offers no opinion on the look and feel of the programming that contradicts the views of Mr. Egan.

87 Complaint ¶ 21.

88 [redacted]

connection between the programming on the two networks.[89]

(c) The Differences in Programming and Look and Feel Were Reflected in Viewer Perception About the Networks

Cablevision's survey expert, Hal Poret, in 2012 conducted a rigorous, scientific survey of television viewers both in the New York metropolitan area in which Cablevision viewers are located as well as in a national sample.[90] Using well-accepted marketing survey techniques, Mr. Poret asked respondents to rate the similarity or dissimilarity in programming of each of ten pairs of networks on a scale of 0 to 10, with 0 meaning extremely dissimilar and 10 extremely similar.[91] The survey shows that television service subscribers considered programming on GSN and WE tv to be very dissimilar, with an average similarity rating of 1.32 among the New York DMA sample and 1.38 among the national sample.[92] By contrast, networks such as Lifetime and Oxygen, two networks featuring women's programming, have similarity ratings of 7.50 and 7.47 in the New York and national samples, respectively.[93] And WE tv, when itself paired with another women's network, Oxygen, garners similarity ratings of 7.62 (New York) and 7.56 (national).[94] Mr. Poret's findings, which are not challenged by any contrary survey evidence, are robust, with no variation overall among viewers depending on age, gender, geographic region, type of television service or any other factor measured.[95] It is powerful, objective evidence that cable television viewers did not perceive GSN and WE tv to have similar programming.

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[89] Complaint ¶ 20; Dorée Direct Test. ¶ 30.

[90] *See generally* Poret Direct Test.

[91] Poret Direct Test. ¶ 11.

[92] *Id.* ¶¶ 28-29.

[93] *Id.* ¶ 30.

[94] *Id.* ¶ 34.

[95] *Id*. ¶ 36.

4. The Target Audiences of GSN and WE tv Were Different

Although GSN will argue that, at the time of the retiering, it targeted women viewers, neither the testimonial nor documentary evidence will support such a conclusion. As noted by Dennis Gillespie, GSN's head of distribution until 2011, [redacted] GSN's presentations to distributors [redacted]

[redacted]

[96] Gillespie Tr. 72:23-73:11.

[97] [redacted]

As GSN repeatedly told affiliates and advertisers, [redacted] [100]

By contrast, as Ms. Dorée, WE tv's head of programming and acquisitions, will testify, during the relevant time period WE tv consistently represented the network to viewers, distributors and advertisers as a women's network with a target audience of women in the 18-49 and 25-54 age groups.[101] The evidence will show that WE tv, unlike GSN, [redacted] WE tv's management team received regular reports on the performance of WE tv against its key competitors [redacted] WE tv's "Upfront" presentations to advertisers highlight the network's ability to deliver an audience [redacted]

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98 *See, e.g., id.* at 2 (emphasis in original).

99 *See, e.g.,* [redacted]

100 *Id.* at 9, 13, 15. [redacted]

101 Dorée Direct Test. ¶ 16.

102 That is not to say that no men ever watched WE tv. Even the most targeted women's networks such as WE tv attract a minority of male viewers.

103 [redacted] *Id.*; *see also* section III.A.7, *infra*.

[redacted]

5. The Actual Audiences of GSN and WE tv Were Different

GSN will endeavor to mask all of this evidence by arguing that GSN in fact, attracted a female audience. The evidence, as a whole, does not support such a conclusion and certainly does not show GSN attracting the overwhelming female audience of WE tv. Relying on data from MRI, [redacted]

More than [redacted] of GSN's women viewers were at least [redacted], and [redacted] percent were [redacted].[108] As a result, the median age of GSN's audience was consistently in the [redacted].

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104 [redacted]

105 *See* Egan Direct Test. ¶ 147; [redacted]

106 *See, e.g.*, [redacted] *see also* Egan Direct Test. ¶ 143; Broussard Direct Test. ¶ 7.

107 *See* [redacted]

108 Egan Direct Test. ¶ 196; *see also* Blasius Direct Test. ¶ 32.

WE tv attracted a starkly different audience. WE tv delivered an overwhelmingly female audience concentrated in the targeted demographics. On average approximately [redacted] percent of the network's viewers were women during the relevant time period; [redacted] percent of those women viewers fell within the 18-49 and 25-54 ranges.[109] The median age of WE tv's viewers typically hovered in the [redacted][110]

Cablevision's economics expert, Mr. Orszag, confirms that there was little overlap among the networks' viewers. Mr. Orszag performed a detailed analysis of [redacted][111]

Mr. Orszag corroborates his conclusion by [redacted] as a result, Mr. Orszag concludes that "prior to Cablevision's re-tiering of GSN, WE tv faced only negligible competition for viewership from GSN."[113] And he further tests this finding by using Nielsen data of audience overlap between networks, analyzing what are referred to as

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[109] *See* Egan Direct Test. ¶¶ 196, 204-05.

[110] *See* Blasius Direct Test. ¶ 32; [redacted]

[111] Orszag Direct Test. ¶ 12.

[112] *Id*. ¶ 60.

[113] *Id*. ¶ 61.

"duplication" reports. [redacted] As Mr. Orszag states: "GSN ranks low on the list of networks watched by WE tv viewers."[114]

6. Advertisers Did Not View WE tv and GSN to Be Similarly Situated

The evidence as to whether advertisers viewed GSN and WE tv as similarly situated is in the same vein: they did not. As Cablevision's advertising expert, Larry Blasius, will testify, the different demographics of the audiences for the two networks would lead advertisers to conclude that the networks were not similarly situated. And Mr. Orszag will testify about the demographic "distance" between GSN and WE tv audiences shown by quantitative analysis, as well as the absence of any meaningful competition for advertisers between the two networks.

Advertisers primarily focus on four factors in selecting cable networks on which to place advertisements: cost per thousand viewers ("CPM"), demographic ratings, median age of viewership, and audience concentration/skew.[115] Each of these factors shows the contrast between GSN and WE tv:

Demographics. The two networks had significantly different Nielsen ratings within the W18-49 and W25-54 demographics that are most valuable to advertisers targeting a female audience.[116] In broadcast year 2009-2010, WE tv's ratings for the W18-49 demographic exceeded those of GSN by approximately [redacted] percent during primetime and [redacted] percent on a total day basis. In the W25-54 demographic, WE tv again enjoyed a sizable advantage,

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[114] *Id.* ¶ 77.

[115] Blasius Direct Test. ¶ 19.

[116] *Id.* ¶ 30.

exceeding GSN's ratings by approximately [redacted] percent during primetime and [redacted] percent for the total day. These are meaningful differences from an advertising perspective and demonstrate why an advertiser seeking to reach the key women's audience would not consider GSN to be a substitute for WE tv.[117]

Median Age. GSN undeniably skewed significantly older than WE tv. For broadcast year 2009-2010, WE tv's female viewers had a median age of [redacted] in primetime and [redacted] on a total day basis, while GSN's had a median age of [redacted] for both time periods.[118] As a result, advertisers targeting the W18-49 or W25-54 demographics would view GSN as an inefficient way to reach their target audiences. WE tv's median age, by contrast, fit comfortably within the range of each demographic group.[119] This age difference further underscores the fundamental difference between the networks from an advertising perspective.

Audience Concentration. Viewers W18-49 and W25-54 constituted only [redacted] and [redacted] percent, respectively, of GSN's total audience. WE tv delivered more than double that amount, with [redacted] percent of WE tv's total audience within each of these age groups.[120] As a result, WE tv was a much more attractive platform to reach women in the W18-49 and W25-54 demographics.

CPM. CPM measures the relationship between the price of advertising and the size of the audience delivered. In 2010, WE tv ranked [redacted] among cable networks with an average CPM of [redacted] GSN, on the other hand, ranked [redacted] with an average CPM of

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117 *Id.*

118 *Id.* ¶ 32.

119 *Id.*

120 *Id.* ¶¶ 35-36.

[redacted] The difference reveals [redacted]

Finally, GSN seeks to make much of the fact that it and WE tv shared advertisers. But this proves little because the lion's share of those overlapping advertisers placed advertising on virtually every cable television network.[123] These advertisers included [redacted][124] As Mr. Orszag explains, it is "implausible" to conclude that these large advertisers are choosing between the networks simply because they happen to buy time on both.[125] The point is further driven home by Mr. Orszag's observation that the top 40 WE tv advertisers purchased advertising on approximately [redacted] of [redacted] cable networks during the relevant period.[126] Moreover, many large advertisers promote different brands on different networks. Mr. Orszag finds that "there is relatively little overlap between top brands advertised on WE tv and GSN."[127] Only [redacted] brands are among the top 40 for both WE tv and GSN.[128] As a result, there is no credible evidence that GSN and WE tv competed directly for advertisers or were viewed as similarly situated by them.

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121 Orszag Direct Test. ¶ 116; *see also* [redacted]

122 Orszag Direct Test. ¶ 116; *see also* Blasius Direct Test. ¶ 31.

123 Blasius Direct Test. ¶¶ 58-65; *see also* Orszag Direct Test. ¶ 124.

124 Orszag Direct Test. ¶ 123.

125 *Id.*

126 *Id.* ¶ 127.

127 *Id.* ¶ 130.

128 *Id.*

7. WE tv Has Never Considered GSN to be a Competitor

Finally, programming networks frequently track their closest competitors, the so-called "competitive set." WE tv regularly monitors its ratings, programming and other metrics against a group of women's networks it considers to be similarly situated.[129] The networks WE tv has regularly included in its competitive set over the years are [redacted][130] GSN has never been included in WE tv's competitive set. That is because it is not perceived by WE tv to be a competitive women's network.[131] [redacted] But GSN's internal perspective is not the relevant one here. If Cablevision sought to advantage WE tv, it would have taken an adverse action against a network that WE tv viewed to be competitive. There are a number of [redacted]—that fit that bill. GSN is not one of them.

Moreover, although GSN may come forward with internal documents describing [redacted]

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129 Dorée Direct Test. ¶¶ 24-26.

130 *Id.*

131 [redacted]

132 [redacted]

[redacted][134]

Objective third party evidence supports that the industry at large did not view GSN as a women's network. The two DBS distributors, DIRECTV and DISH, sell advertising time ceded back to them by cable television networks. Both DISH and DIRECTV sell advertising across a "cluster" of women's networks so that advertisers seeking to reach women viewers can buy advertising on a number of networks in which those viewers are concentrated. WE tv is included in that cluster; GSN is not. The fact that DIRECTV, which owns 42% of GSN today and owned 65% at the time of the retiering, has never sold GSN as a women's network speaks volumes about the bona fides of GSN's claims in this case.[135]

B. Cablevision Did Not Treat Its Affiliated Networks Better than GSN On the Basis of Affiliation

GSN will also attempt to provide circumstantial evidence at trial that Cablevision treated its affiliated networks more favorably than GSN on the basis of affiliation. The proof, however, will not bear out this claim.

Cablevision carried WE tv on a tier consistent with the carriage that WE tv achieved among most unaffiliated distributors. Time Warner Cable, DISH and Verizon FiOS all

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133 CV Exh. 52 at 13.

134 [redacted]

135 *See* CV Exhs. 212, 299, 300, 301 (DIRECTV Media Kits and "cluster" demographic data); CV Exhs. 213, 298 (DISH Media Kits).

carried WE tv on highly penetrated tiers.[136] Even DIRECTV, GSN's majority owner, carried WE tv on a widely distributed tier.[137] Moreover, Cablevision did not uniformly carry all of its affiliated networks on the expanded basic tier: IFC and the Sundance Channel—both owned by the same Cablevision affiliate that owned WE tv—enjoyed less broad carriage.[138]

Similarly, although GSN will argue that the carriage Cablevision's so-called "peers" gave to GSN during the relevant time period shows discrimination, that does not demonstrate that Cablevision made its carriage decision on the basis of affiliation. Whatever inference can be drawn from this comparison, it is outweighed by the overwhelming evidence that Cablevision's decision to retier GSN was motivated by GSN's lack of popularity among Cablevision subscribers and the savings that would result from the retiering. Moreover, GSN's argument concerning carriage on other MVPDs ignores the fact that Cablevision is far from the only MVPD to have determined to give less than full carriage to GSN. As Mr. Orszag demonstrates in his direct testimony, [redacted]

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136 Broussard Direct Test. ¶ 12.

137 *Id.* Carriage of WE tv and GSN on competing MVPDs has little bearing on the central question in this case, whether Cablevision made its carriage determination with respect to GSN on the basis of affiliation. As set forth in section II.A above, there is no evidence whatsoever that the GSN decision was linked in any way to consideration of its impact on WE tv or any other affiliated network.

138 Montemagno Direct Test. ¶¶ 78-80.

139 Orszag Direct Test. ¶ 156.

140 *Id.* ¶ 156 n.193.

[141] In the end, the evidence concerning GSN's penetration on other MVPDs says more about the value that each of those MVPDs placed on the network than it does about the decisionmaking of Cablevision. It is certainly not evidence that can prove discrimination in this case.

Nor can GSN prove that WE tv received any favorable treatment with respect to license fees. Cablevision has entered into multiple carriage agreements with WE tv over the past 15 years; each was negotiated at arm's length notwithstanding the overlapping corporate ownership and each resulted in license fees that were consistent with those in the market.[142]

Finally, GSN will also argue that Cablevision advantaged WE tv with favorable channel placement and marketing support that it did not provide to GSN.[143] This contention does not withstand scrutiny. The testimony will show that Cablevision placed WE tv in the neighborhood of other women's networks, the most sensible location for WE tv and those other networks.[144] GSN now argues that Cablevision should have placed GSN in the same grouping of channels. Yet, despite GSN's contention that it was similarly situated to WE tv (and presumably other women's networks) there is no evidence that

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[141] CV Exh. 34 at 4, 7

[142] *See* CV Exh. 7 (WE tv/Cablevision Affiliation Agreements); *see also* Montemagno Direct Test. ¶¶ 79-80; Broussard Direct Test. ¶ 9.

[143] Supplemental Report of Timothy Brooks, dated Oct. 29, 2014 ("Brooks Supp. Report") ¶¶ 28, 41-42.

[144] Montemagno Direct Test. ¶ 82.

[145] Brooks Tr. 475:5-476:6.

[redacted]

In any case, the programming transmitted and audience reached by GSN would not have supported such a placement.

In the end, the claim that Cablevision gave favorable treatment to WE tv networks on the basis of affiliation is not supported by the evidence.

C. GSN Cannot Sustain Any Claim of Discrimination Concerning Wedding Central

Although GSN will likely spend the bulk of the trial attempting to prove that GSN and WE tv are similarly situated, GSN's carriage complaint also alleges that GSN was similar to the short-lived WE tv spin-off, Wedding Central. This is simply not the case. [redacted] The evidence will show that, unlike GSN's audience of [redacted] Wedding Central targeted an audience of [redacted] and Wedding Central's marketing and other materials [redacted] And because the programming and look-and-feel of Wedding Central largely reflected the elements of WE tv's wedding-related shows targeting younger female viewers, Mr. Egan's expert analysis of those metrics as they pertain to WE tv holds true for Wedding Central as well: the network was extremely dissimilar from GSN.[149]

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146 Montemagno Direct Test. ¶ 83.

147 *See* [redacted]

148 Dorée Direct Test. ¶¶ 33-34; CV Exh. 122.

149 Egan Direct Test. ¶ 28 n.27.

Nor can GSN make any credible argument that Cablevision treated Wedding Central more favorably than GSN on the basis of affiliation. Although it is true that Cablevision was only one of three MVPDs to launch Wedding Central, [redacted] Likewise, GSN cannot claim that Wedding Central received superior channel placement: when it launched, Cablevision put it on channel 177, hardly a coveted spot in the channel line-up.[151] And although Cablevision provided marketing support to Wedding Central, GSN ignores the fact that [redacted]

Finally, the fact that Cablevision shuttered Wedding Central after just two years of operation confirms that Cablevision did not undertake any "profit sacrifice" on behalf of its

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150 Montemagno Direct Test. ¶¶ 86-88.

151 *Id.* ¶ 82. If GSN claims poor channel placement as an independent basis for a finding of discrimination (an allegation that appears nowhere in its complaint), the Presiding Judge has yet another basis on which to dismiss GSN's complaint on statute of limitations grounds. GSN was aware of its "poor" channel placement on Cablevision's systems as early as 2005, when it was moved from channel 67 to channel 88 in the majority of communities served by Cablevision, and it should have been aware of WE tv's channel position during the same time period. GSN cannot explain why it waited six years to complain of this allegedly discriminatory act.

152 *Id.* ¶¶ 74, 86-87.

153 *Id.* ¶¶ 76-77.

affiliated networks. [redacted] There is no evidence that GSN can present at trial showing that Cablevision discriminated against GSN and in favor of Wedding Central on the basis of affiliation.

IV. CABLEVISION'S RE-TIERING DECISION DID NOT UNREASONABLY RESTRAIN GSN'S ABILITY TO COMPETE FAIRLY

Even if GSN is able to establish discrimination, its claims will fail because it cannot demonstrate that the re-tiering has had "the effect of . . . unreasonably restraining [its] ability to compete fairly."[155] GSN will no doubt seek to ignore the plain language in Section 616, and argue that evidence of lesser harm is enough for its discrimination claim to succeed. But a showing that the retiering "adversely affected [GSN's] competitive position in the marketplace" is not enough.[156] Section 616 requires more: namely, "proof of the significant or material detrimental effect implicit in the term 'unreasonable restraint.'"[157]

As we fully set out in our summary decision motion, GSN will not be able to prove that Cablevision's carriage decision unreasonably restrained its ability to compete fairly. Here are the indisputable facts: since the retiering, GSN has grown from [redacted] subscribers to [redacted] today, and has told its advertisers that it will soon reach [redacted].[158] GSN has [redacted] in every agreement it has negotiated since the Cablevision retiering, including agreements with the largest MVPDs in the

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[154] Dolan Tr. at 17:2-19:4; Dorée Direct Test. ¶ 33.

[155] Second Report & Order at 11505.

[156] *WealthTV*, 24 FCC Rcd. at 13002.

[157] *Time Warner Cable*, 729 F.3d at 166.

[158] CV Exh. 256, at 4-5; CV Exh. 325 at 7.

country, such as [redacted][159] GSN increased its advertising revenues from [redacted] in 2010 to [redacted] in 2014, and not surprisingly, [redacted] Indeed, GSN's revenues have [redacted][161] During this time period GSN has also [redacted] In short, since GSN's retiering by Cablevision, GSN has enjoyed its most successful years ever, and it shows no sign of slowing down. Mr. Goldhill, GSN's CEO, projects that 2015 will be the year [redacted]

The differences between the market position of GSN and those of the complainants in prior carriage proceedings are clear. Each of the prior proceedings involved newly-created or narrowly-penetrated networks seeking the carriage necessary to make them financially viable, capable of achieving scale, and positioned to offer competitive programming. In the Presiding Judge's *Tennis Channel* decision, for example, he cited evidence that Comcast excluded Tennis Channel from "one in four viewers in the United States," thereby limiting Tennis Channel's opportunities to invest in competitive programming, hindering its ability to achieve economies of scale, and keeping it from reaching the 40-million-subscriber threshold

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159 CV Exh. 256 at 3-4; CV Exhs. 5, 240, 243, 244, 245.

160 *See* SNL Kagan, *Economics of Basic Cable Networks* 386 (2014 ed.); CV Exh. 263 at 12; [redacted]

161 [redacted]

162 Goldhill 3/3/15 Tr. 93:22-96:11; Brooks Tr. 557:3-16.

163 Goldhill 3/3/15 Tr. 127:25-128:13.

applied by advertisers making purchasing decisions in the national television market.[164] Similarly, in the *WealthTV* litigation, the Presiding Judge found significant that the four defendant MVPDs foreclosed the nascent network from approximately 48 million subscribers—roughly half the national market.[165]

Nothing close is presented here. At the time of the retiering, GSN was fully distributed to [redacted] million subscribers, of which [redacted] million were Cablevision video subscribers.[166] GSN lost approximately [redacted] subscribers in the New York metropolitan area as a result of Cablevision's re-tiering decision, [redacted]. GSN can make no credible argument that its ability to compete for subscribers, viewers, programming, or advertising in the national marketplace was unreasonably restrained by Cablevision's decision.

GSN will argue instead that it has been foreclosed from subscribers in some undefined local market. Neither GSN nor its expert explains why its competitive position should be assessed in a local market, or defines the parameters of the relevant market. And GSN has produced no evidence that it has been unreasonably restrained in its ability to compete for subscribers, viewers, or advertising in the New York DMA or any other local market. What the evidence does show is that the retiering decision has had no meaningful impact on GSN.

Because of its penetration on other MVPDs, including Cablevision's direct competitors, GSN now has over [redacted] subscribers in the New York DMA. As of

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164 *Tennis Channel*, 26 FCC Rcd. at 17198-201.

165 *WealthTV*, 24 FCC Rcd. at 13001-02, 13001 n. 270. *See also TCR Sports Broad.*, 21 FCC Rcd. at 8994, in which the Media Bureau credited plaintiff MASN's allegations that "it [would] be impossible" to "achieve long-term financial viability" without carriage from defendant Comcast.

166 CV Exh. 256 at 5; GSN Exh. 175 at 5.

2013, this included [redacted] Verizon FiOS subscribers, [redacted] Time Warner Cable subscribers [redacted] and approximately [redacted] DISH and DIRECTV subscribers.[167] Cablevision subscribers who wished to continue to watch the network could either sign up for a tier of service that included it (as some [redacted] did)[168] or they could switch to any of Cablevision's formidable competitors that carried GSN more broadly.[169] GSN cannot possibly argue that it has been restrained in competing for subscribers in the New York DMA when [redacted] the cable homes in the market now receive GSN and all other remaining cable television subscribers, on Cablevision or otherwise, have the ability to access the network.

Not surprisingly, moreover, the testimony of Cablevision executive Tom Montemagno will show that Cablevision cannot exercise any meaningful degree of market power to disadvantage GSN. To the contrary, the subscriber base for Verizon FiOS has only increased in Cablevision's footprint, while Cablevision subscribers have decreased.[170] Cablevision also faces increased competition from video program providers that supply video content directly over the Internet directly from broadcast or cable networks or through aggregators of video content such as Netflix or Hulu.[171]

Despite its strong subscriber numbers in the New York DMA, GSN will argue that it lost viewers because of the retiering. But data cited by GSN's own expert contradicts any

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[167] CV Exh. 319; CV Exh. 271; GSN Exh. 175.

[168] GSN Exh. 246. As of June 2014, approximately [redacted] Cablevision subscribers received GSN through their subscriptions to the Sports & Entertainment tier on an a la carte basis or as part of Cablevision's iO Gold package.

[169] *See* Orszag Direct Test. ¶ 144.

[170] Montemagno Direct Test. ¶ 31; GSN Exh. 175 at 21; CV. Exh. 271.

[171] Montemagno Direct Test. ¶ 32.

claim that this short-term loss unreasonably restrained GSN's ability to compete for viewers in New York: the size of GSN's audience in the New York DMA in 2010 (before the retiering) and 2013 (a few years later) [redacted] Nor will GSN be able to show that it has lost any advertising revenue in the New York market. In over three years of discovery, GSN has not produced a single document or proffered any testimony showing that GSN's advertising sales in New York, specifically, have decreased since the retiering. The only concrete evidence relating to GSN's advertising revenues demonstrates that, on a national basis, they have [redacted] since 2010.[173]

Because GSN's undisputed success is fatal to its discrimination claim, it will likely advance two additional theories of unreasonable restraint. Neither can be proven. The first is that other MVPDs will be emboldened by Cablevision's actions and will also reduce or delete the network from their systems. Even four years after the retiering, GSN's witnesses continue to warn of the harm GSN will suffer in the future if it loses this lawsuit against Cablevision. For example, [redacted][174]

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172 *See* Brooks Tr. 589:16-591:22; Brooks Supp. Report ¶ 12. The same expert cites data showing that between 2010 and 2013 GSN's ratings in households and in the women 18+ demographic [redacted] in non-Cablevision homes in the New York DMA. Brooks Supp. Report ¶ 13.

173 As for the other metrics the Commission has identified for assessing unreasonable restraint, GSN makes no effort at all to show that its ability to compete for programming or its "ability to realize economies of scale" have been affected in the New York DMA. This is because national programming networks such as GSN compete for programming and realize economies of scale on a national basis. With almost [redacted] subscribers, GSN has, in fact, achieved such scale economies. *See* CV Exh. 256 at 4-5.

174 Goldhill 3/3/15 Tr. 50:17-52:5; *see also* Brooks Tr. 630:12-632:21 [redacted]

The facts do not match the rhetoric. Since the Cablevision retiering, GSN has entered into [redacted] and added [redacted] subscribers.[175] [redacted][176] GSN's argument also ignores the nature of carriage agreements, which often have a multiyear term. [redacted]

GSN's second theory is that it has lost advertising dollars in the national market because it is carried by Cablevision on a less penetrated tier in the New York DMA, where many ad buyers are located. Even if it is true that GSN's ad buyers are concentrated in the New York DMA, GSN will not be able to offer any proof linking advertising losses to the retiering by Cablevision. To the contrary, [redacted]

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175 CV Exh. 256 at 4-5 [redacted]

176 CV Exh. 256 at 5-6 [redacted]

177 [redacted]

178 [redacted]

[redacted] And notwithstanding how the network is carried by Cablevision, GSN's ad revenues have increased from [redacted].[180] Unable to dispute the growth in advertising revenue, GSN CEO Goldhill can offer only [redacted][181]

Throwaway lines are not a substitute for proof. GSN has failed to come forward with any concrete factual evidence to show advertising losses attributable to the network's level of carriage by Cablevision. Instead, it has been forced to retreat to an untested regression model constructed by one of its experts that attempts to predict how much revenue GSN would have earned in the absence of the retiering. The expert's opinion is irrelevant. The question for the Presiding Judge is not whether GSN could have sold more advertising in the absence of retiering, but whether GSN has been unreasonably restrained in its ability to compete as a result of the retiering. GSN's [redacted] since the retiering flatly contradicts any claim that GSN has been unable to compete.

V. COMPELLING CABLEVISION TO CARRY GSN ON A MORE WIDELY PENETRATED TIER WOULD VIOLATE CABLEVISION'S FIRST AMENDMENT RIGHTS

As the Supreme Court long ago recognized, "[t]here can be no disagreement" that distributors like Cablevision "engage in and transmit speech, and they are entitled to the

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179 *See* CV Exh. 143 at 29 [redacted]

180 *See* SNL Kagan, *Economics of Basic Cable Networks* 386 (2014 ed.); CV Exh. 262.

181 [redacted]

protection of the speech and press provisions of the First Amendment."[182] The remedy GSN seeks here—an order requiring Cablevision to restore GSN to the expanded basic tier—would infringe Cablevision's speech rights by forcing Cablevision to speak to its subscribers in a manner not of its choosing.

The Commission has described the principal purpose of the program carriage rules to be the promotion of fair competition between "similarly situated" programmers.[183] But even in the interest of promoting competition, the Commission's power to interfere with Cablevision's carriage decisions is constrained by the First Amendment, which requires any remedy imposed by the Commission to "further[] an important or substantial governmental interest."[184] Recent opinions from the D.C. Circuit and Second Circuit make it clear that such a substantial governmental interest exists only "when the video programming distributor possesses market power in the relevant market."[185] GSN will be unable to prove that Cablevision has market power in *any* relevant market, much less that it has market power in the "national video programming distribution market" identified by the Commission and Judge Kavanaugh as the

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[182] *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 636 (1994); *see also Tennis Channel,* 27 FCC Rcd. at 8545 (noting an MVPD's "First Amendment Rights are implicated" by a carriage remedy because an MVPD "is entitled, in the exercise of its editorial discretion, to choose to carry" the networks it desires).

[183] *See* Second Report and Order at 11497-98.

[184] *Tennis Channel*, 27 FCC Rcd. at 8547-48; Second Report & Order at 11497-98. Cablevision limits its argument here to an "as-applied" challenge to the Commission's authority, based on an "intermediate scrutiny" standard. Nevertheless, Cablevision reserves the right to argue at the hearing or on appeal that Section 616 and the Commission's carriage discrimination regulations are facially unconstitutional under a strict scrutiny standard. *But see generally Time Warner Cable*, 729 F.3d 137.

[185] *See Tennis Channel*, 717 F.3d at 993 (Kavanaugh, J., concurring); *see also Time Warner Cable Inc.*, 729 F.3d at 165 ("The program carriage regime requires an unaffiliated-network complainant to make a case-specific showing that an MVPD 'unreasonably restrained' its ability to 'compete fairly,' and market power is generally a 'significant consideration' under such a requirement.") (internal citations omitted); *Agape Church, Inc.* v. *FCC*, 738 F.3d 397, 414-15 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (concluding that "absent a finding of market power, the Government may not infringe on the cable operators' editorial discretion").

"relevant market" in the *Tennis Channel* case.[186] Evidence at trial will show that it is the national market in which GSN competes for advertisers and viewers, and that GSN has been flourishing in this market since the retiering. Indeed, with only a [redacted] share of total nationwide MVPD subscribers, Cablevision could not have exercised market power in the national video programming distribution market as a matter of law.[187]

Likewise, GSN will be unable to prove that Cablevision exercised market power in the New York DMA as a matter of fact. It is beyond question that Cablevision faces significant competition from other MVPDs. GSN's own Complaint asserts that GSN is available to subscribers on an expanded basic service level on Cablevision's "in-market competitors AT&T, DIRECTV, DISH and Verizon FiOS."[188] These MVPDs collectively have well over two million subscribers in the New York DMA, many of whom live in Cablevision's footprint and have chosen to forego Cablevision service in favor of its competitors.[189] Verizon FiOS alone has added almost 500,000 subscribers in the New York DMA in the last five years, while Cablevision has lost more than 200,000.[190] Thus, the robust competition in the New York DMA today shows that any concerns about "bottleneck" control in the cable industry animating prior decisions under Section 616 simply do not apply to Cablevision today.[191] This eliminates any justification for compelling Cablevision's speech. On this record, any reversal of Cablevision's legitimate exercise of its editorial discretion would contravene the First Amendment.

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186 *Tennis Channel*, 717 F.3d at 992 (Kavanaugh, J., concurring).

187 *Tennis Channel*, 717 F.3d at 992, 994 (Kavanaugh, J., concurring) ("In today's highly competitive market, neither Comcast nor any other video programming distributor possesses market power in the national video programming distribution market.").

188 Complaint ¶ 24.

189 CV Exh. 271; Montemagno Direct Test. ¶ 31.

190 Montemagno Direct Test. ¶ 31; GSN Exh. 175 at 22; CV. Exh. 271.

191 *Tennis Channel*, 717 F.3d at 993-94 (Kavanaugh, J., concurring).

CONCLUSION

For all the foregoing reasons, Cablevision respectfully submits that GSN will not be able to prove at the hearing that Cablevision discriminated against it on the basis of affiliation. Its complaint should be dismissed.

Respectfully submitted,

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