

REDACTED - FOR PUBLIC INSPECTION

**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

**CABLEVISION SYSTEMS CORPORATION'S MOTION *IN LIMINE*
TO PARTIALLY EXCLUDE THE TESTIMONY OF DR. HAL J. SINGER**

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Defendant Cablevision Systems Corporation (“Cablevision”) respectfully submits this memorandum of law in support of its motion *in limine*, pursuant to Federal Rules of Evidence 702 and 703, to exclude (1) any opinions of Game Show Network, LLC (“GSN”) expert Dr. Hal J. Singer concerning the “profit sacrifice” or “net profit sacrifice” analyses in his written direct testimony dated June 2, 2015 (GSN Exh. 301) and (2) any new opinion or analysis Dr. Singer offers for the first time in his written direct testimony.

PRELIMINARY STATEMENT

Cablevision will demonstrate at trial that it sought to save [REDACTED] per year in affiliate fees by moving GSN from an expanded basic tier to its Sports & Entertainment tier. GSN can offer no contemporaneous evidence showing that discriminatory intent, rather than cost-savings, motivated Cablevision’s decision to retier GSN. Instead, GSN relies on an after-the-fact analysis conducted by its expert, Dr. Hal J. Singer, who offers an opinion that Cablevision ultimately did not benefit from the retiering. Because Dr. Singer’s opinion ultimately rests on assumptions that could not have been taken into account by Cablevision, it sheds no light on the issue of whether Cablevision discriminated on the basis of affiliation. But even putting that threshold problem to one side, as we set out next, Dr. Singer’s opinion should be excluded because it is based on groundless assumptions and flawed methodologies that do not meet the basic legal tests of admissible expert testimony.

Dr. Singer’s opinion has two parts. Dr. Singer concludes that Cablevision’s cost-savings did not exceed the losses it incurred by retiering GSN, losses that purportedly arose from Cablevision customers who “churned” (canceled their subscriptions) or who simply called to complain (leading to a loss in “goodwill”). He calls this the “profit sacrifice” analysis.

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Alternatively, Dr. Singer concludes that even if Cablevision did save money by retiering GSN, it could have saved even more by retiering its affiliated network, WE tv. He calls this the “net profit sacrifice” analysis. Dr. Singer’s “profit sacrifice” and “net profit sacrifice” opinions do not satisfy the standards for admissibility of expert evidence under the Federal Rules, and should be excluded.

First, Dr. Singer’s opinion concerning customer churn is inadmissible because it is grounded on assumptions that are contrary to the evidentiary record. He assumes that Cablevision customers who received a short-term promotion [REDACTED] [REDACTED] would, in the absence of the promotion, have canceled their Cablevision subscriptions in their entirety. This assumption has no basis in the record, and is founded only on Dr. Singer’s speculation about what these customers might have done. The evidence in the record in fact shows that no more than a small fraction of those customers would have cancelled their Cablevision subscriptions in the absence of the promotion. This divergence from the factual record renders Dr. Singer’s opinion on customer churn unreliable and, therefore, inadmissible.

Second, Dr. Singer’s opinion concerning lost “goodwill” is inadmissible because he grounds it in assumptions that are unsupported in fact. It is also the product of an analysis he has no expertise to perform. Dr. Singer’s goodwill calculation is based on a [REDACTED] [REDACTED] loss in “goodwill” for each Cablevision customer who merely called to complain about the retiering but did not actually receive a promotion. Although he characterizes this estimated loss as “reasonable,” there is no record evidence to support the estimate. There is no economic or accounting support for the estimate. Nor can Dr. Singer rely on prior experience for support; he has never before offered an opinion on goodwill. At bottom, it appears clear that the

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“goodwill” loss has been calculated simply to make sure that the purported costs of retiring to Cablevision exceed the savings from no longer paying affiliate fees. Such a results-driven analysis is the antithesis of permissible and admissible expert testimony.

Third, Dr. Singer’s “net profit sacrifice” test was rejected by the D.C. Circuit in the *Tennis Channel* decision. As that court emphasized, the issue of whether an MVPD could have profitably retired its affiliated networks has little bearing on whether it discriminated against a non-affiliated network.

Fourth, Dr. Singer’s testimony is inadmissible because he has not applied a consistent methodology to reach his conclusions. Instead he has changed his opinion whenever confronted with unhelpful evidence, for the sole purpose of “making the numbers work” in order to reach conclusions favorable to GSN.

Finally, Dr. Singer’s testimony contains opinions that he has never disclosed in his prior written testimony or expert reports, and which should be excluded on that basis. At a minimum, GSN should not be heard to object to any rebuttal by Cablevision of this newly-minted testimony.

BACKGROUND

Over the course of this litigation, Dr. Singer has submitted a total of six sworn declarations, expert reports, and written direct testimony.¹

A. Dr. Singer’s Initial Expert Reports in 2011 and 2012

In the initial declarations he filed in connection with GSN’s carriage complaint

¹ See Declaration of Hal J. Singer, Oct. 11, 2011 (“Singer Decl.”); Reply Declaration of Hal J. Singer, Jan. 17, 2012 (“Singer Reply”); Expert Report of Hal. J. Singer, Nov. 19, 2012 (“Singer First Report”); GSN Exh. 223 (Testimony of Hal J. Singer, Mar. 12, 2013); Supplemental Report of Hal J. Singer, Oct. 29, 2014; GSN Exh. 301 (Supplemental Direct Testimony of Hal J. Singer, June 2, 2015).

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and reply, Dr. Singer offered the opinion that Cablevision’s retiering decision “lacks any efficiency justification.”² He based his conclusions on the similar “cost per ratings point” of GSN and WE tv, on GSN’s carriage on the largest MVPDs in the country (most of which dwarf Cablevision in size), and on his unsubstantiated assertion that Cablevision’s failure to analyze the costs and benefits of retiering WE tv was “inherently discriminatory.”³ Dr. Singer provided no response to the declarations submitted by Cablevision witnesses describing their actual non-discriminatory reasons for the retiering. Nor did he respond to the expert analysis of Jonathan Orszag, who studied [REDACTED] and concluded that the GSN retiering had no impact on subscriber “churn”—the rate at which subscribers canceled their Cablevision service.⁴

In his November 2012 expert report, which followed several months of discovery, Dr. Singer’s conclusions did not change, and he provided no new analysis of the “efficiency justification” he claims to have been absent from Cablevision’s retiering decision.⁵ In contrast, in his December 2012 expert report Mr. Orszag reviewed the substantial record evidence showing that Cablevision made its retiering decision in the ordinary course of business in order to save [REDACTED] per year in affiliate fee costs, and without any consideration of the impact of that decision on any affiliated network.⁶ Mr. Orszag also expanded his analysis [REDACTED] [REDACTED] to demonstrate that, even examining the results of the GSN retiering after the fact, it

² See Singer Decl. ¶¶ 42-45; Singer Reply ¶¶ 5, 39-47.

³ See Singer Decl. ¶¶ 42-45; Singer Reply ¶¶ 5, 39-47.

⁴ See Expert Report of Jonathan Orszag, Dec. 12, 2011, ¶¶ 65-66 (showing that [REDACTED] [REDACTED]).

⁵ See Singer First Report ¶¶ 51-57.

⁶ See Expert Report of Jonathan Orszag, Dec. 14, 2012, ¶¶ 114-117.

had no statistically significant effect on the number of customers who churned away from Cablevision; in fact, Cablevision acquired a significant number of new Sports & Entertainment tier subscribers (over [REDACTED]) because of the retiering.⁷ Thus, Mr. Orszag concluded that Cablevision profited from the retiering by saving the affiliate fees it otherwise would have paid to GSN, by maintaining its total number of subscribers, and by increasing the number of subscribers who paid \$6.95 per month to receive Cablevision's Sports & Entertainment tier.⁸

B. Dr. Singer's March 2013 Written Testimony

In his March 2013 written direct testimony, Dr. Singer argued that an *ex post* analysis of Cablevision's repositioning of GSN "cannot validate Cablevision's decisions, as these precise outcomes could not have been known *ex ante* to Cablevision."⁹ Nevertheless, he attempted to critique Mr. Orszag's opinion, contending that Mr. Orszag miscalculated the costs Cablevision incurred and benefits it accrued from retiering GSN. In Dr. Singer's view, Cablevision's [REDACTED] savings in affiliate fees were "largely irrelevant," and the only benefit Cablevision could have gained from the retiering was an increase in subscribers on the Sports & Entertainment tier.¹⁰

As for the costs, Dr. Singer opined that Cablevision only gained incremental Sports & Entertainment tier subscribers because of [REDACTED]; therefore, each of these [REDACTED] subscribers cost Cablevision [REDACTED]

⁷ See *id.* ¶¶ 118-124, Appendix F, Appendix G.

⁸ See *id.* ¶ 124.

⁹ GSN Exh. 223 ¶ 67.

¹⁰ *Id.* ¶ 74.

████████████████████ Dr. Singer also concluded that between ██████████ and ██████████ subscribers churned away from Cablevision because of the GSN repositioning; he assigned a ██████████ cost to Cablevision for each of these subscribers to account for lost profits.¹² Finally, although Dr. Singer noted that ██████████ Cablevision customers called to complain about the retiering, he offered no opinion that Cablevision suffered any losses from those subscribers who complained but did not receive ██████████ ██████████ Specifically, the word “goodwill” appeared nowhere in Dr. Singer’s March 2013 written direct testimony. Dr. Singer’s testimony is summarized below.

Dr. Singer’s March 2013 Written Direct Testimony¹⁴

Cost/Benefit	Per Subscriber Monthly Value	Total Monthly Value
Churn of ██████████ Subscribers	██████████	██████████
██████████ Promotion for ██████████ Subscribers	██████████	██████████
Goodwill Loss from Complaining Subscribers	(\$0.00)	(\$0.00)
Total Monthly Costs	██	
Affiliate Fee Savings ██████████ ██████████	██████████	██████████
Total Monthly Benefits	\$0 (Irrelevant)	

¹¹ *Id.* ¶¶ 75-76.

¹² *Id.* ¶¶ 75-77. The ██████████ cost reflects Dr. Singer’s estimate of the margins Cablevision earned from its video subscribers during the relevant period.

¹³ *Id.* ¶ 75.

¹⁴ *Id.* ¶¶ 73-78.

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Thus, Dr. Singer’s original written direct testimony claimed a loss to Cablevision attributable solely to customer churn and the subsidy.¹⁵ And his conclusion that Cablevision had made an economically inefficient decision was premised solely on his unsubstantiated opinion that any cost savings from the retiering were “irrelevant.”

C. The D.C. Circuit Issues Its *Tennis Channel* Decision, and Rejects Dr. Singer’s Opinions

In May 2013 the D.C. Circuit issued its *Tennis Channel* decision, reversing the Commission’s holding that Comcast had discriminated against Tennis Channel and in favor of its affiliated sports networks. *Comcast Cable Comm’ns v. FCC*, 717 F.3d 982 (D.C. Cir. 2013) (“*Tennis Channel*”). In doing so, the court rejected the analysis Dr. Singer offered in support of Tennis Channel’s claims in that case—an analysis that is substantially identical to the one he submitted in his 2013 written direct testimony in this case.

First, the D.C. Circuit made clear the relevance of the cost-savings Comcast gained from keeping Tennis Channel on a less penetrated tier to any objective cost-benefit analysis of the alleged conduct: the D.C. Circuit credited “the detailed, concrete explanation of Comcast’s additional costs under the proposed tier change” and held that the expense of carrying Tennis Channel on a broadly-penetrated tier of service was “itself a clear negative” for Comcast. *See Tennis Channel*, 717 F.3d at 985.¹⁶

¹⁵ We note that Dr. Singer’s estimate of the number of Sports & Entertainment tier subscribers Cablevision gained from the retiering is contradicted by Mr. Orszag’s expert opinion and by record evidence Dr. Singer relies on in his testimony. While Dr. Singer opines that approximately ██████ customers added the tier in the wake of the retiering, and attributes all of those to the promotion Cablevision offered to some subscribers, Mr. Orszag concludes that ██████ Cablevision subscribers added the tier (*see supra* note 7), and records show that subscriptions increased from ██████ in January 2011 to ██████ in February 2011. GSN Exh. 156 (cited at GSN Exh. 301 ¶ 24 n. 35).

¹⁶ The D.C. Circuit also held that, because his analysis did not show that Comcast would have accrued any net benefit from giving Tennis Channel broader carriage, Dr. Singer’s conclusion that Tennis Channel had a lower “cost-per ratings-point” was “mere handwaving.” *Tennis Channel*, 717 F.3d at 985-86.

Second, the D.C. Circuit held that Tennis Channel's evidence of Comcast's "insufficiently rigorous" cost-benefit analysis was not evidence of discrimination by Comcast. *Tennis Channel*, 717 F.3d at 987. Indeed, the court explicitly rejected Tennis Channel's and Dr. Singer's claim that Comcast discriminated by failing to subject its affiliated networks to the same cost-benefit test it applied to Tennis Channel: "evidence that [retiering affiliated networks] 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 of the latter's content." *See Tennis Channel*, 717 F.3d at 986-87.¹⁷

D. Dr. Singer Changes His Opinion

Faced with the holding in *Tennis Channel*, in his new written testimony Dr. Singer now offers an opinion that is markedly different from his initial trial testimony. The only similarity is his conclusion that his analysis, like his prior analysis, demonstrates discrimination on the basis of affiliation by Cablevision.¹⁸

Dr. Singer begins with what he calls a "profit sacrifice test" that compares the benefit he now acknowledges Cablevision accrued by retiering GSN—[REDACTED] in license fee savings—to the costs Cablevision allegedly incurred as a result of the retiering. Although Dr. Singer uses the same data he used in connection with his original written direct

¹⁷ The issue of whether a cost-benefit analysis must be applied to both affiliated and non-affiliated networks was squarely before the D.C. Circuit. Dr. Singer testified at the Tennis Channel hearing that "[Comcast's] test fails. It fails because it was never applied to Golf, to Versus" (Comcast's affiliated networks). *Tennis Channel Hearing Tr.* at 897 (attached hereto as Exhibit A). And on appeal, the Commission argued that Comcast's carriage decision "was not based on a good-faith cost-benefit analysis" because "Comcast subjected Tennis Channel to a 'cost-benefit' test for carriage that it concededly did not even apply to its own affiliates." Brief of Respondent FCC, *Comcast Cable Comm'ns v. FCC*, No. 12-1337, at 31-32, 2012 WL 5460853, at *31-32 (Nov. 7, 2012). The D.C. Circuit could have held that applying a cost-benefit analysis "selectively" constitutes discrimination, but did not do so.

¹⁸ *See* GSN Exh. 301 ¶ 80.

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testimony (data he has had available to him throughout these proceedings), his analysis of that data bears little resemblance to his March 2013 sworn testimony.

In 2013, Dr. Singer concluded that Cablevision incurred costs of [REDACTED] [REDACTED] for each of the [REDACTED] Cablevision customers who, after complaining, received [REDACTED]. In his new opinion, he contends that the “loss” suffered by Cablevision is not [REDACTED] [REDACTED] but rather that each of these [REDACTED] subscribers would have canceled their Cablevision subscriptions entirely, thereby causing Cablevision a loss of [REDACTED]. Dr. Singer acknowledges that this critical component of his analysis is based on nothing more than his assumptions:

To an economist, it is relevant that some [REDACTED] complaining customers were selected by Cablevision to receive a subsidy while roughly [REDACTED] others were not. Cablevision was apparently trying to infer the likelihood of defection based on what the complainer said on the call; if Cablevision thought the threat was sufficiently high, it offered a subsidy to retain the customer. That Cablevision discriminated in its allocation of subsidies yields critical information.²⁰

Dr. Singer makes this statement without citing any record evidence, and it is clear why: there is no document or testimony showing that Cablevision “selected” customers for the promotion based on “the likelihood of defection” or the “threat” that they might cancel their Cablevision subscriptions. What is “apparent” to Dr. Singer is simply not in evidence.

To these newly-discovered “churning” subscribers Dr. Singer adds the midpoint of the number of subscribers who actually did (by his calculation) leave Cablevision following the retiering, and arrives at a total cost from “churning” Cablevision customers of [REDACTED]

¹⁹ Compare GSN Exh. 223 ¶ 75 to GSN Exh. 301 ¶ 82.

²⁰ GSN Exh. 301 ¶ 82 n. 153.

██████████ Thus, by adopting an unsupported assumption not utilized in his 2013 testimony, Dr. Singer inflates his estimate of Cablevision’s losses by a factor of four, from ██████████ to ██████████ without any new or additional data to account for the increase.

This increased cost figure, however, is still below the ██████████ in cost savings Cablevision achieved through the retiering. Although Dr. Singer ignored that savings in 2013, he now concedes that any analysis of Cablevision’s costs from retiering GSN must take that savings into account. To bridge the gap, Dr. Singer opines that Cablevision has also suffered a loss of “goodwill” from those subscribers who called to complain about the GSN retiering, but who neither churned away nor received ██████████

██████████ To account for the loss of goodwill, Dr. Singer arbitrarily assigns a number of ██████████—for an indefinite period of time—to each subscriber, representing ██████████

As the following table comparing Dr. Singer’s March 2013 and June 2015 testimony illustrates, it is only by adding a “goodwill” loss for ██████████ subscribers that Dr.

²¹ *Id.* ¶ 82. Dr. Singer’s estimate of the number of subscribers who actually churned—██████████—is itself suspect because he reaches this conclusion using an econometric model that is not statistically significant at any of the 1%, 5%, or even 10% levels that are generally accepted among statisticians. GSN Exh. 301 App. 3 ¶ 9. Instead, he defends his 11% measure of statistical significance by stating that there is “nothing magical” about the 1%, 5%, and 10% levels and, though he is not a lawyer, by citing to a number of federal court opinions. GSN Exh. 301 ¶ 82 n. 156. Tellingly, three of the four cases he cites apply a 5% statistical significance level. *See Segar v. Smith*, 738 F. 2d 1249, 1283 (D.C. Cir. 1984) (“[W]e find that the plaintiffs in this case have presented analyses that meet the generally accepted .05 level of statistical significance.”); *Rendon v. AT&T Techs.*, 883 F.2d 388, 398 (5th Cir. 1989) (applying statistical significance of between two and three standard deviations—that is, between 5% and 1%); *Thomas v. Deloitte Consulting LP*, 2004 WL 1960097, at *5 (N.D. Tex. Sep. 2, 2004) (“Given the relatively small sample size used by Dr. Sobol, the court has little difficulty in concluding that a statistical deviation of 7% to 10% does not adequately rule out that the alleged disparities identified in her report were due to chance.”) The fourth opinion, a concurrence, does not address statistical significance at the 1%, 5%, or 10% levels, but helpfully warns that “[s]tatistics are a mischievous tool, especially in court, if they are not prepared and offered with a convincing explanation of their mathematical characteristics and limitations.” *Overton v. Austin*, 871 F.2d 529, 545 (5th Cir. 1989).

²² GSN Exh. 301 ¶ 83.

²³ *Id.* ¶¶ 81 n. 151, 83.

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Singer is able to gin up Cablevision’s “losses” so that they exceed the [REDACTED] in benefits Cablevision gained from the retiring.

March 2013 Testimony²⁴

June 2015 Testimony²⁵

Cost/Benefit	Per Subscriber Monthly Value	Total Monthly Value	Per Subscriber Monthly Value	Total Monthly Value
Churn of [REDACTED] Subscribers	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED] Promotion for [REDACTED] Subscribers	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Goodwill Loss from [REDACTED] Complaining Subscribers	(\$0.00)	(\$0.00)	[REDACTED]	[REDACTED]
Total Monthly Costs	[REDACTED]		[REDACTED]	
Affiliate Fee Savings for 2.7 Million Subscribers	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Total Monthly Benefits	\$0 (Irrelevant)		[REDACTED]	

²⁴ GSN Exh. 223 ¶¶ 73-78.

²⁵ GSN Exh. 301 ¶¶ 81-85.

²⁶ Presumably because he is concerned the Presiding Judge will reject his “goodwill” analysis, in his most recent testimony Dr. Singer again adjusts his self-serving assumptions and suggests that a loss of [REDACTED] is a “more realistic” assumption than the [REDACTED] estimate he has used for the last two years. *See* GSN Exh. 301 ¶ 82 n. 153, n. 159. Yet because his analysis rests on unfounded assumptions about subscriber churn, it does not matter whether Dr. Singer assumes Cablevision’s lost margins are [REDACTED]. His results are unreliable under either scenario.

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In addition to this “profit sacrifice test,” Dr. Singer’s recent written direct testimony also includes a “net profit sacrifice test” that, despite its rejection by the D.C. Circuit, Dr. Singer identifies as “an additional path to show discrimination.”²⁷ Dr. Singer’s “net profit sacrifice test” consists of nothing more than applying a hypothetical cost-benefit analysis to the re-tiering of Cablevision’s affiliated networks, WE tv and Wedding Central, and comparing the savings to the actual savings Cablevision accrued by re-tiering GSN.²⁸ In adopting this construct, however, he merely assumes, contrary to fact, that Cablevision [REDACTED] [REDACTED] He then purports to estimate the costs and benefits to Cablevision of a hypothetical repositioning of WE tv, but does so by altering the methodology he uses to evaluate the GSN re-tiering. While he calculates Cablevision’s lost “goodwill” and losses from providing [REDACTED] when assessing the GSN re-tiering, he calculates no such losses when assessing a WE tv re-tiering, despite the fact that [REDACTED] By altering his methodology, Dr. Singer reaches the conclusion that Cablevision would have saved more money by moving WE tv to the Sports & Entertainment tier.³⁰

ARGUMENT

In order for expert testimony to be admissible, it must (1) rest on a reliable foundation and (2) be relevant to the task at hand. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 597 (1993); *see also Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 148-49

²⁷ *Id.* ¶ 86. This so-called “alternative test” Dr. Singer describes is based on a passage in the *Tennis Channel* opinion that appears in parentheses and starts with the word “conceivably.” *See Tennis Channel*, 717 F.3d at 986. This is not the way an appellate court describes the evidentiary standard that will govern future claims.

²⁸ *See* GSN Exh. 301 ¶¶ 86-92.

²⁹ *Id.* ¶¶ 90-91.

³⁰ *See id.* ¶ 88.

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(1999) (*Daubert* standards apply to all expert testimony, whether based on “scientific,” “technical,” or “other specialized” knowledge).³¹ The first of these requirements, reliability, requires “more than subjective belief or unsupported speculation.” *Id.* at 590. “In order for an expert’s opinion to be reliable and thus admissible, it must be grounded on verifiable propositions of fact.” *Mink Mart, Inc. v. Reliance Ins. Co.*, 65 F. Supp. 2d 176, 180 (S.D.N.Y. 1999). Expert testimony should be excluded where it is based on “unreliable and inaccurate data, together with a series of assumptions that have no basis in fact or reality.” *Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co.*, 650 F. Supp. 2d 314, 319 (S.D.N.Y. 2009). Moreover, an expert’s opinion must “have a reliable basis in the knowledge and experience of his discipline.” *Daubert*, 509 U.S. at 592. Finally, “[i]n evaluating the reliability of an expert’s method, [] a district court may properly consider whether the expert’s methodology has been contrived to reach a particular result.” *See Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1293 n. 7 (11th Cir. 2005) (citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 145-46 (1997)).

I. Dr. Singer’s “Profit Sacrifice” Analysis Should Be Excluded

Dr. Singer’s “profit sacrifice test” conclusions are based on unreliable assumptions, rest on a “goodwill” analysis for which Dr. Singer has no expertise, and are clearly engineered to reach the result that Dr. Singer sets out to reach. He should be barred from testifying about his “profit sacrifice test.”

A. Dr. Singer’s Profit Sacrifice Opinion Is Based on Unreliable Assumptions That Are Contradicted by the Record

Dr. Singer’s conclusion that the GSN retiering caused Cablevision to suffer a “profit sacrifice” is based on two fundamental assumptions: (1) that [REDACTED] customers who

³¹ The Federal Rules of Evidence, including Rules 702 and 703, govern this proceeding. 47 C.F.R. § 1.351.

received [REDACTED] would have left Cablevision outright in the absence of the promotion; and (2) that [REDACTED] customers who called to complain about the retiering but received no promotion caused Cablevision a [REDACTED] loss in “goodwill.” Dr. Singer’s opinion collapses if either of these assumptions is unfounded. Both are.

1. Dr. Singer’s Assumptions Concerning Subscriber Churn Are Baseless

Dr. Singer’s own testimony shows that he has no reason to assume that [REDACTED] recipients of the [REDACTED] promotion would have left Cablevision in the absence of the promotion. Rather, he states that these subscribers “*presumably* threatened to leave Cablevision after the tiering to secure the subsidy.”³² But Dr. Singer offers no factual or economic basis for assuming that all, or even most, of the [REDACTED] customers who received the [REDACTED] promotion threatened to cancel their subscriptions or would have left Cablevision entirely if not provided with a promotion.

In fact, the record evidence Dr. Singer purports to rely on indicates that the vast majority of these customers would *not* have left Cablevision in the absence of a promotion. Specifically, a February 4, 2011 email from Cablevision’s John Bickham reflects that, as of that date, [REDACTED] Cablevision subscribers had called to complain about the GSN retiering.³³ The email makes clear that Mr. Bickham [REDACTED]

[REDACTED]

[REDACTED]

³² GSN Exh. 301 ¶ 82 (emphasis added).

³³ GSN Exh. 124 (cited at GSN Exh. 301 ¶ 76 n. 136).

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In sum, Dr. Singer's assumption that each of the [REDACTED] customers who received the promotion would have otherwise left Cablevision is not only unsupported by the evidence, it is contrary to it. Given the fundamental importance of this assumption to his analysis, his expert opinion is inadmissible. *See Oldham v. Korean Air Lines Co., Ltd.*, 127 F.3d 43, 53 (D.C. Cir. 1997) (there must be sufficient evidence in the record to support an expert's assumptions).

2. Dr. Singer's Assumptions Concerning Lost "Goodwill" Are Baseless

Likewise, Dr. Singer's assumptions about "goodwill" losses lack any foundation in the record or in economic theory. Dr. Singer states that the complaints Cablevision received "imply a significant loss in goodwill."³⁸ But Dr. Singer provides no basis for concluding that Cablevision actually lost any goodwill (as that term is understood in the ordinary accounting sense) as a result of the retiering: his analysis does not demonstrate that Cablevision impaired its goodwill, or should have, and indeed, he testified that he has not even considered this question.³⁹ Given that Dr. Singer has never offered an expert opinion on lost goodwill before, and is not offering an expert accounting opinion on lost goodwill in this case,⁴⁰ his reliance on these figures to support his cost-benefit analysis can offer no assistance to the Presiding Judge, and should be rejected. *Clark v. Takata Corp.*, 192 F.3d 750, 757-58 (7th Cir. 1999); *see also* Fed. R. Evid. 702 (expert must be "qualified as an expert by knowledge, skill, experience, training, or education").

³⁸ *Id.* ¶ 83.

³⁹ Singer Tr. 323:16-22 (Mar. 6, 2015) (attached as Exhibit B). Cablevision's public filings, on which Dr. Singer and GSN rely (*see* GSN Exh. 301 ¶ 109 n. 211; GSN Notice Exh. 11), describe Cablevision's goodwill at length and confirm that "[n]o goodwill impairment was recorded for the years ended December 31, 2012, 2011 and 2010." GSN Notice Exh. 11 at I-35. Dr. Singer ignores Cablevision's actual goodwill calculations in his analysis.

⁴⁰ Singer Tr. 322:12-323:22 (Exhibit B).

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Similarly, Dr. Singer's quantification of such purported goodwill losses at [REDACTED] does not withstand scrutiny. Although Dr. Singer characterizes [REDACTED] as a "reasonable measure of the diminution in goodwill," he cites neither to evidence showing how Cablevision (or any other MVPD) calculates goodwill nor to any economic or accounting treatise to support his claim.⁴¹ To be sure, Dr. Singer has injected the number [REDACTED] into the record in the past, when in his March 2013 testimony he estimated the losses Cablevision incurred by providing [REDACTED]. [REDACTED] But he provides no basis for his new opinion that Cablevision's loss from subscribers who did not receive any promotion is precisely equal to Cablevision's costs for those subscribers who actually did receive a promotion.⁴³ And he has no basis to conclude that Cablevision suffered a monthly, recurring loss in goodwill for some period of time (the length of which he fails to define) as a result of the retiering.⁴⁴

Courts are required to "rule out 'subjective belief or unsupported speculation' by considering 'whether the testimony has been subjected to the scientific method.'" *Clark*, 192 F.3d at 757. "Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *Id.* at 758 (quoting *General Elec. Co.*, 522 U.S. at 146). Dr. Singer's assumptions on the existence and extent of lost goodwill here are unreliable and therefore inadmissible.

⁴¹ GSN Exh. 301 ¶ 83.

⁴² GSN Exh. 223 ¶¶ 75-76.

⁴³ Compare GSN Exh. 223 ¶¶ 75-76 to GSN Exh. 301 ¶ 83.

⁴⁴ GSN Exh. 301 ¶ 81 n. 151 ("I take no position as to how long the gain or loss in certain elements, such as goodwill, would be felt by Cablevision.")

B. Dr. Singer Has Changed His Opinion to Reach a Result Favorable to His Client

Over time, Dr. Singer has changed critical assumptions in his analysis without any principled basis and with only one goal in mind: to make sure that his opinion supports the positions of his client, GSN. This renders his “profit sacrifice” analysis wholly unreliable.

For example, Dr. Singer has altered his opinion on the cost to Cablevision of providing [REDACTED] to some complaining subscribers. In March 2013, Dr. Singer’s opinion was that each of these [REDACTED] subscribers cost Cablevision [REDACTED], a loss separate and distinct from the losses Cablevision incurred from any customer churn.⁴⁵ Now, Dr. Singer assumes that each subscriber who received a [REDACTED] “cost” Cablevision [REDACTED], as if they had canceled their Cablevision subscriptions.⁴⁶ There is no new evidence that has led to the change in Dr. Singer’s assumptions, and no reason he was foreclosed from making this assumption in 2013, when he submitted his original testimony. He has simply changed his assumptions to suit his client’s position.

Similarly, in his supplemental report in 2014 Dr. Singer for the first time included a “goodwill” loss that Cablevision supposedly incurred from each subscriber who complained about the retiering but who did not churn or receive a promotion. During his 2013 deposition, when asked to describe the losses Cablevision might bear from retiering GSN, Dr. Singer made

⁴⁵ [REDACTED]

⁴⁶ GSN Exh. 301 ¶¶ 82 (“A reasonable lower-bound estimate of churning Cablevision customers” includes [REDACTED] subscribers, valued at [REDACTED]).

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no mention of goodwill, and the word “goodwill” appears nowhere in the comprehensive March 2013 written direct testimony he submitted to this court.⁴⁷ The record evidence has not changed since Dr. Singer made his initial estimate of Cablevision’s losses. Only Dr. Singer’s opinion has changed, in the service of new calculations designed to support GSN’s claim.

The unreliability of Dr. Singer’s approach is revealed by the caveats he scatters throughout his testimony, in which he suggests that if one of his assumptions is wrong the Presiding Judge can simply alter another assumption in order to make the analysis work in GSN’s favor. Thus, he opines that if one changes the assumptions applicable to Cablevision’s churning losses from [REDACTED], “it is not even necessary to consider the loss in goodwill” in order to determine that Cablevision suffered a loss from the retiering.⁴⁸ Likewise, he notes that it is actually not necessary to assume, as he does, that all or nearly all of the [REDACTED] subscribers who received a promotion from Cablevision would have churned, as long as the Presiding Judge assumes that each subscriber who leaves gives rise to a loss greater than [REDACTED].⁴⁹

But Dr. Singer never provides an alternative methodology to determine how many Cablevision customers would have canceled their subscriptions without the promotion, if that number is less than 100%. Such an opinion does not “help the trier of fact to understand the evidence or determine a fact in issue.” Fed. R. Evid. 702(a). Rather, it encourages the trier of fact to invent evidence that will support Dr. Singer’s ultimate conclusion. An expert opinion that

⁴⁷ See Singer Tr. 128:6-131:3 (Exhibit C); see generally GSN Exh. 223.

⁴⁸ GSN Exh. 301 ¶ 82 n. 159.

⁴⁹ *Id.* ¶ 82 n. 153 [REDACTED]

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is neither “the product of reliable principles and methods” nor “based on sufficient facts or data” is not admissible under Rule 702. Fed. R. Evid. 702(b)-(c); *see also Elcock v. Kmart Corp.*, 233 F.3d 734, 756 (3d Cir. 2000) (expert’s opinion based on unreliable assumptions was not salvaged by testimony suggesting that the trier-of-fact could use different assumptions); *Stokes v. John Deere Seeding Grp.*, 2014 WL 675820, at *5 (N.D. Ill. Feb. 21, 2014) (expert’s opinion that the same result would be reached if different assumptions were used rendered his theory “unfalsifiable and incapable of being independently tested”).

II. Dr. Singer’s “Net Profit Sacrifice” Analysis Must Be Excluded

Dr. Singer’s “net profit sacrifice” test asks whether Cablevision would have saved more money by retiering WE tv than by retiering GSN.⁵⁰ Dr. Singer concludes that, because Cablevision’s savings from a hypothetical retiering of WE tv would have exceeded its savings from its actual retiering of GSN, Cablevision’s decision to retier GSN was made with discriminatory intent. Dr. Singer’s opinion is irrelevant as a matter of law and unsupported as a matter of fact.

As to the law, Dr. Singer suggests that his “net profit sacrifice” analysis derives from the D.C. Circuit’s decision in *Tennis Channel*.⁵¹ This is wrong. The same opinion Dr. Singer offers here was rejected by the D.C. Circuit, which explicitly held that evidence of the net benefit of retiering an affiliated network “would in itself have little bearing on the lawfulness” of an MVPD’s decision to retier an unaffiliated network.⁵² Dr. Singer makes no effort to explain why the D.C. Circuit would have formulated the test he describes while at the same time

⁵⁰ *Id.* ¶ 80.

⁵¹ *Id.*

⁵² *See supra* p. 8; *Tennis Channel*, 717 F.3d at 986-87.

declaring an application of that test irrelevant as a matter of law. *Tennis Channel* did not adopt Dr. Singer’s “net profit sacrifice” test, it rejected it.

As to the facts, Dr. Singer once again rests his analysis on a core assumption that is inconsistent with the evidence. His opinion assumes that Cablevision could have accrued cost savings by retiring WE tv.⁵³ But Dr. Singer does not even acknowledge, much less discuss, the fact that [REDACTED] [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Furthermore, Dr. Singer fails to calculate the costs and benefits of a hypothetical WE tv retiring using the same methods he used to calculate the costs and benefits of the actual GSN retiring. For example, although the number of GSN viewers who received a promotional [REDACTED] makes up a critical component of Dr.

Singer’s churn analysis, he makes no effort to estimate how many WE tv viewers would have required a similar promotion in order to remedy their complaints. And although Dr. Singer ascribes a [REDACTED] “goodwill” loss to the GSN viewers who complained about the retiring but received no promotion, he makes no attempt to estimate the number of WE tv viewers who would have complained if WE tv were retired. Instead, he

⁵³ GSN Exh. 301 ¶ 86.

⁵⁴ See CV Exh. 7.

⁵⁵ [REDACTED]

assumes that because WE tv's viewers show, by his account, [REDACTED], fewer would have churned away from Cablevision in the event of a retiering.⁵⁶ In the end, Dr. Singer's conclusion that Cablevision would have saved more money by moving WE tv to the Sports & Entertainment tier is based solely on [REDACTED], not any consistently-applied methodology.⁵⁷

Dr. Singer's failure to apply his own methodology with any consistency amounts to "cherry-picking data," which "courts have consistently excluded" because it "produces a misleadingly favorable result by looking only to 'good' outcomes." *EEOC v. Freeman*, 778 F.3d 463, 469-70 (4th Cir. 2015) (Agee, J., concurring) (citing *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078, 1086 (D.C. Cir. 2011)); see also *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 268-69 (2d. Cir. 2002). Dr. Singer's "net profit sacrifice" opinion should be excluded.

III. Dr. Singer's New Opinions Should Be Excluded

The new opinions Dr. Singer has injected into his written direct testimony, in violation of the parties' agreed scheduling order, should be excluded. At the very least, GSN should be precluded from objecting to any rebuttal that Cablevision may offer at trial.

In June 2014, the parties submitted a Joint Status Report to the Presiding Judge that included a proposed schedule for identification of fact and expert witnesses and the submission of expert reports.⁵⁸ Although the Presiding Judge never "so ordered" the parties' proposal, both GSN and Cablevision abided by it and relied on it in conducting supplemental

⁵⁶ See GSN Exh. 301 ¶¶ 90-91.

⁵⁷ See *id.* ¶ 88.

⁵⁸ See Parties' Joint Status Report, *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, File No. CSR-8529-P, at 2 (June 13, 2014).

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discovery. The scheduling order provided that GSN's expert reports were to be served on October 20, 2014, and Cablevision's expert reports on December 3, 2014.⁵⁹ It did not provide GSN with the right to submit rebuttal expert reports or additional supplemental expert reports. Nevertheless, Dr. Singer's written direct testimony presents new opinions that respond to Mr. Orszag's report or attempt to buttress weaknesses in his past opinions.

For example, in his written direct testimony Dr. Singer offers the opinion that if Cablevision accrued "*de minimis*" cost-savings from the retiering it would still be evidence of discrimination, presumably because only "material" cost-savings are evidence of non-discriminatory intent.⁶⁰ This is the first time Dr. Singer has ever suggested that any sort of materiality threshold is relevant to Cablevision's cost-benefit analysis, and he does not define what he would consider "*de minimis*" as opposed to "material." Because it was not disclosed in his prior written opinions, counsel had no opportunity to depose him on this topic.

Likewise, in the portions of his written direct testimony concerning the purported harm the retiering caused GSN, Dr. Singer discusses [REDACTED], and critiques Mr. Orszag's conclusion that GSN's advertising rates [REDACTED]. [REDACTED] Dr. Singer has strewn additional rebuttal testimony in footnotes throughout his opinion.⁶²

⁵⁹ *Id.*

⁶⁰ *See* GSN Exh. 301 ¶ 80 n. 143.

⁶¹ *See id.* ¶¶ 11, 103 n. 202.

⁶² *See id.* ¶ 81 n. 144 (criticizing Mr. Orszag's discussion of goodwill); *id.* ¶ 82 nn. 154 & 155 (criticizing Mr. Orszag's discussion of subscriber churn rates); *id.* ¶ 82 n. 156 (additional discussion of statistical significance); *id.* ¶ 92 n. 176 (modifying churn analysis for WE tv in response to Mr. Orszag's criticism); *id.* ¶¶ 107-109 nn. 207, 209 & 212 (addressing criticisms of and weaknesses in market power analysis).

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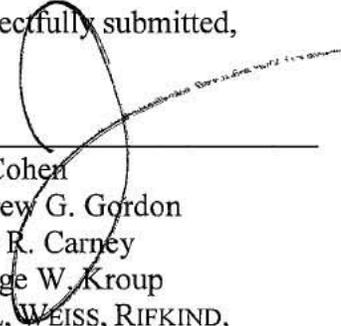
These additions to Dr. Singer's report are not "supplements" provided for under the law; they are "poorly disguised attempts to counter [an opposing party's] arguments with new expert reports." *Freeman*, 778 F.3d at 471 n. 3 (Agee, J., concurring). The Presiding Judge should not indulge Dr. Singer's efforts to bolster and repair his past opinions with new ones, and should exclude all previously-undisclosed opinions that he offers in his written direct testimony. At a minimum, Cablevision's expert must be given the opportunity to respond at trial.

CONCLUSION

For the foregoing reasons, Cablevision respectfully requests that the Presiding Judge grant its motion *in limine* to exclude any opinion offered by Dr. Singer concerning “profit sacrifice” or “net profit sacrifice” analyses, or any new opinions raised for the first time in his written direct testimony.

Dated: June 12, 2015

Respectfully submitted,



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EXHIBIT A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:)
)
THE TENNIS CHANNEL, INC.)
) MB Docket
) No. 10-204
v.)
)
COMCAST CABLE COMMUNICATIONS,) File No.
LLC) CSR-8285-P
)
Complaint Alleging Program)
Carriage Discrimination)

Tuesday,
April 26, 2011

Volume 3

Hearing Room TW-A363

445 12th Street, S.W.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JUDGE RICHARD L. SIPPEL
Chief Administrative Law Judge

1 putting Tennis Channel out into the doghouse?"

2 And they couldn't find any
3 evidence. They couldn't find any evidence.
4 They came back, and they said, "Guess what.
5 We subjected Tennis Channel to a test. Tennis
6 Channel failed the test. Therefore, we are
7 entitled not to carry Tennis Channel the way
8 that we do Golf and Versus."

9 And I would submit, just as we
10 went to our -- subjecting our female
11 candidates to a unique test that they fail and
12 then citing the test, if the test is only
13 applied to the unaffiliated, you can't claim
14 that it's proof that it's not discrimination.
15 It has everything to do with discrimination if
16 it's only applied to the unaffiliated
17 candidates. Okay?

18 And so, for that reason, Ms.
19 Gaiski's test -- I don't know if you want to
20 -- Comcast probably has a nicer name for it.
21 But Ms. Gaiski's test fails. It fails because
22 it was never applied to Golf, to Versus.

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EXHIBIT B

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All of the remaining pages of this Exhibit have been designated as Highly Confidential, as provided in the Protective Order in this proceeding, and have been redacted in their entirety.

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EXHIBIT C

REDACTED - FOR PUBLIC INSPECTION

All of the remaining pages of this Exhibit have been designated as Highly Confidential, as provided in the Protective Order in this proceeding, and have been redacted in their entirety.