

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

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

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

**OPPOSITION OF GAME SHOW NETWORK, LLC TO
 DEFENDANT’S OBJECTIONS TO GSN’S TRIAL EXHIBITS AND OMNIBUS
 MOTION *IN LIMINE* TO EXCLUDE EXHIBITS AND TESTIMONY**

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Table of Contents

	<u>Page</u>
Introduction.....	1
Argument	2
I. The Hearing is the Appropriate Venue for the Presiding Judge to Consider the Evidence.....	2
II. Cablevision’s Relevance Objections are Without Merit.....	4
A. GSN’s Documentary Evidence post-dating February 2011 Are Probative of Whether Cablevision’s Tiering of GSN Constitutes Discrimination.	4
B. GSN’s Direct Testimony Post-Dating February 1, 2011 Is Probative of Whether Cablevision’s Tiering of GSN Constitutes Discrimination.....	6
III. Cablevision’s Hearsay Objections Are Without Merit	7
A. GSN’s Written Testimony is Reliable, Admissible, and Necessary to the Presentation of Evidence of Discrimination.	7
B. GSN’s Documentary Exhibits Are Not Hearsay or are Exceptions to the Hearsay Rule.....	10
1. Deposition Testimony.....	10
2. Customer Complaints.....	10
3. Third-Party Website Materials & News Articles.....	11
4. GSN Documents Falling Under the Business Records Exception.....	12
5. Documents Underlying Expert Opinions.....	13
6. Remaining Documentary Exhibits With Hearsay Objections	13
IV. Cablevision’s Personal Knowledge Objections are Without Merit	14
CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Adkins v. Dirickson</i> , 523 F.Supp. 1281 (E.D. Pa., 1981)	14
<i>Ambrose v. Roeckeman</i> , 749 F.3d 615 (7th Cir. 2014)	12
<i>Comcast Cable Communications, LLC</i> , 26 FCC Rcd. at 3730-31	3
<i>Jonasson v. Lutheran Child & Family Servs.</i> , 115 F.3d 436 (7th Cir. 1997)	2
<i>Moorhead v. Mitsubishi Aircraft Int'l, Inc.</i> , 828 F.2d 278 (5th Cir. 1987)	3
<i>Estate of Rick v. Stevens</i> , 2002 WL 1713301 (N.D. Iowa July 2, 2002)	2
<i>Tennis Channel, Inc. v. Comcast Cable Communications, LLC</i> , Initial Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 11D-01, MB Docket No. 10-204, File No.	5
<i>U.S. v. Wirtz</i> , 357 F.Supp.2d 1164 (D.Minn. 2005)	15
<i>United States v. Detrich</i> , 865 F.2d 17 (2d Cir. 1988).....	7
<i>United States v. Heller</i> , 551 F.3d 1108 (9th Cir. 2009)	2
<i>Wine Country Radio</i> , Memorandum Opinion and Order, 11 FCC Rcd 2333 (1996)	7
Other Authorities	
Fed. R. Evid. 701	9

Fed. R. Evid. 70312

Fed. R. Evid. 801(d)(2)13

Fed. R. Evid. 802(b)(1)10

Fed. R. Evid. 802(d)(2)13

Fed. R. Evid. 803(3)10

Fed. R. Evid. 803(6)9, 11, 13

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Game Show Network, LLC (“GSN”) respectfully submits this opposition to
 Cablevision Systems Corporation’s (“Cablevision’s”) objections to GSN’s trial exhibits and
 omnibus motion *in limine* to exclude exhibits and testimony.

INTRODUCTION

In its objections to GSN’s trial exhibits and its omnibus motion to exclude portions of
 GSN’s exhibits and written testimony, Cablevision seeks to exclude as irrelevant evidence
 plainly probative of Cablevision’s discriminatory conduct.¹

¹ GSN has withdrawn the official notice exhibits to which Cablevision objected (GSN Exhs. 1-
 10, 12-18) to the extent that those documents were offered as stand-alone exhibits. GSN
 (continued...)

Cablevision's objections lack merit and are better resolved at the upcoming hearing. Many of Cablevision's objections rely upon a misunderstanding of the nature of the evidence the motion seeks to exclude, as well as the rules of evidence. Those rules permit fact testimony grounded in personal observation and experience and recognize a wide range of purposes for which evidence may be offered. The Presiding Judge should make these admissibility determinations in the context of all the evidence at trial.

In addition, many of Cablevision's objections are plainly contrary to its own approach in submitting exhibits. Cablevision cannot have it both ways. Its objections to GSN's trial exhibits and omnibus motion *in limine* should be dismissed.

ARGUMENT

I. The Hearing is the Appropriate Venue for the Presiding Judge to Consider the Evidence

Admissibility determinations should not be assessed out of context. Cablevision should not be permitted to defend this action by preemptively excising evidence of its discrimination from the record before the hearing begins. Instead, any disagreements should be addressed at the hearing when the Presiding Judge has the opportunity to consider the evidence in the context of the relevant testimony.

The court's evidentiary gatekeeping role may be substantially relaxed when the judge serves as the factfinder.² In particular, concerns about hearsay are lesser. Thus, while

reserves the right to provide those exhibits to the court as documents upon which GSN's experts relied in their expert reports.

² See, e.g., *Estate of Rick v. Stevens*, 2002 WL 1713301, at *4 (N.D. Iowa July 2, 2002)("[N]ot all evidentiary questions presented in a motion in limine can—or should—necessarily be resolved prior to trial."); *Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436, 440 (7th Cir. 1997)("Some evidentiary submissions ... cannot be evaluated accurately or sufficiently by the (continued...)")

Cablevision's objections on hearsay grounds lack merit in their own right, for the reasons discussed below the objections are particularly inappropriate in this setting.³

Moreover, the Presiding Judge may exercise significant discretion. variation from the Federal Rules of Evidence, by rule or by ruling of the presiding officer, provides a desirable degree of flexibility in the conduct of administrative hearings.⁴ Cablevision's approach arbitrarily narrows the Presiding Judge's broad discretion to determine at the hearing the reliability and weight of the evidence offered by the parties.⁵ Recognizing this discretion, GSN has adopted a more targeted approach in its objections to Cablevision's hearing exhibits and written testimony, leaving to the Presiding Judge the ability to make any determinations regarding the reliability and weight of the evidence at the hearing itself—the time and place when he will best be able to judge its reliability.

trial judge [via a motion *in limine*]. In these instances, it is necessary to defer ruling until during trial, when the trial judge can better estimate its impact on the jury.”); *United States v. Heller*, 551 F.3d 1108, 1112 (9th Cir. 2009) (“[I]n the case of a bench trial, a threshold ruling is generally superfluous.”).

³ *Moorhead v. Mitsubishi Aircraft Int'l, Inc.*, 828 F.2d 278, 287 (5th Cir. 1987)(“[S]trict evidentiary rules of admissibility are generally relaxed in bench trials, as appellate courts assume that trial judges rely upon properly admitted and relevant evidence.”).

⁴ See *Comcast Cable Communications, LLC*, 26 FCC Rcd. at 3730-31; *Application of the Federal Rules of Evidence to Commission Adjudicatory Proceedings*, 57 FCC 2d 411 (1975) (“The possibility of variation from the Federal Rules of Evidence, by rule or by ruling of the presiding officer, provides a desirable degree of flexibility in the conduct of administrative hearings. Nor does it follow that an administrative hearing should be conducted in precisely the same manner as a judicial trial.”).

⁵ On Friday, June 12, 2015, Cablevision submitted its (1) Objections to Complainant's Direct Case Exhibits and (2) Omnibus Motion In Limine to Exclude Inadmissible Exhibits and Testimony. GSN responds to both of Cablevision's submissions in this omnibus opposition because Cablevision's submissions implicate overlapping legal and factual issues. Cablevision also filed a motion *in limine* to exclude portions of the written testimony submitted by GSN's expert, Hal Singer. GSN responds to that motion in a separate opposition.

II. Cablevision's Relevance Objections are Without Merit

A. GSN's Documentary Evidence post-dating February 2011 Are Probative of Whether Cablevision's Tiering of GSN Constitutes Discrimination.⁶

Cablevision objects on relevance grounds to a number of documents that post-date February 1, 2011, the implementation date of Cablevision's tiering decision with respect to GSN. It argues that such documents could not have been relevant to Cablevision's decision-making and therefore must be excluded.

This argument is flawed in several respects. First, it ignores the elementary principle that evidence generated *after* a decision is made can often be probative of the decision—for example, a simple admission that a decision was made for a particular reason could post-date the decision itself. Further, Cablevision's objection also ignores the fact that there are multiple relevant decision points at issue in this case, including but not limited to:

- December 3, 2010: The date on which Cablevision announced its plan to tier GSN;
- February 1, 2011: The date on which it effected the tiering of GSN after Derek Chang, at the time DIRECTV's Executive Vice President of Content Strategy and Development and a member of the GSN management committee, formally refused to carry Wedding Central on DIRECTV;
- March 8, 2011: The date on which Thomas Montemagno refused to restore GSN's carriage because, in part, [REDACTED];⁷

⁶ The objections opposed in this section include those to GSN Exhs. 2-9, 12-18, 141, 142, 144, 145, 147, 148, 149, 151, 153, 155, 157, 159-162, 165, 166, 168, 170, 171, 172, 173, 227, 228, 229, 230, 237, 238, 240, 244, 245, 247-249, 263, 269, 270, 271, 272, 287, 289, 290, 293, and 311. In addition, Cablevision includes GSN Exh. 173 among those to which it objects on relevance grounds because the [REDACTED]. As discussed in this section, Cablevision's date-based objections cannot be sustained. Further, this particular email is merely an [REDACTED]

[REDACTED] The email was forwarded [REDACTED] [REDACTED] for the express purpose of collecting materials responsive to Cablevision's document requests. But the relevant portion of the chain is [REDACTED]

- March 9, 2011: The date on which [REDACTED] [REDACTED] even as it refused to restore GSN's carriage; and
- Every day since, in which Cablevision continues to discriminate against GSN and in favor of its affiliated networks.⁹

The last point is particularly significant. GSN's allegations are not limited to a single point in time. Indeed, Cablevision's position mischaracterizes GSN's allegations of discrimination by limiting them to one singular, static point in time. Rather, GSN complains not only of the decision to move the network to the sports tier but also of an *ongoing* violation of Section 616—that is, Cablevision's continuing refusal to provide nondiscriminatory carriage to GSN. For this reason, materials that post-date February 2011 continue to be relevant because they show that GSN remains entitled to protection under Section 616 and that Cablevision continues to deny GSN the fair carriage it deserves.¹⁰

Notably, even as Cablevision objects to post-February 1, 2011 documents in GSN's exhibit set, it has in excess of 40 documents in its exhibit set dated after February 1, 2011,

⁷ GSN Exh. 138.

⁸ See GSN Exhs. 202 & 203.

⁹ GSN notes that, in the *Tennis Channel* proceeding, the Presiding Judge considered and relied on evidence concerning an instance of programming competition involving the networks at issue that post-dated by nearly two years the discriminatory carriage decision about which Tennis Channel complained. See GSN Notice Exh. 8, *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 11D-01, MB Docket No. 10-204, File No. CSR 8258-P, 26 FCC Rcd 17160, ¶ 26 & n.95 (2011) (discussing Comcast's efforts to seek Wimbledon rights for the Versus network in 2011, two years after the 2009 carriage decision at issue in that case).

¹⁰ Consider, for instance, if GSN rebranded itself and overhauled its programming to become a sports network in late 2011. Cablevision would undoubtedly point to and seek to rely on that fact to insist that it should not be required to move GSN off of the sports tier.

several of which are programming, marketing, and ratings documents for WE tv and GSN.¹¹ Cablevision takes the untenable position that GSN should be precluded from submitting documentary evidence from after the effective date of the tiering but that Cablevision is not under the same limitation.¹²

B. GSN's Direct Testimony Post-Dating February 1, 2011 Is Probative of Whether Cablevision's Tiering of GSN Constitutes Discrimination.¹³

Cablevision objects on relevance grounds to direct testimony by David Goldhill, Dale Hopkins, and John Zaccario concerning GSN's performance after the tiering event. It argues that such testimony is not probative of whether Cablevision's decision to put GSN on the sports tier constituted discrimination on the basis of affiliation because it could not have impacted Cablevision's decision-making.

As discussed in detail above, Cablevision's position cannot be sustained because Cablevision engages in continuing discriminatory conduct by its ongoing refusal to restore GSN to its broadly-distributed tier or otherwise carry the network in a nondiscriminatory manner. Accordingly, portions of written testimony from GSN's fact witnesses concerning programming or other network initiatives implemented after the tiering event are highly relevant and probative

¹¹ If the Presiding Judge strikes GSN's post-February 2011 documents, GSN respectfully submits that the post-February 2011 portions of Cablevision's exhibits must be struck as well: CV Exhs. 5, 6, 8, 9, 14, 21, 24, 32, 35, 152, 160-200.

¹² In the event that the Presiding Judge excludes documents post-dating February 1, 2011 from GSN's exhibit set, he should do so across-the-board, excluding all Cablevision exhibits from after the same date.

¹³ These objections include the following direct written testimony: GSN Exh. 218, Written Direct Testimony of David Goldhill ¶¶ 6, 8-11, 30 [hereinafter "Goldhill Written Direct"]; GSN Exh. 220, Written Direct Testimony of Dale Hopkins, ¶¶ 6, 11, 12 [hereinafter "Hopkins Written Direct"]; GSN Exh. 221, Written Direct Testimony of John Zaccario, ¶ 5 [hereinafter "Zaccario Written Direct"].

of Cablevision's continuing discrimination. For this reason, Cablevision's objections to the following portions of GSN's written direct testimony must be rejected.

III. Cablevision's Hearsay Objections Are Without Merit

Cablevision objects to many of GSN's exhibits and direct testimony on hearsay grounds but none of the objections have merit, including as demonstrated by Cablevision's own use of similar categories of documents. Cablevision demands that GSN produce evidence of harm resulting from its retiering yet objects when GSN's witnesses give their personal recollections as to that harm. Again, the Presiding Judge should decide at the hearing the extent to which this evidence may be relied upon.

A. GSN's Written Testimony is Reliable, Admissible, and Necessary to the Presentation of Evidence of Discrimination.

Cablevision objects to portions of the written testimony of David Goldhill, Dale Hopkins, and John Zaccario on the basis of hearsay. The Presiding Judge is well equipped to judge the credibility of these witnesses, and the probative value of this testimony well outweighs any potential hearsay objections. This is especially the case since the evidence of discrimination that Cablevision challenges as hearsay is precisely the type of evidence it demands GSN produce in order to prove its case. In addition, many of the challenged statements are non-hearsay because they are offered for a non-hearsay purpose, or they fall into a recognized hearsay exception.¹⁴ In any case, the challenged testimony contains indicia of reliability and is therefore admissible in this proceeding.¹⁵

¹⁴ See, e.g., *United States v. Detrich*, 865 F.2d 17, 20 (2d Cir. 1988).

¹⁵ See *Michael Couzens, Esq. Margaret Miller Esq.*, Letter, DA 11-709, 26 F.C.C.R. 6020, 6024 n. 28 (2011) ("hearsay evidence may be admissible in administrative proceedings if there are some indicia of reliability"), citing *Echostar Communications Corp. v. FCC*, 292 F.3d 749, 753 (continued...)

- David Goldhill Written Testimony:
 - Mr. Goldhill testifies that “Mr. Gillespie reported that Cablevision opposed a new agreement on terms consistent with the previous agreement but made clear that it would continue to carry GSN on the same terms set forth [REDACTED]. The quoted testimony is non-hearsay because GSN offers it for the purpose of establishing its effect on the hearer. The testimony at issue plainly bears upon the motivations underlying GSN’s negotiations with Cablevision following the expiration of its affiliation agreement, as well as GSN’s expectations concerning the status of its carriage with Cablevision.
 - Mr. Goldhill testifies concerning Cablevision’s tying fair carriage of GSN to the willingness of GSN’s part-owner, DIRECTV, to carry the floundering Wedding Central.¹⁷ To the extent that any portion of Mr. Goldhill’s testimony concerning Cablevision’s illicit Wedding Central proposal is deemed hearsay, it is nonetheless admissible because it contains indicia of reliability. In fact, it is supported by written documentary evidence in the form of emails.¹⁸ Further, to prevent the Presiding Judge from hearing this evidence would make it nearly impossible for GSN to present this real-world evidence of discrimination.
 - Mr. Goldhill testifies that “[e]very other major distributor recognizes GSN’s value...and has continued to carry the network broadly.”¹⁹ This statement is offered as Mr. Goldhill’s factual testimony that GSN retains broad carriage and his opinion that the broad carriage indicates that the distributors recognize GSN’s value. It is not hearsay.
 - Cablevision seeks to exclude Mr. Goldhill’s testimony regarding the negative reactions of media buyers to Cablevision’s retiering of GSN.²⁰ Again, these statements must be admitted for the Presiding Judge to fairly assess the degree to which GSN has been harmed.

(D.C. Cir. 2002); *Wine Country Radio*, Memorandum Opinion and Order, 11 FCC Rcd 2333, 2334 (1996). In *Couzens*, the Commission found that a declaration challenged on the basis of hearsay was reliable because it was corroborated by email evidence.

¹⁶ Goldhill Written Direct, ¶ 13.

¹⁷ *Id.* ¶¶ 18-20.

¹⁸ See GSN Exhs. 93, 99, 102.

¹⁹ Goldhill Written Direct, ¶ 23.

²⁰ *Id.* ¶¶ 33-34.

- Dale Hopkins Written Testimony:
 - Ms. Hopkins's testimony regarding her understanding that Mr. Gillespie sought to engage Cablevision in renewal negotiations but was rebuffed is offered for the effect on Ms. Hopkins and her actions as a GSN executive.²¹
 - Ms. Hopkins's testimony concerning statements made by [REDACTED] [REDACTED] representatives during GSN carriage negotiations is offered for the purpose of providing her recollection as to the harm GSN faced following the retiering. The Presiding Judge is free to evaluate the reliability of that testimony at trial.²²

- John Zaccario Written Testimony:
 - Mr. Zaccario's testimony concerning GSN Exhibit 8, a network strategy presentation, is not hearsay. The testimony to which Cablevision objects introduces the presentation, which GSN created and maintained in the regular course of business.²³ The exhibit and Mr. Zaccario's testimony are therefore admissible.²⁴ In addition, Mr. Goldhill, the purported speaker, will testify live and will be available for cross-examination.
 - Cablevision objects to Mr. Zaccario's testimony identifying GSN's competitors from an advertising perspective.²⁵ But Mr. Zaccario's testimony concerning GSN's competitive set bears the requisite indicia of reliability to support its admission because it is buttressed by documentary evidence.²⁶ In addition, it may be considered permissible lay opinion testimony.²⁷
 - Mr. Zaccario testifies concerning the criteria employed by advertising purchasing executives, the unique nature of the New York market, and the

²¹ Hopkins Written Direct, ¶ 16.

²² *Id.* ¶

²³ Zaccario Written Direct, ¶ 3.

²⁴ *See* Fed. R. Evid. 803(6) (business records exception).

²⁵ Zaccario Written Direct, ¶ 6.

²⁶ *Id.* ¶ 6; GSN Exh. 11.

²⁷ *See* Fed. R. Evid. 701.

particular harms associated with the action Cablevision took in the New York market.²⁸ Contrary to Cablevision's objection, Mr. Zaccario's testimony is non-hearsay because GSN offers this testimony to establish the state of mind of advertising buyers.²⁹

B. GSN's Documentary Exhibits Are Not Hearsay or are Exceptions to the Hearsay Rule

1. Deposition Testimony³⁰

Cablevision's hearsay objections to these materials are improper because the deposition designations of Cablevision employees are admissible as party admissions. In addition, these deposition transcripts are admissible as the prior sworn testimony of witnesses who are unavailable for trial.³¹ GSN submitted the materials as a courtesy to the Presiding Judge to permit easy reference to the testimony during the pretrial and trial phase of this proceeding.³²

2. Customer Complaints³³

Cablevision objects to a number of emails and letters from Cablevision subscribers responding to Cablevision's decision to tier GSN. These communications are highly relevant, in that they rebut Cablevision's suggestion in this litigation that GSN is not "must-have" programming or not valued by its subscribers. Indeed, Cablevision placed the topic of subscriber

²⁸ *Id.* ¶¶ 10, 11, 13, 14, 17.

²⁹ Fed. R. Evid. 803(3).

³⁰ Exhs. 207-217.

³¹ Fed. R. Evid. 802(b)(1).

³² GSN notes that undersigned counsel adopted a similar approach in a prior hearing proceeding before the Presiding Judge. In *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, the parties put in a complete set of the pleadings and deposition testimony through the exhibit submissions process, and the Presiding Judge allowed those materials into the record.

³³ Exhs. 110, 113, 115, 117, 119, 126, 139.

response in issue by asserting that it did not anticipate its customers would care if GSN were tiered. It cannot now move to exclude communications that suggest otherwise.

Cablevision contends the communications are inadmissible hearsay. However, GSN seeks to introduce the emails to demonstrate that Cablevision had notice of its subscribers' discontent with the decision to tier GSN and place GSN on a sports tier.³⁴ They are relevant to their effect on Cablevision executives who did not reverse their tiering decision. They also may be admissible to demonstrate the subscribers' state of mind as evidence that there was a credible threat that they would drop their Cablevision subscriptions. Moreover, these complaints were maintained in Cablevision's normal course of business are admissible under the business records exception.³⁵ They are also admissible to shed light on the analysis of Cablevision's economic expert, Mr. Orszag, as to the consumer response to the tiering event.³⁶ These emails are not likely to cause unfair prejudice or to mislead the Presiding Judge. Rather, they are the only real-world records that Cablevision produced regarding its customers' views of the retiering. The emails should be admitted.

3. Third-Party Website Materials & News Articles³⁷

Cablevision objects to the introduction of various public news articles and third-party website materials. GSN believes that all such materials should be entered into evidence and

³⁴ In any event, if the Presiding Judge concludes the statements are hearsay, GSN believes it can show that Cablevision regularly receives customer complaints in the ordinary course of its business and has a system in place to compile and track such complaints. Accordingly, these materials fall within the business records exception to the hearsay rule. *See* Fed. R. Evid. 803(6). In addition, they are admissible because they bear the requisite indicia of reliability.

³⁵ Fed. R. Evid. 803(6).

³⁶ *See* CV Exh. 334, Orszag Report, ¶¶ 26-33.

³⁷ Exhs. 7, 40, 114, 168, 170, 171, 177.

given the weight the Presiding Judge deems appropriate. To the extent that these materials present reliability concerns, the Presiding Judge may exercise his discretion to assign them the weight they deserve.

At the same time that it attempts to preclude GSN's use of third-party materials, Cablevision seeks to introduce comparable third-party documents in its exhibit set, including the media kits at Cablevision Exhs. 212 and 213.³⁸ Those materials were downloaded and printed from the websites of other distributors and will not be sponsored by any witness with first-hand knowledge of the information they contain. Again, the inconsistency in Cablevision's position is stark. It offers no support for the arbitrary distinction it seeks to draw between the publicly-available, third-party materials on its own exhibit list and the above-listed exhibits submitted by GSN.

4. GSN Documents Falling Under the Business Records Exception³⁹

Cablevision objects to many emails and other GSN documents. These documents are regularly maintained in the ordinary course of GSN's business and fall within the purview of the sponsoring witness. In addition, for those witnesses such as John Bickham and Kelly Goode who, at present, are not appearing at trial, the parties have agreed that their deposition transcripts will be submitted as their testimony.⁴⁰ The documents marked as exhibits at their depositions are included as trial exhibits for the Presiding Judge's reference in reviewing those transcripts.

³⁸ If the Presiding Judge strikes GSN's challenged news articles and publicly-available third party information, GSN respectfully requests that the following Cablevision exhibits be barred as well: 144, 145, 212, and 213.

³⁹ GSN Exhs. 7, 8, 21, 22, 42, 47, 72, 91, 92, 114, 134, 142, 148, 159-62, 172, 227, 237.

⁴⁰ GSN Exh. 217.

[REDACTED] receives communications like GSN Exh. 134 on a regular basis in the ordinary course of her business.

- **GSN Exh. 172:** Business Records, Fed. R. Evid. 803(6). GSN seeks to introduce the exhibit to demonstrate [REDACTED]. In any event, GSN believes it will be able to show that [REDACTED] regularly receive and maintain communications like GSN Exh. 134 in the ordinary course of their business.
- **GSN Exh. 177:** Business Records, Fed. R. Evid. 803(6), deposition exhibit. GSN believes it will be able to show that [REDACTED] regularly receive and maintain communications like GSN Exh. 177 in the ordinary course of their business. In addition, GSN submitted Exh. 177, [REDACTED]

IV. Cablevision’s Personal Knowledge Objections are Without Merit

Cablevision mischaracterizes some of the testimony and exhibits as mere “speculation.” The reality is that it is up to the Presiding Judge—not the defendant—to determine whether testimony has an adequate foundation. In addition, much of the testimony Cablevision seeks to exclude is factually-based testimony that is well founded in the proponents’ experience. Cablevision seeks to exclude these opinions and recollections solely because they are extremely probative of its discrimination against GSN.

“A witness is deemed competent to testify unless it is nearly impossible that he had first-hand observation.”⁴⁵ Yet Cablevision seeks to exclude a substantial portion of GSN’s written direct testimony on the basis that GSN’s witnesses lack personal knowledge of the subjects addressed in their written testimony. GSN respectfully submits that the parties’ witnesses should be allowed to establish the foundation for their written testimony when they appear at the

⁴⁵ *Adkins v. Dirickson*, 523 F.Supp. 1281, 1284 -1285 (E.D. Pa., 1981), citing J. Weinstein & M. Berger, Weinstein’s Evidence, P 602(02), at 602-5 (1978).

hearing. In the case that the Presiding Judge opts to address Cablevision's objections in advance of the hearing, for the reasons detailed below, each GSN witness must also be allowed testify based on his or her extensive experience in the media industry and firsthand dealings with the subjects of his or her testimony.⁴⁶

- David Goldhill Written Testimony: Mr. Goldhill has more than 20 years of experience in various roles in the media industry,⁴⁷ and has served as the President and Chief Executive Officer of GSN since 2007. In this role, he oversees the network's distribution and programming strategy, and leads development of the network's viewing and advertising base.⁴⁸ To effectively articulate and implement GSN's programming and development strategies, Mr. Goldhill reviews GSN's historical performance and strategy and regularly monitors GSN's competitors, media trade press, and related sources of information. Based on his experience at GSN and in the cable business more broadly, Mr. Goldhill has personal knowledge of each aspect of his testimony, including the matters that are subject to Cablevision's challenge.
 - Mr. Goldhill may testify concerning GSN's 2004 re-branding strategy based on knowledge obtained from his predecessor Richard Cronin as well as from his review of GSN management committee materials.⁴⁹
 - Based on his monitoring of GSN's competitors and review of the trade press, Mr. Goldhill has knowledge sufficient to testify concerning WE tv's programming schedule and target audience.⁵⁰ Similarly, based on these same sources as well as his review of comparative value analyses prepared by the GSN team and third parties, Mr. Goldhill may testify concerning the fact that Cablevision did not move any network other than GSN to the

⁴⁶ See *id.*, quoting *United States v. Espino*, 317 F.3d 788, 797 (8th Cir.2003) ("While the ordinary rule confines the testimony of a lay witness to concrete facts within his knowledge or observation, the Court may rightly exercise a certain amount of latitude in permitting a witness to state his conclusions based upon common knowledge or experience."). See also *U.S. v. Wirtz*, 357 F.Supp.2d 1164, 1169 (D.Minn. 2005).

⁴⁷ Goldhill Written Direct, ¶ 2.

⁴⁸ *Id.* ¶ 1.

⁴⁹ *Id.* ¶ 5.

⁵⁰ *Id.* ¶ 10.

of the New York market is widely recognized, and Cablevision's own witness, Mr. Montemagno, [REDACTED].

- Dale Hopkins Written Testimony: Ms. Hopkins has over 30 years of experience in the television industry, including significant experience working at female-oriented networks.⁶⁰ Ms. Hopkins joined GSN in 2009, and served as the network's Chief Marketing Officer. Since March 2011, she has served as the Executive Vice President of Distribution for GSN.⁶¹ Based on her experience at GSN and her previous experience in the television industry, Ms. Hopkins has personal knowledge of each of the matters included in her written testimony, including those to which Cablevision objects.
 - Mr. Goldhill initially approached Ms. Hopkins about joining GSN in 2008. In their early discussions, Mr. Goldhill explained to Ms. Hopkins that she was hired to develop a marketing and branding strategy to highlight the network's newly-developed female-oriented original programming. He also made clear that he hired her, in part, because of her prior experience at E! Entertainment Television and the Style Network. Accordingly, Ms. Hopkins is able to testify as to her understanding of the reasons why she was hired.⁶²
 - During her tenure as GSN's Chief Marketing Officer, Ms. Hopkins regularly received information about the network's promotional opportunities. As a result, Ms. Hopkins has personal knowledge of proposed cross-promotion opportunities for WE tv's *Downsized* and *Sunset Daze*, and her industry experience allows her to draw reasonable inferences about the value of such crossover promotions.⁶³
 - Upon assuming her role as GSN's Executive Vice President of Distribution, Ms. Hopkins undertook responsibility for GSN's distribution arrangements. Accordingly, Ms. Hopkins reviewed documents and information relevant to GSN's carriage and negotiation history with Cablevision, and may testify concerning these matters.⁶⁴

⁵⁹ Montemagno Written Direct, ¶ 19.

⁶⁰ Hopkins Written Direct, ¶¶ 3-4.

⁶¹ *Id.* ¶¶ 1-2.

⁶² *Id.* ¶ 5.

⁶³ *Id.* ¶ 12.

⁶⁴ *Id.* ¶ 16.

- In his role as Executive Vice President of Advertising Sales, Mr. Zaccario monitors GSN's advertising sales competitors, and draws reasonable inferences from his conversations with advertising buyers. As a result, he has personal knowledge sufficient to identify and testify concerning GSN's competitive set from an advertising perspective.⁷²
- Mr. Zaccario regularly meets with advertising executives, and therefore has personal knowledge sufficient to testify as to the criteria they use to make advertising purchasing decisions. Specifically, Mr. Zaccario can testify as to their requirement that they be able to view a given programming network at home.⁷³ He may also testify concerning advertising buyers' interest in GSN's distribution trajectory, and the impact of GSN being placed on Cablevision's sports tier.⁷⁴ On the same basis, he has personal knowledge to testify concerning the fact that advertising buyers have been deprived of access to GSN,⁷⁵ and to describe instances in which buyers have inquired as to the absence of GSN on Cablevision systems.⁷⁶

⁷² *Id.* ¶ 6.

⁷³ *Id.* ¶ 9.

⁷⁴ *Id.* ¶¶ 12, 13.

⁷⁵ *Id.* ¶¶ 9, 10.

⁷⁶ *Id.* ¶ 11.

CONCLUSION

For the reasons set forth above, GSN respectfully requests that the Presiding Judge deny Cablevision's motions to exclude the testimony and exhibits identified in its June 12, 2015 motion.

Respectfully submitted,

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