

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

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

TO: Chief Administrative Law Judge Richard L. Sippel

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF GAME SHOW NETWORK, LLC**

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TABLE OF CONTENTS

	<u>Page</u>
Proposed Findings of Fact	1
I. BACKGROUND	4
A. Cablevision and Its Affiliated Networks.....	4
1. Cablevision’s Vertical Integration	4
2. WE tv	5
3. Wedding Central	6
4. Cablevision’s Preferential Treatment of Its Affiliated Networks	7
B. GSN.....	10
C. Cablevision’s Decision to Tier GSN.....	12
II. DIRECT PROOF OF DISCRIMINATION.....	17
A. Cablevision’s Tiering of GSN Resulted From Applying Different Carriage Policies to GSN Than to Cablevision’s Affiliated Networks.	17
B. Cablevision Directly Discriminated Against GSN by Conditioning Carriage of GSN on a Commitment from GSN’s Parent, DIRECTV, to Carry Wedding Central.....	22
III. INDIRECT PROOF OF DISCRIMINATION.....	24
A. GSN Is Similarly Situated to Cablevision’s Affiliated Networks WE tv and Wedding Central.	24
1. Target Audience.....	24
2. Target Advertisers.....	27
3. Target Programming & Genre	30
4. Ratings	32
5. License Fee	33

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6.	Cablevision’s Experts Do Not Credibly Challenge that the Networks Are Similarly Situated.....	34
7.	GSN’s Expert Opinions Are Reliable.....	50
B.	Cablevision’s Discrimination Was Not Based on Any Valid Business Purpose.....	53
1.	Cablevision’s Stated “Value” Rationale for Targeting GSN Is Pretextual.....	53
2.	Incremental Loss: At a Minimum Any Losses Associated With Broad Carriage of GSN Would Have Been Equal to or Less Than Those Losses Associated with Broad Carriage of WE tv and Wedding Central.....	56
3.	Net Benefit: Despite Its Mitigation Efforts, Cablevision’s Distribution Division Incurred Direct and Immediate Economic Losses.....	57
IV.	CABLEVISION’S DISCRIMINATION UNREASONABLY RESTRAINS GSN’S ABILITY TO COMPETE FAIRLY.....	59
A.	GSN Suffered Harm in New York Market through Declining Ratings Overall and Among Its Target Demographic.....	60
B.	GSN Suffered Harm on a National Level that Unreasonably Restrained Its Ability to Compete.....	62
1.	Cablevision’s Discrimination Directly Harmed GSN in the Form of Significant Lost Revenue.....	62
2.	Cablevision’s Discrimination Harms GSN’s Ability to Compete for Advertisers.....	63
3.	Cablevision’s Discrimination Harms GSN’s Ability to Grow the Network and Develop Original Programming.....	65
V.	REMEDY.....	65
A.	GSN Seeks Immediate Relief Requiring Cablevision to Carry GSN at the Same Level at Which It Carries Its Affiliated Networks.....	65
B.	Cablevision Is Subject to Maximum Forfeiture Allowable Under Section 616 for Its Violation of the Program Carriage Rules.....	66
	Proposed Conclusions of Law	68

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A. Cablevision Engaged in Discriminatory Conduct the Effect of Which Was to Unreasonably Restrain GSN’s Ability to Compete Fairly..... 68

B. Cablevision Should Be Required to Distribute GSN at the Same Level as Its Affiliated Networks. 72

C. An Order of Forfeiture Should Be Issued Against Cablevision for Its Recurring Misconduct..... 73

Proposed Findings of Fact

INTRODUCTION

1. Complainant Game Show Network, LLC (“GSN”), has filed a program carriage complaint against Defendant Cablevision Systems Corporation (“Cablevision”). (GSN Exh. 1, Program Carriage Complaint, Oct. 12, 2011.)

2. GSN alleges that Cablevision has discriminated against GSN in favor of its affiliated video programming vendors, including WE tv and Wedding Central, in violation of Section 616 of the Communications Act (“Section 616”) and Section 76.1301(c) of the Commission’s rules. (*Id.*)

3. The Media Bureau found that GSN had presented *prima facie* evidence that Cablevision violated Section 616. (Hr’g Designation Order ¶¶ 2, 9, 36, MB Docket No. 12-122, File No. CSR-8529-P (rel. May 9, 2012) [hereinafter *HDO*].)

4. The Media Bureau designated the case for a hearing at which the Presiding Judge was to address 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.

(*Id.* at ¶ 39.)

5. GSN has established through both direct and indirect evidence that Cablevision discriminated against GSN and in favor of Cablevision's affiliated video programming vendors in the selection, terms, or conditions for carriage, on the basis of affiliation and non-affiliation.

6. Cablevision's head of programming, Thomas Montemagno, admitted at trial that he could not walk away from the company's affiliated networks in negotiating terms of carriage — which is precisely what Cablevision did to GSN when it repositioned GSN from Cablevision's broadly penetrated expanded basic tier to its narrowly penetrated sports tier. (Montemagno Tr. 1546:22.) Consistent with this fact, Cablevision admitted that it gave no consideration at all to repositioning its affiliated networks rather than GSN. (*Id.* at 1559:10-12.) This was true even though the executive responsible for Cablevision's decision could not testify that Cablevision's affiliated networks would pass the [REDACTED] [REDACTED] (Joint Exh. 1, Bickham Dep. 107:14-19.) Finally, while Cablevision tiered GSN for the alleged purpose of reducing programming expenses, Cablevision admitted at trial [REDACTED] [REDACTED] [REDACTED] [REDACTED] These facts constitute direct evidence of discrimination on the basis of affiliation.

7. After Cablevision tiered GSN, it conditioned GSN's return to its prior level of carriage on whether GSN's parent company DIRECTV would grant favorable carriage to Cablevision affiliate Wedding Central. (GSN Exh. 297, Goldhill Direct Test. ¶ 19 [hereinafter "Goldhill Written Direct"]; GSN Exh. 260.) This is a separate act of discrimination that GSN established by direct evidence.

8. GSN also established an indirect case of discrimination by Cablevision. GSN and Cablevision's affiliated networks WE tv and Wedding Central are similarly situated. (See Part III.A, *infra.*) Moreover, any losses Cablevision avoided by repositioning GSN could have equally been avoided by repositioning WE tv, and, indeed, Cablevision would have experienced a net benefit by keeping GSN on the expanded basic tier. (See Part III.C, *infra.*) Finally, the evidence shows that Cablevision's proffered justifications for moving GSN to the sports tier, rather than Cablevision's own similarly situated networks, are pretextual.

9. Cablevision [REDACTED]

10. In each of the subsequent years following the tiering, Cablevision could have restored GSN to Cablevision's expanded basic tier, but chose not to do so on the basis of purported cost considerations. (*Id.* at 1581:5-17.)

11. Cablevision's discrimination has unreasonably restrained GSN's ability to compete fairly in the marketplace, and continues to do so.

I. BACKGROUND

A. Cablevision and Its Affiliated Networks

1. Cablevision's Vertical Integration

12. At all relevant times through June 2011, Cablevision Systems Corporation included both a distribution and a programming arm. (GSN Exh. 349, at 5.)

13. Cablevision is owned and controlled by the Dolan family. (GSN Exh. 347, at 34.) As of 2010, the Dolan family owned all of the Cablevision Class B common stock, which entitled the Dolans to elect 75 percent of the Cablevision Board of Directors. (*Id.*)

14. Through its distribution business, Cablevision is the country's fifth-largest cable operator. (GSN Exh. 232, at 1.) In 2010, it served approximately 3.3 million subscribers, some 3 million of whom lived in the New York, NY, metropolitan area, making Cablevision the area's dominant cable provider. (GSN Exh. 347, at 4.) In late 2010, Cablevision served approximately [REDACTED] of all video subscribers in the New York designated market area ("DMA"). (GSN Exh. 103, at CV-GSN 0427076.)

15. Cablevision's position as the largest cable provider in the New York area, which is the No. 1 TV market in the country and home to a concentration of national advertising executives, gives it market power and leverage in negotiating carriage agreements with programming networks. (Montemagno Tr. 1544:1-14.)

16. Until July 2011, Rainbow Media Holdings LLC ("Rainbow") was a wholly-owned subsidiary of Cablevision that operated national entertainment programming networks. (GSN Exh. 347, at 4.) Rainbow's networks included AMC, WE tv, IFC, and the Sundance Channel. From 2009 through 2011, Rainbow produced the Wedding Central network. (*Id.* at 11.) Rainbow also owned the News 12 Networks, which provide 24-hour local news, traffic and weather to the New York metropolitan area. (*Id.*)

17. On June 30, 2011, Cablevision spun off Rainbow into a new public company, AMC Networks. (GSN Exh. 349, at 5.) Both Cablevision and AMC Networks remain controlled by the Dolan family. (GSN Exh. 347, at 34; GSN Exh. 351, at 12.) Prior to the spinoff, Cablevision operated as a vertically integrated business. James Dolan was Chief Executive Officer and President of Cablevision Systems Corporation. Thomas Rutledge was Chief Operating Officer, reporting directly to Mr. Dolan and overseeing both the distribution and programming sides of the business. (Montemagno Tr. at 1537:16-22.) In this role, Mr. Rutledge was responsible for the financial best interests of both the programming and distribution. (*Id.* at 1538:7-15.) The head of the programming side, Rainbow Chief Executive Officer and President Josh Sapan, and the head of the distribution side, Cablevision President of Cable & Communications John Bickham, both reported directly to Mr. Rutledge.

2. WE tv

18. Rainbow originally launched WE tv in 1997 as “Romance Classics.” Until 2005, the network “carried . . . largely movies.” (GSN Exh. 13, at CV-GSN 0248588.) Over the last decade, however, WE tv’s programming evolved to “a number of different types of programming” with a female or relationship theme. (Dorée Tr. 1702:7-8.) WE tv Senior Vice President Elizabeth Dorée testified that WE tv’s programming includes “original reality women’s programming,” “reality wedding programming,” scripted dramas such as *Charmed*, scripted comedies such as *Golden Girls*, movies, and news programs such as *48 Hours* and *20/20*. (CV Exh. 338, Dorée Direct Test., at ¶¶ 13-15 [hereinafter “Dorée Written Direct”]; Dorée Tr. 1704:19-1705:5, 1843:19-21.)

19. WE tv targeted women 25-54 and women 18-49. (Dorée Tr. 1700:19-21.) Nonetheless, WE tv also sold advertising based on delivery of adults 25-54 and adults 18-49 (i.e., male and female viewers) and tracked its ratings performance among adult—not just

female—viewers. (GSN Exhs. 310, 354.) In addition, when WE tv introduced a new tagline (“Simply Fascinating”) at the end of 2008, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (GSN Exh. 352, at 1.)

20. WE tv was distributed broadly by its cable parent to approximately [REDACTED] [REDACTED] of all Cablevision homes.) (GSN Exh. 156.) Nationwide, WE tv was distributed to about 79 million homes as of early 2014. (GSN Exh. 245.)

3. **Wedding Central**

21. Rainbow launched Wedding Central in August 2009 as a network devoted to wedding, dating, and relationship programming. Wedding Central was a women’s network that targeted female viewers, and most of its programming had previously aired on WE tv. (CV Exh. 338, Dorée Written Direct ¶ 33.)

22. Cablevision was the first distributor to carry Wedding Central, carried Wedding Central at a far higher level of penetration than any other distributor, and accounted for the bulk of Wedding Central’s total distribution. (GSN Exh. 245, at 2.) Cablevision carried Wedding Central to about [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*; GSN Exh. 206, at ¶ 8; Broussard Tr. 2024:3-2025:12.)

23. Rainbow officials always knew that Cablevision would launch Wedding Central because Mr. Rutledge would not have approved the creation of the channel if he did not

intend for it to be carried by Cablevision. (Broussard Tr. 2017:2-12.) Indeed, Rainbow planned to leverage Wedding Central's distribution on Cablevision in order to secure broader distribution of Wedding Central by other MVPDs. (GSN Exh. 362, at 5.) Wedding Central's launch plan set a goal of [REDACTED] by the end of 2010. (GSN Exh. 363, at 5) Key to Rainbow's plan for achieving that level of distribution was securing carriage of Wedding Central by DIRECTV. (*Id.* at 10.)

24. Because of its limited distribution and failure to achieve profitability, Wedding Central was shuttered in June 2011. (Broussard Tr. 1946:7-10; Joint Ex. 6, Martin Dep. 17:22-18:6.) This occurred within months of DIRECTV refusing Cablevision's demand that DIRECTV carry Wedding Central as a condition for GSN returning to its prior level of carriage. (GSN Exh. 297, Goldhill Written Direct, ¶ 20.) Wedding Central was never Nielsen-rated. (Joint Ex. 6, Martin Dep. 106:19-22.)

4. Cablevision's Preferential Treatment of Its Affiliated Networks

25. Cablevision and Rainbow did not operate at arm's length. Mr. Montemagno, the Cablevision programming head, stated that he could not [REDACTED]
[REDACTED]

[REDACTED]

26. Key Cablevision executives were not aware that Commission rules prohibit vertically integrated MVPDs from discriminating on the basis on affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming vendors. (Joint Exh. 3, Dolan Dep. 47:22-48:9; *see also* Broussard Tr. 1957:17-25.)

27. Not surprisingly, then, Cablevision’s distribution side regularly and systematically provided extra-contractual, carriage-related benefits to its affiliated programming services. [REDACTED]

[REDACTED]

28. Cablevision provided a host of other benefits to its affiliated networks that were not provided to non-affiliated networks. Cablevision promoted its affiliated networks on the air, on its website, and in customer bills. (GSN Exhs. 31, 241, 242, 243.) Cablevision also engaged in “horse trading” with other distributors, offering favorable treatment to networks

owned by other distributors if those distributors would carry Cablevision-affiliated networks. (Joint Exh. 3, Dolan Dep. 61:10-62:19; GSN Exh. 39.) Mr. Broussard acknowledges [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]. (GSN Exh. 39; Broussard Tr. 2136:8-2137:12.) On another occasion, Cablevision agreed to carry Style Network in exchange for Comcast carrying Rainbow's local news channel, News 12. (Montemagno Tr. 1555:11-17.)

29. Cablevision also provided its affiliated networks with favorable channel placement, helping them to attract more viewers and increase advertising revenue. (GSN Exh. 16, at CV-GSN 0137825-30.) Cablevision carried WE tv on channel 42 in New York, within a few positions of highly-rated women's networks such as Lifetime and Bravo. (GSN Exh. 300, Brooks Revised Direct Test. ¶ 61 [hereinafter "Brooks Written Direct"].) The benefits of favorable channel placement and a good neighborhood were substantiated and well understood.

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

30. In contrast to WE tv's placement in a desirable "high traffic" channel neighborhood, Cablevision carried GSN on channel 88 "in the midst of a cluster of premium movie channels which by their nature generate much less traffic (subscribers have to pay extra to

view them) and are also less compatible [with GSN's women's oriented programming]." (GSN Exh. 300, Brooks Written Direct ¶ 61.)

B. GSN

31. GSN is a cable television network owned by Sony Pictures Entertainment, Inc., and DIRECTV. The service launched as "Game Show Network" on December 1, 1994. In 2004, it rebranded itself "GSN." (GSN Exh. 297, Goldhill Written Direct ¶¶ 4-5.)

32. Cablevision launched GSN in 1997 and, until February 2011, carried GSN on its expanded basic tier of service, a widely-penetrated tier that reached approximately 2.7 million subscribers, or about 90 percent of Cablevision subscribers. (CV Exh. 337, Montemagno Written Direct, ¶¶ 11, 49.)

33. David Goldhill became CEO of GSN in 2007 and adopted a strategy aimed at deepening GSN's engagement with its predominantly female audience and broadening its appeal to women 18 to 49 and 25 to 54. He recognized that the network already was popular among women and sold advertising based on delivery of female demographics. (Goldhill Tr. 257:13-16, 351:11-22.) He decided to "double-down on female demos." (*Id.* at 257:13-16.) To do this, Mr. Goldhill focused all original programming efforts on attracting women 25-54. (*Id.* at 351:18-20.) The network developed a slate of original programs such as *The Newlywed Game*, *Baggage*, and *Love Triangle* that focused on dating, relationships, and other themes directly targeted to female viewers. (GSN Exh. 297, Goldhill Written Direct ¶ 7.) The network focused its original programming on "unscripted" programming — reality competition shows, relationship shows, and game shows. (Goldhill Tr. 189:2-11.)

34. Mr. Goldhill also hired senior programming and marketing executives from other female-oriented networks. (Goldhill Tr. 415:21-25.) He hired as head of programming Kelly Goode, who had worked at Lifetime and CBS (the broadcast network most

known for targeting women). (Goldhill Tr. 416:16-20.) He hired as head of marketing Dale Hopkins, who helped launch E! Entertainment Television and Style, both women's networks. (Hopkins Tr. 586:8-16.)

35. GSN's performance among women has grown consistently. Women, who represented [REDACTED] of GSN's total day adult audience in 2010, made up [REDACTED] of GSN's total day adult audience in 2014. (GSN Exh. 300, Brooks Written Direct ¶ 22.)

36. In every year since at least 2008, the female 25-54 demographic was the single largest demographic in GSN's upfront ad sales. (Zaccario Tr. 726:18-24, 718:2.) At the time of the tiering in February 2011, women 25-54 made up [REDACTED] of the revenue from GSN's up-front ad sales; today women 25-54 made up [REDACTED] of GSN's up-front ad sales. (Zaccario Tr. 726:25-727:6.) The increase in ad revenue among women 25-54 is a direct result of GSN's strategy to target that demographic. "We have a strategy to reach women 25 to 54, and the strategy is working as demonstrated by . . . the advertising results," testified GSN Executive Vice President for Advertising Sales John Zaccario. (Zaccario Tr. 734:5-7.)

37. GSN and WE tv directly competed for viewers in the women 25-54 demographic and for advertisers seeking to reach those viewers. Internal GSN documents for the period 2008 to 2010 consistently identify WE tv as part of GSN's competitive set (GSN Exhs. 11, 57), defined as the networks that GSN competes against most directly because they cater to female viewers in their programming content, marketing, and advertising sales. (GSN Exh. 303, Hopkins Direct Test. ¶ 7 [hereinafter "Hopkins Written Direct"].) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. Cablevision's Decision to Tier GSN

38. By early July 2010, the 2010 upfront season — the advance sale of television networks' advertising inventory for the fourth quarter of 2010 through the third quarter of 2011 — was complete. GSN's upfront ad sales were up [REDACTED] over the prior year. (Zaccario Tr. 730:24-731:3; GSN Exh. 65, at GSN_CVC_00056183.) In particular, upfront sales for the female 25-54 and female 18-49 demographics increased, and those two groups represented [REDACTED] of GSN's total upfront revenue. (Zaccario 731:24-732:2; GSN Exh. 65, at GSN_CVC_00056184.)

39. The results showed that GSN's strategy of targeting women 25-54 was working. (Zaccario Tr. 718:4-11, 734:4-7.) Moreover, GSN's increased ad sales based on that target demographic meant that its competitors were losing share to GSN. (Zaccario Tr.735:22-24.) "These results would come at their expense," Mr. Zaccario testified, referring to GSN's competitive set. (*Id.*)

40. That same month, Cablevision President John Bickham asked Mr. Montemagno to prepare an analysis of the effect of dropping GSN from Cablevision's systems. (CV Exh. 337, Montemagno Written Direct ¶ 44.) Mr. Bickham did not ask for a similar analysis of any other network. (Montemagno Tr. 1559:6-9.)

41. Mr. Montemagno prepared a memo, which he sent to Mr. Bickham on July 22, 2010. The memo stated that GSN ranked [REDACTED]

[REDACTED]

[REDACTED]

42. [REDACTED]

[REDACTED]

43. On November 8, 2010, Mr. Montemagno met with Mr. Rutledge, Mr. Bickham, and other top Cablevision executives to discuss the 2011 programming budget. (CV Exh. 337, Montemagno Written Direct ¶ 57.) Cablevision decided to move GSN to the iO Sports Pak, a premium sports tier. (*Id.* at ¶ 59) Mr. Bickham acknowledged that Mr. Montemagno’s July 2010 memo had no impact on Mr. Bickham’s decision to tier GSN. (Joint Exh. 1, Bickham Dep. 60:1-21.) Instead, Mr. Bickham decided to tier GSN because it was not, in his view, a “must-have” network, a view he reached by watching the network “periodically” for five-to-ten-minute intervals. (*Id.* at 49:18-50:14, 60:1-21, 76:3-17.) Mr. Bickham based his decision on this feeling that “intuitively I knew we could drop the programming without losing customers.” (*Id.* at 60:12-13.)

44. When Cablevision decided to move GSN to the sports tier, the tier consisted of entirely sports networks such as the MLB Network, the Golf Channel, the Tennis

Channel, the NBA Channel, the NHL Network, and Fox Soccer Channel. (GSN Exh. 284, at CV-GSN 0434083.) Mr. Bickham knew that the networks on the sports tier attracted more male viewers than female viewers. (Joint Exh. 1, Bickham Dep. 69:2-6.) To this day, GSN remains the only non-sports network on the sports tier. (Montemagno Tr. 1614:16-19; GSN Exh. 382.) The move required viewers to pay an additional \$6.95 per month to receive GSN.

45. On December 3, 2010, Mr. Montemagno informed GSN that Cablevision would move GSN to the iO Sports Pak, effective February 1, 2011. Cablevision offered GSN two justifications for the decision: a desire to cut programming costs, and GSN's ratings performance. (GSN Exh. 297, Goldhill Written Direct ¶ 15.) The move would save Cablevision [REDACTED] per year in license fees. (CV Exh. 337, Montemagno Written Direct ¶ 59.)

46. Mr. Montemagno stated that, upon informing GSN of the tiering, he had no intention of negotiating with GSN and he was communicating a final decision. (Montemagno Tr. 1602:2-8; CV Exh. 337, Montemagno Written Direct, ¶ 64 ("I told [GSN] the decision was final.")) Once the decision was made, Cablevision told GSN it would change course if GSN parent DIRECTV agreed to carry Wedding Central. (GSN Exh. 297, Goldhill Written Direct ¶ 19; GSN Exh. 260.)

47. By contrast, Cablevision [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

48. Cablevision repositioned GSN to the sports tier on February 1, 2011. (CV Exh. 337, Montemagno Written Direct, ¶ 66.) As a result, GSN's subscribers on Cablevision immediately dropped from nearly 2.7 million to 129,000. (GSN Exh. 156, at 2.)

49. Cablevision's tiering of GSN prompted an immediate and fierce backlash from Cablevision customers. On February 2, 2011, Cablevision received more than [REDACTED] complaints in a single day about the tiering. (GSN Exh. 116.) This was [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] (Montemagno Tr. 1623:4-165:2; GSN Exh. 116 (internal Cablevision email stating, [REDACTED])

[REDACTED]
[REDACTED]
[REDACTED]

50. Before it stopped counting, Cablevision received more than [REDACTED] calls of complaint about the GSN tiering. (GSN Exh. 132, at 2.) One Cablevision executive described the call volume as reflecting [REDACTED] (GSN Exh. 127, at 1.) To stem the tide, and to mollify outraged customers, Cablevision offered customers threatening to disconnect a free upgrade to the sports tier, so they could continue to view GSN. Some [REDACTED] subscribers were provided with free access to the sports tier. (GSN Exh. 337, Montemagno Written Direct ¶ 73.) Of those [REDACTED] subscribers who received a credit, [REDACTED] have since left Cablevision entirely. (*Id.*) Cablevision has thus lost all revenue it received from those customers.

51. After moving GSN to the sports tier, Cablevision changed the name of the tier from the iO Sports Pak to the iO Sports and Entertainment Pak. (GSN Exh. 127.) Even within Cablevision, the new name of the tier was seen as inappropriate. [REDACTED]

[REDACTED] That never happened, however. At the time of the hearing in this case, more than four years after GSN was moved and the name of the tier changed, GSN remained the only non-sports network on the tier. (Montemagno Tr. 1614:16-19.)

52. Following the tiering, GSN continued to press for fair carriage, offering specific and meaningful concessions. [REDACTED]

53. [REDACTED]

[REDACTED] Cablevision rejected the proposal in a phone call on March 8, 2011, with GSN executive vice president of distribution Dale Hopkins. (GSN Exh. 297, Goldhill Written Direct ¶ 26.)

54. Since tiering GSN on February 1, 2011, Cablevision has always had the option of returning GSN to expanded basic carriage. Cablevision could have returned GSN to expanded basic in 2012, 2013, 2014, or 2015, but chose not to because in each of those years, the cost savings to Cablevision of not paying GSN license fees was an important consideration in its programming budget. (Montemagno Tr. 1581:5-17.)

55. With the exception of Cablevision, GSN remains widely carried by all major distributors. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] Distributors other than Cablevision consistently recognize the value GSN provides. Since 2011, GSN has entered into new carriage agreements and has expanded its number of subscribers with [REDACTED]
[REDACTED]

II. DIRECT PROOF OF DISCRIMINATION

A. Cablevision's Tiering of GSN Resulted From Applying Different Carriage Policies to GSN Than to Cablevision's Affiliated Networks.

56. GSN established through direct evidence that Cablevision discriminated against GSN and in favor of Cablevision's affiliated video programming vendors, on the basis of affiliation or non-affiliation, in the selection, terms, or conditions for carriage.

57. First, when Cablevision informed GSN that it would move GSN to the sports tier, it told GSN that the decision was final and not open to negotiation. (Montemagno Tr. 1602:2-8.) After GSN attempted to negotiate, Cablevision walked away from negotiations in March 2011. (GSN Exh. 297, Goldhill Written Direct ¶ 26.) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

58. Second, [REDACTED]

[REDACTED] Cablevision never considered dropping or tiering WE tv or Wedding Central, and never subjected its affiliated networks to the carriage analysis that it applied to GSN. (Montemagno Tr. 1559:10-12; Joint Exh. 1, Bickham Dep. 127:8-10,13.)

59. Cablevision President of Cable & Communications John Bickham stated that he decided to “tier” GSN because he did not consider GSN to be “must-have television.” (Joint Exh. 1, Bickham Dep. 75:18-25.) But Mr. Bickham did not apply this test to Cablevision’s affiliated networks. [REDACTED]

60. Similarly, Mr. Montemagno testified that in evaluating GSN in July 2010 to determine whether it should remain on the expanded basic tier, he considered GSN’s performance based on [REDACTED]

[REDACTED] Cablevision did not conduct a similar analysis of its affiliated networks WE tv and Wedding Central. (Montemagno Tr. 1559:10-12.)

61. Third, rather than consider whether it could save programming expenses by moving an affiliated network to a less widely-distributed tier, Cablevision discriminated in favor of its affiliated networks by [REDACTED]

62. [REDACTED]

63. [REDACTED]

64. Mr. Montemagno admitted at trial that [REDACTED]

65. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

66. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

67. [REDACTED]

[REDACTED]

68. [REDACTED]

[REDACTED]

69. [REDACTED]

[REDACTED]

[REDACTED]

70. Cablevision provided WE and Wedding Central with these long-term contracts that [REDACTED]

[REDACTED]

71. [REDACTED]

[REDACTED]

72. More broadly, the record reflects that Cablevision distribution and the Rainbow networks did not have an arms-length relationship. (Montemagno Tr. 1547:1-7.) For example, Mr. Montemagno admitted that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

73. Similarly, Mr. Dolan, in explaining why Cablevision was the principal distributor of Rainbow's fledgling Wedding Central network, [REDACTED] [REDACTED] Cablevision fails to address its disparate treatment of GSN as compared to Wedding Central, which Cablevision launched and [REDACTED]

[REDACTED]

[REDACTED]

B. Cablevision Directly Discriminated Against GSN by Conditioning Carriage of GSN on a Commitment from GSN's Parent, DIRECTV, to Carry Wedding Central

74. Direct evidence also establishes a further example of discrimination by Cablevision on the basis of affiliation. After deciding to tier GSN, Cablevision informed GSN that it would return GSN to its prior level of carriage only if GSN's parent, DIRECTV, agreed to carry the struggling Wedding Central network broadly. (GSN Exh. 297, Goldhill Written Direct, ¶ 19; GSN Exh. 260.) Conditioning the terms of carriage for GSN, an unaffiliated network, on the provision of benefits to an affiliated network is *per se* discrimination on the basis of affiliation and non-affiliation.

75. Distribution on DIRECTV had been a key plank of Wedding Central's business plan since the network launched. (GSN Exh. 363, at 10.) Obtaining DIRECTV carriage would have materially benefited Wedding Central, by increasing its subscriber base from [REDACTED] million subscribers. (GSN Exh. 372; Broussard Tr. 2044:8-11.) In 2009 and early 2010, Mr. Broussard of Rainbow therefore attempted to obtain Wedding Central

carriage from Derek Chang of DIRECTV, but was unsuccessful. (Broussard Tr. 2044:12-22, 2045:1-3.) Wedding Central’s failure to achieve this key component of its business plan threatened the network’s survival. (GSN Exh. 362, at CV-GSN 0135539; Broussard Tr. 2032:3-8, 2039:25-2040:6, 2044:8-14.)

76. Upon being notified of the tiering on December 3, 2010, Mr. Goldhill emailed the GSN management committee to inform them that Cablevision had decided to tier GSN “[w]ithout warning or negotiation,” and that GSN should respond “immediately.” (GSN Exh. 99.) As part of GSN’s efforts, GSN management committee member Derek Chang, at the time DIRECTV’s Executive Vice President of Content Strategy and Development, contacted Mr. Rutledge to urge Cablevision to reconsider its decision. (*Id.*)

77. Cablevision responded to Mr. Chang’s outreach by attempting to extract a benefit for its affiliated networks. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

78. Deputized to conduct carriage negotiations on behalf of Cablevision, Mr. Broussard renewed his efforts to secure carriage of Wedding Central from DIRECTV. Mr. Broussard proposed to Mr. Chang that Cablevision would keep GSN on its digital basic tier if DIRECTV would carry Wedding Central. (GSN Exh. 297, Goldhill Written Direct ¶ 19; GSN Exh. 260.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Cablevision offered GSN no other means of retaining broad carriage, and Cablevision's distribution executives had no role in the discussions with DIRECTV designed to avoid the tiering. (Montemagno Tr. 1527:12-18.) Instead, Rainbow executives retained authority for negotiating GSN's Cablevision carriage, provided they could extract value for Wedding Central.

79. On January 31, 2011, Mr. Chang told Rainbow that DIRECTV would not carry Wedding Central in exchange for carriage of GSN on Cablevision. The next day, February 1, 2011, Cablevision downgraded GSN to the sports tier.

III. INDIRECT PROOF OF DISCRIMINATION

80. GSN also established through indirect proof that Cablevision discriminated against GSN on the basis of affiliation. GSN is similarly situated to Cablevision's affiliated networks WE tv and Wedding Central, and the evidence shows that Cablevision's proffered justifications for moving GSN rather than Cablevision's own similarly situated networks to its sport tier are pretextual; that any losses Cablevision avoided by repositioning GSN could have equally been avoided by instead repositioning WE tv; and indeed that Cablevision would have experienced a net benefit by keeping GSN on the expanded basic tier.

A. GSN Is Similarly Situated to Cablevision's Affiliated Networks WE tv and Wedding Central.

1. Target Audience

81. Both GSN and WE tv define themselves as "women's networks" in that they target — and reach — women viewers. (Dorée Tr. 1733:7-10; Hopkins Tr. 701:2-7; Goldhill Tr. 351:20-21 ("We've always been a female network.")) By 2010, the audiences for GSN and WE tv were heavily female, with women comprising [REDACTED] of GSN's

audience and [REDACTED] of WE tv's audience (both well within the range of other women's oriented networks). (GSN Exh. 300, Brooks Written Direct, ¶ 22.) Since then, the networks' audiences have grown even closer. In 2014, GSN's audience was [REDACTED] female, while WE tv's audience was [REDACTED] female. (*Id.*) Wedding Central also identified itself as a "women's network" during its brief time on the air. (CV Exh. 338, Dorée Written Direct ¶ 33.)

82. Officials from GSN and WE tv described their networks' audiences in similar terms and provided similar definitions of what it means to be a "women's network." WE tv Senior Vice President Elizabeth Dorée testified that WE tv was a "women's network" because it "actively targets women." (CV Exh. 338, Dorée Written Direct ¶¶ 8, 10.) GSN Executive Vice President Dale Hopkins testified that GSN was a women's network because its "mission every day is to program to and market to women." (Hopkins Tr. 701:2-4.)

83. Consistent with this testimony, television programming expert Timothy Brooks found that GSN, WE tv, and Wedding Central are each "strongly women-oriented networks" featuring shows that appeal primarily to women. (GSN Exh. 300, Brooks Written Direct, ¶ 83; *see also, e.g.*, GSN Exh. 227, at GSN_CVC_00165271 (noting target audience for *Mind of a Man* is women 25-54 and women 25-49, including African-American woman); GSN Exh. 228, at GSN_CVC_00165388 (noting that female viewers of *It Takes a Church* connected with theme of that "young female looking for love"); GSN Exh. 229, at GSN_CVC_00165526-27 (noting *Skin Wars* theme of "[t]he message is the beauty," and comparing to similar shows on Oxygen and Lifetime, such as *Project Runway*).)

84. GSN and WE tv target the same demographic segments for advertising sales purposes: women 18-49 and women 25-54. GSN CEO David Goldhill stated that GSN's primary target audience is women 25-54 and its secondary target audience is women 18-49.

(Goldhill Tr. 186:22-25.) Mr. Goldhill stated that “all of the original programming efforts since I’ve been there, as I’ve testified, has been about increasing women 25 to 54 on the network.”

(Goldhill Tr. 351:18-20.) Ms. Hopkins testified that with GSN’s head of programming, she developed marketing and programming targeted to women 25-54 and 18-49. (GSN Exh. 303, Hopkins Written Direct ¶ 6.) She stated that in each core area of GSN’s business, the “primary focus was on retaining and attracting female viewers.” (*Id.*) Ms. Dorée testified that WE’s programming, marketing, and branding likewise were focused on attracting two female demographics — women 18-49 and women 25-54. (Dorée Tr. 1699:5-17.) GSN’s documents bear out that it was specifically targeting women 25-54 in its programming efforts. (GSN Exh. 227, at GSN_CVC_00165271 (noting target audience for *Mind of a Man* is women 25-54 and women 25-49, including African-American woman); GSN Exh. 228, at GSN_CVC_00165388 (noting that female viewers of *It Takes a Church* connected with theme of that “young female looking for love”).).

85. Like other women’s networks, both GSN and WE tv tracked their performance not only among key women’s demographics, but also among adult demographics. (Dorée Tr. 1781:12-23.) Internal WE tv documents [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As Ms. Dorée testified, however, the network’s tracking of its performance among all adults and persons did not mean WE tv was not targeting women 25-54. (Dorée Tr. 1781:20-1782:1; Dorée Tr. 1764:10-17; *see also* GSN Exh. 352, at 1 [REDACTED])

[REDACTED]

[REDACTED]

86. Even among female-oriented networks, GSN and WE tv have significant audience overlap. WE tv was [REDACTED] among 87 cable networks ranked by shared audience with GSN in fourth quarter 2010: [REDACTED] percent of the viewers who watched either GSN or WE tv watched both, reflecting [REDACTED]. (GSN Exh. 300, Brooks Written Direct ¶ 33.) And GSN continues to share a high percentage of audience with WE tv in more recent quarters. (*Id.* at ¶ 34.) GSN programming documents confirm this overlap. For instance, an analysis of the audience of the GSN show *It Takes a Church* found that it had a “similar audience composition” to the WE shows *Mary, Mary* and *Braxton Family Values*. (GSN Exh. 228, at GSN_CVC_00165388-89.)

87. The median ages of GSN and WE tv viewers also are similar. Nielsen reported that from 2008 to 2011, GSN’s prime time median age ranged from [REDACTED] depending on the quarter. (CV Exh. 314, at 12.) In 2009, WE tv’s prime time median age according to Nielsen was [REDACTED] (CV Exh. 93, at 1.) More recently, a WE tv 2014 tracking document found that WE tv’s prime time median age was [REDACTED] (GSN Exh. 285, at 3.) A difference of [REDACTED] in median age is typical among competitive networks. For instance, the median ages of WE tv’s self-identified “key competitors” vary from that of WE tv

[REDACTED]

[REDACTED]

[REDACTED]

2. Target Advertisers

88. GSN, WE tv, and Wedding Central are similarly situated in terms of the advertisers they target and the demographics against which they sell advertising. GSN and WE

tv primarily target advertisers seeking to reach women 25-54 and women 18-49. (Zaccario Tr. 718:4-11; CV Exh. 338, Dorée Written Direct ¶ 17; GSN Exh. 354.) They also target advertisers looking to buy adults 18-49 and adults 25-54. (Zaccario Tr. 786:2-8; GSN Exh. 354.)

89. The fact that GSN and WE tv both sell adult demographics does not mean they are not women's networks. A WE tv advertising "Target Account Master List" for fall 2009 and winter 2010 indicates that [REDACTED]

[REDACTED] (Id.) Because key advertisers purchased advertising from WE tv on the basis of adults (rather than women) delivered, WE tv executives tracked the network's advertising performance in adult sales demographics. For example, [REDACTED]

[REDACTED] (GSN Exh. 310.) Ms. Dorée testified that selling adults and tracking ratings for men did not change the fact that *Bridezillas* was a show directed at women (Dorée Tr. 1764:10-14) or that WE tv was a women's network targeting women 25-54. (Id. at 1764:15-17.)

90. Like WE tv, GSN measured its performance in selling both women and adult demographics to advertisers, but it remained a women's network with shows targeted at women. (GSN Exh. 174 (tracking both adult and female demographics, but noting that [REDACTED] of GSN's upfront and scatter advertising sales revenue came from the women 25-54 demographic from 2008 through mid-2012, GSN's largest single ad demographic, and that women 18-49 constituted another [REDACTED]; Zaccario Tr. 784:16-25 ("[W]hen given the opportunity to do business on adults 25 to 54, we certainly would."), 840:19-23 (noting that, "to

GSN women 25 to 54 is the most important because that is where we write the overwhelming majority of our business.”.) GSN’s original programming geared toward women 25-54, in particular, was a “calling card” GSN used to target advertisers seeking that demographic. (Zaccario Tr. 723:15-24 (“We used the original programming which was being developed to target women 25 to 54 and the talent we were hiring to host that programming as a calling card to advertisers to let them know that we are . . . in the business of reaching women 25 to 54.”).)

91. GSN and WE tv perform comparably, and are competitive, in the key advertising categories of women 18-49 and 25-54 and adults 18-49 and 25-54, achieving ratings [REDACTED] in each of the four categories. (GSN Exh. 300, Brooks Written Direct ¶ 26.) Mr. Brooks noted the differences to be so small that he would “consider the networks essentially tied.” (*Id.* at ¶ 27.) The ratings put both GSN and WE in “the mid-range” of the 90 cable networks measured by Nielsen in 2010. (*Id.*) The similarity in ratings means that advertisers consider the networks comparable in their ability to deliver the highly desired target female demographics. (*Id.* at ¶ 28.)

92. Advertisers viewed WE tv and GSN as within the same competitive set and have told GSN executives that they viewed WE tv and GSN as competitors. (GSN Exh. 11; Zaccario Tr. 720:9-722:7 (noting that “buyers and advertisers identify the competitive set all the time in the course of ordinary business” and that regional vice presidents of GSN reported that “WE” was a competitor because “buyers, customers and advertisers would tell them.”).

93. When considering the competitiveness of women’s oriented networks, advertisers principally are concerned with how many women 18-49 or 25-54 are delivered, rather than whether a network is “skewing older” or “skewing younger.” (Brooks Tr. 1252:22-

1253:8.) To the extent that there is viewing by older or younger viewers, an advertiser would consider those viewers to be a free, bonus audience. (Brooks Tr. 1253:5-8, 1333:7-14.)

94. Consistent with the fact that the networks perform comparably and that advertisers view them as competitors, the same advertisers — and same brands — advertise on WE tv and GSN. Between July 2010 and July 2011, [REDACTED] of WE tv's top 40 advertising accounts (weighted by expenditures) advertised on GSN. (GSN Exh. 301, Singer Direct Test. ¶ 52, Table 6 [hereinafter "Singer Written Direct"].) Moreover, [REDACTED] of all of WE tv's advertising accounts (weighted by expenditures on WE tv commercials) also advertised on GSN. (*Id.*)

95. Further, [REDACTED] of GSN's top 40 advertising accounts (weighted by expenditures) advertised on WE tv. (*Id.*) [REDACTED] of all of GSN's advertising accounts (weighted by expenditures on GSN commercials) also advertised on WE tv. Brands that advertise on GSN account for [REDACTED] of WE tv's revenue from its top 40 advertising customers. (*Id.*)

3. Target Programming & Genre

96. WE tv, Wedding Central, and GSN all broadcast unscripted programming targeted at female viewers, and developed similar themes in their programming. Each network airs (or aired) female-oriented programming focused on dating, romance, competition, and family dynamics. GSN and WE tv also built shows around celebrities — Sherri Shepherd, Wendy Williams, Jerry Springer, and Rebecca Romijn on GSN, and Toni Braxton, Joan Rivers, Shannen Doherty, and Sinbad on WE tv.

97. In the case of GSN, its CEO testified that its programming focus is on unscripted programming that include game shows, relationship shows, and reality competition shows. (Goldhill Tr. 189:2-11.) For example, GSN's game shows include dating- and celebrity-

themed shows such as *Baggage*, *The Newlywed Game*, *Love Triangle*, and *Match Game*. (GSN Exh. 300, Brooks Written Direct ¶ 7). GSN's relationship shows include *It Takes a Church* and *Mind of Man*, which focus on finding love and the dynamics of relationships (GSN Exhs. 227, 228.) GSN's reality competition shows include *The Amazing Race*, *Dancing with the Stars*, *Beat the Chefs*, and *Skin Wars*. (GSN Exh. 300, Brooks Written Direct, ¶ 8.)

98. GSN also has aired female-oriented reality programming outside the relationship genre, including the GSN reality show *Carnie Wilson: Unstapled*, which followed the celebrity singer as she built a dessert business (GSN Exh. 40), and is similar in concept to WE tv's *The Cupcake Girls*, which follows a group of women entrepreneurs who start a cupcake company (GSN Exh. 181.) And GSN has aired programming in the reality/documentary genre, such as *Family Trade*. (GSN Exh. 300, Brooks Written Direct ¶ 8.)

99. Similarly, WE tv broadcasts relationship shows, reality shows, and competition shows. WE tv's relationship and reality shows included *Bridezillas*, *My Fair Wedding*, *Match Made in Heaven*, and *Braxton Family Values*. (*Id.* at ¶ 9.) WE tv competition shows included *Weight Loss Challenge*, *Style By Jury* and *Skating's Next Star*. (*Id.*) WE tv competition shows also included a game show, *Most Popular*. (GSN Exh. 25.) Ms. Dorée tried to downplay the significance of this fact, but it is apparent that, out of the thousands of pitches that WE tv receives each year, it chose to develop and then produce *Most Popular* because WE tv executives believed the show would appeal to the network's target female demographic, just as GSN believes that game shows appeal to its core female demographic. (Dorée Tr. 1719:23-1720:4; 1835:3-14.)

100. It is not surprising that WE tv broadcast a game show or that GSN's game shows are female-oriented. Mr. Brooks noted, based on his extensive industry experience, the

“widespread understanding in the industry that game shows are generally targeted at women.” (GSN Exh. 300, Brooks Written Direct ¶ 86.) He noted that game shows target women by featuring couples or families as contestants and offering female-oriented prizes. (*Id.*) In examining quiz-based game shows on the air in 2010, Mr. Brooks found that the average audience composition was 62 percent female. (*Id.* at ¶ 87.)

101. GSN and WE tv programs shared not only similar themes and topics; some even had strikingly similar concepts. GSN aired *Dancing with the Stars*, while WE tv aired *Skating’s Next Star*. (GSN Exh. 300, Brooks Written Direct ¶¶ 8, 92.) Likewise, GSN aired *It Takes a Church*, while WE tv aired *Match Made in Heaven* — both religious-themed dating shows. (*Id.* at ¶ 116.) Indeed, when GSN viewers were asked what alternative title would be appropriate for *It Takes a Church*, they indicated that they would name the program *A Match Made in Heaven*. (GSN Exh. 228, at GSN_CVC_00165390.)

102. Wedding Central was a network devoted entirely to romantic relationships and weddings. (GSN Exh. 44, at CV-GSN 0225975 (Wedding Central “genre” described as “Dating, Relationship, and Weddings.”))

4. Ratings

103. GSN and WE tv perform similarly in Nielsen ratings measurements, both nationally and locally. Wedding Central’s audience was too small to be measured by Nielsen.

104. Based on GSN’s and WE tv’s performance on a national total day basis, GSN’s ratings were [REDACTED] (GSN Exh. 300, Brooks Written Direct ¶ 20.) The numbers did not change materially over the years. In 2013, for example, GSN’s total day household rating was [REDACTED] (*Id.*) GSN also attracted more female viewers than WE tv. For women 18+, GSN’s total day rating in 2010

was [REDACTED] (*Id.*) By 2013, GSN's total day rating for women 18+ was [REDACTED]

105. Within Cablevision's home DMA of New York, as well as specifically within only the Cablevision homes within New York, GSN performs comparably to WE tv. Nielsen audience ratings for 2010 show that the networks were within [REDACTED] of a rating point in *both* households and adult women viewers. (*Id.* at ¶ 39; *see also id.* at ¶ 41 (indicating that GSN had total ratings for women 18+ of [REDACTED] [REDACTED] for the second quarter of 2010 when looking at only Cablevision's homes within the New York market).) GSN thus performed comparably to WE tv, even without taking into consideration the favorable channel placement or marketing support that Cablevision provided WE tv — factors that Cablevision's own witnesses acknowledge may impact a network's local ratings. (Egan Tr. 2302:6-15.)

106. WE tv documents tell the same story. A 2009 WE tv document, for example, identified GSN and WE tv as performing [REDACTED]

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

5. License Fee

107. The networks are similarly situated with respect to license fees. Cablevision paid [REDACTED] per subscriber for GSN from [REDACTED] and it paid [REDACTED] per subscriber for WE tv in 2010. (GSN Exh. 194, at 3, 9; GSN Exh. 199, at 6.) As explained in Part II.A, Cablevision [REDACTED]

[REDACTED]

[REDACTED]

(GSN Exh. 398, at 3.)

108. In a distribution marketplace in which Cablevision paid [REDACTED]

[REDACTED]

[REDACTED] (GSN Exh. 80, at CV-GSN 0427144-45, 0427150.) If anything, GSN was a better value to Cablevision than WE tv.

109. Wedding Central [REDACTED]

[REDACTED]

6. Cablevision's Experts Do Not Credibly Challenge that the Networks Are Similarly Situated.

110. Notwithstanding the opinions offered by Cablevision's experts that, under their respective tests, GSN is not similar to WE tv or Wedding Central, GSN actually outperforms members of WE tv's self-identified competitive set under the experts' tests. (CV Exh 334, Orszag Written Direct, Table 4, Table 5; Orszag Tr. 2615:1-21, 2617:5-24, 2618:18-2619:2.)

111. None of Cablevision's experts analyzed the performance of networks that they or WE tv consider to be part of WE tv's competitive set. As a result, their conclusions

about the extent of GSN's similarity to WE tv are inherently unreliable, because they provide no way to measure GSN's performance against the performance of networks that admittedly are similar to WE tv.

a) **Michael Egan's Methodology and Opinions Are Not Reliable or Credible.**

112. Michael Egan sought to offer testimony showing that GSN and WE tv are not similarly situated. Mr. Egan failed to follow a reliable methodology in several significant respects. Further, his specific opinions were unreliable, and therefore are entitled to no weight.

(1) General Unreliability

113. Mr. Egan's testimony is generally unreliable for several reasons.

114. First, Mr. Egan does not employ a consistent methodology for opining on when networks are similarly situated. Mr. Egan has now testified in three program carriage cases, each time on behalf of an MVPD. (Egan Tr. 2178:18-22; *In re. Herring Broadcasting, Inc. d/b/a Wealth TV*, 24 FCC Rcd. 12967 (ALJ 2009); *The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 26 FCC Rcd. 17160 (ALJ 2011) [hereinafter "*Tennis Channel Recommended Decision*"].) In each instance, he has employed a different methodology. In his *Wealth TV* testimony, he purported to employ a "genre" analysis and a "look and feel" analysis. (Egan Tr. 2231:3-6.) In his *Tennis Channel* testimony, he used a "sub-genre" analysis, considered carriage decisions by other MVPDs, conducted an analysis of ownership and management, and examined national Nielsen ratings, but did not employ a "look and feel" analysis. (Egan Tr. 2233:14-25; 2234:20-25; 2235:7-25; *Tennis Channel Recommended Decision*, at ¶ 29.) In this case, he employed none of the *Tennis Channel* factors, instead using a genre analysis, a "look and feel" analysis, and an evaluation of programming expenditures, local Nielsen ratings, and target audience. (Egan Tr. 2236:1-15.) Mr. Egan offered no credible

explanation for his changes in methodology, despite the fact that Chief Judge Sippel in the past raised concerns over these very inconsistencies. (*Tennis Channel Recommended Decision*, at ¶ 29 (noting that “Mr. Egan acknowledged . . . that he had never undertaken this sort of sub-genre analysis before and he was unaware of any prior application of that methodology in the cable industry”).) Mr. Egan’s failure to follow a consistent methodology establishes that his testimony is unreliable.

115. Second, Mr. Egan admitted that the factors he considered are not factors actually employed by Cablevision to measure competitiveness among networks, to his knowledge. (Egan Tr. 2227:1-19.) This further undermines the reliability of his opinions.

116. Third, Mr. Egan did not consider a number of relevant factors: which networks WE tv considers to be its key competitors; target advertising, which the FCC has identified as a relevant factor; license fees, which the FCC has also identified as relevant; Beta survey information, which Rainbow President Josh Sapan acknowledged to be relevant to questions of comparability; and national ratings and carriage decisions by other MVPDs, both of which Mr. Egan had relied upon previously. (Egan Tr. 2228:1-2229:11; 2235:7-14 & 23-25; 47 C.F.R. § 76.1302(d)(3)(iii)(B); Joint Exh. 7, Sapan Dep. 227:8-20; *Tennis Channel Recommended Decision*, at ¶¶ 48, 77.)

117. Fourth, reflecting the unreliable nature of his methodology, Mr. Egan did not test his methodology by applying it to other networks that both parties agree are similarly situated to WE tv. (Egan Tr. 2229:16-2230:7.) His inability to demonstrate that his methodology matches up with the networks WE tv considers to be similarly situated in the real world further confirms its unreliability.

118. Mr. Egan relied in large part on his genre analysis, ignoring a number of relevant factors listed above. This undue reliance further reinforces the unreliability of his methodology, especially given his admissions that “programming can be in a different genre, but still compete,” (Egan Tr. 2239:13-18; *see also* *Id.* at 2241:13-19 (affirming that WE tv has no appreciable programming in the soap opera genre but that WE tv still tracked SOAPNet as a competitor)), and that programming in genres he considers to be different bear key similarities. (Egan Tr. 2251:1-13 & 20-24, 2252:1-14 (acknowledging WE tv shows like *Golden Girls* are comedies, that WE tv aired some movies that are comedies, and that a number of GSN shows have comedic elements); *Id.* at 2189:2-12, 2203:2-10 (acknowledging that game shows and reality shows as unscripted programming are both less expensive to produce).)

119. Mr. Egan’s specific opinions on genre are unreliable and simply constitute personal opinion. Mr. Egan was unable to identify any impartial source for his genre categories, (Egan. Tr. 2239:1-3), and his categorizations were not reliable. For example, he refused to recognize key genre categories that WE tv and Wedding Central use in their real world businesses. (*Compare* Egan. Tr. 2258:21-22; 2261:24-2262:1, *with* GSN Exh. 408, GSN Exh. 44, Joint Exh. 6, Martin Dep. 48:5-8, Broussard Tr. 1943:15-22, Dorée Tr. 1830:19-22.) In addition, his individual program categorizations were arbitrary; for example, he placed programs that WE tv described in identical terms into different genre categories. (Egan. Tr. 2256:17-2258:11; *see also id.* at 2253:20-2256:16.)

120. Mr. Egan’s genre analysis was based solely on an analysis of full-day programming that did not consider particular key programs. (*Id.* at 2288:16-2289:7.) However, Mr. Egan elsewhere emphasized the importance of “defining target programming,” further

highlighting the arbitrary nature of his genre analysis. (*Id.* at 2279:2-11; 2288:4-15; 2289:25-2290:12.)

(2) Unreliable “Look and Feel” Methodology

121. Mr. Egan’s “look and feel” analysis consists of personal opinion and is not based on objective criteria. (Egan Tr. 2268:22-2269:10.) Mr. Egan relied on arbitrary factors such as his sense about the number of female versus male talent appearing on programs, and his personal views on the gender implications of the color schemes of the networks’ promotional materials. (*Id.* at 2272:2-2279:11.) In doing so, he employed outdated stereotypes like those for which he was faulted in prior proceedings before the FCC. (*Compare e.g., Id.* at 2272:17-20, 2273:1-8 (characterizing WE tv as more female-oriented than GSN because GSN’s colors are blue and WE tv’s colors are pink), *with Tennis Channel Recommended Decision*, at ¶ 32 (“Mr. Egan’s suggestion that an American network’s on-the-air-use of American professionals of Latina and Asian extraction creates an international, *i.e.*, a non-American, image is not only incorrect, but also approaches being repugnant.”).)

(3) Unreliable Programming Expenditure Analysis

122. Mr. Egan’s programming expenditure analysis depended entirely on his analysis of costs spent on acquired programming, even though GSN and WE tv do not consider acquired programming to be their “defining target programming.” (Egan Tr. 2345:17-19 (acknowledging that acquired shows for WE tv are not its defining target programming); Goldhill Tr. 235:1-2 (noting that GSN’s major investment is its *original* programming).) Mr. Egan acknowledges that GSN spends more than WE tv on its defining target programming. (Egan. Tr. 2266:21-25 (acknowledging that GSN spent more on original programming).)

123. At the same time, Mr. Egan considers Wedding Central and WE tv to be similarly situated despite having conducted no analysis of Wedding Central’s programming

expenditures. (*Id.* at 2268:13-21.) Notably, there is no record evidence that Wedding Central — which acquired the bulk of its programming from WE tv — incurred anything more than extremely modest programming expenditures. (CV Exh. 338, Dorée Written Direct, ¶ 33 (stating that most of Wedding Central’s programming had already aired on WE tv).)

(4) Unreliable Local Ratings Analysis

124. Mr. Egan used a local ratings analysis (1) despite having considered national ratings in prior cases, (2) without considering the impact on WE tv’s local ratings of the favorable channel placement, neighborhooding, and cross-channel promotion it received from Cablevision, which WE tv’s own employees acknowledged was significant, (Egan. Tr. 2301:14-2302:19; GSN Exh. 17; GSN Exh. 307); and (3) based on a rating system (Nielsen Station Index) that he did not fully understand and that is less reliable than an alternative local ratings system (Nielsen Television Index), (Egan. Tr. 2297:2-8; 2298:25; 2299:11).

(5) Conclusion Regarding Mr. Egan

125. Individually and taken together, Mr. Egan’s opinions lack a reliable methodology, are entirely subjective, are aimed at reaching a specific outcome rather than applying a consistent and reliable methodology, and are not reliable. This is further demonstrated by the numerous instances in which he has offered opinions or made assertions that are inconsistent with the opinions or assertions he has offered elsewhere in this or other cases. (*Compare* Egan Tr. 2316:3-9 (denying that WE tv’s audience demographic was women 18 plus in 2009, 2010, and 2011), *with* GSN Exh. 417, at 19f (asserting that WE tv’s audience demographic in 2009 was women 18 plus); (*compare* Egan Tr. 2319:3-5 (disputing that female skew for GSN approaches ██████████), *with* *Id.* at 2320:8-2321: 3) (acknowledging that GSN gender skew during first quarter of 2012 was ██████████); (*compare* CV Exh. 332, at ¶ 88 (focusing on differences in programming expenditures for *acquired* programming), *with* Egan

Tr. 2229:7-11 (asserting that cable operators value “high quality *original* programming”); (*compare* Egan Tr. 2357:9-16 (testifying that a single program cannot fall into two different genres), *withId.* at 2327:1-17; 2328:5-6 (acknowledging that it is “conceivabl[e]” that a cable network could initially plan to pitch network as one genre and then pitch it as another genre based on perception of what an MVPD is looking for).)

b) Lawrence Blasius’ Opinions Are Not Based on Any Reliable Methodology.

126. Mr. Blasius concluded that GSN was not similarly situated to WE tv from the perspective of a potential advertiser. He testified that (i) when making a purchase decision, advertisers consider four principal criteria: CPM (cost per thousand viewers), gender skew, median age, and demographic ratings; and (ii) GSN and WE tv were dissimilar based upon alleged differences in those metrics. (CV Exh. 228, Blasius Direct Test. ¶ 38 [hereinafter “Blasius Written Direct”]; Blasius Tr. 2420:19-2421:12.) Mr. Blasius has never before rendered an expert opinion as to the similarity of networks from an advertising buyer’s perspective. (Blasius Tr. 2419:23-2420:11.)

127. Mr. Blasius’s opinion is unreliable first because he did not take account of information he himself deemed relevant. He admitted that when making ad buying decisions, advertisers consider factors other than the four he identified, yet he did not consider those criteria in his analysis. (*Id.* at 2422:1-7.) Even as to the four factors Mr. Blasius identified, Mr. Blasius only considered three in his analysis; he admitted that he “didn’t take account of” CPM data — “a key data point that any ad buyer would actually have available to them when they’re making that purchase decision.” (*Id.* at 2423:5-9).

128. Mr. Blasius’s opinion is also unreliable because it is based solely on his personal impressions rather than any objective methodology. (*Id.* at 2431:15-17.) He concluded

that WE tv and GSN are “significantly different” but admitted that he had no objective basis to determine what makes a difference significant, whether individually as to any one metric or for all of them in the aggregate. (CV Exh. 228, Blasius Written Direct ¶ 2; Blasius Tr. 2430:18-2431:17, 2507:14-19.) He admitted that, given the lack of objective methodology, his analysis is not replicable. (Blasius Tr. 2507:20-2508:3.)

129. Further, Mr. Blasius did not attempt to benchmark GSN against the performance of other networks that he testified were in WE tv’s competitive set and thus were similar to WE tv from an advertiser’s perspective. Without that comparison, Mr. Blasius has no basis to conclude that GSN is further from WE tv on his key metrics than the networks he identifies as WE tv’s competitive set.

130. All three of the factors Mr. Blasius analyzed featured a lack of objective methodology and benchmarking, among other shortcomings.

131. With respect to audience skew, Mr. Blasius had no methodology for determining when a difference between two networks was significant, nor did he perform any statistical analysis. (*Id.* at 2430:25-2431:14.) He lacked a method for determining the relative importance of skew as compared with other variables. (*Id.* at 2432:13-2433:23.) He failed to calculate the skew for the networks he testified as being in WE tv’s alleged competitive set, making it impossible to determine how GSN compared to networks that he acknowledged were similar to WE tv from an advertiser’s perspective. (*Id.* at 2431:18-2432:12.) His conclusions with respect to skew are therefore entitled to no weight.

132. With respect to median age, Mr. Blasius testified that networks with median ages outside the 25-54 range are dissimilar from those with median ages within that range. (CV Exh. 228, Blasius Written Direct ¶ 32.; Blasius Tr. 2439:14-24.) However, Mr.

Blasius gave no rationale as to why advertisers would view networks with different median ages as dissimilar if the advertisers purchase ads on the basis of guaranteed delivery of viewers in a given demographic. (GSN Exh. 174; Blasius Tr. 2459:12-16, 2463:5-2464:24.) He had no basis to contest GSN's advertising sales data showing it sold the greatest percentage of its guaranteed-demographic ads against the female 25-54 demographic. (*Id.*)

133. In concluding that GSN and WE tv were dissimilar with respect to median age, he admitted that he only examined a single time period, despite the fact that age data fluctuates over time. (Blasius Tr. 2437:8-10.) He also failed to consider the effects of a custom Nielsen study commissioned by GSN that showed its median age to be [REDACTED]

134. Mr. Blasius had no methodology by which to conclude that differences in median age among networks were significant, nor did he have a method by which to weigh differences in median age against differences on his other metrics. (*Id.* at 2456:21-2457:7.) His analysis regarding median age is therefore entitled to no weight.

135. As to demographic data, Mr. Blasius again had no methodology or objective basis to determine when a difference in demographic ratings was significant or how a demographic ratings difference should be weighed against differences in other metrics. He did not calculate the differences in demographic ratings among WE tv and the other networks within its competitive set, despite having access to the data necessary to do so. (*Id.* at 2467:17-2468:7, 2489:10-18.) Mr. Blasius's conclusion that GSN's demographic ratings show that it is not similarly situated to WE tv is entitled to no weight.

136. Mr. Blasius's lack of benchmarking also calls into question the objectivity of his analysis. Mr. Blasius testified that [REDACTED] were networks

within WE's competitive set and thus similar to WE from an advertiser's perspective. (CV Exh. 228, Blasius Written Direct ¶ 38; Blasius Tr. 2429:15-17.) While his report failed to analyze how these networks performed on the criteria that he applied to GSN, Mr. Blasius admitted on cross-examination that GSN's performance under his tests was as close or closer to WE than the performance of networks he alleged to be within WE's competitive set.

137. For instance, with respect to median age, Mr. Blasius testified that GSN was dissimilar to WE tv because GSN's Nielsen median age data was outside of the 25-54 range. (CV Exh. 228, Blasius Written Direct ¶ 32.) He went even further and testified that a median age outside the 25-54 demographic was "a disqualifying element with respect to trying to lure advertisers seeking to buy a 25 to 54 demographic." (Blasius Tr. 2459:12-23.) Yet Mr. Blasius defined [REDACTED] as being within WE tv's competitive set, even though [REDACTED] median age was outside the 25-54 range. (Blasius Tr. 2441:10-19, 2443:25-2444:4.) Mr. Blasius's testimony that a median age outside the 25-54 range would mean that GSN is dissimilar from WE, when in fact a network that he considered similar to WE tv also had a median age outside that range, calls his objectivity into question. His opinion that GSN's median age would be viewed as "disqualifying" by advertisers seeking to buy a 25 to 54 demographic is also empirically refuted by GSN's substantial ad sales on the basis of that demographic. (GSN Exh. 65, at GSN_CVC_00056184 (showing GSN earned [REDACTED] of its upfront billing from the female 25-54 demographic in the 2010-2011 upfronts, its largest single demographic); Zaccario Tr. 717:16-17, 726:14-727:6 (stating that women 25-54 demographic "has represented the single largest proportion of the company's up front ad sales" in "every year" from at least 2008 to present).)

138. Similarly, with respect to demographic ratings, Mr. Blasius failed to analyze the networks he alleged to be within WE's competitive set despite having access to the data necessary to do so. (Blasius Tr. 2467:17-2468:7, 2489:10-18.) In his direct testimony, Mr. Blasius stated that GSN and WE tv were "significantly different" and "not at all" similar with respect to demographic ratings. (CV Ex. 228, Blasius Direct Testimony ¶ 30; Blasius Tr. 2415:7-12.) On cross-examination, however, Mr. Blasius admitted that GSN was as close or closer to WE tv in demographic ratings than were [REDACTED] — two networks that he alleged are within WE's competitive set. For both total day and primetime demographic ratings, the differences between GSN and WE tv were identical to the differences between [REDACTED] and WE. (GSN Exh. 443; Blasius Tr. 2486:23-2489:5). The primetime difference between GSN and WE tv was five times *smaller* than the difference between [REDACTED] and WE. And GSN's total day ratings were 9 times *closer* to WE tv's than were [REDACTED] total day ratings. (*Id.*) Mr. Blasius's assertion that the difference in demographic ratings points between GSN and WE made them "significantly different," when his own data showed that this difference was substantially smaller than the difference between WE tv and networks that Mr. Blasius considered similar to WE tv, calls the objectivity of his analysis into question. (CV Ex. 228, Blasius Written Direct, ¶ 30.)

c) Hal Poret's Opinions Are Irrelevant to This Proceeding and Are Not Reliable.

139. Mr. Poret sought to measure consumer perception of programming carried by network pairs, including GSN and WE tv, to determine similarity. (Poret Tr. 1419:18-1420:9; CV Exh. 233A, at 26.) Yet he did not show survey respondents any programming. (Poret Tr. 1442:15-17.)

140. Mr. Poret's testimony has no relevance to a determination of whether GSN and WE tv are similarly situated for purposes of Section 616. First, neither Mr. Poret nor any relevant authority identifies surveys of consumer perception as relevant. (*Id.* at 1420:14-19). Second, Mr. Poret offers no opinion on matters of established relevance, including whether the networks target similar audiences and the networks' audience demographic profiles, ratings, or viewer duplication. In fact, Mr. Poret acknowledges that the actual audiences of GSN and WE tv could overlap significantly, and he would not know. (*Id.* at 1420:20-25, 1421:11-1422:5.)

141. Mr. Poret's testimony is also irrelevant because it did not address the programming aired on GSN and WE tv in late 2010 and early 2011 — the period during which Cablevision decided to place GSN on the sports tier. Mr. Poret conducted his survey in 2012, and did not ask respondents to consider programming that was shown on WE tv and GSN in 2010 or 2011. (CV Exh. 233, Poret Direct Test. ¶ 54 [hereinafter "Poret Written Direct"]; Poret Tr. 1437:7-25.) Mr. Poret does not even know how many of the survey respondents saw GSN in 2010. (Poret Tr. 1472:22-24.) Nor did he personally view any GSN programming from 2010. (*Id.* at 1473:21-23.)

142. Mr. Poret's testimony is entitled to no weight because he lacks expertise relevant to this proceeding. His survey experience focuses on trademark controversies. Other than this case, he has no experience with program carriage matters. (CV Exh. 233, Poret Written Direct ¶¶ 3-7; Poret Tr. 1417:11-24.)

143. Mr. Poret did not consider whether each of the networks in WE tv's self-identified competitive set could meet his survey-based consumer perception test. He conducted a \$50,000 survey to measure consumer perception of network programming. (Poret Tr. 1437:7-13) Yet, with the exception of Oxygen, Mr. Poret did not even study consumer perception of the

programming for the networks in WE tv's competitive set. He did not even study WE tv as compared to its sister network Wedding Central. (*Id.* at 1427:23-1428:8, concerning CV Exh. 112, at 5.)

144. Mr. Poret's testimony is unreliable in several respects, and therefore it is not entitled to any weight. Mr. Poret's testimony concerning GSN and WE tv is unreliable because it was based on the survey responses of individuals who did not view the networks. Mr. Poret's testimony is based on the survey responses of individuals who reported they were somewhat, very, or extremely familiar with "the type" of programming offered by both GSN and WE tv. He refers to this group as the "Familiar Group." Mr. Poret did not verify whether the people in this group ever viewed even a single program on either GSN or WE tv. He admits that his testimony is based, in part, on survey responses provided by individuals who do not watch any GSN or WE tv programming in a typical week. (Poret Tr. 1442:12-14.)

145. Mr. Poret's testimony is unreliable because his survey failed to replicate the experience of viewing GSN and WE tv programming as consumers encounter it in the video programming marketplace. Instead of programming, he showed respondents only network names on a computer. (*Id.* at 1442:15-17; CV Exh. 233A.) Mr. Poret acknowledges that survey respondents may have completed his survey based on impressions gained solely from flipping through TV Guide rather than viewing programming. (Poret Tr. 1442:18-1443:12.)

146. In other cases, Mr. Poret's surveys have been rejected as "fatally flawed" because they "bore no resemblance whatsoever to marketplace conditions." (*Fancaster v. Comcast*, 832 F. Supp. 2d 380, 405, 407 (D.N.J. 2011).) Comcast retained Mr. Poret to provide expert testimony in a consumer confusion case that proceeded in the District of New Jersey. Mr. Poret conducted two surveys purporting to measure the risk of confusion between Fancaster and

Comcast websites. For his first survey, Mr. Poret showed survey participants printouts/screen shots rather than the live web pages. The *Fancaster* court excluded the survey on the basis that it failed to approximate the way in which a consumer would interact with the Fancaster and Comcast products, and therefore was not reliable. The Seventh Circuit similarly criticized Mr. Poret's work in *Kraft Food Group Brands LLC v. Cracker Barrel Old Country Store, Inc.*, 735 F.3d 735 (7th Cir. 2013). Kraft alleged that Cracker Barrel restaurants had infringed Kraft's "Cracker Barrel" trademark. Kraft retained Mr. Poret to conduct a survey in support of its claim that consumers were confused by the restaurant's use of the phrase "Cracker Barrel." Mr. Poret designed a survey that showed respondents a picture of a ham, and asked them to respond to certain questions about the product. The court criticized Mr. Poret because the survey experience he created was "radically different" from the way in which survey respondents would actually encounter the product when making decisions in the market. (*Id.* at 742.) The Seventh Circuit also raised "doubts about the probative significance of the Poret survey." (*Id.* at 743.)

147. Mr. Poret was unwilling to acknowledge the Seventh Circuit's criticism of his work in the *Kraft Food* litigation. (Poret Tr. 1449:25-1451:22, 1475:13-16 (refusing to acknowledge that the Seventh Circuit raised doubts about the significance of Mr. Poret's survey); *see also id.* at 1449:4-24.) Mr. Poret's unwillingness to acknowledge what the Seventh Circuit plainly wrote about him calls his candor into question.

d) Jonathan Orszag's Opinions Raise Questions About Their Independence.

148. Mr. Orszag has served as a testifying expert for respondent vertically integrated cable operators in previous matters. On two prior occasions, he testified in this forum that video programming affiliated with a defendant cable distributor alleged to have violated Section 616 was not "similarly situated" to that of a complainant video programming vendor —

the same position that he takes in the present proceeding. (See Direct Test. of Jonathan Orszag, Comcast Hr'g Exh. 24, *NFL Enterprises LLC v. Comcast Cable Commc'ns, LLC*, MB Docket No. 08-214) (Apr. 6, 2009) [hereinafter "Orszag NFL Written Direct"]; *Tennis Channel Recommended Decision*.) Mr. Orszag has never found that a cable distributor discriminated against a similarly situated unaffiliated network, or even that an MVPD's disparate treatment of an unaffiliated network lacked a valid efficiency justification. (Orszag Tr. 2584:19-23; 2585:14-19.)

149. Mr. Orszag's testimony is not reliable and lacks indicia of independence because he chose not to apply the analytical framework that he used in previous Section 616 matters to support Cablevision's case. Mr. Orszag testified in the *NFL Network* and *Tennis Channel* litigations that peer carriage analysis, which he referred to as the "revealed preferences" analysis, was the "most direct and compelling evidence" of whether an MVPD's carriage of an unaffiliated network was discriminatory. (Hr'g Tr. 1291:7-18, *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, MB Docket No. 10-204 (Apr. 27, 2011); see also Orszag Tr. 2628:24-2629:12; Orszag NFL Written Direct.) In this case, the revealed preferences of every major MVPD except Cablevision — "direct and compelling evidence," in Mr. Orszag's words, of whether Cablevision's carriage was discriminatory — reflects that broad distribution of GSN offers value to the MVPD. Cablevision is a clear outlier compared to GSN's other affiliates. Its decision to place GSN on a tier reaching less than ██████ of its New York subscribers in 2011 placed it ██████ GSN's average carriage level in the 2011 marketplace of approximately ██████ percent. (GSN Exh. 301, Singer Written Direct ¶¶ 71. See also GSN Exh. 303, Hopkins Written Direct ¶¶ 17, 20.)

150. Mr. Orszag determined that GSN was not a significant competitor of WE tv based, in part, on his switching analyses and review of audience overlap and duplication. Yet he did not compare GSN's performance to other networks in WE tv's competitive set, which Mr. Orszag identified as including [REDACTED] [REDACTED] (CV Exh. 334, Orszag Written Direct ¶ 89.) In fact, Mr. Orszag completely ignored that GSN outperformed several of these networks.

- GSN was closer to WE tv in switching rates than [REDACTED] [REDACTED]. It also performed better than [REDACTED] [REDACTED] on both analyses. (CV Exh 334, Orszag Written Direct Table 4, Table 5; Orszag Tr. 2615:1-21, 2617:5-24, 2618:18-2619:2.)
- GSN was closer than [REDACTED] in terms of duplication with WE tv's viewership by persons at least 18 years of age. (CV Exh. 334, Orszag Written Direct Table 8; Orszag Tr. 2620:15-24.)
- GSN outperformed [REDACTED] in terms of overlap with WE tv's household viewership. It also outperformed [REDACTED] (CV Exh. 334, Orszag Written Direct Table 10; Orszag Tr. 2621:4-16.)

151. Overall, Mr. Orszag's analysis is unreliable and entitled to no weight because it erroneously imposes requirements that would make it impossible for Cablevision to ever violate Section 616 based on conduct directed at GSN. First, according to Mr. Orszag, to be in significant competition for advertisers with WE tv, GSN must impose a pricing constraint on

WE tv's advertising rates. (Orszag Tr. 2590:15-19) Yet Mr. Orszag testified that WE tv and GSN's respective small share of total industry advertising suggests that GSN advertising is unlikely to impose a significant constraint on WE tv's advertising prices. (*Id.* at 2590:24-2591:3)

152. Second, Mr. Orszag suggests that Cablevision cannot have harmed GSN's ability to compete because Cablevision is too small. Mr. Orszag suggests that an MVPD cannot be liable absent nationwide bottleneck power. Mr. Orszag's size test would immunize essentially every MVPD in the country from liability under Section 616, rendering the statute moot. (CV Exh. 334, Orszag Written Direct ¶¶ 170-180.)

153. Third, Mr. Orszag testified that it is impossible to analyze the comparative costs of tiering WE tv or Wedding Central, as the D.C. Circuit suggested in *Comcast Cable Communications, LLC v. F.C.C.*, 717 F.3d 982 (D.C. Cir. 2013) ("*Tennis Channel*"). According to Mr. Orszag, such analysis requires a natural experiment, that is, requires placing WE tv or Wedding Central on the sports tier to analyze the event. (Orszag Tr. 2656:11-19.) In his view, the exercise is futile.

7. GSN's Expert Opinions Are Reliable.

a) Dr. Hal Singer's Opinions Are Reliable.

154. Dr. Singer is a well-recognized economist with expertise in regulated industries, including telecommunications and video programming. (GSN Exh. 301, Singer Written Direct ¶ 14) In program carriage disputes, he has served as an economic expert for the Tennis Channel, NFL Network and for MASN, which owns the television rights to live baseball games of the Baltimore Orioles and the Washington Nationals. In a program access dispute, he served as an economic expert for DISH Network. (GSN Exh. 301, Singer Written Direct ¶ 19.)

155. Dr. Singer's opinions concerning the similarity of GSN and WE tv or Wedding Central are reliable because they are based on well accepted metrics and rely on record evidence. For example, Dr. Singer and Cablevision's expert Mr. Orszag agree that measuring the lift in WE tv viewership following the tiering event is a reasonable test of whether WE tv and GSN are similarly situated. (GSN Exh. 301, Singer Written Direct ¶ 38.)

156. Dr. Singer's application of two evidentiary standards articulated by the D.C. Circuit in *Tennis Channel* is relevant and reliable. Dr. Singer's analyses are based on record evidence produced by Cablevision and utilize sound and generally accepted methodologies.

157. First, Dr. Singer reliably analyzed *Cablevision's own data* to calculate the profit Cablevision sacrificed by tiering GSN in terms of churn, loss of goodwill, and the cost of subsidizing sports tier subscriptions. Dr. Singer's analysis included a conservative estimate of the intangible harm, which he refers to a loss in goodwill, that Cablevision suffered as a result of the tiering. (Singer Tr. 904:11-905:12.)

158. Second, Dr. Singer carefully considered — applying his expert experience in the industry to facts provided by Cablevision — the cost Cablevision incurred from broad carriage of its affiliated networks, compared to the cost of carrying GSN broadly. He specifically considered whether “the incremental monthly losses of carrying GSN on a broad tier . . . would be the same or less than the incremental monthly loses Cablevision incurred from carrying WE tv broadly. (GSN Exh. 301, Singer Written Direct ¶ 91). Once again, Dr. Singer used reliable facts produced by Cablevision to make his calculations. (*Id.* at ¶ 88 n.169 (citing to GSN Exh. 239, a Cablevision-produced document noting rates paid by Cablevision for WE tv and number of subscribers).) Indeed, Dr. Singer's figures on the intensity of viewership among

GSN and WE tv viewers — which directly relates to the likelihood of churning in response to tiering — referred directly to Cablevision expert Jonathan Orszag’s own report. (GSN Exh. 301, Singer Written Direct ¶ 88 n.171 (citing Expert Report of Jonathan Orszag, ¶¶ 125, 126, 129 (Dec. 14, 2012)).)

b) Timothy Brooks’ Opinions Are Reliable.

159. Mr. Brooks is a well-recognized expert in media research with significant expertise in both quantitative research based on Nielsen Media Research (Nielsen), Beta Research (“Beta”), Gfk MRI (“MRI”) and other data and qualitative research based on designing and conducting focus groups and audience surveys. (Brooks Tr. 1134:17-1137:8; GSN Exh. 300, Brooks Written Direct 83-86).

160. Mr. Brooks reliably focused on objective, third-party Nielsen demographic data and Beta and MRI data as the basis for his opinions about the similarity of GSN, WE tv and Wedding Central. Specifically, Mr. Brooks conducted a systematic ratings comparison of the three networks, focusing first on the most stable national Nielsen demographic ratings, then looking to Nielsen ratings within the New York DMA in which Cablevision is the dominant operator, and then looking both to Nielsen ratings within only Cablevision households in the New York DMA and also only non-Cablevision households in the New York DMA. (GSN Exh. 300, Brooks Written Direct 9-12.) In performing these analyses, Mr. Brooks considered ratings for both total households and particular audience demographics. (*E.g.*, GSN Exh. 300, Brooks Written Direct 13, 17.) Mr. Brooks’ comparisons of the networks’ relative performance in Cablevision’s service area is informed by his having also evaluated their performance in national and other local ratings. (*Id.*) Mr. Brooks’ conclusions that WE tv and GSN are similar in terms of their performance in key demographic ratings are particularly probative because he evaluated the performance of GSN, WE tv, and Wedding Central relative to other women’s networks,

including those that WE tv has identified as its key competitors, (*E.g.*, GSN Exh. 300, Brooks Written Direct 14-15.)

161. As the co-author of *The Complete Directory to Primetime Network and Cable TV Shows*, the leading publication of its kind, Mr. Brooks also has substantial expertise in the nature of the programming that airs on GSN, WE tv, and Wedding Central, as well as other women's networks. (Brooks Tr. 1136: 211137:8.) As Mr. Brooks testified in this proceeding, "many of the elements of [the GSN] programming were very similar to the elements of WE tv," including that both "involv[e] real people. They're both non-scripted. They're both essentially in real time And they both include, many of the shows, not all, but many of those shows include elements having to do with family dynamics, [or] having to do with romantic relationships." (Brooks Tr. 1150:7-17.) According to Mr. Brooks, those shared elements may explain the strong performance of the networks among adult women, as well as substantial actual audience overlap among the networks. (*Id.* at 1149:15-1150:17)

B. Cablevision's Discrimination Was Not Based on Any Valid Business Purpose

162. The U.S. Court of Appeals for the D.C. Circuit has identified at least three ways that GSN can establish the lack of a valid business purpose for the tiering, in order to make an indirect showing of discrimination on the basis of affiliation. These are (i) that an otherwise valid purported business consideration is pretextual, (ii) that the incremental losses from carrying GSN on a broader tier would be the same or less than the incremental losses to Cablevision from carrying its similarly-situated affiliated networks on the broader tier, and (iii) that Cablevision in fact would have benefited from keeping GSN on the broader tier. (*Tennis Channel*, 717 F.3d 982.) The evidence establishes all three.

1. Cablevision's Stated "Value" Rationale for Targeting GSN Is Pretextual.

163. In this litigation, Cablevision asserts that it tiered GSN based on two factors relating to GSN's "value": (1) GSN's license fee, and (2) viewership as measured by set-top box data. Cablevision specifically claims that its decision was based on an analysis conducted by Mr. Montemagno in July 2010. (CV Exh. 337, Montemagno Written Direct ¶ 44-46; CV Exh. 119) The evidence proves that assertion to be false.

164. First, Cablevision's invocation of Mr. Montemagno's July 2010 memorandum is pretextual because it was not the basis for Cablevision's tiering decision. Mr. Montemagno acknowledges that he did not have the authority to and did not actually make a final decision as to GSN's carriage on Cablevision systems. (Montemagno Tr. 1558:18-22.) Instead, Mr. Bickham had that authority and made the ultimate tiering decision. (Montemagno Tr. 1558:18-1559:5.) By Mr. Bickham's own admission, he decided to tier GSN because it was not, in his view, a "must-have" network, a view he reached by watching the network "periodically" for five-to-ten-minute intervals. (Joint Exh. 1, Bickham Dep. 24:23-25, 49:18-50:14, 60:1-21, 76:3-17.) Mr. Montemagno's July 2010 assessment had no impact on Mr. Bickham's thinking. (*Id.* 60:1-21.)

165. Second, Mr. Bickham's "must-have" rationale for tiering GSN was itself pretextual. Mr. Bickham defined a "must-have" programming as "the kind of programming that if you lose it, people will call and disconnect because you don't have it." (Joint Exh. 1, Bickham Dep. 75:2-6.) [REDACTED]

[REDACTED] Cablevision's post-tiering conduct, in the face of proof that GSN met Mr. Bickham's "must-have" test, establishes that Mr. Bickham's stated reason for moving GSN to the sports tier was pretextual.

166. Third, the analysis contained in the July 2010 memorandum on which Cablevision now seeks to rely is pretextual; it relied on a non-standard, non-representative sample of data that no Cablevision witness could explain. [REDACTED]

[REDACTED]

167. Mr. Montemagno did not include this information in his memorandum, however. (Montemagno Tr. 1575:2-6, 1575:19-24.) [REDACTED]

[REDACTED]

168. Finally, Cablevision's claim that it repositioned GSN because of the cost savings it would achieve in its programming budget is pretextual. If Cablevision had been motivated to identify cost savings for the programming budget, it could have the saved the same

amount — and more — by enforcing rather than waiving its contractual [REDACTED]
[REDACTED] See Part II.A, *supra*. Cablevision’s claim that its decision was
based on the need to reduce its programming budget is thus a pretext for discrimination; [REDACTED]
[REDACTED]
[REDACTED]

2. Incremental Loss: At a Minimum Any Losses Associated With Broad Carriage of GSN Would Have Been Equal to or Less Than Those Losses Associated with Broad Carriage of WE tv and Wedding Central.

169. The evidence establishes that any incremental losses to Cablevision from keeping GSN on a broader tier — in the form of increased subscriber fees — were no greater, and in fact less, than the losses to Cablevision from continuing to carry its similarly-situated affiliated networks on the broader tier.

170. Maintaining GSN’s carriage on the family tier would have cost Cablevision approximately [REDACTED] in 2011, a mere [REDACTED] of Cablevision’s total programming budget. (GSN Exh. 80, at CV-GSN 0427144.)

171. In contrast, had it opted to move WE tv to the sports tier, Cablevision would have saved [REDACTED] per month in avoided license fees — or, nearly [REDACTED] [REDACTED] in 2011 alone, [REDACTED] than the cost savings it purportedly achieved by tiering GSN. Yet Cablevision [REDACTED]. (Joint Exh. 1, Bickham Dep. 64:1-8, 104:4-105:6; Joint Exh. 3, Dolan Dep. 133:10-15.) Part of the avoided costs reflects an overpayment by Cablevision for [REDACTED] (See GSN Exh. 239, at CV-GSN 0433041-42 [REDACTED]
[REDACTED]

172. There is no evidence that Cablevision would have lost more subscribers from tiering WE tv than it did from tiering GSN. Cablevision's own analysis establishes that GSN's viewers exhibited *greater* viewing intensity than did WE tv's viewers. (CV Exh. 334, Orszag Written Direct, ¶¶ 153-55 (showing that GSN has a [REDACTED] [REDACTED]). Cablevision would need to incur churn of at least [REDACTED] to lose money by tiering WE tv. But only about [REDACTED] of WE tv households would have churned in response to a hypothetical tiering of WE tv. Thus, Cablevision not only incurred a profit sacrifice by tiering GSN, it likely incurred a profit sacrifice by not tiering WE tv. (GSN Exh. 301, Singer Written Direct, ¶ 91.)

173. Even without moving WE tv to a different tier, Cablevision could have achieved a significant cost savings simply by [REDACTED] [REDACTED]. (GSN Exh. 109, at CV-GSN 0357843; GSN Ex. 41; Joint Exh. 1, Bickham Dep. 176:21-177:7, 177:16-24.)

3. Net Benefit: Despite Its Mitigation Efforts, Cablevision's Distribution Division Incurred Direct and Immediate Economic Losses.

174. GSN has done more than show that Cablevision lost more money keeping its affiliated networks on expanded basic than it would have by keeping GSN on that tier. The evidence establishes that tiering GSN actually cost Cablevision more than the subscriber fees that Cablevision saved, such that Cablevision would have benefited from keeping GSN on expanded basic.

175. On the day after the GSN tiering, Cablevision received [REDACTED] complaints about the move. (GSN Exh. 116.) This was approximately [REDACTED] more calls than Cablevision received in a single day in connection with its [REDACTED] [REDACTED]. (GSN Exhs. 116, 118.) Within a week, Cablevision had received

over [REDACTED] calls from customers complaining about Cablevision's decision to put GSN on the sports tier. (GSN Exh. 132; *see also* GSN Exh. 127 ([REDACTED] [REDACTED]); GSN Exh. 129.)

176. Many of the complaints focused on how inappropriate the sports tier was for a network like GSN, which contains no sports programming and which appeals to viewers that would never subscribe to that tier. (*See, e.g.*, GSN Exhs. 110, 113, 114, 115, 117, 119, 126 & 139.)

177. In an effort to address consumer displeasure, Cablevision allowed [REDACTED] (GSN Exhs. 120, 124, 125.) This [REDACTED] caused Cablevision quantifiable financial losses because it was obligated to pay license fees to every service carried on the sports tier for each of the roughly [REDACTED] subscribers upgraded to the tier [REDACTED]. Because Cablevision [REDACTED] [REDACTED]. (GSN Exh. 301, Singer Written Direct ¶¶ 77, 80.)

178. To the extent that some households cancelled their Cablevision subscriptions as a result of the tiering, Cablevision incurred additional losses due to customer churn or disconnects that resulted from the tiering. Cablevision would have sacrificed profits of [REDACTED] per subscriber per month due to customer churn in response to GSN's tiering. (*Id.* at ¶¶ 80, 81.) Between [REDACTED] customers left Cablevision due to [REDACTED]. (*Id.* at ¶ 78.) In the absence of the sports tier subsidy, that number would have been even greater. Absent the subsidy, as a result of the tiering

of GSN, Cablevision would have incurred monthly losses of at least [REDACTED] due to churning customers. (*Id.* at ¶¶ 81-83.)

179. In addition to these losses related to churn, a calculation of Cablevision's monthly loss must account for the loss in goodwill for the non-churning customers who called to complain about the tiering episode. Some [REDACTED] customer complaints demonstrates a significant loss in goodwill. Goodwill is important because it permits Cablevision to raise its video prices each year; a dissatisfied customer is less inclined to tolerate a price increase. A reasonable measure of the diminution in goodwill is the size of the subsidy offered by Cablevision to preserve customer relations; Cablevision's subsidization policy reveals its willingness to pay this subsidy to any or all of the [REDACTED] complaining customers. Applied across the [REDACTED] customers who did not churn (but whom Cablevision nevertheless stood ready to subsidize), the incremental cost is [REDACTED]. (*Id.* at ¶ 83.)

180. Cablevision lost [REDACTED] per month due to the tiering, which exceeds the [REDACTED] in license fees payable to GSN per month prior to the tiering. Overall, even with highly conservative assumptions, by tiering GSN, Cablevision would have incurred monthly distribution losses of [REDACTED] in the absence of the subsidy. (*Id.*)

181. Cablevision would have had to attract more than [REDACTED] as many [REDACTED] sports tier subscribers as it lost from churn in order for the tiering to be profitable. (*Id.* at ¶¶ 77-78.) There is no evidence that Cablevision did so.

IV. CABLEVISION'S DISCRIMINATION UNREASONABLY RESTRAINS GSN'S ABILITY TO COMPETE FAIRLY

182. In order to show a violation of sections 616 and 76.1301(c), an unaffiliated network must show that the effect of the distributor's discriminatory conduct is to "unreasonably restrain" its "ability to compete fairly." (47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).) GSN has established that Cablevision's discriminatory downgrade of GSN to the sports tier unreasonably restrained GSN's ability to compete at the local and national level. *First*, GSN is losing approximately [REDACTED] per year every year it remains on the sports tier, due to decreased subscriber fees and advertising revenue. *Second*, because Cablevision is the dominant cable operator in New York, home to a concentration of national advertising executives, Cablevision's tiering means GSN is not accessible in the homes of ad buyers and decision-makers, harming GSN's advertising revenue and reputation. *Third*, the direct reduction in GSN revenue as a result of the tiering means GSN has less money to invest in the network, attract top talent, and create original programming in an effort to stand out from its competitors. And *fourth*, Cablevision's move of GSN to a sparsely penetrated and male-dominated sports tier has caused a significant reduction in GSN's ratings in the New York market.

A. GSN Suffered Harm in New York Market through Declining Ratings Overall and Among Its Target Demographic.

183. The tiering had an immediate and significant effect on GSN's ratings in New York, which harmed GSN's ability compete in New York, to sell advertising, and to deliver its target demographics to advertisers. Cablevision holds a significant share of the market for video programming in New York — [REDACTED] — that allows Cablevision to foreclose GSN from reaching millions of viewers in the New York area. (GSN Exh. 103, at CV-GSN 0427076.) This substantial market share gives Cablevision ample ability to restrain a network such as GSN, a result borne out in the New York ratings following the tiering.

184. Indeed, WE tv's senior programming executive confirmed it would be harmful for her network to be placed on the sports tier because it would not benefit a women's network to be surrounded by "more male [networks]." (Dorée Tr. 1880:22-25. *See also id.* 1882:15-1883:3.)

185. Comparing the second quarter of 2010 (before the tiering) to the second quarter of 2011 (the first full quarter after the tiering), GSN's ratings in the New York DMA fell by [REDACTED] (GSN Exh. 300, Brooks Written Direct ¶ 46.) GSN's losses in its target demographics of women 25-54 and women 18-49 were even greater. From the second quarter of 2010 to the second quarter of 2011, GSN's rating in New York fell from [REDACTED] (*Id.* at ¶ 48.) At the same time, WE tv showed a ratings increase overall and among women 25-54 and 18-49 in New York. (*Id.* at ¶ 49.) Mr. Brooks concluded that "Cablevision appears to have benefitted its own WE tv network by removing a competitor from wide availability on its lineup." (*Id.* at ¶ 125.)

186. Advertisers look at Nielsen data, and advertising transactions are done on the basis of Nielsen data. (Zaccario Tr. 771:7-14.) Lower ratings harms the ability of GSN to sell advertising and to increase the rates at which it sells advertising. Furthermore, when GSN does not deliver to advertisers the number of viewers in a target demographic that it promised, it must make up the difference in audience deficiency units ("ADUs"). In 2011, the year of the tiering, GSN's TV ad sales missed their target by [REDACTED] due in part to the tiering. (*Id.* at 806:9-22.)

187. As will be shown in Part IV.B, *infra*, the harm suffered by GSN is amplified because Cablevision is a dominant cable operator in New York, home to most of the

top advertising agencies and buyers. GSN's decreased visibility in that market significantly impacts its ability to sell advertising and depresses its advertising rates. (GSN Exh. 298, Zaccario Written Direct ¶¶ 12-17.)

B. GSN Suffered Harm on a National Level that Unreasonably Restrained Its Ability to Compete.

1. Cablevision's Discrimination Directly Harmed GSN in the Form of Significant Lost Revenue.

188. Cablevision's tiering of GSN has resulted in direct harms of approximately [REDACTED] per year in the form of lost subscriber fees and lost advertising revenue. The loss of 2.5 million subscribers from Cablevision, at a monthly rate of [REDACTED] per subscriber, directly translates to an annual loss of [REDACTED] (GSN Exh. 297, Goldhill Written Direct ¶ 31.) GSN financial models estimate that, at the time of the tiering, each GSN subscriber was worth about [REDACTED] in annual advertising revenue, leading to an additional loss of [REDACTED] (Zaccario Tr. 740:2-11.) Today, each subscriber is worth about [REDACTED] per year in advertising revenue, meaning the advertising loss attributable to the tiering now stands at [REDACTED] million per year. (*Id.* at 740:12-20.)

189. This direct loss is equal to approximately [REDACTED] of GSN's overall television profit. (Goldhill Tr. 234:9-21.) A loss of this magnitude severely restrains GSN's ability to develop new programming, market the network, and thereby increase its ratings and delivery of target demographics, as will be explained in Part IV.B.3, *infra*.

190. The direct loss from specific advertisers following the tiering was quantifiable. Long-term advertisers including [REDACTED] [REDACTED] reduced their advertising on GSN. (GSN Exh. 298, Zaccario Written Direct ¶ 9.) During the 2011 upfront, immediately following the tiering, [REDACTED] (Zaccario Tr. 742:19-743:2.) [REDACTED]

[REDACTED] (*Id.* at 743:4-12.) In all, GSN experienced a decline in advertising revenue from [REDACTED]

[REDACTED] the year in which the tiering occurred. (GSN Exh. 298, Zaccario Written Direct ¶ 9.)

191. The tiering also delayed GSN's ability to reach a key distribution threshold required by certain advertisers. At the time of the tiering, GSN had about 73 million subscribers nationwide. Some advertisers set 80 million subscribers as a benchmark for them to consider purchasing time on a network. (*Id.* at ¶ 11.) The loss of 2.5 million Cablevision subscribers, just as GSN was nearing the 80 million subscriber level, delayed GSN's ability to reach that threshold. (*Id.*) Advertisers who were seeking the 80 million threshold either did not buy on GSN or demanded reduced rates. (Zaccario Tr. 742:5-7.) GSN has since reached 80 million subscribers, but the loss of 2.5 million Cablevision subscribers meant it took that much longer to get there, harming GSN in the process in the form of lost advertising and reduced rates. (*Id.* at 741:15-742:5.)

2. Cablevision's Discrimination Harms GSN's Ability to Compete for Advertisers.

192. Cablevision's tiering of GSN has unreasonably restrained GSN's ability to compete for advertisers. Cablevision is the dominant cable operator in the New York market, serving [REDACTED] of all video subscribers in the New York DMA. (GSN Exh. 103, at CV-GSN 0427076.) Most of the major advertising agencies have their principal headquarters in New York, and a large number of senior advertising executives — who act as the decision-makers for companies buying advertising — live in Cablevision's footprint in the New York market. (GSN Exh. 298, Zaccario Written Direct ¶ 12.)

193. Senior advertising executives make purchasing decisions based not only on objective metrics such as demographic delivery but also on their own viewing of the

programming. (*Id.* at ¶ 13.) Ad buyers want to sample a program, to get a sense of a network's programming and keep tabs on what shows are generating buzz in the industry. (Zaccario Tr. 744:18-25.) The tiering meant that buyers who are subscribers to Cablevision — the No. 1 cable provider in the New York market — suddenly lost their ability to sample GSN's programming. It also meant that their friends and family who are Cablevision subscribers also lost access to the GSN, so that the ad buyers would not hear buzz about GSN programs. (*Id.* at 744:24-745:5.)

194. GSN has heard from media buyers who have inquired about GSN's lack of availability on their home televisions. (*Id.* at 745:13-17.) A buyer for [REDACTED] who was a Cablevision subscriber told GSN officials on several occasions that she was disappointed she could not sample GSN's programs in her home and that it not help GSN's prospects for selling more advertising to [REDACTED] (*Id.* at 745:17-25.) The lead ad buyer for [REDACTED] told GSN she was unable to sample GSN's programs in her home and was concerned that GSN was not available to Cablevision's basic service subscribers. (*Id.* at 746:1-6; GSN Exh. 298, Zaccario Written Direct ¶ 17.)

195. The record confirms the special importance of New York, with Cablevision officials noting it is the country's top ad market, with ad buyers an important part of the audience. Cablevision Chief Executive James Dolan conceded that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 11:21-12:4.) In

extolling the benefits of a Manhattan launch for Wedding Central, a WE tv executive noted that the launch would get the network [REDACTED]

[REDACTED] (GSN Exh. 275.) The tiering meant that ad buyers in the “#1 ad market” could not see GSN.

3. Cablevision’s Discrimination Harms GSN’s Ability to Grow the Network and Develop Original Programming.

196. The loss of revenue due to the tiering has harmed GSN’s ability to develop and acquire new programming and to market its programming and grow its audience.

Significant investment is required to develop and launch original programming such as *It Takes a Church* and *Skin Wars*. GSN airs about four “tentpole” shows each year — major programs which have substantial marketing and production costs. (Goldhill Tr. 235:2-6.) These shows are hugely important to a network. They define the network, bring in new audiences, and drive advertising revenue and affiliate relationships. (*Id.* at 235:11-15.) The marketing and production costs for one major program are approximately [REDACTED] a year — equivalent to the direct loss due to the Cablevision tiering. (Goldhill Tr. 235:5-6.)

197. This loss unreasonably restrains GSN’s ability to compete with its competitive networks, including WE tv. Networks attract new audiences and create buzz through the original programming they offer. Original programs also help networks sell themselves to distributors and command rate increases. GSN’s ad sales staff uses original programming as a “calling card” to sell advertising. (Zaccario Tr. 723:18-22) Having fewer original programs harms GSN’s ability to attract new audiences and sell itself to distributors and advertisers.

V. REMEDY

A. GSN Seeks Immediate Relief Requiring Cablevision to Carry GSN at the Same Level at Which It Carries Its Affiliated Networks.

198. GSN seeks equitable, non-discriminatory treatment from Cablevision. (Zaccario Tr. 747:6-9.) Requiring Cablevision to carry GSN in the same manner in which it

carries or carried its similarly-situated affiliated networks WE tv and Wedding Central would relieve the harms GSN has suffered as a result of the hearing and rectify the harm done to its ability to fairly compete in the marketplace. (*Id.*)

199. Carriage on expanded basic by Cablevision — the same level of carriage enjoyed by similarly situated WE tv and by Wedding Central when it was on the air — would end the direct harms inflicted on GSN in the form of lost subscriber fees and advertising revenue. The additional revenue GSN would gain from equitable treatment would enable it to invest in more original programming to compete fairly with its competitive set. Carriage on expanded basic would also return GSN to the homes of the senior advertising executives who are based in New York and who make advertising decisions for major national brands. This would relieve the ongoing harm from the tiering to GSN's ability to compete for advertising.

B. Cablevision Is Subject to Maximum Forfeiture Allowable Under Section 616 for Its Violation of the Program Carriage Rules.

200. Cablevision should be fined the maximum forfeiture available amount under the law. Since February 1, 2011, Cablevision has denied GSN carriage equal to that which it grants its own similarly situated affiliates, in violation of Section 616. Cablevision's discrimination against GSN has continued on a day-to-day basis since February 1, 2011, amounting to 1,684 days as of this date.

201. GSN has suffered substantial harm as a result of Cablevision's conduct. (*See* Part IV, *supra*; 47 C.F.R. § 1.80(b)(4) note § II(4) ("substantial harm" as upward adjustment factor).)

202. GSN's attempts to negotiate a solution with Cablevision were rejected, and GSN was forced to file a program carriage complaint to seek relief. (*See* 47 C.F.R. § 1.80(b)(4) note § II(4) ("good faith or voluntary disclosure" as downward adjustment factor).)

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203. Cablevision has ample resources (*see* GSN Exh. 401A, noting Cablevision’s cash on hand in 2014 as \$813 million) and is fully able to pay the maximum forfeiture amount that is imposable based on its conduct: \$400,000. (See 47 C.F.R. § 1.80(b)(4) note § II(2) (“ability to pay” as upward adjustment factor); 47 C.F.R. § 1.80(b)(1).)

Proposed Conclusions of Law

A. Cablevision Engaged in Discriminatory Conduct the Effect of Which Was to Unreasonably Restrain GSN's Ability to Compete Fairly.

1. Cablevision has “engag[ed] in conduct the effect of which is to unreasonably restrain the ability of [GSN,] an unaffiliated video programming vendor[,] to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.” (47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).)

2. In its Hearing Designation Order, the Media Bureau found that GSN had “put forth sufficient evidence supporting the elements of its program carriage discrimination claim to establish a prima facie case” under Section 616. (*HDO* ¶ 2.) Cablevision now bears the burden to rebut the Media Bureau’s *prima facie* finding of discrimination, as the FCC has repeatedly articulated in analogous contexts. (*Cf. Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 13 FCC Rcd. 15822, ¶ 56 (1998) (“Once a prima facie complaint has been determined, the burden of proof is on the defendant to establish that it did not violate the program access provisions of the Communications Act.”); *Turner Vision, Inc. v. Cable News Network, Inc.*, Mem. Op. & Order, 13 FCC Rcd. 12610, ¶¶ 14-15 (CSB 1998) (in program access context, burden shifts to vendor after complainant makes prima facie showing); *Cellular Vision of N.Y., L.P. v. Sports Channel Assocs.*, 10 FCC Rcd. 9273, ¶ 23 (CSB 1995) (defendant must establish that it has not engaged in discriminatory behavior after complainant meets its burden to prove prima facie elements of program access claim).) Because Cablevision has failed to offer evidence to meet its burden and rebut the Media Bureau's finding, GSN must prevail.

3. Even if GSN bore the burden of proof, it has offered sufficient evidence to meet that burden. (*Cf. TCR Sports Broad. Holding, LLP v. Time Warner Cable Inc.*, 25 FCC Rcd. 18099, ¶ 11 (2010).) GSN has established through both direct and indirect evidence that Cablevision discriminated against GSN and in favor of its affiliated programming vendors in the selection, terms, or conditions of carriage, on the basis of affiliation. (*See* Parts II & III, *supra*.)

4. “A complainant relying on direct evidence requires documentary evidence or testimonial evidence . . . that supports the claim that the defendant discriminated on the basis of affiliation or non-affiliation of vendors.” (*HDO* ¶ 10.) GSN has established through direct evidence that Cablevision has violated — and continues to violate — Section 616. Specifically, Cablevision has discriminated in favor of WE tv and Wedding Central on the basis of their affiliation with Cablevision, and against GSN on the basis of non-affiliation. [REDACTED]

[REDACTED] (*See* Part II.B, *supra*.)

These facts constitute direct evidence of discrimination.

5. Furthermore, GSN established discrimination through indirect proof. “A complainant relying on circumstantial evidence requires (i) evidence that the complainant provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD, based on a combination of factors . . . , and (ii) evidence that the defendant MVPD has treated the video programming provided by the complainant differently than the similarly situated video programming provided by the programming vendor affiliated with the defendant MVPD with respect to the selection, terms, or conditions for carriage.” (*HDO* ¶ 10.)

6. GSN, WE tv, and Wedding Central are similarly situated. For purposes of the inquiry under Section 616, the networks need not be “identical”; instead, it is sufficient that they compete with each other (for ratings, advertisers, and audience, for example) and have generally comparable popularity. (*Herring Broad., Inc. v. Time Warner Cable Inc.*, Mem. Op. & HDO, 23 FCC Rcd. 14787, ¶ 75 (MB 2008); *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd. 15783, ¶¶ 27-28 (MB 2008) [hereinafter *TCR*], *rev'd on other grounds*, 25 FCC Rcd. 18099, ¶ 11 (FCC 2010).)

7. This standard is satisfied here. GSN has established that it is similarly situated to Cablevision affiliates WE tv and Wedding Central with regard to target audience and demographic, target advertisers, target programming, ratings, and license fees. (*See Part III.A, supra.*)

8. With respect to the selection, terms, or conditions of carriage, Cablevision treats GSN, WE tv, and Wedding Central differently based on their affiliation or non-affiliation. Cablevision moved GSN to a sports tier, while it maintained WE tv and Wedding Central on expanded basic and [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Cablevision did so despite the fact that any losses from keeping GSN on expanded basic were met or exceeded by the losses from keeping WE tv on that tier, and the fact that Cablevision would have experienced a net benefit from keeping GSN on expanded basic. (See Part III.B, *supra*.) Cablevision’s proffered business justifications for tiering GSN and not its affiliated networks are pretextual.

9. Finally, Cablevision’s differential treatment of GSN unreasonably restrains GSN’s ability to compete fairly. The relevant market for harm is New York, where Cablevision is based and has the vast majority of its subscribers. The Second Circuit has explained, “If a vertically integrated cable operator . . . has the ability to prevent an unaffiliated network from reaching a substantial portion of consumers in [the local MVPD] market[,] [i]t thereby may significantly inhibit the unaffiliated network’s ability to compete fairly in that area’s video programming market.” (*Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 162-63 (2d Cir. 2013).) GSN need not show that it “cannot compete at all, i.e., would exit the industry, operate at a loss, or suffer some similar major disadvantage”; instead, it is sufficient to show that the differential treatment “restrained [the complainant’s] ability to compete fairly for viewers, advertisers, and [] programming rights.” (*TCR* at ¶¶ 30, 31.)

10. GSN has established harm in the New York market, as well as nationally. (See Part IV, *supra*.) GSN has established that Cablevision’s differential treatment has harmed its ability to compete in the marketplace in terms of lost revenue of [REDACTED] per year and a loss of access to key advertising executives in the top advertising market in the country. (See

Part IV.B.1, *supra*.) GSN's ability to compete with WE tv for advertisers is significantly harmed when advertising buyers cannot receive GSN on expanded basic in their homes, but they can and do receive WE.

11. Cablevision's differential treatment of GSN restrains its ability to compete fairly for the same audiences, advertisers, and programming as WE tv, Cablevision's affiliated network. GSN and WE compete for the same audience — women 18 to 49 and 25 to 54. (*See* Part III.A.1, *supra*.) The direct loss of revenue harms GSN's ability to develop and acquire programming targeted to women and to market that programming. Because Cablevision is the dominant cable operator in New York, the relegation of GSN to a sports tier [REDACTED] [REDACTED] GSN's ratings among its target demographics and overall in New York.

12. In conclusion, Cablevision has discriminated against GSN in favor of its affiliated programming vendors, including WE tv and Wedding Central, in violation of Section 616 of the Communications Act and Section 76.1301(c) of the Commission's rules.

B. Cablevision Should Be Required to Distribute GSN at the Same Level as Its Affiliated Networks.

13. Mandatory carriage of GSN on equitable terms on Cablevision's systems is necessary and appropriate to remedy the foregoing violations. Section 616 requires Cablevision to carry GSN on a non-discriminatory basis. Specifically, Cablevision should be required to carry GSN in each of its cable systems on the most highly penetrated tier on that system on which it carries WE tv.

14. Cablevision should be ordered to pay carriage fees for GSN at the per-subscriber rate set forth in the expired affiliation agreement under which the parties continue to operate, and should be ordered to negotiate in good faith a renewed carriage agreement with GSN for continued carriage on non-discriminatory terms and conditions.

C. An Order of Forfeiture Should Be Issued Against Cablevision for Its Recurring Misconduct.

15. Cablevision has engaged in conduct for which it should be subject to the forfeiture provisions under 47 C.F.R. § 1.80(a)(2).

16. A forfeiture penalty may be assessed against any person found to have willfully or repeatedly failed to comply with any provision of the Communications Act or any rule or regulation promulgated under the Act, pursuant to 47 C.F.R. § 1.80(a)(2). (See also 47 U.S.C. § 503(b)(1)(B).) The forfeiture amount must take into account the “nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.” (47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(8).)

17. Cablevision’s ongoing failure to comply with Section 616 constitutes a continuing and repeated violation, having commenced on February 1, 2011, and continuing to this day. (*Cf. Roger L. Hoppe, II*, Petition for Reconsideration, Informal Objection, 22 FCC Rcd. 19313, 19316 (MB 2007) (continuing violation is repeated for the purpose of forfeiture calculation if it lasts for more than one day).)

18. Accordingly, Cablevision, as a cable operator, should be assessed the daily maximum forfeiture amount of \$37,500 for each day of the continuing violation, “except that the amount assessed for any continuing violation shall not exceed a total of \$400,000 for any single act or failure to act.” (47 C.F.R. § 1.80(b)(1).)

19. Cablevision is subject to the statutory maximum forfeiture amount of \$400,000, and it should be required to forfeit that amount promptly to the Commission.

Respectfully submitted,



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