

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 CORPORATION,)	
Defendant.)	
)	
Program Carriage Complaint)	

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

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

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INTRODUCTION

For years, Cablevision Systems Corporation (“Cablevision”) used its distribution business to favor its affiliated programming business, Rainbow Media Holdings LLC (“Rainbow”), without regard for the legal restrictions that Section 616 of the Communications Act imposes on vertically-integrated multichannel video programming distributors (“MVPDs”). Cablevision’s distribution executives regularly made decisions designed to favor its affiliated networks, affording them benefits that were not available to unaffiliated programming networks, and subjected unaffiliated networks to significantly less favorable treatment.

Under Section 616 and its implementing regulations, vertically-integrated MVPDs like Cablevision are expressly prohibited from either favoring affiliates or disfavoring unaffiliated networks in the terms and conditions of carriage. Cablevision did precisely that with respect to GSN, with which it is not affiliated, and WE tv and Wedding Central, with which it is affiliated: it gave its affiliated networks a range of beneficial terms that were never available to GSN; it relegated GSN to carriage on a narrowly penetrated, highly inappropriate tier when it did not and would not consider tiering its affiliated networks; and it ultimately conditioned its final decision to tier GSN on the willingness of one of GSN’s owners, DIRECTV, to launch and carry one of Cablevision’s floundering affiliated networks.

GSN has proved these acts of discrimination through both direct and circumstantial evidence. At trial, Cablevision made the extraordinary assertion that it is *permitted* to discriminate against GSN so long as GSN is not similarly situated to its affiliated networks. But that simply misstates the law. Whether the networks are similarly-situated is an element of a case based on circumstantial evidence, but it is irrelevant when there is direct evidence — as there is here — that the MVPD discriminated on the basis of affiliation. In any event, even as to

GSN's circumstantial case, GSN has established that it was similarly situated to Wedding Central and WE tv, and that Cablevision treated it differently based on affiliation.¹

LEGAL STANDARD

Congress passed the 1992 Cable Act to address concerns that vertically-integrated cable operators have “the incentive and ability to favor their affiliated programming services,” such as by providing their “affiliated programmer[s] more desirable channel position[s]” or other benefits on the basis of affiliation.² To address these concerns, Congress enacted Section 616 to prohibit discrimination on the basis of either the affiliation or non-affiliation of programming networks.³ That is, a vertically-integrated MVPD may not treat unaffiliated programmers “differently” from affiliated programmers either by taking steps that enhance its affiliates’ competitive positions or by taking steps that hinder or handicap the unaffiliated networks.⁴

ARGUMENT

GSN established Cablevision’s discrimination through both direct and circumstantial evidence. It also established that Cablevision had no reasonable business justification for its conduct and that GSN was “unreasonably restrain[ed]” in its ability to “compete fairly” by this discrimination, entitling GSN to appropriate relief.

¹ This brief highlights GSN’s key arguments. A fuller description of the facts and evidence is contained in GSN’s Proposed Findings of Fact & Conclusions of Law.

² See S. Rep. No. 102-92, at 25 (1991), as reprinted in 1992 U.S.C.C.A.N. 1133, 1158.

³ 47 C.F.R. § 76.1301(c).

⁴ *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, 25 FCC Rcd. 18099, ¶ 12 (FCC 2010) (“[T]he *Order* correctly concluded that, under this standard, a vertically-integrated MVPD “[may treat] unaffiliated programmers differently from affiliates, [only] so long as it can demonstrate that such treatment did not result from the programmer’s status as an unaffiliated entity.”); 47 C.F.R. § 76.1301(c); *Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*, 27 FCC Rcd. 8508, ¶ 44 (2012) [hereinafter “*Tennis Channel*”]; *Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*, 26 FCC Rcd. 17160, ¶¶ 108-109 (ALJ 2011) [hereinafter “*Tennis Channel Recommended Decision*”].

I. DIRECT PROOF OF DISCRIMINATION

Cablevision has argued that, “if the networks are not similarly situated, we can discriminate.”⁵ That assertion is simply wrong. To the extent that either “affiliation or non-affiliation ‘actually played a role in th[e] process and had a determinative influence on the outcome’” of Cablevision’s carriage decisions, Cablevision’s conduct is illegal.⁶ The question of whether GSN is “similarly situated” to Cablevision’s affiliated networks is relevant only to the extent that GSN seeks to prove discrimination through circumstantial rather than direct evidence.⁷ Because GSN established discrimination by direct evidence, the “similarly situated” question is not prerequisite to a finding that Cablevision violated Section 616.⁸

Likewise, Cablevision’s position that GSN may prove discrimination by direct evidence only if Cablevision expressly admitted that it based its carriage decisions on affiliation lacks merit.⁹ “Direct evidence” of discrimination refers to evidence that, if true, requires no inferential

⁵ See Tr. 112:24-25; see also Cablevision Proposed Findings of Fact & Conclusions of Law ¶ 252 [hereinafter “Cablevision Proposed Findings”] (“[S]o long as GSN is not similarly situated to WE tv or Wedding Central, Cablevision is entitled to run its vertically-integrated business in a manner that maximizes profits for the enterprise as a whole, whether that results in favorable treatment for affiliated networks or not.”).

⁶ See *Tennis Channel Recommended Decision*, ¶ 105 & n. 321 (quoting *Herring Broad. Inc. v. Time Warner Cable Inc.*, Recommended Decision, 24 FCC Rcd. 12967, ¶ 63 (ALJ 2009) and *Hazan Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)); see also *TCR Sports Broad.*, 25 FCC Rcd. 18099, ¶ 12 (“[T]he Order correctly concluded that, under this standard, a vertically-integrated MVPD ‘[may treat] unaffiliated programmers differently from affiliates, [only] so long as it can demonstrate that such treatment did not result from the programmer’s status as an unaffiliated entity.’”).

⁷ See *In re Revision of the Commission’s Program Carriage Rules*, 26 FCC Rcd. 11494, ¶ 14 (FCC 2011) [hereinafter “*Second Report and Order*”] (describing similarly situated inquiry as an element of a circumstantial case of discrimination).

⁸ *Id.*

⁹ See Cablevision Proposed Findings ¶¶ 222 & 223 (suggesting that GSN must provide “conclusive direct evidence of discrimination,” such as “an email from the defendant MVPD stating that the MVPD took an adverse carriage action against the complainant programmer because it is not affiliated with the MVPD” (emphasis added)).

leap in order for a court to find discrimination.¹⁰ This may include an e-mail or admission by a defendant MVPD that expressly admits it took an adverse carriage action “based on non-affiliation.”¹¹ However, GSN also may establish unlawful discrimination via direct evidence based on underlying facts that, if true, compel the conclusion that unlawful discrimination was a motivating factor in the relevant decision.¹²

Here, GSN established discrimination through two lines of direct evidence: (1) Cablevision’s admissions and other proof as to how Cablevision treats GSN and its affiliated networks materially differently in the terms and conditions of carriage; and (2) GSN’s proof that Cablevision later conditioned reasonable carriage for GSN on its ability to extract value from one of GSN’s parent companies for Cablevision’s affiliated networks.

A. Cablevision’s Favoritism of Its Affiliated Networks and Punishment of Unaffiliated GSN

1. Applying Different Standards to Affiliated and Unaffiliated Networks

Cablevision applied completely different standards for setting the terms and conditions of carriage for its affiliated networks than it did for unaffiliated networks.

¹⁰ See *Bass v. Bd. of Cnty. Comm'rs, Orange Cnty., Fla.*, 256 F.3d 1095, 1111 (11th Cir. 2001) (“‘[D]irect evidence’ refers to a type of evidence which, if true, would require no inferential leap in order for a court to find discrimination.”).

¹¹ *Second Report and Order* ¶¶ 12-13.

¹² See *id.* at ¶ 12 (noting that direct evidence includes “evidence . . . supporting the facts underlying the claim”); *Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 394-95 (6th Cir. 2008) (characterizing direct evidence of discrimination as “evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions”); *Robin v. Espo Eng’g Corp.*, 200 F.3d 1081, 1089 (7th Cir. 2000) (explaining that direct evidence of age discrimination must be “sufficient . . . to allow a rational jury to reasonably conclude that but for [the plaintiff’s] age . . . [the defendant] would not have fired him”); see also *Trotter v. Bd. of Trustees of Univ. of Ala.*, 91 F.3d 1449, 1453 (11th Cir. 1996) (noting that direct evidence of discriminatory intent includes “statements indicating racial bias on the part of a decisionmaker in an employment setting”).

First, Cablevision distribution executives admitted that they could not engage in arm's length negotiations with their affiliated networks with respect to the terms and conditions of carriage. Whereas Cablevision's distribution business ordinarily uses its ability to walk away from negotiations as leverage with unaffiliated networks — and explicitly did so with GSN — Cablevision's only distribution witness at the hearing, Thomas Montemagno, explained that Cablevision did not “have the same leverage . . . [with Cablevision's affiliates] because they go crying to dad!”¹³ “Dad” was Chief Operating Officer Thomas Rutledge, who oversaw both the programming and distribution sides of the business.¹⁴ The evidence discussed below established that Mr. Rutledge regularly intervened to benefit affiliated networks and to discriminate against unaffiliated networks.

Cablevision's Wedding Central launch illustrated this inability to “walk away” and how it helped Cablevision's affiliated networks. Cablevision distribution executives were not permitted to refuse a carriage deal with the network; carriage of Wedding Central by Cablevision was always a foregone conclusion because of Cablevision's admittedly different standard for dealing with its affiliates.¹⁵

Unaffiliated networks generally — and GSN in particular — did not enjoy this protection against “walking away.” To the contrary, Cablevision told GSN without any warning that it was

¹³ Montemagno Tr. 1546:1-25 ([REDACTED]); GSN Exh. 33.

¹⁴ See GSN Exh. 33; Montemagno Tr. 1546:7-1547:6.

¹⁵ See Montemagno Tr. 1545:2 ([REDACTED]); see also GSN Exh. 28 ([REDACTED]).

being tiered, something it admittedly would not do to its own network.¹⁶ And after GSN attempted to negotiate, Cablevision walked away from negotiations in March 2011.¹⁷

In addition, Cablevision's former distribution President, John Bickham, admitted that he made the decision to tier GSN based on criteria that Cablevision never applied to its affiliated networks. Specifically, he testified that he tiered GSN because, in his extremely limited viewing of GSN, he determined that it was not "must-have programming."¹⁸ But he admitted he never applied that test to Cablevision's affiliated networks, acknowledging that Wedding Central would fail his test and that he could not say whether WE tv would pass.¹⁹ Even the pretextual carriage analysis of GSN that Mr. Montemagno separately prepared, and which Mr. Bickham admitted did not drive his decision, provides direct evidence of discrimination: Cablevision acknowledges that it never prepared or applied an analysis like that to the networks it owned.²⁰

Evidence that Cablevision granted protection against tiering to its affiliated networks, and then tiered an unaffiliated network by applying a test it never applied to its affiliates, constitutes

¹⁶ Significantly, one of the reasons Cablevision claims it tiered GSN is that GSN was out of contract. In fact, [REDACTED] when Cablevision [REDACTED] [REDACTED] GSN Exh. 297, Goldhill Supplemental Direct Test., ¶ 13-14 [hereinafter "Goldhill Written Direct."]. Further, Cablevision negotiated a new long-term contract with WE tv that guaranteed [REDACTED] during the precise same time period. GSN Exh. 202.

¹⁷ GSN Exh. 297, Goldhill Written Direct ¶ 26.

¹⁸ Joint Exh. 1, Bickham Dep. 74:21-77:6.

¹⁹ *Id.* at 107:14-24. In fact, GSN met Mr. Bickham's definition of "must have programming." *Id.* at 73:17-21 (characterizing "must have" television as television that Cablevision could "reduce the carriage of . . . without having a negative impact on the business"). As discussed in Part II.B.2-3, *infra*, Cablevision's tiering of GSN had a substantial negative impact on its distribution business.

²⁰ *See* Montemagno Tr. 1559:10-12.

direct evidence of discrimination. These facts compel the conclusion that affiliation “played a role in th[e] process and had a determinative influence on” Cablevision’s carriage decisions.²¹

This conclusion is borne out by the sharp divergence between how Cablevision treats its own networks and GSN, and how the general cable marketplace treats the networks. Cablevision treats its own networks far better than the marketplace does. It pays them more, triggering the MFN obligations discussed in greater detail below.²² It granted Wedding Central carriage to [REDACTED] of its customers before any other MVPD even agreed to launch the network;²³ indeed, most other MVPDs refused ever to carry Wedding Central, and the only two other MVPDs that did carry Wedding Central carried it at a dramatically lower rates (roughly [REDACTED] [REDACTED])²⁴ Finally, Cablevision granted WE tv channel placement so favorable that WE tv did far better in the Cablevision market than it did in other markets.²⁵ At the same time, Cablevision treated GSN far worse than it was treated by the marketplace. After the

²¹ See *supra* note 12.

²² See Part I.B, *infra*.

²³ See GSN Exh. 245, at 2.

²⁴ See Broussard Tr. 2024:3-2025:12.

²⁵ Compare GSN Exh. 300, Brooks Revised Direct Test. ¶ 61 [hereinafter “Brooks Written Direct”] (“Cablevision carries WE tv . . . in the midst of a high traffic channel neighborhood.”) with GSN Exh. 165 ([REDACTED])

[REDACTED]). In addition to these benefits, Cablevision granted its affiliated networks marketing support it did not grant unaffiliated networks, see GSN Exh. 31; GSN Exhs. 184-192 (listing [REDACTED]); GSN Exhs. 240-244 ([REDACTED]); and special access to the proprietary set-top box data that it did not grant to GSN, even as it has cited a selective slice of this unshared data to justify tiering GSN, see GSN Exhs. 14, 35, 150. Cablevision’s grant of these benefits solely to affiliated networks is the precise type of conduct that the Commission cited as potentially unlawful in its 1993 Order implementing the program carriage framework. See *In re Implementation of Sections 12 & 19 of the Cable Television Consumer Prot. Act of 1992 Dev. of Competition & Diversity in Video Programming Distribution & Carriage*, 9 FCC Rcd. 2642, ¶ 13-17 (FCC 1993).

tiering, Cablevision carried GSN at a penetration level dramatically below what it enjoyed among distributors not engaged in discriminatory conduct.²⁶ These deviations between Cablevision and the rest of the marketplace directly flow from Cablevision's culture of favoring its affiliated networks and disfavoring unaffiliated networks.

2. Enriching Affiliated Networks

Cablevision's cost-saving rationale for tiering GSN offers further direct evidence of its discriminatory conduct. Cablevision claims it tiered GSN to save its distribution business money, but its distribution business then [REDACTED]

[REDACTED]²⁷ Year after year, Thomas Rutledge directed Cablevision's distribution business to [REDACTED]

Cablevision did not dispute that such a [REDACTED] would be indefensible. Instead, it relied on testimony from Robert Broussard to argue that Rainbow [REDACTED]

[REDACTED]²⁸ This argument was both pretextual and unsupported. First, as the Presiding Judge recognized, [REDACTED]

²⁶ See GSN Exh. 297, Goldhill Written Direct ¶ 23

²⁷ See Montemagno Tr. 1660:16-20; see also GSN Exh. 398, at 2.

²⁸ See Broussard Tr. 1935:10-1936:14, 1939:7-24, 1941:25-1942:3.

[REDACTED]

[REDACTED]²⁹ Second, Mr. Montemagno — the only Cablevision employee to testify — made clear that Cablevision’s distribution business rejected this argument outright, and that they considered themselves [REDACTED]

[REDACTED]³⁰ Third, the evidence showed that Mr. Montemagno was correct: Cablevision was unable to cite any language in either its [REDACTED]

[REDACTED]

[REDACTED]

Instead, these were obviously distinct agreements that had nothing to do with each other. Cablevision’s attempt to conflate them is pretextual.

Cablevision’s [REDACTED]

[REDACTED] For example, in 2010, when it tiered GSN, Cablevision’s distribution business

[REDACTED]³¹ [REDACTED]

[REDACTED]

[REDACTED]³² Unsurprisingly, Cablevision distribution executives acknowledge that [REDACTED]

[REDACTED]

[REDACTED]³³

²⁹ *Id.* at 2113:21-24; 2114:2-7; 2114:15-17, 2130:17-2131:14.

³⁰ *See* Montemagno Tr. 1649:25-1650:4.

³¹ GSN Exh. 398; GSN Exh. 239; GSN Exh. 109, at CV-GSN 0375843; Joint Exh. 1, Bickham Dep. 176:21-177:24. [REDACTED]

[REDACTED] GSN Exh. 398, at 4. [REDACTED] *Id.* at 8.

³² CV Exh. 337, Montemagno Direct Test. ¶ 59.

³³ *See* Montemagno Tr. 1601:20-23.

Based on these and other undisputed facts, it is clear that Cablevision applies a wholly different standard for unaffiliated and affiliated networks, resulting in wholly different terms and conditions of carriage. Affiliated networks were not subject to or even considered for tiering, whereas unaffiliated GSN was tiered based on a standard never applied to Cablevision's affiliates. And Cablevision's affiliated networks [REDACTED]

[REDACTED]. This differential treatment is direct evidence of discrimination.

B. Cablevision's Attempt to Extract Value from GSN's Parent in Return for Fair Carriage for GSN

GSN also proved discrimination through a second line of direct evidence: when GSN asked Cablevision to reverse the tiering decision, Cablevision used that request to try to extract value for its affiliated networks in return for giving fair carriage to GSN. Conditioning the terms of carriage for an unaffiliated network on securing value for an affiliated network is a plain violation of Section 616.

Wedding Central faced an existential challenge in 2010: Cablevision had already granted the new network broad carriage, but the network needed to leverage that favorable carriage to secure launch and carriage from other MVPDs or it would cease to exist. In late 2010, it was failing in this effort. Only two other MVPDs were carrying it at all, and at extremely modest levels.³⁴ By virtue of its size, DIRECTV provided Wedding Central with an easy way to reverse its failure: securing carriage from DIRECTV would single-handedly increase its carriage

³⁴ Broussard Tr. 2024:2-2025:12.

[REDACTED].³⁵ Distribution on DIRECTV had been essential to Wedding Central's business plan, but DIRECTV had refused to carry the network.³⁶

Cablevision's tiering decision gave it an opportunity to coerce DIRECTV, one of GSN's parents, into carrying Wedding Central. The tiering announcement prompted GSN to ask Derek Chang, the DIRECTV representative on GSN's management committee, to contact Cablevision about the decision.³⁷ The core facts surrounding Cablevision's illegal response to Mr. Chang's outreach are undisputed. Rather than responding to Mr. Chang in the ordinary course through Cablevision's distribution arm, Cablevision Chief Operating Office Thomas Rutledge told Mr. Chang to discuss GSN's carriage with Rainbow executive Josh Sapan.³⁸ At the same time, Mr. Rutledge instructed Rainbow to come up with a [REDACTED]

[REDACTED]³⁹ Mr. Sapan and Mr. Broussard proposed — and then repeated this “ask” in a series of conversations — that GSN could maintain its broad carriage with Cablevision if DIRECTV granted carriage to Wedding Central.⁴⁰ Mr. Broussard documented this proposal in an internal email, in which he made it clear that he had directly linked GSN carriage to Wedding Central carriage as a reasonable exchange of value.⁴¹

³⁵ See GSN Exh. 363 at 363-011; Broussard Tr. 2021:13-2022:21, 2028:18-2047:5. When Wedding Central was ultimately unable to secure carriage from DIRECTV, it went out of business within months.

³⁶ Broussard Tr. 2021:13-2022:21, 2028:18-2047:5.

³⁷ GSN Exh. 297, Goldhill Written Direct ¶ 18.

³⁸ *Id.* at ¶ 19.

³⁹ See GSN Exh. 98.

⁴⁰ See Broussard Tr. 2044:12-22; Joint Exh. 2, Chang Dep. 127:16-21, 127:25-128:7 128:13-18, 129:2-25, 132:22-133:10.

⁴¹ See GSN Exh. 260.

Cablevision does not dispute that conditioning the terms of GSN's carriage on value for its affiliated network would be a plain violation of Section 616.⁴² Nor could it: vertically-integrated MVPDs simply are not permitted to make carriage decisions on the basis of affiliation and therefore may not extract benefits for their affiliated networks as the price of carriage.⁴³

Instead, Cablevision argues that there is no evidence it announced its tiering decision in order to extract value for Wedding Central.⁴⁴ But this argument is irrelevant: it is clear that before implementing its announced decision, Cablevision conditioned GSN's continued carriage at its existing level on DIRECTV agreeing to launch Wedding Central.⁴⁵ Whatever Cablevision's motivations were in notifying GSN it would be tiered, Cablevision's subsequent decision to condition GSN's carriage on extracting a benefit for an affiliated network violates Section 616.

Cablevision also argues that it did not actually promise it would carry GSN broadly in exchange for Wedding Central carriage.⁴⁶ This argument does nothing but damage Cablevision's credibility. The undisputed facts show that: (1) Cablevision's distribution arm turned carriage negotiations regarding GSN over to the company's programming executives; (2) Cablevision's distribution arm told the programming executives to generate "asks" for which it would be worth keeping GSN broadly penetrated; (3) and Cablevision's affiliated networks acted on this direction by making a specific (and illegal) proposal of a Wedding Central swap to GSN. This proposal was exactly in line with what even Cablevision's witnesses conceded were prior

⁴² See Cablevision Proposed Findings at ¶¶ 55-62.

⁴³ See 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

⁴⁴ See Cablevision Proposed Findings at ¶ 233.

⁴⁵ See *supra* notes 38-42.

⁴⁶ Cablevision Proposed Findings at ¶¶ 59, 231-32.

attempts at *quid pro quo* carriage deals for the benefit of Wedding Central.⁴⁷ These facts could not be more clear, and they constitute direct evidence of discrimination.

II. CIRCUMSTANTIAL PROOF OF DISCRIMINATION

GSN also proved discrimination through circumstantial evidence: it established that Cablevision treated it differently from its “similarly situated” affiliated networks, and that Cablevision did not have a “reasonable business purpose” for these acts.⁴⁸

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

To prove it is “similarly situated,” an unaffiliated network need not show itself to be “identical” to the affiliated network. Instead, the Commission looks at “a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors.”⁴⁹ “[N]o single factor is necessarily dispositive.”⁵⁰ Instead, “the more factors that are found to be similar, the more likely the programming in question will be considered similarly situated to the affiliated programming.”⁵¹

These factors show GSN to be similarly situated to WE tv and Wedding Central:

⁴⁷ See GSN Exh. 29, at CV-GSN 0005277 ([REDACTED]). Mr. Broussard acknowledges [REDACTED] GSN Exh. 39; Broussard Tr. 2136:8-2137:12.

⁴⁸ See *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 985 (D.C. Cir. 2013); see also *TCR Sports Broad.*, 25 FCC Rcd. 18099, ¶ 1; *Tennis Channel* ¶¶ 68-69; Hr'g Designation Order ¶¶ 10, 28, MB Docket No. 12-122, File No. CSR-8529-P (rel. May 9, 2012) [hereinafter “HDO”]; *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd. 15783, ¶ 29 (MB Oct. 30, 2008), *rev'd on other grounds*, 25 FCC Rcd. 18099, 18105 (2010) [hereinafter “TCR”]; *Herring Broad., Inc. v. Time Warner Cable Inc.*, Mem. Op. & Hr'g Designation Order, 23 FCC Rcd. 14787, ¶¶ 75-76 (MB 2008) [hereinafter “Omnibus HDO”].

⁴⁹ *Second Report and Order* ¶ 14.

⁵⁰ *Id.*

⁵¹ *Id.*

Target Audience. GSN, WE tv, and Wedding Central are each strongly female-oriented networks that target women viewers.⁵² GSN's programming includes female-oriented original programming and competition/game show programming well-understood to appeal predominantly to women.⁵³ As a result, GSN overwhelmingly attracts women: in 2010, [REDACTED] of its audience was female, and in 2014, [REDACTED] of its audience was female.⁵⁴ These rates are highly similar to WE tv's:⁵⁵ in 2014, [REDACTED] of WE tv's audience was female, with its rate standing at [REDACTED] in 2010.⁵⁶

Even among women's networks, GSN and WE tv have a particularly close relationship. WE tv was [REDACTED] among 87 cable networks ranked by shared audience with GSN in the fourth quarter 2010, reflecting [REDACTED] [REDACTED].⁵⁷

⁵² See GSN Exh. 227, at GSN_CVC_00165271 [REDACTED]; GSN Exh. 237, at GSN_CVC_00165215 [REDACTED]; GSN Exh. 228, at GSN_CVC_00165388 [REDACTED]; see also CV Exh. 332, Egan Direct Test. ¶ 97(c) [hereinafter "Egan Written Direct"] [REDACTED]; GSN Exh. 303, Hopkins Direct Test. ¶ 6.

⁵³ GSN Exh. 297, Goldhill Written Direct ¶¶ 6-7; GSN Exh. 300, Brooks Written Direct ¶¶ 85-87.

⁵⁴ GSN Exh. 300, Brooks Written Direct ¶ 22; see also GSN Exh. 143, at GSN_CVC_00133066 (showing [REDACTED]; GSN Exh. 13, at CV-GSN 0248589.

⁵⁵ Because Wedding Central never achieved success, reliable data on Wedding Central's performance is not available. Cablevision conceded, though, that Wedding Central was similarly situated to WE tv. Cablevision Exh. 332, Egan Written Direct ¶ 28 n.27 ("In fact, approximately [REDACTED] of the programs that aired on Wedding Central in 2010 also aired on WE tv.").

⁵⁶ GSN Exh. 300, Brooks Written Direct ¶ 22.

⁵⁷ *Id.* at ¶¶ 33-34; see also GSN Exh. 301, Singer Direct Test. ¶ 37 [hereinafter "Singer Written Direct"].

Target Advertisers. The key advertising demographics for women's networks are women 25 to 54 and 18 to 49, and persons 25 to 54 and 18 to 49.⁵⁸ Both GSN and WE tv target advertisers seeking to reach these four key sales demographics, and they achieve comparable ratings in each of the four categories.⁵⁹ Reflecting this shared focus, the same advertisers — and same brands — advertise on WE tv and GSN.⁶⁰

Cablevision makes much of the fact that GSN's viewers were on average older than WE tv's viewers. But these differences are more modest than between WE tv and other networks it admits are its key competitors, and, in any event, do not keep the networks from being similarly situated. Both networks targeted women generally, and both succeed in selling advertising inventory to advertisers interested in reaching women 25 to 54 and 18 to 49.⁶¹ On the metrics that matter in terms of age — ability to sell to advertisers — the networks are similarly situated.⁶²

Target Programming & Genre. There are meaningful similarities in the programming on GSN, WE tv, and Wedding Central. Each network airs (or aired) substantially unscripted, female-oriented programming focused on dating, romance, and family dynamics.⁶³ And both WE tv and GSN offer programming designed to appeal to women through a variety of genres,

⁵⁸ GSN Exh. 300, Brooks Written Direct ¶¶ 24-26.

⁵⁹ *Id.* at ¶ 26.

⁶⁰ *See* GSN Exh. 301, Singer Written Direct ¶ 52 & Table 6.

⁶¹ *See* GSN Exh. 300, Brooks Written Direct ¶¶ 24-28; Zaccario Tr. 718:4-11; CV Exh. 338, Dorée Direct Test. ¶ 17; GSN Exh. 354.

⁶² *See Id.*

⁶³ *See* GSN Exh. 300, Brooks Written Direct ¶¶ 6-10.

including competition-based reality shows, reality shows, and game shows, which attract a female audience.⁶⁴

Cablevision argues strongly that WE tv and GSN cannot be similarly situated because they feature programming in different genres. But the FCC has made clear that “no single factor is . . . dispositive,”⁶⁵ and Cablevision’s over-reliance on genre is defective on several grounds. First, Cablevision itself concedes that it is similarly situated to a range of networks, including some like SOAPnet (while it existed) that are in an entirely different genre from WE tv.⁶⁶ Second, programs in the same genre can attract entirely different audiences, and programs in different genres can target the same viewers.⁶⁷ Cablevision’s proffered programming expert, Michael Egan, amply demonstrated how arbitrary Cablevision’s genre distinctions are: he disagreed with WE tv executives on genre classifications and he employed genre distinctions that were, by definition, nonsensical—for example, classifying two programs that WE tv described *identically* as falling into different genres. Third, WE tv’s programming is defined not by genre but by a focus on female viewers. For this reason, its genre definition has changed considerably over time, even as the network’s core audience and competitive set has largely remained constant.⁶⁸ Finally, Mr. Egan failed to follow his methodology set forth in earlier cases before the Presiding Judge — making clear that his genre methodology (in addition to the rest of his methodology) was adopted only to reach a predetermined outcome.⁶⁹

⁶⁴ *Id.* at ¶¶ 8-9, 86; *see also* GSN Exh. 25.

⁶⁵ *Second Report and Order* ¶ 14 (“no single factor is . . . dispositive”).

⁶⁶ *See* Egan Tr. 2239:13-18 (Egan admitting this fact).

⁶⁷ *See Id.* at 2243:14-18 (Egan admitting this fact).

⁶⁸ Joint Exh. 3, Martin Dep. 49:17-50:9.

⁶⁹ *See* Proposed Findings of Fact and Conclusions of Law of GSN at ¶¶ 114-15; *see also* Egan Tr. 2256:22-2258:11 (classifying *Amazing Wedding Cakes* and *Wedding Cake Masters* in (continued...))

Ratings. Nationally, GSN materially outperforms WE tv: it has audience ratings that are [REDACTED] higher.⁷⁰ Even within Cablevision's home market, where WE tv benefits from favorable channel placement, GSN performs comparably to WE tv.⁷¹ Demographically, the networks are virtually identical with respect to their ratings among target audiences.⁷²

License Fee. GSN was not less attractive than WE tv in terms of its license fees. In fact, GSN was markedly less expensive than the above-market rate Cablevision paid WE tv. Cablevision paid GSN [REDACTED] per sub and WE tv [REDACTED] per sub in 2010.⁷³

B. Cablevision Had No Reasonable Business Justification For Tiering GSN.

Cablevision's discriminatory decision to retier GSN was not based on "a reasonable business purpose."⁷⁴ Under the D.C. Circuit's recent *Tennis Channel* decision, GSN can prove this under three alternative tests: (1) by showing that the proffered business justification was pretextual; (2) under the "incremental loss" test, by showing that Cablevision incurred an equal or greater loss from favoring its affiliated networks than it would have incurred from continuing to treat the unaffiliated network equally; or (3) under the "net benefit test," by showing that the

different genres, even though WE tv described them in word-for-word identical terms), *id.* at 2253:20-2254:16 (classifying *Unforgettable Celebrity Wedding Gowns* and *Unforgettable Wedding Venues* in different genres, even though they appeal to "substantially similar audiences"), *id.* at 2254:17-2255:14 (same for *Platinum Babies* and *Platinum Weddings*), *id.* at 2255:15-2256:16 (same for *Sin City Weddings* and *Disney Dream Weddings*).

⁷⁰ GSN Exh. 300, Brooks Written Direct ¶ 20.

⁷¹ *Id.* at ¶¶ 41, 44. Likewise, in key demographic ratings, the networks perform comparably. *Id.* at ¶ 26.

⁷² The networks are within [REDACTED] of a ratings point in performance amongst persons 18-49 and persons 25-54 and WE tv slightly exceeds GSN by [REDACTED] of a rating point amongst women 18-49 and women 25-54. *Id.*

⁷³ GSN Exh. 194, at 3, 9; GSN Exh. 199, at 6.

⁷⁴ See *Comcast Cable*, 717 F.3d at 985, cited by Enforcement Bureau's Submission Regarding Cablevision's Motion for Summary Decision ¶ 20 (May 27, 2015).

Cablevision would have obtained a “net benefit” from carrying GSN fairly.⁷⁵ Each of these tests is satisfied here.

1. Cablevision’s Justification is Pretextual

Cablevision attempted to justify its tiering decision by relying on a memorandum that Thomas Montemagno wrote depicting GSN as a poor performer on Cablevision systems.⁷⁶ That claimed rationale is a pretext because John Bickham, who actually made the tiering decision, admitted that he did not base it on the Montemagno memorandum.⁷⁷ Instead, he based his decision on his view, formed after watching a few minutes of GSN programming at his home, that GSN was not “must have” television.⁷⁸ As noted, he never applied this standard to any affiliated network, and it is at odds with the standard that other Cablevision witnesses — including CEO James Dolan — acknowledged should be used to make carriage decisions.⁷⁹

Mr. Bickham’s application of his must-have standard was also disproven by subsequent events. Mr. Bickham defined must-have programming as programming that would induce customer disconnects if it is removed.⁸⁰ But Cablevision’s internal documents reflect record numbers of customer complaints as a result of the GSN tiering decision — and no evidence of another instance where Cablevision experienced anywhere close to the same level of customer

⁷⁵ See *Comcast Cable*, 717 F.3d at 985-87.

⁷⁶ See Cablevision Proposed Findings at ¶¶ 43, 50.

⁷⁷ See Joint Exh. 1, Bickham Dep. 60:1-21.

⁷⁸ See *Id.* at 24:23-25, 49:18-50:14, 60:1-21, 76:3-17.

⁷⁹ See Joint Exh. 3, Dolan Dep. 122:7-16.

⁸⁰ Joint Exh. 1, Bickham Dep. 75:2-6.

outrage.⁸¹ Cablevision was so alarmed that it subsidized complainants threatening to terminate service. Yet Cablevision persisted in its decisions to tier GSN.⁸²

Moreover, Cablevision's live testimony about the Montemagno memorandum shows Cablevision's reliance on it to be pretextual. Mr. Montemagno admitted both that he was not the decision-maker regarding tiering and that he did not understand the data he put in his document.⁸³ Thus, while his memorandum claimed that GSN performed poorly in a specific quarter, it did so by citing an unrepresentative sample of set-top box data that was less than a tenth of Cablevision's customary sample size.⁸⁴ Mr. Montemagno was unable to explain why the unrepresentative sample size was used, even though a standard, representative sample size from the same time period was available and showed GSN to perform far more strongly.⁸⁵

GSN also showed Cablevision's cost-savings rationale to be pretextual at an even more fundamental level. If Cablevision were truly interested in saving money for its distribution business, it would not [REDACTED]

[REDACTED]⁸⁶ [REDACTED]

[REDACTED]

[REDACTED] proves that Cablevision's cost-savings claim is a complete pretext.

⁸¹ GSN Exhs. 116 & 118.

⁸² *See infra* note 96.

⁸³ *See* Montemagno Tr. 1548:24-1549:2, 1563:22-1565:25.

⁸⁴ *See* CV Exh. 119.

⁸⁵ *See* Montemagno Tr. 1565:10-25. The representative data ranked GSN at [REDACTED]. GSN Exh. 68, at 11. Mr. Montemagno did not include this information in his memo. Montemagno Tr. 1575:2-6, 1575:19-24. Instead, his memo was based on data drawn from a sample of fewer than 3,000 Cablevision homes, which ranked GSN at [REDACTED] CV Exh. 119, at 3.

⁸⁶ GSN Exh. 109, at CV-GSN 0357843; GSN Ex. 41; Joint Exh. 1, Bickham Dep. 176:21-177:7, 177:16-24.

2. Incremental Loss Test

GSN also refuted Cablevision's claimed business justification under the second means recognized in the *Tennis Channel* decision, by establishing that Cablevision would have saved more by tiering its affiliated network.

Cablevision would have owed GSN approximately [REDACTED] more per year had it not tiered GSN.⁸⁷ Moving WE tv to the sports tier would have saved Cablevision a much greater amount: nearly [REDACTED] in 2011 alone.⁸⁸ Yet Cablevision *never considered* tiering WE tv.⁸⁹ At the same time, Cablevision was unable to introduce any evidence that it would have received any customer complaints over dropping WE tv, let alone the outcry it received when it tiered GSN. Nor could the differential treatment be justified by differences in the networks' popularity, as they perform comparably nationally and in Cablevision's market.⁹⁰

3. Net Benefit Test

Finally, GSN met the "net benefit test" by establishing that Cablevision lost money by tiering GSN. At the outset, this fact is apparent from the overwhelming market consensus on GSN's value: the MVPDs against which Cablevision measures itself carry GSN at a much broader level than Cablevision.⁹¹ This broad consensus is consistent with GSN's undisputed

⁸⁷ GSN Exh. 80, at CV-GSN 0427144.

⁸⁸ Joint Exh. 1, Bickham Dep. 103:22-104:2; GSN Exh. 239 [REDACTED]

⁸⁹ Joint Exh. 1, Bickham Dep. 64:1-8; 104:4-105:6; Joint Exh. 3, Dolan Dep. 133:10-15.

⁹⁰ GSN Exh. 300, Brooks Written Direct ¶¶ 20-21. To be sure, tiering WE tv would likely have damaged WE tv's advertising and license fee revenues — just as they damaged GSN's. Protecting that benefit is an act of discrimination that facially violates Section 616.

⁹¹ GSN Exh. 297, Goldhill Written Direct ¶ 23

value based on the metrics cited by Cablevision's own executives.⁹² This alone speaks to the net benefit Cablevision would have enjoyed from keeping GSN where it was.

But GSN also established through Dr. Singer's testimony that Cablevision lost a net benefit from tiering GSN. Dr. Singer demonstrated that, setting aside Cablevision's temporary fix of giving the sports tier away for free to upset customers, Cablevision would have lost [REDACTED] per month from tiering GSN.⁹³ The math supporting this calculation is simple and conservative: Cablevision would have lost [REDACTED] per month due to lost customers,⁹⁴ and it lost at least [REDACTED] per month in goodwill.⁹⁵ These combined losses of [REDACTED] exceed the [REDACTED] Cablevision claims to have saved from the tiering.⁹⁶

Cablevision's efforts to placate its angry customers by giving the sports tier away for free temporarily lessened this harm.⁹⁷ But Cablevision lost money even with the giveaway: [REDACTED] for each of the [REDACTED] subscribers who were given the sports tier for free,⁹⁸ plus [REDACTED] in profits⁹⁹ for every one of the [REDACTED] customers it still lost even with the

⁹² See Joint Exh. 3, Dolan Dep. 122:7-16; Joint Exh. 1, Bickham Dep. 88:8-14; see also GSN Exh. 63; GSN Exh. 45; GSN Exh. 60, at 12. Indeed, Cablevision's own research personnel warned the operator about the extreme loyalty shown by GSN viewers. GSN Exh. 296.

⁹³ GSN Exh. 301, Singer Written Direct ¶¶ 81-84.

⁹⁴ *Id.*, at ¶¶ 81-83.

⁹⁵ *Id.*

⁹⁶ *Id.* Neither the program carriage statute or rules require complainants to establish that "an MVPD's failure to carry its service [broadly] . . . cause[s] subscribers to switch to other MVPDs that do carry the service." Omnibus HDO ¶ 21. However, the D.C. Circuit suggested it is one potential way to meet its "net benefit" test and to show that an MVPD did not have a reasonable business purposes for its carriage decision. See Comcast Cable, 717 F.3d at 985-87.

⁹⁷ GSN Exh. 132; see also GSN Exh. 127 ([REDACTED]); GSN Exh. 129.

⁹⁸ GSN Exh. 301, Singer Written Direct ¶¶ 77-78.

⁹⁹ *Id.* at ¶ 81.

giveaway.¹⁰⁰ And because this giveaway was temporary — covering only [REDACTED]¹⁰¹ — Cablevision’s losses would be expected to revert to an amount that outmatched even its claimed savings after the giveaway was ended.

III. The Tiering Unreasonably Restrained GSN’s Ability To Compete.

To violate Section 616, Cablevision’s discrimination must also have “unreasonably restrain[ed]” GSN’s “ability . . . to compete *fairly*” in the communities that Cablevision serves.¹⁰² Contrary to Cablevision’s view, 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.”¹⁰³ Instead, GSN must show that the differential treatment “restrained [its] ability to compete fairly for viewers, advertisers, and . . . programming rights.”¹⁰⁴

The Second Circuit has made clear that the relevant marketplace for determining a restraint is not the entire nation but rather Cablevision’s local coverage area: the “discrete geographic areas defined by the boundaries of [Cablevision’s] individual [cable] systems.”¹⁰⁵ This focus on the local marketplace is confirmed by the legislative history behind Section 616.¹⁰⁶

¹⁰⁰*Id.* at ¶ 78.

¹⁰¹ GSN Exhs. 124 & 125.

¹⁰² 47 U.S.C. § 536(a)(3) (emphasis added); *see also Tennis Channel* ¶ 83; *HDO* ¶¶ 10, 29-34; *TCR* ¶ 30; *Omnibus HDO* ¶¶ 77-78.

¹⁰³ *TCR* ¶ 30 (“Neither the text of section 616, nor its legislative history, support such a restrictive interpretation.”)

¹⁰⁴ *TCR* ¶¶ 30-31; *see also Tennis Channel* ¶ 41-43 (noting that the “unreasonably restrain” language is not an analogue to antitrust standards).

¹⁰⁵ *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 144 (2d Cir. 2013).

¹⁰⁶ The legislative history of the 1992 Cable Act clearly sets forth a concern with the locally-derived market power. *See* H.R. Conf. Rep. 102-862, at 55-56 (1992), as reprinted in 1992 U.S.C.A.N. 1231 (“For a variety of reasons, . . . most cable television subscribers have no opportunity to select between competing cable systems.”); S. Rep. 102-92, at 8-9 (“A cable system serving a local community, with rare exceptions, enjoys a monopoly . . .”).

A. Local Harm

Cablevision holds roughly 61 percent of the market within the communities it serves.¹⁰⁷

There can be no serious dispute that foreclosing a network from 61 percent of the relevant marketplace “unreasonably restrain[s]” GSN’s “ability to compete fairly” in that market.

Cablevision’s own Rainbow executives have effectively conceded this point, describing the impact of such tiering by a major distributor [REDACTED]¹⁰⁸

Moreover, Cablevision witnesses readily acknowledged their market power in their own market.¹⁰⁹

B. National Harm

Even if the relevant metric were national harm, GSN established such harm.

First, GSN’s overall subscriber base was reduced by more than [REDACTED], which translates to a loss of [REDACTED] in annual license fee revenues.¹¹⁰

Second, GSN’s diminished access to viewers impacts its ability to generate advertising revenue. GSN estimates it has lost approximately [REDACTED] [REDACTED] in advertising revenues annually.¹¹¹

A loss of [REDACTED] each year — about [REDACTED] — directly impacts GSN’s ability to make competitive investments in programming and marketing.¹¹² These, in turn, affect GSN’s broader ability to compete with WE tv and others for

¹⁰⁷ GSN Exh. 301, Singer Written Direct ¶ 115.

¹⁰⁸ GSN Exh. 10.

¹⁰⁹ Joint Exh. 3, Dolan Dep. 11:3-18. Montemagno Tr. 1544:1-14.

¹¹⁰ GSN Exh. 297, Goldhill Written Direct ¶ 31.

¹¹¹ *Id.*

¹¹² *Id.* at ¶¶ 31-32.

the same women's audience.¹¹³

In addition to these readily quantifiable harms, GSN has also suffered other material harms. These include harms that flow from the unique nature of the Cablevision market, which is home to a large number of top advertising agencies and media buyers. GSN's decreased visibility in New York significantly impacts its ability to sell advertising and depresses its advertising rates well beyond the New York marketplace.¹¹⁴ For example, a simple regression model created by GSN's economist shows that [REDACTED]

[REDACTED].¹¹⁵
Cablevision itself recognized the value of this market — for example, by paying \$1 million to secure favorable channel placement for Wedding Central from the other principal distributor serving New York (Time Warner Cable).¹¹⁶

That GSN has continued to remain viable does not negate the harm from the Cablevision tiering. The relevant benchmark is how GSN has performed relative to what GSN would have achieved *absent* the tiering. “There is nothing inconsistent about a network attracting viewers, programming, and advertising to become similarly situated to other networks and yet being unreasonably restrained from finding greater success . . . due to discrimination by an MVPD.”¹¹⁷ GSN's growth does not diminish the aggregate [REDACTED] in direct losses it experienced from the tiering, the other harms that it suffered, and the impact of these harms on its ability to compete fairly by investing in new programming and marketing.

¹¹³ See Joint Exh. 3, Dolan Dep. 45:8-15.

¹¹⁴ GSN Exh. 298, Zaccario Supplemental Direct Test. ¶¶ 12-17.

¹¹⁵ GSN Exh. 301, Singer Written Direct ¶¶ 101-103 & Table 9.

¹¹⁶ GSN Exh. 206, at ¶ 8.

¹¹⁷ *Tennis Channel* ¶ 67.

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

In light of the foregoing, the Presiding Judge should require Cablevision to carry GSN at the same level of distribution that it carries its similarly situated network, WE tv. In addition, Cablevision should provide GSN with equitable treatment with respect to its channel placement. Finally, Cablevision should be required to pay the maximum forfeiture permitted by law, or \$400,000, because of its willful failure to comply with the Commission's rules.¹¹⁸

CONCLUSION

For the reasons set forth above, the requested relief should be granted.

Respectfully submitted,

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¹¹⁸ 47 C.F.R. §§ 1.80(b)(1), 1.80(b)(4), 1.80(f).

CERTIFICATE OF SERVICE

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