

**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)	

TO: Chief Administrative Law Judge Richard L. Sippel

**OPPOSITION OF DEFENDANT CABLEVISION SYSTEMS CORP. TO GAME
SHOW NETWORK, LLC'S MOTION TO COMPEL DISCOVERY**

PRELIMINARY STATEMENT

Defendant Cablevision Systems Corp. (“Cablevision”) respectfully submits this opposition to the Motion to Compel Discovery filed by Complainant Game Show Network, LLC. (the “Motion”), which seeks an Order compelling (1) the deposition of Cablevision’s Chief Executive Officer, James Dolan, and (2) the production of documents responsive to GSN’s belated document request to search the files of former Cablevision executive John Bickham. The Motion should be denied.

First, GSN can establish no legitimate basis for subjecting Cablevision’s CEO to a disruptive deposition. Courts are particularly attuned to protecting chief executive officers from so-called “apex” depositions in circumstances where they do not have detailed or unique knowledge of the facts underlying a dispute. That is particularly true here. Mr. Dolan is not a trial witness. And, despite the more than 168,000 documents that Cablevision has produced, GSN has not identified a single one that went

to or came from Mr. Dolan regarding [REDACTED]
[REDACTED]. No document shows that Mr. Dolan had any
involvement whatsoever in [REDACTED]
[REDACTED] Unable to show that Mr. Dolan was
[REDACTED], GSN points to evidence
surrounding one meeting that Mr. Dolan attended with Sony executives and GSN several
months *after* the GSN repositioning decision was made. But this single after-the-fact
meeting is insufficient to justify GSN’s deposition request. Cablevision executive
Thomas Montemagno—who will be deposed on January 10 and will testify at
[REDACTED]
[REDACTED] and also attended and can testify about the subsequent
Sony meeting. GSN is free to depose other knowledgeable Cablevision witnesses on the
narrow relevant issue regarding Cablevision’s non-discriminatory business rationale for
repositioning GSN, but Mr. Dolan is not such a witness.

Second, having received over 168,000 documents from 27 Cablevision
custodians (far broader document discovery than should have been necessary in a
carriage dispute such as this), GSN cannot justify re-opening document discovery at this
late date simply because it speculates that Mr. Bickham “may have” different or unique
documents showing [REDACTED].¹ Mr.

Bickham was [REDACTED]
[REDACTED]

As a result, Mr. Bickham was not named as a custodian in connection with the exhaustive

¹ Motion at 1.

document production that Cablevision undertook and completed after extensive negotiations between the parties with respect to whose documents would be searched. Cablevision should not be put to the cost and burden of searching, reviewing and producing additional documents at this late date on the basis of speculation that there might be something in Mr. Bickham's files. Given the parties' need to complete more than approximately 20 fact and expert depositions in the two months that remain before the discovery deadline expires, the time for a fishing expedition has long since passed.

BACKGROUND

This carriage complaint centers on the decision by Cablevision in late 2010 to reposition GSN to a different tier of carriage on Cablevision's system.

Cablevision executive Tom Montemagno, who will be deposed on January 10, 2013,

[REDACTED]

On the other hand, Cablevision's Chief Executive Officer, James Dolan, who has wide-ranging responsibilities regarding Cablevision and its affiliated businesses,

[REDACTED]

[REDACTED]. After Cablevision notified GSN of its decision, however, [REDACTED]

[REDACTED]

[REDACTED].² Subsequently, on February 7, 2011, Mr. Dolan, along with Mr. Montemagno and Thomas Rutledge of Cablevision, attended one meeting with several

² *Id.* Exs. E and F.

Sony executives and the GSN CEO to discuss issues respecting the future business relationship between Sony [REDACTED], GSN and Cablevision.³

Cablevision is not aware of any further involvement by Mr. Dolan relating to GSN that could support GSN's request for his deposition. Significantly, Cablevision produced approximately 168,000 documents in this case to date. Out of those 168,000 documents, [REDACTED]

[REDACTED]

The parties have agreed to limit the number of fact depositions to six (6) witnesses on each side (with any additional depositions to occur only upon a showing of good cause), with the objective of focusing on the witnesses who will actually appear at trial. At GSN's request, Cablevision has already scheduled for deposition Thomas Montemagno and executives from AMC and/or WE tv, Robert Broussard and Elizabeth Doree, all of whom have submitted declarations in this case and will testify at trial.⁴ GSN has informed Cablevision that it will await Cablevision's trial witness list on December 14 before considering other depositions. Nonetheless, GSN counsel also requested potential deposition dates for Mr. James Dolan. After carefully considering the request and Mr. Dolan's limited role in the matter, and having concluded that Mr. Dolan would not be a trial witness, Cablevision objected to Mr. Dolan's deposition.

³ *Id.*, Ex. D.

⁴ In addition, Cablevision is considering GSN's deposition request for Kim Martin, the President of WE tv.

As also noted, these depositions come on the heels of expansive document discovery in which Cablevision produced 168,000 documents. Prior to beginning the time-consuming and expensive search for documents, GSN suggested and Cablevision agreed to proceed by exchanging document custodian lists and proposing electronic search terms. The parties thereafter negotiated over which employees' files should be included in the respective searches. Cablevision ultimately identified 27 custodians whose documents Cablevision agreed to search because of the relative likelihood that responsive documents would be located. At GSN's request, Cablevision added additional custodians, such as former Chief Operating Officer Thomas Rutledge.

Based on its initial investigation, Cablevision did not include John Bickham as a custodian because of the limited nature of his role in the matters related to this dispute. Mr. Bickham was the former president of Cable and Communications at Cablevision and, during the relevant time period, [REDACTED]

[REDACTED]. He did not deal with individual networks like GSN in the regular course of business; rather, Mr. Montemagno and his team [REDACTED]. Although GSN reviewed Cablevision's proposed custodians—and insisted on several more that Cablevision had not suggested—it never proposed Mr. Bickham prior to raising him after the completion of discovery.

ARGUMENT

A. Mr. Dolan's Deposition is Not Warranted

Nowhere in its motion does GSN offer a legitimate justification for subjecting Cablevision's CEO, James Dolan, to a deposition in this matter. Nor could it.

While GSN asserts that Mr. Dolan [REDACTED] [REDACTED] a careful reading of GSN’s papers reveals no meaningful support for this statement.

Despite its sweeping assertion, GSN can point to no evidence—and there is none—that Mr. Dolan [REDACTED] [REDACTED]. Out of the 168,000 documents Cablevision produced in this case, [REDACTED]. None of these reflect [REDACTED]

[REDACTED]
[REDACTED]

All that GSN points to are [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]⁶

This is simply too slender a reed on which to hang a deposition in a case that will turn on the decision made by Cablevision *prior* to any of these events. GSN offers no explanation how the single Sony meeting after the repositioning decision is even relevant to the narrow issue of discrimination in this case.⁷ Even if the Court were to decide that it needs to hear testimony regarding this February meeting, both Mr.

⁵ Motion at 2.

⁶ *Id.* at 6.

⁷ Indeed, the Media Bureau questioned whether the discussions between the parties and their affiliates after the repositioning decision [REDACTED] were even sufficient to establish a *prima facie* case of discrimination on the basis of affiliation. *Game Show Network v. Cablevision Systems Corp.*, Hearing Designation Order, MB Docket No. 12-122, File No. CSR-8529-P, DA 12-739 (MB May 9, 2012) at ¶ 36.

Montemagno of Cablevision and Mr. Goldhill of GSN (a likely trial witness) were in attendance and will be able to testify about what transpired. There is nothing to suggest that the discussion at the meeting was so nuanced that more than two witnesses are necessary to speak to it.

Notably, in circumstances where, as here, there is little evidence that a company CEO has unique knowledge of the matters at issue, courts have broad authority to limit discovery. *See Affinity Labs of Texas v. Apple, Inc.*, No. C 09-4436 CW, 2011 WL 1753982, at *15 (N.D. Cal. May 9, 2011) (“When a party seeks the deposition of a high-level executive (a so-called ‘apex’ deposition), the court may exercise its discretion under the federal rules to limit discovery.”). “Virtually every court that has addressed deposition notices directed at an official at the highest level or ‘apex’ of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment.” *Id.* (citations omitted) (disallowing deposition on grounds that plaintiff failed to show that Apple CEO had unique personal knowledge of relevant facts).

Accordingly, courts generally shield CEOs from apex depositions unless the executive has some non-cumulative or unique personal knowledge of facts relevant to the case. *See, e.g., Alliance Industries, Inc. v. Longyear Holding, Inc.*, No. 08CV490S, 2010 WL 4323071, at *3-4 (W.D.N.Y. Mar. 19, 2010) (“‘Apex’ depositions are disfavored in this Circuit unless the executives have personal knowledge of relevant facts or some unique knowledge that is relevant to the action. Included in this concept is whether compelling the official’s testimony would be cumulative to testimony from other sources within the subject enterprise.” (citations omitted)) (disallowing deposition of CEO where plaintiffs failed to show he had unique knowledge of the facts at hand);

Groupion, LLC v. Groupon, Inc., No. 11-0870, 2012 WL 359699, at *2 (N.D. Cal. Feb. 2, 2012) (“In determining whether to allow an apex deposition, courts consider (1) whether the deponent has unique first-hand, non-repetitive knowledge of facts at issue in the case and (2) whether the party seeking the deposition has exhausted other less intrusive discovery methods”) (disallowing apex depositions where plaintiff failed to show that the apex deponents had unique, non-repetitive knowledge of the facts, or that less intrusive means of discovery had been exhausted).

Here, GSN cannot meet its burden to demonstrate that the deposition of Mr. Dolan is warranted. GSN does not cite a single document indicating that Mr. Dolan either was [REDACTED]

[REDACTED] Moreover, it does not identify any unique knowledge regarding GSN held by Mr. Dolan, or personal knowledge of non-cumulative facts regarding [REDACTED] that GSN cannot obtain from Mr. Montemagno or Mr. Goldhill. GSN’s rationale for deposing Mr. Dolan can be applied with equal force to the CEO’s of GSN’s owners, Sony and DirecTV, who arguably could be deposed for the same general purpose to explore the extent of their knowledge about GSN’s competitive strategies, network characteristics and relationship with Cablevision.

The legal issue surrounding Cablevision’s conduct respecting GSN is a streamlined inquiry into discriminatory intent. Absent a valid reason showing that Mr. Dolan’s deposition will reveal non-cumulative information relevant to that specific issue, GSN cannot justify a deposition of Mr. Dolan.

B. Document Discovery of John Bickham’s Files Is Not Warranted

GSN’s request for an additional document production from the files of John Bickham should also be denied on the grounds that it represents nothing more than a fishing expedition.

In support of the Motion, GSN asserts that the discovery to date reveals that Mr. Bickham “may have” documents showing [REDACTED]

[REDACTED] But before this Court orders Cablevision and its counsel to drop its deposition, expert and trial work to engage in the costly process of gathering, reviewing and producing any responsive materials from Mr. Bickham’s files, GSN should be compelled to demonstrate that such an effort will result in the production of new material that GSN has not already received in the 168,000 documents Cablevision has already produced. GSN cannot meet that burden. Indeed, none of the documents referencing Mr. Bickham in GSN’s motion indicate that there are other *unique* documents in Mr. Bickham’s files that have not yet been produced from the files of the Cablevision executives who—unlike Mr. Bickham— [REDACTED]

[REDACTED]

Moreover, GSN itself initiated a custodian approach to document discovery shortly after the parties first served their document requests. When utilizing the custodian approach to document production, each side of necessity must make reasonable assessments of the custodians most likely to have non-cumulative documents, while undertaking some marginal risk (as is true in every litigation) that responsive documents may not be found because the parties cannot be put to the unreasonable burden of searching the files of every executive—especially in a case with a compressed

REDACTED – FOR PUBLIC INSPECTION

schedule such as here. Since Mr. Bickham was a very senior executive, GSN knew or should have known about his role at Cablevision. Nonetheless, it chose to forgo asking for his inclusion as a custodian while at the same time pressing for the inclusion of other executives, such as Thomas Rutledge, to whom the programming department at Cablevision reported.

Absent a compelling reason to believe that Mr. Bickham's files will contain any new material, GSN should be held to its custodian agreement made at the outset of document discovery. Should depositions of Mr. Montemagno or other Cablevision witnesses indicate that Mr. Bickham would have unique responsive documents, Cablevision will work with GSN at that time to search for and produce any discrete materials. Cablevision submits that a broad time-consuming and costly sweep of Mr. Bickham's files at this stage is not justified by GSN's motion, which should be denied.

CONCLUSION

For all of the foregoing reasons, GSN's Motion to Compel should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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