

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

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

TO: Chief Administrative Law Judge Richard L. Sippel

**TRIAL BRIEF OF DEFENDANT CABLEVISION SYSTEMS CORP.**

Jay Cohen  
Andrew G. Gordon  
Gary R. Carney  
PAUL, WEISS, RIFKIND, WHARTON  
& GARRISON LLP  
1285 Avenue of the Americas  
New York, NY 10019-6064  
(212) 373-3000

Howard J. Symons  
Tara M. Corvo  
Robert G. Kidwell  
MINTZ, LEVIN, COHN, FERRIS,  
GLOVSKY AND POPEO, P.C.  
701 Pennsylvania Avenue, N.W.,  
Suite 900  
Washington, D.C. 20004  
(202) 434-7300

March 12, 2013

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**TRIAL BRIEF OF DEFENDANT CABLEVISION SYSTEMS CORP.**

Defendant Cablevision Systems Corporation (“Cablevision”) respectfully submits this Trial Brief in the above-captioned program carriage complaint proceeding brought against Cablevision by Complainant Game Show Network, LLC (“GSN”).<sup>1</sup>

**Preliminary Statement**

A network claiming to have been discriminated against with respect to the terms and conditions of carriage must show either direct evidence of discrimination or circumstantial evidence that it is similarly situated to an affiliated network that has received preferential treatment in the terms and conditions of carriage on the basis of affiliation. The network has the further burden of proving that discrimination actually motivated the carriage decision. And it must also prove that the discrimination unfairly restrained its ability to compete.

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<sup>1</sup> As used herein, “GSN” refers to both Game Show Network, LLC and/or the programming network owned by that entity, GSN.

GSN can do none of this. GSN will not be able to discharge its burden to prove that the 2010 decision by Cablevision to move GSN from a broadly distributed tier of service to one less highly penetrated had anything at all to do with GSN's lack of affiliation with Cablevision. Nor can GSN demonstrate that the repositioning had any meaningful impact on its ability to compete fairly in the marketplace. And although GSN will assert that this case is a reprise of the *Tennis Channel* proceeding that should lead the Presiding Judge to the same result, the evidence, as opposed to the rhetoric, will demonstrate clearly that it is not.<sup>2</sup>

First, notwithstanding robust deposition and documentary discovery, there is a complete absence of evidence of discrimination on the basis of affiliation or non-affiliation. No witness will testify and no document will demonstrate that the decision made with respect to GSN had anything to do with discrimination in favor of networks affiliated with Cablevision. To the contrary, the undisputed evidence will prove that Cablevision's decision to re-tier GSN resulted from an analysis of the cost of the network compared to its limited value to Cablevision's subscribers. Under increasing pressure from cable networks seeking higher subscriber fees and broadcast networks demanding significant payments for retransmission consent, Cablevision weighed the costs and benefits of continuing to offer GSN to all of its Expanded Basic cable subscribers and determined that the former outweighed the latter. The result: [REDACTED]

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<sup>2</sup> Importantly, public reports of the recent argument in the D.C. Circuit put in doubt whether the Commission's ruling in *Tennis Channel, Inc. v. Comcast Cable Commc'ns*, Memorandum Opinion and Order, 27 FCC Rcd. 8508 (2012), will survive appellate scrutiny on First Amendment or other grounds. See Mike Scarcella, *D.C. Circuit Appears Skeptical of FCC in Tennis Channel Case*, BLT: The Blog of Legal Times (February 25, 2013, 2:50 PM), <http://legaltimes.typepad.com/blt/2013/02/dc-circuit-appears-skeptical-of-fcc-in-tennis-channel-case.html>; Alina Selyukh, *Court Grills FCC, Tennis Channel in Comcast Discrimination Suit*, Reuters (February 25, 2013, 4:52 PM), <http://www.reuters.com/article/2013/02/25/us-usa-fcc-comcast-tennis-idUSBRE91O16S20130225>.



- **Target Programming.** GSN’s affiliation agreements with MVPDs, which spell out the content that GSN intends to and is obligated to deliver, describe the programming on the network as [REDACTED]

[REDACTED]

[REDACTED] Again, the contrast to WE tv is clear: WE tv’s affiliation agreements explicitly recite that its programming is [REDACTED]

[REDACTED]. Numerous presentations made by GSN to cable and satellite distributors and advertisers similarly portray the network as [REDACTED]

[REDACTED]

[REDACTED]

The contrast with WE tv’s presentations— [REDACTED]

[REDACTED]

[REDACTED]—is a stark one.

- **Program Schedule.** GSN’s actual programming schedule is overwhelmingly dedicated to game shows or gaming. For instance, just two classic game shows, *Family Feud* and *Deal or No Deal*, have comprised up to seven hours of its programming each day. Those shows are supplemented by a variety of rerun and original game show fare. And unlike any women’s network—and certainly unlike WE tv and Wedding Central—GSN carried poker programming geared specifically toward men during primetime two nights of the week. By contrast, WE tv’s programming line-up consists exclusively of shows on topics of interest to women and includes high-profile original reality series and specials. These programming differences are confirmed by a

comprehensive survey of local and national viewers of the networks conducted by Cablevision’s expert, Hal Poret. The survey demonstrates conclusively that viewers do not perceive GSN and WE tv as having similar programming.

- **Target Audience.** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] WE tv, by contrast,

has consistently marketed and presented itself as targeting women in the 18-49 and 25-54 demographics.

- **Actual Audience.** GSN’s game show and gaming-related content attracts a broad audience of men and women. Although GSN’s Nielsen data shows a [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] By contrast, WE tv is consistently watched by an audience that is more than [REDACTED] percent women. In addition, the women who watch GSN are significantly older than the women who watch WE tv. The *median* age of GSN’s viewers is between [REDACTED] [REDACTED], well above the age of the typical WE tv viewer, which is firmly within the W18-49 and W25-54 demographic groupings. [REDACTED] Nielsen data also confirm that there is little audience overlap between GSN and WE tv. Cablevision’s

economist, Jonathan Orszag, will testify that GSN viewers did not shift their viewing to WE tv when Cablevision re-tiered the network, the result that would have been predicted had the networks actually had similar audiences.

- **Target Advertising.** Advertisers do not view GSN and WE tv as competitive networks. Mr. Orszag's economic analysis shows that there is no meaningful competition for advertising dollars between the networks because of the significant difference in the demographics of their audiences. Cablevision's expert, Mr. Blasius, drawing on his long experience in the cable television advertising business, makes the same point. He concludes that the significant differences in demographic ratings, median age and percentage of female viewers within the 18-49 and 25-54 demographics between GSN and WE tv would lead advertisers to conclude that the networks are not similarly situated.

The absence of evidence of discrimination dooms GSN's claim. But even if GSN could demonstrate that Cablevision's carriage decision was informed by its lack of affiliation, its complaint should still be dismissed because it will be unable to prove that Cablevision's decision unreasonably restrained GSN's ability to compete fairly. To succeed on a Section 616 claim, it is not enough for GSN to show it would have been better off if Cablevision had not re-tiered it; that is always the case in carriage disputes. Rather, the statute explicitly requires GSN to establish that the adverse carriage decision on the basis of non-affiliation has resulted in an unreasonable restraint on its ability to compete fairly in the video programming marketplace. That it cannot do. GSN, unlike fledgling networks that have brought prior carriage complaints, has approximately [REDACTED] subscribers. The network is carried broadly in Cablevision's footprint by Cablevision's competitors, including DIRECTV, DISH and Verizon FiOS. As a

result, Cablevision’s repositioning of GSN has not cut off GSN’s ability to reach viewers in the areas served by Cablevision. Although GSN speculated in its carriage complaint that Cablevision’s decision could lead other MVPDs to follow suit, in fact, the opposite has occurred:

[REDACTED]

Finally, and particularly in light of the absence of competitive harm, any remedy requiring Cablevision to restore GSN to broader carriage would violate Cablevision’s First Amendment rights. The prohibition on discrimination contained in Section 616<sup>3</sup> is premised on the outdated view that a cable operator such as Cablevision has market power that would allow it to exercise “bottleneck” control over the distribution of programming to consumers. Given the intensely competitive landscape in which Cablevision now operates, there is no longer any legitimate reason to impinge upon Cablevision’s editorial discretion to decide which networks to carry. The decision to restrict GSN’s carriage represented a legitimate exercise of that discretion and any remedy that would reverse it necessarily fails to survive constitutional scrutiny.<sup>4</sup>

### **Procedural Posture and Issues To Be Determined**

On May 9, 2012, the Commission’s Media Bureau issued a Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture (“HDO”) referring GSN’s program

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<sup>3</sup> Communications Act, 47 U.S.C. § 536 (1984), *amended by* Cable Television Consumer Protection and Competition Act, 47 U.S.C. § 536 (1992).

<sup>4</sup> This very issue is currently before both the D.C. Circuit and the Second Circuit. *See Comcast Cable Commc’ns, LLC v. FCC & USA*, No. 12-1337 (D.C. Cir. filed Dec. 3, 2012); *Time Warner Cable Inc. v. FCC & USA*, No. 11-4138 (2d Cir. filed June 26, 2012).

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carriage complaint against Cablevision for a hearing before an Administrative Law Judge.<sup>5</sup> The Media Bureau specifically designated GSN’s complaint for hearing upon 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.<sup>6</sup>

The Media Bureau noted that it had not reached the merits of the issues designated for hearing and directed the Presiding Judge “to develop a full and complete record and to conduct a *de novo* examination of all relevant evidence in order to make an Initial Decision.”<sup>7</sup> The parties have engaged in voluminous pre-hearing discovery, producing well over five hundred thousand pages of documents and taking nineteen fact and expert depositions.

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<sup>5</sup> *Game Show Network, LLC v. Cablevision Systems Corp.*, Hearing Designation Order and Notice for Opportunity for Hearing for Forfeiture, 27 FCC Rcd. 5113 (MB 2012) (hereinafter “HDO”).

<sup>6</sup> HDO, 27 FCC Rcd. at 5136-37 ¶ 39.

<sup>7</sup> HDO, 27 FCC Rcd. at 5114 ¶ 2.

## Argument

### I. THE LEGAL STANDARD

The complainant in a Section 616<sup>8</sup> case bears the burden of proving by a preponderance of evidence that the defendant MVPD discriminated against it on the basis of affiliation.<sup>9</sup> To satisfy this burden, GSN must first present either direct evidence supporting its claim that Cablevision discriminated on the basis of affiliation or circumstantial evidence establishing that such discrimination occurred.<sup>10</sup> The circumstantial evidence must demonstrate that (i) GSN’s programming is “similarly situated” to programming provided by a network affiliated with Cablevision, and (ii) Cablevision has treated the two similarly situated networks differently with respect to the selection, terms, or conditions of carriage.<sup>11</sup>

Even if it is able to demonstrate discrimination on the basis of non-affiliation, GSN bears the burden of proving that its unaffiliated status “actually motivated” the cable operator’s decision.<sup>12</sup> Therefore, the presence of “legitimate reasons for” Cablevision’s carriage decision “borne out by the record and not based on the programmer’s affiliation or non-

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<sup>8</sup> GSN’s principal claim revolves around WE tv, a long-established women’s programming network operated by Rainbow (now AMC Networks), and formerly a Cablevision affiliate. Wedding Central, a spin-off of WE tv, was only on the air for a brief time [REDACTED]. The analysis here with respect to WE tv applies with equal force to Wedding Central.

<sup>9</sup> *Tennis Channel, Inc. v. Comcast Cable Commc’ns*, Initial Decision, 26 FCC Rcd. 17160, 17204 ¶ 100 (ALJ 2011) (citing *Herring Broadcast, Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, Recommended Decision, 24 FCC Rcd. 12967, 12995 ¶¶ 57-58 (ALJ 2009) (hereinafter “*WealthTV*”); *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (noting where statute is silent, “the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims”)).

<sup>10</sup> *Revision of the Commission’s Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report & Order, 26 FCC Rcd. 11494, 11504 ¶ 14 (2011) (hereinafter “Second Report & Order”).

<sup>11</sup> 47 C.F.R. § 76.1302(d)(3)(iii)(B); see also Second Report & Order ¶¶ 14-16.

<sup>12</sup> See *WealthTV*, 24 FCC Rcd. at 12997 ¶ 63.

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affiliation,” preclude a finding of discrimination.<sup>13</sup> Examples of legitimate business reasons for an adverse carriage decision include a lack of subscriber demand and interest, the costs of carriage, unfavorable terms and conditions of carriage, lack of appeal to advertisers and better alternative options.<sup>14</sup>

If it can make out a showing of impermissible discrimination, GSN has the additional burden of proving that that the adverse carriage decision unreasonably restrained its ability to compete fairly.<sup>15</sup> The pertinent consideration is whether the lack of a broader carriage on Cablevision limits the ability of GSN to compete over the long term.<sup>16</sup> In prior Section 616 cases, this assessment has been made “based on the impact of the defendant MVPD’s adverse carriage action on the programming vendor’s subscribership, license fee revenues, advertising revenues, ability to compete for advertising and programming, and ability to realize economies of scale.”<sup>17</sup>

With these standards in mind, we turn to the evidence. It will show that GSN will not be able to discharge its burden of proving discrimination.

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<sup>13</sup> *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Memorandum Opinion and Order, 25 FCC Rcd. 18099, 18104 ¶¶ 10-11 (2010).

<sup>14</sup> *See id.* at ¶¶ 13, 18-20 (noting subscriber demand, costs of carriage and bandwidth, and decisions of other cable operators as legitimate factors); *WealthTV*, 24 FCC Rcd. at 12998 ¶¶ 64-65 (noting terms and conditions of carriage and alternative options as relevant factors).

<sup>15</sup> 47 C.F.R. § 76.1301(c).

<sup>16</sup> *See Tennis Channel, Inc. v. Comcast Cable Commc’ns*, Memorandum Opinion and Order, 27 FCC Rcd. 8508, 8539 ¶ 84 (2012) (finding harms imposed on Tennis Channel by Comcast’s tiering decision were “of such a magnitude that they clearly restrain Tennis Channel’s ability to compete fairly with similarly situated networks in the marketplace”); *TCR Sports v. Comcast*, Mem. Op. & Hr’g Designation Order, 21 FCC Rcd. 8989, 8993 ¶ 11 (MB 2006) (“TCR argues that without carriage by Comcast, it will be impossible for MASN to reach the necessary level of subscribership to achieve long-term financial viability, and that Comcast’s refusal to carry MASN thus restrains TCR from competing fairly.”).

<sup>17</sup> Second Report & Order ¶ 15 n.60 (citing decisions by Media Bureau). The Commission itself, in an example illustrating the similarity of two music channels, suggests that the use of the license fee and ratings factors are not meant to demonstrate similarity on a standalone basis, but rather can distinguish between networks in an instance where the two networks based on other factors, such as programming similarity, appear to be similarly situated. Second Report & Order ¶ 14.

**II. THERE IS NO DIRECT EVIDENCE THAT CABLEVISION DISCRIMINATED AGAINST GSN BASED ON AFFILIATION**

There is no document, no testimony—no evidence at all—showing that Cablevision’s repositioning of GSN in December 2010 had anything whatsoever to do with WE tv or Wedding Central. Nor is there any proof that Cablevision based its decision on affiliation or non-affiliation of GSN. As Cablevision’s former President, John Bickham, testified, [REDACTED]

[REDACTED]

[REDACTED] <sup>18</sup> [REDACTED]

[REDACTED] <sup>19</sup> [REDACTED]

Mr. Bickham’s testimony will be buttressed by that of Tom Montemagno, Executive Vice President of Programming for Cablevision. He will testify that, [REDACTED]

[REDACTED]

[REDACTED] <sup>20</sup> [REDACTED]

[REDACTED] <sup>21</sup> [REDACTED]

[REDACTED] <sup>22</sup> [REDACTED]

[REDACTED]

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18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

[REDACTED] 23 [REDACTED]

Mr. Montemagno will also explain that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 24 [REDACTED]

[REDACTED] 25 [REDACTED]

[REDACTED]

[REDACTED] 26 [REDACTED] No witness

will contradict him.

Mr. Montemagno will testify [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 27 [REDACTED]

[REDACTED]

[REDACTED] 28 [REDACTED] There can be no

dispute concerning the cost pressures facing Cablevision and other MVPDs; in fact, {{GSN

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23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 29 [REDACTED]

[REDACTED]

[REDACTED] 30 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 31 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 32 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 33 [REDACTED]

[REDACTED] 34 [REDACTED]

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29 [REDACTED]

30 [REDACTED]

31 [REDACTED]

32 [REDACTED]

33 [REDACTED]

34 [REDACTED]

Cablevision's lack of consideration of WE tv and Wedding Central is further demonstrated by its contemporaneous decision to give carriage to another unaffiliated women's network, OWN, the Oprah Winfrey Network. Had Cablevision been seeking to protect its affiliated women's networks at the expense of GSN, it would not have launched another independent network that is indisputably similar in terms of programming and target audience to WE tv and Wedding Central. In short, the evidence will show Cablevision's carriage decision concerning GSN to be the product of precisely the type of non-discriminatory analysis that a cable operator such as Cablevision should perform in the ordinary course of its business to offer the most compelling service to its subscribers. That decision cannot support a finding of discrimination on the basis of affiliation under Section 616.<sup>35</sup>

GSN nonetheless attempts to reverse engineer a claim of direct discrimination from discussions between the parties after Cablevision made its re-tiering decision. After Cablevision notified GSN of the repositioning on December 3, 2010, GSN Board member and DIRECTV executive Derek Chang contacted Tom Rutledge, then COO of Cablevision. Mr. Chang urged Mr. Rutledge not only to reconsider the GSN carriage decision, but specifically to [REDACTED]

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<sup>35</sup> Relying on the Presiding Judge's decision in *Tennis Channel, Inc. v. Comcast Cable Commc'ns*, 26 FCC Rcd. 17160 (ALJ 2011), GSN will argue that Cablevision had an obligation to engage in a simultaneous cost-benefit analysis with respect to its affiliated networks. We do not believe that is what Section 616 requires. And in any case, WE tv was considerably more popular among its subscribers than GSN, ranking [REDACTED]

[REDACTED] Thus, it was GSN, not Cablevision, that injected DIRECTV into the GSN carriage discussions, and only after the re-tiering decision had already been made.<sup>36</sup> And although Mr. Chang had subsequent discussions with Josh Sapan, Rainbow’s president, and Robert Broussard, Rainbow’s senior distribution executive, about DIRECTV’s willingness to carry Wedding Central,<sup>37</sup> there is no evidence at all that Cablevision made the decision to re-tier GSN in order to induce such discussions. To the contrary, Mr. Montemagno will testify that carriage of Wedding Central by DIRECTV had nothing to do with Cablevision’s decision. And Mr. Broussard and Ms. Martin, president of WE tv and Wedding Central, will explain that they had no prior knowledge at all of the decision made by Cablevision.

Moreover, there is no evidence at all to suggest that Wedding Central carriage played any role in Cablevision’s decision. To the contrary, the evidence will show GSN to be the only party that thought about any linkage between carriage of the two networks prior to Cablevision’s re-tiering decision. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>38</sup> [REDACTED]

<sup>36</sup> Montemagno Direct Test. ¶ 62; *see also* [REDACTED]

<sup>37</sup> [REDACTED]

<sup>38</sup> [REDACTED]

**III. THERE IS NO CIRCUMSTANTIAL EVIDENCE THAT CABLEVISION DISCRIMINATED AGAINST GSN BASED ON AFFILIATION**

**A. GSN and WE tv Are Not Similarly Situated**

Given the complete absence of proof of direct evidence of discrimination, GSN will devote most of its efforts at the hearing to its attempt to prove discrimination circumstantially. To do so, GSN must establish, in the first instance, that it is similarly situated to one of Cablevision’s affiliated networks. Similarity is necessarily a fact-intensive inquiry that turns on a detailed analysis of factors such as “genre, ratings, license fee, target audience, target advertisers [and] target programming.”<sup>39</sup> Such an analysis, properly grounded in the evidence, cannot support a finding that GSN is similarly situated to WE tv.

**1. The Networks**

Launched in 1994 as the Game Show Network,<sup>40</sup> in its early years GSN’s programming consisted almost exclusively of a library of 1960s and 1970s game show reruns.<sup>41</sup> Game Show Network changed its name to GSN in 2004 and [REDACTED]

[REDACTED]

[REDACTED]<sup>42</sup>

By contrast, WE tv came into being as Romance Classics, a network showing acquired romance movies and television shows designed to appeal to an audience of women 18-

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<sup>39</sup> Second Report & Order ¶ 14. Although GSN asserts that the test is whether the networks “generally compete with each other and have similar levels of viewer popularity” and then evaluates its similarity to WE tv and Wedding Central under this self-created standard, the Commission has never suggested any such approach. *See Game Show Network, LLC v. Cablevision Systems Corporation*, Program Carriage Complaint, File No. CSR-8520-P, ¶ 35 (filed Oct. 12, 2011) (“Complaint”).

<sup>40</sup> Complaint ¶ 15.

<sup>41</sup> Egan Direct Test. ¶ 123.

<sup>42</sup> [REDACTED]

54.<sup>43</sup> Rebranding itself as WE: Women’s Entertainment and subsequently as WE tv, the network expanded its programming to include reality shows and other original programming geared for and primarily of interest to women, landing its first break-out hit in 2004 with the reality show *Bridezillas*, about the dramatic ups and downs of brides-to-be and their families.<sup>44</sup> Wedding Central was launched as a spin-off of the wedding-themed programming on WE tv, with a target audience of women 18-35.<sup>45</sup>

**2. The Target Programming of WE tv and GSN Is Different**

GSN has always focused on game shows and shows about gaming.<sup>46</sup>

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>47</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>48</sup> [REDACTED]

The evidence concerning WE tv could not be more different. [REDACTED]

[REDACTED]

[REDACTED]

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<sup>43</sup> Martin Direct Test. ¶ 4.

<sup>44</sup> *Id.* ¶ 11-13.

<sup>45</sup> *Id.* ¶ 41.

<sup>46</sup> See Egan Direct Test. ¶ 123.

<sup>47</sup> [REDACTED]

<sup>48</sup> [REDACTED]

[REDACTED] . 49 [REDACTED]

[REDACTED] . 50 [REDACTED]

**3. The Actual Programming on WE tv and GSN Is Not Similar**

**(a) The Genres of Programming Are Distinct and Have Almost No Overlap**

A critical differentiating factor between two networks is the genre of programming each carries. Cablevision’s expert, Michael Egan, has done an exhaustive genre analysis of the programming on GSN and WE tv, similar to the one he performed in the *WealthTV* proceeding. He will opine that the two networks could not be more different in programming, both in type and breadth.

Mr. Egan reviewed programming presented on both networks in sample weeks over a three-year period. His analysis reveals that five genres of programming comprised [REDACTED] percent of WE tv’s schedule: Reality, Comedy, Drama, Movie, and News. By contrast, less than [REDACTED] percent of GSN’s programming fit in any one of those categories.<sup>51</sup> GSN devoted [REDACTED] percent of its programming hours to the Game Shows and Gaming genres; less than [REDACTED] percent of WE tv’s programming is in those categories.<sup>52</sup>

GSN has no direct response to Mr. Egan’s expert opinion. Neither of its expert witnesses has engaged in a comprehensive review of the programming on the two networks, much less performed a genre analysis. In the end, GSN is reduced to making a few general

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49 [REDACTED]

50 [REDACTED]

51 Egan Direct Test. ¶ 24.

52 *See id.*

observations about “relationship” programming transmitted by both networks. But as Mr. Egan correctly points out, relationship programming “is a vague subject matter, not a genre. It is, perhaps, the most common subject matter on television, being regularly a part of nearly all TV genres . . . [and] is so vague and encompassing that it fails to be a distinct and distinguishing measure.”<sup>53</sup> Viewed in this light, it is crystal clear that there is virtually no overlap between the program genres on the two networks.

**(b) The Look and Feel of Programming on GSN and WE tv Is Very Different**

Mr. Egan has also examined the look and feel of GSN and WE tv. Based on extensive viewing of shows, clips, and “sizzle reels” of each network, he concluded that “the two networks, to varying degrees, use their visual and audio languages to create very different personalities.”<sup>54</sup> Mr. Egan will testify that GSN’s look and feel could best be described as “Traditional Game Show” with a powerful emcee, dramatic music, flashy lighting and a single studio set.<sup>55</sup> He also noted that GSN does not “attempt . . . to create a GSN personality separate from the Game Shows or a thematic umbrella to connect the shows to each other or to any specific demographic group in its audience . . . [but] lets the Game Shows speak for themselves.”<sup>56</sup> By contrast, Mr. Egan found that “WE tv presents a single-minded theme and focus on 18-54 year old women, their relationships, and their families via the shows themselves and the promos in between them. It is articulated through the subject matter; the age, look, and

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<sup>53</sup> *Id.* ¶ 104.

<sup>54</sup> *Id.* ¶ 66.

<sup>55</sup> *Id.* ¶¶ 61-63.

<sup>56</sup> *Id.* ¶ 63.

gender of the show ‘casts’; the graphic styles and colors; the music; and the taglines.”<sup>57</sup> Unlike GSN, WE tv employs a theme expressed in promotional spots between shows to tie the shows together with each other and with the network’s brand promise.<sup>58</sup>

Again, GSN has done no analysis comparable to Mr. Egan’s.<sup>59</sup> All it does to support its argument that the networks have comparable programming is to note that a handful of shows have been pitched by third parties to both networks.<sup>60</sup> That evidence does not even begin to demonstrate similarity in programming between the networks. WE tv receives more than [REDACTED] [REDACTED] show pitches each year. The fact that [REDACTED] shows in 2011 and 2012 were pitched to both networks does more to demonstrate the difference rather than similarity in programming between them.<sup>61</sup> GSN’s other throwaway piece of evidence—that on a few isolated occasions the networks engaged in cross-promotion with each other—also fails to reflect any meaningful connection between the programming on the two networks.<sup>62</sup>

**(c) The Differences in Programming and Look and Feel Are Reflected in Viewer Perception About the Networks**

Cablevision’s survey expert, Hal Poret, conducted a rigorous, scientific survey of television viewers both in the New York metropolitan area in which Cablevision viewers are located as well as in a national sample.<sup>63</sup> Using standard marketing survey techniques, Mr. Poret asked respondents to rate the similarity or dissimilarity in programming of each of ten pairs of

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<sup>57</sup> *Id.* ¶ 64.

<sup>58</sup> *Id.* ¶¶ 65.

<sup>59</sup> [REDACTED]

<sup>60</sup> Complaint ¶ 21.

<sup>61</sup> [REDACTED]

<sup>62</sup> Complaint ¶ 20.

<sup>63</sup> *See generally* Poret Direct Test.

networks on a scale of 0 to 10, with 0 meaning extremely dissimilar and 10 extremely similar.<sup>64</sup> The survey shows that television service subscribers consider programming on GSN and WE tv to be very dissimilar, with an average similarity rating of 1.32 among the New York DMA sample and 1.47 among the national sample.<sup>65</sup> By contrast, networks such as Lifetime and Oxygen, two networks featuring women’s programming, have similarity ratings of 7.50 and 7.47 in the New York and national samples, respectively.<sup>66</sup> And WE tv, when itself paired with another women’s network, Oxygen, garners similarity ratings of 7.62 (New York) and 7.56 (national).<sup>67</sup> Mr. Poret’s findings, which are not challenged by any survey evidence to be introduced by GSN, are extremely robust, with no variation overall among viewers depending on age, gender, geographic region, type of television service or any other factor measured.<sup>68</sup> It is powerful, objective evidence that cable television viewers do not perceive GSN and WE tv to have similar programming.

**4. The Target Audiences of GSN and WE tv Are Different**

Although GSN will attempt to persuade the Presiding Judge that it is a network targeted to women, neither the testimonial or documentary evidence will support such a conclusion. As noted by Dennis Gillespie, GSN’s head of distribution until 2011, [REDACTED]

[REDACTED]

[REDACTED] „69 [REDACTED]

[REDACTED]

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<sup>64</sup> Poret Direct Test. ¶ 11.

<sup>65</sup> *Id.* ¶ 28-29.

<sup>66</sup> *Id.* ¶ 30.

<sup>67</sup> *Id.* ¶ 34.

<sup>68</sup> *Id.* ¶ 36.

<sup>69</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>70</sup> [REDACTED]

[REDACTED]<sup>71</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>72</sup> [REDACTED]

[REDACTED]<sup>73</sup> [REDACTED]

By contrast, as its President, Kim Martin, will testify, WE tv consistently represented the network to viewers, distributors and advertisers as a women’s network with a target audience of women in the 18-49 and 25-54 age groups.<sup>74</sup> WE tv’s management team receives [REDACTED] reports on the performance of WE tv against its key competitors (a list that does not include GSN) in attracting viewers in the W18-49 and W25-54 demographics.<sup>75</sup> WE tv’s presentations to the national advertising and programming industry at the annual “Upfronts” highlight the network’s ability to deliver an audience in these demographics.<sup>76</sup> [REDACTED]

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70 [REDACTED]

71 [REDACTED]

72 [REDACTED]

73 [REDACTED]

74 Martin Direct Test. ¶ 16.

75 [REDACTED]

76 [REDACTED]

[REDACTED] .<sup>77</sup> [REDACTED]

[REDACTED] .<sup>78</sup> [REDACTED]

[REDACTED] .<sup>79</sup> [REDACTED]

**5. The Actual Audiences of GSN and WE tv Are Different**

GSN will endeavor to mask all of this evidence by arguing that the network, in fact, attracts a female audience. In reality, the percentage of GSN’s viewers that are women varies by reporting source. Nielsen data show GSN has a female skew (although not as significant as that of WE tv), but other audience data [REDACTED] [REDACTED] paint a much more balanced picture. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] .<sup>80</sup> [REDACTED] And Nielsen data show that the women who watch GSN are significantly older than the women who watch WE tv. More than [REDACTED] of GSN’s women viewers are at least [REDACTED], and [REDACTED] percent are over [REDACTED] .<sup>81</sup> As a result, the median age of GSN’s audience has consistently been in the [REDACTED] .

WE tv’s actual audience is starkly different. WE tv delivers an overwhelmingly female audience, concentrated in the targeted demographics. On average approximately [REDACTED]

<sup>77</sup> [REDACTED]

<sup>78</sup> [REDACTED]

<sup>79</sup> [REDACTED]

<sup>80</sup> [REDACTED]

<sup>81</sup> Egan Direct Test. ¶ 190.

percent of the network’s viewers are women; [REDACTED] percent of those women viewers fall within the 18-49 and 25-54 ranges.<sup>82</sup> The median age of WE tv’s viewers has typically hovered in the

[REDACTED]<sup>83</sup>.

Cablevision’s economist, Mr. Orszag, confirms that there is little overlap among the networks’ viewers. Mr. Orszag performed a detailed analysis of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>84</sup>

Mr. Orszag corroborates his conclusion by [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>85</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>86</sup> And he further tests this finding by using Nielsen data of audience overlap between networks, analyzing what are referred to as “duplication” reports. These data, too, confirm the lack of viewer overlap between GSN

<sup>82</sup> See *id.*

<sup>83</sup> See Blasius Direct Test. ¶ 32; CV Exh. 93 (WE tv Fact Sheets).

<sup>84</sup> [REDACTED]

<sup>85</sup> [REDACTED]

<sup>86</sup> [REDACTED]

and WE tv. As Mr. Orszag states: “GSN ranks low on the list of networks watched by WE tv viewers.”<sup>87</sup>

**6. Advertisers Do Not View WE tv and GSN to Be Similarly Situated**

The evidence as to whether advertisers view GSN and WE tv as similarly situated with respect to advertising is in the same vein; they do not. As Cablevision’s advertising expert, Larry Blasius, will testify, the different demographics of the audiences for the two networks would lead advertisers to conclude that the networks are not similarly situated. And Mr. Orszag will testify about the demographic “distance” between GSN and WE tv audiences shown by quantitative analysis, as well as the absence of any meaningful competition for advertisers between the two networks.

Advertisers primarily focus on four factors in selecting cable networks on which to place advertisements: cost per thousand viewers (“CPM”), demographic ratings, median age of viewership, and audience concentration/skew.<sup>88</sup> Each of these factors shows the stark contrast between GSN and WE tv.

CPM. CPM measures the relationship between the price of advertising and the size of the audience delivered. In 2010, WE tv ranked ninth among cable networks with an average CPM of \$8.63. GSN, on the other hand, ranked 83<sup>rd</sup> with an average CPM of \$2.62.<sup>89</sup> The difference reveals the greater value that advertisers place on WE tv.

Demographics. The Nielsen ratings of the two networks are significantly different within the W18-49 and W25-54 demographics that are most valuable to advertisers

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<sup>87</sup> *Id.* ¶ 72.

<sup>88</sup> Blasius Direct Test. ¶ 19.

<sup>89</sup> Orszag Direct Test. ¶ 111; *see also* [REDACTED]

targeting a female audience.<sup>90</sup> In broadcast year 2009-2010, WE tv's ratings for the W18-49 demographic exceeded those of GSN by approximately [REDACTED] percent during primetime and [REDACTED] percent on a total day basis. In the W25-54 demographic, WE tv again enjoyed a sizable advantage, exceeding GSN's ratings by approximately [REDACTED] percent during primetime and [REDACTED] percent for the total day. These are meaningful differences from an advertising perspective.<sup>91</sup>

Median Age. GSN undeniably skews significantly older than WE tv. For broadcast year 2009-2010, the median age of WE tv's female viewers was [REDACTED] in Primetime and [REDACTED] on a total day basis, while GSN's female median age was [REDACTED] for both time periods.<sup>92</sup> As a result, advertisers targeting the W18-49 or W25-54 demographics would view GSN as an inefficient way to reach their target audiences. WE tv's median age, by contrast, is comfortably within the range of each demographic group.<sup>93</sup>

Audience Concentration. Viewers W18-49 and W25-54 constituted only [REDACTED] and [REDACTED] percent, respectively, of GSN's total audience. WE tv delivered more than double that amount, with [REDACTED] percent of WE tv's total audience within each of these age groups.<sup>94</sup> As a result, WE tv is a much more attractive platform to reach women in the W18-49 and W25-54 demographics.

Finally, to the extent that GSN and WE tv do share advertisers, it proves little since the lion's share of those overlapping advertisers are large advertisers that advertise on

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<sup>90</sup> Blasius Direct Test. ¶ 30.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* 32.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* ¶ 35-36.

virtually every cable television network.<sup>95</sup> These advertisers included [REDACTED]

[REDACTED]<sup>96</sup> As Mr. Orszag explains, the fact that networks share common advertisers is not indicative of whether advertisers are choosing between the networks.<sup>97</sup> That these large national advertisers would be choosing primarily between WE tv and GSN is “simply implausible”;<sup>98</sup> they top the advertising list of virtually every cable network, a fact that GSN ignores.<sup>99</sup> As Mr. Orszag further observes, the top 40 WE tv advertisers purchase advertising on approximately [REDACTED] of the [REDACTED] cable networks for which Nielsen data were available.<sup>100</sup> Moreover, many large advertisers promote different brands on different networks. Mr. Orszag finds that “there is relatively little overlap between top brands advertised on WE tv and GSN.”<sup>101</sup> Only [REDACTED] brands are among the top 40 for both WE tv and GSN.<sup>102</sup> As a result, there is no credible evidence that GSN and WE tv compete directly for advertisers or are viewed as similarly situated by them.

#### 7. WE tv Has Never Considered GSN to be a Competitor

Finally, programming networks frequently track their closest competitors, the so-called “competitive set.” WE tv regularly monitors its ratings, programming and other metrics against a group of women’s networks it considers to be similarly situated.<sup>103</sup> The networks

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<sup>95</sup> Blasius Direct Test. ¶ 61; *see also* Orszag Direct Test. ¶ 118.

<sup>96</sup> [REDACTED]

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Singer Report ¶ 46.

<sup>100</sup> Orszag Direct Test. ¶ 121.

<sup>101</sup> *Id.* ¶ 104.

<sup>102</sup> *Id.*

<sup>103</sup> Martin Direct Test. ¶ 24-28.

WE tv regularly includes in its competitive set are [REDACTED]

[REDACTED]<sup>104</sup> GSN has never been included in WE tv’s competitive set. That is because it is not perceived by WE tv to be a competitive women’s network.<sup>105</sup>

[REDACTED]<sup>106</sup> But GSN’s perspective is not the relevant one here. If Cablevision sought to advantage WE tv, it would have taken an adverse action against a network that WE tv viewed to be competitive. There are a number of networks—[REDACTED]—that fit that bill. GSN is not one of them.

Objective third party evidence supports WE tv’s view of its competition. The two DBS distributors, DIRECTV and DISH, sell advertising time ceded back to them by cable television networks. Both DISH and DIRECTV sell advertising across a “cluster” of women’s networks so that advertisers seeking to reach women viewers can buy advertising on a number of networks in which those viewers are concentrated. WE tv is included in that cluster; GSN is not. The fact that DIRECTV, which owns 65 percent of GSN, does not sell GSN as a women’s network, speaks volumes about the bona fides of GSN’s claims in this case.<sup>107</sup>

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104 [REDACTED]

105 [REDACTED]

106 [REDACTED]

107 See CV Exh. 212 (DIRECTV Media Kit); CV Exh. 213 (DISH Media Kit).

**B. Cablevision Did Not Treat WE or Wedding Central Better than GSN On the Basis of Affiliation**

GSN will also attempt to provide circumstantial evidence at trial that Cablevision treated its affiliated networks more favorably than GSN on the basis of affiliation. The proof, however, will not bear out this claim.

GSN complains that Cablevision did not re-tier WE tv and that the failure to do so constitutes favoritism on the basis of affiliation. The argument is completely circular and makes no sense. First and foremost, [REDACTED] WE tv is popular among Cablevision’s subscribers, consistently attracting enough unique viewers to rank it in the top half of the Expanded Basic tier networks.<sup>108</sup> [REDACTED]

[REDACTED]

[REDACTED].<sup>109</sup> [REDACTED]

[REDACTED].<sup>110</sup> [REDACTED]

Moreover, Cablevision does not uniformly carry the former Rainbow networks on the Expanded Basic tier—both IFC and the Sundance Channel are on less penetrated tiers.<sup>111</sup> [REDACTED]

[REDACTED]

[REDACTED].<sup>112</sup> [REDACTED]

[REDACTED]

[REDACTED]

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<sup>108</sup> Montemagno Direct Test. ¶ 71.

<sup>109</sup> [REDACTED]

<sup>110</sup> [REDACTED]

<sup>111</sup> Montemagno Direct Test. ¶ 71.

<sup>112</sup> [REDACTED]

Nor can GSN prove any favorable treatment with respect to license fees. Cablevision has entered into multiple carriage agreements with WE tv over the past 15 years; each was negotiated at arm's length notwithstanding the overlapping corporate ownership and each resulted in license fees that were consistent with those in the market.<sup>113</sup>

Finally, GSN will argue that Cablevision advantaged WE tv with favorable channel placement. But the testimony will show that Cablevision placed WE tv in the neighborhood of other women's networks, the most sensible location for WE tv and those other networks. And when it launched Wedding Central, Cablevision put it on channel 177, hardly a coveted spot in the channel line-up.<sup>114</sup>

In the end, the claim that Cablevision gave favorable treatment to its affiliated networks on the basis of affiliation is not supported by the evidence.

#### **IV. CABLEVISION'S RE-TIERING DECISION DID NOT UNREASONABLY RESTRAIN GSN'S ABILITY TO COMPETE FAIRLY**

Even if GSN is able to establish discrimination, GSN's claims will fail because it cannot demonstrate that the re-tiering has had "the effect of unreasonably restraining [its] ability . . . to compete fairly."<sup>115</sup> GSN will no doubt seek to ignore the unreasonable restraint language in Section 616, but it is a critical component. The anti-discrimination provisions of the statute are grounded in the now outdated construct that cable operators such as Cablevision have bottleneck market power with respect to networks such as GSN. GSN, however, cannot credibly

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<sup>113</sup> See CV Exh. 7 (WE tv/Cablevision Affiliation Agreements); see also Montemagno Direct Test. ¶ 72-73; Broussard Direct Test. ¶ 9. [REDACTED]

<sup>114</sup> Montemagno Direct Test. ¶ 74.

<sup>115</sup> Second Report & Order ¶ 15.

claim that carriage on Cablevision systems is critical to its ability to reach its intended viewers, because Cablevision has no such market power.

Cablevision and other cable operators face significantly increased competition in the MVPD business.<sup>116</sup> In New York alone, Cablevision faces intense competition from the two incumbent telephone companies, Verizon FiOS and AT&T, that offer video programming; as well as from the two major providers of DBS service, DISH and DIRECTV. Competition is also increasing from a variety of new internet services that deliver television shows and movies to viewers without the need for a cable or satellite subscription.<sup>117</sup> This intense competition debunks any notion that Cablevision has bottleneck market power with respect to GSN.

GSN will not be able to prove that Cablevision's carriage decision unreasonably restrained its ability to compete fairly. Here are the facts: GSN lost approximately [REDACTED] subscribers in the New York metropolitan area as a result of Cablevision's re-tiering decision, [REDACTED] Cablevision subscribers who wished to continue to watch the network could either sign up for the Sports and Entertainment Pak (and thousands did) or they could switch to any of Cablevision's formidable competitors that carried GSN more broadly.<sup>118</sup>

GSN also argues that it is likely that other MVPDs will be emboldened by Cablevision's actions and will also reduce or delete the network from their systems. But GSN's speculation is inconsistent with the facts. Since learning of Cablevision's decision, GSN has [REDACTED]

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<sup>116</sup> Montemagno Direct Test. ¶¶ 26-33.

<sup>117</sup> *Id.*

<sup>118</sup> *See* Orszag Direct Test. ¶ 143.

[REDACTED]

[REDACTED] 119 [REDACTED]

[REDACTED] 120 [REDACTED]

[REDACTED] 121 [REDACTED]

[REDACTED]

[REDACTED] 122

Further, [REDACTED]

[REDACTED]

[REDACTED] 123 [REDACTED]

[REDACTED] 124 [REDACTED]

[REDACTED]

[REDACTED] 125

In the end, GSN is reduced to arguing that [REDACTED] because it is on a less penetrated tier in New York City, where many ad buyers are located. Even if it were true that ad buyers are concentrated there, GSN will not be able to offer any proof linking advertising losses to the re-tiering by Cablevision. To the contrary, [REDACTED]

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119 [REDACTED]

120 [REDACTED]

121 [REDACTED]

122 [REDACTED]

123 [REDACTED]

124 [REDACTED]

125 [REDACTED]

[REDACTED]

[REDACTED] <sup>126</sup> [REDACTED]

[REDACTED]

[REDACTED] has unreasonably restrained its ability to compete fairly.

**V. COMPELLING CABLEVISION TO CARRY GSN ON A MORE WIDELY PENETRATED TIER WOULD VIOLATE CABLEVISION’S FIRST AMENDMENT RIGHTS**

As the Supreme Court long ago recognized, “[t]here can be no disagreement” that distributors like Cablevision “engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”<sup>127</sup> Forcing Cablevision to carry GSN as part of its expanded basic tier would infringe Cablevision’s speech rights by forcing Cablevision to speak to its subscribers in a manner not of its choosing. This is a content-based remedy that is subject to strict scrutiny which GSN’s requested relief plainly cannot survive.

Nor could GSN’s request for relief survive an intermediate standard of scrutiny. This is because restoring GSN to broader carriage would not “further[] an important or substantial governmental interest” and is not sufficiently tailored to address the goal of promoting fair competition between “similarly situated” programmers in the video distribution market.<sup>128</sup>

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<sup>126</sup> [REDACTED]

<sup>127</sup> *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994); see also *Tennis Channel, Inc. v. Comcast Cable Commc’ns*, Memorandum Opinion and Order, 27 FCC Rcd. 8508, 8545 ¶ 97 (2012) (noting an MVPD’s “First Amendment Rights are implicated” by a carriage remedy because an MVPD “is entitled, in the exercise of its editorial discretion, to choose to carry” the channels it desires).

<sup>128</sup> *Tennis Channel*, 27 FCC Rcd. at 8547-48 ¶ 103; Second Report & Order ¶ 4.

**REDACTED – FOR PUBLIC INSPECTION**

The Commission has described the principal purpose of the program carriage rules to be the promotion of fair competition between “similarly situated” programmers without hindering competition in the video distribution market.<sup>129</sup> Given this, the program carriage regulations are insufficiently tailored to achieve the stated purpose here because any risk of harm to competition is entirely conjectural. Moreover, the government interest in promoting competition and diversity in programming is no longer served by Section 616. Rather, today’s intensely competitive marketplace itself serves as a check on any market power cable operators may have once wielded over the distribution of programming to consumers. Thanks, in part, to the now-robust competition from satellite and telephone companies, there is no longer any legitimate reason to impinge upon Cablevision’s discretion to decide which networks to carry.

It is beyond question that Cablevision faces significant competition from other MVPDs in the relevant markets. Indeed, GSN’s own Complaint asserts that GSN is available to subscribers on an expanded basic service level on Cablevision’s “in-market competitors AT&T, DIRECTV, DISH and Verizon FiOS.”<sup>130</sup> This eliminates any justification for compelling Cablevision’s speech. In these circumstances, any reversal of Cablevision’s legitimate exercise of its editorial decision to restrict GSN’s carriage would clearly contravene the First Amendment.

**Conclusion**

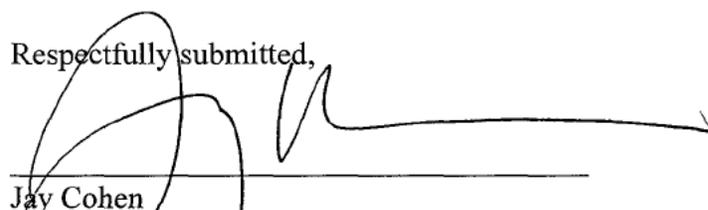
GSN will not be able to prove at the hearing that Cablevision discriminated against it on the basis of affiliation.

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<sup>129</sup> See Second Report and Order ¶ 4.

<sup>130</sup> Complaint ¶ 24.

Respectfully submitted,



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Jay Cohen  
Andrew G. Gordon  
Gary R. Carney  
PAUL, WEISS, RIFKIND, WHARTON  
& GARRISON LLP  
1285 Avenue of the Americas  
New York, NY 10019-6064  
(212) 373-3000

Howard J. Symons  
Tara M. Corvo  
Robert G. Kidwell  
MINTZ, LEVIN, COHN, FERRIS,  
GLOVSKY AND POPEO, P.C.  
701 Pennsylvania Avenue, N.W.,  
Suite 900  
Washington, D.C. 20004  
(202) 434-7300

*Counsel for Cablevision Systems Corporation*

March 12, 2013