

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

FILED/ACCEPTED

MAR 20 2013

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
GAME SHOW NETWORK, LLC,)
Complainant,)
)
v.)
)
CABLEVISION SYSTEMS CORPORATION,)
Defendant.)
)
Program Carriage Discrimination)

MB Docket No. 12-122
File No. CSR-8529-P

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Federal Communications Commission
Office of the Secretary

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

OPPOSITION OF GAME SHOW NETWORK, LLC TO CABLEVISION SYSTEMS CORP.'S MOTION *IN LIMINE* TO EXCLUDE PORTIONS OF THE TESTIMONY OF HAL J. SINGER AND TIMOTHY BROOKS OR, IN THE ALTERNATIVE, MOTION TO STRIKE CABLEVISION'S SUPPLEMENTAL EXPERT TESTIMONY

Game Show Network, LLC ("GSN") hereby submits this opposition to Cablevision Systems Corporation's ("Cablevision's") motion to exclude portions of the testimony of GSN experts, Hal J. Singer, Ph.D and Timothy Brooks. In the alternative, GSN hereby moves to strike the Supplemental Direct Testimony of Michael Egan and the Supplemental Direct Testimony of Jonathan Orszag, which Cablevision filed in response to the written testimony that is the subject of its motion to exclude.

Cablevision's motion is premised on the notion that Dr. Singer and Mr. Brooks have "amplified" their testimony in ways that go beyond their respective November 19 expert reports (the "November 19 Expert Reports") and that such testimony therefore "would unfairly prejudice Defendants and undo the carefully considered scheduling orders that have governed these proceedings." As described below, Cablevision's premise is simply untrue. Much of the

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testimony to which Cablevision now objects was submitted by Dr. Singer and Mr.

Brooks—sometimes in nearly identical language—in their respective November 19 Expert Reports. More fundamentally, however, Cablevision’s objections are patently inconsistent with the parties’ February 19, 2013 Stipulation Regarding Scheduling and the scheduling orders entered by the Presiding Judge in this case on February 20, and February 28, 2013 (together, the “Scheduling Order”).

In fact, the parties’ stipulations and the Scheduling Order make clear that the written direct testimony of any expert witness might include “opinions . . . not previously offered in [the] expert witness’s report.”¹ Moreover, the parties’ February 19, 2013 stipulation and the Scheduling Order provide Cablevision the opportunity to respond to any “new” expert testimony through a supplemental submission. Specifically, the parties stipulated that each party would be “allowed to submit supplemental expert testimony on March 19, 2013 for the limited purpose of rebutting any opinions offered in the other Party’s written direct expert testimony that was not previously offered in an expert witness’s report.”² Cablevision in fact availed itself of this opportunity when it filed lengthy supplemental expert reports on behalf of Mr. Michael Egan and Mr. Jonathan Orszag on March 19, 2013 that respond to same testimony to which they have objected. Under the parties’ agreement, these supplemental submissions were the proper vehicle for responding to any expert testimony to which Cablevision objects—not a motion *in limine*.³

¹ Scheduling Order (Feb. 20, 2013); Stipulation Regarding Scheduling (Feb. 19, 2013). As it happens, neither Dr. Singer nor Mr. Brooks expanded their testimony or opinions other than to respond to Cablevision’s witnesses’ December 14 expert reports, although that was a matter of GSN’s reasoned discretion rather than to comply with any stipulation or scheduling order. *See infra* sections I & II.

² Stipulation Regarding Scheduling (Feb. 26, 2013).

³ The parties’ stipulations and Scheduling Order do, however, make clear that the scope of supplemental expert submissions was limited to “rebutting any opinions offered in the other (continued...) ”

That Cablevision itself *proposed* and stipulated to this process makes its objections to Dr. Singer's and Mr. Brooks' testimony particularly puzzling. Both parties presumably endeavored to produce in a timely manner the documents subject to discovery in this proceeding. However, more than [REDACTED] pages of documents were produced by Cablevision within weeks of November 19, and [REDACTED] of additional pages of documents were produced by Cablevision *after* November 19, including as recently as March 7.⁴ In their respective depositions, Cablevision's counsel questioned both Dr. Singer and Mr. Brooks about the extent of any new opinions or testimony they had developed, including to the extent such new opinions or testimony were necessitated by Cablevision's documents and expert reports. Following Dr. Singer's deposition, Cablevision's counsel proposed the supplemental expert report process to provide the parties' experts the ability to respond to any new expert opinions that might be contained in an expert's written testimony.

Cablevision acknowledges that GSN's expert witnesses were permitted to amplify the opinions in their respective November 19 Expert Reports to respond to "criticisms leveled at [their] initial reports by Cablevision's experts."⁵ But Cablevision also argues that this imposes a limiting principle without pointing to any language in the parties' stipulations or the Scheduling Order to that effect. That is not the case. Indeed, if the parties and the Presiding Judge had intended to so limit the scope of the written expert testimony, then there would have been no

Party's written direct expert testimony that was not previously offered in an expert's report." GSN therefore reserves the right to object to any supplemental testimony offered by Mr. Egan or Mr. Orszag that exceeds the permitted scope of such supplemental expert testimony as agreed to by the parties and authorized under the Scheduling Order.

⁴ In light of this, Dr. Singer and Mr. Brooks reserved the right to alter and supplement their November 19 conclusions based on a review of additional documents. *See* Declaration of Timothy Brooks, at n. 1 (Nov. 19, 2012) [hereinafter "Brooks Expert Report"]; Expert Report of Hal. J. Singer, PhD, at n. 1 (Nov. 19, 2012) [hereinafter "Singer Expert Report"].

⁵ Motion, at 2.

reason to include a process for GSN to submit supplemental, rebuttal expert testimony on March 19. The Scheduling Order makes clear that GSN, like Cablevision, was permitted to submit supplemental expert testimony on March 19 to respond to “new” expert testimony. But, of course, there could be no “new” Cablevision expert testimony if the parties had contemplated Cablevision’s limiting principle (*i.e.*, that Cablevision was permitted to file “new” testimony only to respond to criticisms leveled by GSN’s experts). That is because no GSN witness had an opportunity to submit critiques of Cablevision’s December 14 expert reports (nor was such an opportunity ever contemplated) between the December 14 filing of Cablevision’s expert reports and the March 12 filing of Cablevision’s experts’ written testimony. Moreover, Cablevision’s position would mean that Dr. Singer and Mr. Brooks were required to respond to critiques from Cablevision’s experts in their respective November 19 Expert Reports—before Cablevision’s experts had ever submitted any report or testimony to the Presiding Judge in this case.⁶

Furthermore, the opportunity to respond to new expert testimony (which Cablevision in fact availed itself of in lengthy submissions filed with the Presiding Judge) belies any claim of unfair prejudice to Cablevision. If anything, it would be unfairly prejudicial to GSN to exclude highly probative opinions and testimony developed by its experts when Cablevision produced [REDACTED] of pages of documents in this case shortly before Dr. Singer and Mr. Brooks filed their November 19 Expert Reports and [REDACTED] of pages of documents even after November 19, 2012.⁷ Indeed, as noted above, Cablevision produced documents relevant to the expert analyses as recently as March 6 and March 7, 2013.

⁶ The parties’ expert witnesses had made filings before the Media Bureau before any discovery between the parties. However, the earliest submission by an expert witness to the Presiding Judge was the November 19 Expert Reports submitted by GSN’s expert witnesses.

⁷ [REDACTED]

(continued...)

Because Cablevision's motion is inconsistent with its own stipulations and the Scheduling Order entered in this case, it should be denied on its face.

In any event, as noted above, neither Dr. Singer nor Mr. Brooks expanded their testimony or opinions other than to respond to Cablevision's witnesses' December 14 expert reports. Accordingly, even if the Presiding Judge were to apply the limiting principle that Cablevision seeks to impose on the written testimony of GSN's expert witnesses, he would find that the testimony to which Cablevision has objected is either (1) consistent with, or a logical extension of, Dr. Singer's or Mr. Brooks's November 19 Expert Reports (although in some cases supplemented by references to Cablevision documents that Dr. Singer and Mr. Brooks did not have a reasonable opportunity to review prior to November 19); or (2) appropriate to respond to Cablevision's expert witnesses.

I. OBJECTIONS TO DR. SINGER'S TESTIMONY

Dr. Singer's "Mahalanobis Distance Analysis" evaluates GSN's demographic "proximity" to 100 other cable networks, rather than 36 other cable networks. (GSN Exh. 223 ¶ 52). Based on an analysis of 360 different Nielsen demographic specifications, Dr. Singer's written testimony concludes that WE tv is, on average, the [REDACTED] closest network to GSN among 101 cable networks.⁸ This is consistent with the finding in his November 19 Expert Report that, across the same 360 different specifications, WE tv is, on average, the [REDACTED] closest network to GSN among 37 cable networks.⁹ Dr. Singer's expansion of the analysis to evaluate WE tv relative to 100 other cable networks rather than 36 other cable networks was

⁸ GSN Exh. 223, Written Direct Testimony of Hal J. Singer, ¶ 52 [hereinafter "Singer Written Direct"].

⁹ Singer Expert Report, ¶ 45.

directly responsive to Mr. Orszag's December 14 expert report, which criticized the November 19 analysis for considering "only 38 networks out of [additional] networks for which demographic data are available."¹⁰

Dr. Singer's "Both Duplication" analyses evaluate the audience overlap between viewers of 6 GSN shows with viewers of [REDACTED] cable networks rather than 16 cable networks. (GSN Exh. 223 ¶¶ 6, 39). Dr. Singer's written testimony studies the audience overlap between those viewers who watch six GSN programs with viewers of [REDACTED] cable networks, including WE tv. Dr. Singer concludes that a significant number of viewers of these six GSN programs watch WE tv as compared to those who watch [REDACTED] other cable networks. That finding is consistent with his November 19 Expert Report, which shows [REDACTED] [REDACTED] with WE tv relative to 15 other cable networks. The expansion of the analysis to evaluate WE tv relative to a larger set of cable networks was directly responsive to Mr. Orszag's December 14 Expert Report, which criticized Dr. Singer for looking at "only 16 other networks."¹¹ Moreover, Cablevision's own motion acknowledges that Cablevision had the opportunity to question Dr. Singer about this expanded analysis during Dr. Singer's deposition.¹²

Dr. Singer's analysis shows how much more broadly WE tv and Wedding Central are carried by Cablevision than Cablevision's peer MVPDs. (GSN Exh. 223 ¶ 27). This is not a new point, but merely echoes a point made in Dr. Singer's November 19 Expert Report. As discussed in the November 19 Expert Report, Cablevision carries GSN on a much less penetrated tier than Cablevision's peer cable and satellite companies carry GSN.¹³ In

¹⁰ Expert Report of Jonathan Orszag, ¶ 87 (Nov. 14, 2012).

¹¹ *See id.* ¶ 72.

¹² *See Motion at 2, 4.*

¹³ Singer Expert Report, ¶ 55.

contrast, Cablevision broadly carries affiliated networks, such as WE tv and Wedding Central,¹⁴ even when other MVPDs do not provide as broad carriage to the same networks.¹⁵ Dr. Singer's March 12 expert testimony repeats these points. His written testimony merely adds the specific levels of penetration for carriage of Cablevision's affiliated networks, WE tv and Wedding Central, on Cablevision versus on peer MVPDs based on documents that Dr. Singer did not have a reasonable opportunity to review prior to November 19.¹⁶

Dr. Singer quantifies the number of hours of "Love Block" programming on GSN between October 2010 and September 2010 as a share of primetime programming. (GSN Exh. 223 ¶¶ 5, 33). Dr. Singer echoes a point he made in his November 19 Expert Report, in which he included similar analyses and in fact used some of the exact same language to which Cablevision now objects. The fact that Dr. Singer's quantification of the number of hours of "Love Block" programming is presented slightly differently is not a reasonable basis to object.

Dr. Singer includes a table containing the [REDACTED]

[REDACTED]

[REDACTED]. (GSN Exh. 223 ¶ 36). The table that is subject to Cablevision's objection provides information that was part of an analysis included in Dr. Singer's November 19 Expert Report and thus is not new. The November 19 Expert Report analyzed the audience overlap between GSN and 85 other cable networks during the fourth quarter of 2010 using several different measurements.¹⁷ It concludes for example, that WE tv is the [REDACTED] closest

¹⁴ *Id.* at Table 1.

¹⁵ *See, e.g., id.* ¶ 24.

¹⁶ [REDACTED]

¹⁷ Singer Expert Report, ¶ 33 & Table 3.

network to GSN in terms of “both duplication” audience overlap among 86 cable networks based on total-day viewership among adults (*i.e.*, persons 18-99) during the fourth quarter of 2010.¹⁸

Dr. Singer likewise explains [REDACTED]
[REDACTED]—the other measurements available through the Nielsen NPower/MarketBreaks report that Dr. Singer discussed. Dr. Singer’s expert testimony merely illustrates these points through a Table that shows the both duplication and secondary duplication results from the same analysis discussed in his November 19 Expert Report. Moreover, [REDACTED]

[REDACTED].
Dr. Singer shows how [REDACTED] between WE tv and GSN compares to overlap between WE tv and other cable networks. (GSN Exh. 223 ¶ 54). Dr. Singer’s November 19 Expert Report shows significant advertiser overlap, even at the brand level, between WE tv and GSN. To provide additional context, Dr. Singer’s written testimony discusses how the overlap between WE tv and GSN compares relative to 87 other cable networks. This is not a new or different analysis, but merely additional context for a point that Dr. Singer makes in both his November 19 Expert Report and written testimony.

II. OBJECTIONS TO MR. BROOKS’S TESTIMONY

Mr. Brooks includes Nielsen national audience data that show that quiz shows appeal to women. (GSN Exh. 222 ¶ 78). Mr. Brooks’s November 19 Expert Report opines that there is “widespread understanding in the industry that game shows are generally targeted at women.”¹⁹ The testimony to which Cablevision objects makes this same point, although does so

¹⁸ *Id.*

¹⁹ Brooks Expert Report, ¶ 74.

by showing that programs coded as “quiz-giveaway” or “quiz panel” [REDACTED] [REDACTED].²⁰ In any event, even to the extent this is considered a new analysis, it is directly responsive to Mr. Egan’s December 14 expert report, which took the position that, “Game Shows are less female-skewed than the majority of other program types.”²¹ Mr. Egan spent several paragraphs of his December 14 expert report critiquing Mr. Brooks’s opinion that game shows skew significantly female, and it was therefore appropriate for Mr. Brooks to repudiate those criticisms with objective, third party data.

Mr. Brooks cites to documents showing that [REDACTED]

[REDACTED]. (GSN Exh. 222 ¶ 25). Mr. Brooks’s November 19 Expert Report opined that, in his experience, the four key categories demographic categories for advertising sales purposes for women’s networks, including WE tv, are women 25-54, persons 25-54, women 18-49, and persons 18-49.²² Mr. Brooks’s written testimony states that [REDACTED]

[REDACTED]. This is the not a new analysis. Moreover, Mr. Brooks did not have a reasonable opportunity to review the documents cited in his written testimony prior to producing his November 19 Expert Report.

Mr. Brooks cites set-top box data from a Cablevision “Audience By Network” report that covers the period from January-December 2010. (GSN Exh. 222 ¶ 59). This is not a new point, but merely incorporates additional data from Cablevision’s set-top box data system. Mr. Brooks’s November 19 Expert Report concludes that [REDACTED]

²⁰ GSN Exh. 222, Written Direct Testimony of Timothy Brooks, ¶ 78 [hereinafter “Brooks Written Direct”].

²¹ Expert Report of Michael Egan, ¶ 91 (italics removed) (Nov. 14, 2012).

²² Brooks Expert Report, ¶ 23.

[REDACTED]
[REDACTED]. Mr. Brooks makes this same point again in his written testimony, but cites to [REDACTED]

[REDACTED]. Because this is the same analysis and opinion, there is no reasonable basis for Cablevision to register an objection. Moreover, Mr. Brooks did not have a reasonable opportunity to review and analyze the [REDACTED] prior to November 19.²³

Mr. Brooks cites two documents that show the impact that “force tuning” has on the reliability of Cablevision set-top box data. (GSN Exh. 222 ¶ 60). Mr. Brooks’s November 19 Report identifies a number of reliability issues with set-top box data.²⁴ Mr. Brooks makes the same points in his written testimony, noting that certain Cablevision documents [REDACTED] likewise suggest reliability issues with set-top box data.²⁵ Because these documents [REDACTED] go to the same points and opinions offered by Mr. Brooks in his November 19 Expert Report, there is no reasonable basis for an objection. In any event, Mr. Brooks would not have had a reasonable opportunity to review and analyze these documents

²³ Not only was the report part of a production that was not made until October 10, 2012, but Cablevision has been highly secretive about its set-top box data. [REDACTED]

[REDACTED] However, Cablevision declined to produce to GSN the full set of requested set-top box data documents, which has further delayed the ability of GSN’s expert witnesses to fully analyze the produced documents.

²⁴ See Brooks Expert Report, ¶¶ 49-57.

²⁵ See Brooks Written Direct, ¶ 60.

report prior to November 19,²⁶ and [REDACTED]
[REDACTED]. Cablevision also
appears to record an objection to Mr. Brooks citing a document [REDACTED]
[REDACTED]
[REDACTED]. However, this is likewise in support of a proposition that Mr. Brooks made in his
November 19 Expert Report.²⁷

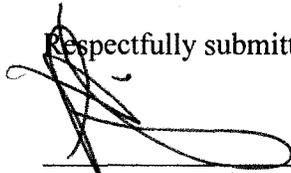
²⁶ These documents were produced October 5 and October 10, 2012. The secretive nature of Cablevision's set-top box data system and its withholding of discovery with respect to this system also delayed the ability of GSN's expert witnesses to analyze these documents.

²⁷ Brooks Expert Report, ¶ 56.

CONCLUSION

For the reasons set forth above, GSN respectfully requests that Cablevision's motion to exclude portions of the testimony of GSN experts be denied. In the alternative, GSN respectfully requests that the Supplemental Direct Testimony of Michael Egan and the Supplemental Direct Testimony of Jonathan Orszag be stricken.

Respectfully submitted,



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