

**Before the
Federal Communications Commission
Washington, DC 20554**

FCC 12M-56
09492

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| In the Matter of |) | |
| |) | |
| Game Show Network, LLC, |) | MB Docket No. 12-122 |
| Complainant, |) | File No. CSR-8529-P |
| |) | |
| v. |) | |
| |) | |
| Cablevision Systems Corp. |) | |
| Defendant |) | |
| |) | |
| Program Carriage Complaint |) | |

MEMORANDUM OPINION AND ORDER

Issued: December 11, 2012

Released: December 11, 2012

Background

1. Game Show Network, LLC (GSN) has obtained through discovery 168,000 company documents provided by Cablevision Systems Corp. (Cablevision). However, Cablevision has failed to include John Bickham, former President of Cable & Communications, on its custodian list. Since the exchange of the initial custodian lists in August, GSN has acquired documents through discovery that allegedly indicate that [REDACTED].¹ Cablevision has refused to comply with GSN's request that Cablevision add Mr. Bickham as a document custodian and thus withholds Mr. Bickham's files from discovery. In light of the schedule for the parties' fact depositions, GSN seeks an order compelling Cablevision to produce responsive documents for Mr. Bickham within 10 days.

2. Cablevision has also objected to GSN's request that it make its Chief Executive Officer, James Dolan, available for deposition. GSN alleges that Mr. Dolan was "[REDACTED]".
[REDACTED]".
GSN Motion at 2. It seeks an order compelling Cablevision to provide dates for Mr. Dolan's deposition.

¹ This ruling takes care to avoid disclosure of information or facts that have been designated confidential by any party. Keeping that concern in mind, confidentiality will continue where appropriate.

Discussion

3. The Commission's discovery rules provide parties with a broad remedy to obtain material that is relevant to the issues set for a hearing, including obtaining documents and deposing witnesses. Section §1.311 provides:

Sections 1.311 through 1.325 provide for taking the deposition of any person (including a party), for interrogatories to parties, and for orders to parties relating to the production of documents and things and for entry upon real property. These procedures may be used for the discovery of relevant facts, for the production and preservation of evidence for use at the hearing, or for both purposes.

For purposes of discovery, these procedures may be any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for hearing. For the preservation of evidence, they may be used in any case which has been designated for hearing and is conducted under the provisions of this subpart (see §1.201)

Persons and parties may be examined regarding any matter, not privileged, which is relevant to the hearing issues, including the existence, description, nature, custody, condition and location of persons having knowledge of relevant facts. It is not ground for objection to use of these procedures that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

4. Under this broad discovery regimen, GSN's Motion to Compel Discovery has sufficient merit to require production of Mr. Bickham's documents and also permit Mr. Dolan's deposition. GSN has made a convincing showing to the Presiding Judge that both Mr. Bickham and Mr. Dolan each have relevant information relating to the issue set for adjudication. Both Mr. Bickham and Mr. Dolan occupied corporate positions of responsibility that provided an opportunity for and a likelihood of awareness of the reasons supporting an executive decision to relocate the network of an independent, non-integrated programmer against its wishes. It is uncontroverted that after analyzing the aforementioned discovered documents, GSN found 25 or so documents showing Mr. Bickham's direct role in significant and relevant decision-making. The e-mail that GSN included with its pleading labeled Exhibit A suggests that

[REDACTED] suggests that

[REDACTED] ² Exhibit C

[REDACTED] If the picture that these Exhibits paint is accurate, [REDACTED]

² The determinations made here as to the contents of the exhibits submitted by GSN are only for purposes of this discovery ruling. The contents of these exhibits will be re-evaluated in light of the entire record once it is complete.

5. It appears that GSN has not adequately supported its claim that Mr. Dolan was “ [REDACTED] .” GSN Motion at 2. But significantly, GSN has produced uncontroverted evidence that Mr. Dolan “ [REDACTED] .” *Id.*; see Exhibits D and E. For these reasons, Messrs. Bickham and Dolan are likely to have discoverable knowledge and information of the reasons for moving GSN’s programming to a different tier, a substantial change that was not requested or desired by GSN.

6. Cablevision argues that GSN knew or should have known about Mr. Bickham’s role as a “very senior executive” with Cablevision and thus it should be held to the consequences of its failure to name him in the August custodian list exchange. Cablevision Opposition at 10. GSN’s account that it only later learned that Mr. Bickham [REDACTED] is persuasive. The discovery process is not akin to a game show such as *Let’s Make a Deal*; Cablevision cannot force GSN to blindly guess which door leads to relevant documents. If that were so, Cablevision would assume the role of Monty Hall—having full knowledge of what’s behind each door but making GSN guess at its peril. With such superior knowledge as to [REDACTED], Cablevision should readily have anticipated that GSN’s failure to include Mr. Bickham on the custodian list would result in avoidable delays that would likely cause a failure to meet the close of discovery date set in the latest scheduling *Order*, FCC 12M-47.

7. Cablevision also believes that GSN “should be compelled to demonstrate” that discovery of Mr. Bickham’s documents would “result in the production of new material that GSN has not already received.” Cablevision Opposition at 9. Cablevision is effectively asking GSN to not only pick the door that an uninformed GSN believes will lead to a prize, but also guess the prize. There is no basis in regulation or reason for placing such an irrational litigation risk on GSN. The precise contents of “unique documents” cannot be known until they are produced. If some portion of Mr. Bickham’s documents is relevant to this proceeding for discovery purposes, Cablevision must produce them.

8. Cablevision argues that Mr. Dolan should not be subjected to a deposition because there is no evidence that Mr. Dolan “ [REDACTED] .” Cablevision Opposition at 6. It further argues that the discussions involving Mr. Dolan that GSN cites are not relevant to the discrimination issue in this case because the communications occurred after the decision to reposition the network was made. Cablevision Opposition at 6-7. It makes no difference in ordering a deposition whether significant information arises before or after a discoverable corporate decision or event. Mr. Dolan is likely to have been a central figure in the discussions that GSN cites and should present testimony about his participation in those discussions, as well as facts related to the subject matter of those discussions. He may also be asked to provide testimony about meetings that may have been held in preparation for those discussions, as well as testimony about any consideration that might have been given to [REDACTED]

██████████. As this testimony could provide or lead to evidence of actionable discrimination,³ Cablevision must make Mr. Dolan available for deposition.

9. Cablevision argues that a deposition of Mr. Dolan would be what some courts have referred to as an “apex deposition.” The principle refers to concerns that some courts have expressed for potential abuse or harassment where “apex” or high ranking corporate officers are subjected to depositions. *Affinity Labs v. Apple, Inc.*, 2011 WL 1753982 at *15 (N.D. Cal. May 9, 2011) (citations omitted). To advance this concern, Cablevision cites a patent case in which a court disallowed the deposition of Apple’s late CEO Steve Jobs based upon his public statements touting Apple products as “innovative” and “ground-breaking.” *Id.* at *3. However, the overriding principle in that court’s ruling in favor of Apple’s “apex” official was the court’s judicial discretion to limit discovery under the federal rules. *Id.* A similarly broad trial discretion resides with the Presiding Judge here under the *APA* and the Commission’s rules of practice. See 5 U.S.C. §556 and 47 C.F.R. §1. 243. There is no doubt that Mr. Dolan, CEO of Cablevision, can be classified an “apex” official. However, the Presiding Judge chooses not to exercise discretion to limit discovery here because GSN has made an adequate showing of Mr. Dolan’s probable knowledge. Even a reasonable wariness of “apex” depositions is trumped by circumstances indicating a CEO has actual knowledge of significant, relevant facts concerning a corporate decision in issue. Unlike the *Affinity Labs* case, in which the deposition request was based upon public statements of generic praise for Apple products, the deposition request of Cablevision’s CEO in this case is founded on discussions in which Mr. Dolan is known to have participated concerning the subject of ██████████. Yet in deference to his “apex” status, Mr. Dolan’s deposition shall be taken at his reasonable choices of date, time and place at his or his attorney’s place of business. But he shall cooperate in answering questions.

10. Finally, it is evident that under the recently extended schedule for termination of discovery on February 1 and commencement of hearing on March 19 that GSN as a responsible litigant with the expected full cooperation of Cablevision, can complete this limited and focused additional document exchange, and can timely conclude a deposition of one additional cooperative fact witness without an additional extension of the procedural schedule.

Rulings

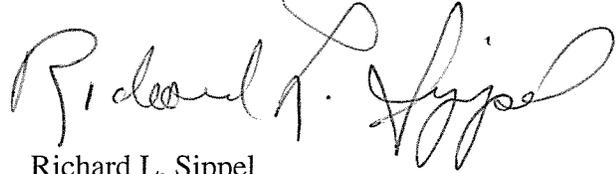
Accordingly, IT IS ORDERED that Game Show Network, LLC’s Motion To Compel Discovery filed on November 28, 2011, IS GRANTED.

IT IS FURTHER ORDERED that Game Show Network, LLC and Cablevision Systems Corp. SHALL FILE A PROPOSED ORDER for signature of the Presiding Judge by **December**

³ The Commission has held that a showing of intentional or deliberate discrimination can be made *via* direct or circumstantial evidence. *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Memorandum Opinion and Order, MB Docket 10-204, File No. CSR-8258-P, FCC 12-78 at n.138 (July 24, 2012).

12, 2013, at or before 4 pm EST, scheduling the Bickham document production, and setting a place, date, and time for the deposition of Mr. Dolan.

FEDERAL COMMUNICATIONS COMMISSION⁴

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is fluid and cursive, with a large initial "R" and a long, sweeping tail.

Richard L. Sippel
Chief Administrative Law Judge

⁴ Courtesy copies of this *Order* forwarded on issuance before 3 p.m. to each counsel of record.