UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	:	
	:	
HOUSTON REGIONAL SPORTS NETWORK, L.P.	:	Chapter 11
	:	
Debtor.	:	Case No.: 13-35998

COMCAST'S SUPPLEMENTAL BRIEF IN FURTHER OPPOSITION TO THE TEAMS' MOTION TO COMPEL

Comcast Sports Management Services, LLC; Houston SportsNet Holdings, LLC; Comcast Cable Communications, LLC; and NBCUniversal Media LLC (collectively, "Comcast") hereby submit this supplemental brief, as requested by the Court during the December 20, 2019 telephonic hearing (the "December 20 Hearing"), in connection with the motion to compel filed by Houston Astros, LLC and Rocket Ball, Ltd. (together, the "Teams") on December 6, 2019 [ECF 1085], and Comcast's opposition thereto [ECF 1093].[1]

INTRODUCTION

As discussed during the December 20 Hearing, the parties' remaining disputes in connection with the Motion relate to discovery that the Teams contend is germane to the valuation of Comcast's Affiliation Agreement under a purported replacement value theory. In particular, the Teams seek "drop analyses" (i.e., analyses by Comcast Cable seeking to estimate the number of customers who potentially would stop subscribing to Comcast Cable, and the financial impact of losing such customers, if Comcast Cable decided to stop carrying a particular network), along with related emails, for the period December 1, 2017 through the present.[2]

[1] Unless otherwise defined herein, capitalized terms have the same definitions as those in Comcast's Opposition to the Motion [ECF 1093].

[2] As explained in Comcast's Opposition to the Motion [ECF 1093], Comcast mooted certain aspects of the Motion, agreeing to search for and produce analyses and related emails related to the Network going back to October 1, 2010, including the emails of an additional custodian, Meghan Squire.

During the December 20 Hearing, the Court noted that the discoverability of the information the Teams seek turns, in part, on the question to be answered in connection with the replacement value theory that the Teams hope to advance. As the Court explained, "If the question that we need to answer is what Comcast would have done on the confirmation date, then I don't really understand how subsequently available types of analysis would be relevant." Dec. 20, 2019 Hr'g Tr. at 23:5-8. By contrast, the Court suggested that if Comcast already had started doing drop analyses as of the confirmation date, or if the question "isn't what Comcast would have done, but what was the replacement value in a more universal way of asking it," the information sought could be relevant. *Id.* at 23:13-21. The Court, therefore, requested that the parties provide supplemental briefing to address this issue. *Id.* at 24:5-6.

Comcast submits that the Teams' exploration into the hypothetical "cost" of replacing the Comcast Affiliation Agreement (i.e., the replacement value theory) is irrelevant—both because the Teams waived reliance on such theory by disavowing it when this matter was tried the first time, and because (as Comcast and its experts are prepared to explain at trial) it is simply the wrong way to value an asset such as the Comcast Affiliation Agreement. Comcast appreciates, however, that this Court has reserved judgment on the appropriateness of such a valuation methodology until a later stage in these proceedings and, therefore, Comcast has responded to the Teams' discovery on the assumption that evidence bearing on such a theory may, in principle, properly be discoverable.

Even so, the drop analyses that the Teams now seek are irrelevant to a replacement cost methodology. As the Teams have framed it, including during the December 20 Hearing, their theory is that the Comcast Affiliation Agreement had little to no value because, if the Network had rejected, rather than assumed, the existing agreement, Comcast purportedly would have entered quickly into a replacement agreement to carry the New Network on the same or better

economic terms. Just as a more traditional assessment of the price at which an asset would be sold by a willing buyer to a willing seller must be based on information that would be known or knowable to the parties to such a transaction, the argument that the Comcast Affiliation Agreement could be replaced at little to no cost must necessarily turn on what Comcast *actually* would have done as of the effective date of the Plan (i.e., the date that the Court has determined should be the starting point for any valuation).

As a result, drop analyses could only be relevant if such analyses actually existed in 2014, prior to the November effective date, by which time Comcast would have had to make its hypothetical decision whether and on what terms to carry the New Network. But such analyses did not in fact exist at that time, as they were not developed until 2015. The analyses, therefore, could not have informed any decision that Comcast hypothetically would have made in 2014 about carrying the New Network. Moreover, even if such analyses had existed in 2014, they would still be irrelevant because certain customer viewership data required to run such an analysis was not available in the Houston market at that time.

Despite their irrelevance, Comcast has already produced drop analyses and related emails from the key individuals in Comcast Cable's Content Acquisition Group (the group tasked with negotiating affiliation agreements for Comcast Cable) through December 31, 2016—more than two years after the effective date. Requiring Comcast to search for and produce additional materials beyond that date, through the present, would serve no valid purpose.

Accordingly, Comcast respectfully submits that the discovery sought by the Teams is irrelevant to the issue before the Court and disproportionate to the needs of the case, and that the Motion should be denied.

ARGUMENT

As an initial matter, the Teams' attempt to rely on a replacement value theory is inappropriate for a variety of reasons, including that they and their expert expressly rejected such a methodology in connection with the 2014 confirmation hearing. As a matter of law, the Teams should be held to that litigation decision. Moreover, the Teams' replacement value theory is inconsistent with the Teams' and the Network's actions leading up to the 2014 hearing. A debtor may reject a contract that, in its business judgment, has no value to the reorganized debtor. *See* 11 U.S.C. § 365(a). If, as the Teams now contend, the Comcast Affiliation Agreement had no value because Comcast would have entered into a new agreement on the same or better terms after bankruptcy, the Teams could have caused the Network to reject the agreement, which would have avoided any litigation over its value. Or the Teams could have declined to waive their right to their administrative claims (which would have led to the Network's liquidation), formed a new network, and sought carriage from Comcast on the same terms. But none of that happened. To the contrary, the reorganization plan expressly required the Comcast Affiliation Agreement to be assumed (*see* Plan [ECF 772] § 12.1(a)), and the obligations of the Teams, buyers, and Network were all conditioned on that event taking place (*see* Investment Agreement [ECF 772-2] § 7.01(a)). That undisputed, real-world fact alone fatally undermines any conclusion that the Comcast Affiliation Agreement would have been easily and quickly replaced at little to no cost.[3]

In any event, even assuming for the sake of argument that the Teams should be permitted to rely on a replacement value theory at this stage of the litigation, the discovery they seek is not relevant to such a theory, as explained below.

[3] In addition, as explained above, Comcast is prepared to show through expert testimony at trial that, as a matter of valuation principles, replacement value is an inappropriate method to value an asset such as the Comcast Affiliation Agreement.

I. ANY REPLACEMENT VALUE QUESTION TURNS ON WHAT COMCAST WOULD HAVE DONE AS OF THE EFFECTIVE DATE

The question to be answered in connection with the Teams' replacement value theory necessarily depends on what Comcast would in fact have done as of or around the time of the effective date in November 2014, if the Comcast Affiliation Agreement had been rejected—*not* on a theoretical or "universal" analysis of replacement value. Indeed, that is precisely how the Teams themselves have repeatedly framed the question to be answered. For example, the Motion stated that the Teams are seeking discovery purportedly relevant to "whether Comcast would enter an agreement to carry the New Network or drop carriage, in the hypothetical scenario where the Debtor had rejected the existing Affiliation Agreement." Mot. ¶ 11. And during the December 20th Hearing, Astros' counsel explained:

> [T]he theory effectively, Your Honor, is . . . first a threshold question, would Comcast have entered into a new contract for carriage, a new affiliation agreement with the new network if, hypothetically, the network had rejected the Comcast Cable affiliation agreement in the bankruptcy. And then the secondary question is . . . if the new network and Comcast were to have entered into a new affiliation agreement, what effectively would the terms be or how would they differ, if at all, from the terms of the Comcast Cable affiliation agreement.

Dec. 20, 2019 Hr'g Tr. at 9:4-14; *see also id.* at 10:7-12 (explaining that discovery sought is germane to "threshold question in a replacement value theory" of "whether Comcast would *actually* agree to enter into a new affiliation agreement with the network, the new network" if the existing agreement had been rejected (emphasis added)).

The Teams described their replacement value theory in the same way when they first tried to advance it following the 2014 confirmation hearing, in opposition to Comcast's appeal. *See, e.g.*, Br. of Appellees Rocket Ball, LTD and Houston Astros, LLC, No. 14-3133 [Dkt. 31], at 44 (S.D. Tex. Nov. 19, 2014) ("There is considerable evidence that Comcast would enter into a new affiliation agreement at rates equal to or higher than that which are provided under

Comcast's affiliation agreement if that agreement were terminated."); Resp. Br. of Appellees, No. 15-20497, at 67 (5th Cir. Feb. 3, 2016) ("In short, there was a high probability that, if the Network rejected the Comcast affiliation agreement, Comcast would have entered into substantially the same agreement at the same rate after the plan's effective date . . . .").

The conclusion that the Teams' replacement value theory must turn on what Comcast actually would have done as of the relevant valuation date also follows from basic valuation principles. Because the value of an asset can vary over time, its valuation necessarily depends on the date as of which the valuation is being conducted. It is well settled that valuation is necessarily a forward-looking exercise, and events affecting value that transpire after, and were unknown as of, the date of the valuation are legally irrelevant. *See Ithaca Tr. Co. v. United States*, 279 U.S. 151, 155 (1929) ("Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it cannot be done."). As the Supreme Court explained long ago, "[T]he value of the thing to be taxed must be estimated as of the time when the act is done." *Id.*; *see also, e.g.*, *First Nat'l Bank of Kenosha v. United States*, 763 F.2d 891, 894 (7th Cir. 1985) ("[S]ubsequent events are not considered in fixing fair market value, except to the extent that they were reasonably foreseeable at the date of valuation . . . ."); Fishman, Pratt, & Morrison, *Standards of Value: Theory and Applications* 65 (2013) ("Since valuation is of a particular point in time, practitioners are required to reach their conclusions based on information that is known or knowable (or reasonably foreseeable) at the valuation date."). *See generally* Br. of Comcast Lender on Remand [ECF 1041] at 19-21 & nn.8-10 (collecting additional sources).

As the Court has recognized, this principle applies equally when valuation is measured based on a replacement cost methodology. *See, e.g.*, Aug. 14, 2018 Hr'g Tr. at 69:23-70:10 (noting that "it strikes me as pretty unfair to think that I'm going to consider subsequent events," either after there could have been a buyer of the asset or after there could have been replacement

value determinations, "instead of putting myself back in the shoes at the Confirmation Hearing").[4] Here, any replacement cost methodology would seek to value the Comcast Affiliation Agreement based on the cost to the Network to obtain an equivalent, replacement carriage agreement. The Comcast Affiliation Agreement, however, is unique; there was no equivalent, alternative way to obtain access to Comcast Cable's subscribers in or around the Houston market. Accordingly, the valuation question necessarily turns on whether Comcast itself would have entered into an equivalent deal with the New Network on the same or better economic terms. And, as with any valuation, that hypothetical question must be made as of a particular point in time, which the Court already has determined should be the effective date (adjusted backward, as necessary to the petition date). *See* Mem. Op. [ECF 1070] at 1, 11.

In that respect, valuation cannot be compared to the example of a DNA paternity test, which the Court raised during the December 20 Hearing. *See* Dec. 20, 2019 Hr'g Tr. at 23:13-24. Whether an individual is the biological father of a child does not depend on the date as of which the question is assessed; it is an objective fact that does not change. If a court were to rule on paternity using the scientific testing and methodologies available at a given point in time, and better or more accurate DNA tests were developed years later, it would make sense for the court to consider those newer tests to ensure that its earlier ruling was correct. Valuation, by contrast, "depends largely on more or less certain prophecies of the future," and a "value is no less real at that time if later the prophecy turns out false than when it comes out true." *Ithaca Tr.*, 279 U.S. at 155. The question here (accepting, for now, the premise that the "replacement cost" of the asset is relevant) is not whether Comcast would have decided to carry the New Network, at the same or similar terms, based on "perfect" information about the future consequences of deciding whether or not to do so, but rather, whether Comcast would have made such a decision based on

[4] The Astros' Counsel agreed with the Court in that regard. *See* Aug. 14, 2018 Hr'g Tr. at 77:3-10.

the information available as of the date on which the Comcast Affiliation Agreement was hypothetically rejected—i.e., as of the effective date.

Accordingly, the Court must look to how Comcast actually would have approached the issue of whether and on what terms to carry the New Network on or around the effective date. To the extent Comcast's thinking about carriage decisions have evolved since then, to include new methodologies that did not exist as of the effective date (or used data that were not available at that time), such information could not have informed Comcast's thinking at the time and, thus, is not relevant to the issue before the Court now.

II. COMCAST HAD NOT YET BEGUN TO PERFORM DROP ANALYSES AS OF LATE 2014, NOR WAS THE DATA REQUIRED FOR SUCH ANALYSES AVAILABLE IN HOUSTON AT THAT TIME

As noted above, the discovery the Teams seek concerns drop analyses for certain other regional sports networks, and related emails, for the period January 1, 2017 through the present. During the December 20 Hearing, counsel for the Astros argued that even if the outcomes of such analyses in 2017 (or later) "may not be particularly germane to a hypothetical analysis of [the Network] back in 2014, the process, the way of looking at the data, . . . certainly may be." Dec. 20, 2019 Hr'g Tr. at 20:23-21:4. Yet, as noted, that could only be true if Comcast would have employed such analyses (i.e., looked at the available data the same way) in the fall of 2014, prior to the November effective date, when it (hypothetically) would have been asked to consider whether and on what terms to carry the New Network. As explained below, however, Comcast did not in fact perform such analyses at that time; indeed, the data required for such analyses was not then available in the Houston market. Therefore, such analyses can provide no insight into how Comcast would have looked at the issue at the time and, thus, are irrelevant.

Drop analyses are a type of analysis performed by Comcast's Enterprise Business Intelligence Group ("EBI"), which provides business intelligence and analytic support to various

business and functional groups throughout Comcast Cable. *See* Decl. of Matthew Hull, dated Jan. 17, 2019 ("Hull Decl.") ¶¶ 3-4.[5] The purpose of drop analyses are to provide a conservative estimate of the number of customers that potentially would stop subscribing to Comcast Cable, along with the expected financial impact of losing such customers, if Comcast Cable decided to "drop" (i.e., stop carrying) a given network. *Id.* ¶ 5. The Content Acquisition Group, which is the group tasked with negotiating and deciding whether or not to enter into or renew carriage agreements, can then compare such metrics with the total cost of carrying the particular network, as a data point in deciding whether and on what terms to provide carriage. *Id.* ¶¶ 4-5.

Importantly, however, the first drop analyses for any network were not performed until 2015—months after the effective date. *Id.* ¶¶ 4, 6. Prior to that time, Comcast Cable had no way to analytically measure how many customers potentially would stop subscribing if the customers lost access to a particular channel. *Id.* ¶ 6. Moreover, even if Comcast had wanted to run such an analysis in the fall of 2014, it would have been unable to do so because sufficient customer viewership data—a required input into any drop analysis, collected through Comcast Cable's current-generation set-top boxes—did not exist in the Houston market (or any other market) at that time. *See id.* ¶¶ 9-10. Accordingly, Comcast could not, and would not, have relied on a drop analysis to inform its decision-making in or around fall 2014 in terms of whether or on what terms to carry the New Network in a hypothetical world in which the Network had rejected (rather than assumed) the Comcast Affiliation Agreement.

That conclusion renders all of the additional discovery the Teams seek irrelevant. That includes (1) any actual drop analyses performed for any other regional sports network between

[5] During the December 20 Hearing, the Court noted that the parties would need to figure out a way to get to the bottom of whether Comcast started performing drop analyses prior to 2015. *See* Dec. 20, 2019 Hr'g Tr. at 24:7-14. Comcast submits that the attached Declaration from Matthew Hull, Senior Vice President, EBI, Comcast Cable, is sufficient to meet Comcast's evidentiary burden in that regard. If the Court believes, however, that a short deposition of Mr. Hull is necessary or appropriate to further test the answer to that narrow question, Comcast will of course make Mr. Hull available.

January 1, 2017 and the present; (2) related emails from the custodians for which Comcast has agreed to produce documents, consisting of three members of the Content Acquisition Group (Greg Rigdon, Jennifer Gaiski and Meghan Squire); and (3) related emails from two members of EBI, Ed Brassel and Matthew Hull. That is particularly true, given that Comcast has already searched for and produced any drop analyses for regional sports networks through December 31, 2016—more than two years after the effective date—that could be located in a reasonable search, along with related emails. In other words, despite its view that any drop analyses—all of which post-date the effective date—are irrelevant, Comcast nonetheless already voluntarily provided over two years' worth of such analyses. Accordingly, even assuming for the sake of argument that such analyses had any relevance here (which they do not), the production of two years' worth of information is more than sufficient; any further production would not be proportional to the needs of the case.

CONCLUSION

For these reasons, and for the reasons in Comcast's Opposition to the Motion [ECF 1093], the information sought in the Motion is irrelevant to the issues before the Court, and the Motion should be denied.

Dated: January 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all counsel via the Court's ECF system on January 17, 2020.

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