IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

AT&T SPORTSNET SOUTHWEST'S OPPOSITION
TO THE TEAMS' MOTION TO COMPEL

AT&T SportsNet Southwest ("AT&T") hereby submits this opposition to the motion of Houston Astros, LLC and Rocket Ball, Ltd. (together, the "Teams") for entry of an order compelling AT&T to produce documents purportedly responsive to the Teams' Subpoena to AT&T Requesting Production of Documents (the "AT&T Motion" or "AT&T Mot.") [ECF 1086]. In support of its opposition and statement in response, AT&T respectfully states the following:

INTRODUCTION

1. AT&T worked in good faith with the Teams to try to reach agreement on the scope of a potential document production responsive to the Teams' subpoena that, while still overbroad and seeking irrelevant documents, would not have been unduly burdensome.[1] In those discussions,

[1] Notwithstanding the fact that the subpoena was served on AT&T after the discovery deadline for doing so (*see* AT&T's Responses and Objections to the Petitioning Creditors' Subpoena Requesting the Production of Documents at ¶ 1 (noting that the Subpoena was untimely because Petitioning Creditors were required to "serve written discovery requests on parties and third parties" no later than October 8, 2019 and AT&T was served on October 9, 2019, *see* Dkt. No. 1078, Stipulation Regarding Valuation Hearing at 1 (Oct. 2, 2019), rather than moving to quash the subpoena on procedural grounds, AT&T attempted to engage in good faith negotiations with the Teams to limit the scope of the subpoena, which efforts were, as described *infra*, unsuccessful.

AT&T made it clear that it was willing to make that limited production if the Teams were willing to withdraw all other outstanding requests for documents in their subpoena. The Teams, however, refused to do so and instead moved to compel production of two categories of documents — AT&T's projections of subscriber counts on a going forward basis and information regarding carriage agreements that AT&T has entered into since the effective date. Both categories seek only documents that post-date the effective date of the Plan and cannot be relevant to the issue to be decided on remand -- that is, the Affiliation Agreement's fair value to the Network as of the effective date.[2] Accordingly, the Motion should be denied.

BACKGROUND

Teams' Subpoena to AT&T

2. On October 8, 2019, the Teams served a Subpoena requesting Production of Documents from AT&T, seeking a wide range of documents and other information. *See* AT&T Mot. Ex. 1 [ECF 1086-1].[3] The Teams' subpoena to AT&T sought 11 separate categories of documents, almost all of which related to the operation of the AT&T network after the effective date, including operating reports and financial projections. Although not specifically demanded in the requests, during the meet and confer discussions, the Teams also requested any new carriage agreements that AT&T had entered into since the 2014 confirmation. *See* AT&T Mot. Ex 2. [ECF 1086-2], Nov. 20 email.

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[2] The Old Network refers to Houston Regional Sports Network L.P.. d/b/a Comcast SportsNet Houston.

[3] The Teams also served written discovery requests on Comcast, seeking a wide range of documents and other information. *See* Mot. Ex. 1 [ECF 1085-1]. The Teams' document requests to Comcast sought 50 separate categories of documents, many of which were entirely unrelated to the Old Network, including requests for documents about Comcast's carriage decisions with respect to *other* regional sports networks or that were otherwise unrelated to the issues currently before the Court. Notably, all of the requests called for documents dated well after the effective date, defining the so-called "Relevant Time Period" as October 1, 2014 through the date of production. *Id.* at 1.

3. On October 22, 2019, AT&T served responses and objections to the Teams' subpoena, objecting to the document requests on the basis that they did not seek evidence that was relevant to the claims or defenses of either party including insofar as they sought information that was not available or known as of the effective date.

4. Over the next several weeks, AT&T met and conferred in good faith with the Teams regarding the Teams' requests. During these discussions, the Teams asserted that the documents sought were relevant to the DCF-based methodology previously adopted by both parties and the Court, but took the position that such assumptions could be updated to account, with hindsight, for actual events since the 2014 confirmation hearing. AT&T Mot. Ex 2. (ECF 1086-2), Nov. 13, Nov. 20, Nov. 22, 2019 emails. In response, AT&T explained that the documents sought by the Teams were irrelevant to a DCF analysis, since the information in the documents post-dated the confirmation date and reflected current management's view of AT&T's future performance. AT&T Mot. Ex 2. (ECF 1086-2), Nov. 22, 2019 email. AT&T also explained that such information, including its own projections and new carriage agreements contained highly sensitive commercial information. *See* AT&T Mot. (ECF 1086-2), Nov. 20, Dec. 6, 2019 emails.

5. During the course of the parties' discussions, as a proposed compromise to avoid motion practice and without prejudice to its various objections, AT&T offered to produce on an attorneys' eyes-only basis monthly statements of operations. AT&T Mot. (ECF 1086-2), Nov. 20, 2019 email. AT&T made clear that its willingness to produce the monthly statements of operations was conditioned on the Teams' agreement to withdraw all of their remaining requests in the Subpoena. AT&T Mot. (ECF 1086-2), Nov. 20, 2019 email.

6. The Teams, however, pressed for additional documents; specifically, (1) information concerning carriage agreements AT&T has entered into since confirmation; and (2) AT&T's projections of subscriber counts going forward. AT&T Mot. (ECF 1086-2), Nov. 22,

2019 email. AT&T disputed the relevance of the additional documents because the information contained in those documents was generated after the Confirmation, was neither known nor foreseeably known as of the confirmation, and therefore could not be relevant to a DCF analysis. Additionally, the documents sought by the Teams contained highly sensitive commercial information.

Motions To Compel Documents

7. The Teams filed Motions to Compel against both AT&T and Comcast. As to AT&T, the Teams seek two categories of documents: AT&T's projection of subscriber counts going forward and information regarding carriage agreements that AT&T entered into since confirmation. As to Comcast, the Teams seek production of: (1) documents and information concerning Comcast's actual and projected subscriber counts receiving AT&T's network since the effective date and in the future, (2) documents and information concerning Comcast's assessment of carrying the Old Network or AT&T's network and (3) documents or information concerning Comcast's drop analyses of whether to continue or drop carriage of any RSN. Comcast Motion at 2-3.

8. The Teams argue that the documents and information being sought from Comcast are relevant only to a replacement value theory. Comcast Motion at 2. By contrast, regarding the documents sought from AT&T, the Teams <u>do not</u> argue that they are relevant to a replacement value analysis, but instead assert that they are relevant only to a DCF analysis. AT&T Motion at ¶ 1. As described below, all of the documents sought from AT&T post-date the effective date of the Plan and cannot be relevant to the Affiliation Agreement's fair value to the Network as of the effective date.

Prior Proceedings

9. Following the Fifth Circuit's remand of this case "for a re-valuation of [Comcast Lender's] collateral" (ECF 1017 at 16), this Court entered an order, dated November 2, 2018 (the "November 2, 2018 Order"), reopening the evidentiary record in this case (ECF 1054). As the Court made clear in an accompanying memorandum opinion to the November 2, 2018 Order, its decision to reopen the evidentiary record was a narrow one and the Court did not address the relevance or admissibility of the evidence the Teams wanted to introduce in that opinion, noting that the "scope of the evidentiary record need not be decided at the outset" but that, "[t]o be clear, Comcast will be free to argue whether evidence, when offered, is relevant to the valuation issue." (ECF 1053. at 14).

10. During an earlier hearing on August 14, 2018, however, the Court expressed its view that it would be inappropriate to consider evidence of events that post-dated the prior confirmation hearing and effective date. For example, the Court observed that "looking from today at historic events that occurred after there could have been a buyer of this asset or after there could have been, for example, replacement value determinations, I don't think that the winner or the loser of litigation ought to depend on the length of time it takes for an appellate court to review matters. And it strikes me as pretty unfair to think that I'm going to consider subsequent events instead of putting myself back in the shoes at the Confirmation Hearing." Aug. 14, 2018 Hr'g Tr. at 69:23-70:10; *see also, e.g., id.* at 70:16-20 ("[U]sing subsequent events and then having the hearing to value it really – in light of today's events, really does strike me as inconsistent with any case that I'm aware of . . . ."). The Court further noted that while evidence of post-effective date events might be relevant if the question to be answered on remand concerned the value of losses to Comcast, *id.* at 71:4-10, "if the right measure is what was the market on the effective date, then I can't imagine why I would consider those post-events," *id.* at 71:16-18; *see also id.* at 74:20-75:6 (further explaining distinction). Indeed, counsel for the Astros agreed, conceding

that "[i]f that [i.e., market value] is the only measure of value that you can consider, it'd be different to look at subsequent events. . . . I don't really see how you get there, I agree with that." *Id.* at 75:16-76:1.

11. In a subsequent Memorandum Opinion, dated July 31, 2019, this Court held that the question to be answered on remand is: "Was the Affiliation Agreement between Comcast and the [Old] Network of inconsequential value as of the petition date, based on the proposed use or disposition of the Affiliation Agreement under the confirmed Plan?" (ECF 1070 at 1). The Court further clarified that the answer to that question would be based on the "fair market value of the Affiliation Agreement to the Reorganized Debtor on the effective date," adjusted, as necessary to determine "the fair market value of the Affiliation Agreement to the Old Network as of the petition date." *Id.* at 11. Accordingly, the Court made clear that the value of Comcast's collateral would not be measured based on Comcast's losses, but rather, on fair market value—which, as the Court explained (and as the Astros' counsel conceded) at the August 2018 hearing, renders any consideration of post-effective date events inappropriate.

December 20, 2019 Status Conference

12. At the status conference held on December 20, 2019, the Court heard argument from counsel as to relevance of the documents sought by the Teams' motions to compel. In response to argument from Comcast's counsel about the relevance of post-confirmation drop analyses, Comcast's counsel noted that "just going back to the August 2018 hearing, Your Honor also recognized that the issue of the irrelevance of post-effective date information applied equally to DCF analysis as well as a replacement value analysis," to which this Court responded "Right, in my mind, I was thinking of data, not methodology." Dec. 20, 2019 Hr'g Tr. at 17:13-20. Likewise in response to argument from AT&T's counsel regarding the irrelevance of AT&T's projections from the present date going forward, this Court responded: "So, in general, I don't

understand how an actual 2018 or any year after the confirmation hearing would be directly relevant in terms of plucking it into a DCF analysis. I just can't understand how we could have valued it with that kind of crystal ball." *Id.* at 27:6-10.

13. While the Court noted that documents that post-dated the confirmation date might be relevant to cross-examination of the parties' damages experts if there was a challenge to the methodology of determining a forecast, it further observed that it was "inclined to defer this decision until we see what gaps there are in the expert reports. Because if the two experts independently use the same type of methodologies, then I don't know why this should be relevant. So I am going to allow everybody to file some post-briefs, but I'm a bit inclined to postpone the AT&T discovery until after experts produced their reports with the methodologies to see if it then becomes relevant because of different assumptions that are made." *Id.* at 28:3-11.

ARGUMENT

14. Although the scope of discovery is generally broad, "the legal tenet that relevancy in the discovery context is broader than in the context of admissibility should not be misapplied so as to allow fishing expeditions." *Millennium Mktg. Grp., LLC v. United States*, 2008 WL 4461999, at *4 (S.D. Tex. Sept. 29, 2008) (citation omitted). On a motion to compel, "[t]he moving party bears the burden of showing that the materials and information sought are 'relevant to any party's claim or defense and proportional to the needs of the case.'" *Baker Hughes Oilfield Operations LLC v. Packers Plus Energy Servs. Inc.*, 2018 WL 1172513, at *4 (S.D. Tex. Mar. 6, 2018) (quoting Fed. R. Civ. P 26(b)(1)). "Once the moving party establishes that the materials requested are within the scope of permissible discovery, the burden shifts to the party resisting discovery to show why the discovery is irrelevant, overly broad, or unduly burdensome or oppressive, and thus should not be permitted." *Marin v. Gilberg*, 2009 WL 426061, at *2 (S.D. Tex. Feb. 19, 2009).

A. The Teams' Request for AT&T's Current Projections of Subscriber Counts and Carriage Agreements Entered Into Since Confirmation Should Be Denied

15. The Teams ask this Court to order AT&T to produce: (1) information concerning carriage agreements AT&T has entered into since confirmation; and (2) AT&T's projections of subscriber counts going forward. Those requests are irrelevant to a DCF analysis to be conducted as of the effective date, and seek highly confidential and proprietary information. Accordingly, those requests should be denied.

16. As noted above, this Court repeatedly observed at the August 31, 2018 hearing and at the December 20, 2019 status conference that if the question to be answered on remand is about the fair market value of Comcast Lender's collateral—as the Court subsequently determined to be the case—then evidence about post-effective date events would be irrelevant. *See supra* ¶¶ 9-12. That conclusion is entirely consistent with cases setting forth the well-settled rule that "subsequent events are not considered in fixing fair market value, except to the extent that they were reasonably foreseeable at the date of valuation," *First Nat'l Bank of Kenosha v. United States*, 763 F.2d 891, 894 (7th Cir. 1985); *In re Hannover Corp.*, 310 F.3d 796, 802 (5th Cir. 2002) (explaining, in determining whether options provided to debtor had "value" for purposes of section 548(c), that "permitting the exercise of judgment in hindsight [would] conflict with basic economics and with Fifth Circuit caselaw"); *In re Vecchitto*, 235 B.R. 231, 237 (Bankr. D. Conn. 1999) (explaining, in valuing stock held by debtor, that the "fair market value of the stock on June 14, 1993 is the price a buyer would be willing to pay to acquire it on that date; it is, therefore, properly determined prospectively as of that date, without the benefit of later hindsight"), *aff'd*, 229 F.3d 1136 (2d Cir. 2000). Furthermore, authoritative treatises on valuation confirm this principle. *See* Laro & Pratt, *Business Valuation and Taxes* 17 (2005) ("Generally, since valuation is determined as of a specific date, events subsequent ... should not affect the value of the property"); 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.").[4]

17. Courts have applied this bedrock principle in other contexts, such as, for example in assessing the debtor's solvency. *See, e.g., Paloian v. LaSalle Bank, N.A.*, 619 F.3d 688, 693 (7th Cir. 2010) (liability should have been calculated based on expected amount as of valuation date, not actual amount determined later); *In re R.M.L., Inc.*, 92 F.3d 139, 155 (3d Cir. 1996) ("The use of hindsight to evaluate a debtor's financial condition for purposes of the Code's 'insolvency' element has been criticized by courts and commentators alike." (citing cases)); *In re WRT Energy Corp.*, 282 B.R. 343, 383 (W.D. La. 2001) (in determining value of notes in 1994, court could not consider decline in value of underlying assets in fall of 1995 that was neither anticipated nor foreseeable as of year-end 1994); *MFS/Sun Life Trust v. Van Dusen Airport Services*, 910 F. Supp. 913, 939 (S.D.N.Y 1995) (relying on projections for discounted cash flow analysis that were reasonable when made even though "[w]ith the acuity that comes from hindsight, we know that the forecasts were inaccurate").[5]

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[4] Courts have recognized Shannon Pratt's treatises as leading authorities on business valuation. *See, e.g., U.S. Bank N.A. v. Verizon Communications Inc.*, 2013 WL 230329, at *8 (N.D. Tex. Jan. 22, 2013), *aff'd*, 761 F.3d 409 (5th Cir. 2014); *In re Doctors Hospital of Hyde Park, Inc.*, 507 B.R. 558, 641 (Bankr. N.D. Ill. 2013); *In re Commercial Financial Services, Inc.*, 2005 WL 6499290, at *11 (Bankr. N.D. Okla. Sept. 14, 2005); *In re Med Diversified, Inc.*, 334 B.R. 89, 98 (Bankr. E.D.N.Y. 2005).

[5] *See also, Succession of McCord v. C.I.R.*, 461 F.3d 614, 626 (5th Cir. 2006) ("[T]he [Tax Court] violated the firmly-established maxim that a gift is valued as of the date that it is complete; the flip side of that maxim is that subsequent occurrences are off limits."); *Cayuga Indian Nation of New York v. Pataki*, 83 F. Supp. 2d 318, 326 (N.D.N.Y. 2000) (excluding expert testimony on fair market value as unreliable because it was based in part on subsequent events after valuation date); *Fehrs v. United States*, 620 F.2d 255, 264 n.6 (Ct. Cl. 1980) (expert erred in valuing stock as of transfer date by considering earnings after transfer date).

18. Here, that principle bars the Teams from using post-effective date information about AT&T's network to derive the value of the Affiliation Agreement to the Old Network. A valuation conducted for purposes of determining a secured creditor's rights under a plan of reorganization must be conducted, *and based only on information available*, at the confirmation hearing. Otherwise, a "wait-and-see approach would in effect do away with bankruptcy courts' obligation to determine value under § 506(a). *In re Heritage Highgate*, 679 F.3d 132, 142 (3d Cir. 2012)/ That result is at odds with the Bankruptcy Code. In § 506(a), Congress expressly provided for the division of allowed claims supported by liens into secured and unsecured portions during the reorganization, before the plan's success or failure is clear." *Id.*; *see also In re Terrestar Corp.*, 2015 WL 5719469, at *7 n.2 (Bankr. S.D.N.Y. Sept. 29, 2015) ("it would be improper and incredibly inefficient for courts to reconsider cases based on information about valuation provided after the fact"); *In re Patterson*, 375 B.R. 135, 142–143 (Bankr. E.D. Pa. 2007) (in valuing under section 506(a) collateral of secured creditor who received notice of chapter 13 case *after* confirmation of plan, declining to rely on debtor's appraiser because "I simply am not convinced that Edelson's appraisal opinion was not inflated to some extent by hindsight information"); *cf. Citibank, N.A. v. Baer*, 651 F.2d 1341, 1348 (10th Cir. 1980) (affirming finding that plan was "fair and equitable" prior to creditor vote, as required by Bankruptcy Act, notwithstanding substantial increase in debtor's value before final confirmation; "We will not, with the benefit of hindsight, independently determine whether the plan has in fact resulted in an undue benefit to the senior debt holders. We must view the decision in light of the facts, circumstances, apprehensions and uncertainties existing at the time of the order.").

19. The documents that the Teams are seeking to compel — AT&T's current projections of its network's subscriber counts and post-confirmation carriage agreements that AT&T entered into — were not available to a hypothetical buyer of the Network in October 2014.

Those documents are entirely irrelevant to the value of the Network as of emergence. All information relevant to the value of the reorganized Network that was available in October 2014 was presented to the Court at the valuation hearing, and the Court determined the value of the reorganized Network as of that time, on that basis. The AT&T network's post-emergence financial performance is not the type of subsequent evidence that reflects the value of the Network as of the valuation date. Because such post-emergence evidence is irrelevant as a matter of law, the Court should deny the Motion to Compel.

20. The Motion likewise fails to explain why the specific documents at issue — current projections of AT&T's subscriber counts going forward and carriage agreements that AT&T entered into since confirmation fall outside this well-settled rule. Nor could it. Information concerning carriage agreements that post-date the effective date have no bearing on a DCF analysis that was supposed to be performed as of the effective date. Likewise, AT&T's current projections of subscriber counts going forward; that is, projections done in 2020 have no bearing on a DCF analysis that was to be performed as of 2014. Allowing the Teams to use such post-effective date information to construct their own projections as of the effective date would allow them to use information that was not known or reasonably foreseeable as of December 2014 and would be valuing the Affiliation Agreement by hindsight.

21. While the Court indicated at the December 20, 2019 status conference that evidence of post-effective date information might be relevant to cross-examination of the parties' experts if there was disagreement between the experts as to methodology (*see* Dec. 20 Hr'g Tr. at 27:21-28:2), allowing use of information that was neither known nor reasonably foreseeable as of the effective date would likewise violate the principle that subsequent events cannot be considered if they were not known or were not reasonably foreseeable. For example, if the parties' EBITDA growth projections in the DCF analyses differ, with one expert projecting a higher rate of EBITDA

growth than the other expert and it turns out that the actual EBITDA growth rate in the post-confirmation period was consistent with a higher EBITDA growth assumption, it would nonetheless be improper for the Court to allow the expert to be cross-examined by actual results if those results were not known or not reasonably foreseeable as of the effective date. On the other hand, if there were contemporaneous EBITDA growth projections of the Old Network prepared by analysts as of the effective date, that information could potentially be relevant to cross-examination of the experts.

22. Given the obvious irrelevance of the documents sought by the Teams, and the highly confidential and proprietary information contained in those documents, there is no need to subject AT&T to any potential business harm by requiring it to disclose that information to the Teams. With respect to any carriage agreements that AT&T has entered into post-confirmation, even if the Court believes that the information contained in those agreements might be relevant to cross-examination of the parties' experts as it relates to a 2014 DCF analysis, AT&T should be granted the opportunity to explore other ways that such information could be provided to the Teams while protecting the confidentiality of that information, rather than providing them with the underlying carriage agreements.

23. Accordingly, the Teams' motion to compel AT&T to produce: (1) information concerning carriage agreements AT&T has entered into since confirmation; and (2) AT&T's projections of subscriber counts going forward should be denied in its entirety.[6]

CONCLUSION

[6] In addition, AT&T's 2020 projections of subscriber counts going forward would not be a useful comparator for assessing actual results for years that pre-dated the 2020 projections and, therefore, would not assist this Court in assessing what weight should be given, for example, to the revenue projections in the years preceding 2020, in the parties' experts reports.

24. For these reasons, AT&T respectfully requests that the Court deny the Teams' motion to compel.

Dated: January 17, 2020

Respectfully submitted,

/s/ Jeffrey A. Fuisz

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2020, a true and correct copy of the foregoing Opposition to The Teams' Motion to Compel was served via ECF Noticing all parties receiving ECF Notices in these chapter 11 cases.

/s/ Michael Lynn
Michael Lynn