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

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| In re:<br>HOUSTON REGIONAL SPORTS NETWORK, L.P.,<br>Reorganized Debtor. | Chapter 11<br>Case No. 13-35998 |

**THE TEAMS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL DISCOVERY RESPONSES FROM AT&T SPORTSNET SOUTHWEST**

Pursuant to the Court's invitation at the status conference held in this matter on December 20, 2019, and in further support of *The Teams' Motion to Compel Discovery Responses from AT&T Sportsnet Southwest* (ECF No. 1086) (the "**Motion**"), Houston Astros, LLC and Rocket Ball, Ltd. (collectively, the "**Teams**") submit this brief addressing their entitlement to the production of certain commercial information of AT&T SportsNet Southwest (the "**Network**") post-dating November 17, 2014 (the "**Effective Date**")—the effective date of the chapter 11 plan confirmed in this matter.

## INTRODUCTION

This is a discovery dispute arising in the context of remand proceedings to re-value the carriage agreement between the Network and Comcast (the "**Affiliation Agreement**"). While, through the meet and confer process, the Network has agreed to produce a considerable amount of financial information that postdates the Effective Date, the Teams and the Network reached an impasse with respect to two categories of evidence: (1) the Network's current projections of subscriber counts (the "**Subscriber Projections**"); and (2) any new affiliation agreements (the "**New Affiliation Agreements**") between the Network and any multichannel video programming distributors ("**MPVDs**"). Mot., ¶ 4. The Network has not asserted that producing Subscriber

Projections or New Affiliation Agreements is burdensome, but rather has argued that such information is irrelevant.

The Network is wrong. Under the liberal relevance standard applicable in discovery, there can be little dispute that the Subscriber Projections and New Affiliation Agreements are relevant to the dispute here. Among other things, the information is relevant to assess the reasonableness and reliability of expert projections incorporated in to their valuation opinions. The Network should be compelled to produce its Subscriber Projections and New Affiliation Agreements now.

## BACKGROUND

The original trial to value the Affiliation Agreement took place in October of 2014. The re-valuation trial will take place this year. At the re-trial, the Court will determine the "fair market value of the Affiliation Agreement to the Reorganized Debtor" as of September 27, 2013—the petition date in the Network's bankruptcy case. (ECF 1070) at 10-11.

The Comcast Affiliation Agreement is not easily valued. It is a contract by the Network to provide, and by Comcast to carry, the Network's content—chiefly telecasts of certain Houston Rockets NBA basketball games and certain Houston Astros MLB baseball games. Only the Network has a license to produce telecasts of these games. Only Comcast has the right to provide cable television service within its Houston-area franchise. The Affiliation Agreement prohibits the parties to transfer their rights or obligations thereunder. Moreover, no other entity ***could*** perform the parties' respective obligations to the other. In short, the Affiliation Agreement is a unique asset.

At the 2014 trial, the Teams and Comcast presented expert testimony with respect to the value of the Affiliation Agreement. Given the challenges inherent in determining the market

value of this asset, each side's expert attempted to infer the Affiliation Agreement's value by indirect means. Both fundamentally employed the same two-step process. Step one was to ascertain the total enterprise value of the Network using a discounted projected cash flow analysis. Step two was to allocate that value among the Network's primary revenue generating assets—namely, the Affiliation Agreement and the Network's affiliation agreements with other MPVDs.

Each of these steps relied on projections about the Network's future business performance. While future expenses were reasonably predictable, future revenues were not. The Network was certain to have three material affiliation agreements—the Affiliation Agreement and new contracts with AT&T and DirecTV. No one knew whether the Network would enter into additional affiliation agreements in the future. Even as to these known affiliation agreements, future revenue was uncertain because Comcast and the other carriers pay the Network on a per-subscriber basis. Thus, future changes in the carriers' subscriber counts would change the Network's affiliate revenue.

The Teams' expert, Comcast's expert, and ultimately the Court addressed these uncertainties by making assumptions. Among other things, they made assumptions about if—and when—other carriers would agree to carry the Network's content. And they made assumptions about how much revenue the Network's various agreements would generate—based on assumed changes in subscriber levels and carriage rates—nearly twenty years into the future. The Teams' expert predicted no future carriage. Comcast's expert projected that the Network's new owners would promptly bring in substantial new carriage. The Court's valuation assumed a high likelihood of significant new carriage. Oct. 10, 2014 Hr'g Tr. 89:25-90:8.

Comcast appealed the Court's valuation and the Fifth Circuit remanded for a re-valuation. The Court reopened the evidentiary record and the Teams sought discovery, including from the Network. The Network objected to producing the Subscriber Projections and New Affiliation Agreements as "wholly irrelevant" to these proceedings because the information post-dates the original valuation trial.[1] Mot. at Ex. 2 (Dec. 6, 2012 email from J. Archer to M. Kilgarriff). The Network has made no particular claim that producing documents would be burdensome.

## ARGUMENT

There are only two requirements to make non-privileged information discoverable. First, it must be "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Second, "it must be proportional to the needs of the case." *Id.* Proportionality and relevance are related as the proportionality analysis requires consideration of, among other things, the benefits and burdens of production and the importance of the discovery to resolving the matter. *See, e.g.*, *Vaigasi v. Solow Mgmt. Corp.*, 2016 U.S. Dist. LEXIS 18460, at *42 (S.D.N.Y. Feb. 16, 2016) ("Proportionality and relevance are 'conjoined' concepts; the greater the relevance of the information in issue, the less likely its discovery will be found to be disproportionate."). Where, as here, there is little burden involved in producing the requested information, the focus is properly on relevance.

### A. The Requested Information Is Relevant

Relevance for the purposes of Rule 26(b) is not defined in the Federal Rules of Civil Procedure (the "**Civil Rules**"). For trial purposes, the Federal Rules of Evidence deem evidence relevant "if: (a) it has any tendency to make a fact or more less probable without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. As broad as

[1] Regardless of the outcome of this dispute, the Network should be compelled to produce the documents it agreed to produce in the November 20, 2019 email from Judith Archer which is attached to the Motion as Exhibit 2.

this standard is, the relevance standard for discovery purposes is broader still. *See, e.g.*, *Wyatt v. Kaplan*, 686 F.2d 276, 284 (5th Cir. 1982) ("[R]elevance is broadly defined in the context of discovery."); *Rangel v. Mascorro*, 274 F.R.D. 585, 590 (S.D. Tex. 2011) ("[T]he threshold for relevance at the discovery stage is lower than at the trial stage.").

In the discovery context, "[r]elevancy is broadly construed, and a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the claim or defense of any party." *Enron Corp. Savs. Plan v. Hewitt Assocs., L.L.C.*, 258 F.R.D. 149, 159 (S.D. Tex. 2009) (quotations omitted) (*citing Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 470 (N.D. Tex. 2005));[2] *see also Ries v. Ardinger* (*In re Adkins Supply, Inc.*), 555 B.R. 579, 589 (Bankr. N.D. Tex. 2016) (same).

That the Subscriber Projections and New Affiliation Agreements ***may possibly*** have a bearing on determining the value of the Affiliation Agreement is therefore sufficient to justify the relief requested in the Motion. That much is plainly the case here. First, the unique valuation challenge posed by the Affiliation Agreement warrants using all available information to reach the most informed conclusion. Second, evidence of actual performance has been found not only relevant but admissible to evaluate the reasonableness of expert projections in conducting historical valuations.

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[2] This remains true even after the 2015 amendments to Civil Rule 26(b). *See, e.g.*, *Rivera v. Robinson*, 2019 U.S. Dist. LEXIS 83827, at *7-8 (E.D. La. May 16, 2019) ("Relevance is still to be 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on' any party's claim or defense.") (quoting *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978)); *Fed. Nat'l Mortg. Ass'n v. SFR Invs. Pool 1, LLC*, Case No., 2016 U.S. Dist. LEXIS 23925, at *4 n.16 (D. Nev. Feb. 25, 2016) (finding the scope of relevance remains broad even after 2015 amendments); *Townsend v. Nestle Healthcare Nutrition, Corp.*, 2016 U.S. Dist. LEXIS 53918, at *9 (S.D. W. Va. Apr. 22, 2016) (internal quotations omitted) ("[I]t remains true that relevancy in discovery is broader than relevancy for purposes of admissibility at trial.").

**1. Subsequent Events Are Admissible as Direct Evidence of Value**

Bankruptcy courts may consider subsequent events in determining the historical value of an asset: "there is no policy reason why bankruptcy judges should not be allowed to consider subsequent events in valuing assets or determining liabilities." *In re Sierra Steel, Inc.*, 96 B.R. 275, 279 n.6 (9th Cir. B.A.P. 1988). At least one bankruptcy court in Texas has done so. *See Ind. Bell Tel. Co. v. Lovelady*, 2008 U.S. Dist. LEXIS 131600, at *17-19 (Bankr. W.D. Tex. March 5, 2008). In *Indiana Bell Telephone*, the bankruptcy court evaluated the debtor's solvency as of the date of an alleged constructive fraudulent transfer. *Id.* at *12. In determining solvency, the court was required to determine the value of three litigation claims against the debtor. *Id.* Notwithstanding that on the date of the transfer one of the claims had not been filed and none of the claims had been reduced to judgment, the court found that it was not bound to apply the probability based calculation that would necessarily have been employed on the transfer date. Rather, citing, *inter alia*, *Sierra Steel*, the court used the actual amount of the subsequent judgments to conclude that the debtor was insolvent as of the date of the transfer. *Id.* at *18; Table 1.

Likewise, when valuing a debtor's asset to determine its solvency as of a historical date, the Tenth Circuit has held that "courts may consider information subsequent to the transfer date if it tends to shed light on a fair and accurate assessment of the asset or liability as of the pertinent date." *Gillman v. Sci. Research Prods.* (*In re Mama D'Angelo*), 55 F.3d 552, 556 (10th Cir. 1995). There, the Tenth Circuit found that it was appropriate for the bankruptcy court to use current awareness of circumstances relating to the productivity of the debtor's assets that were in existence but may have not been known at the date of the historical valuation. *Id.*; *cf. Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 698 (1933) (reference to

post-valuation date performance of patent "is not to charge the offender with elements of value non-existent at the time of his offense [but] to bring out and expose to light the elements of value that were there from the beginning").

Further, where, as here, the valuation of a unique asset is at issue, courts will look to subsequent events to determine historical value. In *Sinclair*, the Supreme Court endorsed reference to subsequent events to value a patent as of a historical date. *Sinclair*, like this matter, was a discovery dispute. At issue was whether the plaintiff, inventor of a petroleum cracking device, could obtain discovery from the defendant, alleged misappropriator of the invention, concerning the defendant's commercial use of the invention subsequent to its misappropriation to prove damages.

The Court first observed that valuing the patent posed a challenge because it was "a thing unique" for which "no contemporaneous sales to express the market value" did or could exist. *Id.* at 697. The Court continued that the absence of market value, however, could not excuse liability for damages. Accordingly, it instructed that "the law [must] make the best appraisal it can, summoning to its service whatever aids it can command." *Id.* Where the valuation is conducted before the effects of the misappropriation are known, these "aids" are ordinarily limited to the testimony of experts. But,

> if years have gone by before the evidence is offered[, e]xperience is then available to correct an uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within.

*Id.* at 698. The Court concluded by reiterating that "imagining a forced sale, and then accepting as a measure its probable results" is not an appropriate value measure for assets for which no market exists. *Id.* at 699.

*Sinclair* of course involved valuation as the measure of damages in contrast to a straight asset valuation exercise. However, in *Sinclair*, the Court was confronted with the same challenge faced by this Court—how to value a unique asset. Simulating the knowledge of market participants as of the Effective Date to value the Affiliation Agreement as of the Petition Date makes no more sense here than asking how the market would have valued the experimental invention in *Sinclair*. To ignore the facts known about the asset's earning potential at the date of trial would needlessly layer fiction upon fiction, and lead to the unsatisfying result of a conclusion demonstrably at odds with reality. With a unique asset such as the Affiliation Agreement, the Court should "make the best appraisal that it can, summoning to its service whatever aids it can command." Like in *Sinclair*, this includes direct evidence of the Network's post-Effective Date performance.

Again, this is a discovery dispute and it is not necessary for the Court to decide at this juncture what subsequent event information, such as any New Affiliation Agreements and the Subscriber Projections, may be admissible at trial. It is sufficient for the purposes of the Motion only that the Subscriber Projections and New Affiliation Agreements ***may possibly*** have a bearing on determining the value of the Affiliation Agreement. This standard is met.

**2. Subsequent Events Are Relevant in Assessing the Reasonableness of Expert Projections**

Even where events subsequent to the measuring date are not considered as direct evidence of value, such events have long been used to assess the reasonableness of projections as of the measuring date. *See VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 631 (3d Cir. 2007) ("A company's actual subsequent performance is something to consider when determining *ex*

*post* the reasonableness of a valuation . . . .") (citing *Moody v. Sec. Pac. Bus. Credit*, 971 F.2d 1056, 1074 (3d Cir. 1992)).[3]

The relevance of subsequent events to assessing expert reliability has long been recognized. For example, *Couzens v. Commissioner*, 11 B.T.A. 1040 (1928), concerned a review of the IRS's 1925 valuation of stock in Ford Motor Company as of 1913. On appeal to the Board of Tax Appeals, a host of witnesses offered competing views of the fair market value of the stock. *Id.* at 1064-65. Their "diversity of reasoning" yielded a "conflict of opinion" that the Board was left to reconcile. *Id.* at 1065. As part of its analysis, the Board admitted post-measuring date evidence over the objection of the IRS. The Board agreed with the IRS that value as of 1913 was "not to be judged by subsequent events." *Id.* Rather, the focus of its inquiry was on "the reasonable expectations entertained on that date." Nevertheless, the Board found that it was proper to consider evidence of events after the measuring date "to establish both that the expectations were entertained [on that date] and also that such expectations were reasonable and intelligent." *Id.* When presented with post-1913 evidence at trial, the Board erred on the side of caution and admitted it wholesale, leaving to later deliberation what weight, if any, should be placed on any particular piece. *Id.* at 1166.

The Second Circuit followed a similar approach to *Couzens* in *United States v. Brooklyn Union Gas Co.*, 168 F.2d 391 (2d Cir. 1948), where it reviewed a fair market value analysis for takings purposes. At issue was the United States Navy's 1941 taking of 25 acres to expand its

[3] *See also Georgia-Pac. Corp. v. United States*, 640 F.2d 328, 226 Ct. Cl. 95, 108 n.5, 130, 133, 145 (1980) (referring to subsequent events to reconcile competing expert views on what a hypothetical reasonable buyer and seller of timberland as of 1968 taking date would have considered in negotiating hypothetical sale); *Schuh Trading Co. v. Comm'r*, 95 F.2d 404, 412 (7th Cir. 1938) ("As we have shown, evidence as to subsequent events is material in testing the propriety of the valuation . . . .").

Brooklyn shipyard. This taking included infrastructure installed by the local gas and electric franchise holders.

By 1946, when the district court conducted a trial on the market value of the utilities' infrastructure as of 1941, evidence showed that the utilities were making more money serving the Navy than they had serving their old customers that previously occupied the property. While the district court admitted this fact into evidence, it took the position that events subsequent to the valuation date were irrelevant to the 1941 value and awarded compensation to the utilities for the taking of their infrastructure. The United States appealed, contending that no compensation was due the utilities where post-taking evidence showed the taking increased their sales.

The Second Circuit began its analysis by addressing the difficulty in valuing an asset for which no market exists. It accepted that, without market sales data, it was permissible to infer value by reference to the "present value of clearly to-be-expected future earnings," albeit "cautiously in [the absence] of other significant proof and under circumstances where it has distinct probative value." *Id.* at 395, 396. Consistent with this cautious approach, the court stressed that "care [must be] taken to reject speculative values." *Id.* at 396. It then directed the use of actual values to determine which projected values were speculative.

With the utilities' prospective earnings so central to valuing their lost infrastructure, the Second Circuit asked whether historical projections "may be checked up by the actualities as they have happened." *Id.* at 397. It concluded they must be, given the alternative of knowingly relying on information at odds with reality:

> It would seem an eerie conclusion that a court must resort to guess, closing its eyes to reality, when its decision must actually be formulated after the true facts have become available. We think the evidence admissible not as the standard of value in itself, but for its bearing upon the prospective values at the time of taking.

*Id.* The Second Circuit found it particularly appropriate to review actual usage where the parties all reasonably contemplated some usage by the Navy's shipyard: "There were clear grounds for expecting some development of the kind that actually happened, and evidence of such actual happening is useful to support or check the assumed prospects." *Id.*

Like the infrastructure in the fraction of the utilities' franchise zone taken in *Brooklyn Union Gas*, there is and can be no market for the Affiliation Agreement as a standalone asset. Accordingly, the parties must resort to indirect means of inferring what value, if any, the Affiliation Agreement had to the Network as of the Petition Date. At the original trial, the parties' respective experts projected future earnings of the Network and then allocated a portion of those projected earnings to the Affiliation Agreement as a proxy for the Affiliation Agreement's value. The experts each assumed that the Network would attempt to sell its content to MVPDs in the Houston area through New Affiliation Agreements. At the retrial, the Teams intend to employ this same methodology, among others, to calculate the value of the Affiliation Agreement as of the Petition Date.

Just like in *Brooklyn Union Gas*, the Network's actual performance after the measuring date—from 2014 through the date of the 2020 trial—will be relevant at least to assessing the reasonableness of expert projections, including as to assumptions regarding any new affiliation agreements and the appropriate subscriber counts for calculating affiliate revenues. Where the Teams' original expert projected that the Network would not enter into any New Affiliation Agreements, Comcast's original expert found it highly probable that the Network ***would***, including with Dish Network, Suddenlink, and many other MVPDs serving the Houston area. Similarly, both sides' original experts accepted the Network's projections of subscriber counts, which may or may not be reasonable.

Now, evidence of the Network's actual performance is available, including that sought by the Motion. The terms of any New Affiliation Agreements will reflect what success the Network has had in selling its content to MPVDs. And the actual subscriber counts since the original valuation trial, and the Network's current Subscriber Projections, will reflect the most current and accurate information for assessing the reasonableness of any projections in an updated cash flow projection. Even if not direct evidence of value as of the Petition Date, this information is undoubtedly a useful metric to assess expert prognostications. *See VFB*, 482 F.3d at 631 ("A company's actual subsequent performance is something to consider when determining *ex post* the reasonableness of a valuation . . . ."); *see also Georgia-Pac. Corp. v. United States*, 640 F.2d 328, 226 Ct. Cl. 95, 108 n.5, 130, 133, 145 (1980) (referring to subsequent events to reconcile competing expert views on what a hypothetical reasonable buyer and seller of timberland as of 1968 taking date would have considered in negotiating hypothetical sale); *Schuh Trading Co. v. Comm'r*, 95 F.2d 404, 412 (7th Cir. 1938) ("As we have shown, evidence as to subsequent events is material in testing the propriety of the valuation . . . .").

For example, if an expert correctly predicts the future behavior vis-à-vis the Network of every other MPVD serving the greater Houston market, that would tend to buttress the expert's credibility. *See Int'l Cards Co. v. Mastercard Int'l, Inc.*, 2016 U.S. Dist. 165225, at *19-20 (S.D.N.Y. Nov. 29, 2016) (cash flow projections attained sufficient indicia of reliability where "there was no gross mismatch" between projections and actual performance). Likewise, it would tend to show the validity or invalidity of AT&T's projections that served as a starting point for the parties' original experts.[4] Actual performance is properly used to review business projections, which "tend to be optimistic." *Moody*, 971 F.2d at 1073.

[4] To the extent the Network argues that post-valuation date information should not be produced or considered because such information was not known or foreseeable, it misses the

Finally, while the authorities cited herein all show that evidence of post-measuring date events can be admissible in a historical valuation trial, the question at this juncture remains only one of relevance for discoverability. As to that issue, the information the Teams seek in their Motion is plainly discoverable.

**B. The Network Has Not Asserted Burden**

The Network has not asserted that there would be any material burden in gathering and producing any New Affiliation Agreements or Subscriber Projections. The Teams believe that these categories comprise no more than a handful of documents. Absent an articulated burden supported by specific facts, any objection based on burden must fail. *See, e.g.*, *Nasufi v. King Cable, Inc.*, 2017 U.S. Dist. LEXIS 123088, at *19 (N.D. Tex. Aug. 4, 2017).

The Network has expressed concerns about confidentiality of commercially sensitive information reflected in any New Affiliation Agreements and Subscriber Projections. As noted in the Motion, the Teams stand ready to allay the Network's reasonable confidentiality concerns through appropriate accommodations.

**C. The Court Should Order Immediate Production**

At the status conference on December 20, 2019, the Court suggested the possibility of deferring discovery from the Network until after the experts submit their reports and the need to reconcile methodologies becomes apparent. The Teams' submit that the Network should produce now, even if the Court is prepared to hear the evidence solely for the purposes of reconciling conflicting expert testimony.

(continued…)

point. Discovery of post-valuation actual facts and subsequent projections is appropriate because it shines a light on whether an expert's assumptions were reasonable at the time of valuation.

First, it is not necessary to await a disagreement between experts for the information to become relevant. At the very least, updated subscriber projections and new affiliate agreements (if any) are relevant to confirm the reasonableness of any expert models presented in this case.

Second, if history is any guide, any disagreement between the Teams' experts and Comcast's experts at the upcoming trial is a near certainty. Indeed, given the binary nature of the ultimate question—i.e., whether the Affiliation Agreement is of inconsequential value or not—a trial will necessarily involve a disagreement between experts.

Third, the Network has already agreed to produce some information to the Teams pursuant to their subpoena. A single production reduces the burden on the Network and the Teams alike.

Finally, although the Teams and Comcast are in discussions to relax the pretrial schedule in these proceedings to some extent, it will remain relatively tight. Concluding the Network's production now will avoid any possibility for delay resulting from deferred production in the future.

## CONCLUSION

For the foregoing reasons, the Teams request that the Court grant the Motion to compel and direct the Network to produce the Subscriber Projections and any New Affiliation Agreements, together with such information as the Network has already agreed to produce consensually, without delay.

Dated: Los Angeles, California
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**CERTIFICATE OF SERVICE**

On the date hereof, I, Roberto J. Kampfner, caused the foregoing document to be filed through the Court's CM/ECF filing system. As a result of such filing, a "Notice of Electronic Filing" or "Daily Summary Report of Bankruptcy Filings" was sent to the registered ECF users of record in this case.

/s/ Roberto J. Kampfner
Roberto J. Kampfner