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Federal Communications Commission
Office of the Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

HERRING BROADCASTING, INC.,
Complainant,
v.
Cox COMMUNICATIONS, INC.
Defendant

File No. 7829-P

DOCKET FILE COPY ORIGINAL

CARRIAGE AGREEMENT COMPLAINT

TO: The Commission:

Complainant, Herring Broadcasting, Inc., ("Herring Broadcasting") doing business as WealthTV, ("WealthTV"), as its Complaint against the defendant, Cox Communications, Inc., ("Cox") alleges as follows:

1. This Complaint is brought pursuant to Section 616 of the Communications Act of 1934 ("Section 616") and Section 76.1301(c) of the Commission's rules, 47 C.F.R. §76.1301(c), arising from Cox's unreasonable, discriminatory, and ongoing refusal to carry WealthTV, or even to negotiate meaningfully and in good faith for carriage. During the period of such refusal, Cox agreed to carry an affiliated programming service called MOJO that is substantially similar to WealthTV in all material respects, including programming content, branding, look and feel, target demographic, and target advertisers. Cox owns MOJO along with three other cable industry partners. Cox's refusal to carry or even negotiate for carriage in good faith with WealthTV, while agreeing to carry a substantially

similar affiliated programming service, MOJO, constitutes discrimination in the selection, terms, and conditions of carriage, in violation of the Commission's rules, and Cox has thereby restrained WealthTV's ability to compete fairly.

2. WealthTV presents herein its prima facie case of Cox's violation of the law and Commission regulations, specifically: (a) Cox has denied carriage to WealthTV and refused to negotiate meaningfully and in good faith for carriage; (b) Cox is a vertically integrated video programmer and video distributor and meets all of the applicable statutory and regulatory definitional elements; (c) WealthTV likewise meets the statutory and regulatory definitions as a vendor of video programming and is not affiliated with Cox; (d) Cox has afforded carriage to its programming affiliate, MOJO, a service that is substantially similar to WealthTV, while denying carriage to WealthTV because it prefers to favor its own affiliated programming service so as to maximize overall company revenues, thus illegally discriminating against WealthTV; and (e) the effect of this discriminatory conduct has been to restrain WealthTV's ability to compete fairly in the marketplace by (i) denying WealthTV access to Cox's millions of subscribers, (ii) affording MOJO a preclusive first mover advantage with respect to the common pool of viewers and advertisers to which both MOJO and WealthTV are targeted and do appeal and (iii) along with its powerful partners in ownership of MOJO, discouraging other MVPDs from affording WealthTV a fair opportunity for carriage.

PARTIES AND JURISDICTION

3. Cox Communications, Inc., a subsidiary of media company Cox Enterprises, Inc., has its principal office at 1400 Lake Hearn Drive, Atlanta, GA 30319. Cox's main telephone number is 404-843-5000. Cox, directly and through its affiliates, provides cable service over cable systems and is a cable operator and a multichannel video programming distributor, as defined in 47 C.F.R. §76.1300 (d).
4. Herring Broadcasting, a California corporation, has its principal office and place of business at 4757 Morena Blvd., San Diego, CA 92117. Herring Broadcasting does business as WealthTV. Herring Broadcasting's main telephone number is (858) 270-6900. Herring Broadcasting has been distributing WealthTV's twenty-four hours per day, seven days per week ("24/7") programming to cable operators and other multichannel video programming distributors since June 1, 2004, and is a video programming vendor as defined in 47 U.S.C. §536(b) and 47 C.F.R. §76.1300(e). WealthTV provides a 24/7 high definition ("HD") feed and a simulcast 24/7 standard digital feed for subscribers not currently receiving high definition services. In addition, WealthTV has Video on Demand ("VOD") and HD VOD packages available.
5. On or about May 7, 2007, Herring Broadcasting furnished to Cox written notice of its intent to file a carriage agreement complaint with the Commission, served as required by 47 C.F.R. § 76.1302(b). A copy of the notice is attached as Exhibit 1.

6. By approximately the end of May, 2007, Cox responded by telephone to WealthTV's written notice and an in-person meeting took place between WealthTV and Cox in Atlanta on July 9, 2007.

7. Attached hereto as Exhibit 2 is an affidavit executed by Charles Herring, Co-Founder and President of WealthTV, complainant, as required by 47 C.F.R. § 76.1302(c)(2).

8. Attached hereto as Exhibit 3 is an affidavit executed by Robert Herring, Sr., Co-Founder and Chief Executive Officer of WealthTV, complainant, in further support of the allegations herein.

FACTS

9. Herring Broadcasting produces WealthTV, a video programming service that focuses on inspirational and aspirational programming about prosperous and fulfilling lifestyles. WealthTV's programming themes focus on enjoyable aspects of financial success, including travel, fine wines, luxury transportation, studies of other cultures, and opportunities for philanthropy. WealthTV's programming lineup includes *Wealth on Wheels*, a series on high end automobiles and other vehicles, *Taste! The Beverage Show*, a show on fine wines and spirits, with a travel and cooking component, and *Innov8*, a series on the latest and greatest gadgets and gizmos.

10. In contrast to many programming services, WealthTV is a truly independent stand-alone programming service, founded and solely owned by innovative and entrepreneurial businessman Robert Herring, Sr. and his two sons,

Robert, Jr. and Charles, without support from any cable operators or other program distribution companies including broadcasters, telcos, or direct broadcast satellite companies. WealthTV is one of only a few truly independent programmers to have successfully launched a new network in recent years. Since its launch on June 1, 2004, WealthTV has secured carriage agreements on over 75 incumbent cable systems, cable overbuilders, and telco video systems, including GCI, Charter Communications, Verizon FiOS TV, WideOpenWest, Qwest, Armstrong Cable, Surewest, Metrocast, Grande Communications, Service Electric, Sunflower Cable, Western Broadband, AT&T U-Verse and OEN Fision.

11. Cox Communications, Inc. is a privately held subsidiary of media conglomerate Cox Enterprises, Inc. Cox Enterprises, Inc., operates 86 radio stations, 17 daily newspapers including the *Atlanta Journal-Constitution* and the *Dayton Daily News*, 26 non-daily papers, including *The Western Star*, Ohio's oldest weekly newspaper. In addition Cox Enterprises owns and operates multiple television network broadcast affiliates of ABC, CBS, NBC, and FOX along with other independent broadcast networks totally 15 in number.¹ Cox Enterprises also owns The Travel Channel. Additionally, during the period when the complained of continuing violations occurred and up until the time of WealthTV's pre-filing notice, Cox Enterprises owned a substantial investment in Discovery Communications. Discovery Communications owns and operates 29 network entertainment brands on over 100 channels globally and is the number one non fiction media company reaching more than 1.5 billion subscribers in over

¹ See:

http://www.coxenterprises.com/corp/operating_companies/operatingcompanies.htm?Vermenu=operatingcompanies

170 countries. On May 14, 2007, Cox Enterprises exchanged its approximate 25% ownership in Discovery Communications for Travel Media, Inc., the company that owns the Travel Channel and TravelChannel.com. Travel Media also held approximately \$1.3 billion in cash.²

12. Cox is the third largest cable operator in the United States.³ It provides cable services to numerous regions across the United States including Southern California, New England, Arizona, Las Vegas, Oklahoma, Kansas, Hampton Roads, and Central Florida among others. Like New York, the Florida markets served by Cox are well known for setting the trends in fashion, cuisine, and lifestyle across the nation, and thus are ideal markets for WealthTV's programming services. Systems owned, managed and controlled by Cox service over 6 million customers.⁴ Cox and its parent have owned or own in whole or in part a number of affiliated programming networks and therefore have incentives to favor these affiliates over competing unaffiliated programming networks to maximize overall company revenues. Among the programming affiliated with Cox and its parents, through May 6, the date of WealthTV's pre-filing notice, 2007, are: Animal Planet, BBC America, Discovery Channel, Discovery en Espanol, Discovery Health Channel, Discovery Home, Discovery Kids, FitTV, HD Theater, Investigation Discovery, The Military Channel, The Science Channel, TLC, Discovery Kids en Espanol, Discovery Travel and Living, The Travel Channel, & MOJO. Cox currently owns The Travel Channel and is also

² See: <http://phx.corporate-ir.net/phoenix.zhtml?c=76341&p=irol-newsArticle&t=Regular&id=999940&>

³ See: <http://www.ncta.com/Statistic/Statistic/Top25MSOs.aspx>

⁴ See: <http://www.cox.com/about/>

part owner of MOJO according to the press release announcing its launch. (See Exhibit 4)

**COX HAS UNREASONABLY AND DISCRIMINATORILY REFUSED TO
NEGOTIATE MEANINGFULLY AND IN GOOD FAITH WITH
WEALTHTV DESPITE DEMONSTRATED MARKET DRIVEN
INTEREST IN ITS SYSTEMS**

13. WealthTV first approached Cox to initiate carriage discussions in the summer of 2004. Since that time, WealthTV has visited numerous Cox systems across the United States and has met in person with key divisional representatives of Cox in leading markets. During the course of these meetings and other exchanges, WealthTV provided Cox with detailed information about its service, including sample and complete episode programming, research, and periodic updates thereof. WealthTV also demonstrated that its programming, which has strong appeal among affluent viewers, brings higher advertising rates, which would be of direct financial benefit to Cox because WealthTV offers its distribution partners two minutes of advertising time on the channel per hour. Officials of several Cox cable systems have expressed interest in providing WealthTV to their customers, including but not limited to key Cox representatives in Wichita, Kansas and New England. By way of example, on July 19, 2004 WealthTV representatives continued discussions with Tony Matthews and Robert Bunting of Cox Communications, Wichita during a Cable and Telecommunications Association for Marketing ("CTAM") industry summit in Boston. Mr. Matthews and Mr. Bunting expressed their interest in adding WealthTV to their lineup, as Cox Wichita was preparing to make channel additions as part of an upcoming channel lineup enhancement. They offered to

launch WealthTV across their digital subscribers, representing approximately 80,000 subscribers with an HD launch shortly thereafter. Mr. Matthews asked if WealthTV would be willing to provide launch support for the digital launch. In a second follow-up meeting during the CTAM summit, WealthTV confirmed that it would extend \$0.50 per digital subscriber in launch support. At the conclusion of the second meeting, it was agreed that WealthTV in digital would be launched with the HD launch to take place shortly thereafter. The Cox Wichita representatives confirmed that they had the responsibility to determine which channels to launch and the requisite influence and ability to conclude the needed corporate agreement within their company. Other Cox locations, including New England expressed a strong desire to carry the newly launched WealthTV. During the same CTAM summit in July of 2004, WealthTV representatives, including Charles Herring, had a dinner meeting with Mark Cameron, director of product management. Mr. Cameron expressed his desire to launch WealthTV and offered to help in any way he could with the needed corporate approval. By the end of the CTAM summit, WealthTV felt it was assured of the needed corporate agreement driven by Cox Wichita with in immediate launch with Cox - Wichita and Cox - New England to follow shortly thereafter.

14. By August 5, 2004, WealthTV was informed that Kimberly Edmunds, GM of Cox Wichita, approved the launch of WealthTV and received approval from her boss. WealthTV was again assured that the launch was imminent. By the end of the year, WealthTV was unable to engage Cox's corporate programming group in discussions for the needed agreement to launch in Wichita and New England.

Several efforts were made, but the Cox representatives simply refused to have any serious dialogue. By the beginning of 2005, it was clear that more was needed than simply strong field support to drive the needed corporate agreement.

15. On or about May 2, 2005, Charles Herring flew to Wichita to meet with Tony Matthews and Adena Barnes to determine if there still was interest in launching WealthTV and gain further insight to where the breakdown took place. Over lunch, Mr. Matthews indicated that his interest in carrying WealthTV had not wavered. He stated that Kimberly Edmunds personally called Mr. Wilson to ask to conclude an agreement so that Cox Wichita could launch WealthTV.

Within days of this meeting, Charles Herring, along with John Wheeler, affiliate sales for WealthTV, met with Robert C. Wilson, SVP of Programming and Patrick J. Esser, EVP, of Cox Communications in Atlanta. Mr. Wilson denied that *anyone* from Cox Wichita ever contacted him to express interest in launching WealthTV. Mr. Herring notified Mr. Wilson that he had recently visited Cox Wichita and confirmed the information personally. In addition, when Mr. Herring displayed a slide showing each of the Cox field locations that expressed interest in launching WealthTV's services, Mr. Esser questioned the validity of the slide.

Charles Herring followed up the visit with a letter to Mr. Esser dated June 7, 2005 which included:

During our visits to Cox locations over the last 12-16 months, we have had numerous strong positive responses. I felt a little challenged during our meeting when we showed a matrix of Cox locations that have responded favorably to WealthTV's programming and have expressed a strong interest in considering a launch if a corporate hunting license was in place. I would like to request that you speak with three very different Cox regions and hear for yourself their thoughts on the value of WealthTV.

Regardless of the level of field support for WealthTV and requests expressed by their own regional personnel, Cox's corporate programming group has discriminatorily refused to negotiate meaningfully and in good faith with WealthTV and dismissed the desires of its regional systems.

THE PROVEN CONSUMER APPEAL AND QUALITY OF WEALTHTV'S PROGRAMMING

16. WealthTV's programming service has proven consumer appeal, as evidenced by the large number of carriage deals it has already secured.⁵ To date, WealthTV has secured linear carriage (that is, on a tier where it is available for full time viewing 24/7 by cable subscribers) with over 75 cable operators, overbuilders, and telcos. WealthTV airs on-going interstitials soliciting viewers to provide feedback via WealthTV's website. The compiled data show overwhelming support for the channel. Additional proof of the market appeal comes from the reactions to WealthTV's service by officials of Cox, as described herein.

COX REQUESTS WEALTHTV CONTENT FOR ITS AFFILIATED HIGH DEFINITION CHANNEL, BUT WILL NOT CARRY WEALTHTV

17. Cox – San Diego, including General Manager William Geppert, and Dennis Morgigno, Station Manager of Cox – San Diego's "4SD – High Definition" station, have visited with senior management at WealthTV's headquarters and production studios to discuss, among other things, the

⁵ Further evidence of the consumer appeal and popularity of WealthTV is evidenced by the strongly positive viewer feedback it has received. A small sampling of emails from viewers reflecting the channel's popularity is attached as Exhibit 5.

availability of WealthTV-produced content for its own local high definition channel. Ironically, Cox is willing to air WealthTV's content on its own high definition channel in San Diego, namely **4SD – High Definition**, but it is not willing to carry WealthTV.

**COX – LAS VEGAS, STOPS WEALTHTV FROM AIRING 24/7 AS A
MULTICAST CHANNEL OF KLAS**

18. In early 2006, WealthTV was approached by Chip Harwood of Multicast Networks Group, Inc. ("MNG") to gain carriage on Cox – Las Vegas via a multicast arrangement with KLAS, a CBS affiliate in Las Vegas. Mr. Harwood informed WealthTV that KLAS was interested in carrying WealthTV 24/7 as a multicast channel. After several discussions and meetings with WealthTV and the President of KLAS, both parties favorably viewed launching WealthTV as a multicast channel of KLAS in the Las Vegas market. Unfortunately, Leo Brennan, GM of Cox – Las Vegas notified KLAS that adding WealthTV as a multicast channel would be unacceptable to him. His primary concern was that he anticipated WealthTV's programming would play favorably and if KLAS eventually replaced WealthTV with a CBS planned business channel, (which had been in the plans for years but never materialized), his customers would be upset with Cox. In other words, the GM of Cox – Las Vegas expected WealthTV to perform so well that if the service was no longer carried it would be deleterious to Cox's relationships with its subscribers in the market.

LAUNCH OF MOJO

19. The launch of MOJO was announced on March 19, 2007. (See Exhibit 4) It was created by transforming an existing channel, INHD, into the new channel called MOJO as of May 1, 2007. The new channel, MOJO, is substantially similar to WealthTV. The old channel, INHD, was completely different from what MOJO is today. INHD was a *general* entertainment high definition programming service that had no unifying theme other than that all of its programming was in high definition format. Thus, viewers might see children's programming such as *Santa vs. The Snowman*, a children's cartoon, as equally likely as they might see programming for adults, such as *The Twilight Zone*⁶.

20. MOJO is wholly owned by four cable MSOs: Cox, Comcast, Time Warner, and Bright House. (See Exhibit 4)

21. The new channel, MOJO, presented itself as a well-defined themed programming service aimed at "*active affluents*", ages 25 to 49.⁷ In the press release announcing its launch, MOJO described its programming as being characterized by "*new series spanning adventure travel, comedy, finance, music, cuisine and spirits and high tech toys*" and "*diverse shows includ[ing] an eclectic mix of witty and urbane comedy, sports, adventurous travel, music and the finer pleasures of food and drink.*" (See Exhibit 4)

22. MOJO's definitive programming transformation caused an increase in advertising by 37% according to Robert D. Jacobson, president and CEO of iN

⁶ In TWC's answer to WealthTV's complaint it argued that MOJO and WealthTV were not substantially similar and appended the affidavit of Michael Egan. In its reply, WealthTV rebutted this argument and offered the rebuttal affidavit of Jedd Palmer. (See Exhibit 5)

⁷ See Exhibit 4; See also Exhibit 10; "INHD's New Moniker: MOJO," Mike Reynolds, Multichannel News, March 19, 2007 (www.multichannel.com/article/CA6425787.html)

DEMAND Networks as reported in a March 22, 2007 TV Week article entitled "Q&A: Robert D. Jacobson, in DEMAND Networks."⁸ (See Exhibit 7) Upon the launch of MOJO, Cox agreed to offer the channel across all of its systems and in high definition throughout the United States.

23. By the time of MOJO's launch announcement on March 19, 2007, Cox had engaged in numerous discussions with WealthTV over several years and was intimately familiar with WealthTV. Cox by then had access to WealthTV's programming samples and marketing materials that Cox had requested and was able to view WealthTV's product where it was launched on non-Cox MVPD systems, some of which directly competed with Cox's systems. Cox also had access to information available publicly and through industry sources about WealthTV's success, viewer appeal and appeal to advertisers. Cox also had access to materials provided to Cox during presentations and follow-up visits, including marketing materials, presentations, and sample programming DVDs,

⁸ For full text of this article see:
www.tvweek.com/news/2007/03/qa_robert_d_jacobson_in_demand.php

24. Thus, Cox had the opportunity, knowledge and motivation to launch a WealthTV-like programming service. Cox benefited financially more from launching its own MOJO service than it would have by launching the substantially similar and established independent programming services of WealthTV. Cox, thus launched MOJO, while refusing to acknowledge strong field support from Cox regional systems for WealthTV and denying WealthTV the opportunity to enter into carriage agreement discussions, it readied its own affiliated programming service based on WealthTV's proven successful model.

**MOJO IS A SUBSTANTIALLY SIMILAR PROGRAMMING SERVICE
TO WEALTHTV**

25. MOJO is substantially similar to WealthTV in numerous material respects as detailed below.

26. **Programming:** A comparison of programming on MOJO and WealthTV reveals numerous examples of MOJO's program offerings that mirror

WealthTV's programming:

- a. In June, 2004, upon launch of its network, WealthTV launched *Taste! The Beverage Show*, a male hosted series with a travel and fine food component that focuses on educating viewers about wines and spirits. The goal of *Taste!* is to democratize wines and spirits so that all viewers can enjoy them without feeling overwhelmed by what they do not know. Roughly three years later, MOJO aired its first episode of *Uncorked* in April of 2007. *Uncorked* is described on the MOJO website as a travel, foods, and spirits show whose host will "ask the

dumb question so you don't have to." WealthTV's *Taste, The Beverage Show* offers more than six times as many episodes as *Uncorked*.

- b. In June 2004, upon launch of its network, WealthTV launched *Wealth on Wheels*, which focuses on the latest trends in automotive technology and hottest cars. Episodes have included automotive factory tours, automotive shows and test drives in some of the most sought after vehicles on the road. WealthTV has aired more than 50 episodes of this series and its predecessor. In August of 2007 MOJO announced a series called *Test Drive*, an automotive technology show with highlights of some of the most sought after cars. For example, one of the four episodes is entitled "*Ultimate Test Drive*" and the description from MOJO's web site is as follows, "*They're powerful, luxurious and carry a heavy price tag. Can you handle it? Craig J. Jackson takes a fast ride in the exotic automobile lane and uncovers an economical way to put the pedal to the Bentley, Lamborghini and Ferrari metal.*" (Emphasis supplied) Most importantly, both WealthTV's *Wealth on Wheels* and *Test Drive* target the identical demographics with similar programming.
- c. In November 2004, WealthTV produced its first *Charlie Jones, Live to Tape* show. This series is a hosted one-on-one talk show that features legendary football sportscaster and one of the first voices of the American Football League, Charlie Jones, who interviews remarkable

athletes, coaches, and celebrities of yesteryear and features their untold stories. MOJO features *Timeless*, which apparently debuted in 2006 on ESPN2, then migrated to MOJO. *Timeless* is a one-on-one style talk show in which the NFL Linebacker and host, Dhani Jones, “*taps into the classic themes of sports and competition, the plight of the underdog, the impossible play, the unlikely hero and their remarkable talent. Their stories are off-beat, inspiring and, of course ... timeless*”, according to MOJO’s website. (Emphasis supplied)

- d. In mid-2004, WealthTV launched *Taste of Life*, which focuses on educating viewers about the behind the scenes experiences associated with travel, spirits and especially food. Viewer interest in this series generated so many inquiries that WealthTV devoted a section of its website to posting over 180 recipes that have been featured on the show. In June 2006, MOJO launched *After Hours*, a series that gives viewers a behind the scenes look at Los Angeles restaurants, claiming that “*Some of life’s best lessons are learned after hours.*” Celebrity Chef Daniel Boulud hosts the show and “*...takes his exclusive dinner parties to SoCal, feting celebrities from shows such as Boston Legal, the Office and Crash. The guests are as interesting as the menu, the conversation flows as easy as the wine, and the vibe is distinctly After Hours.*” (Emphasis supplied) MOJO has also copied WealthTV’s practice of posting series-related recipes to its website; as of December 18, approximately a dozen recipes have appeared.

e. In April 2005, WealthTV launched *Innov8*, in which each episode features the latest “gadgets and gizmos” from around the world, according to WealthTV’s website. WealthTV has also produced a special show on the 2007 CES show in Las Vegas highlighting the best of CES from the latest gadgets to the biggest TVs. WealthTV has 14 shows on gadgets of all types. In December 2006, MOJO premiered *Geared Up*, which is described on its website as follows: “*MOJO plugs in and shows off the latest and greatest from the world of high-end electronics on Geared Up, the ultimate guide to the ultimate in technology.*” (Emphasis supplied) Shortly after its initial airing, MOJO’s *Geared Up* copied WealthTV in airing a special focused around CES 2007.

27. **Target Demographic:** Robert D. Jacobson, Chief Executive Officer of iN DEMAND, has explained to reporters that MOJO is for “...men making more than \$100,000 per year...” (See Exhibit 7; emphasis supplied). Multichannel News reported in a March 19, 2007 article that MOJO is designed to appeal to 25 to 49 year old (see Exhibit 8) “*active affluents*” who are “...*dynamic, intelligent, and adventurous*” with a skew towards men. (Emphasis supplied). MOJO’s own press release reiterates that the channel was “created exclusively for the discerning male, with attitude, wit and style” (see Exhibit 4). A summary comparison of WealthTV’s Target Audience provided in WealthTV’s standard presentation to potential distribution partners, including Cox, dating back to 2004 (See relevant excerpt at Exhibit 9) compared to MOJO’s target audience,

announced three years later, clearly indicates that MOJO is targeting the exact audience as WealthTV.⁹

28. **Target Audience:** The following table summarizes the close similarities between WealthTV's and MOJO's target audiences:

	WealthTV	MOJO
Age	<i>25 to 49</i>	<i>25 to 49</i>
Sex	<i>Skewed Male</i>	<i>Males</i>
Education	<i>Skewed Educated</i>	<i>Intelligent</i>
Income	<i>Above \$100,000</i>	<i>"more than \$100,000"</i>

29. **Look and Feel:** The non-themed, general entertainment service INHD was transformed into a themed service offering original programming in high definition similar to WealthTV. Robert D. Jacobson, Chief Executive Officer of iN DEMAND, talking about the transformation of INHD to MOJO states, "*We know we wouldn't compete with ESPN on sports, or USA and TNT as general entertainment programming.*" (See Exhibit 7; emphasis supplied). In effect, the "*general entertainment programming*" offered by channel INHD was failing and was morphed directly into the path of the proven WealthTV lifestyle and entertainment theme, serving a near identical demographic with similar programming.

⁹ In Time Warner Cable's answer to WealthTV's complaint in a separate but related matter pending before the Commission, it argued that MOJO and WealthTV did not appeal to the same demographic, asserting in essence that MOJO appealed to males and WealthTV had broader cross-gender appeal. WealthTV offered in its reply the rebuttal affidavit of Mark Kersey, documenting that the two programming services do appeal to the same target male demographic. (See Exhibit 10).

30. Uniqueness of WealthTV's Programming Theme Copied by MOJO:

MOJO's targeted programming theme is directly from WealthTV's 2004 playbook described in presentations to Cox. Prior to the launch of MOJO, Mr. Jacobson of iN DEMAND acknowledged that a high definition channel can no longer be just a showcase for the new HD format and must be appealing to viewers for other, additional features. (See Exhibit 7) By March 2007, iN DEMAND executives expected that the market for high-definition programming would grow, but believed that there would be a lack of themed dedicated channels. As of March 2007, iN DEMAND viewed the market for original programming aimed at affluent males ages 25 to 49 as underserved. Thus, as iN DEMAND was "...evaluating the programming landscape to make sure (it) had a programming landscape that was sustainable", (see Exhibit 7) it struck upon and copied WealthTV's successful model.

31. In the March 19, 2007 press release, announcing MOJO's launch, significant similarities between WealthTV and MOJO were highlighted.

- a. In the release, MOJO defined its brand as comprised of "...new series spanning adventure travel, comedy, finance, music, cuisine and spirits and high tech toys." WealthTV had been featuring programming in each of these categories years before MOJO launched its programming service.
- b. MOJO used the term "*active affluents*" in its press release to describe its targeted audience. WealthTV, with its well defined and targeted

programming, comprised of among other things adventure travel, had become synonymous with “active affluents”.

32. Mr. Jacobson of iN DEMAND addressed the viability and demographics of MOJO stating “...*there are not many [channels] that speak to the active affluents – men making more than \$100,000 a year and who are active. It’s a sustainable channel option.*” (See Exhibit 7; emphasis supplied) Mr. Jacobson also said, “*Fortunately, we were right in our projections. We were confident that there would be strong appeal for exclusive content aimed at high-end males.*” (See Exhibit 8; emphasis supplied) Though Mr. Jacobson correctly stated that there are not many other channels that speak to the “active affluent”, the obvious and prominent example of the one that does, well known to Mr. Jacobson and his partners at Cox was WealthTV, which was established three years before MOJO morphed from iN DEMAND to a WealthTV like service with an identical target demographic.¹⁰

33. **Target Advertisers:** In a January 2004 interview, Charles Herring, president of WealthTV was reported to be “*optimistic that the channel will attract advertisers looking to reach an audience that can afford high-end luxury goods*”. (See Exhibit 11; emphasis supplied) With the same target audience and nearly identical programming, WealthTV and MOJO target the same advertising market. As an example, both programmers feature shows on wine and spirits and both companies have targeted the same advertising agency for Grey Goose Vodka.

¹⁰ According to the March 19 press release announcing MOJO’s launch, its cable company owners were aware of and supportive of its transformation. (See Exhibit 4).

34. In view of their similarities, WealthTV has inquired of Cox why it was able to find room on its systems for MOJO, an affiliated channel similar to WealthTV, but not for the pioneer of the aspirational wealth lifestyle channel, WealthTV, even though WealthTV was offered on favorable carriage terms to Cox years before the launch of MOJO. No satisfactory answer has been received.

**OUTREACH BY WEALTHTV TO COX SUBSEQUENT TO THE
LAUNCH OF MOJO**

35. Within days of MOJO's launch, WealthTV notified Cox of its intent to file a carriage agreement complaint. WealthTV voiced concerns that Cox's refusal to negotiate or execute a carriage agreement with WealthTV while simultaneously finding room on its systems for a substantially similar service evidenced impermissible discrimination in Cox's decision making.

36. Approximately 60 days after the pre-filing notice, the parties met on July 9, 2007 at Cox's facilities in Atlanta. WealthTV was represented by Robert Herring, Sr., Charles Herring, and their counsel, Kathleen Wallman. Cox was represented by Robert Wilson and Cox's in-house counsel. It was stated that Cox would not give WealthTV any consideration at that time nor likely in the foreseeable future while HD launches of other channels already carried by Cox were pending or possible. Obviously, the newly launched stand-alone service MOJO received much more favorable consideration and treatment than this and enjoys carriage on Cox. Robert Wilson is not only the Senior Vice President of Programming for Cox Communications, but also serves on the Board of Directors

of INDemand, which owns and operates MOJO.¹¹ All discussions to date between WealthTV and Cox's corporate programming group, including a follow-up visit in late October of 2007, have been devoid of any meaningful terms and conditions of carriage. Cox is simply not willing to negotiate meaningfully and in good faith with WealthTV.

**COX'S PATTERN AND PRACTICE OF DISCRIMINATION AGAINST
INDEPENDENT PROGRAMMERS**

37. Cox is a vertically integrated provider and distributor of programming. The Commission's attention has been directed to numerous studies documenting the opportunities and incentives that such vertically integrated programmer-distributors have to favor affiliated programming over non-affiliated programming. Among these studies, adverted to in the Commission's prior and ongoing proceedings, such as in MB Dockets 05-192, 06-151 and 07-42 are:

- a. Chen, D., and D. Waterman (2007), "Vertical Ownership, Program Network Carriage and Tier Positioning in Cable Television: An Empirical Study," *Review of Industrial Organization*, Vol. 30, No. 3.
- b. Singer, H. & Sidak, G., "Vertical Foreclosure in Video Programming Markets: Implications for Cable Operators," *Review of Network Economics*, Vol. 6, 2007, available at <http://ssrn.com/abstract=1004369>.
- c. Clements & Abramowitz, *Ownership Affiliation and the Programming Decisions of Cable Operators* (2004), <http://web.si.umich.edu/tprc/papers/2004/289/TPRC2004.pdf>

38. Studies also have demonstrated that vertically integrated programmer-distributors in fact favor affiliated programming over non-affiliated programming.

¹¹ See: http://www.cox.com/about/bio/bio_wilson.asp

39. Cox's own channel lineup demonstrates the inclination to disfavor independent programming. As way of example, Cox's high definition channel lineup for subscribers in the San Diego (as of 12/1/07), heavily favors affiliated networks. Of the non-broadcast, non-PEG high definition channels found at channel numbers 1 and 700 to 790, 10 of the 30 channels are (or were affiliated via its direct ownership of Discovery Communications up to the date of the pre-filing notice by WealthTV) with Cox representing 33.33%.¹²

40. The high improbability of an independent programmer gaining carriage on Cox has significant financial consequences for an independent programmer seeking such carriage. Programming services that aren't available on the leading cable provider in major markets such as New England, San Diego (8th largest city in the U.S.) and Phoenix, Arizona (6th largest city in the U.S.) are hindered when seeking national advertisers, upon whose revenues independent programmers rely for financial success. In addition, smaller cable companies tend to follow the programming lead of the top cable providers

41. In total, the inability of independent programmers to complete carriage agreements with major MSOs including Cox make it dramatically more difficult to for independents to reach the threshold of viewership that is required to make an independent channel financially viable – 20 million viewers.¹³

42. The high and usually impossible bar for independent programmers to gain carriage has significant consequences for the diversity of programming available

¹² See: http://www.cox.com/sandiego/docs/channellineup_20071201.pdf

¹³ In TWC's answer to WealthTV's complaint, it denied WealthTV's assertion that 20 million viewers was required to make an independent channel viable. In its reply, WealthTV rebutted this argument and offered in rebuttal the Supplemental Affidavit of Charles Herring. (See Exhibit 12).

to the public and raises costs for consumers by excluding lower cost independent programming.

43. The recourse supplied by Section 616 of the Communications Act of 1934, as amended, and the Commission's rules for complaints against MVPDs that discriminate against independent programmers are seldom used. The open-ended nature of the complaint process, with no deadlines, and the inherent difficulties of litigating against wealthy incumbent MVPDs are often cited as the reasons for the procedures' underuse.

44. The Commission recently reportedly considered reforms to the carriage access complaint process to address these deficiencies, but contrary to the expectations and hopes of the independent programmer community did not act on these reforms at its November 2007 meeting.

45. WealthTV alleges that the evidence of a pattern and practice of discrimination by Cox is substantial and should be duly considered by the Commission in its deliberations upon and disposition of this complaint.

FIRST COUNT: VIOLATION OF 47 C.F.R. § 76.1301(c)

46. Paragraphs 1 through 45 above are repeated and realleged as it fully set forth herein.

47. 47 C.F.R. § 76.1301(c) makes it unlawful to "engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the

selection, terms, or conditions for carriage of video programming provided by such vendors.”

48. Insofar as Cox has refused carriage to WealthTV and has discriminatorily refused to negotiate meaningfully and in good faith with WealthTV, Cox has violated Section 76.1301(c).

49. Separately and in addition, insofar as Cox has refused carriage to WealthTV, an independent programming service, and granted carriage to its affiliate MOJO, a substantially similar programming service, Cox has violated Section 76.1301(c).

CONCLUSION

50. WealthTV has exhausted all reasonable opportunities and is unable to come to any agreement regarding carriage with Cox. It is now clear that achieving such an agreement is impossible because of Cox’s policies and practices of discrimination against independent programmers in favor of its own affiliated programming, specifically, in this case, MOJO. For all of the reasons set forth above, complainant seeks the Commission’s relief, as described below.

RELIEF SOUGHT

WHEREFORE, WealthTV respectfully requests, pursuant to 47 C.F.R. § 76.1301 and 76.1302, that the Commission:

- (a) Order Cox to provide WealthTV carriage on all Cox systems, pursuant to the terms of a carriage agreement similar to MOJO;