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

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| In the Matters of | ) | |
| | ) | |
| Herring Broadcasting, Inc. d/b/a WealthTV, | ) | MB Docket No. 08-214 |
| Complainant | ) | File No. CSR-7709-P |
| v. | ) | |
| Time Warner Cable Inc. | ) | |
| Defendant | ) | |
| | ) | |
| Herring Broadcasting, Inc. d/b/a WealthTV, | ) | File No. CSR-7822-P |
| Complainant | ) | |
| v. | ) | |
| Bright House Networks, LLC, | ) | |
| Defendant | ) | |
| | ) | |
| Herring Broadcasting, Inc. d/b/a WealthTV, | ) | File No. CSR-7829-P |
| Complainant | ) | |
| v. | ) | |
| Cox Communications, Inc., | ) | |
| Defendant | ) | |
| | ) | |
| Herring Broadcasting, Inc. d/b/a WealthTV, | ) | File No. CSR-7907-P |
| Complainant | ) | |
| v. | ) | |
| Comcast Corporation, | ) | |
| Defendant | ) | |

TO: Marlene H. Dortch
Secretary, Federal Communications Commission

ATTN: The Honorable Richard Sippel
Chief Administrative Law Judge

**DECLARATION OF SANDY MCGOVERN AS DESIGNATED EXPERT WITNESS FOR WEALTHTV**

Submitted herewith is the declaration of Sandy McGovern as a designated expert witness for WealthTV.

Respectfully submitted,

Herring Broadcasting, Inc., d/b/a
WealthTV

By Its Attorneys

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February 20, 2009

# DECLARATION OF SANDY MCGOVERN

I, Sandy McGovern, do hereby declare under penalty of perjury, that the following is true and correct to the best of my knowledge and belief:

1. My legal name is Sandra Gravely McGovern Durrie. I am known professionally in the television business as Sandy McGovern. I have been the principal of my own consulting firm, McGovern Media Associates, LLC, since January of 2000, but I began my career in the television business in late 1980. Over the course of my 28 years in the industry, I have developed a uniquely broad background of experience, spanning both U.S. and international television business, with direct experience in cable and satellite programming, satellite programming distribution, IPTV (telco) programming distribution, mobile video programming distribution, and programming production. My major consulting clients have been VOOM (the high definition DBS provider owned by Cablevision Systems), SES Americom (satellite and IPTV), Hiwire Mobile Video, RENTRAK (audience research), and the U.K.'s Channel 5 (for whom I have done projects on programming channel analysis.)
2. I began in the television business in 1980 as the Eastern Regional Director of Rainbow Programming, and was promoted to be VP and the head of Affiliate Sales & Marketing in 1982. I then took the same title at The Weather Channel, and then 3 years later, was hired as Senior Vice President of Affiliate Sales for Discovery Communications Inc. (then owned by TCI, United Cable, Cox Cable,

and Newhouse Cable, along with 3 non-cable partners). DCI was the parent of The Discovery Channel. At Discovery Communications, I was one of 9 members of the founding executive staff. During my tenure in affiliate sales at Discovery, my sales staff was responsible for taking the nascent channel to 60 million U.S. households making it the fifth largest cable network in the U.S. at that time, with unprecedented growth. In late 1991, the company acquired The Learning Channel, which it reprogrammed and rebranded as TLC. As an executive staff member, I was heavily involved in the reevaluation of The Learning Channel's programming, and the development of the newly branded and newly programmed TLC. In affiliate sales roles for all three companies (Rainbow Programming, The Weather Channel, and Discovery) over the course of 12 years (1980-1992), I was responsible for all aspects of negotiation of all programming carriage agreements with domestic cable operators, and the marketing of the programming services to those cable operators, and in collaboration with them to their consumers.

3. From 1992-1995, I pioneered Discovery's entry into international development and distribution as Senior Vice President of International Business Development. In that role, I performed the due diligence and business development on all six inhabited continents negotiating joint ventures with local business partners and launching separate, indigenous channels in Latin America, Asia, Iberia, Australia, New Zealand, the Middle East, and Japan. I was responsible for directing all aspects of The Discovery Channel in those partnerships, which included (but not limited to) evaluating, negotiating, and scheduling the programming for each

regional network. When I left Discovery International, we had generated 87 million subscribers in 89 countries in less than 3 years.

4. In 1995, I was recruited to be President and COO of North American Television, whose owners were the Canadian Broadcasting Company and Power Corp., both of Toronto, Canada. One of my directives as President was to reprogram their general entertainment service, Trio, and their news service, NewsWorld International, to make them more suitable to a U.S. audience. Those channels have since been acquired, reprogrammed and rebranded and now exist in the U.S. as Sleuth and Current, respectively.

5. In 1996, I was recruited by National Geographic Television to develop a business plan to launch its branded cable networks, both domestic and international. I became founding President of National Geographic Channels Worldwide, which was a joint venture of National Geographic Television and NBC. I was the lead negotiator from National Geographic to establish the terms of the joint venture with NBC as the global partner. As President of NGCW, I was responsible for all aspects of the business of the international partnerships, including original programming development, programming acquisitions, scheduling, sales, marketing and public relations. In my 3 and 1/2 year tenure, NGCW grew out of my business plan into indigenous channels around the world totaling 50 million households in 60 countries and nine languages, again, unprecedented growth. I negotiated with such local partners for these joint ventures as BSkyB (Europe), Foxtel (Australia), and Star (Asia). Variety magazine named me one of their "Breakthrough Achievers of Women in Show Business for 1998," and under my

leadership, Multichannel News International honored NGCW as "Global Programmer of the Year" for 1999. I was a guest speaker and panelist to television industry panels around the world for my particular expertise in programming and branding. The creative team I directed won the following awards for on-air and print: 1 CTAM Gold (Cable Television Advertising and Marketing), 1 Promax Gold, 1 Promax Silver, 24 Silver and Bronze BDA (Broadcast Design Awards), and 2 Gold BDA Asia Awards.

6. During my nine years of consulting to the TV industry (2000-present), the contract most relevant to the WealthTV complaint was with VOOM, the high definition satellite company, owned by Cablevision Systems. For 26 months (March 2003-May 2005), I was a full-time executive consultant, in a role acting as Executive Vice President of Programming. VOOM was a competitor to all cable companies, as well as to DirecTV, Dish, and any other video providers. VOOM's mission was to access, license and supply directly its vast offering of the most high definition channels to U.S. households via its own satellite. VOOM, as a satellite video provider, has since gone out of business as of May 2005; however, to be clear, VOOM's own original hi-def channels were available to other cable and satellite providers until 2008, when they too went out of business. Since May 2005, I have had no business dealings nor done any work for either VOOM, its parent company (Cablevision Systems), nor In Demand nor any of In Demand's owners. This experience is particularly relevant in several ways. As a representative of a new market entrant, I was highly motivated to secure the best possible programming for VOOM and could not afford to include programming

that seemed marginal, amateurish, or might otherwise convey the impression to potential customers switching from established multichannel video programming distributors (MVPDs) that VOOM was the home of "second best" programming. To the contrary, to induce subscribers of existing cable or satellite providers to switch, I recognized that VOOM must provide a measurably superior video experience. We sought as much high definition programming as was available from all programming sources (domestic and international), as well as developing our own 21 hi-def channels. During that time I had many dealings with WealthTV to access their hi-def channel, concluding in a very successful carriage agreement.

7. By contrast, I also tried, unsuccessfully, to license the In Demand high definition channels, INHD and INHD2, whose owners were Comcast Cable, Time Warner Cable, Cox Cable and Advance/Newhouse Cable. Ultimately, their exclusivity to cable companies only led VOOM, with me as a primary complainant, to file a program access complaint with the FCC on January 11, 2005. For this reason and through my work as Executive Vice President of Programming, I developed a thorough knowledge and understanding of the programming of INHD and INHD2, as well as the programming of WealthTV during that same period.
8. During the time I was at VOOM attempting to license INHD, it was clear that INHD was a general entertainment channel of repurposed programming and offering fare for family audiences, as well as distinctly identifiable programs for children, women and men. INHD2 offered far more sports in its mix.
9. Since being appointed as the expert witness to replace Mr. Jedd Palmer on behalf of WealthTV, I have had a chance to thoroughly review and evaluate: 1) the

original WealthTV presentation done for Ms. Jen Gaiski of Comcast Cable on March 26, 2004, 2) the WealthTV website, 3) the MOJO website, 4) MOJO press coverage, including, but not limited to, several interviews with Mr. Rob Jacobson, CEO of In Demand (parent company of MOJO), 5) an article quoting Mr. David Asch, Senior Vice President of Programming for MOJO, 6) schedules for MOJO and WealthTV (the latter of which was a schedule for the week prior to the MOJO 24/7 launch on May 1, 2007), 7) declarations of both Mr. Jedd Palmer and Mr. Michael Egan, 8) multiple episodes of most of the series originally produced for MOJO, 9) multiple episodes of many of the series originally produced for WealthTV as well as those acquired to fit into the genres they established when they launched in 2004, 10) The New York Times Guide to Essential Knowledge, a section titled, "The Power of the MSOs." 11) the Wetmachine website, 12) the Bloomberg website, and 13) other general news articles from the television industry trade press as well as consumer press.

**MOJO Copied WealthTV's Genres and Programming Concept and MOJO Was Not a Simple Rebranding of INHD**

10. Based on this extensive experience and my review of the print, electronic, and programming sources in Point #9, I conclude that the relaunch of INHD constituted more than a mere rebranding. Further, the essential programming elements of MOJO bear a direct similarity to those of WealthTV far beyond the casual similarity of elements that may occur in genre programming.

11. In my evaluation of all the materials referenced in Point #9, I have also concluded that the programming and marketing for MOJO deliberately replicated the concepts, genres, formats, and targeted audience of WealthTV.

12. I note that in copying the concepts, MOJO's execution of its original programming was not as professional as the programming created by WealthTV. In my expert opinion, the originally produced WealthTV series were more thoughtful, had better scripting, and many times, better production values (camera work, sound quality, music, editing) than the promotable signature programming of MOJO. This indicates to me, given my familiarity with the programming market, that the producers of MOJO programming rushed the product to market in a deliberate effort to foreclose markets from WealthTV and to use their superior distribution resources to disadvantage WealthTV. After viewing the MOJO programming and WealthTV programming, I observe that most of the original series with which MOJO launched and marketed aggressively were thinly-veiled replicas of the series that had been carried on WealthTV for three years.

13. Not only did MOJO copy the programming concepts, but the descriptors it used in its marketing materials and website were strikingly similar to those used by WealthTV from 2004 forward. MOJO's acknowledged targeted demographic (upscale men, ages 25-49) was clearly identified in the original presentations made to cable and satellite operators by WealthTV in the period prior to MOJO's launch.

**The Difference Between Rebranding a Channel and Relaunching a Channel**

14. Time Warner's expert, Michael Egan, has stated that MOJO and WealthTV contain similar elements because it is typical for a broadly distributed network to "nest" or "incubate" new programming. While it is true that it is typical for a broadly distributed network to "nest" or "incubate" new programming during a particular time slot for the purpose of expanding its particular genre from that block of time, it is just as typical to "nest" a new and entirely different programming concept directed at a new audience with the intention of either 1) spinning it off into a full channel independent of the "mother channel," or 2) using the block to find the new audience and transition the old channel into an entirely new one through reprogramming and rebranding. In my opinion, the latter is what occurred with INHD and MOJO. INHD, a general entertainment channel using repurposed programming, nested a block of a distinctively different genre of original programming targeted to a distinctively different audience, calling the block MOJO, and ultimately transforming the original INHD into an entirely different channel branded as MOJO. I have done a thorough evaluation of the MOJO sample schedule as well as reviewed its websites, and cite here an industry interview with Rob Jacobson, its CEO. In my opinion, from my vast experience in programming, branding, and affiliate sales agreements (all of these agreements include a specific description of a channel's genre in detail), MOJO is a different channel from INHD or INHD2. The distinctions are underscored by the descriptors MOJO uses on its websites targeting a new audience: "...with a passion for travel, music, finance, food, drink," and MOJO also covering "the best

things that life has to offer." Its new original branded programming clearly appeals to upscale men versus INHD's repurposed programming which targeted a family audience. MOJO developed programming focusing on Wall Street and finance, international travel, top chefs and fine restaurants, wine appreciation, exotic locations and adventures---distinctly not general entertainment for a family audience.

15. The contradictory statements of MOJO executives in promoting the relaunch of MOJO further highlights the rush to market. Rob Jacobson, in a TV Week interview on March 22, 2007, says in discussing MOJO, "As many men watch television, there are not many (channels) that speak to the active affluents---men making more than $100,000 a year and who are active." In my earlier personal dealings with In Demand, Mr. Jacobson would never have made this statement in referring to INHD because INHD was truly family fare. In a press release on July 1, 2003 announcing an INHD alliance with Anime Network (animation), Jason Patton, Senior Director of Business Development for In Demand said, "INHD has been designed to serve as a destination for a vast array of sports and entertainment content whose visual appeal will be magnified by the High-Definition medium." The press release continues with boilerplate language stating, "The INHD suite will feature several hundred hours of movies, professional sports and general interest entertainment that maximizes the High-Definition experience." These conflicting descriptions in the words of the executives at In Demand reinforce the fact that INHD and MOJO were two different channels with different audiences. While men were targeted in part by INHD (along with families, women and

children), MOJO clearly positioned itself to target a distinctive affluent male audience.

16. As noted previously, large cable multiple system operators (MSOs) have greater luxury than competitors and new entrants such as VOOM to air inferior programming in which they have an equity share. For over 25 years, it has been well understood in the cable and satellite business that the cable MSOs strongly favor launching services in which they have ownership, giving their own channels a significant competitive advantage over those without cable ownership. I quote from The New York Times Guide to Essential Knowledge, "By deciding which networks to carry on their systems, MSOs transformed themselves into the gatekeepers of cable television. An entrepreneur might launch a network, but it was doomed to failure unless the MSOs elected to carry it." It was precisely to counter this well-known trend in the industry that Congress created the existing carriage complaint process.

17. The recent experience around the launch of the Major League Baseball Network (MLB Network) demonstrates that cable programmers and other industry observers still consider carriage on the largest MSOs as critical to success, and that affiliated networks will receive privileged treatment at the expense of unaffiliated networks. An article distributed on December 31 by Bloomberg reports that "after giving Comcast Corp., DirecTV Group Inc. and other pay-TV providers an equity stake in the channel, MLB Network gained access to about 50 million homes." Because the largest MSOs provide immediate access to so many homes, they can attract significant advertising with lower quality programming

than that available on smaller MPVDs. Not only this, but due their large scale, the large MSOs have the advantage of deep discounts from virtually all channels, giving them higher margins, while the small operators pay the top of rate cards, thereby shrinking their margins and thus prohibiting them from earning profits leading to discouraging them from entering the market.

**Damage From Refusal to Carry**

18. Cable networks make money from two sources: licensing fees and advertising. Both of these sources of revenue depend not merely on the number of actual viewers as measured by companies like Nielsen, but also on the number of potential viewers to which the channels have access.
19. If a cable operator refuses to carry a network, it forecloses the cable network from reaching these subscribers in the manner relevant to advertisers. It also forecloses these networks from receiving license fees.
20. An independent network foreclosed from reaching the "eyeballs owned" by larger networks will suffer both from the reduced license fees and from reduced ability to attract advertisers. For a network such as WealthTV to be denied carriage with the major MSOs in the major television markets (Time Warner virtually controls the top two, New York and Los Angeles), not only seriously disadvantages it with subscriber fees but additionally stymies its opportunity to earn advertising revenues which depend on reaching a critical mass. (It should be noted that, based on my own personal experience when I served as EVP of Programming for VOOM, WealthTV was offering its service for free through 2008, and allowing carriage on the systems at any level, i.e., basic cable, a high definition tier, video-

on-demand. This offers far more flexibility for distribution than virtually any programming channel allows, thereby shining even more doubt as to the reasons that In Demand owners did not carry it.)

21. Generally speaking, viewers will not switch from one MVPD to another based on programming with which they are unfamiliar. This gives the MSOs an incentive to take a proven programming concept, such as WealthTV's and develop rival programming, and capture the additional advertising revenue for itself. Because viewers are unlikely to switch, a sufficiently large MSO or group of MSOs can use hastily developed and inferior programming without fear that viewers would drop off their systems to migrate to another MPVD over any given channel such as WealthTV, even though the one channel was superior in its quality.

22. The experience with WealthTV and MOJO follows this pattern. In an article and interview with Rob Jacobson by Daisy Whitney for TV Week, it reports that after one year of MOJO's being a full-time network, its advertising revenues grew by 108% over that of the earlier INHD channel. Not only does this underscore the point that INHD dramatically shifted its programming and targeted the WealthTV demographic when it launched MOJO, but it reinforces the disadvantage to WealthTV. In only one year, MOJO had luxury brand advertisers such as Bose, Acura, Sony, Lexus, Cadillac, Sony BluRay, and Grey Goose because it was carried in the key advertiser markets and had access to many million more subscribers than WealthTV. Had WealthTV been available on even a small portion of the systems of Comcast, Time Warner (particularly New York and Los Angeles), Cox, and Advance/Newhouse, it would surely have been sharing in

some of those advertising revenues. Adding to the obstacles of WealthTV's ability to achieve critical mass, the influence of the In Demand owners extends broadly to other cable operators. Many of the smaller ones (and all of them are smaller than Comcast, Time Warner, and Cox) look to the larger MSOs who owned In Demand in order to mirror the channels they carry. The smaller MSOs believe that the programming departments of the larger ones are superior in their decision-making on programming line-ups, so if Comcast or Time Warner launch or don't launch a channel, the smaller cable operators are likely to do the same. Thus the lack of carriage by Comcast, Time Warner, Cox and Advance/Newhouse struck another blow to WealthTV's ability to secure affiliate agreements with other cable operators.

23. Particularly in light of the fact that the channel MOJO ceased to exist at the end of 2008, in my opinion, the remedy of carriage of WealthTV by the MSOs seems like a win-win proposition. Without MOJO, there is no other high definition channel other than WealthTV targeting affluent 25-49 year old males. It is my understanding that WealthTV has made an offer for a remedy, which I believe to be extremely fair and reasonable by any industry standards.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 20, 2009

Sandy McGovern

McGovern Declaration of February 20, 2009

Print and Electronic Source Material

1. Reynolds Article - Read Multichannel News article by Mike Reynolds article dated March 19, 2007

Source: http://www.multichannel.com/article/128290-INHD_s_New_Moniker_Mojo.php

2. Hibberd Article - March 22, 2007, Q&A : Robert D. Jacobson, IN Demand Networks On the Demise of INHD2, and Rebranding of INHD into Mojo by James Hibberd
Source: http://www.tvweek.com/news/2007/03/qa_robert_d_jacobson_in_demand.php

3. Whitney Article - Also read TVWeek Article by Daisy Whitney, June 17, 2007
http://www.tvweek.com/news/2007/06/in_demand_has_its_mojo_working.php
(TVWeek article June 17, 2007 Daisy Whitney, iN DEMAND has its MOJO working.

4) http://www.broadcastingcable.com/article/104700-INHD_s_Got_Its_Mojo_Working.php?q=mojo+rob+jacobson

5) http://www.snarkhunting.com/2006/05/page/2/

6) **http://www.tvweek.com/news/2008/10/rounding_up_hd_news_2.php**

7) **http://www.tvweek.com/news/2007/10/spike_tv_going_hd_in_2008.php**

8) http://www.multichannel.com/article/82344-Mojo_Banks_on_Tech_Food.php

9) http://en.wikipedia.org/wiki/MOJO_HD

10) http://findarticles.com/p/articles/mi_m0EIN/is_2006_June_14/ai_n26896045/print?tag=artBody;col1

11) http://shop.mojohd.com/

12) http://www.mojohd.com/press/

13) http://www.satelliteguys.us/cable-television-discussion-forums/81195-inhd2-being-discontinued

14) New York Times Guide to Essential Knowledge, section on The Power of the MSOs.

15) WealthTV website www.wealthtv.net

16) WetMachine posting at http://www.wetmachine.com/totsf/item/1440

17) Bloomberg website at http://www.bloomberg.com/apps/news?pid=20601103&sid=aC1FfSKgRVR0&refer=us

**McGovern Declaration**
**February 20, 2009**

## Programming Source Material Viewed

## WealthTV Shows Viewed

1) Taste! The Beverage Show
   Episodes 2, 5, 9

2) Divine Life
   Episodes 104 and 109

3) Innov8
   Episode 1

4) The Best of 2007 International CES

5) CES 2008
   Parts 1 & 2

6) Great Cars
   Ferrari

7) Karma Trekkers
   Malta

8) The Ray Lucia Show
   Episode 1

9) World of Wealth

10) Taste of Life
    Vancouver Island
    Washington, DC

11) Forbes FYI…The Good Life
    Episode 1

12) Out of This World Adventures
    Episode 1

13) The Best of Home Theaters

14) Offshore Racing

15) Charlie Jones: Live to Tape
    Guest: Joe Bauer

16) Envy
    Episodes 2 and 8

17) Wealth on Wheels
    Episodes 10 and 36

## MOJO Shows Viewed

1) Three Sheets
   Season 1
   Episodes 1 and 2

2) Beer Nutz
   Season 1
   Episodes 1 and 7

3) Bobby G
   Season 1
   Episode 1

4) Uncorked
   Season 1
   Episode 1

5) Test Drive
   Season 1
   Episode 1

6) Pressure Cook
   Season 1
   Episode 1

7) Geared Up
   Season 1
   Episodes 1 and 6

8) After Hours
   Season 1
   Episode 6

9) Dr. Danger
   Season 1
   Episodes 2 and 3

10) Wall St. Warriors
    Season 1
    Episode 1

11) King of Miami
    Season 1
    Episode 1

12) Start-Up Junkies
    Episode 1

13) Fields of Glory
    Auburn University

**CERTIFICATE OF SERVICE**

I, Kathleen Wallman, hereby certify that, on February 20, 2009, copies of the foregoing document with attachments were served via electronic mail on the following:

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