

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)	
)	
Herring Broadcasting, Inc. d/b/a)	MB Docket No. 08-214
WealthTV,)	
Complainant)	File No. CSR-7709-P
v.)	
Time Warner Cable Inc.)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a)	File No. CSR-7822-P
WealthTV,)	
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 Hon. Richard L. Sippel
Chief Administrative Law Judge

**Reply in Further Support of Defendants' Joint Motion for
Modification of Court Room Memorandum**

Defendants Time Warner Cable Inc., Bright House Networks, LLC, Cox

Communications, Inc., and Comcast Corporation (the "Defendants"), by their counsel, hereby

respectfully submit this reply in response to the “Opposition to Joint Motion for Modification of Court Room Memorandum” (the “Opposition”) filed by Herring Broadcasting, Inc., d/b/a WealthTV (“WealthTV”). WealthTV opposes Defendants’ request that a DVD player and television display be permitted at the hearing for the limited purpose of allowing the DVDs attached as Exhibits D and E to the Expert Report of Michael Egan – which total 25 minutes – (the “Egan DVDs”) to be played as part of Mr. Egan’s testimony at the hearing. The essence of WealthTV’s argument is that, in a case that involves, among other things, the question of whether two cable television program services are “substantially similar,” it would be prejudiced if the Presiding Judge viewed clips from these two program services which support Defendants’ expert’s theory that the services are not “substantially similar.” While Defendants recognize the Presiding Judge’s discretion in the conduct of the trial, WealthTV’s Opposition provides no legal basis for excluding the Egan DVDs from evidence and thus, it is fully appropriate that the Presiding Judge view them in the courtroom, accompanied by the sponsoring witness’s testimony. As such, Defendants urge the Presiding Judge to grant the Defendants’ “Joint Motion to Modify the Courtroom Memorandum” (“Motion”) without further delay.

WealthTV’s Opposition makes the sweeping assertion that viewing the Egan DVDs at the hearing will unfairly prejudice WealthTV because the Egan DVDs are, among other things, “biased,” “misleading,” and “slanted.”¹ However, WealthTV’s argument confuses “adverse” with “prejudice.” There is no question that the DVDs are adverse to WealthTV’s position in the case. However, the threshold for exclusion on the basis of prejudice, as articulated in Rule 403 of the Federal Rules of Evidence, is not that the evidence is adverse to a party. Rather, exclusion under Rule 403 is an extraordinary remedy which is proper only when the probative value of the proffered evidence is outweighed by some prejudicial quality, such as the capacity to inflame

¹ Complainant’s Opposition to Joint Motion for Modification of Court Room Memorandum at 3 (“Opposition”).

emotions in the finder of fact.² For the Presiding Judge to exclude the Egan DVDs from the record in this proceeding, WealthTV must demonstrate, at a minimum, that their admission would create “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”³ WealthTV’s Opposition fails to demonstrate that the probative value of the Egan DVDs “is substantially outweighed by the danger of unfair prejudice” that may result from admitting the Egan DVDs into evidence and viewing them at the hearing.⁴

WealthTV’s Opposition speculates that the Defendants intend for the Presiding Judge to act as “a casual viewer” at the hearing and that viewing the Egan DVDs – one of which compares clips representative of the overall look, feel and production quality of WealthTV and MOJO and the other of which compares clips of the five specific programs that WealthTV claims were copied by MOJO with their alleged MOJO “counterparts” – will not allow him to gather enough information to develop a fair opinion on the overall nature of the two programming services.⁵ In making this assertion, WealthTV ignores the fact that the Presiding Judge will have before him for consideration a variety of other materials that speak to the issue of the alleged similarity between the two programming services, including written direct testimony of various witnesses, expert reports and supporting documentation, and trial briefs. Furthermore, WealthTV will be able to cross examine the sponsoring witness in connection with the presentation of the Egan DVDs, and will be able to address any concerns it may have through testimony of its own witnesses and in its proposed findings and conclusions.

In other words, the Presiding Judge will not be viewing the Egan DVDs in a vacuum, as WealthTV has alleged in its Opposition. Rather, as Defendants pointed out in the Motion, the

² See *U.S. v. Thevis*, 665 F.2d 616, 634 (C.A.Ga., 1982).

³ FRE 403, Notes of Advisory Committee.

⁴ FRE 403.

Egan DVDs will simply serve as a useful supplement to these other materials and will aid in the Presiding Judge's understanding and appreciation of the nature of the programming services at issue. WealthTV has failed to demonstrate how viewing the Egan DVDs at the hearing would be inflammatory in any way or how doing so could possibly invoke an improper or emotional response from the Presiding Judge when WealthTV will have "ample opportunity... to ensure that the evidence [is] placed in its proper perspective."⁶

As to WealthTV's claim that the condensation of Mr. Egan's work is not a fair or accurate representation of the two programming services, not only do Defendants respectfully disagree, but also they would point out that the "representativeness" of the DVDs is a matter for cross-examination, not a basis for exclusion.⁷ After viewing dozens of hours of WealthTV and MOJO programming, Mr. Egan carefully selected the clips that he felt best illustrated the differences between the two services. The Egan DVDs summarize his work and are designed to reflect the basis for his overall opinion, given in sworn testimony. Defendants do not understand WealthTV to be suggesting that Mr. Egan has altered the content of the material on the Egan DVDs; and, of course, there is no evidence that he has done so.

Nor will viewing the Egan DVDs "present obstacles to the efficient and orderly conduct of the hearing," or lead to an "unwieldy" cross-examination as WealthTV argues.⁸ As stated in the Motion, the presentation of the Egan DVDs at the hearing is intended to summarize lengthy testimony and exhibits while permitting the Presiding Judge to observe the programming's

⁵ Opposition at 2.

⁶ *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1502 (C.A.11 (Ga.), 1985).

⁷ Notably, much of the material for the shorter DVD prepared by Mr. Egan designed to compare the look and feel of WealthTV and MOJO programming was taken from "sizzle reels" and website clips that these to programmers themselves have held out to prospective multichannel video programming distributors, advertisers and viewers as a representative sample of their fare.

⁸ Opposition at 4.

images and soundtrack through an audiovisual display.⁹ WealthTV has had copies of the Egan DVDs since February 27, 2009. Consequently, there is no reason why WealthTV would be unable to effectively cross-examine Mr. Egan without need for “significant manipulation of video equipment to stop and start the video at important points to conduct the questioning.”¹⁰ WealthTV’s claim that viewing the Egan DVDs will necessitate a protracted and cumbersome examination is unsupported, particularly in light of the fact that WealthTV’s counsel has already questioned Mr. Egan about the Egan DVDs in taking his deposition and so should not in any way be surprised by Mr. Egan’s testimony nor be unprepared to cross-examine him without delay. In short, there is nothing about the presentation of the Egan DVDs that will conflict with the sound administration or accelerated pace of the hearing.¹¹

As WealthTV acknowledges, both sides have retained experts who have viewed both WealthTV and MOJO programming and then incorporated their findings in their written expert reports. For example, Mr. Egan describes programming he viewed on MOJO as “contemporary,” “hip,” and “edgy.”¹² But because these terms are susceptible to varying interpretations, Mr. Egan also directed the preparation of the Egan DVDs to provide concrete visual examples to help inform his written testimony.¹³ In sum, the presentation of the Egan DVDs is relevant to the consideration of critical issues in these cases, and the Complainant has failed to demonstrate any basis for exclusion of such evidence from the record or at trial. In the

⁹ Furthermore, Defendants will provide the necessary video equipment and coordinate with WealthTV in advance of the hearing to minimize any disruption.

¹⁰ Opposition at 4.

¹¹ *Gross Telecasting* is completely relevant to the instant proceedings because it stands for the proposition that presentation of recorded video evidence is wholly appropriate in evaluating a claim relating to the nature of video programming – in that case whether the programming at issue was biased or slanted, and in these cases, whether certain video programming is “substantially similar.” Exclusion of the Egan DVDs as advocated by WealthTV would stretch the rules of evidence beyond their intended meaning and impede the administration of a full and fair proceeding. *Gross Telecasting, Inc., For Renewal of Licenses of Stations WJIM, WJIM-FM, WJIM-TV, Lansing Michigan*, Initial Decision, 92 FCC 2d 248 (1981).

¹² See Expert Report of Michael Egan, Feb. 27, 2009, at 7-8, 13.

¹³ Indeed, counsel for WealthTV asked Mr. Egan to define these terms during his deposition.

interest of preserving a full and complete record and facilitating the prompt commencement and expedited conduct of the hearing, Defendants respectfully request that their Joint Motion for Modification of Court Room Memorandum be granted without further delay.

Respectfully submitted,

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Dated: April 1, 2009
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CERTIFICATE OF SERVICE

I, Micah M. Caldwell, hereby certify that, on this 1st day of April, 2009, copies of the foregoing "Reply in Further Support of Defendants' Joint Motion for Modification of Court Room Memorandum" were sent via e-mail, to the following:

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