REDACTED – FOR PUBLIC INSPECTION

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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

To: Marlene H. Dortch, Secretary
Federal Communications Commission

From: The Hon. Richard L. Sippel
Chief Administrative Law Judge

DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE PORTIONS OF THE TESTIMONY OF CHARLES HERRING

Defendants Time Warner Cable Inc. ("TWC"), Comcast Corporation ("Comcast"), Cox Communications, Inc. and Bright House Networks, L.L.C. ("Defendants") hereby move *in limine* to preclude portions of the Testimony of Charles Herring submitted in the above-captioned program carriage complaint proceeding by Complainant Herring Broadcasting, Inc. d/b/a WealthTV ("WealthTV").

Mr. Herring's written direct includes factual testimony, expert testimony, hearsay and improper argument. Only the first category is admissible under the Federal Rules of Evidence that govern this proceeding. Within his 106-page opus, Mr. Herring (1) provides unqualified rebuttal expert analysis that both is inadmissible under Fed. R. Evid. 702 and violative of the Presiding Judge's order prohibiting expert rebuttal testimony; (2) offers his own interpretations of third-party business strategies and statements despite having no personal knowledge as required by Fed. R. Evid. 602; and (3) cites quotations from trade press and third-party conversations of subordinates that are nothing more than hearsay barred by Fed. R. Evid. 801 and 802. Mr. Herring can properly testify to the facts concerning the background and strategies of WealthTV and his personal dealings with Defendants that are within his personal knowledge. He cannot twist the Presiding Judge's order requiring written direct testimony into a platform for inadmissible argument; unqualified, undesignated, and untimely "expert" opinions; and third party news reports and alleged conversations that cannot be cross-examined. If he were permitted to do so, the effect may well be to extend the hearing because Defendants will be forced into a lengthy cross-examination of the many matters about which Mr. Herring is incompetent to testify, a result that would be inconsistent with the expedited nature of this proceeding.

The majority of Mr. Herring's proposed testimony suffers from one or more of these infirmities. We set forth below the legal framework for the exclusion of these portions. For the convenience of the Presiding Judge, we attach to this motion as Exhibit "A" a color coded annotated version of Mr. Herring's testimony that shows precisely which portions are inadmissible and why.[1]

I. Portions Of The Herring Testimony Should Be Precluded Under Fed. R. Evid. 701 and 702 To The Extent It Constitutes Improper Expert Rebuttal Testimony

Unwilling to rely solely on the experts he has retained, Charles Herring devotes 45 pages of testimony to his own personal analysis of iN DEMAND's INHD and MOJO programming in an effort to support WealthTV's assertion that an inference of discrimination can be drawn from the purported substantial similarity of MOJO and WealthTV programming. But three experts, including WealthTV's own designated industry expert, Sandy McGovern, are providing opinions and testimony on that very issue. Similarly, Mr. Herring offers opinions (as opposed to facts, to which the Defendants do not object) on the threshold number of subscribers necessary for a typical network to draw advertisers, despite the testimony of WealthTV's expert, Gary Turner, to the same effect. Finally, Mr. Herring offers his own evaluation of data purporting to show the demographics of WealthTV viewers, the sole subject of WealthTV's expert Mark Kersey.

[1] Because WealthTV has not yet provided a non-confidential version of Mr. Herring's direct testimony, which has been marked highly confidential, a redacted version of Exhibit A is not being submitted in the public docket in this proceeding at this time.

Mr. Herring is not qualified as an expert to supplement the opinions offered by his own experts under Fed. R. Evid. 702.[2] Nor is he qualified to rebut the opinions of Defendants' experts. And even if Mr. Herring could be deemed to be an expert, his proposed opinions are untimely and improper under the Presiding Judge's January 29 Further Revised Procedural and Scheduling Order that (a) fixed deadlines for designation of experts and submission of their reports, deadlines that passed long ago, and (b) precluded precisely the type of rebuttal expert testimony that Mr. Herring seeks to offer.

Rule 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness *qualified as an expert* by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[3] In determining whether expert testimony is admissible, the court must determine whether the expert is in fact "qualified 'by knowledge, skill, experience, training or education' to render an opinion."[4] If the witness is

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[2] The Federal Rules of Evidence govern the hearing. *See* 47 C.F.R. § 1.351 (2009) ("Except as otherwise provided in this subpart, the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern formal hearings"). Although the Presiding Judge may "relax" those rules to serve the ends of justice (*see id.*), there is no authority or reason for eliminating all evidentiary protections, as WealthTV seeks to do here.

[3] FED. R. EVID. 702 (emphasis added).

[4] *United States* v. *Nacchio*, 555 F. 3d 1234, 1241 (10th Cir. 2009) (quoting Rule 702).

qualified, the court then must determine if the expert is providing an opinion based on reliable underlying reasoning and methodology as set forth in *Daubert.*[5]

WealthTV cannot avoid this rule by simply offering up expert opinion clothed in the direct testimony of a fact witness. Mr. Herring is not an expert in comparative programming and has never worked for a cable operator. Nor does he have any expertise that would allow him to offer an opinion on target demographics of cable networks. He offers no credentials that would enable the Presiding Judge to deem him qualified to render reliable expert opinions on the business strategies of iN DEMAND, the similarity of MOJO to WealthTV, the target demographic of MOJO or INHD, or the level of advertising sales required to sustain a cable network.[6]

Moreover, WealthTV has never designated Mr. Herring to be one of its expert witnesses on any of these issues despite the clear directive of the Presiding Judge to identify any such witnesses so that they could be deposed.[7] WealthTV clearly understood that testimony on these issues would require expert testimony, having designated as experts Ms. McGovern, Mr. Turner and Mr. Kersey.

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[5] *Id.* at 1241 (internal citations omitted); *see also Daubert* v. *Merrell Dow Pharma.*, 509 U.S. 579, 592-93 (1993) (holding that the court must make "a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue").

[6] Mr. Herring is free to testify as to WealthTV's own efforts to sell its advertising, to the extent such facts are within Mr. Herring's personal knowledge and are not hearsay. But that does not give him the license to offer "expert" testimony about cable network advertising sales matters generally.

[7] Order, Dec.15, 2008.

Mr. Herring's testimony is a thinly-veiled attempt to put before the Presiding Judge an entirely new round of opinion evidence that is intended to bolster the testimony of WealthTV's experts and offer an expert rebuttal to the Defendants' experts, Michael Egan and Larry Gerbrandt. By way of example, Mr. Herring provides the following in his testimony:

- A putative analysis of INHD's early programming themes and target audiences;[8]
- An analysis of the programming and target demographics of the Fine Living Channel;[9]
- Specific critiques of the methodologies employed by Comcast's industry expert, Larry Gerbrandt, and TWC's industry expert, Michael Egan;[10]
- A genre analysis comparing the programming categories of INHD and those of MOJO;[11]
- A study of the alleged similarities in the target audiences of MOJO and WealthTV;[12]
- A genre and individual programming comparative analysis between WealthTV and MOJO;[13]
- An economic consumer demand analysis purporting to demonstrate that there was no business justification for Defendants to prefer MOJO over WealthTV;[14]

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[8] Herring Test. at 24-28.

[9] *Id.* at 10-11.

[10] *Id*. at 28, 36-40, 50-51, 53-54.

[11] *Id*. at 30-32.

[12] *Id*. at 33-36.

[13] *Id*. at 40-56.

[14] *Id*. at 56-69.

- An updated consumer survey analysis conducted after and in response to the deposition of WealthTV's putative survey expert, Mark Kersey;[15]
- An assessment of subscriber levels necessary for a network to become economically viable for national advertisers;[16] and
- An evaluation of the reasonableness of benchmarking the terms of a proposed remedy against other industry agreements.[17]

As Mr. Herring is not a recognized expert in any of these fields, offers no qualifications to be certified as an expert in this proceeding, and nowhere discloses any reliable methodology or principles upon which his testimony is based, these analyses, opinions and theories cannot be admitted under Fed. R. Evid. 702.[18]

Nor can WealthTV shoehorn this testimony within the lay witness opinion provision of Fed. R. Evid. 701. Federal Rule of Evidence 701 provides: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

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[15] *Id*. at 18.

[16] *Id*. at 94-97.

[17] *Id*. at 98-101.

[18] *See, e.g.*, *United States* v. *Giambro*, 544 F.3d 26, 33 (1st Cir. 2008) (upholding district court decision to reject putative expert testimony because witness lacked expertise and did not base his testimony on sufficient facts or data or reliable principles and methods, instead using purely anecdotal underlying data that was without scientific basis); *see also United States* v. *Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005) (upholding district court decision to reject testimony by party's proffered expert witness because witness lacked expertise and notwithstanding, relied upon untrustworthy methodology).

The final clause of this rule, concerning specialized knowledge, was added in 2000 "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing."[19] Courts must "channel [ ] testimony that is *actually expert testimony* to Rule 702."[20] Thus, because Mr. Herring is not qualified as an expert witness, the judge should evaluate his testimony under Fed. R. Evid. 701.[21] Pursuant to that rule, courts regularly reject testimony by a putative lay witness if the witness has no personal knowledge and is testifying about matters that require scientific, technical or specialized knowledge.[22]

Here, Mr. Herring is acting as precisely the sort of "expert in lay witness clothing" that the drafters of Rule 701(c) sought to prevent. Mr. Herring is not just basing this opinion

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[19] FED. R. EVID. 701 Advisory Committee's Notes; *see also Hirst* v. *Inverness Hotel Corp.*, 544 F.3d 221, 227 (3d Cir. 2008) (noting that "a party may not use Rule 701 as an end-run around the reliability requirements of Rule 702").

[20] FED. R. EVID. 701 Advisory Committee's Notes (emphasis added).

[21] *See* FED. R. EVID. 701; *see also Fossyl v. Milligan*, No. 07-4546, No. 07-4548, 2009 WL 692163, at *9 (6th Cir. Mar. 18, 2009).

[22] *See, e.g., United States* v. *Testerman*, 263 Fed. Appx. 328, 332 (4th Cir. 2008) (noting lay witness' testimony of specialized computer knowledge was properly excluded under Rule 701); *Banks* v. *United States*, 78 Fed. Cl. 603, 648 n.75 (2007) (declining to consider lay witnesses' testimony concerning geological processes in spite of witnesses having undertaken research and "possess[ing] the education to reach an intelligent layman's interpretation of that research" because the witnesses were not experts; excluding opinion testimony by lay witnesses as to topics that venture into scientific, technical or other specialized knowledge pursuant to Rule 701); *Thomas* v. *Atmos Energy Corp.*, 223 Fed. Appx. 369, 374 (5th Cir. 2007) (upholding lower court ruling to exclude portion of lay witness testimony containing legal arguments pursuant to Rule 701); *Rodriguez* v. *West New York*, 191 Fed. Appx. 166, 169 (3d Cir. 2006) (upholding lower court determination to exclude testimony of lay witnesses pursuant to Rule 701 because testimony was an opinion requiring specialized knowledge of customs and practices not based on lay witnesses' personal observations).

testimony on his rational lay perception of certain factual matters. He is affirmatively proffering comparative programming "genre" and economic analyses, criticizing the procedures of other experts and updating and confirming the work of his own putative survey expert. WealthTV has designated an expert, Ms. McGovern, to testify on the allegedly "numerous and substantial similarities between MOJO and WealthTV" and on "the differences between INHD and MOJO;" an advertising expert, Mr. Turner, to testify as to the "the significance of a network's achieving certain household coverage thresholds" in order to be a viable advertising entity; and a putative survey expert, Mr. Kersey, to "document the demographic profile of WealthTV's viewers."[23] Yet, WealthTV now seeks to have Mr. Herring testify as to these very same matters.[24]

WealthTV cannot have it both ways. The Presiding Judge should not permit WealthTV to introduce the expert opinions of Mr. Turner, Ms. McGovern and Mr. Kersey as based upon the notion that their fields require "specialized knowledge" under Rule 702, and to then repackage and re-label that same testimony as merely commonplace lay opinion when presented by Mr. Herring.[25]

Furthermore, by maneuvering Mr. Herring into a rebuttal expert witness, WealthTV is attempting an end run around the Presiding Judge's directions concerning expert witnesses to the

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[23] *See* Complainant's Trial Brief, 30-31 (April 6, 2009).

[24] *See id*. at 29-30 (Herring will "document that MOJO is substantially similar to WealthTV," "will address the importance of having a critical mass of subscribers in order for an advertiser-supported video programming service to have a viable and sustainable business," and "will also testify about the target and actual audience of WealthTV.").

[25] *See United States* v. *Peoples*, 250 F.3d 630, 641 (8th Cir. 2001) (holding that since testimony in the instant case was similar to expert testimony properly admitted in other cases, it supported the conclusion that it was impermissible lay opinion); *United States* v. *Figueroa-Lopez*, 125 F.3d 1241, 1244-45 (9th Cir. 1977) (same).

prejudice of Defendants. At the November 25, 2008 pre-hearing conference, counsel for WealthTV explicitly requested the right to introduce rebuttal expert witnesses. The Presiding Judge rejected the request, unambiguously stating that he was "very much opposed to having rebuttal expert witnesses."[26] Accordingly, the Presiding Judge set a schedule providing that WealthTV's "final" expert reports were due on February 20, 2009.[27] Defendants then had the opportunity to take thorough depositions of all three of WealthTV's designated experts — *but not Mr. Herring*, who now at this late hour offers even more detailed opinions than each of his three designated experts.

Thus, even if WealthTV could overcome its fatal evidentiary hurdles, it would be fundamentally unfair to permit WealthTV to circumvent the efficient procedure established in this case by introducing de facto rebuttal expert testimony through a witness never subject to discovery.

For these reasons, Mr. Herring's expert testimony should be stricken. For the convenience of the Presiding Judge, those portions of Mr. Herring's written direct testimony that constitute improper expert testimony are identified in Exhibit "A" in blue.

II. Portions Of The Herring Testimony Should Be Precluded Under Fed. R. Evid. 602 To The Extent That It Is Not Based Upon Personal Knowledge

Substantial portions of Mr. Herring's testimony also must be precluded because they are not based at all on his personal knowledge, as required under Fed. R. Evid. 602. Rule 602 recites

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[26] Hr'g Tr. 154:9-10, November 25, 2008.

[27] Order, Jan. 29, 2009.

the most fundamental rule of evidence that a "witness may not testify as to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Although personal knowledge may include reasonable inferences, "those inferences must be grounded in observation or other first-hand personal experience. They must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience."[28]

Defendants generally have no objection to Mr. Herring testifying about the background and strategies of WealthTV, or the dealings that he individually had with Defendants, as such matters are fairly within the scope of his personal knowledge (subject to restrictions on hearsay that we discuss below). But Mr. Herring's proposed testimony roams far wide of matters about which he has personal knowledge. Rather, Mr. Herring offers commentary on numerous subjects to which he is plainly incompetent to testify:

- The business strategies, programming objectives and perceived network demographics of iN DEMAND management in creating INHD and later, MOJO;[29]
- The statements made, and the meaning of statements made in the trade press and other articles by executives of iN DEMAND (which is not a party in these cases) and industry commentators;[30]

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[28] *Payne* v. *Pauley*, 337 F. 3d 767, 772 (7th Cir. 2003) (internal quotations and citation omitted); *see also Olivas* v. *ITT Hartford Life and Annuity Ins. Co*., 57 F.3d 1077, No. 94-cv-55335, No. 94-cv-55342, 1995 WL 349855, at * 2 (9th Cir. Jun. 9, 1995) (upholding exclusion of evidence that was based on witness' speculation rather than personal knowledge); *Schertz* v. *Waupaca County*, 875 F.2d 578, 582 (7th Cir. 1989) (same).

[29] Herring Test. at 25-40.

[30] *See*, *e.g.*, *id*. at 26-30, 33-35, 37, 41-43, 49-50, 61-64, 94-96.

- The knowledge held by business executives at each of the Defendants and their perception of WealthTV as a competitor to MOJO;[31]
- The reasons and factual basis for the use of the MOJO tag line;[32]
- The categories of programming that iN DEMAND executives assigned to MOJO programming;[33]
- The advertising solicited by iN DEMAND for MOJO;[34]
- The consumer demand for MOJO;[35]
- WealthTV's relative VOD performance compared to other networks;[36] and
- The rationale for the discontinuance of MOJO.[37]

Mr. Herring cannot testify – i.e., bear witness under oath – as to matters with which he has no personal knowledge. If he were testifying orally, he could not offer speculation or press reports or documents that simply have been produced by Defendants in discovery in this proceeding. The fact that the Presiding Judge has required written direct testimony does not convert the testimony to a thesis paper with citations to third party sources. He is limited to actual testimony based on personal knowledge. The fact that Mr. Herring has now read certain documents does not constitute personal knowledge or render him competent to testify as to their

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[31] *Id*. at 29.

[32] *Id*. at 40.

[33] *Id*. at 40-43.

[34] *Id*. at 58.

[35] *Id*. at 61.

[36] *Id*. at 64.

[37] *Id*. at 66-70.

contents or meaning.[38] As a result, citations to such documents in Mr. Herring's pre-filed direct testimony do not satisfy the requirements of Rule 602. If it did, the rule would have no meaning.

For the convenience of the Presiding Judge, those portions of Mr. Herring's written direct testimony that are not based on personal knowledge are identified in Exhibit "A" in green.

III. Portions Of The Herring Testimony Should Be Precluded To the Extent That It Relies On Inadmissible Hearsay Statements

In the same vein, Mr. Herring's testimony is riddled with hearsay statements offered for the truth that must be excluded under Fed. R. Evid. 801 and 802. Rule 801(d) provides that: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay statements are deemed inadmissible under Fed. R. Evid. 802 unless falling within a delineated exception. None of these statements fall within any recognized hearsay exception and thus must be excluded.

First, Mr. Herring includes in his direct testimony numerous quotes from articles from the trade press, web sites, blogs and other industry commentators.[39] One of Mr. Herring's most

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[38] *See, e.g.*, *United States v. Becerril-Lopez*, 541 F.3d 881, 888 (9th Cir. 2008) (finding district court abused its discretion by allowing witness to testify as to a matter about which he only learned from reading a report); *Wilson v. Maricopa County*, No. CV-04-2873, 2007 WL 686726, at *13-14 (D. Ariz. Mar. 2, 2007) (instructing party that they are not permitted to rely upon third-party press releases and articles as evidence of the truth of the matters asserted therein because party did not have personal knowledge of those matters); *American Mobile Radio Corp.*, Order and Authorization, 13 FCC Rcd. 8829, ¶ 21 (1997) ("newspaper and magazine articles are the equivalent of hearsay and do not meet the specificity and personal knowledge requirements" necessary to establish a substantial and material question of fact with respect to evaluating a license application); *Mr. Lawrence E. Steelman, Capstar TX Ltd. P'ship, Mr. Stanley Daniels*, Letter, 22 FCC Rcd. 4866, 4869 (Med. Bur. 2007) (same).

[39] Herring Test. at 26-30, 33-35, 37, 41-43, 49-50, 61-64, 94-96.

frequent tactics is to quote news articles with statements of third-parties as support for his conclusions.[40] None of these third-parties are before the Presiding Judge, of course, and there is nothing about quotations in news articles that give those statements the necessary indicia of reliability to warrant their admission.[41] Nor can Mr. Herring pack into his personal testimony out-of-court media statements regarding anecdotal views on the critical mass of subscribership necessary for a network to become attractive to advertisers.[42] These are examples of hearsay that should not be admitted.[43]

Second, in discussing WealthTV's dealings with the Defendants and other MSOs, Mr. Herring repeatedly injects into his direct testimony purportedly positive statements made by Defendants' executives to others within the WealthTV organization, such as Nico Fasano and John Scaro, which were then allegedly reported to Mr. Herring.[44] But WealthTV has not elected

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[40] *Id*. at 26-29, 34-35, 37, 42, 61-62, 94.

[41] There is no reason even to consider such third-party statements, when WealthTV will have the opportunity to cross-examine the Defendants' executives and David Asch from iN DEMAND at the hearing.

[42] *Id*. at 94-96. This is particularly true when these same sources are not even relied upon by WealthTV's advertising expert, Mr. Turner.

[43] *See, e.g.*, *Williams v. Daytona Beach*, No. 6:04-cv-1879, 2006 WL 354635, at *20 (M.D. Fl. Feb. 15, 2006) (noting that plaintiff could not establish existence of a municipal policy by citing to a newspaper article because the article was hearsay); *Wood* v. *Cottey*, No. 1:02-CV-01450, 2004 WL 3315376, at *1 n.1 (S.D. Ind. Sept. 21, 2004) (noting that witness may not submit newspaper articles to establish facts reported in the article since content of article is hearsay); *Authement* v. *Seacor Marine, Inc*., No. 92-cv-1721,1993 WL 386304, *2 (E.D. La. Sept. 20, 1993) (noting that newspaper articles are hearsay because they report statements communicated to the author by others, irrespective of whether the author accurately transcribed information provided to him/her).

[44] *See, e.g.*, Herring Test., 82-87, 90.

to call Mr. Fasano or Mr. Scaro, much less the cable operator executives that supposedly made these statements, and they will not be available to be cross-examined as to what actually was said. Thus, even if the Presiding Judge were to treat Defendants' statements as non-hearsay admissions, they were made to others within the WealthTV organization who are not testifying. Recitations to Mr. Herring of Defendant statements made by non-testifying individuals constitute double- or multiple hearsay not falling within an exception.[45] As one example, Mr. Herring purports to testify about attenuated pronouncements that TWC indicated to WealthTV that TWC would do an affiliation agreement, and this is based on Mr. Herring being assured of that by one of his colleagues, Dean Harris, who in turn had been informed by some unknown person that they in turn had confirmed that with TWC executive Mickey Carter.[46] Such double- (or triple-) hearsay statements are not admissible to show that TWC had interest in WealthTV.[47]

Further, although WealthTV appears to consider statements by iN DEMAND executives as admissions by the Defendants, there is no legal basis for this treatment. WealthTV has not and cannot demonstrate that iN DEMAND had authority to speak for any Defendant, or that it

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[45] *See*, *e.g.*, *Gilligan v. Moreau*, 234 F.3d 1261, No. 00-7109, 2000 WL 1608907, at *3 n.4 (2d Cir. Oct. 25, 2000) ("The testimony of witnesses as to what the witness heard a party say is admissible as a party admission. The testimony of witnesses as to what someone else told them a party said is inadmissible double hearsay. The fact that it is a party who repeats the hearsay does not render the statement a party admission."); *Keenan* v. *Allan*, 889 F. Supp. 1320, 1339 n.5 (E.D. Wash. 1995) (evaluating double hearsay statement; noting that while initial statement from opposing party to a clerk may be considered a party-admission by an opponent, the reiteration of the opposing party's statement from the clerk to another party is hearsay not falling within an exception and thus not admissible).

[46] Herring Test., 73-74.

[47] *See* FED. R. EVID. 805 (permitting hearsay within hearsay only if each part of the combined statements falls within a hearsay exception); *Broady* v. *Zanzibar on the Waterfront, LLC*, 576 F. Supp. 2d 14, 25 (D.D.C. 2008) (excluding "double hearsay" testimony).

was acting as an agent. A third-party statement does not become an admission of another entity simply by virtue of a stockholder relationship.[48]

In short, the Rules of Evidence do not permit WealthTV to funnel any and all evidence it thinks may be plausibly useful through Mr. Herring regardless of his personal knowledge or the reliability of such proof. Mr. Herring's testimony should be limited like everyone else's testimony in this case to admissible statements of fact within his personal knowledge.

For the convenience of the Presiding Judge, those portions of Mr. Herring's written direct testimony that constitute improper hearsay are identified in Exhibit "A" in pink.

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[48] *See Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co., Ltd.,* 505 F. Supp. 1190, 1247 (D.C. Pa. 1980) *rev'ed on unrelated grounds* 475 U.S. 574 (1986) (declining to consider a statement by the employee of a subsidiary as a party admission against the parent corporation unless proponent of evidence established that the subsidiary "had authority to make a statement concerning the subject under Rule 801(d)(2)(C), or that the subsidiary acted as the parent's agent and the statement concerned a matter within the scope of it agency, under Rule 801(d)(2)(D)"). The court in *Zenith* held that "[i]n the absence of any showing of express authority … plaintiffs, as proponents of the evidence, should be required to make the same kind of showing as would be required to impose vicarious liability upon the parent corporation: that the parent corporation 'directly intervenes in the management' of the subsidiary so as to treat it as a 'mere department of its own enterprise.'" *Id.* at 1248 (internal citation omitted).

See also United Vaccines, Inc. v. *Diamond Animal Health, Inc.*, 409 F.Supp. 2d 1083, 1096 (W.D. Wis. 2006) (finding that defendant who owned all of the stock of another defendant was not liable for the subsidiary's contracts without evidence of a principle-agent relationship between the two corporations); *Binder* v. *Bristol-Meyers Squibb, Co.,* 184 F.Supp. 2d 762, 773 (N.D.Ill. 2001) (declining to hold parent liable for obligations of subsidiary because of lack of agency; noting that "[l]iability for the activities of the subsidiary will attach to the parent corporation only if the parent dominates those activities" (internal citations and quotations omitted); *Phoneix Canada Oil Co. Ltd.* v. *Texaco, Inc.,* 658 F.Supp. 1061, 1084-85 (D. Del. 1987) (listing reasons why wholly owned subsidiaries were not the agents of their parent); *Westfed Holdings, Inc. v. United States,* 55 Fed. Cl. 544, 564 (2003) *rev'd on other grounds,* 407 F.3d 1352 (Fed. Cir. 2005) (in considering whether admissions of a subsidiary could be attributed to its corporate parent, the court assessed the situation under agency law and declined to find subsidiary's statements to be admissions since an agency relationship between the parent and subsidiary was not established).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the testimony of Charles Herring be excluded and stricken from the record to the extent identified in Exhibit "A."

Respectfully submitted,

TIME WARNER CABLE INC.

/s/ Jay Cohen

Jay Cohen
Gary Carney
Samuel E. Bonderoff
Vibhuti Jain
PAUL WEISS RIFKIND WHARTON AND GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

Arthur H. Harding
Seth A. Davidson
Micah M. Caldwell
FLEISCHMAN AND HARDING LLP
1255 23rd Street, NW
Eighth Floor
Washington, DC 20037
(202) 939-7900

COMCAST CORPORATION

/s/ David H. Solomon

David H. Solomon
L. Andrew Tollin
Robert G. Kirk
J. Wade Lindsay
WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037
(202) 783-4141

James L. Casserly
Michael H. Hammer
Megan A. Stull
Michael Hurwitz
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238
(202) 303-1000

COX COMMUNICATIONS, INC.

/s/ David E. Mills

David E. Mills
J. Christopher Redding
Jason E. Rademacher
J. Parker Erkmann
Lynn M. Deavers
DOW LOHNES PLLC
1200 New Hampshire Avenue, NW
Washington, DC 20036
(202) 776-2000

BRIGHT HOUSE NETWORKS, LLC

/s/ R. Bruce Becker

R. Bruce Beckner
Matthew S. Schwartz
Robert M. Nelson
FLEISCHMAN AND HARDING LLP
1255 23rd Street, NW
Eighth Floor
Washington, D.C. 20037
(202) 939-7900

Dated: April 10, 2009
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CERTIFICATE OF SERVICE

I, Micah M. Caldwell, hereby certify that, on this 10th day of April, 2009, copies of the foregoing "Motion *In Limine* to Exclude Portions of the Testimony of Charles Herring" were sent via email, to the following:

The Honorable Richard L. Sippel*
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Ms. Mary Gosse
Office of Administrative Law Judges
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Kris Anne Monteith*
William Davenport
Gary P. Schonman
Elizabeth Mumaw
Federal Communications Commission
Enforcement Bureau
445 12th Street, S.W.
Washington, DC 20554

Kathleen Wallman
Kathleen Wallman, PLLC
9332 Ramey Lane
Great Falls, VA 22066
Counsel for Herring Broadcasting, Inc., d/b/a WealthTV

Harold Feld
STS LLC
1719 Noyes Lane
Spring, MD 20910
Counsel for Herring Broadcasting, Inc., d/b/a WealthTV

*Courtesy copy also delivered by hand

/s/ Micah M. Caldwell
Micah M. Caldwell

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Exhibit A

Legend to Testimony of Charles Herring, for Complainant Herring Broadcasting, Inc. d/b/a WealthTV, dated April 6, 2009

Color	Fed. R. Evid.
	702 (Improper Expert Testimony)
	602 (No Personal Knowledge)
	801/802 (Hearsay)

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

In the Matter of	)	
	)	
	)	MB Docket No. 08-214
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7709-P
Complainant	)	
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	)	

TESTIMONY OF CHARLES HERRING, FOR COMPLAINANT HERRING BROADCASTING, INC. D/B/A DATED APRIL 6, 2009

Introduction

On June 1, 2004, Herring Broadcasting Company, Inc. successfully launched WealthTV, a national cable network, across the United States. Upon its launch on June 1, 2004, WealthTV was immediately available 24/7 in high definition, HD, and in a "downconverted" standard

definition, SD, format. The HD network was unique in offering an all original "themed" programming lineup appealing to an upscale, male skewed audience in the 25 to 49 age group. To the best of my knowledge, upon WealthTV's launch, it was one of only a handful of national cable channels to offer a high definition network service. Other high definition channels included HD Net, launched on September 6, 2001, Discovery HD Theater, launched June 1, 2002, and INHD/INHD2 operated by iN DEMAND, launched in September of 2003, all focused on the technology of HD rather than a themed programming lineup specifically targeting a well-defined demographic. That is to say, rather than focus on producing original programming around a central theme or idea, these other HD networks aired a mix of HD programming for the "wow factor" offered by the high definition life-like picture quality.

At the time of WealthTV's launch on June 1, 2004, it was a unique and differentiated service from the other HD cable networks in the marketplace. Because of the tremendous amount of interest within the cable industry with respect to high definition, and with with only a few HD networks launching per year, WealthTV' launch was closely watched by those associated with the cable television business. With the successful negotiation of each new affiliation agreement, WealthTV demonstrated the viability of a themed programming network with special appeal to a small but highly desirable demographic in the audience at large, and likely to be among the earliest adopter of HD – wealthy men ages 25 to 49 years old.

By early 2006, iN DEMAND's INHD programming was still not resonating with viewers. iN DEMAND began preparing for the 24/7 launch of a new network, MOJO, to replace the fledging INHD service. Unlike INHD, MOJO offered a themed original programming lineup, focused on the same network genre of luxury lifestyle entertainment to attract the exact same target audience as WealthTV. MOJO's original core themed programming concept and targeted audience was straight out of the WealthTV playbook. But despite the similarity with WealthTV, and

WealthTV's proven track record, iN DEMAND and its cable operator owners decided they would rather create their own version of WealthTV than share revenue with an independent programming vendor.

WealthTV's senior management had been meeting with and divulging its programming and business strategies to iN DEMAND's cable owners since early 2004 in an effort to secure carriage for its channel. Yet despite interest in precisely the programming WealthTV produced and the demographic WealthTV targeted, and despite WealthTV's ability to reach affiliation agreements with other video distributors, iN DEMAND's four cable owners refused to engage in meaningful negotiations. This unlawful discriminatory conduct by iN DEMAND's owners, namely Comcast Corporation, Time Warner, Cox Communications, and Bright House Networks, restrained WealthTV's ability to compete fairly with MOJO, which received the benefits of carriage on the largest cable systems in the most desirable markets – such as New York and Los Angeles. This is precisely the sort of discriminatory conduct Congress wanted the FCC to end by creating the carriage access complaint process. In The Cable Television Consumer Protection and Competition Act of 1992, Congress established a number of key policy goals including fostering "a diverse, robust, and competitive market in the acquisition and delivery of multichannel video programming" and ensuring "that cable operators did not use their dominant position in the multichannel video distribution (MVPD) market, acting unilaterally or jointly, to unfairly impede the flow of video programming to consumers." (WTV001 0002122)

I. BUILDING WEALTHTV, SOLID MANAGEMENT AND A CONSISTENT VISION TARGETING THE EARLY ADOPTER, 25 TO 49 YEAR OLD MALES EARNING MORE THAN $100K PER YEAR

About WealthTV's Management Team

WealthTV is led by my father, Robert Herring, Sr., CEO, of WealthTV. He is a highly proven and successful business entrepreneur with over 35 years of experience founding and leading high technology companies. In 1972, my father was the sole founder of Industrial Circuits, an advanced printed circuit board company. The company was self funded and solely owned by my family. By 1988, Industrial Circuits had become one of the largest producers of printed circuit boards. The business was sold in 1988. Shortly thereafter, my father, brother and I started Herco Technology, a manufacturer of high volume printed circuit boards. The advanced operations were built from the ground up. By 2000, the company was the largest independent producer of printed circuit boards in the United States, operating out of a 232,000 sq ft facility with 600 employees. In 1992, my father also solely acquired and owned Synthane Taylor a high-end manufacturer of advanced materials for the electronics industry. Both Synthane Taylor and Herco Technology were sold to Teradyne, Inc. in August of 2000.

In addition to experience with cutting edge technology, my father also owned and invested in businesses related to the entertainment industry and, significantly, was heavily involved in the early days of the rapid expansion of the Direct Broadcast Satellite (DBS) industry. Through the years, [redacted] In the early 1990s, our family business, Herco Technology, became the producers of the primary electronic component for DirecTV' set-top-box. We watched and contributed to the expansion of the DirecTV set-top-box deployment to over a million subscribers.

This combination of exposure to cutting edge MVPD technology and the entertainment industry inspired us to consider entry into the emerging DBS programming market. We considered launching a "WealthTV like" service. Because satellite costs remained prohibitively high, we decided to focus our resources on our existing businesses. Yet, we remained convinced that the

concept of placing a themed channel, designed to have appeal to a male targeted demographic with significant income and a tendency to be early adopters of new high-end video technologies could be successful, given the right investment commitment and management team. After selling our family electronic business in 2000, we resumed our investigation into the feasibility of launching such a channel.

Another key initial senior management member of WealthTV was Dean Harris. Mr. Harris has an extensive background in the financial services sector and the media industry. Prior to joining WealthTV, Dean was the president of Heftel Entertainment, overseeing Heftel's program production and post production facilities in Las Vegas and Miami. He was a member of the board of directors for Billboard Live!, an entertainment subsidiary of Billboard Magazine. As GM of WealthTV from its inception until September 2006, Mr. Harris oversaw daily operations of the network, including being the Executive in Charge of Production on hundreds of hours of original programming.

Once we committed to the business of WealthTV, we relied on the lessons of our past highly successful start-up operations. Most importantly, the senior management of WealthTV, led by my father, continued a practice implemented in previous businesses, namely investing in the best talent available. Fortunately, Southern California has a plethora of talented individuals in the entertainment industry. As we prepared for launch, we hired the most capable staff members available, from technical engineering managers to oversee operations to producers, editors, on-air talent, sound technicians and video photographers for content production. We also assembled the best available affiliate sales team, comprised of highly seasoned veterans within the cable industry. Today, our full time staff is approximately 45 people strong.

As needed, WealthTV had numerous other resources available. In addition to hiring multiple consultants as deemed beneficial, including [redacted] Further, WealthTV contracted Sony and Ascent Media, part of Liberty Media, one of the nation's largest media conglomerates, to turn key our production studios. The initial contract was in the multimillions of dollars and both Sony and Ascent Media offered extensive resources as needed.

We also recognized the need to have top-notch production facilities. My brother, Robert Herring, Jr., accompanied by a small staff, including our technical engineering manager, oversaw the initial construction of the production operations and assisted in daily operations of the network. Over the years, he has overseen numerous construction projects, managed production operations with upwards of 400 employees, and held the titles of General Manager and Director of Engineering for our previous electronic company's operations. His experience in the design of facilities and management of production ensured that WealthTV would have an experienced team on the ground and intense hands-on involvement by the owners/investors critical to success.

Today, I'm pleased and amazed with the talents of our staff. Many members have been with us prior to the launch of WealthTV in June of 2004 and are celebrating their fifth year anniversary with WealthTV. Indeed, the fact that despite the persistent discriminatory treatment and barriers to entry created by the defendants in favor of their affiliate MOJO, we have continued to grow our operation and remain invested in the programming while MOJO has gone dark.

Internal Funding

WealthTV's management was and remains highly committed to the success of WealthTV. Unlike many emerging networks preparing for launch, WealthTV wasn't burdened with funding challenges as its owners were committed to fully funding the network's launch and ramp, mitigating the usual concerns of an emerging network of how ling it may take to achieve profitability. When management has directly and heavily invested capital into a business, they demonstrate a strong commitment to the long term success of the organization.

WealthTV Built Full Production Capabilities, Master Control & Uplink Prior to its Launch

In 2003, it became clear that there was minimal high definition content available in the marketplace. Moreover, the type of content readily available didn't always fit WealthTV's targeted audience. In January of 2004, a small group of WealthTV's staff, including me, attended a major content acquisition show in Las Vegas called NATPE. The amount of HD content readily available was minimal. Moreover, much of the content simply didn't fit our target audience. It was apparent that WealthTV would need to either help outside production companies move more rapidly towards high definition production and/or build-out our own production studios to create content specifically targeting our audience.

WealthTV did both. We worked with several outside production companies to create original high definition content for the channel. Many companies were paid in advance for multiple episodes of a series to help fund their acquisition of HD equipment. More importantly, WealthTV made a substantial investment in building full in-house production capabilities. We acquired a 40,000 sq ft facility to house our production operations and headquarters. In late 2003, Sony's video production integration group was tasked with re-designing the layout of the facility to house and optimize internal content creation from concept to airing. (Sony's integration group was acquired by Ascent Media shortly after the design phase but prior to build-

out.) In early 2004, the roof of the facility was removed to enhance the studio space and the building was heavily renovated to house our production studios, edit bays, graphic creation, sound correction, center equipment room, control room, master control and uplink operations. Ascent Media, with help from Motorola, designed our master control, giving WealthTV the ability to uplink on site – which is the process of transmitting the feed from earth to a satellite spacecraft. The creation of our own content would further enhance the viability of WealthTV. Offering a differentiated service with unique and original content, rather than repurposed content, would enhance the appeal to video consumers. By producing and maintaining full rights to our content, WealthTV can offer advanced services, such as video on demand without worrying about contractual license issues. Most importantly, the commitment shown in building full production capabilities signaled that WealthTV was fully committed to offering a viable quality long-term product.

WealthTV made this extraordinary upfront commitment because it intended to target a specific audience – males 25 to 49, earning more than $100,000 per year. To appeal to this high-end audience requires top-quality programming, which requires a top-notch facility. In addition, we understood that the more aspects of the programming chain we could bring under our control, the greater our ability to guarantee the consistent quality demanded by the targeted demographic and by the video distributors.

The Concept of WealthTV – A Themed High End Lifestyle Network

Several years prior to launching WealthTV, my father discussed with me his desire to launch a high-end lifestyle channel. Although at the time, there was no name placed on the concept, it would become WealthTV years later. The initial concept of the channel remains the same, namely to use themed original lifestyle programming to attract a high end male skewed audience

with disposable income. Through the years, in order to give people a quick picture of the concept of the channel we have stated it is similar to the *Robb Report* magazine. To some extent this is true, yet not the complete picture. Like the *Robb Report* WealthTV which features content on cars, boats, cigars, and travel. Yet, WealthTV also offers shows featuring finance, food, wine, music, and other high-end lifestyle programming.

After the sale of our family businesses in August 2000 more discussions took place regarding the potential business model, necessary infrastructure, and types of programming that could be aired. In the early summer of 2003, my father and I had extensive discussions on the necessary infrastructure of launching a channel and programming that it could feature. The examples were numerous. I recall discussions on exotic cars, yachts, travel, fine wines, foods, and finance. In order to attract a more educated audience, the programming would have to offer substance with the entertainment. We also wanted to avoid Hollywood "gossip" and pure flash. If a jet was shown, we'd explain why the owner uses it, the advantages to his business and life, and the expenses in owning one. We felt that the concept was very unique based upon the lack of such a dedicated channel on TV at the time. We also realized that the programming would draw in a secondary audience, namely those looking to live vicariously. In early December, 2003 as we began a content buying spree for the channel, it was announced in a press release that "We are actively seeking fresh, high-end lifestyle and entertainment programs with a broad appeal that show the high-end lifestyle at its best."[1]

We recognized that advertising revenue is a critical component to the success of emerging networks and carving out a niche for WealthTV would be key. Our strategy for becoming a long-term viable network focused on attracting a highly desirable audience for advertisers – namely an

[1] Source: A WealthTV press release dated December 12, 2003, "WealthTV Begin's Content Buying Spree", http://www.wealthtv.net/releases.html

upscale male skewed audience with plenty of disposable income. I've used the phrase "having special appeal to the high end viewer" to describe this strategy.

WealthTV's all original themed programming strategy features shows on how wealth is achieved, used and enjoyed.[2] Themes focus on enjoyable aspects of financial success, including travel, fine dining, luxury transport, gadgetry, finance, philanthropy, and thoughtful insights on cultures, among others. With various heavily male skewed series, we've used multiple images in our advertisements with key short phrases to convey the target audience of the network. An example is a full page color ad (Exhibit 1[3]), WealthTV ran in 2007 and 2008, which has placed in multiple magazines. The ad uses the phase, "from great cars to the best cigars, WealthTV delivers the luxury lifestyle all in high definition." Unlike other networks which were launching a "high definition" channel back in the early part of this decade, such as INHD, by no means was WealthTV about the technology. The themed high-end lifestyle network concept of WealthTV was developed well before we decided to launch in high definition.

A Scare for WealthTV – Fine Living

By at least late 2003, I became aware of Fine Living. The name sounded like it could be similar to WealthTV and we were afraid that our "unique" programming model wasn't so unique. Although WealthTV was launching in HD and Fine Living didn't offer a HD feed, WealthTV wasn't about the technology. WealthTV was about the themed high-end lifestyle programming. I had my cable service upgraded to receive Fine Living. And after watching the channel and reading numerous articles, and later having in-depth discussions with one of its founders, we realized that the concept of Fine Living and WealthTV were nothing alike. Although Fine

[2] See WTV001 0000028, WealthTV's pre-launch marketing flyer.
[3] This Exhibit is document WTV001 0000005.

Living sounds similar to WealthTV, the concept is not. Fine Living is about how to enjoy your life at your current economic level. A key series was *Simplify your Life*. This series gives helpful, timesaving tips to allow viewers to better enjoy their life. An example of an episode of *Simplify your Life* is how to use Tupperware containers to place extra belongings underneath your bed to tidy up one's living quarters. This isn't a type of show that would ever air on WealthTV. Two of Fine Living's key programming categories were "personal space" and "practical living". Both fell outside of WealthTV's theme.

Nor, as we continued to reassure ourselves, did Fine Living have a male skew. Demographic data on Fine Living offered on its website[4] with a source specified as Nielsen, Spring of 2006, shows it attracts 69% women to WealthTV's 71% percent men. Fine Living clearly targets females, while WealthTV is designed to attract males. Today, Fine Living offers Martha Stewart programming, typifying the network. While no one doubts the appeal of Martha Stewart to certain audience demographics, including those with significant disposable income, she does not particularly appeal to males ages 25 to 49. To the best of my knowledge, WealthTV was a unique concept and remained so up until nearly three years later when MOJO launched its nearly identical services.

WealthTV's Targeted Demographic - Educated, High-End, 25-49 Year-Old Males

WealthTV's targeted demographic has been consistent from 2003 when I help found the company until today. Our desire has been and remains to target a ***male skewed*** audience from ***25 to 49*** years old. WealthTV is designed to have the highest interest among such male viewers with ***incomes above $100,000***. We've designed and described WealthTV as holding a ***special appeal***

[4] http://www.fineliving.com/fine/pac_ctnt/text/0,,fine_10778_45883,00.html

to the highest income households. Branding the channel as "WealthTV" has demonstrated our desire to attract the highest income households.

Our target audience hasn't been a secret in the industry or with the defendants. WealthTV has clearly communicated our target audience to operators and advertisers in our initial introductory presentations. From our initial discussions with operators in early 2004 through our launch in June, WealthTV visited with nearly all the major cable operators, including Time Warner, Comcast, Bright House and Cox, providing initial overviews and highlighting our targeted demographic, a key element and discussion topic for any network seeking carriage. For example, in March of 2004, I flew to Philadelphia with our senior affiliate sales person to visit with Comcast's programming department. We presented a thorough overview on WealthTV, including a PowerPoint presentation, consisting of fourteen slides[5], dated March 26, 2004. The presentations supplied during these initial introductory visits were generally similar to materials delivered to all cable operators and advertisers. As an example, on June 9, 2004, WealthTV provided a presentation[6] to Orion Cable. The presentation is identical to the Comcast presentation, except for the addition of one slide specifically for Orion Cable. Both presentations contain a WealthTV Targeted Audience (Exhibit 2) slide. WealthTV's initial presentations to advertisers also included discussions on our targeted demographic. For example, on April 12, 2004, I provided a presentation[7] to Yachting Magazine's Time4Media, a subsidiary of Time Warner that includes an identical demographic page. Nearly four years later, on January 25, 2008, as WealthTV is kicking off an <u>exclusive</u> advertising representation relationship with TV Ad Works, I responded via email with two emails (See Exhibit 29[8]) with the associated attachments, including to the president of the organization, copying others, including its CEO,

[5] WTV001 0004604 to WTV001 0004617
[6] WTV001 0004674 to WTV001 0004680
[7] WTV001 0004735 to WTV001 0004784
[8] These exhibits have associated bate stamps, but at the time of this writing, I'm unaware of the number.

when asked for demographic information with, "WealthTV attracts 70% men, educated, affluent from 25-49+." A summary of WealthTV's target audience as shown to Comcast in a formal presentation dated March 26, 2004 is shown below:

TARGET AUDIENCE OF WEALTHTV (see WTV 001 0004611)

AGE: 25 to 49 years old.

SEX: Male skewed

INCOME: Home with incomes above $100,000 to have the highest interest (special appeal)

EDUCATION: Skewed towards EDUCATED

I personally made the Target Audience slide provided in the three presentations cited above (Exhibit 2).[9] My definition of skewed is having a definitive slant or towards something. Since at least early 2004, I've stated that the audience for WealthTV is at least to some extent represented by me. Upon the launch of WealthTV in 2004, I was 38 years old, male, college educated, and have been fortunate to travel extensively - falling in the stated income shown above.

WealthTV's Direct Overlap with HD Early Adopter Viewers

Although the concept of WealthTV was established well before our decision to launch in high definition, our management team was well aware of the fact that our network demographic directly overlapped with high-end advanced consumer electronics male skewed audience, including the early adopters of high definition televisions. As clear evidence of this

[9] Exhibit 2 is the same as WTV001 0004611, WTV001 0004674, WTV001 0004742

understanding, WealthTV has numerous shows on gadgets and consumer electronics, including *WealthTV's Amazing Gadget's & Technology, Innov8,* and *The Best of Home Theater,* among others. Over the last three years, WealthTV has sent internal production crews to capture the happenings at the consumer electronics show, producing five complete shows solely on CES. In 2003 and early 2004, our management team researched the target market for high definition set consumption and viewers.

The research repeatedly showed that the male, high income households held the highest interest in high definition programming. The audience is comprised, not surprisingly, of 25-49 year olds. Our goal was to provide programming directly targeted at these early adopters, namely upscale male viewers. During our initial presentations to the defendants, we highlighted that the WealthTV demographic key characteristics was identical to the HD early adopters as shown on the Target Audience slide (WTV001 000411). On December 9, 2004, in an email soliciting Forbes, I wrote, "All statistics show that the HD viewer is well educated, affluent, and interested in the best life has to offer. A highly concentrated viewership of the ideal demographics may be preferred over a very broad base. WealthTV's programming strategy is to deliver a 24/7 national cable channel in high definition that is highly desired by this audience, while entertaining everyone, regardless of economic status."[10] [As of the launch of WealthTV, other HD services, including INHD, didn't focus their programming with themed content, but rather offered a broad assortment of general entertainment programming. To my knowledge, WealthTV was the first cable HD network to offer a defined themed network targeted at this specific audience – namely 25 to 49 year olds, male skewed, educated, with a high income (above $100k per year).]

WealthTV's Target Audience is Sufficient to Reach Enough Subscribers for Viability

[10] See WTV001 004421

Although WealthTV targeted a very specific demographic, providing a clear focus for our programming choices as distinct from more "general" networks, it is a large enough demographic to support a programming network – even one producing original HD programming such as WealthTV. WealthTV's targeted age range of 25 to 49 spans not just a few years, but 25 years. US Census Bureau data[11] shows that for July 2004, the year WealthTV launched its services, of the male population in the United States, totaling 144 million men, more than 53 million were men ages 25 to 49 years old. By no means can 53 million men from the ages of 25 to 49 million be described as a small or niche audience. A smaller subset of the 53 million men fall into the high income range, yet WealthTV appeals to people who aspire to get there. Targeting this audience offered a substantial and broad audience for WealthTV. Even with a dedicated mission to have appeal to an educated, high income, male skewed audience, WealthTV's programming appeals to a relatively broad group that enjoys the finer things in life regardless of income such as our shows on wines and travel.

Although the skew to males earning $100,000 or more significantly narrows the primary audience targeted, we anticipated that to some degree males in the appropriate age group but earning less than $100,000 would also watch. There is a vicarious living and aspirational appeal with these types of shows. In addition, we recognized that many of our shows, although tailored to our targeted audience, would attract some women. Today, our demographic data shows our targeted audience is being successfully reached. We clearly know that not every viewer has an annual income of $100,000 or higher and not every viewer is male, but such viewers form the bulk of our audience. There is no reason to alienate anyone wishing to enjoy our programming lineup and our high-end focus discourages certain types of programming, which appeals to our focused target audience and to some outside our focus audience. We have described WealthTV as

[11] http://www.census.gov/popest/national/asrh/NC-EST2007-sa.html. This same data source shows that for 40-50 year olds, the US male population is 22,342,735 and the 18 to 24 year old male population is roughly 15 million. Some estimates are required.

"Intelligent Family Television" not because we offer children's programming, and not we have averted our focus from our target demographic. We describe WealthTV this way because members of tour target demographic as a practical matter do watch television with other member of the household in the room. They can watch WealthTV without concern that others in the household will be exposed to inappropriate content during normal family viewing hours. This in no way means that we have shifted our target demographic, nor that our actual delivered demographic has changed.

WealthTV's Measured Demographic

In Q3 of 2007, WealthTV hired the services of Kersey Research Strategies to perform third party confirmation of our audience demographics. One of our key series, *Taste! The Beverage Show*, was perfect for adult beverage advertisers. We also felt our music series *Sound Check* might be an ideal show for advertising beer and liquor. At the time, WealthTV was working with KSL Media, a New York based advertising firm representing Grey Goose, a high end vodka supplier. The firm instructed WealthTV on their need to self monitor media demographics to confirm reach of our actual demographic. Adult beverage suppliers self regulate their media placements. The self regulated requirement established by the Distilled Spirits Council of the United States, DISCUS, are designed to reasonable access that 70% or greater of the expected viewers are of the legal permissible drinking age, LPA. After working with KSL Media on acceptable methodologies, including the acceptable minimum statistical relevant sample size, and reviewing the Distilled Spirits Council of the United States, DISCUS, requirements, WealthTV hired Kersey Research Strategies to confirm our audience demographics, tabulating viewer feedback forms. Kersey Research confirmed the data showed the following:

THIRD PARTY MEASURED AUDIENCE OF WEALTHTV (see Kersey Testimony)

AGE: 21-34 is 16%, 35 & up is 83%.

SEX: 71% men

INCOME: 55% with household income of $75,000 or greater. (Compared to 29.5% for the US population[12])

Although I did not personally evaluate the raw data used in the tabulations, I was by no means surprised by the measured male skewed, high income audience findings. Since WealthTV's launch on June 1, 2004, WealthTV has been targeting this demographic with original content. By late 2007, our programming was clearly delivering on our targeted audience. My confidence in this data was exhibited by sharing it with our advertising firm Exhibit 29 and advertisers. We also posted on our website the letter provided by Kersey Research stating our audience meets the requirements of DISCUS.

WealthTV had been independently tabulating viewership data since its launch in 2004 via its website viewer feedback and comments forms. [Our information technology (IT) managers have reported to me on numerous occasions the roughly 70% male to 30% female viewership ratio as shown by the tabulated feedback data. The data has been relatively consistent since 2004.] For example, on December 19, 2007, John Nickles, WealthTV's IT Manager, tabulated 550 viewer feedback forms (Exhibit 30) as shown by the age category totals. Of the 550 viewer feedback forms, Mr. Nickles was able to discern the gender of respondent on 485 forms. [The reported raw data and viewership findings indicated 70.4% of the viewer feedback forms are men. This data, based upon the sample size has an uncertainty of less than 4.6%. The reported viewership forms with incomes of $75k per year and higher is reported as 55.9 percent. (I'm aware that the start date is incorrectly shown on the Excel spreadsheet. As indicated by Mr. Nickle's email, he "updated" an existing report. I believe the start date was in September 2007.) The numbers are]

[12 see http://www.census.gov/prod/2007pubs/p60-233.pdf page 29]

consistent with the tabulated findings of Kersey Research Strategies showing 55.2 percent of the viewership forms are from viewers with an income of $75k per year or greater and in line with previous measured internal data showing that over a majority of our audience earns $75k per year or greater, substantially over the US census bureau averages. On September 24, 2007, before Kersey Research Strategies was hired for this project and before Mr. Nickles provided the tabulated data for 550 viewership forms in December, I wrote Mr. Kersey stating, WealthTV needs "...third party verification that more than 70% of our audience is 21 or older. We are highly confident that this is the case, but need third party quantitative data" (Exhibit 31). My high level of confidence was based upon previous reports showing that a relatively small percentage of our audience by age is 20 years old or younger, substantially less than the up to 30% level allowed by DISCUS. We have reconfirmed the information in Mr. Kersey's tabulation work, including emailing any feedback respondents as necessary to confirm all data fields. This work was performed based upon questions raised during Mr. Kersey's deposition. The tabulated data hasn't varied more than a trivial amount from the previous work performed.

The Branding Images of WealthTV

The advertising images used by WealthTV to brand the network speak loudly to its targeted demographic of upscale male audience and have been consistent in approach since our inception. One of our first marketing piece (WTV001 0000027, -28) printed and distributed months before the launch of WealthTV in June 2004, highlights the luxury upscale male skewed audience WealthTV targets. The six images show fast and luxury cars, private jets, and yachts, undeniably projecting an image of upscale luxury lifestyle entertainment targeted at to high income male viewer.

Perhaps the most revealing ad (WTV001 0002633) for WealthTV ran on Time Warner Cable's own web site in San Antonio at least by March 2, 2007. This ad was supplied to Time Warner on February 23, 2007. WealthTV's staff and presumably Time Warner's marketing team felt that this image properly spoke to the WealthTV brand as it was displayed on Time Warner's home page. The image was the first branding web banner on Time Warner's website advertising the new HD VOD service by WealthTV. Once again, we see a consistent and male focused theme with our elegantly dressed James Bond like man with images of fine cigars and an exotic car with a young blond leaning on the side of the car. The image says luxury lifestyle entertainment targeted to an upscale male viewer.

WealthTV highlighted various shows for our VOD offering on Time Warner. WealthTV offered images and descriptions of our VOD offering to Time Warner which were posted on Time Warner's website. The July 2007 WealthTV Programming Highlights (Exhibit 32) for WealthTV's VOD offering highlights six WealthTV shows, they are: *Best of Men's Wear*, *Wealth on the Water*, *The Boomer Show with Brian Christie*, and two *Wealth on Wheels* titles, namely *L.A. Auto Show* and *Viewer's Choice Awards*. *WOW! Park City*, featuring the top rated ski resort in the nation, Deer Valley. The overall branding message is luxury lifestyle entertainment targeted to an upscale male audience.

WealthTV's most current print image appears in an AT&T U-Verse mailer (Exhibit 3) for March 2009. The front of the mailer features six images of various networks. One of the six is WealthTV's *Electrified* series. We know that this show is a top performing series as measured across over 2.5 million televisions[13]. The multiple part WealthTV *Electrified* series showcases

[13] On two occasions in 2009, I've viewed Rentrak TV Essentials data for WealthTV. Electrified was one of our top performing shows for a weekly period.

the conversion of a Porsche 911 to a 100% electric racing machine. There is no doubt in my mind that this show draws a primarily male audience.

The latest full-page print ad campaign (WTV001 0000008) for WealthTV was featured in *American Driver*, a magazine featuring cars, travel destinations, and upscale luxury living. To the best of my knowledge, the ads ran from early 2007 into mid 2008. The WealthTV full-page ad shows an image of a late thirties to early forties year old James Bond like man dressed in a black tuxedo. The image of the man is centered on the page and is substantially bigger than the woman who is drifting out of the picture. Unlike the woman, the man is looking squarely at the viewer. The message is clear – this network is about the man. Six images further paint the picture. In the upper right is a beautiful blond woman with her hand on an exotic bright yellow sports car, in the center we see a close-up of fine cigars, in the lower right is an image of scampi and pasta entre with perfect presentation. The center bottom image shows a hotel pool side. The last two images are of a private jet in the air and an amazing private estate. These images were designed to resonant with an upscale male audience looking for the finer things in life, consistent with our 25-49, male skewed, educated, income of $100k and up (or aspire to) demographic.

In an ad (WTV001 0000981) ran in the Wild Blue Wonder magazine on Frontier Airlines, WealthTV is described as, "…it's the luxury lifestyle and entertainment network featuring travel secrets, fast cars, investment tips, and much more." Again, we see on the television an image of a sophisticated relatively young man in a black tuxedo.

WealthTV's current brochure cover (Exhibit 33) features four images on the cover, namely an exotic travel destination on the water, a man's elegant time piece, a picture of Steve Forbes, and a beautiful bright red high performance car. The images are designed to project and convey

upscale luxury lifestyle entertainment targeted to a high income male audience in the 25 to 49 age group.

Industry Trade Show Branding

WealthTV has exhibited at various leading cable programming trade shows, including The Cable Show, since 2005. Our messaging theme has been very consistent with luxury lifestyle entertainment programming with a targeted demographics of a high-income, male skewed audience. For example, each year, WealthTV has multiple large HDTV flat screens prominently displaying our programming. In addition, we offer a free giveaway that speaks to our brand and attracts crowds to our booth. In 2005 WealthTV raffled the use of a classic Rolls Royce with driver for the evening. In 2006, WealthTV featured a book signing with Malcolm Gladwell, a well known author of business books, including "Tipping Point". I believe we gave away 500 signed copies. We selected Malcolm Gladwell because he appeals to the male, business reader, in our 25 to 40 targeted demographic. In addition, WealthTV featured a cigar roller (Exhibit 4) in the booth.

In 2007, WealthTV had a red Ferrari 360 (Exhibit 5) in our booth. In 2008, WealthTV featured a cigar roller and two red Ferrari's. On April 1st, 2009, WealthTV's booth opened with a cigar roller, a red Ferrari F430 and a Lamborghini Gallardo. Fine cigars, exotic sports cars, and well-known business authors speak of our luxury lifestyle entertainment programming targeting a high income, male skewed audience, 25-49 year old.

Examples of WealthTV's Luxury Lifestyle Entertainment Programming

WealthTV offers a wide range of all original programming designed to appeal to a 25 to 49 year old, male skewed, educated, and upscale audience. WealthTV offers programming covering luxury lifestyle entertainment, including travel, adult beverages, cooking, gadgets and technologies, cars, boats, planes, motorcycles, cigars, finance, music, comedy, among numerous others. All content on WealthTV has never been aired before in the US. Thus, longer descriptions are provided herein. Five examples of our luxury lifestyle entertainment programming are highlighted below, with numerous additional examples provided throughout my testimony.

Wealth on Wheels (Exhibit 6) features numerous different angles on cars, but a common theme is highlighting the latest high-end cars and technologies in the automobile industry. Each year, WealthTV travels to various automotive shows to highlight the latest trends and advancements in the automotive industry. In addition we take viewers on test drives. Each year, WealthTV honors the hottest new releases in six categories and features a show highlighting the winner cars. A show highlighting the latest automotives could feature the "best family van" or "the most economical car to own" or as is commonly done, the "best buy" in each category. WealthTV doesn't take this approach. Four of the six categories use the word "sports" cars or "luxurious" cars. A close examination of the categories and winning cars loudly speaks to our audience.

- Most Exciting New Release of 2009 – Ferrari California
- Most Luxurious SUV of 2009 - Lexus LX 570
- Most Luxurious Sedan of 2009 - BMW 7 Series
- Hottest Sports Car under $50k of 2009 - Audi TTS Roadster
- Hottest Sports Car no Price Limit of 2009 – Aston Martin DBS
- Most Advanced use of Hybrid Technology of 2009 – Cadillac Escalade Hybrid

World of Wealth – this series first aired in June of 2004. The series delves into the world of business through the eyes of well-known business celebrities, experts, and visionaries. The series is best described as a financial show. Each show offers a business theme topic, such as globalization, highlighting what it means in business today and tomorrow.

Sound Check (Exhibit 7) – A hip and witty 30 year old male host, Matt Gagin, with dark, funky sunglasses delivers his dry and insulting humor between the latest pop music videos, typically 5 per show, from Coldplay to Will Smith.

Featured artists include: Janet Jackson, Rainer Maria, Sean Lennon, Norah Jones, Meat Loaf, and Ziggy Marley, Coldplay ,Richard Ashcroft, Joss Stone, Will Smith, Broken Social Scene, Corinne Bailey Rae, Gorillaz, Placebo, K.O.S, Joan Jett, Beck, Aly and AJ, OK GO!, Interpol The Beastie Boys, Hilary Duff, The Concrete, Gwen Stefani, Ambulance LTD., RBD, Sleep Station, Skinny Puppy, Beth Orton, Sachal Vasandani, MXPX, Janet Jackson, The Dears, Lilly Allen, Madonna, Meg And Dia, 30 Seconds to Mars, Ben Harper, Los Lonely Boys, Emily Haines, Mcfly, Emerson Hart, Lisa Marie, and The Vines, Plain White T's, Jimmy Buffet, Girl in a.Coma, Interpol, Blue County, Coldplay, Talib & Kwelui, Amos Lee, and Green Day, Lenny Kravitz, Kylie Minogue, Brisaroche, Gorillaz, and Raven Simone, Vanessa Hudgens, Voodoo Blue, Taking Back Sunday, Annie Stela, Marie Digby, Varsity Fan Club, Corinne Bailey Rae, Placebo, Ben Harper, The Cute Lepers, The Jonas Brothers, Katy Perry, Miley Cyrus, Corinne Bailey Rae, KT Tunstall, The Last Goodnight, Coldplay, Saving Abel, Mikel Knight, Yellowcard, The Starting Line, Plain White T's, Raul Midon, Plushgun, Sick Puppies, MAE, Reliant K, Anberlin, Ben Harper, Lily Allen, Beth Orton, Lenny Kravitz, Coldplay, Stacie Orrico. (WTV 001 0004655 and WTV 001 0004657)

The Big Biz Show (Exhibit 8) – Sully and Russ 'T' Nailz are two funny guys who happen to be in the business of personal finance and investing with an unmatched ability to deliver bar room style conversation with a business flair. Russ "T" Nailz is a professional comedian, while Sully is truly a financial expert.

The Very Best of Everything with Marc Cummings (Exhibit 9) – This series began airing upon WealthTV's launch and was advertised in the first marketing material printed on WealthTV. Marc Cummings is a modern day renaissance man. He is a Cordon Bleu Master trained chef, former Davis Cup tennis pro, a world class fisherman, a cultural expert, and has traveled the

world. (Marc is also the grandson of Nathanial Cummings, founder of Sarah Lee.) In each episode the viewer joins Marc as he travels to resort destination and enjoys a wide range of activities. In segments Marc may take us fishing off Florida or for a little tennis. Segments have included an occasional highlight of an amazing sports car. Each show features cooking and a tour of the resort, along with insights into the surrounding area, culture, and history.

It's important to note that looking at a stand-alone show and determining the audience is substantially different than looking at a group of programming designed to attract a targeted audience. Yet, *The Very Best of Everything with Marc Cummings*, featuring travel, sports, cooking (and drinking), an occasional car, and cultural insights hits many of the topics that appeal to upscale men, 25 to 49 years old, and featured on WealthTV.

WealthTV also airs shows that may appear to be outside the target demographic. On such show is "Fashion Runway". This series features beautiful models on the runway. Several shows have little to no dialogue which, from the male perspective, simply isn't needed. The images are revealing (Exhibit 10). WealthTV's *Let's Shop*, with voluptuous host Cheryll Gillespie travels the world looking for the best in local affairs from coffee and rum in the Caribbean to bikini's in Rio De Janeiro. The series is filled with scantily clad beautiful women from around the world (Exhibit 11).

II. HOW INHD WENT FROM SOMETHING UNLIKE WEALTHTV TO TARGETING THE SAME DEMOGRAPHIC: DEFENDANTS PREFER TO DEVELOP THE AFFILIATE MOJO RATHER THAN DEAL WITH AN INDEPENDANT

iN DEMAND's INHD/INHD2 Lacked a Theme Other than "High Definition Programming"

In September of 2003, iN DEMAND launched INHD and INHD2. The concept of iN DEMAND's INHD was solely to air content in high definition. The network was never designed to be a themed network or have a defined target audience. INHD was simply a "generic hi-def service" (WTV005 0000106), without a theme and without a focused target audience. INHD2[14] was designed as a pre-emptible channel for paid sporting events and other preferred programming. The network was acting as "filler programming", preventing the channel from otherwise being dark, using much of the same library as INHD. As an example of the wide range of programming on INHD, it offered numerous children's programs such as *Rumpelstiltskin*, *Puss in Boots*, *Boy who Drew Cats*, *Brer Rabbit & Boss Lion*, and *Davy Crockett*[15]. INHD also aired programs with general appeal including to children and adults such as *Penguins: Antarctic & Sub-Antarctic*[16], and *Ocean Oasis*[17]. INHD featured IMAX movies, sports, old black and white movies converted to HD, and Westminster Kennel Club Dog Show (WTV005 0000008) programming. In July of 2004, INHD offered a "Christmas in July" programming block (WTV001 0002117) featuring various Christmas classics including *Miracle on 34th Street*. INHD is best described as a "general entertainment" (WTV001 0002062) genre channel. Anything went on INHD as long as it was in high definition.

INHD Suffered from an Identity Crisis and was Floundering

By 2005, INHD's fledging "general entertainment" programming genre, focusing on exploiting the audio and video aspects of the high definition technology, rather than a themed programming strategy targeting a specific audience, was floundering. As can be readily seen in iN DEMAND's

[14] From MOJO's website, What is INHD2? INHD2 is a second 24/7 digital cable channel featuring similar general entertainment programming scheduled at varying times from INHD to give you more viewing options at any given time. Source: http://web.archive.org/web/20060426121958/www.inhd.com/faq.jsp

[15] *Rumpelstiltskin*, *Puss in Boots*, and *Boy Who Drew Cats* are all shown as "Children's Specials" on WTV005 0000001. *Brer Rabbit & Boss Lion* is shown on WTV005 0000007, *Davy Crockett* is shown on WTV005 0000009.

[16] See WTV005 0000005

[17] See WTV005 0000009

March 2005 press release (WTV001 0002996, -8), entitled "INHD Seeking Ideas and Concepts for Original High Definition Programming: Network Call for Submission From Producers", the network was willing to entertain any type of programming, stating that it "wants to take off the gloves" and is willing to entertain any type of show that "fully exploits the video and audio advantages of high definition". INHD makes it clear that "thanks to its **uninhibited** format, INHD is considering a wide range of programming concepts" (emphasis added). This also made clear that in March 2005 INHD didn't have a programming theme other than being "in high definition" and had no target audience specified. BuyingHDTV.com, a leading high definition on-line service, operated by Mark Kersey, reported on the announcement with the title, "INHD Seeking Programming Ideas"[18] likewise demonstrates that while WealthTV – then negotiating with iN Demand's owners – had a definite "programming idea" and a developed "programming concept", INHD did not. The announcement reads "INHD said yesterday that it is actively courting producers with ideas and concepts for original programming that it can showcase in high def." In other words, while iN DEMAND's owners were refusing to negotiate in good faith with a fully developed programming network that met their specifications, iN DEMAND was looking for any direction with respect to programming it could find, as long as they could develop it themselves.

INHD's pre-emptible service using much of the same INHD content was also having similar trouble. According to iN DEMAND's President and CEO, Robert Jacobson, "INHD was developed to serve the needs of the cable operators to satisfy people's desire for more HD programming" (WTV 005 0000102, -4). "We knew the time was going to come when it was no longer enough to be about technology, it was going to be about programming and having a brand that stood on its own." Yet, INHD wasn't about a brand, it was, as Mr. Jacobson admits, only about the technology. Mr. Jacobson acknowledges that "we didn't know what [identity]..."

[18] http://www.buyinghdtv.com/html/hdtv_blog.html

INHD might take, "we only knew the channel lineup was going to get cluttered with well-established brands." (WTV005 0000102, -4) By September of 2006, it was reported that "several cable systems (have) recently dropped INHD2, citing a duplication in its programming" (with INHD) (WTV001-00003126). According to Robert Jacobson, INHD2 was simply a channel that could be pre-empted for regional sports programming. In other words, INHD2 provided "filler" programming "...for cable operators to lay-in regional sports networks (HD) shows when needed." The plug was pulled on the duplicative INHD2 network at the end of 2006 (WTV001 0002176, -9). iN DEMAND needed to completely reinvent INHD, effectively creating a new network in the same channel space if it was to survive.

Nesting a New Themed Programming Block INHD – The Birth of MOJO

The About MOJO HD section in a January 2008 press release via Business Wire, describes the birth of MOJO; "INHD created a new primetime, called MOJO, exclusively for the discerning male, with attitude, wit and style - delivering original shows about lifestyle interests including high tech, finance, adventurous travel, music, cuisine and spirits."[19] This new primetime programming block is themed and distinctively different from INHD. Further, the genre is "**lifestyle interests**" for the **discerning male, or "luxury or upscale lifestyle interests"** with several examples of programming that fall within this genre – namely " **luxury or upscale lifestyle interests"**. While the description does not use the exact words WealthTV used to describe its programming concept, it is substantially similar to how WealthTV's management has described, branded and advertised the network since its inception in 2004.

[19] Source: http://www.smartbrief.com/news/aaaa/industryBW-detail.jsp?id=F7E952F0-4243-4E5B-9CAD-CC15576E342E)

The first announcement of a new programming direction for INHD appeared on May 8th, 2006. TV Week reported that the nine new series under the "MOJO" themed brand would add significantly to iN DEMAND's current slate of originals dominated by the company's programming for its Howard Stern On Demand channel (WTV005 0000113, -5). (It should be noted that Howard Stern isn't original programming, but repurposed from iN DEMAND's On Demand Channel for INHD.) The MOJO programming block, comprised of various programs in the upscale luxury lifestyle genre would air two nights a week from 9 pm to midnight EST (WTV001 0002050).

I've read Larry Gerbrandt's declaration and noted several fundamental errors. First Mr. Gerbrandt completely ignores the fact that MOJO was only a programming block two days a week for three hours each day. This equates to a total of six hours within a week comprised of 168 hours. Thus the MOJO themed programming block was only 3.6% of the INHD programming as of June 18, 2006. Mr. Gerbrandt wrongly assumes that all the programming aired on INHD as of June 18, 2006 until the channel was fully replaced was MOJO programming. Furthermore, multiple programs that were never claimed to be MOJO programming and never aired on MOJO after its full time launch on May 1, 2007 are misidentified by Mr. Gerbrandt as MOJO programming. Although Mr. Gerbrandt is an industry analyst, anyone knowledgable on programming, programming blocks and nesting, as I am, should be able to note his mistakes. These critical mistakes are deceptive or sloppy and coupled with misleading categorization and avoiding other key facts leads to inaccurate conclusions.

Comcast, Time Warner, Cox, and Bright House's Knowledge of WealthTV and Were Aware It Competed for the Same Viewers

On March 17, 2007, Robert Jacobson, President and CEO of iN DEMAND stated that "...the MOJO move has the backing of the cable industry and the company's owners: Comcast, Time

Warner Cable and Cox Communications."[20] The senior programming personal at these cable companies were fully aware of WealthTV, its themed programming and its target audience. WealthTV's senior management had been meeting with senior programming individuals at Comcast, Time Warner Cable, and Cox Communications since early 2004 in efforts to solicit the critical carriage needed to grow WealthTV's business. The senior programming "gate keepers" for Cox, Comcast, and Time Warner, were also board members for iN DEMAND. Whether or not these senior programming executives provided WealthTV materials or tracked the progress and development of WealthTV, as I believe happened, or whether they simply replicated our research and development process to come to the same conclusion, iN DEMAND's cable owners knew that WealthTV represented competition for their planned MOJO network. I know this as I told them exactly what our target demographic was, why we thought a channel appealing to that demographic could do well, and what king of programming we offered, were working on, and how that programming would attract our demographic and appeal to advertisers trying to reach men 25-49 with disposable income.

These critical gatekeepers had intimate knowledge of WealthTV's programming, target audience, and overall business model – while advising iN DEMAND on strategies and approving the new creation, MOJO. It has been publicly reported that Bob Wilson, SVP of Programming for Cox Communications is on the board of directors for iN DEMAND. It is also known that Matt Bond, EVP of programming of Comcast had strategic control and input into iN DEMAND. Fred Dressler, EVP of programming for Time Warner was also an iN DEMAND board member. WealthTV's senior staff, including me, provided in-depth overviews of our programming, including samples via DVD, target audience, and network strategies to these individuals numerous times. If nothing else, iN DEMAND and its programming developers had the opportunity to communicate regularly with the relevant decision makers at Comcast, Time

[20] See WTV005 0000100

Warner, Cox, and Bright House to inform them of the development of an iN DEMAND network designed to compete with WealthTV and to hold off on signing any final affiliate deal with WealthTV until iN DEMAND could develop its own "WealthTV-like" service.

iN DEMAND Accurately Describes MOJO as Different From INHD and Similar in Approach to WealthTV

iN DEMAND's August 23, 2006 press release on Dr. Danger, accurately describes MOJO as a new genre of programming from that of INHD. The press release reads:

> *What is MOJO?*
>
> *The distinctive, new MOJO programming, which launched in June on INHD, is a* ***new genre*** *especially geared to the multi-faceted lives of the affluent and discerning "MOJO Man" who comprises most of the upscale hi-def audience*[21]. (emphasis added)

Defendants have argued that MOJO was simply a rebranding of INHD. This is a flawed argument. With a plethora of children's programs, INHD could have re-launched itself as a HD channel dedicated to children more easily than claiming to "rebrand" itself as a WealthTV like network targeting affluent male, from 25 to 49 years old. Apparently, regardless of how INHD used the channel space it occupied, any new programming name and concept it put in the space occupied by INHD would constitute a "rebranding", not the replacement of INHD and the launch of a new channel. What is relevant is not what iN DEMAND and its cable owners chose to describe the process, but that when MOJO went live as a network concept it substantially resembled WealthTV.

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[21] Source: *Source: http://web.archive.org/web/20061019041413/www.inhd.com/press/pressDetail.jsp?pressId=60*

In its effort to re-invent INHD, Robert Jacobson states, "Fortunately, we were right in our projections. We were confident that there would be strong appeal for exclusive content aimed at the high end males." This radical change in programming strategy is materially different than INHD, which provided content for children as well as men and women. Jacobson goes on to state, "...that since the premiere of the MOJO programming block last June, INHD has achieved a 37% increase in ad revenue." (WTV005 0000100). The attractiveness of this demographic is over the more general programming previously offered by INHD is, of course, precisely why WealthTV targeted this demographic beginning in 2004.

iNDEMAND made a radical and fundamental material change to its programming lineup for its MOJO service compared to its INHD channel. INHD's programming lineup was comprised primarily of REPURPOSED "general entertainment"[22] programming, repurposed general entertainment IMAX Movies[23], and a mixture of sporting events, including Tennis and MLB, targeting a broad audience, including children. HDNet's co-founder Mark Cuban, discussing the differences of HDNet and INHD, highlights INHD's reliance on general entertainment REPURPOSED programming including some content that previously aired on HDNet. Cuban states, "We produce original programming shot in HD; they don't. In the non-sports arena, much of their content is content that was shown on HDNet in the past."[24]

Much of INHD's content was TV-G rated, including IMAX movies, and Major League Baseball, with broad appeal, including children. Contrast this to MOJO's program offering which was spearheaded with an extensive slate of ORIGINAL and edgy series focused towards a 25-49 year old[25] intelligent, affluent male[26] viewer with minimal sporting events. As stated by

[22] See http://www.televisionconference.com/jacobsonbio.htm
[23] See http://www.nationmaster.com/encyclopedia/INHD
[24] See http://www.sportsbusinessjournal.com/article/33709
[25] See http://www.ctam.com/conferences/summit/2007/multi/multi_day1.pdf (See page 2)
[26] See iNDEMAND's Press Release Dated March 19, 2007 http://www.mojohd.com/press/view/2

iNDEMAND's President in a June 17, 2007 Q&A with TVWeek, "The idea behind MOJO is that it's aspirational yet achievable."[27] Significantly WealthTV used the word "aspirational" heavily to describe the broad appeal of our network before MOJO's existence and subsequence targeting the same demographic as WealthTV. The word is in WealthTV's brochure as a key descriptor, found in numerous press releases, in our presentations given to the defendants, including a PowerPoint presentation given to Julie Simon, Time Warner Cable and in email correspondences with the defendants Bright House (WTV001 0001648) and Cox Communications. For Example in a July of 2006 email (WTV001 0004296) to Bob Wilson, SVP of programming for Cox Communications, I wrote, "The aspirational aspect of WealthTV is driving our digital feed with numerous operators. Luxury fever is hot with luxury spending is skyrocketing across all demographics." The material differences between MOJO's programming and INHD's are succinctly summarized by cable industry veteran Jedd Palmer, "MOJO and INHD were only similar in that both channels scheduled high definition programming."[28] By contrast, however, MOJO and WealthTV were substantially similar, prompting Defendants to privilege their affiliate while rejecting our readily available but unaffiliated programming.

MOJO launched with a number of new original series, premiering and exclusively airing under the MOJO brand. This was not only a complete change in strategy from the INHD, but substantially similar to the strategy in which WealthTV had invested in as early as 2003 when we built our own production studios. MOJO's signature series as highlighted on its daily program schedule and website featured these original and defining 18 plus "MOJO Series", all of which appear to be targeted at MOJO's self-described audience of 25 to 49 year old affluent males[29]

[27] See http://www.tvweek.com/news/2007/06/in_demand_has_its_mojo_working.php
[28] See Affidavit of Jedd Palmer, pg 4 para 7, File No. CSR-7709-P, Complainant's Reply to Time Warner
[29] See Affidavit of Jedd Palmer, pg 8 para 8, File No. CSR-7709-P, Complainant's Reply to Time Warner

"(MOJO's) new original branded programming[30] clearly appeals to upscale men versus INHD's repurposed programming which targeted a family audience"[31]. MOJO's signatures series, targeted at MOJO's defined audience included *Uncorked with Billy Merritt, King of Miami, I Bet You, The Show, Pressure Cook, Bobby G: Adventure Capitalist, Start-up Junkies, Three Sheetz, Beer Nutz, After Hours, Doctor Danger,* and *Fueled* among others.[32] In November 2007 MOJO announced a new programming block every Thursday entitled MOJO Money Night.[33] This block partnered three original MOJO series about maverick entrepreneurs and investors, *Bobby G: Adventure Capitalist, Start-up Junkies*, along with *Wall Street Warriors*. Three of MOJO's original signature series featured adult beverage shows, namely *Beer Nutz, Three Sheetz*, and *Uncorked with Billy Merritt.* All of the original series highlighted above premiered under the MOJO brand. Collectively these original programming series define a materially different programming lineup with a clear and distinct targeted audience from that of INHD.

MOJO's Self Proclaimed Target Audience is Identical to WealthTV's. MOJO's self proclaimed target audience is affluent males, from 25 to 49 years old, with high incomes, $100k and up (also reported as $75k and up). iN DEMAND claimed that this audience is "largely underserved". As iN DEMAND and defendant knew, however, WealthTV had sought to serve this audience for more than two years before this announcement, but had been thwarted from doing so by defendants' desire to develop their own affiliate rather than contract with an independent.

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[30] iNDEMAND announced nine original series in May of 2006. The scheduled original lineup grew to approximately double the size by its 24/7 launch date on May 1, 2007. Also see http://www.broadcastingcable.com/article/104095-inDemand_Gets_Its_MOJO_On.php

[31] See the Declaration of Sandy McGovern, Exhibit 1, para 7.

[32] *Three Sheetz, Beer Nutz, After Hours, Doctor Danger and Fueled premiered on a MOJO block "nested" within INHD. As explained by Expert Witness Sandy McGovern in para 7, see Exhibit 1, it is typical for a network to "nest" new programming in a time slot to find a new audience and transition the old channel intoan entirely new one through reprogramming and rebranding. She concludes that this "...is what occurred with INHD and MOJO."*

[33] See http://www.tvweek.com/news/2007/11/mojo_puts_its_money_on_thursda.php

On May 8, 2006, TV Week Quotes Robert Jacobson, President and CEO of iN DEMAND (WTV005 0000113):

> *"MOJO is dedicated to being an exhilarating resource for men who live accomplished and adventurous lives. This is a chance to better connect with an going basis with the active, **affluent male**."* (emphasis added)

On September 16, 2006, TV Predictions in a Q& A with Robert Jacobson, President and CEO of IN Demand reports (WTV001 03127):

> *TVP: INHD has made several programming changes in recent months, adding shows that appeal to young males (MOJO, etc.) Is INHD becoming the Spike TV of HDTV?*
>
> *R J: While both INHD and Spike gear their programming to males, that's where the similarity ends. Men are not one single demographic. INHD's audience is more **affluent** and **older** (our demographic target is **25-49 years old, $75K + income**). INHD programs to a distinct group of active, success- oriented men who represent HD's most passionate viewer base and a group that largely feels ignored by traditional television programming."* (emphasis added)

On June 22, 2006, In a Q&A article with Broadcasting & Cable (WTV005 0000108), it reported:

> *Q. How did you come up with MOJO?*

A. It was pretty easy. When you look at who is watching HD, it's largely ***upscale men*** *that are largely underserved on television. And MOJO is the first network named geared toward that group of people.* (emphasis added)

On March 19, 2007 Multichannel News (WTV001 0003144) reports:

"As iN DEMAND executives expected, the market for high-definition programming has grown, but there remains a relative dearth of dedicated channels. None, they said, are specifically ***aimed at affluent males ages 25 to 49*** *with a batch of original programs".*

On June 17, 2007, TV Week (WTV001 0002065) in a Q&A with Robert Jacobson reports:

Through consumer research, iN Demand learned that its viewers are ***primarily affluent males earning more than $100,000 a year****. So the company retooled its programming strategy to target that group under the MOJO-branded programming block launched last June.*

Mr. Jacobson: *If you look at* ***men 25 to 49****, there aren't a lot of channels that are speaking to them. It's about creating a niche that is unique and sustainable. We aren't going to compete with ESPN and Fox for sports and USA and TNT for general entertainment. So we had to find a place to call our own that was sustainable. We looked at who was watching early on, and they were* ***men*** *and tended to be* ***affluent****. We knew we had already developed an audience, and the question was how to find programming to speak to them.*

In other words, WealthTV's predictions about the nature of the HD market, its program development, and its marketing were all exactly in line with what iN DEMAND claims were its independent studies and program development process, and lead to a substantially similar result. Whether or not iN DEMAND and its owners used our materials and research, or replicated them on their own, they clearly liked the idea better when it came from an affiliated programming network than when it came from an independent.

The MOJO Audience – Average Age of 39.3 year old, with 38% over 50 years old

In Michael Egan's written testimony, he tries to claim that the MOJO viewer is "relatively young". It is unclear what this vague statement means. Age is generally a quantitative measurement and has meaning. For example, an 18 year old person is generally a senior in high school or a recent high school graduate whereas a 25 year old, with 7 more years of experience, may be a college graduate with multiple years of full time experience in the workforce establishing his or her career. The maturity level and interests of 18 year olds and 25 year olds are at different levels. To add clarity to Mr. Egan's statement, MOJO's full page color advertising page[34] carried in an Advertising Supplement to Television Week during the 2008 CES show, held in early January, states that the average age of a MOJO viewer is 39.3 years old. For a further breakdown, MOJO's website under advertising offers a four page colored presentation called "The MOJO Viewer"[35]. With a little math, this slide is very revealing. The slide shows various breakdowns for the percentage of adults 18 years old or older. Sixty-two percent of MOJO's audience is shown as 18 to 49 years old with 39% between 18 and 34 years old. To determine the percentage of viewers from 35 to 49 years old, one simply needs to subtract 39%

[34] See WTV001 0002129

[35] Exhibit 12, http://www.MOJOhd.com/advertise/pdf/MOJO_AudienceProfile.pdf. This presentation has an undetermined batestamp number at the writing of this document.

from 62% yielding 23%. With 62% of the viewers ranging from 18 to 49 years old and the slide reporting only on the percentage of adults 18 years old or older, the remainder of the 62%, namely 38% are ages 50 and up. These percentages seem reasonable considering the average age of the MOJO viewer is reported at 39.3 years old. The table below reflects this information, Also see Exhibit 27:

Age of MOJO's Audience as Reported by iN DEMAND	
Average Age of MOJO's Viewer:	**39.3 years old**
% of MOJO's Viewership 18-34:	**39%**
% of MOJO's Viewership 35-49:	**23%**
% of MOJO's Viewership 50 & Up:	**38%**

Source: Advertising supplement to Television Week. Sites 9/07 Study

Various statements by iN DEMAND regarding its target audience are consistent with a 39.3 year old average viewer age. For example, Robert Jacobson, iN DEMAND's President and CEO states that "Spike, to me, skews younger" (WTV005 0000104). Spike, which features primetime UFC "cage" fighting reports its demographic as encompassing 18 to 49 years olds (WTV 001 0002070) as opposed to MOJO's (and WealthTV's similarly situated targeted audience comprised of 25-49 year olds. Mr. Jacobson further draws a comparison between INHD's programming changes with the addition of the nested MOJO block and Spike, stating, "while both Spike and INHD gear their programming to males, that's where the similarity ends. iN DEMAND's audience is "more affluent and **older**…" (emphasis added) Published articles further equate MOJO's targeted upscale viewership to high end magazines such as Gentleman's Quarterly, QC, while Spike is more equated to Maxim (WTV001 0002166). In TWC's answer, it twists the truth and states MOJO's model is similar to Maxim (page 18).

When it comes to demographic information, age is a key quantitative measurable. It is interesting to note that Mr. Egan's first declaration seems to conflict with his most recent testimony regarding MOJO and WealthTV's target audience. In item 10 of Mr. Egan's initial expert declaration, he states that "WealthTV's Complaint claims that its target demographic is 18-49 year old males." He is incorrect in both his statement regarding WealthTV's targeted demographic and what is stated in WealthTV's Complaint. Item 31 of WealthTV's Carriage Agreement Complaint provides a side by side table of the target audience for WealthTV and MOJO. The age for both similarly situated networks is 25 to 49 years old as confirmed by repeated statements by its senior management. Further, Mr. Egan misstates MOJO's target audience as 18-49 in his declaration, see item 11. Mr. Egan goes on to state that "There are a number of services that seek to attract 18- to 49- year-old male viewership (in addition to MOJO, which is clearly aimed at this demographic), including Spike, HDNet, FX, ESPN, Comedy Central, G4, and Verses. This statement directly conflicts with statements and the facts of WealthTV's and MOJO's target audience. In addition, Mr. Egan's statements about MOJO targeting the same audience as Spike are directly in conflict with numerous public statements by iN DEMAND's President and CEO Robert Jacobson as highlighted in the above paragraph. Since Mr. Egan is comparing "target audience", not measured audience, his statements and conclusions on such a key component of demographic composition simply can't be relied upon. I'm pleased to see that Mr. Egan corrected his blunder regarding the audience of WealthTV and MOJO in his second written statement – his most recent testimony, indicating WealthTV and MOJO with the exact same target age demographic of 25 to 49 (items 8 and 28).

It should be noted that reported data for MOJO varies although the source appears to be the same, namely a September 2007 study by Frank N. Magid Assoc. For example, MOJO's "MOJO

View" presentation[36] reports different numbers of up 6% different (see college degree) than the data used in the 2008 CES advertising supplement in TV Week (WTV001 0002072). Further, table 6 in paragraph 23 of Mr. Egan's testimony shows tabulations for various categories not reported in the two public documents. A side by side comparison in the table below (also see Exhibit 28) shows these differences. (Further, MOJO's website as of December 31, 2007 states "82% of MOJO viewers are male and 61% have a college degree. The cited source is Frank N. Magid Associates, 2007, see Exhibit 13).

		The MOJO	
Measurable:	**MOJO TVWeek**	**Viewer**	**Table 6**
Male:	70%	70%	**REDACTED**
Avg Age:	39.3	38.4	NOT PROVIDED
At Least College Degree	58%	52%	NOT PROVIDED
HHI $100k:	34%	31%	"NO CATEGORY"
$75k+:	NOT PROVIDED	NOT PROVIDED	**REDACTED**
50-74.9K:	NOT PROVIDED	NOT PROVIDED	**REDACTED**
35-49.9K:	NOT PROVIDED	NOT PROVIDED	**REDACTED**
Below $35k:	NOT PROVIDED	NOT PROVIDED	NO CATEGORY

As noted previously, WealthTV's targeted audience is "male skewed", comprised of approximately 71% men as reported by Kersey Research Strategies. Not surprising, based upon

[36] The source for this exhibit is MOJO's website, see http://www.mojohd.com/advertise/pdf/MOJO_AudienceProfile.pdf

WealthTV featuring numerous programming titles on cars, boats, planes, cigars, finance, high tech toys, including various electronic gadgets. Both WealthTV and MOJO performed actual audience sampling in September of 2007 timeframe. ***Both networks achieve nearly identical male skew***, with WealthTV only one percentage point ahead of MOJO at 71% male. Compared to other US TV households, WealthTV and MOJO are roughly 25 percentage points higher. Compared to other HDTV viewers, WealthTV and MOJO are well over 10 percentage points higher. Both MOJO and WealthTV are achieving their goal of hitting a 25-49 audience, although both to some extent reach beyond the 49 year old age group. And both networks receive a disproportionate amount of viewers in the high income brackets. In conclusion both networks are similarly situated, targeting the identical audience and achieving their target audience.

WealthTV and MOJO Have Similar Tag Lines

Prior to the launch of WealthTV in June of 2004, WealthTV paid an outside firm for developing the tag line, "It's Your Life… Spend it Well". In April 2007, on the top center of MOJO's home page was the MOJO tag line, "DON'T LIVE A LITTLE, LIVE A LOT". This tag line was used by MOJO and prominently displayed at the top of its website in 2006 and through April 2007 (Exhibit 14). It seems to have disappeared once WealthTV filed its prefiling notice with the FCC and pointed out the shocking similarities between the WealthTV and MOJO tag lines.

MOJO's Upscale Male Genre is Identical to WealthTV

Numerous articles and press releases clearly describe the genre for MOJO as original upscale lifestyle programming for the discerning male. iN DEMAND commonly described MOJO on its website by stating, "MOJO is original HD programming tailored to the lifestyle interests of the modern man." In a 2008 press release, the "About MOJO" section reads, "INHD created a new

primetime, called MOJO, exclusively for the **discerning male**, with attitude, wit and style - delivering **original** shows about **lifestyle interests** including high tech, finance, adventurous travel, music, cuisine and spirits."[37] (emphasis added) The upscale lifestyle programming theme tailored for a male audience is identical to the programming genre of WealthTV. With identical programming genres, MOJO and WealthTV are similarly situated networks. Regardless if, hypothetically, one network showed more high tech or travel shows, while the other may have not offered programming in a few of the "...wide ranging upscale men's interest..."[38] programming areas available, both networks shared the exact same genre focused at the same target audience.

MOJO & WealthTV Share Key Programming Series in High-end Cuisine, Spirits, Finance, High Tech Toys, Music, & Adventure Travel

MOJO describes numerous of its original programming series as including programs featuring high-end cuisine, spirits, music, high tech, finance and adventure travel (WTV005 0000124). To the best of my knowledge, the first published articles mentioning MOJO appeared on May 8, 2006. Multichannel News (WTV001 0002050) and TV Week (WTV 005 0000113) carried similar articles stating that the new MOJO block would begin airing the week of June 18, 2006. The Multichannel News article states (WTV001 0002050):

> *iN DEMAND currently has nine series in development within the **realms of cuisine and spirits, music, high-tech, finance and adventurous travel.** Officials said six will premiere when the MOJO block premieres.*[39] *(emphasis added)*

[37] "INHD created a new primetime, called MOJO, exclusively for the discerning male, with attitude, wit and style - delivering original shows about lifestyle interests including high tech, finance, adventurous travel, music, cuisine and spirits."
[38] http://www.mojohd.com/press/view/9
[39] The air days were initially Sunday and Wednesday night, in the heart of prime time, from 9 pm (EST) to midnight (EST) and 6 pm (PST) to 9 pm (PST). (Like WealthTV, MOJO only offered one feed for all time zones.) Prior to the full time launch of MOJO on May 1, 2007, it is believed that the nested MOJO programming block expanded to four nights a week during prime time (WTV005 0000128).

Shortly thereafter, on June 14, 2006, iN Demand issued a press release stating that the MOJO block would premiere on June 18, 2006. The press release, carried by Business Wire (WTV005 0000124) clearly defines the MOJO programming as follows:

> *THE MOJO PROGRAMMING*
>
> *The distinctive new MOJO programming covers a gamut of subjects including* ***cuisine and spirits, music, high tech, finance and adventurous travel*** *– all presented with intelligence, wit and style – and with a male point of view which invokes the sensibilities of the upscale men's magazine world." (emphasis added)*

On June 22, 2006, In a Q&A article with Broadcasting & Cable, it reported that WTV005 0000108):

> *"The Latest offering? A new programming block on INHD1 called MOJO, that focuses on* ***high-end cuisine, spirits, finance, music and adventurous travel.****"* (emphasis added)

On September 2006, Robert Jacobson, in a TV Prediction's article (WTV001-0003128) states:

> *"Our focus is to grow the MOJO programming with distinctive new originals which cover a gamut of subjects including* ***cuisine and spirits, music, high tech, finance and adventurous travel…****"* (emphasis added)

On March 19, 2007, iN DEMAND announced (WTV001 0003142) that its MOJO programming block, with its new original programming lineup would be replacing INHD. The announcement states:

> "MOJO was born in June, 2006 as a prime-time programming block on the INHD network, with original high-def series geared to males who are "active affluents" – dynamic, intelligent, adventurous. Since then, the network has further developed the MOJO brand and expanded its slate of programming, with new series spanning **adventure travel, comedy, finance, music, cuisine, and spirit and high tech toys."** (emphasis added)

MOJO's April 14, 2008 press release announcing a new high tech show called *The Circuit*, shows indicates (http://www.MOJOhd.com/press/view/30):

> *"Original shows are about wide-ranging men's interests including **high tech, finance, comedy-reality, adventurous travel, music, cuisine and spirits.**"*

iN DEMAND is clearly focusing its programming lineup with its original series to target its audience of 25 to 49 year old affluent males. Networks are defined by its target audience and programming genre within its original series and prime time programming block. Since MOJO's inception as a programming block nested within INHD, the new and original MOJO programming aired in primetime and defined the network. The MOJO targeted programming areas of high-end cuisine, spirits, adventure travel, finance, high tech toys, music, and adventurous travel indisputably fall into an upscale lifestyle genre for the discerning male. A summary of the numerous descriptions of MOJO over it life is provided as Exhibit 26.