BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

To: Marlene H. Dortch, Secretary
Federal Communications Commission

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

REDACTED FOR PUBLIC INSPECTION
MB 08-214

COMPLAINANT'S TRIAL BRIEF

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I. INTRODUCTION AND SUMMARY

A. Introduction

Complainant Herring Broadcasting, Inc. d/b/a WealthTV ("WealthTV"), by its counsel, hereby respectfully submits this Trial Brief in accordance with the Order Adopting Further Revised Dates, FCC 09M-30, entered on April 1, 2009 in the above-captioned proceeding (the "Order"). WealthTV's Trial Brief sets forth those elements of its case against Defendants Time Warner Cable Inc. ("Time Warner"), Comcast Corporation ("Comcast"), Cox Communications, Inc. ("Cox") and Bright House Networks, LLC ("Bright House") (collectively, "Defendants") required by the Order. This Trial Brief follows the form and categories instructed by the Order.

In lieu of a recitation of the relevant facts of the above-captioned proceedings, WealthTV incorporates by reference the description of the relevant facts set forth in its complaints against each of the Defendant and in its responses to the replies submitted by the Defendants in response to such complaints.

B. Summary

In the more than 8,000 pages of documents Defendants produced in discovery, the most telling evidence of disparate treatment on the basis of affiliation was what was *not* there: an agreement between MOJO, or its predecessor INHD, and any of the Defendants for program carriage. Although Defendants carried MOJO on their systems across the country, and did the same for INHD before that, Defendants did not enter into carriage contracts with either MOJO or INHD. The affiliate relationship between Defendants and their affiliate apparently made the normal written contract for carriage unnecessary.

While MOJO, because of its affiliation with Defendants, obtained carriage on Defendants' systems without even the formality of entering into a written agreement, Defendants have forced WealthTV, a non-affiliated video programming vendor, to spend over four years running the gauntlet of Defendants' supposed criteria for deciding whether a programming service deserves an affiliate agreement granting it carriage before ultimately denying WealthTV one. This disparity alone would be enough to establish discrimination on the basis of affiliation that had the effect of unreasonably restraining WealthTV's ability to compete fairly. However, as outlined below, there are additional facts establishing such discrimination.

In the program access discrimination area, the Federal Communications Commission (the "Commission") has adopted a burden-shifting standard as a way to police another form of prohibited discrimination by vertically integrated cable-programming companies. In light of the similarities between the two types of discrimination and the legislative intent behind statutes prohibiting both types of discrimination, it is appropriate for the Presiding Judge to adopt the burden shifting standard in the instant case. It is especially appropriate, too, to apply the burden-shifting rule in light of the evident disparity of requiring a written contract for WealthTV, but not for Defendants' affiliate. Under this standard, once WealthTV establishes a *prima facie* case of program carriage discrimination, the burden shifts to Defendants to show that their conduct had a legitimate, nondiscriminatory rationale. The Commission's Media Bureau approved the application of this rule in the program carriage context in October 2008 when it upheld the decision and award of an arbitrator with respect to a program carriage dispute between a video programmer and Time Warner Cable.[1]

In the event the Presiding Judge declines to adopt the burden shifting standard, WealthTV will still prevail on the underlying elements of proof. The Defendants violated the law by

[1] *In the Matter of TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Order on Review, MB DA 08-2441 (rel. Oct., 30, 2008) [hereinafter *TCR Sports*].

granting carriage to their affiliate and denying carriage to WealthTV, a video programming vendor similarly situated to MOJO, on the basis of MOJO's affiliation with the Defendants. The Defendants' conduct had the demonstrable effect of unreasonably restraining WealthTV's ability to compete fairly. As a result, Defendants' actions constitute unlawful discrimination under the applicable statute and regulation.

II. LEGAL THEORY OF WEALTHTV'S CASE

A. Statutory and Regulatory Basis for WealthTV's Claim

WealthTV's claim is brought under 47 U.S.C. 536(a), which provides, in relevant part, as follows:

> (a) Regulations
>
> Within one year after October 5, 1992, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors. Such regulations shall –
>
> * * *
>
> (3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors;
>
> (4) provide for expedited review of any complaints made by a video programming vendor pursuant to this section;
>
> (5) provide for appropriate penalties and remedies for violations of this subsection, including carriage;
>
> ***
>
> (b) "Video programming vendor" defined

> As used in this section, the term "video programming vendor" means a person engaged in the production, creation, or wholesale distribution of video programming for sale.

The relevant corresponding section of the Commission's regulations implementing this statute is 47 C.F.R. § 76.1301(c), which provides as follows:

> (c) Discrimination. No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

Defendants acknowledged in their respective Answers that the definitional aspects of the regulations specified in 47 C.F.R. § 76.1300 have been met insofar as they are each video programming distributors and that MOJO is an affiliated programming service. WealthTV is a video programming vendor not affiliated with any of the Defendants.

B. Defendants Engaged in Conduct the Effect of Which Was To Unreasonably Restrain WealthTV's Ability to Compete Fairly.

1. *Defendants Denied Carriage to WealthTV and Refused to Negotiate in Good Faith*

WealthTV sought carriage with each of the Defendants beginning in 2004, the year it began transmitting its signal. Since 2004, WealthTV has concluded over 100 carriage agreements with various carriers, including Verizon, AT&T, Charter and others. In fact, WealthTV now has dozens more distribution partners than MOJO did when Defendants decided to carry MOJO. But since 2004 WealthTV's carriage discussions with Defendants have gone nowhere toward achieving an agreement for carriage.

As Charles Herring states in his Written Direct Testimony, when MVPDs negotiate in good faith, an agreement can be concluded quickly and simply. Defendants did not negotiate in good faith and gave no meaningful consideration to WealthTV's request for carriage on reasonable terms.[2] This resulted not only in a failure to achieve an agreement, but in the loss of valuable time to market by WealthTV during the dawn of HDTV adoption.

In the course of its many sales pitches with Defendants' officials in their respective corporate headquarters and in the field, WealthTV imparted a great deal of information to Defendants about WealthTV's programming and target audience. Collectively, among the Defendants, there were hundreds of visits by WealthTV representatives to discuss possible carriage.[3] With respect to each Defendant, field personnel responsible for local or regional decisions about what programming to carry (not all local systems or regions offer the exact same channel line-up to their viewers) offered numerous expressions of interest and support for WealthTV's carriage on systems for which they had responsibility. Yet, Defendants' headquarters personnel apparently squelched these expressions of interest from Defendants' personnel in the field, individuals with front line experience and responsibility for what the Defendants' customers want and are allowed to see based on Defendants' programming choices. At the same time, Defendants managed to find room to carry their own affiliate, MOJO.

In the course of these many visits, WealthTV representatives left numerous sample videos with Defendants' representatives. Defendant Time Warner Cable even carried some of

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[2] Defendants apparently intend to argue that WealthTV deserved and deserves in a best case scenario for WealthTV only a hunting license. As Defendants' expert Howard Homonoff testified, a hunting license is an industry term for an agreement between a cable company's headquarters and a programming service that specifies terms and conditions, but leaves the actual decision to carry the programming service to a future date to be made "by members of an organization or systems in the field". Homonoff Depo. Tr. at 14-15. But a hunting license was not and is not a reasonable form of agreement in light of the fact that WealthTV is far beyond the initial start-up phase where it had no subscribers; it has achieved carriage agreements with over 100 Multichannel Video Programming Distributors ("MVPDs"). Moreover, and in contrast, there is no evidence that Defendants forced MOJO to go to the effort involved in a hunting license. This is additional evidence of disparate treatment on the basis of affiliation.

[3] *See* WealthTV Doc. Prod., WTV 001 0005385 – 0005394 (documents outlining WealthTV's various contacts with the Defendants).

WealthTV's programming for approximately six months as Video on Demand on its San Antonio, Texas system. However, a broader agreement failed to come together despite WealthTV's efforts and the interest of officials at the San Antonio system offices. These numerous contacts and the information and programming conveyed by WealthTV to Defendants' representatives afforded Defendants the opportunity and luxury of time to study WealthTV's programming and decide what they could profitably mimic. WealthTV, however, is not required to prove the deliberate copying of WealthTV's programming, look and feel, public descriptions and other aspects of WealthTV by Defendants to show that unlawful discrimination occurred. It is sufficient to show (1) that the refusal to carry WealthTV arose from MOJO's status as an affiliated video programming vendor and/or WealthTV's status as an independent programming vendor, and (2) that this refusal to carry WealthTV or negotiate in good faith unreasonably restrained WealthTV from competing fairly in the MVPD marketplace by making it more difficult to do so.

2. *Unreasonable Terms and Conditions as Compared To Similarly Situated Network.*

In addition to denying carriage to WealthTV, Defendants also sought to provide advantages to MOJO, the effect of which was to restrain WealthTV's ability to compete fairly due to the "terms, or conditions for carriage of video programming provided by such vendors" in the words of the applicable statute. For example, Defendant Time Warner Cable forced WealthTV to go through an arduous carriage application process, culminating in a single Video on Demand contract with Time Warner Cable's San Antonio system, while all four Defendants provided their affiliate MOJO with broad carriage without even the formality of a written agreement. This provided MOJO with immediate access to millions of homes, unfairly conferring a huge competitive advantage and restraining WealthTV's ability to compete fairly to attract advertisers and carriage agreements with other MPVDs. Further, to the extent Defendants provided other advantages to MOJO, such as bundling MOJO with other programming of iN DEMAND -- the parent company of MOJO and INHD, which is in turn wholly owned by Defendants -- these terms and conditions had the effect of unreasonably restraining WealthTV's ability to compete fairly.

It is not necessary for WealthTV to show that Defendants actively intended that their conduct injure or restrain WealthTV. The statute and regulations deliberately use the words "the effect of which" so as to eliminate the need to demonstrate intent.[4] It is sufficient under the statute and regulations for WealthTV to show that Defendants deliberately chose to engage in conduct based on the affiliation or non-affiliation of the programming vendor, and that the *effect* of this conduct was to restrain WealthTV's ability to compete fairly.

As discussed below, WealthTV's establishment of a prima facie case of discrimination as found by the Media Bureau shifts the burden to Defendants to show that they had legitimate business reasons for denying WealthTV carriage on their systems. However, in the event the Presiding Judge declines to follow this rule adopted by the Media Bureau in *TCR Sports*,[5] WealthTV satisfies its burden under the statute and regulations if it demonstrates that (1)(a) the denial of carriage unfairly restrained WealthTV's ability to compete, (b) the terms and conditions offered to it by Defendants as compared with those offered to their affiliate, MOJO, unreasonably restrained its ability to compete fairly, or (c) both (a) and (b) in combination unreasonably restrained WealthTV's ability to compete fairly even if one alone would not have

[4] *See* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).
[5] *See TCR Sports*, *supra* note 1

done so, and that (2) the relevant conduct occurred either because MOJO was affiliated with Defendants or that WealthTV was not affiliated with Defendants.

C. WealthTV Established a Prima Facie Case of Discrimination, and the Burden Has Shifted to Defendants to Demonstrate a Legitimate Justification for Their Discriminatory Conduct

In its October 10, 2009 Memorandum Opinion and Hearing Designation Order ("MO/HDO"), followed shortly thereafter by an Erratum, the Media Bureau ruled that WealthTV had established a *prima facie* case that Defendants had discriminated against it as prohibited by law and regulation.[6] Under the Commission's precedents in the program carriage dispute area, which the Media Bureau ruled applicable to program carriage disputes in a recent case, *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*,[7] upon a *prima facie* finding of program carriage discrimination, the burden shifts to Defendants to prove that they had a legitimate business justification for their discriminatory conduct. In the absence of decided cases in the program carriage area, the Media Bureau's decision and the arbitrator's Decision and Award ("MASN Arbitration Decision")[8] relied upon precedents from the program access dispute area in light of the similarity in discriminatory conduct policed by the relevant statutes and regulations in these areas. Therefore, in this case and consistent with *TCR Sports*, from this point forward, Defendants carry the burden of proof to explain their actions as something other than discrimination. Moreover, in the Media Bureau's

[6] *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.,* Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd 14787, MB Docket 08-214 (rel. Oct. 10, 2008) ("MO/HDO"); *see also In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.,* Erratum, MB Docket 08-214 (rel. Oct. 15, 2008)

[7] *TCR Sports, supra* note 1. To be sure, the MASN arbitration and the Media Bureau's review of it arose in the context of the RSN arbitration proceedings specified as conditions in the Adelphia merger. But there is nothing special or different about a dispute involving programming of other types of programming including other types of men's channels other than sports such as are involved here that suggests a different legal standard should govern.

[8] *In the Matter of Arbitration between TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, American Arbitration Association, Case No. 71-472-E-00697-07 (June 2, 2008) (Arb. Not Identified) [hereinafter MASN Arbitration Decision].

decision in *TCR Sports Broadcasting*, it applied this burden shifting standard in the context of its de novo review of the MASN Arbitration Decision. Thus, there is no inconsistency between de novo review and the application of a burden shifting standard.

Defendants no doubt will argue against the *prima facie* burden shifting standard and that the Presiding Judge should look to employment discrimination law for a standard that some courts have interpreted as more difficult for plaintiffs to meet, whereby the plaintiff bears the burden of showing that the Defendants' reasons are not pretextual. The Media Bureau and the arbitrator whose decision and award was under review rejected this approach. Time Warner Cable argued this approach was supported by a House Energy and Commerce Committee Report that was part of the legislative history of what eventually became the 1992 Cable Act, of which the provision codified at 47 U.S.C. § 536 was part. The Media Bureau found this reference was "not persuasive evidence of Congress' intent to apply employment law standards to program carriage dispute, an area wholly unrelated to economic-based discrimination like that at issue in this case."[9]

D. Defendants Cannot Demonstrate a Legitimate Business Justification for Their Discriminatory Conduct

Each Defendant has asserted its own specific business justifications for denying carriage to WealthTV based on criteria that each says it uses for deciding whether to grant carriage to a programmer. The criteria upon which Defendants each relied, as summarized in the MO/HDO, based in each instance on the Defendant's Answer to WealthTV's Complaint, are as follows:

[9] *TCR Sports*, *supra* note 1, at 11-12, ¶ 23.

Comcast: capacity constraints; the type and quality of the programming; the channel's track record of producing programming; evidence of consumer appeal for the channel; the experience of the channel's management team; and the terms offered by the channel.[10]

Cox: likely viewer appeal; the quality of the programming; whether the channel has a proven track record of attracting viewers or is associated with an established brand; the likelihood of the channel's success considering its management team and business plan; bandwidth management; proposed terms of carriage; the local needs of Cox's cable systems; and whether the channel has a regional appeal that might be attractive to certain systems.[11]

Time Warner Cable: capacity constraints; the proven track record of success of the channel; the experience of the channel's management team; the subscriber interest in the channel; input from Time Warner Cable's division management; and the terms offered by the channel.[12]

Bright House: capacity constraints; whether the channel is carried by competitors; the experience of the channel's management team; the overall product mix of the Bright House system; subscriber demand for the channel; input from Bright House's division management; and the terms offered by the channel.[13]

The record evidence here contradicts these asserted reasons for refusing to carry WealthTV, and gives rise to an inference that these are pretexts for Defendants' actual discriminatory conduct toward WealthTV.

First, Defendants have an economic motive to discriminate against WealthTV. This motive is the very reason that the program carriage statute and regulations were put in place in the early 1990s. Congress found that vertical integration "gives cable operators the incentive and ability to favor their affiliated programming services" by, in part, "refus[ing] to carry other programmers." S. Rep. No. 102-92, at 25 (1991), as reprinted in 1992 U.S.C.C.A.N. 1133, 1158 ("Senate Report").[14] A specific example of the incentive to discriminate is in the area of

[10] MO/HDO, *supra* note 7, at 27, ¶ 55
[11] *Id*. at 22, ¶ 44
[12] MO/HDO, *supra* note 7, at 13, ¶ 22
[13] *Id*. at 17, ¶ 33
[14] *See also* Senate Report, at 24, 1992 U.S.C.C.A.N., at 1157 (finding that "concerns" over a cable company's refusal to deal with video programming vendors "are exacerbated by the increased vertical integration in the cable

advertising. Advertising sales provide a valuable revenue stream for video programming vendors like WealthTV. When Defendants carry an unaffiliated video programming vendor, that programmer gets to fill, under industry norms, the lion's share of advertising minutes available in each show and keep that revenue. Only a small portion, perhaps two minutes, is given back to the cable company to fill and keep the attendant revenue. By comparison, when Defendants carry an affiliated video programming vendor, all of the advertising revenue flows to the benefit of Defendants because of the affiliate relationship. Moreover, when a video programming vendor affiliated with Defendants and an unaffiliated one are competing for the same advertising dollars, Defendants have an economic motivation to protect the affiliated programmer from competition by denying carriage to the unaffiliated programmer.

Defendants also hoped to realize significant revenue from licensing fees to other MVPDs. The record reflects considerable discussion among and effort by the Defendants, individually and collectively, to promote MOJO as a source of revenue by marketing MOJO to other cable companies, for example. While there is nothing wrong with trying to maximize revenue from affiliated programming, Congress explicitly prohibited cable operators from leveraging their control over cable systems to confer unfair advantages on affiliated video programming vendors

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industry"); *id*. at 25-26, 199 U.S.C.C.A.N. at 1158-59 ("You don't need a Ph.D. in Economics figure out that the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the advantage of the program services in which he has an equity investment and/or in which he is selling advertising availabilities, and to the disadvantage of those services in which he does not have an equity position"); Report and Order and Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Docket Nos. MB-07-29 et al., 2007 WL 2846428, ¶ 3 (FCC rel. Oct. 1, 2007) ("The 1992 Cable Act and its legislative history reflect Congressional findings that increased horizontal concentration of cable operators, combined with extensive vertical integration, created an imbalance of power, both between cable operators and program vendors and between incumbent cable operators and their multichannel competitors.") (footnotes omitted); Second Report and Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642, at ¶ 2 (1993) ("When drafting the 1992 Cable Act,…Congress concluded that vertically integrated cable operators have the *incentive and ability* to favor affiliated programmers with respect to granting carriage on their systems.") (emphasis added).

when competing for MVPD licensing agreements to protect competition in the video programming marketplace.[15] Because WealthTV is a similarly situated programming vendor, every system carrying WealthTV is less likely to carry MOJO, giving Defendants an incentive to disadvantage WealthTV. Similarly, because an MVPD carrying MOJO is unlikely to carry the similarly situated WealthTV, the unfair advantages conferred by the Defendants on their affiliate MOJO had the effect of unreasonably restraining WealthTV's ability to compete fairly.

In addition to added revenue, cable operators have an economic incentive to reduce their programming costs by using affiliated programming rather than unaffiliated programming. This creates an economic incentive to use affiliated programming rather than independent programming, even if the independent programming is of superior quality. As explained by Defendants' expert Dr. Ordover, [redacted] This created yet another incentive for Defendants to discriminate against the independent WealthTV in favor of their affiliate MOJO.

Second, the criteria used by Defendants as claimed rationales for excluding WealthTV appear inconsistently applied, demonstrating that they are mere pretexts for unlawful discrimination based on affiliation. For example, the capacity constraints criterion claimed by Bright House, Time Warner Cable and Comcast, and the analogous bandwidth management criterion claimed by Cox, cannot be a claim that these MSOs are out of room to add new channels Defendants continually add capacity and add and drop channels from their line-ups as indicated in documents produced by Defendants. The "terms offered" rationale offered by all

[15] 47 U.S.C. §536(a)(3); *see also* 47 U.S.C. §533(f)(2)(A)-(B); Senate Report, at 23-29; House Report, at 41-43.

four Defendants as an apparent reason for not carrying WealthTV is similarly without merit. WealthTV offered its product to Defendants for an initial term of carriage *for free*, so cost cannot have been a legitimate factor. Likewise, turning WealthTV down on the grounds of the popularity or viewer appeal of its programming makes no sense. In April 2007, right before MOJO was launched 24/7, it had no distribution partners whereas WealthTV had over 75 video distributors. And the claimed evaluation of the channel's management team, which apparently factored negatively in WealthTV's case, is without merit. As described in the Written Direct Testimony of Charles Herring, the Co-Founders of WealthTV have a history of successful entrepreneurship and have made a significant investment in developing a top-notch team and state-of-the-art production facilities. If the management team factor operates as a blanket exclusion of new entrants, validating it in this proceeding is not in the public interest.

Third, Defendants so far have offered no showing as to how they methodically applied the same claimed criteria to MOJO before deciding to afford it carriage or whether they applied the same claimed criteria at all. In fact, it came to light during discovery that Defendants have no written agreement for carriage with MOJO or its predecessor INHD.[16] Nonetheless, Defendants carried both channels on substantially all of their systems across the country, and Defendants paid consideration to iN DEMAND for such carriage. Defendants apparently did not require either INHD or MOJO to run the gauntlet of the supposed criteria by which Defendants

[16] WealthTV sought through its document requests to each Defendant "all documents relating to the terms of carriage" of INHD and MOJO, which would include the affiliation agreement between MOJO on the one hand and each of the Defendants on the other and the affiliation agreement between INHD on the one hand and each of the Defendants on the other. *See, e.g.* Complainant's First Request for Production of Documents to Defendant Comcast Corporation, at 8, ¶ 4 (Dec. 5, 2008). No Defendant produced responsive documents, and counsel for WealthTV has sought and received confirmation from each of Defendants' counsels that no responsive documents were found. Conversely, signed affiliation agreements sought by WealthTV between Defendants and other non-affiliated programming services have been located and produced.

allege they carefully weigh carriage decisions to get a carriage agreement. This in and of itself is disparate treatment. At the very least, it is extremely significant circumstantial evidence of disparate treatment, if not direct evidence of such.

E. WealthTV and MOJO Are Similarly Situated

If the Presiding Judge declines to follow the decision in *TCR Sports* in adopting the burden shifting legal standard discussed above, WealthTV intends to rely on the following approach to its case.

The essence of discrimination is treating two similarly situated entities differently – for example, affording carriage to an affiliate such as MOJO without even going to the trouble of entering into a carriage contract or going through the evaluation that supposedly attends such a decision, while purportedly applying a rigorous analysis to an independent video programming vendor such as WealthTV.[17] WealthTV alleges that the Defendants, who collectively own iN DEMAND, the parent company of MOJO, broke the law by discriminating in favor of MOJO and against WealthTV so as to unreasonably restrain it from competing fairly in the marketplace. They did this by carrying MOJO on substantially all of their respective local cable systems while denying carriage to WealthTV, a similarly situated video programming vendor.

WealthTV and MOJO are similarly situated for numerous reasons. First, they target the same audience ("target demographic") and deliver the same audience demographic ("actual

[17] The Media Bureau ruled as a matter of law that two programming services need not be identical to be similarly situated. See MO/HDO, *supra* note 7, at ¶ 39. ("Cox appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination. We find that this is a misreading of the program carriage statute and our rules.") Moreover, such a standard would be absurd because it would afford statutory protection and a remedy only to programming services that completely replicated one another.

demographic").[18] This is significant because a programming service draws the attention of paying, general national advertisers[19] based on the likelihood that the advertisers can reach likely buyers and consumers of their products and services. If the target and actual demographics of a programming service match the desired demographics of an advertiser, the advertiser is likely to be more interested in purchasing advertising time on the programming service. Thus, a seller of men's apparel is more likely to be interested in advertising on a programming service that attracts male viewers than one that does not.

Two programming services with similar target and actual demographics thus are competitors for viewers and advertisers' dollars and, therefore, for space on MVPDs' distribution systems, including Defendants' cable systems. Here, WealthTV described its target demographic in presentations to Defendants going back to 2004 as appealing to affluent males between the ages of 25 and 49. MOJO's target demographic is claimed to be the same. WealthTV's actual demographic, measured by responses to an Internet survey since WealthTV is not Nielsen rated, was measured as 71 percent male, with 99 percent of respondents identifying themselves as 21 years of age or older .[20] MOJO, also not metered according to an official from iN DEMAND, its parent company, apparently claims reliance on a "Mojo Attitudes &

[18] Pursuant to Defendants' document requests, WealthTV produced presentation decks that purported to describe WealthTV's target demographic more broadly. As indicated in the Written Direct Testimony of Charles Herring, these were not consistent with WealthTV's official position.

[19] General national advertisers pay an agreed upon fee for placement of their advertisements on the programming service. In contrast, direct response advertisers place advertisements inviting viewers to call to buy the service or product advertised, and pay the programming service based on the level of response received.

[20] Declaration of Mark Kersey at 2, ¶ 4. The Declaration of Mark Kersey, appended to WealthTV's Reply to Time Warner's Answer and to its Complaints against Bright House, Cox and Comcast, will also be offered as his Written Direct Testimony.

Awareness" study dated September 2007 and showing an audience that is 70% male, of an average age of 39.3, and with 34% of viewers having household incomes of $100k or higher.[21]

The overlapping demographic profile of the two programming services is alone enough to support a finding that the two are similarly situated. The overlapping demographic profile is relevant to all of the other similarities because it drives choices about programming and how the programming services hold themselves out to the public and to distributors such as Defendants. A video programming vendor's decisions, at least for a programmer that relies on an advertising model for a portion of its revenues as WealthTV does, as to what programming to air reflects at bottom a judgment about what will appeal to viewers whom advertisers are trying to reach and who, therefore, will be willing to buy air time for their advertisements. Video programming services that intend to appeal to the same target demographic, therefore, offer programming similar to one another. When a cable company's affiliate is competing for the same demographic as an unaffiliated video programmer seeking carriage on the parent cable company, there is motivation on the part of the cable company to protect the affiliate's franchise, brand, and advertising sales opportunities.

Second, and relatedly, MOJO and WealthTV offer programming that is very similar in theme and content. Both WealthTV and MOJO have offered programming in the areas of food, wine, automobiles, sports interviews, food and electronics and gadgets. Since June 2004, WealthTV has offered *Taste! The Beverage Show*; in April 2007, MOJO launched *Uncorked*. Both programs focus on educating viewers about wine and spirits. Since June 2004, WealthTV has offered *Wealth on Wheels*; in August 2007, MOJO launched *Test Drive*. Both programs

[21] WealthTV Doc. Prod., WTV001 00002072.

focus on the latest trends in autos and auto technology. Since June 2004 WealthTV has offered *Charlie Jones, Live to Tape*; MOJO offered *Timeless*. Both programs featured interviews of sports figures. Since June 2004, WealthTV has offered *Taste of Life*, which focuses on behind the scenes experiences relating to travel, spirits, and food. In June 2006, MOJO began offering *After Hours*, which is about behind the scenes experiences involving Los Angeles restaurants. In April 2005, WealthTV began airing *Innov8*, which is about new "gadgets and gizmos"; in December 2006, MOJO began airing *Geared Up*, which similarly features high-end electronics and technology. The Media Bureau relied on these examples of similarities as part of its prima facie finding.[22]

WealthTV's Reply to Time Warner Cable's Answer and its Complaint against each of the other Defendants was supported by a declaration by Jedd Palmer, a twenty-five year veteran of the cable industry whose review of the programming schedules of the two programming services was the basis for his conclusion that "the overwhelming majority of the programming on both networks is the same, or very, very similar, in subject, type, feel, look and target audience." As the Presiding Judge is aware, Mr. Palmer is no longer offered as a witness in these cases because of health issues. The expert who was allowed to substitute for him as a witness, Sandy McGovern, similarly concluded that MOJO's programming "deliberately replicated the concepts, genres, formats, and targeted audiences of WealthTV."[23]

Third, the two video programming vendors describe themselves and hold themselves out to the public in ways that are very similar to one another. For example, the Media Bureau noted that "[d]escriptions of WealthTV and MOJO's programming found on their respective websites

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[22] MO/HDO, *supra* note 7, at 9-10, ¶ 13.
[23] Declaration of Sandra McGovern as Expert Witness for WealthTV, at 7, ¶ 11.

further suggests the two networks offer similar programming" and offered various sources as support.[24] The Chief Executive Officer of iN DEMAND described MOJO as for "men making more than $100,000 per year."[25] MOJO has also used the term "active affluents" to describe its target audience.[26] These descriptions track with the way that WealthTV introduced itself to Defendants.[27]

Although the law affords cable operators latitude in deciding what to carry on their systems, that latitude is not unbounded. There are numerous examples in the law and Commission regulations of requirements that cable operators carry certain content or convey information other than that of their own choosing.[28] One example applicable to this case is the situation of the vertically integrated cable operator, one that owns and operates distribution

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[24] *Compare* http://www.wealthtv.net/programming.html (stating that WealthTV provides "fresh and compelling landmark exclusive programming in high definition. From programs on private jets and exotic first-class travel to the intellectual discussion of money and philanthropy, WealthTV showcases a wide range of programming designed to have a broad appeal") *with* http://www.mojohd.com/about/ (describing the MOJO network as "the new 100% hi-def channel [that] is tailored to fit your interests from exceptional food to extreme locales, from high tech toys to high stake antics, from Wall Street to easy street and the best of sports, music, movies and more. It's 180º from ordinary and 100% high definition, because life is how you see it").

[25] *See* Carriage Agreement Complaint, *In the Matter of Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc.*, FCC File No. CSR-7709-9, at ¶¶ 30, 35 and Exhibit 11 (filed Dec. 20, 2007) [hereinafter TWC Complaint].

[26] *See id.* at Exhibit 4; Press Release, *MOJO is Rising!! INHD Prepares for a May 1 Lightswitch When the Hi-Def Cable Channel Becomes MOJO* (Mar, 19, 2007) (MOJO is "geared to males who are 'active affluents'.").

[27] *See, e.g.,* TWC Complaint, *supra* note 26, at Exhibit 12 (Excerpt from WealthTV's Standard MSO Presentation 2004, Target Audience Slide).

[28] For example, MSOs' must carry obligation has been upheld by the United States Supreme Court. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997). MSOs' other government-mandated obligations to propagate speech that is not their own include obligations to carry or transmit public educational and governmental channels, programming on leased access capacity, and emergency alerts. Further, in *TCR Sports,* the Media Bureau decisively rejected the argument of Time Warner Cable that first amendment concerns barred a mandatory carriage remedy, not only in the context of the *Adelphia Order*, but more broadly. *TCR Sports*, *supra* note 7, at 29, ¶ 49. Specifically, the Media Bureau pointed to the Second Report and Order as having contemplated a mandatory carriage remedy and discussed *Time Warner v. FCC*, in which the United States Court of Appeals for the District of Columbia Circuit upheld the leased access provisions of the 1992 Cable Act notwithstanding appellant's first amendment arguments that this violated its first amendment rights. Time Warner Entertainment Co., L.P. v. FCC, 93 F.3d 957 (1996)

systems and also owns an interest in a programming service. Such cable operators are not permitted to favor affiliated video programming vendors over unaffiliated ones.

Another indication of discrimination is the uneven application of decisional criteria. Decisional criteria applied evenly to similarly situated entities should not produce opposite results. Defendants have argued that their decision not to carry WealthTV reflects the normal and usual exercise of business and editorial judgment, not discrimination in favor of MOJO. Yet as shown above, most of the criteria provide no logical basis for excluding WealthTV from carriage and nowhere so far have Defendants shown how they applied these criteria to their own affiliate.

WealthTV argues that Defendants made a decision to carry MOJO in 2007, and that this was the decision that was discriminatory within the meaning of the statute and regulations. Defendants argue that no carriage decision was made in 2007. They argue, instead, that MOJO was merely a rebranding of a channel that Defendants were already carrying, INHD, and had decided to carry in 2003. But INHD, which ceased to exist as a channel when MOJO gained carriage, was also an affiliate of Defendants, because it was owned by iN DEMAND, which in turn is collectively wholly-owned by the four Defendants. WealthTV contends that MOJO and INHD were different channels for the reasons offered in the Written Direct Testimony of Charles Herring and Sandy McGovern and MOJO was not merely a rebranded version of INHD that inherited its channel position, audience and other attributes. As a result, WealthTV maintains that the Defendants made a fresh carriage decision in 2007, three years after similarly-situated WealthTV made itself available to Defendants for carriage. Even if the Presiding Judge were to determine that MOJO was merely a rebranding of INHD, which WealthTV strenuously maintains it was not, Defendants' conduct in maintaining carriage of an affiliate, no matter what it is called, while denying carriage to a similarly situated unaffiliated programming service is actionable under the law.

F. Defendants' Conduct Had the Effect of Unreasonably Restraining WealthTV from Competing Fairly

Defendants' discriminatory refusal to deal with WealthTV had the effect of unreasonably restraining WealthTV from competing fairly by making it more difficult for WealthTV to reach the critical mass of subscribers, especially in critical urban markets, needed to attract significant general national advertisers. WealthTV's business depends upon revenues from advertisers as well as payments from MVPDs that carry it. WealthTV's expert witness Gary Turner stated in his declaration that advertisers generally want to deal with programming services that have at least 20 million viewers. With access foreclosed to Time Warner Cable's 13.2 million subscribers, Comcast's 24.4 million subscribers, Cox's 5.2 million subscribers, and Bright House's 2.3 million subscribers because of the Defendants' discriminatory conduct, reaching that threshold is much more difficult.

Defendants dispute as a factual matter whether there is a meaningful 20 million subscriber threshold for attracting advertisers. As WealthTV's experts Gary Turner and Sandy McGovern each testified, the 20 million subscriber threshold is an axiom in the industry.[29] Defendants dispute this. But even Defendants' expert Howard Homonoff acknowledged that 20 million subscribers "may be" a meaningful threshold and that, in any event, having a larger number of subscribers rather than a smaller number is a better way of attracting advertisers.[30]

[29] Declaration of Gary Turner as Designated Expert Witness for WealthTV, at ¶ 6; McGovern Depo. Tr. at 324-25.
[30] Homonoff Depo. Tr. at 155-56.

As long as WealthTV is foreclosed from Defendants' systems, its ability to grow is compromised and it is thereby unreasonably restrained from competing fairly.

Even if the Presiding Judge decides not to credit the 20 million subscriber threshold as an industry standard for advertisers' interest, WealthTV will still prevail for two reasons. First, as Defendants' expert Howard Homonoff testified, regardless of whether one regards the 20 million threshold as significant, having more subscribers is better than having fewer subscribers for purposes of attracting paying advertisers. The issue is not whether Defendants' conduct was the felling blow to the long term viability of the programming service, though long-term viability is certainly implicated, but rather whether the effect of Defendants' conduct was to unreasonably restrain WealthTV's ability to compete fairly. In these cases, Defendants' conduct made it more difficult for WealthTV to achieve break-even status in a reasonable time horizon for a start-up of its kind. As a result, Defendants' conduct had "the effect" of unreasonably restraining WealthTV from competing fairly as prohibited by the statute and regulations.

Second, even if WealthTV could have built up its subscriber base by concluding carriage deals with MVPDs other than Defendants, this does not relieve Defendants of complying with the law. Specifically, the Media Bureau, in the MO/HDO, rejected as a matter of law the notion that a cable company could be excused from liability under the law just because it was possible for a programmer to get other carriage agreements that would contribute to its success.[31] This rejection of the "pass the buck" concept of compliance with the law should govern the trial proceedings and decision in this case as well.

[31] See MO/HDO, *supra* note 7, at ¶ 19. ("TWC argues that WealthTV could meet a 20 million subscriber benchmark through carriage agreements with other large MVPDs….We reject this claim because it would effectively exempt all MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs. Moreover, the program carriage provisions of the Act prohibits an MVPD from discriminating against an unaffiliated programmer regardless of the competition the MVPD faces.")

G. Defendants' Decision to Cease Carriage of MOJO is Irrelevant

Defendants Time Warner Cable and Comcast argued in the record before the Media Bureau prior to the issuance of the MO/HDO that their decision to cease carriage of MOJO near the end of last year rendered WealthTV's lawsuits moot.[32] WealthTV responded in the record that the discrimination occurred when Defendants made the decision to deny carriage to WealthTV while affording carriage to MOJO, and that a subsequent decision to end carriage of MOJO did not undo the violation. The Media Bureau agreed with WealthTV as a matter of law. This legal issue was not designated for hearing, and the Media Bureau's conclusion governs in these proceedings. The Media Bureau stated, "[t]he fact that MOJO will cease operations in the future is not relevant to the issue of whether the defendants engaged in unlawful discrimination during the period that WealthTV sought carriage."[33] Nor does the decision to cancel MOJO mitigate or erase the damage experienced by WealthTV, or excuse Defendants' continuing refusal to carry WealthTV.

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[32] See MO/HDO, *supra* note 7, at ¶ 9 n.27.

[33] *Id.* The MO/HDO goes on to state as follows:

> Our conclusion is consistent with the Commission's finding in other contexts that steps taken by a licensee following a violation do not eliminate the licensee's responsibility for the period during which the violation occurred. *See SBC Communications, Inc.*, Order of Forfeiture, 16 FCC Rcd 5535, 5542, ¶ 18; *see also Coleman Enters., Inc. d/b/a Local Long Distance, Inc., Order of Forfeiture*, 15 FCC Rcd 24385, 24388, ¶ 8 (2000); *America's Tele-Network Corp., Order of Forfeiture*, 16 FCC Rcd 22350, 22355, ¶ 15 (2001). In addition, if carriage of WealthTV is ultimately required, the fact that the defendants will no longer be carrying MOJO on the relevant cable systems indicates that they will have a vacant channel on which to accommodate WealthTV. *Id*.

Notably, iN DEMAND's statement upon the announcement that carriage of MOJO would cease was not that MOJO had not worked as a concept, or had failed, but rather that it had succeeded.

> "The Mojo HD channel was originally conceived as a way to satisfy consumers' thirst for pure true high-definition programming," In Demand said in a statement. "While Mojo HD accomplished this goal, there is a wealth of HD programming now available and thus we have chosen to discontinue the service."

Mojo HD Shut Down by Cable Companies, www.tvweek.com/news/2008/10/cablers_pull_plug_on_mojo_hd.php (Oct. 7, 2008), WealthTV Doc. Prod., WTV001 0002074.

H. WealthTV's Complaints are Each Timely Filed; Cox's Statute of Limitations Argument Has No Basis in the Statute or Regulations

In a similar vein, Cox, but no other Defendant, argued that WealthTV's complaint was time barred because it was filed more than a year after the date on which Cox says it denied WealthTV carriage. But the regulations provide that a complaint may be filed up to one year after service of the required pre-complaint-filing notice.[34] The Media Bureau rejected as a matter of law Cox's invention of a new statute of limitations running from whatever date a cable company may subsequently unilaterally assert was its date of denial of carriage.[35] That issue has not been designated for hearing and the Media Bureau's legal conclusion governs in this proceeding.

I. Other Distributors' "Rationales" for Not Carrying WealthTV are Not Relevant

Defendants apparently intend to argue that they cannot be found to have discriminated against WealthTV because there are other cable and satellite companies in the United States that have no affiliation with MOJO and do not carry WealthTV. Their argument apparently is that if another video programming distributor relied upon a non-discriminatory reason for not carrying WealthTV, they may borrow that reason and assert that it was their actual reason.

This is fallacious logic. This action is about whether Defendants discriminated against WealthTV, not whether others did not. Moreover, many of the carriers whose "rationales" for denial of carriage Defendants would like to borrow did not carry MOJO either, so their non-carriage of WealthTV makes no comparative point.

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[34] 47 C.F.R. § 76.1302

[35] See MO/HDO, *supra* note 7, at ¶38. After offering two fact-based reasons for rejecting Cox's statute of limitations argument, the Media Bureau stated, "Third, the plain language of the Commission's rules provides that the statute of limitations is satisfied if the program carriage complaint is filed within one year of the pre-filing notice, which WealthTV has done in this case." *Id*.

Further, it is impossible to discern on the basis of such evidence whether MVPDs that so far have declined to carry WealthTV did so for reasons arising from Defendants' actions to unfairly advantage its affiliate and disadvantage WealthTV. For example, an MVPD influenced by the substantial penetration given MOJO by its owners, or agreeing to carry MOJO because MOJO's owners have bundled MOJO with other more desirable iN DEMAND offerings, is unlikely as a practical matter to commit to paper the rationale that it would have agreed to carry WealthTV but for having already agreed to carry MOJO.

Rather, it is far more typical, as borne out by WealthTV's experience, for video programming distributors to give no definitive reason for failing to conclude an agreement. The only concrete reason WealthTV has become aware of recently is from [redacted], in an email stating that the company was not interested in talking with WealthTV in light of WealthTV's actions against the Defendants.[36] Presumably, retaliation for assertion of lawful rights is not a reason that Defendants would want to borrow as a rationale for denial of carriage.

J. Direct Evidence of Discrimination is Not Necessary

Even if the Presiding Judge declines to adopt the burden-shifting legal standard urged by WealthTV, no direct evidence of discrimination is required. Neither the statute nor the Commission's regulations contain such a requirement, and in other contexts where finders of fact

[36] See WealthTV Doc. Prod., [redacted]

have to evaluate allegations of discrimination, circumstantial evidence and inferences based upon it have been found to be sufficient bases to support a finding of discrimination.[37]

III. ESSENTIAL FACTS TO BE PROVEN

WealthTV maintains that under the proper legal standard to be applied in these cases, the burden of proof has shifted to Defendants to demonstrate that its reasons for denying carriage to WealthTV were not pretextual. These are determinations of fact that turn on credibility assessments entrusted to the finder of fact.[38] In the event that the Presiding Judge does not adopt that standard, WealthTV will proceed as follows:

1. Essential Fact 1: WealthTV will prove that it is similarly situated to MOJO for the reasons identified above.
2. Essential Fact 2: WealthTV will prove that Defendants made a carriage decision on the basis of affiliation with respect to WealthTV, and that that decision favored Defendants' affiliate and disfavored WealthTV, an unaffiliated video programming vendor.

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[37] *See Hossack v. Floor Covering Assocs. of Joliet, Inc.* 492 F.3d 853, 862 (7th Cir. 2007) ("[w]e have previously identified three types of circumstantial evidence of particular relevance when establishing the inference of intentional discrimination in Title VII cases," including "suspicious" behavior, treatment of those "similarly situated to the plaintiff," and "evidence that the employee was qualified"; noting that "[e]ach type of circumstantial evidence is sufficient in and of itself to support a judgment for the plaintiff" and that "bits of circumstantial evidence may also be used to compose a convincing mosaic of discrimination"). In the MASN Arbitration Decision, the arbitrator adopted the burden-shifting framework, apparently accepting MASN's argument that "[i]t would be illogical to hold economic discrimination by plaintiffs in this context to stricter standards when, unlike other forms of discrimination, it is economically rational for a vertically integrated MVPD to discriminate on the basis of affiliation. Indeed, the FCC's burden-shifting framework bears some resemblance to the McDonnell Douglas framework, which is designed for cases in which there is no direct evidence. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111,121 (1985) ("McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination")." Claimant's Pre-Hearing Arbitration Brief, *In the Matter of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, American Arbitration Association, Case No. 71-472-E-00697-07 (filed Nov. 9, 2007). WealthTV relies on that argument here.

[38] *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

3. Essential Fact 3: WealthTV will prove that Defendants' conduct had the effect of unreasonably restraining its ability as an unaffiliated video programming vendor to compete fairly in the marketplace. Defendants' discriminatory conduct locked WealthTV out of delivering its services to the millions of subscribers that Defendants serve and discouraged other major programming distributors from giving serious consideration to carrying WealthTV. This had the effect of making WealthTV less appealing than it otherwise would be to advertisers, thus delaying and curtailing WealthTV's ability to achieve break-even status, profitability and long-term viability, since WealthTV's business relies on both affiliate fees and advertising revenues.

4. Essential Fact 4: WealthTV will demonstrate that its proposed remedy of carriage on the same terms as MOJO enjoyed is reasonable.

In the course of it cross-examinations, WealthTV will demonstrate that the Defendants' experts' opinions are flawed and should not be relied upon. Defendants collectively offered four experts and reserved the possibility that some Defendants might later adopt the reports and testimony of one another's experts. It appears from the Witness Lists exchanged on April 3, 2009 that Defendants will do so. All of Defendants' experts are practiced witnesses, with one touting that he has "served as an expert witness in dozens of litigations"[39] Depositions of these experts revealed that by and large they have developed no familiarity with the documents produced in this case and have not been privy to the facts of the specific dealings between WealthTV or MOJO on the one hand and the Defendants who retained them on the other hand,

[39] Expert Report of Larry Gerbrandt, at 2.

which would seem to limit their usefulness to the Presiding Judge as experts in this matter. A summary of the basic flaws follows:

> **Janusz Ordover:** Dr. Ordover was retained by Cox and Bright House, the two smaller cable companies among the four defendants. [redacted]
>
> The Media Bureau rejected both the contention that the law requires that the conduct threaten the viability of the programming vendor and the notion of *per se* immunity on the grounds of size in the MO/HDO as a matter of law. The Presiding Judge should not rely on an expert opinion based on an economic argument for the same erroneous legal premise.
>
> Further, as Dr. Ordover acknowledged in his own testimony [redacted]
>
> **Howard Homonoff:** Mr. Homonoff was retained by Time Warner Cable. His expert report contains [redacted]

[redacted]

Larry Gerbrandt: Mr. Gerbrandt's report contains [redacted]

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[40] Mr. Gerbrandt testified that he was at the time of his deposition that he was "studying statistics through a program administered by statistics.com". Gerbrandt Depo. Tr. at 21. When asked whether there was a gap in his appreciation or understanding of statistics that caused him to take that course, he answered in the affirmative. *Id.* at 33.

[41] Mr. Egan said that his practice in this regard was to watch "some programming" from a proposed program offering; "sizzle reels. . . I would ask them for some sample episodes and I might watch a few minutes of two or three of them." Egan Depo. Tr. at 113.

[redacted]

Michael Egan: Mr. Egan is a "management consultant" retained by Time Warner Cable. [redacted]

IV. WITNESSES FOR EACH ESSSENTIAL FACT

WealthTV plans to call the following witnesses to provide direct testimony on its behalf at trial. A summary of each witnesses expected testimony is included.

Charles Herring: Charles Herring is Co-Founder and President of WealthTV. His responsibilities in this role have included participation in and supervision of WealthTV's negotiations and attempted negotiations with actual and potential video distribution partners, including Defendants Time Warner Cable, Comcast, Bright House and Cox.

Mr. Herring's testimony will address the course of dealings between WealthTV and the Defendants and how the Defendants' refusal to negotiate in good faith and refusal to carry WealthTV injured WealthTV. His testimony will also document that MOJO is substantially similar to WealthTV and similarly situated to it. His testimony 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. He will also address the appropriate remedy for Defendants' refusal to carry WealthTV and explains the reasonableness of the terms of carriage WealthTV seeks as its remedy. Mr. Herring will also testify about the target and actual audience of WealthTV.

Mr. Herring may address other factual developments relating to the relationship between WealthTV and the Defendants. His testimony supports all Essential Facts to be Proven.

Sandra McGovern: Ms. McGovern has been the principal of McGovern Media Associates, LLC, a media consulting firm whose clients have included VOOM (the high definition DBS provider owned by Cablevision), SES Americom (satellite and IPTV), Hiwire Mobile Video, RENTRAK (audience research), and U.K.'s Channel 5 (programming channel analysis), since January 2000. Ms. McGovern spent her first 12 years in the television industry (from 1980 to 1992) in an affiliate sales roles at Rainbow Programming, The Weather Channel, and Discovery Channel, successively. In these roles, Ms. McGovern was responsible for all aspects of negotiation of all programming carriage agreements with domestic cable operators, the marketing of programming services to those cable operators, and, in collaboration with those cable operators, marketing programming services to the cable operators' customers.

In addition to Ms. McGovern's experience in the area of affiliate sales, she also has experience with programming services' purchase decisions. From March 2003 through May 2005, Ms. McGovern served as a full-time executive consultant to VOOM acting as VOOM's Executive Vice President for Programming

Ms. McGovern's testimony will explain the numerous and substantial similarities between MOJO and WealthTV and the differences between INHD and MOJO. Her testimony will counter the testimony of Defendants' witnesses on this subject, if necessary. Her testimony will explain how Defendants' refusal to carry WealthTV has injured WealthTV and put it at a competitive disadvantage in the video marketplace. Her testimony may also address the appropriate remedy for Defendant's misconduct and support the reasonableness of the terms of carriage sought as part of the remedy. Her testimony supports all Essential facts to be Proven.

Mark Kersey: Mark Kersey is President of Kersey Research Strategies which focuses on cable and telecommunications analytical research services. His testimony will document the demographic profile of WealthTV's viewers. His testimony will explain that WealthTV appeals to men at the same level as is claimed for MOJO. His testimony supports Essential Fact to be Proven Number 1.

Gary Turner: Gary Turner is a leading industry expert on selling advertising inventory. Dating back to 1998 until 2007, Mr. Turner's advertising firm, Turner Media Group, later known as The Media Group, sold the advertising inventory for EchoStar. Mr. Turner is also one of the pioneer's in interactive television, iTV, an advanced interactive transactional advertising platform. Mr. Turner's firms have represented numerous MVPDs and networks in selling advertising inventory. Mr. Turner is also the co-founder and an owner of Performance One Media, an advertising placement agency, specializing in direct response ads. Mr. Turner's firms have launched numerous channels. In 2007, The Media Group owned and operated eight transactional networks: The Men's Channel, Healthy Living Channel, Beauty & Fashion Channel, Resort and Residence, iDrive, Men's Outdoors & Recreation, America's Preview Channel and iShop TV.

Mr. Turner's testimony will address the significance of a network's achieving certain household coverage thresholds in order to attain long term viability and how defendants' unlawful refusal of carriage damaged WealthTV. His testimony will address how advertisers treat household coverage thresholds. His testimony supports Essential Facts to be Proven Numbers 1 through 3.

The Parties reserved in a recent statue report to the Presiding Judge the possibility of calling witnesses under subpoena WealthTV is unaware that Defendants' have made any final decision in this respect but is prepared to do so simultaneously with Defendants.

V. DOCUMENTS TO BE RELIED UPON

WealthTV anticipates using the documents that it submitted as exhibits under the prior trial schedule on November 1 and 10, 2008. Attached are copies of the lists of Exhibits submitted at that time. WealthTV is not able to specify at this time the documents it will use in cross-examination of Defendants' witnesses. WealthTV may need to use documents in addition to those specified here both in connection with proof of its case and in cross-examination.

Each witness who testifies on behalf of WealthTV will sponsor such documents as are presented with that witness's Written Direct Testimony. These documents will be offered as Exhibits. Insofar as each witness is identified above as to which Essential Facts he or she will support, that witness's documents will be offered as Exhibits to support such Essential Facts.

In addition, although WealthTV continues to oppose Defendants' Joint Motion for Modification of Court Room Memorandum in a manner that would permit them to play the DVDs attached as Exhibits D and E to the Expert Report of Michael Egan (the "Egan DVDs") during the trial, the Presiding Judge has not ruled on the. Thus, WealthTV faced the dilemma set out in WealthTV's Surreply to Defendants' Joint Motion for Modification of Court Room Memorandum, dated April 2, 2009 of whether to create its own DVDs protectively in the event Defendants' Motion is granted. WealthTV has now done so. The DVDs are attached to Mr. Herring's testimony and will be sponsored by him at the trial if the Defendants' Motion is granted.

VI. REMEDY SOUGHT

WealthTV's desired remedy is straightforward: carriage on the same Defendant systems on which Defendants carried MOJO, under the same terms and conditions afforded MOJO. WealthTV intended to rely on the Defendants' carriage agreements with MOJO to advise the Presiding Judge of the specifics of these terms and conditions so that an appropriate and specific order could be entered. But no such agreements were produced and Defendants' respective counsels have confirmed that none were found. Nevertheless, it is evident from documents produced by Defendants that payments were made by Defendants to iN DEMAND in exchange for carriage of MOJO. As a result, even if not reduced to a written contract signed by the parties to the agreement, terms and conditions exist which would be the basis of a remedy. WealthTV intends to develop this subject, of course, through cross-examination of Defendants' fact witnesses using documents produced by Defendants. (Depositions in these cases were confined by stipulation of the parties to expert witnesses.)

As a proxy and benchmark for terms and conditions of carriage of MOJO that were reduced to writing, WealthTV alternatively seeks carriage by Defendants on the same terms and conditions offered by iN DEMAND to EchoStar for carriage of MOJO's predecessor INHD.

This proposed agreement was introduced as an exhibit in other litigation before the Commission and has been identified by WealthTV as an exhibit in this case as indicated in the attached Exhibit lists.

In the event that the Presiding Judge declines to order carriage of WealthTV on one of the foregoing bases, WealthTV seeks a so-called baseball-style approach in which each party is instructed to produce its best and final offer for and of carriage. The Presiding Judge would then adopt one of the two offers as the basis for relief.

VII. LEGAL AUTHORITY

WealthTV specifies the following key legal authorities upon which it may rely at trial and thereafter but may expand this list.

A. Statutes and Regulations

The relevant statute is 47 U.S.C. § 536, set out above. The relevant regulation is 47 C.F.R. § 76.1301, also set out above.

B. Court and Administrative Cases

There is no decided case directly on point with the instant cases either in the courts or before the Commission. There is instructive precedent from the area of program access discrimination. The issue on that area is whether a vertically integrated programmer has discriminated against another video programming distributor with respect to the availability or terms and conditions of carriage of satellite-distributed programming.

In *TCR Sports*, the Media Bureau upheld the approach of the MASN Arbitration Decision, relevant here insofar as the Media Bureau embraced the arbitrator's application of the legal standard that is applicable here: after the complainant has made out a prima facie case, the burden shifts to the defendant to demonstrate that its actions were not discriminatory by showing that its carriage decision was actually based on legitimate business reasons.[42] A copy of the Media Bureau's Order and the MASN Arbitration Decision (Public Version – Redacted for Public Use) are attached.

The underlying program access cases that the arbitrator in the TCR case relied on were Memorandum Opinion and Order, *Turner Vision, Inc., Satellite Receivers, Ltd., Consumer Satellite Systems, Inc., and Programmers Clearing House, Inc. v. Cable News Network, Inc.,* 13 FCC Rcd. 12610 (June 30, 1998) and Memorandum Opinion and Order, *CellularVision of New York, L.P. v. SportsChannel Associates,* 10 FCC Rcd 9273 (CSB 1995). WealthTV relies on these cases as well.

C. Legislative Materials

WealthTV will rely on the following legislative materials: House Report, Senate Report, 47 U.S.C. §§536(a)(3) & §533(f)(2)(A)-(B).

D. Commission Materials

Additional support for the burden shifting standard is found at Second Report and Order, *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642, 2654 ¶¶ 29-30; ¶ 116 (1993).

Support for the 20 million subscribers viability threshold is found at Fourth Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of the Commission's Cable Horizontal and Vertical Ownership Limits, et al.*, MM Docket No. 92-264 (rel. Feb. 11, 2008).

[42] *TCR Sports, supra* note 2.

VIII. EVIDENTIARY ISSUES

WealthTV is currently unaware of any evidentiary issues other than those previously identified regarding the use of confidential and highly confidential materials in the presentation of testimony and cross-examination.

IX. THE PUBLIC INTEREST SERVED BY THE REMEDY SOUGHT

The drafters of Section 616 identified two important interests served by prohibiting the discrimination practiced here by Defendants. In adopting the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Congress made detailed findings that concentration in the cable industry created undue market power for cable operators vis-a-vis independent programmers.[43] Congress therefore made it an explicit policy of the 1992 Cable Act to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers."[44] Section 616 addresses this market power question directly, providing independent programmers with new remedies to ensure a vibrant and competitive free market in video programming.[45] In particular, the drafters of the legislation worried that vertically integrated cable operators would use their power to squeeze out independent programmers, such as WealthTV. As recorded in the Senate Report: "You don't need a Ph.D. in Economics to figure out that the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the advantage of the program services in which he has an equity investment and/or in which he is selling advertising

[43] 1992 Cable Act §2(a)(2) & (a)(4)-(5).
[44] 1992 Cable Act §2(b)(5).
[45] Senate Report at 23-27.

availabilities, and to the disadvantage of those services, including local independent broadcasting stations, in which he does not have an equity position."[46]

The second critical purpose of the program carriage complaint process is to ensure that viewers have access to a diversity of programming. Again, Congress explicitly found in the 1992 Cable Act that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media,"[47] and that it is a primary purpose of the Cable Act to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media."[48] This need for diversity of views extends not only to traditional news programming, but to entertainment programming as well. "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."[49] As the Supreme Court has long recognized, the best way to achieve diversity of views is to ensure a robust "marketplace of ideas" in which different perspectives compete, and that ensuring diversity of ownership protects this robust marketplace of ideas by increasing the likelihood of "genuinely antagonistic" views.[50]

A judgment for WealthTV serves both the purpose of enhancing competition in the programming market and the purpose enhancing the diversity of genuinely antagonistic views available to the public. As the Supreme Court observed when opining on a related provision of the 1992 Act addressing the carriage of broadcast programming: "We have identified a

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[46] Senate Report, at 26.
[47] 1992 Cable Act § 2(a)(6)
[48] *Id*. at §2(b)(1).
[49] *Red Lion Broadcasting Co., Inc. v. FCC*, 390 U.S. 367, 390 (1969).
[50] *See FCC v.National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

corresponding 'governmental purpose of the highest order" in ensuring public access to "a multiplicity of information sources' And it is undisputed the Government has an interest in "eliminating restraints on fair competition."[51] As the means of serving these important ends, Congress has determined that the public should have the right to choose among the best programming available, which requires a market in which vertically integrated cable operators such as the Defendants cannot leverage their position in the marketplace to the detriment of independents such as WealthTV.[52] The system Congress designed to ensure that vertically integrated cable operators do not unfairly interfere with the ability of independent programmers to compete and reach willing viewers depends on vigorous enforcement. As the House Report observed, "vertically integrated operators have impeded the creation of new programming services by refusing or threatening to refuse carriage to such services that would compete with their existing programming services."[53] Because the drafters of Section 616 believed that "concerns raised regarding increased vertical and horizontal integration in the cable industry are serious and substantial" and that "it is critical for the FCC to consider whether, and to ensure that, the structure of the industry is suited to service in the public interest," Congress created this carriage complaint process to "prevent multichannel video programming distributors from discriminating against non-affiliated cable programming services" such as WealthTV.[54]

A judgment for WealthTV, and granting the relief sought, vindicates the statutory scheme Congress established to preserve both the competitive nature and diversity of the video programming market. True, WealthTV is only one small independent video programming vendor

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[51] *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180, 190 (1997) (citations omitted).
[52] *See* 47 U.S.C. §536(a)(3). *See also* 47 U.S.C. §533(f)(2)(A)-(B).
[53] House Report, at 41.
[54] *Id*. at 43.

marketing a single special interest entertainment channel. But, as Congress recognized in creating 47 U.S.C. §536, and the other provisions of the 1992 Cable Act that work in concert with this provision to achieve the same goals of diversity and competition,[55] only by ensuring that such small independent voices can exist and compete fairly can Congress protect the greater public interest in diversity of programming choices and robustly competitive programming market.

[55] *See generally Time Warner Entertainment Co, LP v. FCC*, 211 F.3d 1313 (2000) (importance of diversity and competition, appropriateness of addressing problem with more than one statutory provision, and reasonable inference that concentration could erect barriers to independent programmers).

Respectfully submitted,

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April 14, 2009

CERTIFICATE OF SERVICE

I, Kathleen Wallman, hereby certify that, on April 6, 2009 copies of the foregoing document were served via electronic mail on the following except as indicated:

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