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77. INHD and MOJO sought carriage on DirecTV and Dish Networks and was not successful. Tr. at 4349-50. MOJO sought carriage on AT&T U-Verse and was not successful. Tr. at 4350-51. INHD and MOJO were not carried by Verizon FiOS. Tr. at 4040.

5. Defendants Carried INHD, MOJO, and Many Other New Channels Despite the Bandwidth Constraints It Claims Justify Its Decision Not To Carry WealthTV

78. Adding bandwidth and making bandwidth more efficient is a competitive necessity for Defendants that enables them to compete effectively against other MVPDs such as the DBS providers. *See, e.g.*, Tr. at 4614 (discussing Comcast's efforts to increase bandwidth).

79. Comcast did not want to launch WealthTV in HD because of bandwidth concerns. Tr. at 4729. Despite bandwidth constraints, Comcast carried INHD, INHD2, and MOJO without regard to any of the evaluative criteria it applies to unaffiliated vendors. Comcast also has continued to add channels to its systems while operating under those bandwidth constraints and while taking steps to mitigate bandwidth constraints including migrating channels from analog to digital. Tr. at 4612-14. In 2009 alone to date, Comcast has added in excess of twenty channels to its systems. Tr. at 4612-13. During the period that Comcast was in discussions about possible carriage with WealthTV, it added well over 100 channels to its systems. Tr. at 4560. None of the new channels competed for the same audience that WealthTV has been targeting. Tr. at 4719.

80. Likewise, despite bandwidth constraints, Cox carried INHD, INHD2, and MOJO. Carriage of MOJO was an assumed fact because of the relationship between iN DEMAND and its owners, the Defendants. Tr. at 4916. Moreover, during the period 2004 to 2007, despite alleged bandwidth constraints, Cox continued launching many other HD channels, launching 20 to 25 in 2007 alone. Tr. at 4907-08.

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81. Ms. Witmer of TWC stated that TWC's implementation of Switched Digital Video eliminates any technical limitations to TWC's providing as many HD channels as DirecTV. Tr. at 4036.

6. Defendants Did Not Evenhandedly Apply Their Purported Carriage Criterion Concerning Whether a Proposed Programming Service was Associated with an Existing Brand.

82. Comcast viewed the fact that WealthTV was not associated with an existing, successful brand as a negative factor in evaluating whether to carry WealthTV. Comcast Ex. 3 at 4. But neither INHD nor MOJO had an established SD brand at the time Comcast granted them carriage. Tr. at 3983-84. Moreover, it is undisputed that the only brand MOJO was associated with was that of Defendants' own affiliate, iN DEMAND.

83. Likewise, TWC prioritized the launch of HD channels that had an established SD brand because it was under competitive pressure to add HD channels to its lineup and wanted to ensure that it would have capacity to carry popular programming when it became available in HD. Tr. at 3981-83. Thus, TWC viewed the fact that WealthTV was not associated with an existing, successful brand as a negative factor in consideration of carriage. *See* TWC Ex. 81 at 8-9. But neither INHD nor MOJO had an established SD brand at the time TWC granted them carriage. Tr. at 3983-84.

84. Cox also prioritized the launch of HD channels associated with well-known brands because of their SD feeds, but launched INHD, and later MOJO, even though it had no SD feed. Tr. at 4921-22.

D. Defendants Treated MOJO More Favorably than WealthTV with Respect to Terms of Carriage in Addition to Selection for Carriage

85. Defendants discriminated against WealthTV not only with respect to carriage, but also with respect to the proposed terms of carriage in the event that Defendants granted carriage to

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WealthTV. To the extent any of the Defendants have been at all willing to consider carriage of WealthTV, such carriage was only pursuant to the granting of a “hunting license” and not full linear carriage. At best, linear carriage was contemplated in only one the Defendant’s markets or part thereof. Comcast Ex. 3 at 5-7; Tr. at 4007-08; TWC Ex. 52. A hunting license refers to a master agreement that covers the terms and conditions of carriage executed between a video programming service and an MSO’s corporate programming department. The agreement enables the video programming service to seek carriage on the MSO’s systems individually. The actual decision about whether a programming service will be launched in a particular system or systems is deferred. TWC Ex. 86 at 5. In contrast, Defendants did not require INHD or MOJO to pursue a hunting license. Rather Defendants granted these affiliated video programming services full linear carriage. Tr. at 4000-01.

86. Further, to the extent that TWC was willing to consider any form of carriage of WealthTV, it insisted upon the right to drop carriage of WealthTV at any time without any continuing obligation to pay WealthTV. Tr. at 4008. By contrast, while Defendants had the right to drop carriage of MOJO on their systems, they had an obligation to continue to fund MOJO as if carriage had continued. Tr. at 4008. TWC thus afforded MOJO more favorable terms of carriage than it was discussing with WealthTV.

VI. WealthTV and MOJO Are Similarly Situated

87. WealthTV and MOJO are similarly situated because they targeted the same demographic, namely affluent men ages 25 to 49, through similar types of programming. WealthTV Ex. 152 at 9.

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A. WealthTV and MOJO Had the Same Target Audience

88. In each of its initial presentations to Defendants, WealthTV described its target demographic as men aged 25 to 49. WealthTV Ex. 152 at 9.

89. WealthTV's branding at industry trade shows tracked its branding aimed at 25 to 49 year old males. Each year, WealthTV's industry trade show presence, including at the National Cable and Telecommunications Association's "The Cable Show," prominently features HDTV screens, for which young men are the early adopters. For numerous years, WealthTV has featured bright red exotic sports cars in its booth. In addition, WealthTV has offered raffle prizes and giveaways, such as the use of a Rolls Royce with a driver for an evening, and hand-rolled cigars, designed to appeal to its target demographic. WealthTV Ex. 144 at 19-20.

90. WealthTV's understanding that it was reaching its targeted male demographic was reinforced by a tabulation of data collected through its website by Kersey Research Strategies. The tabulation indicated that 71% of the respondents were male. WealthTV shared this data with the firm seeking advertisers on WealthTV's behalf and posted it on the WealthTV website. WealthTV Ex. 144 at 16-17.

91. WealthTV's public branding was consistent with its targeted demographic of males aged 25 to 49. WealthTV Exs. 3, 33. WealthTV published advertisements in American Driver Magazine designed to appeal to its target demographic. WealthTV Exs. 34 & 35. WealthTV also included advertisements designed to appeal to its target demographic in materials produced by its distribution partners. WealthTV Exs. 3 & 40.

92. In subsequent presentations to each of Defendants, WealthTV further explained that its programming had "broad appeal" because it was also attractive to persons outside its target

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demographic. *See, e.g.*, TWC Ex. 22 at 2. That is “not atypical.” Tr. at 5225-26. Likewise, MOJO’s viewership was 30% female. WealthTV Ex. 12; Tr. at 4373.

93. MOJO targeted the same audience as WealthTV. In an advertising supplement to Television Week, MOJO supplied information stating that the average age of MOJO viewers is 39.3 years old and that 34% of MOJO viewers earn more than \$100,000 per year, among other attributes of a high-end viewer. WealthTV Ex. 133. This description of MOJO’s audience closely tracked with Charles Herring’s understanding of the composition of WealthTV’s audience. WealthTV Ex. 144 at 26.

94. MOJO sought advertising from the same types of advertisers from which WealthTV sought advertising. Both WealthTV and MOJO secured Bose as an advertiser. Both solicited Grey Goose as an advertiser. WealthTV was actively soliciting Lexus, Porsche, BMW, Morgan Stanley and Samsung Electronics as advertisers. WealthTV Ex. 144 at 26.

95. Mr. Bond, currently Chairman of the Board of iN DEMAND and a member of the board since the early 2000s, understood the demographic of MOJO, based on iN DEMAND’s presentations to the board, to be young men in their twenties and early thirties. Tr. at 4696-97.

96. WealthTV Exhibits 12 and 133 are promotional pieces issued by iN DEMAND about MOJO. In WealthTV Exhibit 12, 58% of MOJO viewers are said to have at least a college degree. In WealthTV Exhibit 133, 52% are said to have a college degree or higher.

97. iN DEMAND viewed the demographic of males 18 to 49 as underserved. Tr. at 4388-89.

98. INHD’s programming also had appeal to males 12 to 17. Cox Ex. 39. The audience of MOJO is skewed toward the younger end of the male 18 to 49 demographic. This does not necessarily mean men who are 18 or 19 years of age. It means men in their thirties. Tr. at 4377.

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99. Because MOJO was not rated by Nielsen or any other similar ratings agency, there are no objective measures to determine whether MOJO reached its target audience. Tr. at 4332 & 4382. WealthTV is also not Nielsen rated. Tr. at 4177-78. The testimony of WealthTV's designated expert in this area, Mark Kersey, was excluded over WealthTV's objection. Tr. at 3699-70.

B. Programming Similarities

100. MOJO offered program series that were similar to WealthTV's program series. MOJO's series highlighted on its daily program schedule and website 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. Five examples of similar programming series offered by WealthTV are Wealth on Wheels, World of Wealth, Sound Check, The Big Biz Show, and The Very Best of Everything with Marc Cummings. WealthTV Ex. 144 at 20-22 & 25.

101. The essential programming elements of MOJO's programming are directly similar to WealthTV to an extent far beyond the casual similarities that may occur in genre programming. WealthTV Ex. 152 at 6.

102. WealthTV offered original programming in a variety of categories designed to appeal to men who are 25 to 49 in categories including travel, adult beverages, cooking, gadgets and technologies, cars, boats, planes, motorcycles, cigars, finance, music, comedy and others. WealthTV Ex. 144 at 20.

103. MOJO also offered original programming in variety of categories designed to appeal to men age 25 to 49 in categories including travel, music, finance, food and drink among others. WealthTV Ex. 152 at 8-9.

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104. MOJO described its programming in its March 19, 2007 press release as “spanning adventure travel, comedy, finance, music, cuisine, and spirits and high tech toys.” WealthTV Ex. 94. These are the same kinds of programming WealthTV developed, and WealthTV has marketed this programming in the same way. WealthTV offers an extensive number of original series that cover these same programming categories. WealthTV Ex. 144 at 24.

C. Superior Attributes of WealthTV Over MOJO

105. In certain respects, WealthTV had advantages over MOJO. MOJO was offered to subscribers only as a HD service by Defendants and all other MVPDs that carried it. Tr. at 4332-33; Cox Ex. 84 at 19. In contrast, in addition to its HD service, WealthTV was also available as an SD down-converted feed. WealthTV Ex. 144 at 1-2.

106. MOJO’s programming was not as professionally executed as was WealthTV’s original programming. WealthTV’s originally produced programming was “more thoughtful, had better scripting” and frequently had better production values than MOJO’s originally produced programming. WealthTV Ex. 152 at 7.

VII. Defendants Did Not Extend Fair Consideration to WealthTV and Did Not Negotiate in Good Faith

107. In addition to affording preferential treatment to its affiliate, MOJO, each of the Defendants refused to negotiate with WealthTV in good faith for carriage on their respective systems.

A. TWC

108. WealthTV began meeting with representatives of TWC to discuss WealthTV’s desire for carriage on TWC’s systems in 2004 prior to the launch of WealthTV’s video programming service. WealthTV Ex. 144 at 29.

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109. Between 2004 and 2005, WealthTV visited every TWC system and had numerous discussions with TWC's corporate programming and marketing personnel. WealthTV Ex. 144 at 29.

110. During these meetings, WealthTV described to TWC corporate personnel, including Director of Programming Arthur M. "Mickey" Carter, the infrastructure WealthTV had built, its programming lineup, the fact that WealthTV was offering free carriage through the end of 2008, and WealthTV's target demographic, namely high income male viewers. WealthTV Ex. 144 at 31.

111. WealthTV's meetings with TWC systems from 2004 through 2007 resulted in expressions of interests from many of these systems, including locations in Texas, New York, North Carolina, South Carolina, Wisconsin, Ohio, and New England. Individuals from these systems indicated that they would contact TWC's corporate office to express interest in carrying WealthTV on their systems. WealthTV Ex. 144 at 30.

112. In addition to the interest expressed by individual TWC systems, WealthTV also received indications of interest in carrying WealthTV from corporate officers of TWC. WealthTV Ex. 144 at 31.

113. Despite the interest expressed in carrying WealthTV, indications from Mr. Carter that a deal would be completed by the end of the summer of 2006, and statements around the same timeframe by Executive Vice President of Programming Fred Dressler that he would "make space" for WealthTV, no deal for carriage of WealthTV materialized. WealthTV Ex. 144 at 31-32.

114. In December 2006, Scott Pleyte, Programming Marketing Manager for TWC-San Antonio ("TWC-SA"), sent an unsolicited email to WealthTV expressing interest in carrying

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WealthTV on the TWC-SA system after a colleague viewed the programming on another MVPD's system. WealthTV Ex. 144 at 32.

115. Despite TWC-SA's inability to carry WealthTV due to WealthTV's lack of a corporate affiliation agreement with TWC, WealthTV entered into an agreement with TWC-SA to provide TWC-SA with WealthTV's HD VOD service for free for six months. WealthTV Ex. 144 at 33-34.

116. Although WealthTV typically only offers its HD VOD service for free to MVPDs that carry its linear service, WealthTV decided to provide the HD VOD service to TWC-SA for free on the basis of its belief, supported by statements by Mr. Carter, WealthTV Ex. 144 at 31, and by Mr. Pleyte, WealthTV Ex. 86, that TWC's corporate officer personnel would work with WealthTV to sign an affiliation agreement in the near future. WealthTV Ex. 144 at 33.

117. After TWC-SA launched WealthTV's HD VOD service, Mr. Pleyte encouraged other TWC Texas systems to consider launching WealthTV's HD VOD service. WealthTV Ex. 81. In addition, other TWC systems outside of Texas expressed an interest in WealthTV's HD VOD service. WealthTV Ex. 144 at 35.

118. Prior to WealthTV's launch of a HD VOD marketing campaign targeted at other TWC systems, Eric Goldberg, Senior Programming Director for TWC, contacted WealthTV to inform it that WealthTV HD VOD launches would be limited to Texas systems. WealthTV Ex. 144 at 35.

119. After providing TWC, at the request of Mr. Goldberg, with an amended TWC-SA HD VOD agreement permitting other Texas systems to launch WealthTV's HD VOD service, Mr. Goldberg informed WealthTV that the launch of WealthTV's HD VOD service would be limited to TWC-SA only. WealthTV Ex. 144 at 35.

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120. Limiting the launch of WealthTV's HD VOD service to TWC-SA despite interest in other TWC systems in Texas and elsewhere denied WealthTV the opportunity to demonstrate the appeal of its content to other TWC systems. WealthTV Ex. 144 at 35.

121. Although WealthTV had an HD VOD agreement in place and worked to modify the agreement with Mr. Goldberg of TWC to include all of Texas, Mr. Goldberg did not allow the broader revision of WealthTV's HD VOD agreement because he recognized that WealthTV was a national service and he "realized I better pull back and try to negotiate a longer form [agreement]." *See* Tr. at 4196-97.

122. After the launch of WealthTV's HD VOD service in TWC-SA, WealthTV continued to reach out to TWC corporate personnel to express its interest in executing an affiliation agreement with TWC. WealthTV Ex. 144 at 36.

123. In April 2007, WealthTV learned that Mr. Carter, the corporate executive with whom it had been dealing, was no longer employed by TWC. WealthTV Ex. 144 at 36.

124. Despite attempts in April 2007 to obtain the names of additional TWC programming personnel from Mr. Goldberg after Mr. Carter's departure, Mr. Goldberg refused to assist WealthTV. WealthTV Ex. 144 at 36.

125. In addition, despite reaching out directly to Melinda Witmer, Executive Vice President and Chief Programming Officer at TWC, on several occasions in April 2007, Ms. Witmer never responded and WealthTV was unable to engage TWC in carriage negotiations. WealthTV Ex. 144 at 36. Ms. Witmer did not negotiate with WealthTV. Tr. at 3950. Ms. Witmer did not engage personally in any way with WealthTV. Tr. at 3970. No programming can get on TWC without Ms. Witmer's agreement, as she is the person who signs the programming contracts. Tr. 3958.

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126. On May 1, 2007, iN DEMAND launched MOJO on a 24/7 basis and TWC provided MOJO with linear carriage. WealthTV Ex. 144 at 36.
127. After notifying TWC-SA that it was terminating the HD VOD agreement at the end of the six-month term provided for in the agreement, WealthTV learned that TWC was launching MOJO's free HD VOD service, the MOJO Mix, nationwide. WealthTV Ex. 144 at 36-37.
128. TWC elected to launch the MOJO Mix nationwide and not WealthTV's HD VOD service despite the fact that WealthTV's service launched five months earlier and provided four times more content than the MOJO Mix. WealthTV Ex. 144 at 37.
129. Subsequent to submitting to TWC the pre-filing notice of its intent to file a carriage agreement complaint required by Commission regulations, 47 C.F.R. § 76.1302(b), WealthTV continued to pursue an affiliation agreement with TWC. WealthTV Ex. 144 at 37-39.
130. On August 7, 2007, WealthTV submitted a proposed term sheet to TWC and Mr. Goldberg responded on August 23, 2007, with nine comments, including (i) a request for unilateral drop rights, (ii) a statement that TWC would make no commitment for carriage of WealthTV on any system, and (iii) a statement that TWC needed the right to reposition WealthTV on any tier it chose. WealthTV Ex. 144 at 37-38.
131. Despite concerns about the lopsidedness of TWC's requested terms, concerns that WealthTV expressed to TWC, WealthTV, on September 5, 2007, agreed to all of TWC's terms. WealthTV's agreement to provide TWC with HD VOD service on a nationwide basis was contingent on the launch of WealthTV's linear service on at least one TWC system. This was a point which had not been in contention. WealthTV Ex. 144 at 39.

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132. Ms. Witmer's expectation as to what a reasonable offer to WealthTV would be is that WealthTV's HD VOD would be free only in connection with the distribution of the linear service of WealthTV. Tr. at 4012.

133. On October 19, 2007, Mr. Goldberg informed WealthTV that TWC would move forward with the term sheet. WealthTV Ex. 144 at 39.

134. Despite Mr. Goldberg's October 19th communication, TWC never provided WealthTV with a revised term sheet and Mr. Goldberg subsequently informed WealthTV that TWC would need to renegotiate the term sheet. WealthTV Ex. 144 at 39.

135. After Mr. Goldberg's communication regarding the need to renegotiate, WealthTV reasonably concluded that TWC did not have, and never had, an intention to negotiate with WealthTV in good faith. WealthTV Ex. 144 at 39.

136. TWC offered HD programming on an optional pay tier that consumers could choose to pay for if they wanted access to HD programming not already available to them in other formats. Tr. at 3947. TWC carried MOJO on this optional digital pay tier. Tr. at 3948.

137. Since MOJO ceased operations, TWC has added several new networks on the optional digital pay tier. Tr. at 3948-49.

B. Comcast

138. WealthTV began meeting with individual Comcast systems and with Comcast corporate personnel in March 2004 to discuss its desire for carriage on Comcast systems. WealthTV Ex. 144 at 41.

139. The Comcast corporate headquarters officials with whom WealthTV representatives met included Mr. Bond and Mr. Dannenbaum. Mr. Bond is the Executive Vice President of Content Acquisition for Comcast Cable and is responsible for signing contracts for carriage if Comcast

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decides to extent carriage to a programming service. Tr. at 4555. Mr. Dannenbaum was Senior Vice President of Content Acquisition. Tr. at 4751.

140. During meetings with Comcast corporate personnel, WealthTV described WealthTV’s target audience and strong appeal to high income viewers, its skew toward male audiences, and its appeal to advertisers, and provided Comcast corporate personnel with a sample reel of WealthTV programming. WealthTV Ex. 144 at 42.

1. WealthTV Received Multiple Expressions of Interest by Comcast Systems; There Is No Evidence of Such Support Regarding INHD or MOJO

141. WealthTV’s visits to Comcast systems resulted in expressions of support for carriage of WealthTV by several of those systems. WealthTV Ex. 144 at 42.

142. **BEGIN HIGHLY CONFIDENTIAL** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **END HIGHLY**

CONFIDENTIAL However, Mr. Bond did not express any interest in the offer. WealthTV Ex. 144 at 42.

143. Comcast offered no documentary or testimonial evidence of expressions of support from the field for its launch of INHD or MOJO.

2. Comcast Blocked WealthTV From Gaining Carriage on Adelphia

144. In 2005, WealthTV signed an agreement with OlympuSAT to replace an OlympuSAT channel, Chronicle, on OlympuSAT’s channel lineup carried on various MSOs, including systems then owned by Adelphia Communications Corp. (“Adelphia”). WealthTV Ex. 144 at 42.

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145. On July 6, 2005, during a meeting to discuss carriage of WealthTV, Mr. Herring informed Mr. Dannenbaum of WealthTV's agreement with OlympuSAT, which would result in WealthTV replacing Chronicle of Adelpia's systems. WealthTV Ex. 144 at 43.

146. At the time of Mr. Herring's meeting with Mr. Dannenbaum, the Commission had not yet approved and Comcast had not yet completed its acquisition of certain of Adelpia's systems. See Memorandum Opinion and Order, *In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses*, MB Docket No 05-192 (rel. July 21, 2006).

147. When Mr. Herring informed Mr. Dannenbaum of the OlympuSAT agreement, Mr. Dannenbaum stated that Comcast had instructed Adelpia not to make any channel lineup changes without Comcast's approval and that he would "put an end" to WealthTV's replacement of Chronicle on Adelpia systems. WealthTV Ex. 144 at 43.

148. Mr. Herring pleaded with Mr. Dannenbaum not to interfere with the OlympuSAT deal, but Mr. Dannenbaum would not provide him with any assurances. WealthTV Ex. 144 at 43.

149. On July 18, 2005, Judy Meyka, Senior Vice President of Programming for Adelpia, informed Mr. Herring that WealthTV would not be replacing Chronicle on Adelpia systems. WealthTV Ex. 144 at 43.

150. While Mr. Dannenbaum testified that he does not recall making a call to an Adelpia official instructing them not to allow WealthTV to replace Chronicle on Adelpia systems, he acknowledged being informed that Ms. Meyka was asked whether the call occurred and stated that she had stated that Mr. Dannenbaum did call her. See Tr. at 4779-80.

151. The Adelpia's decision not to carry WealthTV resulted in WealthTV exercising its option to cancel its deal with OlympuSAT if subscriber numbers dropped below a certain percentage. WealthTV Ex. 144 at 42-43.

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152. After WealthTV cancelled its agreement with OlympuSAT, OlympuSAT sued WealthTV claiming that Mr. Herring's discussion with Mr. Dannenbaum regarding the agreement resulted in OlympuSAT's loss of the carriage deal. WealthTV Ex. 144 at 43-44.

153. During a meeting with Mr. Herring in August 2006, Mr. Dannenbaum provided Mr. Herring with insight into Comcast's lack of interest in carrying WealthTV when he informed Mr. Herring that Comcast didn't want to make another MTV on its back without owning the network. WealthTV Ex. 144 at 44.

154. It was clear to Mr. Herring that Mr. Dannenbaum was conveying the message that Comcast would not have any interest in launching WealthTV, unless it had a direct ownership interest in the network. WealthTV Ex. 144 at 44.

3. Comcast Did Not Negotiate in Good Faith with WealthTV

155. Although WealthTV and Comcast were engaged in carriage discussions going back to 2004 and WealthTV had presented several written carriage proposals, Comcast never made a formal, written proposal for carriage of WealthTV. Tr. at 4644-45 & 4661. Prior to April 2008, Comcast had never made a definitive offer to WealthTV about terms of carriage. Tr. at 4644.

156. Mr. Dannenbaum led WealthTV to believe that an affiliation agreement with Comcast was achievable and that making time to get the draft agreement to WealthTV was the main obstacle. In 2005, Comcast discussed the possibility of providing WealthTV with a hunting license type affiliate agreement. Tr. at 4765. Providing such an agreement was a low priority for Comcast and other things took precedence over it. WealthTV never received an affiliation agreement from Comcast. Tr. at 4765. On November 16, 2005, Mr. Dannenbaum responded to an email from a WealthTV representative requesting that Mr. Dannenbaum send an affiliation agreement that had been previously discussed by saying that he would send the agreement if

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possible. Tr. at 4767; WealthTV Ex. 230 at 1. Mr. Dannenbaum subsequently indicated that he was too busy to send the agreement and was not sure when he could make it happen. Tr. at 4768; WealthTV Ex. 230 at 1.

157. WealthTV continued to contact Comcast to seek carriage from at least 2006 through April 2008. Tr. at 4706-07.

158. In April 2008, after Mr. Herring informed him that WealthTV intended to file a program carriage discrimination complaint against Comcast with the Commission, Mr. Bond proposed to Mr. Herring that Comcast carry WealthTV in a large designated market area (“DMA”), namely Chicago, for one year and then evaluate WealthTV’s performance at the end of that year. WealthTV Ex. 144 at 45. Mr. Bond had in mind no formalized process of review at the end of the one-year period. Tr. at 4658-59.

159. Mr. Bond understood that the statute of limitations for WealthTV’s filing of its complaint would shortly expire and offered to agree to toll the statute of limitations, though he did not seek approval for doing so. Tr. at 4559 & 4737. Even during this timeframe, Comcast still never sent any written proposal to WealthTV, though WealthTV sent another written proposal to Comcast on April 14, 2008. Tr. at 4648 & 4701.

160. In the context of the discussions in April 2008, it became clear that Mr. Bond’s interest in WealthTV’s carriage extended only to acquiring carriage of WealthTV’s HD VOD programming for free and providing WealthTV with a hunting license for its linear service with a commitment to carry the programming in one major metro area that Mr. Bond felt would best suit WealthTV’s target demographic. Tr. at 4558. Mr. Bond proposed Chicago and declined to consider carrying WealthTV on Comcast’s systems in the San Francisco Bay Area or Houston. Comcast Ex. 3 at 6. Moreover, Comcast never committed to launching WealthTV’s linear HD

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service in any market. Tr. at 4651. The proposed distribution contemplated launch to digital subscribers, and did not require launch to any HD subscribers. Tr. at 4651, 4655-56, & 4659.

161. In April 2008, Comcast had bandwidth available in Chicago because of the digital transition occurring there which had just begun. Tr. at 4558-59.

162. Upon discussing the carriage proposal with Mr. Bond further on April 18, 2008, Mr. Herring came to understand that Mr. Bond did not intend for Comcast to carry WealthTV across the entire Chicago DMA with its 2.2 million subscribers, but only across a subset of the Chicago DMA with less than 40,000 subscribers. WealthTV Ex. 144 at 45.

163. Although Mr. Bond testified in his written direct testimony that at no time during his discussions did he state that Comcast would agree to distribute WealthTV to only 40,000 Comcast subscribers, during Mr. Bond's testimony at trial, he acknowledged that the initial launch of WealthTV would be only in that part of Chicago where Comcast had completed its digital conversion. The lower bound of the number of D1 subscribers to whom WealthTV would be available initially was 40,000. Comcast Ex. 3 at 7; Tr. at 4655-56.

164. After Mr. Herring's April 18, 2008 discussion with Mr. Bond, WealthTV reasonably concluded that Mr. Bond was engaging in delay tactics and that Comcast had no intention of negotiating with WealthTV in good faith. WealthTV Ex. 144 at 45.

C. Cox

165. Cox is the third largest cable MSO in the United States. Cox Ex. 79 at 3. It has 26 systems and 5.4 million video subscribers. Cox has approximately **BEGIN HIGHLY**

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1. WealthTV Visited With Cox Field Offices and Learned of Substantial Expressions of Interest in Launching WealthTV; These Expressions of Support were Rebuffed by Cox's Corporate Headquarters

166. WealthTV began meeting with Cox systems in 2004, prior to the launch of WealthTV, and for several years thereafter, seeking carriage of WealthTV on Cox systems. WealthTV Ex. 144 at 45.

167. During these meetings several Cox systems, including New Orleans, Florida, Phoenix, North Carolina, and Wichita, expressed interest in carrying WealthTV on their systems once WealthTV executed an affiliation agreement with Cox's corporate office. WealthTV Ex. 144 at 45.

168. Many of the Cox personnel WealthTV met with at the individual Cox systems indicated that WealthTV was free to use their names as references when discussing possible carriage with Cox's corporate office and, in the case of Wichita, programming personnel from that system contacted Cox's corporate office directly to express interest in carrying WealthTV. WealthTV Ex. 144 at 46-47.

169. In May 2005, Mr. Herring revisited the Cox Wichita system to confirm its continued interest in carrying WealthTV to ensure its support continued prior to meeting with Cox corporate personnel. WealthTV Ex. 144 at 47.

170. In 2004, Tony Matthews, Vice President of Marketing for the Cox system in Wichita, discussed WealthTV with the General Manager of the Cox system in Wichita, Kimberly Edmunds. Tr. at 5082.

171. Mr. Matthews called Andy Albert, Vice President of Programming, located at Cox's corporate headquarters in Atlanta to express interest in WealthTV. Tr. at 4895. Mr. Albert is a key person in the corporate programming department. Tr. at 5300. Mr. Albert is one of three

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people who report to Mr. Wilson. Mr. Albert's responsibilities include negotiating affiliation agreements for Mr. Wilson. Tr. at 4894-96.

172. Ms. Edmunds formed the impression that Mr. Matthews contacted Cox's corporate programming department regarding WealthTV. Tr. at 5084.

173. Mr. Wilson did not confirm that Mr. Matthews contacted Mr. Albert until after the institution of the instant case. Tr. at 4965 & 4967.

174. Cox's culture has always embraced the idea of localism, and local decision-making. Tr. at 5089. Cox's marketing and programming departments have collaborated with field systems in evaluating video programming services and making programming decisions. Tr. at 5090. These are existing policies understood by Ms. Edmunds. Tr. at 5117.

175. In June 2005, Mr. Herring met with Mr. Wilson and Patrick Esser, President of Cox, to discuss carriage of WealthTV on Cox's systems. WealthTV Ex. 144 at 47.

176. During Mr. Herring's meeting with Mr. Wilson and Mr. Esser, Mr. Wilson denied being contacted by Cox's Wichita's system, despite Mr. Herring's recent confirmation of that contact in Wichita, and challenged Mr. Herring's assertions of the interest of various Cox systems. WealthTV Ex. 144 at 47.

177. Despite the support expressed by several Cox systems, Cox's corporate office refused to engage in meaningful carriage discussions with WealthTV. WealthTV Ex. 144 at 46-47.

2. Cox Blocked WealthTV from Carriage on Its Las Vegas System By Preventing WealthTV from Consummating a Deal for the Multicast of Its Programming Via KLAS, a CBS Affiliate in Las Vegas

178. In 2004, a representative of WealthTV visited with Leo Brennan, who was at that time General Manager of Cox's system in Orange County, California, to inform him about the network and explore his interest in carrying it. Tr. at 5290; Cox Ex. 81 at 1.

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179. In 2006, WealthTV sought to enter into an agreement with KLAS, a broadcast station and a CBS affiliate in Las Vegas, Nevada, which Cox carried in its Las Vegas system pursuant to a retransmission consent agreement. WealthTV Ex. 144 at 47-48.

180. KLAS' retransmission consent agreement with Cox provided that Cox would retransmit the main KLAS signal plus certain additional multicast signals in the Las Vegas area. WealthTV Ex. 144 at 48.

181. WealthTV's intended agreement with KLAS provided for the retransmission of WealthTV's signal as a "multicast feed" under the KLAS-Cox retransmission consent agreement. WealthTV Ex. 144 at 48.

182. When Emily Neilson, General Manager of KLAS, called Mr. Brennan to confirm that Cox would retransmit WealthTV's signal under the retransmission consent agreement, Mr. Brennan, who had since become a Senior Vice President and General Manager of Cox's Las Vegas system,³ informed her that the retransmission consent agreement prohibited KLAS from carrying WealthTV on its multicast feed and that he would not permit such carriage. WealthTV Ex. 144 at 48; Tr. at 5297.

183. Mr. Brennan signed the retransmission consent agreement with KLAS that was in force at that time and had the authority to modify it to accommodate retransmission of WealthTV's signal, Tr. at 5302, but he declined to do so despite acknowledging that he believed Cox's Las Vegas subscribers would enjoy WealthTV programming. WealthTV Ex. 144 at 48.

184. One of the two multicast channels available to KLAS was used to re-broadcast KLAS on an additional channel and the other channel went unused during Mr. Brennan's tenure in Las Vegas. Tr. at 5314-15.

³ Mr. Brennan is now the Chief Operating Officer of Cox. Brennan Direct Test. at ¶ 1.

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185. Mr. Brennan testified that he never spoke with Charles Herring. However, Mr. Herring spoke with Mr. Brennan via telephone on or about May 15, 2006 and subsequently thanked Mr. Brennan for his time in an email sent to an email address assigned to Mr. Brennan's home email account. Tr. at 5315; WealthTV Ex. 144 at 48; WealthTV Ex. 111.

186. Based on WealthTV's dealings with Cox's corporate personnel regarding expressions of support from the field and on its dealings with Mr. Brennan, WealthTV concluded that Cox was not willing to have meaningful carriage discussions with WealthTV. WealthTV Ex. 144 at 46-48.

3. Cox's Corporate Programming Department Did Not Negotiate in Good Faith with WealthTV for Carriage and Afforded Cox's Affiliates, INHD and MOJO, Superior Treatment

187. If a video programming service wants to be carried on Cox, it must execute an affiliation agreement with Cox's corporate programming department, and Mr. Wilson, Senior Vice President of Programming for Cox, ultimately has the final say on all such deals. Tr. at 4914; Cox Ex. 79 at 2.

188. Mr. Wilson decided not to carry WealthTV in the very first meeting he had with WealthTV in 2004. Tr. at 4901-02. Nevertheless, Mr. Wilson attended subsequent meetings with WealthTV despite his decision, Tr. at 4902, because, through 2008, he kept an open mind with respect to Cox's possible carriage of WealthTV. Tr. at 4919-20. WealthTV continued contacting Cox for four years after its first meeting. These contacts included a February 2007 email message from Charles Herring to Mr. Wilson to pass on a favorable comment concerning a WealthTV show from a viewer on the Verizon FiOS system. WealthTV Ex. 245.

189. Mr. Wilson had a practice of inviting video programming services he had declined to carry to keep Cox updated about changes that may affect the service's carriage proposal, such as

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a change in the programmer's business model or the execution of an affiliation agreement with another MVPD. Tr. at 4903. Mr. Wilson's continued meetings with WealthTV were consistent with this practice.

190. Field support for the launch of a channel can be important to Cox if there is a groundswell of support among Cox's systems. There was no groundswell of support for INHD before its launch. With respect to MOJO, since the systems were already carrying INHD, there was nothing about which to have a groundswell. Tr. at 4924.

191. For Cox, the overriding consideration of possible carriage of WealthTV was the programming content and attractiveness to consumers. Tr. at 4933.

192. To evaluate WealthTV's programming, Mr. Wilson reviewed a DVD provided by WealthTV. He returned the DVD with a note commenting favorably upon the show Distant Shores included in the DVD. Tr. at 4933-34 & 4936; WealthTV Ex. 247.

193. Cox used the criteria of "significant demand" and "grand appeal" to determine whether WealthTV deserved carriage. Tr. at 5059 & 5060.

194. Cox negotiates and executes all of its affiliation agreements in Atlanta. Cox tries to leverage its buying volumes optimally by entering into agreements that cover its entire base of subscribers in order to get the most favorable terms and conditions. Tr. at 4862.

195. Cox prefers not to do hunting license deals because they lack the potential to produce the most favorable terms and conditions. This has been Cox's informal policy for quite some time and a more formal policy for the last two years. Tr. at 4864-65.

196. Cox's strategy with respect to HD programming treated as important from a competitive standpoint the need to launch HD feeds corresponding to existing services already carried by Cox. Tr. at 4869-70.

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197. Cox evaluated whether to carry INHD and INHD2 on its systems based on the ability of iN DEMAND's management to provide Cox with reasonable content that would be comparable to HDNet and the ability of Cox's local systems to pre-empt the programming to insert content as needed. Tr. at 4881-82. HDNet was an independent service that offered two feeds that were carried by Cox's competition. One of the reasons that Cox declined to carry HDNet was that it was based on the HD format rather than the quality of the content. Tr. at 4871-72.

198. Mr. Wilson did not believe in carrying an HD video programming service whose draw was the format of HD rather than themed content. Tr. at 4871. Cox was more interested in a themed content channel than a generic HD channel that was more about the format than the content. Tr. at 4926.

199. Despite Mr. Wilson's claimed disinterest in a channel with this type of focus, Cox evaluated the potential audience appeal of INHD and INHD2 by looking at whether the channels met the primary objective of providing content that was formatted in HD. INHD and INHD2 met this criterion by the mere fact of providing content in HD format. Tr. at 4883

200. Mr. Wilson believed that WealthTV was an HD-only channel. Tr. at 4901. This belief was mistaken because WealthTV is also available in a down-converted SD feed. WealthTV Ex. 144 at 1-2.

201. Cox has deals with many networks with which it does not have drop rights. Tr. at 4939.

D. BHN

202. WealthTV began meeting with representatives of BHN to discuss WealthTV's desire for carriage on BHN's systems in 2004, prior to WealthTV's launch. WealthTV Ex. 144 at 39.

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203. During meetings with BHN systems, several systems expressed interest in carrying WealthTV, including BHN's systems in Orlando, Tampa, and Bakersfield. WealthTV Ex. 144 at 39-40.

204. Despite their interest in carrying WealthTV, BHN personnel at various systems informed WealthTV that they would be unable to carry the network until WealthTV signed an affiliation agreement with TWC's corporate office. WealthTV Ex. 144 at 39-40.

205. In July 2006, Anne Stith, formerly Director of Product Marketing for BHN's Tampa system,⁴ stated that although she was interested in launching WealthTV in Tampa to ensure BHN remained competitive with Verizon FiOS, she could not do anything until WealthTV signed a corporate affiliation agreement with TWC. WealthTV Ex. 144 at 40.

206. Ms. Stith does not recall any networks with which BHN entered into an affiliation agreement independent of TWC between 2004 and 2007, while Ms. Stith was employed by BHN. Tr. at 4442-43.

207. In February 2007, at the suggestion of BHN field personnel, WealthTV contacted Steven Miron, then President of BHN,⁵ to request a meeting with Mr. Miron to discuss WealthTV's interest in negotiating an affiliation agreement with BHN. WealthTV Ex. 144 at 41.

208. Mr. Herring had his assistant email Mr. Miron to set up a meeting, but Mr. Miron suggested that WealthTV speak to him by phone prior to setting up a meeting. WealthTV Ex. 144 at 41.

⁴ Ms. Stith is now Director of Product Management at Comcast's Houston system. Tr. at 4415-16.

⁵ Mr. Miron is now the Chief Executive Officer of BHN. Tr. at 4481.

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209. At Mr. Miron's suggestion, a WealthTV representative contacted Mr. Miron by telephone to discuss WealthTV's interest in an affiliation agreement with BHN. WealthTV Ex. 144 at 41.

210. During his telephone conversation with the WealthTV representative, Mr. Miron stated that, because BHN was covered by TWC national affiliation agreements, it would not be an efficient use of WealthTV's time to continue to pursue carriage directly with BHN. BHN Ex. 9 at ¶¶ 4-5; Tr. at 4507-08.

211. Despite his asserted authority to do so, Mr. Miron refused to consider carrying WealthTV until it had entered into an affiliation agreement with TWC. WealthTV Ex. 144 at 41.

212. Based on its discussions with Mr. Miron, Ms. Stith, and other BHN personnel WealthTV reasonably concluded that BHN was not willing to have any meaningful carriage discussions with WealthTV until such time as WealthTV entered into an affiliation agreement with TWC. WealthTV Ex. 144 at 41.

213. Mr. Miron did very little to evaluate whether WealthTV was a suitable offering to BHN. Tr. at 4526.

214. The primary basis upon which Mr. Miron evaluated WealthTV was a survey of the interest of certain BHN subscribers in various HD networks. Tr. at 4526; BHN Ex. 3.

215. The survey conducted at the request of BHN was a survey of BHN subscribers who currently had HD set top boxes in their homes. Tr. at 4435.

216. BHN conducted the survey for the purpose of gauging BHN subscriber interest in the specific HD channels included in the survey, including WealthTV. Tr. at 4498-99.

217. Many of the other networks included in the survey against which WealthTV was compared were carried on BHN systems in SD format at the time the survey was conducted and were, therefore, readily available to BHN subscribers, while WealthTV was not. Tr. at 4457-58.