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VIII. Defendants Unreasonably Restrained the Ability of WealthTV To Compete Fairly

218. National cable networks receive revenue by two primary sources: affiliate fees and advertising revenue. Both affiliate fees and advertising revenue are directly related to the number of subscribers a national cable network achieves. WealthTV Ex. 144 at 49; WealthTV Ex. 146 at 2-3; Tr. 2723-24.

219. TWC has approximately 14 million subscribers, Comcast has more than 24 million, Cox has 5.2 million, and BHN has 2.3 million. TWC Ex. 84 at 1; Comcast Ex. 3 at 1; Cox Ex. 79 at 3; BHN Ex. 8 at 16. Defendants' unlawful denial of access to these subscribers unfairly restrains WealthTV's ability to compete fairly. Wealth TV Ex. 144 at 49-50.

220. Defendants' refusal to carry WealthTV has undermined WealthTV's affiliate sales efforts by giving rise to potential distribution partners' questions about the long term viability of WealthTV. This in turn has hobbled WealthTV's ability to achieve fair market value for its programming service through rates and terms appropriately reflecting such fair market value. WealthTV Ex. 144 at 51.

IX. Remedy for Defendants' Discrimination Against WealthTV

221. The Defendants and iN DEMAND did not enter into any formal agreement for carriage of MOJO. *See supra* ¶ 37. WealthTV Exhibit 23 is WealthTV's proposed affiliate agreement and is based on an iN DEMAND affiliate agreement.

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **END HIGHLY CONFIDENTIAL**

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223. The fair market value for WealthTV's services, as established by its largest distribution partner (measured by number of subscribers receiving WealthTV's high definition feed), Verizon FiOS TV, is 15.4 cents for 2009. WealthTV Ex. 144 at 53-54.

224. In connection with the framing of a proper remedy, it is also relevant that Mr. Bond was willing in April 2008 to pay approximately \$.08 per subscriber per month for WealthTV's SD feed. Hearing Tr. at 4650. Mr. Bond does not recall requesting an MFN clause from WealthTV nor drop rights. Hearing Tr. at 4660-61. Further, Comcast carried MOJO on almost all of its systems and distributed it to all of its HD customers. Hearing Tr. at 4661-62 & 4673-74. Comcast originally paid for MOJO on the basis of all digital subscribers; that rate structure was changed in December 2007. Hearing Tr. at 4668-69.

COMPLAINANT'S PROPOSED CONCLUSIONS OF LAW

I. Defendants Violated § 616 of the Cable Act by Discriminating On the Basis of Affiliation

A. Applicable Legal Standards

225. In § 616 of the Cable Act, 47 U.S.C. § 536 (1992), Congress directed the Commission to adopt rules to prohibit "discriminat[ion] . . . on the basis of affiliation or nonaffiliation." 47 U.S.C. § 536(a)(3). In doing so, Congress recognized that when a cable operator elects to own its own programming assets (as the Defendants do), that vertical integration "gives cable operators the incentive and ability to favor their affiliated programming services" by, among other things, unreasonably "refus[ing] to carry other programmers." S. Rep. No. 102-92, at 25 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158.

226. The Commission, acting pursuant to Congress's mandate, promulgated the regulation at issue here. That regulation provides that "[n]o multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated

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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.” 47 C.F.R.

§ 76.1301(c).

227. Under this regulation, proof of discrimination is properly judged according to a burden-shifting framework. First, WealthTV must establish a *prima facie* case of discrimination.⁶ Once WealthTV establishes that *prima facie* case of discrimination, the Defendants must justify their differential treatment by establishing a legitimate, non-discriminatory reason for it. In addition, WealthTV must show that Defendants’ discrimination restrained its ability to “compete fairly.” 47 C.F.R. § 76.1301(c).

228. This analytical framework is well-grounded in Commission precedent and policy. *First*, the Media Bureau has correctly concluded that this burden-shifting framework governs complaints brought under the anti-discrimination provisions of the Cable Act and the Commission’s program carriage regulations. Order on Review, *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, DA 08-2441 (MB rel. Oct. 30, 2008).

229. *Second*, the Commission has used that framework in the analogous context of program access disputes, in which a vertically integrated programmer is accused of discriminatorily denying programming to an unaffiliated MVPD. Once a plaintiff establishes a *prima facie* case of discrimination, the defendant must justify its conduct – for example, a refusal to sell

⁶ Cf. Memorandum Opinion and Hearing Designation Order, *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, 21 FCC Rcd 8989, ¶ 8 (2006); Second Report and Order, *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, ¶ 29 (1993).

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programming – for legitimate business reasons; otherwise, the plaintiff prevails.⁷ Once the plaintiff has established a *prima facie* case of discrimination, if a defendant cannot explain the difference in treatment, that is sufficient proof that prohibited discrimination has occurred.⁸

230. *Third*, the Commission has long used this burden-shifting framework in other contexts of economic discrimination (*e.g.*, under 47 U.S.C. § 202(a)), strengthening the conclusion that the framework is appropriately applied here to judge WealthTV’s claim of economic discrimination. *See* Report and Order, *Implementation of the Telecommunications Act of 1996*, 12 FCC Rcd 22497, ¶ 291 n.782 (1997).

231. *Fourth*, this analytical framework is supported by compelling policy justifications. As discussed above, Congress recognized that vertically integrated operators have an economic motive to discriminate against unaffiliated programming vendors. Yet, at the same time, those same vertically integrated operators will have much more ready access to information about their own decision-making than will unaffiliated vendors. This “information asymmetry” makes it appropriate to “shift the burden” to the Defendants after a *prima facie* showing of discrimination has been made. *Cf. National Communications Ass’n, Inc. v. AT&T Corp.*, 238 F.3d 124, 130-31 (2d Cir. 2001) (stating that the “burden is better placed on the party with easier access to relevant information,” such that it is preferable that a party engaging in disparate treatment “prove the reasonableness” of disparate treatment).

⁷ *See* Memorandum Opinion and Order, *Turner Vision, Inc. v. Cable News Network, Inc.*, 13 FCC Rcd 12610, ¶¶ 14, 15 (CSB 1998); Memorandum Opinion and Order, *CellularVision of New York, L.P. v. SportsChannel Assocs.*, 10 FCC Rcd 9273, ¶ 23 (CSB 1995).

⁸ *See* First Report and Order, *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*, 8 FCC Rcd 3359, ¶¶ 14, 95, 116 (1993).

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B. The Anti-Discrimination Provisions of § 616 Apply To Defendants

232. It is undisputed that each of the Defendants is a “multichannel video programming distributor” for purposes of the Cable Act and applicable Commission regulations. 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

233. It is undisputed that WealthTV is an “unaffiliated video programming vendor” for purposes of the Cable Act and applicable Commission regulations. 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

234. Accordingly, each of the Defendants is prohibited under the Cable Act and the Commission’s regulations from discriminating against WealthTV in the selection, terms, or conditions for carriage of video programming provided by WealthTV, on the basis of WealthTV’s non-affiliation, in a manner that has the effect of unreasonably restraining WealthTV’s ability to compete fairly.

C. WealthTV Established a *Prima Facie* Case of Discrimination

1. The Media Bureau’s *Hearing Designation Order*⁹ Satisfies WealthTV’s Burden To Make a *Prima Facie* Showing of Discrimination

235. The Media Bureau concluded in its *Hearing Designation Order* that WealthTV established a *prima facie* showing that each Defendant had discriminated against WealthTV in violation of the program carriage rules. *HDO* ¶¶ 24, 35, 46, 57. The legal effect of the *HDO* was to establish WealthTV’s *prima facie* case and shift the burden to Defendants to refute that *prima facie* case by adducing evidence of legitimate, non-discriminatory motives at the hearing just concluded.

⁹ Memorandum Opinion and Hearing Designation Order, *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, 23 FCC Rcd 14787, MB Docket No. 08-214, DA 08-2269 (rel. Oct. 10, 2008) (“*Hearing Designation Order*” or “*HDO*”).

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2. The Evidence Adduced at the Hearing Establishes a *Prima Facie* Showing of Discrimination

236. In all events, the evidence at the hearing established a *prima facie* showing of discrimination on the basis of affiliation, in violation of § 616 of the Cable Act and the Commission's program carriage regulations.

237. A *prima facie* showing of discrimination can be supported by either direct or indirect evidence, or a combination of both. Direct evidence of discrimination includes statements of the decision-makers that reflect impermissible considerations. It can also include evidence that the Defendant had policies that are discriminatory on their face. *See, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (discrimination was proven by reference to policy that was discriminatory on its face); *Ramsey v. City & County of Denver*, 907 F.2d 1004, 1007-08 (10th Cir. 1990) (proof of "an existing policy which itself constitutes discrimination" would constitute direct evidence).

238. Discrimination can also be proven by indirect, or circumstantial, evidence. For example, evidence that candidates that were similarly situated to the Plaintiff apart from the forbidden characteristic received better treatment supports an inference that the disparate treatment was based on those forbidden considerations. *See, e.g., American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 728 (7th Cir. 1986).

239. Direct evidence and circumstantial evidence can be used in conjunction to support a claim of discrimination. *See, e.g., Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994). Here, the record contains ample evidence, both direct and indirect, that the Defendants discriminated against WealthTV, and in favor of MOJO, on the basis of affiliation.

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3. WealthTV Submitted Substantial Evidence of Defendants' Discriminatory Double Standard For Carriage of Programming of Their Affiliates INHD and MOJO As Opposed to an Unaffiliated Vendor, WealthTV

240. WealthTV submitted substantial and unrefuted evidence of Defendants' preferential treatment of affiliated networks such as INHD and MOJO, as compared to unaffiliated networks like WealthTV. That evidence establishes WealthTV's *prima facie* case of discrimination under § 616 of the Cable Act and the Commission's program carriage regulations.

241. WealthTV submitted substantial evidence that although Defendants purport to have uniform criteria or considerations that they weigh in carriage decisions, in fact, they applied these criteria differently or not at all in deciding whether to provide carriage to affiliate programming from iN DEMAND as opposed to non-affiliated programming vendors, specifically, WealthTV, and on what terms. In this case, the affiliated and unaffiliated programming vendors effectively were put on two "tracks." Affiliated vendors INHD and MOJO effectively received automatic carriage, without so much as a formal agreement. Unaffiliated vendors, such as WealthTV, were forced to go through an arduous carriage application process and were required to meet numerous criteria that Defendants never applied to their affiliated programming vendors. The reason for the disparity was simple: because the Defendants owned iN DEMAND, they viewed INHD and MOJO as their own network, Tr. at 4000-01 (PFoF ¶ 48), and they gave it preferential treatment over unaffiliated networks.

242. WealthTV submitted unrefuted evidence that TWC gave preferential treatment to its affiliate, MOJO, in violation of the Cable Act and the Commission's program carriage regulations. Melinda Witmer, Executive Vice President and Chief Programming Officer of TWC, and a current Board Member of iN DEMAND, Tr. at 3970-71, 4875 (PFoF ¶ 17), testified at the hearing that TWC "[did not] think of" INHD and MOJO as "in terms of offering carriage."

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Tr. at 4001 (PFoF ¶ 48). Rather, carriage of INHD and MOJO was considered automatic because of the relationship between iN DEMAND and its owners, the Defendants. *Id.* In contrast, TWC evaluated whether to carry programming from unaffiliated vendors. *See supra* ¶ 46. TWC refused to enter into a carriage agreement with WealthTV for linear service on TWC's systems, apparently based on these considerations, but by Ms. Witmer's own admission, it never applied these factors in evaluating whether to carry INHD or MOJO. Tr. at 4001 (PFoF ¶¶ 48).

243. Likewise, WealthTV submitted unrefuted evidence that Cox gave preferential treatment to its affiliate, MOJO, in violation of the Cable Act and the Commission's program carriage regulations. Cox's principal witness, Mr. Wilson, testified that carriage of MOJO was not the culmination of an evaluation of any enumerated criteria that it applied evenhandedly to affiliated and unaffiliated networks alike. Rather, carriage of MOJO was an assumed fact because of the relationship between iN DEMAND and its owners, the Defendants. Tr. at 4916 (PFoF ¶ 50). In fact, Mr. Wilson testified that the Board's approval of iN DEMAND's budget, which included funds for INHD and MOJO, carried with it the assumption that all of the iN DEMAND partners would carry INHD and MOJO. Tr. at 4916 (PFoF ¶ 51). By contrast, Cox rejected WealthTV's proposals for carriage and never engaged in meaningful negotiations with WealthTV to bargain for improvements in the terms of the proposal that it found unattractive. Tr. at 4918-19 (PFoF ¶ 70),

244. Similarly, WealthTV submitted unrefuted evidence that Comcast subjected unaffiliated networks such as WealthTV to completely different standards in evaluating whether or not to carry its programming. For example, Mr. Bond stated that one of the prerequisites that it requires is that a programmer have prior programming experience. Tr. at 4573 (PFoF ¶ 58). Mr.

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Bond believed that WealthTV fell short of that standard, and viewed that as a “negative consideration.” *Id.* Comcast did not, however, impose any such prerequisite on INHD or MOJO. At the hearing, Mr. Bond conceded that he knew that David Asch and Robert Jacobson, who were the senior executives at iN DEMAND in charge of INHD, INHD2, and MOJO, had never previously been responsible for programming a linear programming cable network. Tr. at 4576-77 (PFoF ¶ 25). Yet that didn’t deter Mr. Bond from including INHD and MOJO in the Comcast lineup. *Id.* at 4577 (PFoF ¶ 57). Mr. Bond also stated that he was concerned about carrying WealthTV because its proposed pricing structure made it unattractive. Comcast Ex. 3 at 4 (PFoF ¶ 67). Mr. Bond also testified, however, that Comcast agreed to carry MOJO even though the price that it had to pay iN DEMAND was “about the same” as the fee WealthTV was seeking. Tr. at 4617 (PFoF ¶ 67).

245. WealthTV submitted additional direct evidence of Comcast’s discriminatory conduct. Alan Dannenbaum, then Comcast’s Senior Vice President for Content Acquisition, and now Executive Vice President for Distribution at Comcast, stated that Comcast had no interest in launching WealthTV, unless it had a direct ownership interest in the network. WealthTV Ex. 144 at 44 (PFoF ¶¶ 153-54).

246. WealthTV submitted additional evidence of Defendants’ preferential treatment of its affiliates. Robert Wilson Senior Vice President of Programming of Cox, and an iN DEMAND board member since 1996 or 1997, testified that Cox considers, as a criterion for deciding whether to grant carriage to a programming service, whether the service is carried by competitors, including, in particular DBS providers such as DISH Network and DIRECTV. Cox Ex. 79 at 51 (PFoF ¶ 74). However, those standards were not applied to MOJO, which was not carried by DIRECTV or the DISH Network. Nonetheless, because MOJO was an affiliate, Cox

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carried it, notwithstanding criteria that it otherwise applied to unaffiliated networks. Tr. at 4938 (PFoF ¶ 74). By contrast, WealthTV was carried by several of Cox's main competitors, including Verizon FiOS, AT&T U-Verse, and Qwest. Cox Exs. 71, 72, & 76; WealthTV Ex. 84 at 2 (PFoF ¶ 9).

247. BHN also adopted differential policies for carriage of affiliates as opposed unaffiliated programming vendors. None of the criteria BHN considers in deciding whether to carry a particular program service was applied to INHD and MOJO; BHN relied on the decision making processes of TWC, whose decision with respect to carriage of MOJO was understood to be automatic, simply because of TWC's ownership interest in iN DEMAND. While BHN had the ability to make an independent decision with respect to programming decisions about nationwide services, Mr. Miron acknowledged that it rarely does, Tr. at 4508-12 (PFoF ¶ 49), and it did not with respect to MOJO or WealthTV.

248. WealthTV also submitted unrefuted evidence that Defendants applied differential standards regarding the terms and conditions of carriage. This constitutes a separate and free-standing violation of the Cable Act and the Commission's regulations, which prohibit discrimination "in the selection, terms, or conditions for carriage." *See* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

249. It is undisputed that none of the four Defendants had a written contract with iN DEMAND regarding carriage of INHD or MOJO. Tr. at 3989-90 (TWC); Tr. at 4619 (Comcast); Tr. at 4914 (Cox) (PFoF ¶ 53). Comcast had no negotiations with iN DEMAND at all for carriage of INHD or MOJO. *Id.* at 4615 (PFoF ¶ 53). Mr. Bond testified that, as to affiliated programming vendors such as iN DEMAND, "[a] contract, a written contract was not necessary . . . because of [the] relationship between the companies." *Id.* at 4620 (emphasis

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added); *id.* at 461 (PFoF ¶ 53). Without any negotiation or formal contract, Comcast and the other owners of iN DEMAND simply entered into an informal arrangement where by the owners paid iN DEMAND a fee per high-definition subscriber. Tr. at 4619 (PFoF ¶ 53). The iN DEMAND owners had discretion to change the fee structure, also without negotiation or formal contract of any kind. Tr. at 4617-18 (PFoF ¶ 39). In contrast, assuming Defendants even agreed to carry an unaffiliated network, they insisted on arms-length negotiations and formalized written contracts. *See* Tr. at 3958, 3985-86 (TWC); Tr. at 4701, 4702 (Comcast); Tr. at 5071-72 (Cox) (PFoF ¶ 54).

250. The foregoing evidence demonstrates that Defendants applied different standards – essentially, a “two-track” system – for carriage of its affiliates INHD and MOJO as opposed to WealthTV. That evidence constitutes direct evidence of discrimination sufficient to support WealthTV’s *prima facie* case.

4. Evidence of Defendants’ Disparate Treatment of WealthTV and MOJO

251. WealthTV also presented extensive circumstantial evidence further buttressing the conclusion that the Defendants discriminated against WealthTV on the basis of affiliation. As discussed above, an inference of discrimination is supported by evidence that two candidates for carriage were similarly situated (with the exception of the forbidden characteristic) and received disparate treatment. Here, the evidence shows that the Defendants declined to carry WealthTV, but did carry their own affiliated MOJO network, despite substantial similarities between the two networks. The evidence thus supports WealthTV’s *prima facie* showing that Defendants’ differential treatment of INHD / MOJO and WealthTV was a product of discrimination on the basis of affiliation.

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252. As the Media Bureau has ruled as a matter of law, two programming services need not be identical to be similarly situated. *See HDO* ¶¶ 17, 27, 39, 51 (holding that it is a “misreading of the program carriage statute and [the Commission’s] rules” to conclude that “a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination”). The proper inquiry is whether WealthTV and MOJO were “substantially similar” programming services. *See id.* ¶ 12.

253. WealthTV’s evidence shows that they were substantially similar. It is undisputed that MOJO’s target audience was young males, variously described by Defendants as either 18 to 49 or 25 to 49 year old males. WealthTV Ex. 133 (PFoF ¶ 31). It is further undisputed that MOJO targeted this audience by focusing its programming on male-oriented themes such as “adventure travel, comedy, finance, music, cuisine, and spirits and high tech toys.” WealthTV Ex. 94 (PFoF ¶ 104).

254. The weight of the evidence demonstrates that WealthTV was substantially similar to MOJO in its target audience and programming themes. WealthTV, like MOJO, targeted an audience consisting primarily of 25 to 49 year old men with disposable income. This target demographic is reflected in: (1) WealthTV’s branding at industry trade shows, WealthTV Ex. 144 at 20 (PFoF ¶ 89); (2) WealthTV’s programming, *id.*; (3) WealthTV’s target advertisers, such as Lexus, Porsche, BMW, Bose, Grey Goose, Morgan Stanley, and Samsung, *id.* at 26 (PFoF ¶ 94); and (4) WealthTV’s public branding, WealthTV Exs. 3, 33 (PFoF ¶ 91).

255. Although WealthTV stated in some contexts that its programming had “broad appeal” in the sense that it was attractive to others outside this demographic, the record evidence shows that WealthTV was targeted to the same audience as MOJO. The fact that programming services attract viewers outside their target demographic is “not atypical,” Tr. at 5225-26 (PFoF ¶ 92);

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indeed, MOJO, too, had an audience consisting of 30% women, WealthTV Ex. 12 (PFoF ¶ 92); Tr. at 4373 (PFoF ¶ 92).

256. The testimony of Defendants' expert, Michael Egan, is unreliable and not deserving of any evidentiary weight. Mr. Egan swore that the demographic of MOJO was men aged 18-49 in his declaration in support of TWC's Answer to WealthTV's complaint, then swore in his Expert Report that the demographic of MOJO was men aged 25-49. At his deposition, he acknowledged that his testimony had changed. But at trial, he swore that the variance was "a typo." Tr. at 5198, 5202-03.

257. Mr. Egan's testimony is unreliable on the additional ground that his methodology is not standard in the cable industry. Mr. Egan purported to do a comparison of the programming of WealthTV and MOJO through a "genre analysis." Tr. at 5168. But Mr. Egan admitted that his "genre analysis" is "not a standard tool used . . . by experts in [the] field of program acquisition." Tr. at 5217. Mr. Egan had "never used any similar methodology in any other expert testimony." *Id.* at 5220. In fact, rather than "rely on a standard industry reference, such as Tribune Media Services, to define the genres that [he used] for classification purposes," Mr. Egan simply "used genres that [he] created." Tr. at 5220-21. And he admitted that there are "elements of subjectivity" to his classifications. Tr. at 5226.

258. Mr. Egan's application of a completely untested methodology, created out of whole cloth for the first time in this litigation, fails the most basic standards for the admissibility of expert testimony. *See Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993) (factors in determining whether expert testimony is reliable include whether it has been subjected to peer review and publication, its known or potential error rate, and whether it has attracted widespread acceptance within a relevant scientific community). Because Mr. Egan's testimony is unreliable

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as expert testimony under *Daubert*, it should not be relied upon. *See id.* at 594 (“Widespread acceptance can be an important factor in ruling particular evidence admissible, and ‘a known technique which has been able to attract only minimal support within the community’ may properly be viewed with skepticism.”) (quoting *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985)).

259. Mr. Egan’s testimony is unreliable for an additional reason: although he swore under oath that the target demographic for MOJO was 18 to 49 when preparing his original declaration in January 2008, by the time of his deposition, he testified that, “upon further examination of all this material, and looking at everything, . . . [MOJO] is targeting 25 to 49 year-olds.” Tr. at 5200-01. His opinion, therefore, had, “to that extent . . . changed.” *Id.* at 5201, 5203. However, at the hearing, Mr. Egan testified that his use of the “18 to 49” range in his January 2008 declaration had been a “typo,” Tr. at 5197-98, and that he had not changed his prior opinion, *id.* at 5202-03. These inconsistencies in his sworn testimony call into question Mr. Egan’s reliability as an expert.

260. WealthTV submitted unrefuted evidence that Defendants treated WealthTV and MOJO disparately, despite their substantial similarity. As discussed above, MOJO was given automatic coverage on all four Defendants’ systems, without the need for any contract negotiations, much less a formal, written contract. WealthTV was denied linear coverage on all of the Defendants’ networks, despite years of persistent and vigorous efforts to obtain carriage. This evidence, combined with the direct evidence of Defendants’ policy of preferential treatment, which accorded affiliates a separate and easier path to carriage, establishes WealthTV’s *prima facie* case of discrimination.

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D. Defendants Failed To Rebut WealthTV's *Prima Facie* Case of Discrimination

1. Evidence That Defendants Denied WealthTV Carriage Based on Purportedly "Non-Discriminatory" Criteria Does Not Refute WealthTV's *Prima Facie* Case Because Those Criteria Are, in Fact, Discriminatory in That They Were Never Applied to Defendants' Affiliates

261. WealthTV expects Defendants to rely heavily on testimony from their own executives asserting that they denied linear carriage to WealthTV on supposedly "good faith," "legitimate," and "non-discriminatory" grounds, in the exercise of their "editorial discretion" and other "business considerations." These considerations are not non-discriminatory, however, because the evidence shows they were not even-handedly applied to affiliates and non-affiliates alike. The application of different standards to different categories of candidates defined by impermissible considerations is still discriminatory.

2. Evidence That Defendants Entered into Carriage Agreements With Other Non-Affiliated Networks Is Similarly Inadequate To Refute WealthTV's *Prima Facie* Case

262. Defendants' evidence that they entered into carriage agreements with some other non-affiliated programming services is also inadequate to refute WealthTV's *prima facie* evidence. As a legal matter, WealthTV does not have the burden to show that Defendants categorically excluded non-affiliated programming services from carriage on their systems. Even if some non-affiliated services do obtain carriage, the Cable Act and the Commission's program carriage rules forbid vertically integrated cable operators from giving affiliated vendors preferential treatment or, conversely, imposing stricter standards on unaffiliated vendors. The evidence in this case demonstrates precisely that preferential treatment.

3. Evidence of WealthTV's Carriage on Other Cable MSOs Supports Rather Than Refutes WealthTV's *Prima Facie* Case

263. WealthTV also expects that Defendants will argue that decisions by certain cable MSOs not to carry WealthTV are proof that Defendants did not discriminate on the basis of affiliation.

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Factually, the evidence does not support that contention. WealthTV has affiliation agreements with more than 125 distribution partners, WealthTV Ex. 144 at 23, including Verizon FiOS (Cox Exs. 71, 72), Insight Communications (TWC Ex. 10), Charter Communications (Time Warner Exs. 18, 51), National Cable Television Cooperative (TWC Ex. 3), Qwest Broadband Service (Cox Ex. 76) and GCI Cable (Cox Ex. 77) (PFoF ¶ 9). The past success of WealthTV in obtaining affiliation agreements with distribution partners – despite the refusal of the four Defendants to enter into a carriage agreement – is strong evidence of the strength of WealthTV’s product.

264. Legally, the fact that other cable MSOs made independent decisions not to carry WealthTV does not support Defendants’ contention that their decision to do so was non-discriminatory. Whatever the basis for other MSOs’ decisions, the evidence in this case shows that the Defendants applied facially disparate standards for carriage and gave preferential treatment to affiliated programming vendors such as iN DEMAND and its linear HD services INHD and MOJO.

4. TWC’s and Comcast’s Offers of Hunting Licenses Do Not Refute WealthTV’s Evidence of Discrimination

265. The fact that TWC and Comcast both proposed to WealthTV some form of hunting license does not refute WealthTV’s evidence that they discriminated against WealthTV on the basis of affiliation. A “hunting license” is a commonly used form of carriage agreement that does not require carriage on any of the MSO’s cable systems, but rather permits the network to “hunt” for carriage with the MSO’s individual cable systems, subject to basic economic terms set forth in the licensing agreement. Homonoff Written Test. at 5 (PFoF ¶ 85, 156).

266. Whether a “hunting license” is a meaningful form of carriage is disputed by the parties. *See Cox. Tr.* at 4864-65 (PFoF ¶ 195) (Cox policy against hunting licenses). WealthTV

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concluded that TWC's and Comcast's offers of a hunting license were not meaningful offers.

WealthTV Ex. 144 at 39 (PFoF ¶¶ 134-135); Tr. at 4558 (PFoF ¶¶ 160, 164); WealthTV Ex. 144 at 45 (PFoF ¶ 164).

267. Critically, in contrast to its dealings with WealthTV, TWC did not require INHD or MOJO to pursue a hunting license. Tr. at 4000-01 (PFoF ¶ 48). All four Defendants simply provided INHD and MOJO with full linear carriage because they owned iN DEMAND. The evidence that TWC and Comcast offered WealthTV hunting licenses while offering INHD and MOJO full carriage without negotiation, without application of their decisional criteria and without a written agreement thus further supports the conclusion that Defendants operated pursuant to a discriminatory double standard in violation of the Cable Act and the Commission's program carriage rules.

5. Defendants Cannot Evade The Cable Act's Non-Discrimination Provisions By Recharacterizing MOJO As a "Rebranding" of INHD

268. Finally, Defendants' contention that MOJO was not a "new" network but simply a "rebranding" of INHD and INHD2 is not sufficient to refute WealthTV's *prima facie* evidence of discrimination. As an initial matter, the record evidence does not support Defendants' factual contention that MOJO was simply a "rebranding" of INHD and INHD2. The switch to MOJO entailed fundamental changes in the concept and programming offered. Whereas INHD and INHD2 broadcast HD programming that was quite random, MOJO was oriented around a theme and targeted toward young men variously described by iN DEMAND and Defendants as between 18 and 49 or 25 and 49. Moreover, iN DEMAND engaged in marketing and promotional activities such as a launch campaign with the launch of a new network (PFoF ¶ 30).

269. In all events, the semantic debate as to whether MOJO was a "new launch" or a "rebranding" misses the legal point. It is undisputed that the Defendants had the flexibility to

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take INHD and INHD2 off of their respective systems. *See, e.g.*, Tr. at 4890 (PFoF ¶¶ 41, 44) (“we had the flexibility to discontinue carrying them at some point in time”). Indeed, there was no carriage agreement and therefore no obligation by the Defendants to carry iN DEMAND’s programming. Whether MOJO was considered a rebrand or a new launch, Defendants had a choice as to whether to switch to MOJO or, instead, offer carriage to WealthTV. The evidence shows that Defendants discriminated against WealthTV on the basis of affiliation in making the choice to switch to MOJO.

E. Defendants’ Discriminatory Conduct Unreasonably Restrained WealthTV’s Ability To Compete Fairly

270. WealthTV submitted unrefuted evidence to support the conclusion that Defendants’ discriminatory conduct “unreasonably restrain[ed] the ability of [WealthTV] to compete fairly.” 47 U.S.C. § 536(a)(3); C.F.R. § 76.1301(c). Under that standard, it is not necessary for WealthTV to prove that it would be unable to compete at all – *i.e.*, that it would cease to be a going concern – absent carriage by the Defendants. Rather, the natural meaning of an “unreasonable” restraint on “fair competition” is that the Defendants’ conduct deprived WealthTV of the ability to compete on a level playing field in an effort to reach a significant number of potential subscribers.

271. Also, the Media Bureau has held that Defendants may not evade their obligation not to discriminate by contending that WealthTV could obtain other customers by obtaining carriage on other MSO’s systems. The Media Bureau explicitly rejected this claim in the *HDO*, on the ground that it “would effectively exempt all MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs.” *HDO* ¶¶ 19, 30, 42, 54. The Media Bureau also ruled that “the program carriage statute . . . does not excuse an MVPD’s discriminatory conduct based on the possibility of alternative distribution platforms.” *Id.* ¶ 54.

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272. The evidence in the record, including the testimony of Defendants' own experts, supports the conclusion that Defendants' discriminatory refusal to offer WealthTV carriage had the effect of making it materially more difficult for WealthTV to reach a significant base of customers who are subscribers of the Defendants. TWC has approximately 14 million subscribers, Comcast has more than 24 million, Cox has 5.2 million, and BHN has 2.3 million. TWC Ex. 84 at 1; Comcast Ex. 3 at 1; Cox Ex. 79 at 3; BHN Ex. 8 at 16 (PFoF ¶ 13). There are only 65 million cable video subscribers in the entire country. TWC Ex. 86 at 8 (Howard B. Homonoff Written Direct Testimony). By any yardstick, the Defendants' customers represent a significant subscriber base (70% of all U.S. cable video subscribers), and would be important to any program service provider that wanted to grow and attract more advertisers. Moreover, these potential subscribers are significant to WealthTV in particular, as it would dramatically expand its subscriber base, which, as of January 2009, stood at a total of **BEGIN HIGHLY CONFIDENTIAL** [REDACTED] **END HIGHLY CONFIDENTIAL**. Comcast Ex. 25 (PFoF ¶ 11). Foreclosing access to those customers represents a significant impediment to any programming vendor's ability to "compete fairly" in the market for programming services.

273. The testimony of Janusz Ordover, a witness presented on behalf of Cox and BHN, is both irrelevant and unreliable. *Daubert*, 509 U.S. at 589. Dr. Ordover testified that, because both Cox and BHN have relatively small shares of the total number of cable subscribers nationwide and relatively small ownership interests in MOJO, their decision not to carry WealthTV did not unreasonably restrain the ability of WealthTV to compete in the relevant markets. Tr. at 5375-83; *see also* BHN Ex. 9; Cox Ex. 44. But as the Media Bureau has recognized, the program carriage rules "apply to all MVPDs, regardless of their subscriber base." *HDO* ¶ 30. The fact that a programmer could, in theory, reach a sufficient number of subscribers by obtaining

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carriage with MVPDs that were unaffiliated with MOJO is irrelevant, “because it would effectively exempt all MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs.” *Id.*

274. Because the purpose of 47 U.S.C. § 536(c) and 47 C.F.R. § 76.1301(c) is to protect programmers from discrimination by MVPDs on the basis of affiliation, Dr. Ordovery’s testimony regarding the benefits to consumers and to the public interest that might come from Cox’s and BHN’s discrimination against WealthTV is irrelevant. That Dr. Ordovery does not believe, as an economic matter, that strict enforcement of the statute and Commission regulations may be in the long-term interests of consumers simply does not matter when it comes to interpreting and applying the statute and rule as written.

F. Remedy

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

[REDACTED]

276. [REDACTED]

[REDACTED]

END

HIGHLY CONFIDENTIAL

277. The reasonableness of WealthTV's proposed remedy is also supported by the fact that Mr. Bond was willing in April 2008 to pay approximately \$.08 per subscriber per month for WealthTV's SD feed. Hearing Tr. at 4650 (PFoF ¶ 224).

278. WealthTV's proposed term of 10 years is also fair and reasonable remedy.

279. WealthTV Exhibit 23 is an affiliate agreement, based on an iN DEMAND affiliate agreement, proposing additional terms of carriage. WealthTV Exhibit 23 is fair and reasonable and its terms should be adopted as part of the remedy for Defendants' discrimination against WealthTV.

Respectfully submitted,

Herring Broadcasting, Inc., d/b/a
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June 2, 2009

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CERTIFICATE OF SERVICE

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