

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

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

TO: Marlene H. Dortch
Secretary, Federal Communications Commission

ATTN: The Honorable Richard Sippel
Chief Administrative Law Judge

**COMPLAINANT'S PROPOSED REPLY FINDINGS OF FACT
AND REPLY CONCLUSIONS OF LAW**

June 24, 2009

**CONFIDENTIAL AND/OR HIGHLY CONFIDENTIAL INFORMATION, SUBJECT TO
PROTECTIVE ORDER IN FCC NOS. CSR-7709-P, 7822-P, 7829-P, 7907-P**

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Complainant Herring Broadcasting, Inc. d/b/a WealthTV, pursuant to the Presiding Judge's Order dated May 4, 2009, Order, *In the Matter of Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc.*, MB Docket No. 08-214 (May 4, 2009), hereby respectfully submits the following Proposed Reply Findings of Fact ("WTV RFoF") and Reply Conclusions of Law ("WTV RCoL").

SUMMARY

1. Federal Communications Commission ("Commission") rules implementing Section 616 of the Communications Act of 1934, 47 U.S.C. § 536,¹ prohibit multichannel video programming distributors ("MVPDs") from "discriminating on the basis of affiliation or non-affiliation of vendors in the selection, terms or conditions for carriage of video programming." 47 C.F.R. § 76.1301(c). The record evidence in this case makes clear that Time Warner Cable ("TWC"), Comcast Corporation ("Comcast"), Cox Communications ("Cox"), and Bright House Networks ("BHN") (collectively, the "Defendants") have discriminated in favor of INHD and MOJO on the basis of their affiliation with iN DEMAND, the company that offered INHD and MOJO, giving them more favorable treatment than they gave WealthTV.
2. Defendants granted INHD and MOJO carriage, without evaluating either network in accordance with their self-stated carriage decision-making criteria, in complete disregard of the law against favoring their own Affiliates. The fact that their Affiliate iN DEMAND created INHD and MOJO, by Defendants' own admission, was the dispositive consideration in their decision to carry INHD and MOJO.

¹ Section 616 was added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

3. For INHD and MOJO, Defendants tossed aside consideration of the criteria that they claim to use when making decisions about whether a video programming service deserves carriage. They ignored the lack of experience that Robert Jacobson and David Asch, the top iN DEMAND executives responsible for INHD and MOJO, had with respect to running a Linear Video Programming Network. They ignored the fact that INHD and MOJO had no carriage on either of the direct broadcast satellite (“DBS”) providers while asserting that this was fatal to WealthTV’s case for carriage. They ignored the precarious financial condition of iN DEMAND. They overlooked INHD’s and MOJO’s lack of association with any established brand demanded by consumers. They overlooked INHD’s and MOJO’s inability to provide any standard definition (SD) feed. Moreover, in granting carriage to INHD and MOJO, Defendants paid no regard to the formalities that go with an arms length relationship, such as entering into a written contract for carriage or negotiating over whether the Defendants should grant them carriage and, if so, on what terms or conditions. Defendants dispensed with these steps – steps which the Defendants demanded WealthTV take – solely because INHD and MOJO were affiliated with Defendants. Defendants thereby discriminated against WealthTV and in favor of INHD and MOJO.

4. Defendants claim that they applied legitimate, non-discriminatory criteria to WealthTV and that WealthTV failed to pass muster. But if Defendants had applied these criteria to INHD and MOJO – which Defendants tellingly make no claim or pretense of having done² – both INHD and MOJO would have fared poorly. The very fact that Defendants did not afford

² Cox alone among the Defendants claims to have applied “the same criteria” it applied “when it made other carriage decisions” to INHD. Defendants’ Joint Proposed Findings of Fact and Conclusions of Law ¶ 164 (“Defendants’ Proposed Findings” or “Defs. PFOF”). As further detailed below, this claim is unsupported by the record citations relied upon. *See id.* ¶ 164 n.345.

WealthTV carriage by the same process as MOJO constitutes discrimination by Defendants against WealthTV. There is, therefore, no serious question that Defendants discriminated in favor of INHD and MOJO and against WealthTV.

5. Defendants' conduct had the effect of unreasonably restraining WealthTV's ability to compete fairly by denying it access to their collective 45 million subscribers constituting approximately 70% of the cable video subscribers in the U.S. The Defendants together restrained WealthTV through their representatives on iN DEMAND's Board of Directors, which approved, during its meetings, the creation, Launch, and carriage of INHD and MOJO. Defendants argue that WealthTV should simply overcome Defendants' discrimination by making agreements with other MVPDs. The Media Bureau, in its *Hearing Designation Order* ("HDO"),³ rejected those arguments as a matter of law, and rightly so. Adoption of these arguments by the Administrative Law Judge ("ALJ") or the Commission would effectively gut the substance of Section 616 of the 1992 Cable Act and the Commission's regulations thereunder by establishing the untenable rule that no individual MVPD can be held liable for discrimination under these provisions as long as a Video Programming Network like WealthTV has the option of obtaining subscribers by entering into Affiliation Agreements with non-discriminating MVPDs. Defendants' legal arguments should not be accepted because they would effectively immunize from liability conduct that Congress has declared illegal.

6. **BEGIN HIGHLY CONFIDENTIAL INFORMATION** [REDACTED]

[REDACTED]

[REDACTED]

³ 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*").

[REDACTED]
[REDACTED]
[REDACTED]
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7. Defendants claim that the rates proposed by WealthTV were unreasonable, but the record evidence shows that WealthTV offered the Defendants WealthTV's SD and HD feeds for free from 2004 through the end of 2008. Defendants' witnesses' testimony indicates that for 2007 alone, Defendants collectively paid their wholly owned subsidiary iN DEMAND an amount in excess of \$50 million dollars for INHD and MOJO, representing the wholesale cost of the programming subsequently provided to subscribers.⁴ WealthTV's remedy is thus amply supported by the evidence in the record.

COMPLAINANT'S PROPOSED REPLY FINDINGS OF FACT

- I. Defendants Discriminated In Favor of MOJO and Against WealthTV on the Basis of Their Affiliation With iN DEMAND**
 - A. Defendants Did Not Evenhandedly Apply Their Claimed Decision-Making Criteria But Instead Gave MOJO Automatic Carriage By Virtue of Its Affiliate Status**

8. Defendants state in their Joint Proposed Findings of Fact and Conclusions of Law ("Defendants' Proposed Findings" or "Defs. PFoF") that they applied the decision-making criteria identified in Defendants' witnesses' testimony and summarized in the Defendants' Proposed Findings to decide whether to carry WealthTV. *See* Defs. PFoF ¶¶ 17, 45-48, 57, 76. Yet, tellingly, Defendants TWC, Comcast, and BHN nowhere claim that they applied these

⁴ *See infra* note 16 for the computation supporting this figure.

criteria in deciding whether to carry INHD or MOJO. This admission is fatal to Defendants' defense that they treated INHD and MOJO on the one hand and WealthTV on the other hand evenhandedly and, therefore did not discriminate against WealthTV.

9. Defendants' carriage of INHD and MOJO was automatic by their own admission. TWC's Chief Programming Officer, Melinda. Witmer, admitted that TWC did not require INHD or MOJO to negotiate for carriage. Instead, Defendants granted INHD and MOJO carriage automatically because INHD and MOJO were affiliated with Defendants. Tr. at 4001:4-9 (Witmer). Despite claims that few Video Programming Networks are able to achieve it, Defendants automatically made available to INHD and MOJO the "broad carriage" that Defendants' Proposed Findings acknowledges virtually all programming services prefer. Defs. PFOF ¶ 19. INHD and MOJO were not relegated to the less desirable route to carriage, the Hunting License. *See id.*; Tr. at 4348:5-13 (Asch).

10. Cox alone among the Defendants claims to have applied "the same criteria" to INHD it applied "when it made other carriage decisions." Defs. PFOF ¶ 164. However, Cox's record citations do not support its factual assertions. *See id.* ¶ 164 n.345. For example, the Transcript citation at 4863:6-15 is a general discussion of the role Bandwidth plays in Cox's carriage decisions and makes no reference to how or whether it affected Cox's decision to carry INHD. The excerpt at 4877:19-4879:13 sets forth Robert Wilson's view that INHD met Cox's need for HD content. There is no record evidence that Cox evaluated WealthTV on such a minimalist standard. The excerpt at 4881:10-4883:20 relates to INHD's and MOJO's preemptibility for other programming and that Cox evaluated carriage of INHD and INHD2 on the basis of their

ability to provide “reasonable content” that was “relatively comparable” to HDNet. Cox applied no such criterion to WealthTV.⁵

11. Moreover, Cox’s Senior Vice President for Programming, Mr. Wilson, admitted that carriage of INHD and MOJO was “assumed” by Defendants once iN DEMAND’s Board of Directors, on which Mr. Wilson, Ms. Witmer and Mr. Bond served, approved the budgets for the channels. Tr. at 4915:19-4916:12 (Wilson). Mr. Wilson’s admission belies any late manufactured story that Cox applied any of its claimed customary decision-making criteria to INHD or MOJO. *Id.*

12. The process that Defendants followed, if any, to afford carriage to INHD and MOJO entailed, at most, a minimal evaluation of whether those affiliated channels could offer Defendants HD content at a time when giving subscribers more HD content was of increasing

⁵ At 4885:1-11, Mr. Wilson states his view that the License Fees for INHD and MOJO were “reasonable.” *Cf.* Tr. at 4918:20–4919:6 (Wilson did not seek to negotiate price or any aspect of WealthTV’s proposed Term Sheet); Tr. 4617:1–4617:8 (Bond viewed the price for MOJO and the price for WealthTV as “about the same”). The citation at 4888:1–4890:8 begins in the middle of the witness’s answer and recites that Mr. Wilson believed that Steve Brenner and Rob Jacobson “had extensive experience through their holding contests with the studios, basically (static) with the other sports products they distribute.” It is not clear what kind of relevant industry experience Mr. Wilson is referring to at this point. At 4925:9-14, Mr. Wilson states that INHD was a way of delivering HD content to viewers on favorable terms, and at 4940:3-17, he acknowledges that Cox could drop INHD or MOJO at will. *Cf.* 4918:20–4919:6 (Wilson did not seek to negotiate terms with WealthTV). In Cox’s final citation to the Transcript in note 345 – 4959:6-16 – Mr. Wilson acknowledges that he did not pay much attention to the programming changes that occurred when INHD became MOJO. It is not clear what this has to do with criteria for carriage.

Far from supporting the assertion that Cox used the same criteria that it used in evaluating “other carriage decisions” such as the one it made regarding WealthTV, these citations establish that apart from the purported “experience” criterion, Cox used idiosyncratic criteria to give INHD and MOJO carriage because of their affiliation with Cox. Cox makes no mention in describing the criteria it used to decide to carry INHD and MOJO of the criteria that Defendants assert they applied to WealthTV such as financial stability, association with an established brand, availability of an SD feed or consumer appeal of the programming beyond the showcase effect of HD programming.

competitive importance to Defendants. *See* TWC Ex. 81 at 7, ¶¶ 15-16 (Witmer Direct Test.); Cox Ex. 84 at 5-6, ¶¶ 16-17 (Asch Direct Test.); Tr. at 4703:15-4704:1 (Bond); Cox Ex. 79 at 9-10, ¶¶ 29-32 (Wilson Direct Test.). Defendants should have evaluated WealthTV on the same basis. The testimony of Defendants' witnesses that they evaluated WealthTV based on criteria that were concededly never applied to INHD or MOJO constitutes repeated admissions of unlawful discrimination.

B. MOJO Would Not Have Satisfied Many of the Claimed Carriage Decision-Making Criteria Defendants Applied to WealthTV

13. Not only did Defendants admit granting automatic carriage to INHD and MOJO, but the record evidence shows that had Defendants applied the same criteria to INHD and MOJO as they purportedly did to WealthTV, INHD and MOJO would have fared poorly, and worse than WealthTV. The evidence thus confirms that Defendants did not apply their self-stated criteria to INHD and MOJO.

1. Defendants Ignored the Precarious Financial Condition of INHD and MOJO

14. One of the criteria that Defendants claim to have applied to WealthTV is an evaluation of WealthTV's third-party financing and, thereby, its long-term financial viability. *See, e.g.,* Comcast Ex. 3 at 5, ¶ 10 (Bond Direct Test.). It is clear that Defendants did not apply this same criterion to INHD or MOJO.

15. **BEGIN CONFIDENTIAL INFORMATION** [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] **END CONFIDENTIAL INFORMATION** which can run up to or over \$100 million. Comcast Ex. 3 at 5, ¶ 10. **BEGIN CONFIDENTIAL INFORMATION** [REDACTED]

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CONFIDENTIAL INFORMATION which they did because of their affiliation with the two channels. Had Defendants made an objective evaluation of the financial stability of INHD and MOJO, they would not have passed muster.

16. Defendants' claim that INHD and MOJO enjoyed third-party financial support is circular and specious. INHD and MOJO were creations of iN DEMAND, a wholly owned subsidiary of Defendants. Defendants funded iN DEMAND, and "[w]ithout considering the contributions of the [Defendants], INHD and later MOJO lost millions of dollars." Cox Ex. 84 at 23, ¶ 85.

Defendants are in no legitimate sense a "third party" with respect to their own wholly-owned subsidiary.

2. Defendants Ignored Top iN DEMAND Executives' Lack of Programming Experience

17. Another factor that Defendants claim to have applied to WealthTV is an evaluation of the programming experience of WealthTV's management. *See, e.g.*, Comcast Ex. 3 at 5, ¶ 10. It is clear that Defendants did not apply this factor to INHD or MOJO.

18. Neither Mr. Jacobson nor Mr. Asch, the two top executives at iN DEMAND responsible for INHD and MOJO, had any experience running or programming a Linear cable channel before they were entrusted with responsibility for running INHD and MOJO. Tr. at 4576:19-4577:18 (Bond). This was ignored by Defendants as a concern, *see id.*, because INHD and MOJO were their Affiliates, even though it was repeatedly identified by Defendants as a reason that carriage of WealthTV was blocked. *See* Comcast Ex. 8 at 3, ¶ 6 (Dannenbaum Direct Test.); Comcast Ex. 3 at 5, ¶ 10; Cox Ex. 79 at 25, ¶ 81; BHN Ex. 9 at 3, ¶ 8 (Miron Direct Test.); TWC Ex. 81 at 4, ¶ 9.

3. Neither INHD nor MOJO Had Any Association with an Established Brand Demanded by Consumers, But Defendants Ignored This

19. Another criterion that Defendants claim to have applied to WealthTV is an evaluation of whether WealthTV was associated with an established brand demanded by subscribers. *See, e.g.*, Cox. Ex. 79 at 16, ¶ 56. It is clear that Defendants did not apply this factor to INHD or MOJO.

20. Neither INHD nor MOJO had any association with an established brand that was popular with consumers, and Defendants nowhere contend otherwise. Tr. at 4921:2-4922:5 (Wilson). This deficiency was ignored by Defendants as a concern because INHD and MOJO were their Affiliates, even though it was repeatedly identified by Defendants as a reason that carriage of WealthTV was blocked. *See* Tr. at 4096:18-22 (Carter); Tr. at 4465:13-21 (Stith); Tr. at 4752:14-22 (Dannenbaum); Cox Ex. 79 at 15, ¶ 52.

4. Neither INHD nor MOJO Offered Any Evidence of Actual Audience Appeal

21. Defendants assert that another criterion they applied to WealthTV was an evaluation of whether it had viewer appeal. *See, e.g.*, Cox Ex. 79 at 14, ¶ 50. A key reason they denied carriage to WealthTV was that it did not present evidence of audience appeal. *See* Defs. PFOF ¶ 146. As an initial matter, Defendants overlooked ample evidence of WealthTV's audience appeal. WealthTV is carried on over 125 distribution Systems, including Verizon FiOS, AT&T U-verse, Charter Communications, and Qwest Communications International, Inc. ("Qwest"), which furnishes ample evidence of audience appeal. WealthTV Ex. 144 at 23 (Amended Herring Direct Test.). WealthTV did not provide Nielsen ratings to the Defendants because WealthTV is not Nielsen rated. Tr. at 4177:21-4178:1 (Carter).

22. WealthTV also furnished evidence of audience appeal by tabulating viewer feedback forms to confirm among other things, audience demographics. WealthTV Ex. 144 at 16. Mr.

Wilson of Cox was aware of the availability of this information because Charles Herring supplied him with an example of an actual feedback form from a Verizon FiOS customer in February of 2007, months before the Launch of MOJO. *See* WealthTV Ex. 245. The form shows the demographic information of the viewer, namely a male, 25-40 years of age, with an income of \$75,000 to \$125,000. *See id.* Mr. Herring supplied information from the viewer commenting on the programming, adding that the viewer's comment "about more travel shows with an understanding of the culture is a repeated theme that effects our programming decisions." *Id.* Even when presented with such information about viewer feedback and appeal, *see id.*, Mr. Wilson did not even bother to retain the information for future consideration. Tr. at 5034:16–5035:12.

23. At any rate, it is clear that Defendants did not require INHD or MOJO to prove audience appeal through rigorous evidence of the kind that WealthTV supposedly failed to provide. Neither INHD nor MOJO was Nielsen rated. Tr. at 4332:1-2 (Asch). Defendants decided to accord carriage to INHD and MOJO before each had Launched. Tr. at 4916:5-12 (Wilson). Therefore, no evidence of actual, measured audience appeal was available or could have been available when Defendants decided to afford carriage to INHD and MOJO.

24. Nor did Defendants receive any information about the local appeal of INHD or MOJO before offering each carriage. Tr. at 4924:10-18 (Wilson). There is no record evidence that any of Defendants Systems in the field expressed an interest in INHD or MOJO before Defendants decided to carry them.

5. Neither INHD nor MOJO Offered any Standard Definition Feed, But Defendants Ignored This

25. iN DEMAND offered INHD and MOJO exclusively in HD format. They were not available in SD format. Tr. at 4573:4-10 (Bond). Defendants claim that their HD strategy was to Launch HD feeds of existing popular SD channels. Comcast Ex. 3 at 4, ¶ 9; Tr. at 3983:4-8 (Witmer); Tr. at 4921:2-11 (Wilson). But Defendants overlooked INHD's and MOJO's inability to offer any SD feed and Launched them in HD-only format. Tr. at 3983:9–3984:17 (Witmer); Tr. at 4573:4-10 (Bond); Tr. at 4921:12–4922:5 (Wilson). Since its inception, WealthTV has offered a down-converted SD format of WealthTV Ex. 144 at 1-2.

6. Defendants Claim That Bandwidth Constraints Prevent Addition of New Channels, But Found Room for INHD and MOJO

26. Defendants assert that they experience Bandwidth constraints that prevent them from adding new channels. Tr. at 4097:1-3 (Carter); Comcast Ex. 3 at 2-3, ¶ 5; Cox Ex. 1 at 1 (Wilson strategy memorandum). However, they concede that they are taking steps to reclaim Bandwidth and to use Bandwidth more efficiently to make room for new channel offerings. Tr. at 4028:15-19 & 4030:9-17 (Witmer); Tr. at 4613:5-8 & 4613:14-20 (Bond); Cox Ex. 79 at 4, ¶¶ 13-14. Furthermore, they admit that during the pendency of discussions with WealthTV they have added dozens of new channels to their Systems. TWC Ex. 56 (list of Affiliation Agreements); TWC Ex. 81 at 4-5, ¶ 10; Tr. at 4560:9-11 (Bond); Tr. at 4907:12–4908:3 (Wilson) (20 to 25 channels added in 2007). It is undisputed that during the period that they were discussing carriage with WealthTV and asserting Bandwidth constraints as a reason for denying carriage, they found room on their Systems to continue carriage of INHD and Launch MOJO. Tr. at 4347:19–4348:4 (Asch). During the same period when Defendants say that they had no Bandwidth to offer carriage to WealthTV, they dropped carriage of INHD2, freeing up additional

Bandwidth that they still declined to make available for carriage of WealthTV. *See* Cox Ex. 84 at 15, ¶ 52.

C. Defendants Did Not Reject Carriage of WealthTV for Legitimate Business Reasons

27. Not only did Defendants not apply the same criteria to WealthTV as it did to INHD and MOJO, but Defendants' assessment of WealthTV was not based on a good faith consideration of the criteria it claims to have applied.

1. Defendants Made No Inquiry Into the Financial Stability of WealthTV

28. Defendants claim that WealthTV's lack of third-party financing and uncertain financial stability were factors in their decision to deny WealthTV carriage. *See* Tr. at 4589:17-22 (Bond); Tr. at 4930:22–4931:10; *see also* TWC Ex. 81 at 5, ¶ 11 (financial resources are a factor). However, with the exception of Cox, which made a superficial inquiry, Defendants concede that they never made any inquiry into the financial stability of WealthTV, its source of funding, or whether it had the wherewithal to make a sustained commitment to support its Video Programming Network. Tr. at 4039:15-18 (Witmer); Tr. at 4590:3-10 (Bond); Tr. at 4931:15–4932:15 (Wilson). Nor is there any record evidence that they advised WealthTV of any such concerns. It is, therefore, clear that, despite their claims, Defendants did not engage in a fair or adequate evaluation of WealthTV under this factor.

2. Defendants Made No Inquiry About the Relevant Industry Experience of WealthTV's Management and Staff

29. Defendants claim that the lack of industry experience among WealthTV's owners and management was another factor in their decision to deny WealthTV carriage. *See* TWC Ex. 81 at 4, ¶ 9 (experience is a factor in carriage decisions); Comcast Ex. 3 at 5, ¶ 10; Cox Ex. 79 at 14,

¶¶ 48-49. At the same time, however, Defendants concede that they did not make any inquiry into the relevant industry experience of WealthTV's management or staff. *See* Tr. at 4042:6-12 (Witmer); Tr. at 4589:12-16 (Bond) (unaware of Nikki Marvin's involvement with WealthTV programming). Nor is there any record evidence that they advised WealthTV of any such concerns. Although Mr. Herring did not claim he had extensive programming expertise, nor did he claim that he led WealthTV's programming group, the Herrings continued a practice implemented in previous businesses, namely investing in the best talent available. WealthTV Ex. 144 at 5. WealthTV hired and retained numerous capable people with experience in the industry. *Id.* By the time of MOJO's 24/7 Launch in May 2007, WealthTV had been operating its services for three years. It is clear that, despite their claims, Defendants did not engage in a fair or adequate evaluation of WealthTV under this factor. Therefore, Defendants cannot rely on this alleged criterion as a basis for their negative treatment of WealthTV.

3. Defendants Rely on WealthTV's Alleged Relative Lack of Carriage as an Excuse for Denying Carriage to WealthTV While Contradictorily Asserting that WealthTV's Subscriber Growth Rate Proves That Their Denial of Carriage Cannot Have Unreasonably Restrained WealthTV's Ability To Compete Fairly

30. The Defendants claim that a key reason that they denied carriage to WealthTV was that it lacked carriage on other Systems, *see* Tr. at 3991:8-12 (Witmer) (carriage on other MVPDs a factor); Comcast Ex. 3 at 5, ¶ 11; Cox Ex. 79 at 51, ¶¶ 175-176, even though WealthTV had carriage on over 125 distribution partners' platforms. WealthTV Ex. 144 at 23. Contradicting this asserted rationale, Defendants state in their Proposed Findings that WealthTV has a growing base of subscribers, which they assert should be an adequate defense against the charge that they have unreasonably restrained WealthTV's ability to compete fairly. Defs. PFOF ¶¶ 307-309.

Defendants cannot have it both ways by characterizing WealthTV's subscriber base as both too low to merit carriage and too high to evidence any cognizable claim of unreasonable restraint.

D. WealthTV Did Not Concede that Defendants Had Legitimate Business Reasons for Denying Carriage to WealthTV

31. Defendants quote selectively and misleadingly from the trial testimony of Mr. Herring to make it appear that he agreed that Defendants rejected carriage of WealthTV for the "legitimate business reasons" that they seek to rely upon for their defense. Defs. PFOF ¶ 222. In fact, Mr. Herring testified that he believed that the only reason that Defendants did not carry WealthTV was because they were Affiliated with MOJO.

Q Mr. Herring, is it your claim in this case that the only reason the defendants did not carry WealthTV is because they were affiliated with Mojo?

A I believe that's probably why they didn't carry WealthTV. I believe that to be true.

Q That's the only reason?

A Over time, early on there might have been other issues, but I believe that to be true.

Q So, it's your testimony under oath that the only reason that the defendants in this case do not carry WealthTV today is because they were affiliated with iN DEMAND. Right?

A I believe that's correct.

Tr. at 3250:11–3251:5 (emphases added). In the excerpt selectively quoted by Defendants, Mr. Herring agreed that Defendants had "business reasons" for denying carriage to WealthTV, by which he meant, as his testimony prior to the cited excerpt makes clear, the Affiliate relationship between Defendants and MOJO.⁶ At no time during his testimony did he adopt or concede

⁶ See also Tr. at 3656:22–3657:11 (Herring). Mr. Herring testified as follows:

Defendants' various rationales for denial of carriage, which they characterize as "legitimate business reasons."⁷

E. Defendants' Expert Witness Howard Homonoff Made No Inquiry Into the Course of Conduct Between WealthTV and Any of the Defendants and His Testimony Should Be Given No Weight

32. Defendants rely on the testimony of their expert Howard Homonoff as support for the idea that they did not unreasonably restrain WealthTV's ability to compete fairly because, in his experience, there are multiple routes that a programming service can take to gain carriage. According to Mr. Homonoff, because WealthTV had other avenues of distribution available to it, avenues that other Video Programming Networks have used successfully, Defendants could not have unreasonably restrained WealthTV. *See* TWC Ex. 86 at 19-21, ¶¶ 37 & 39-40 (Homonoff Direct Test.). However, Mr. Homonoff conceded that he made no inquiry into the course of dealings between WealthTV and any of the Defendants and was not offering any opinion regarding whether any of the Defendants discriminated against WealthTV. Tr. at 4804:21–4805:22 (Homonoff). His testimony that a Video Programming Network such as WealthTV might achieve success with other forms of carriage such as a Hunting License, or that WealthTV

When I saw the launch of Mojo and I understood what was going on at the time, especially with the Time Warner location, along with the other locations, to me it all made sense on why they were taking the positions they were taking, and basically the desire was to insure the success of their own programming, which was in my mind very similar to WealthTV while not allowing WealthTV to progress. I believe they were doing that for economic reasons, to protect their channel.

⁷ Contrary to Defendants' assertions, there is no record evidence that Mr. Herring's acknowledgement of the physical phenomenon of finite Bandwidth that cable companies experience, the fact that there are more channels that wish to be carried than are carried and that cable companies are generally concerned about the prices that programming services wish to charge them conceded that Defendants legitimately applied any criterion related to Bandwidth or pricing to WealthTV, INHD, or MOJO. *See* Defs. PFoF ¶ 223. Moreover, there is no record evidence that Mr. Herring, who is not a lawyer, used or intended to use "legitimate business reasons" as a legal term of art.

could change its business plan to offer its programming over the internet, for example, has no factual basis and should be given no weight.

F. WealthTV Rejected the Tardy Carriage Proposals Raised by Time Warner Cable and Comcast Because They Were Defective and Inadequate and Inequitable vis-à-vis the Extensive Carriage Enjoyed by MOJO

1. Comcast

a. Comcast Concedes That It Never Put a Written Offer of Carriage Before WealthTV

33. The lengthy account of Comcast’s purported offer to WealthTV omits the key concession of Madison (“Matt”) Bond’s testimony: that Comcast never put any of its proposals in a written offer of carriage.⁸ Tr. at 4645:3-5 (Bond); Defs. PFoF ¶¶ 97-100. Furthermore, Mr. Bond also conceded that Comcast did not begin specific discussions with WealthTV until the month before the statute of limitations was scheduled to run on WealthTV’s ability to file a complaint against Comcast. *See* Comcast Ex. 3 at 5-7, ¶¶ 12-15. Under these circumstances, WealthTV did not accord the fragments of a possible carriage deal raised by Mr. Bond as a serious carriage offer worthy of discussion in Mr. Herring’s written direct testimony.

b. Comcast’s Suggestion of Possible Carriage in Chicago Involved Only 40,000 Subscribers Without Any Credible Prospect of More Extensive Carriage and Was a Delay Tactic To Forestall a Complaint Near the Expiration of the Statute of Limitations

34. Contrary to Defendants’ assertions, *see* Defs. PFoF ¶ 88, Mr. Bond did not engage in “good faith” efforts or provide “valuable” offers to WealthTV. Mr. Bond waited almost a year after WealthTV submitted its pre-filing notice to Comcast, with the statute of limitations close to running out, to allegedly “engage more seriously and productively to see if [the parties] could break through” and conclude a deal. Tr. at 4717:22 – 4718:2 (Bond). Yet, Mr. Bond did not

⁸ Comcast asserts (¶ 68) that it made “two good faith, non-discriminatory offers to carry WealthTV.” No record evidence is cited in support of this assertion.

make a single definitive offer of carriage to WealthTV. Tr. at 4644:9-14 (Bond). There was, by Comcast's concession, never a written or formal proposal made to WealthTV by Comcast, Tr. at 4645:3-5 (Bond), while WealthTV made numerous written, formal proposals to Comcast. Tr. at 4645:9-15 (Bond). Mr. Bond in the late stages of his effort to forestall a complaint suggested possible carriage in one market, Chicago, with possible expansion of carriage no sooner than one year later following an unspecified process of re-evaluating WealthTV's performance. WealthTV Ex. 144 at 45; Tr. at 4657:21-4658:13. More importantly, it became clear in an April 18, 2008 telephone call in which Messrs. Herring and Bond participated that Mr. Bond was not suggesting carriage throughout the Chicago market where Comcast has more than 2.2 million subscribers, but rather only 40,000 subscribers, a small fraction of the total subscribers in the market. WTV PFOF ¶ 160; *see also* Tr. at 4651:8-4656:17 (Bond). Convinced that Comcast was not negotiating sincerely or in good faith, and having so told Mr. Bond, Mr. Herring declined Mr. Bond's suggestion that WealthTV toll the statute of limitations as not purposeful. Tr. at 3625:5-9, 3625:14-16 & 3637:1-18 (Herring).⁹

⁹ Mr. Bond's Written Direct Testimony was not candid on the point of how many subscribers he suggested WealthTV would be exhibited to in the Chicago market during his discussions with WealthTV in April 2008. In his Written Direct Testimony, he stated that "[a]t no time during these discussion did I state that Comcast would agree to distribute WealthTV only to 40,000 WealthTV (*sic*) subscribers." Comcast Ex. 3 at 6-7, ¶ 15. Upon cross examination, he was forced to concede that the number pertinent to the April 2008 discussions was in fact only 40,000 subscribers and nothing like the 2.2 million subscribers Comcast has in the Chicago market:

Q. So is it fair to say that when you say in your testimony that at no time during these discussions did I state that Comcast would agree to distribute WealthTV only to 40,000 WealthTV subscribers, you had in mind a relationship, a deployment that might grow over time, but the lower bound could be as low as 40,000 at the start, correct?

A. At the start, but yes, the assumption was the distribution would grow over time.

Tr. at 4656:7-17 (Bond).

2. The Testimony of Alan Dannenbaum is Unreliable and Should be Given No Weight

35. Defendants' Joint Findings points to the testimony of Alan Dannenbaum to support Comcast's contention that the existence of MOJO had no impact on its decision of whether or not to carry WealthTV. Defs. PToF ¶ 70. But Mr. Dannenbaum's testimony lacks credibility and should be afforded no evidentiary weight. Mr. Dannenbaum was unable to provide a straightforward answer as to why he could not definitely say whether he did or did not make a call to Adelphia official Judy Meyka to instruct her not to allow WealthTV's signed agreement to replace the channel Chronicle on Adelphia's Systems to proceed. Under cross-examination, he was forced to admit that he could not swear that he did not make the call because he learned that that called party, Ms. Meyka, affirmed that he did call her:

Q [Ms. Mumaw] Thank you.

Earlier you testified that you didn't believe that you called Adelphia to discuss carriage of Wealth TV programming. Does that mean that you don't recall or that you didn't make the call?

A I am - you know, almost 100 percent certain I didn't make the call. I didn't want to say, yes, absolutely I didn't make the call if for some reason I don't remember making that call and it turns out I did. I don't believe I did. I don't have any recollection of doing so. I am virtually 100 percent certain I did not do so. But I can't - I just couldn't say with 100 percent certainty I never called. You have to understand there is interaction between people in the industry that happens, at cable shows and whatever. I honestly don't think I made the call.

Q Is there something in particular that is making you hesitate on giving those percentages?

A The only thing that is making me hesitate is that they asked Judy Meyka, and she said I called. But I don't think I did. I think the answer is, I didn't call. But I didn't feel 100 percent absolutely certain to say that in my sworn testimony.

Tr. at 4778:20-4780:4. Accordingly, Mr. Dannenbaum's testimony should be given no weight.

G. Time Warner Cable

36. In light of the nature of TWC's offer of carriage to WealthTV, WealthTV's rejection of TWC's offer was reasonable. TWC offered to provide WealthTV with a Hunting License to pursue carriage on its individual Systems. Pursuant to the terms of the offer, WealthTV would be required to provide TWC with its HD VOD service for free making it available to TWC's Systems nationwide without any promise that its Linear feed would be carried anywhere.¹⁰ TWC Ex. 52; TWC Ex. 83 at 9-10, ¶ 22, (Goldberg Direct Test.). As a result, this offer provided nothing of value to WealthTV and was at odds with Ms. Witmer's testimony that TWC would not customarily or reasonably expect to offer a programming service's VOD signal without commensurate Linear carriage. Tr. at 4012:13–4013:15 (Witmer). TWC's witnesses claimed that TWC offered WealthTV Linear carriage in one market, allegedly San Antonio, but TWC does not dispute that no such offer was ever presented in writing. TWC Ex. 83 at 10, ¶ 23; TWC Ex. 84 at 10-11, ¶ 26. At no point did Mr. Herring "turn[] down his own deal" as asserted in Defendants' Proposed Findings (¶ 64). In light of the unreasonableness of TWC's carriage offer, WealthTV was justified in rejecting it.

37. In addition to claiming that WealthTV rejected reasonable offers of carriage, TWC also suggests in Defendants' Proposed Findings that WealthTV's declining to allow the San Antonio VOD trial contract to renew was unreasonable. Defs. PFOF ¶¶ 54-55. But WealthTV's participation in the trial was based on its understanding, based on conversations with Mickey Carter, that a Linear carriage deal between WealthTV and TWC was imminent. WealthTV Ex.

¹⁰ Andrew Rosenberg testified that he did not know until subsequent to his discussions with WealthTV that San Antonio was willing to launch WealthTV. Tr. at 4249 (Rosenberg). Moreover, no term of carriage was specified. Tr. at 3368-3369 (Herring).

144 at 33. Once it became apparent that Mr. Carter's statement could not be relied upon, WealthTV declined to continue to participate in the trial, which involved supplying VOD programming to TWC's San Antonio System without compensation to WealthTV and at WealthTV's expense. TWC Ex. 32; WealthTV Ex. 144 at 33-34.

H. BHN Told WealthTV that it Would Not Carry WealthTV Unless WealthTV Secured a Carriage Agreement with TWC

38. Despite BHN's allegations to the contrary, WealthTV's decision in early 2007 to stop pursuing carriage on BHN directly with BHN was reasonable in light of statements made by BHN executives. Defendants' Joint Findings misleadingly suggests that WealthTV was less than diligent in pursuing carriage with BHN. Defs. PFOF ¶¶ 209-211 & 216. But Steve Miron, then the President of BHN, informed WealthTV that it would be a waste of time for WealthTV to try to negotiate carriage with BHN unless and until it had secured an Affiliation Agreement with TWC. BHN Ex. 9 at 4-5, ¶ 12. As a result, WealthTV's decision to discontinue pursuing carriage negotiations directly with BHN was reasonable in light of Mr. Miron's statements to WealthTV personnel.

39. Moreover, Mr. Miron was held out to WealthTV as the unique person at BHN's headquarters with whom WealthTV could deal if it desired to discuss carriage. *See* WealthTV Ex. 52; WealthTV Ex. 144 at 41. Once Mr. Miron refused to meet with WealthTV and informed WealthTV that it was futile to continue discussions unless WealthTV obtained an agreement with TWC, no further negotiations were possible.

1. BHN Theoretically Had the Ability To Negotiate Carriage Agreements Independent of TWC But as a Practical Matter Rarely Did

40. BHN's parent company is the Time Warner Enterprise/Advance Newhouse Partnership ("TWE/AN"), a partnership between TWC and Advance-Newhouse. BHN Ex. 9 at 1, ¶ 2.

Pursuant to the terms of that partnership, BHN is covered by the Affiliation Agreements that TWC enters into with Video Programming Networks. *Id.* at 2-3, ¶ 7. In addition to the Affiliation Agreements that TWC negotiates on its behalf, BHN is also permitted to negotiate directly with Video Programming Networks. Tr. at 4441:19-4442:3 (Stith).

41. Despite BHN's claimed authority to negotiate on its own behalf, both of BHN's witnesses conceded that the practice and policy of BHN was to rely on TWC to negotiate Affiliation Agreements with national Video Programming Networks. Tr. at 4441:1-7 (Stith). Mr. Miron could recall only two occasions in recent years when BHN negotiated Affiliation Agreements with national Video Programming Networks independent of TWC.¹¹ Tr. at 4509:1-17 (Miron). During that same period, TWC reached Affiliation Agreements covering over 100 new channels for itself and BHN. *See* TWC Ex. 56; TWC Ex. 81 at 4-5, ¶ 10. Obviously, BHN's independent negotiations are a rarity representing only a tiny fraction of the Affiliation Agreements it is bound by.

42. BHN is owned by TWE/AN. Tr. at 4482:4-6 (Miron). Two-thirds of TWE/AN is owned by TWC. Thus, BHN is effectively owned two-thirds by TWC with the remaining one-third owned by Advance/Newhouse. In these ownership circumstances, it is implausible to argue

¹¹ On one of those occasions, with respect to A&E, BHN's negotiations came about as an accident of timing because TWC wanted to postpone its own discussions with A&E for strategic reasons. Tr. at 4509:20-4510:12 (Miron).

that BHN's decision-making with respect to programming decisions is truly independent of TWC.

2. BHN's Decision Not To Carry WealthTV Was Not the Result of Its Evaluation of WealthTV Under its Claimed Criteria

43. BHN claims that it made a decision not to carry WealthTV based on an evaluation of the same criteria that it applies to all Video Programming Networks seeking carriage on BHN. Tr. at 4485:2–4486:18 (Miron). However, this allegation is contradicted by the fact that Mr. Miron refused even to meet with WealthTV to discuss carriage until such time as WealthTV had entered into an Affiliation Agreement with TWC. Tr. at 4506:20–4507:14 (Miron); BHN Ex. 9 at 4-5, ¶ 12. Because Mr. Miron was identified to WealthTV upon its inquiry as the sole person responsible for making carriage decisions at BHN and Mr. Miron refused to meet with WealthTV to discuss carriage, it would have been impossible for BHN to have reached an informed decision regarding WealthTV based on its claimed criteria. As a result, BHN's allegation that it reached a decision on WealthTV based on an evaluation of it under its claimed criteria is baseless and without merit.

I. WealthTV Diligently and Persistently Pursued Carriage with Cox After 2004 and Through 2008

44. Mr. Wilson acknowledged that WealthTV had been persistent in contacting Cox to seek carriage for years after his alleged denial of carriage. Tr. at 4920:17-20 (Wilson). Cox's assertion that it made a final decision in 2004 at its first meeting with WealthTV, before the Launch of MOJO, does not comport with record evidence demonstrating that Mr. Wilson continued to meet with and receive communications from WealthTV's representatives regarding WealthTV's carriage on Cox's Systems. *Id.* at 4920:1-16.

II. Defendants Discriminated Against WealthTV By Carrying MOJO While Denying Carriage To WealthTV, Despite Their Substantial Similarities

A. Programming Service's Target Demographic is the Audience to Which the Programming Service Intends to Appeal

45. Contrary to Defendants' assertions in their proposed findings of fact, there is no confusion concerning WealthTV's target demographic. A target demographic is what a network wants to be and the demographic it hopes to reach. Tr. at 3772:12–3773:10 (McGovern); Tr. at 5225:12-17 (Egan). Accordingly, there is no more authoritative source for a programming service's target demographic than what the programming service tells MVPDs its target demographic is. Tr. at 3661:1-5 (Herring).¹²

B. WealthTV Has Consistently Described its Target Demographic as Males, 25 to 49 Years of Age and Did Not Invent this Target Demographic for Purposes of This Litigation Contrary to Defendants' Charge

46. WealthTV stated its target demographic clearly and repeatedly in numerous presentations to Defendants. WealthTV Ex. 144 at 12; *see* Defs. PFoF ¶ 283 & n.565. WealthTV's target demographic is and always has been males between the ages of 25 and 49. Defendants' suggestion that WealthTV invented its target demographic for purposes of this litigation is completely without foundation in the record evidence.

¹² The cited excerpt is as follows:

Q [Mr. Cohen] Did you not understand that programmers sometimes ask for research from cable networks to demonstrate that they're actually describing their demographic correctly? That's not something you understand?

A I think there's a fundamental difference, and the fundamental difference is we determine what our target audience is, and whether we hit that target audience is another story.

Tr. at 3660:17-3661:5 (Herring)

47. Defendants argue that statements by Mr. Herring that WealthTV's Video Programming Network has appeal to individuals outside of the males age 25 to 49 demographic is inconsistent with having a target demographic of males age 25 to 49. *See, e.g.*, Defs. PFoF ¶ 285. However, as even Defendants' own expert acknowledged with respect to MOJO, the fact that a Video Programming Network has appeal outside its target demographic does not mean that the network's target demographic has changed and is not otherwise inconsistent with its target demographic. *See* Tr. at 5227:9-17 (Egan).

C. Defendants Concede that WealthTV Articulated Its Stated Target Demographic as Males 25 to 49 Years of Age in Several Presentations to Defendants

48. At trial, Defendants tried to make much of the absence among discovery materials of presentation decks labeled as prepared for TWC and Cox that contained the demographic slide admitted as WealthTV Exhibit 2, which clearly states the target demographic of WealthTV as males between the ages of 25 and 49. In Defendants' Proposed Findings, however, Defendants now acknowledge that Exhibit 2 was contained in "several presentations" made to Defendants. *See* Defs. PFoF ¶¶ 5, 283 & n.565.¹³

D. WealthTV and MOJO Carried Similar Programming

49. In paragraphs 100 through 104 of WealthTV's Proposed Findings of Fact and Conclusions of Law ("WealthTV's Findings" or "WTV PFoF"), WealthTV proposed findings of fact, supported by record evidence, that WealthTV and MOJO carried similar programming. WealthTV and MOJO offered programming series that were similar to one another, such as *Fueled* on MOJO and *Wealth on Wheels* on WealthTV, with both shows featuring high-end

¹³ Defendants characterize WealthTV Exhibit 2 as stating WealthTV has broad appeal skewed toward educated, high income males. Defs. PFoF ¶ 283 n.565. However, although the demographic slide makes this statement, it also makes clear that WealthTV's target audience is men ages 25 to 49. WealthTV Ex. 2.

automobiles. WTV PFoF ¶ 100. As WealthTV's expert Ms. McGovern noted, 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, ¶ 10 (Amended McGovern Written Test.).

50. Defendants attempt to discredit Ms. McGovern's opinions regarding the similarity between WealthTV's and MOJO's programming by pointing out that, in connection with her opinion, she viewed only a handful of WealthTV programs, programs that Mr. Herring had provided to her. *See* Defs. PFoF ¶ 302. But Ms. McGovern's methodology, in contrast to Mr. Egan's, replicates what a programming executive actually does in the real world in deciding whether to carry a Video Programming Network. Mr. Egan acknowledged that the analysis he did to support his testimony was different and more extensive than what he did as a programming executive. *See* Tr. at 5219:1-17 & 5242:10-13 (Egan).

51. Moreover, Defendants fail to acknowledge that Ms. McGovern has over 28 years of experience in the cable television industry, including experience in negotiating Affiliation Agreements with Video Programming Networks on behalf of MVPDs. WealthTV Ex. 152 at 1-5, ¶¶ 1-6. Ms. McGovern was offered as an expert in cable television program development, sales, and programming for multichannel distributors and acquisition of programming by multichannel distributors and her qualifications were accepted as such. Tr. at 3711:17-3713:6 (colloquy of Presiding Judge and counsel). As a result, Ms. McGovern's opinion is offered from the viewpoint of an MVPD programming executive evaluating networks on behalf of an MVPD. From that viewpoint, in Ms. McGovern's opinion, she viewed a sufficient amount of programming to reach the conclusion that WealthTV's and MOJO's programming was similar to an extent beyond the casual similarity that may ordinarily occur. Tr. at 3867:18-3869:13

(McGovern); WealthTV Ex. 152 at 6, ¶ 10. Because this is the perspective most relevant to evaluating networks in connection with carriage decisions, Sandy McGovern’s opinion is entitled to significant weight.¹⁴

52. In addition to the similarities between the individual program series offered by WealthTV and MOJO, both Video Programming Networks offered programming that falls into the same category and/or Genre. This fact is borne out both by the programming itself, as well as in the manner both Video Programming Networks marketed themselves. *See* WTV PFoF ¶¶ 102-104.

53. Although Defendants have denied copying WealthTV, both with respect to HDNet and Plum TV, Defendants acknowledge iN DEMAND’s looking to existing competitor Video Programming Networks for concepts and ideas to aid it in developing affiliated channels. Tr. at 4881:10–4882:11 (Wilson); Cox Ex. 84 at 11-12, ¶¶ 37-39. With respect to HDNet, Mr. Wilson admitted that the idea behind INHD and INHD2 was to create channels that were “very similar,” Tr. at 4878:13-15, “equivalent,” Tr. at 4880:11-14, and “relatively comparable,” Tr. at 4882:5-6, to HDNet. With respect to Plum TV, Mr. Asch acknowledged that in connection with the transformation of INHD to MOJO, iN DEMAND studied Plum TV, but “decided not to emulate PlumTV.” Cox Ex. 84 at 12, ¶ 39.

54. Further, Mr. Asch denied any awareness of WealthTV prior to December 2007 when the instant lawsuit was filed, Cox Ex. 84 at 12, ¶ 40, even though WealthTV had prominent displays at the Cable Show for each of the years that Mr. Asch was involved with INHD and MOJO and

¹⁴ Ms. McGovern’s decision to limit, upon further reflection, the scope of her testimony by deleting references to deliberate copying and her views on an appropriate remedy have no impact on the weight of her opinion regarding the striking similarities between the programming offerings of the two Video Programming Networks. *See, e.g., Nucor Corp. v. Bell*, C/A No. 2:06-CV-02972-DCN, 2008 WL 4442571, at *6 (D.S.C. Jan. 11, 2008) (finding that withdrawal of one aspect of expert’s testimony did not render remaining testimony inadmissible).

had taken numerous other steps to make its brand and presence known in the industry. WealthTV Ex. 144 at 19-20. At the time of WealthTV's Launch in 2004, it was one of only a handful of national cable channels to offer an HD network service. WealthTV Ex. 144 at 2. WealthTV also issued numerous news releases including a release covering its Launch of its HD VOD services on TWC's San Antonio System. *See* WealthTV Ex.93. Mr. Asch nevertheless claims that the many steps that he and others at iN DEMAND took to determine how to transform INHD into something more appealing, including their "extensive research," their viewing of "countless hours" of the programming of other Video Programming Networks, and their outreach to "broadcasting and cable industry professionals" failed to come across any reference to WealthTV. Cox Ex. 84 at 11-12, ¶ 38.

1. The Testimony of Defendants' Expert Witness Michael Egan is Unreliable and Should Be Given No Weight

55. Defendants rely on the testimony of their expert witness, Michael Egan, to refute the record evidence that the programming of MOJO and WealthTV is similar. But Mr. Egan's testimony is unreliable and not deserving of any evidentiary weight. A key issue regarding the similarities between WealthTV and MOJO is whether they share the same target demographic. WealthTV contends that they do and Defendants contend that they do not. Resolving that issue requires a clear record as to what the target demographic of MOJO is. Mr. Egan gave contradictory testimony on this point and it should, therefore, be disregarded.

56. In his declaration dated February 4, 2008 filed in connection with TWC's Answer to WealthTV's Complaint, Mr. Egan swore under oath that MOJO's target demographic was men age 18 to 49. Later, in his Expert Report dated February 27, 2009, Mr. Egan swore under oath that MOJO's target demographic was men age 25 to 49. When questioned regarding his

conflicting sworn statements at his deposition, Mr. Egan stated that, after further evaluation between the time of filing of his February 2008 declaration and February 2009 report, his opinion regarding MOJO's target demographic had changed. But at trial, when questioned at trial regarding his conflicting sworn statements, Mr. Egan swore under oath that the variance was "a typo." WealthTV Ex. 270; Tr. at 5197:4–5198:13, 5200:9–5201:14 (Egan). Defendants attempt to gloss over this disparity in sworn testimony in their Joint Filing, *see generally* Defs. PFOF ¶¶ 273-282, but the record evidence of contradictory sworn testimony is clear. In light of Mr. Egan's cavalier treatment of his sworn statements and testimony, his opinions are entitled to little weight.

57. In addition to Mr. Egan changing his testimony, his opinions are also unreliable and not deserving of evidentiary weight in light of the fact 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" that he claims demonstrates material differences between WealthTV's and MOJO's programming. Tr. at 5168:13-15 (Egan). But Mr. Egan admitted that his "genre analysis" is "not a standard tool used . . . by experts in [the] field of program acquisition." *Id.* at 5217:11-18. Mr. Egan had "never used any similar methodology in any other expert testimony." *Id.* at 5220:1-4. 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" admitting that there are "elements of subjectivity" to his classifications. *Id.* at 5220:14–5221:1, 5226:11-14.

58. Mr. Egan's Genre analysis of MOJO is also at odds with MOJO's announced description of its programming. MOJO describes its programming lineup, in its March 19, 2007 press release, as including "new series spanning adventure travel, comedy, finance, music, cuisine, and

spirit and high tech toys.” WealthTV Ex. 94. Mr. Egan determined that the top five defining Genres of MOJO are Sports, Music, Movies, Documentary, and Reality programming. TWC Ex. 85 at 6-7, ¶ 10 & Table 1 (Egan Direct Test.); Defs. PFoF ¶ 275. There is only one category in common between Mr. Egan’s analysis and MOJO’s description of itself – music. This is another reason that Mr. Egan’s analysis should be given no weight.

59. Mr. Egan’s testimony is also unreliable and not deserving of evidentiary weight in light of his unwillingness to acknowledge clear changes in MOJO’s audience demographics from the time period during which it was operated as INHD and the period after iN DEMAND Launched MOJO – changes identified in his own written testimony. According to Mr. Egan’s testimony, during the summer of 2005, 20% of INHD’s viewership was 55 and over. In the fall of 2007, after MOJO’s Launch, the percentage of MOJO’s viewers age 55 and over had almost doubled to 39%. TWC Ex. 85 at 22, ¶ 29 & Table 10. This represented almost two-fifths of MOJO’s viewership and was greater than the percentage of MOJO viewers that were age 18 to 35 (which included the lower band of MOJO’s target demographic) and the percentage of MOJO viewers that were age 35 to 54 (which included the upper band of MOJO’s target demographic). *Id.* Despite this clear evidence that the switch from INHD to MOJO had changed its demographics, Mr. Egan stated that this did not affect his opinion of MOJO’s target demographic. Tr. at 5225:5-9 (Egan). Nor was Mr. Egan able to respond as to how the testimony of members of iN DEMAND’s Board of Directors, contradicting his testimony about MOJO’s demographic, affected his opinion. Tr. at 5203:18–5204:1 (Egan).

60. Mr. Egan’s analysis of MOJO’s “Look and Feel” was not performed in a formal nature nor was the viewing performed in preparation of his analysis as an expert witness. Tr. at

5250:8–5252:13 (Egan).¹⁵ To the best of Mr. Egan’s recollection, he watched MOJO “maybe approximately a year before” he wrote his declaration. *Id.* at 5251:4-7. His viewing was from his home once or twice a week with a beer in his hand and his feet kicked up. *Id.* at 5251:13-18. When asked if his viewing was as an expert analyzing the program or if he was relaxing and just watching for comfort, Mr. Egan acknowledged his viewing was for comfort. *Id.* at 5251:21–5252:8. Relying on such “analysis” based on Mr. Egan’s habit of viewing MOJO once or twice a week as a sporadic casual viewer approximately a year prior to his declarations falls well short of any reasonable analysis, and for this additional reason Mr. Egan’s analysis should be given no weight.

61. Finally, Mr. Egan’s opinions are unreliable and not deserving of evidentiary weight because his professional career has been intertwined with TWC resulting in a lack of objectivity and independence. A company in which Mr. Egan was a principal, Renaissance Media Partners, LLC, was a business partner of TWC in a venture called Renaissance Media Holdings, LLC (“Holdings”), which acquired and operated a number of former TWC Cable Systems. TWC Ex. 85 at 2-3, ¶ 3; Tr. at 5208:10-16 (Egan). TWC had a continuing interest in these systems even after their sale because of its interest in Holdings. Tr. at 5207:1-11 (Egan). Although Mr. Egan described TWC as a passive investor in the venture, on cross-examination he acknowledged that TWC was responsible for program management functions for national Video Programming Networks with respect to the Cable Systems owned by Holdings. *Id.* at 5210:1-9. Eventually, the co-owners of Holdings sold the Cable Systems to a third party in what Mr. Egan acknowledged was a “profitable sale” for him. *Id.* at 5211:7-9 & 5214:12-20. In addition to Mr.

¹⁵ Although Mr. Egan states in the quoted portion of the transcript that his “Look and Feel” analysis was formal, his description of his method of analysis contradicts this statement. *See* Tr. at 5250:13–5252:8 (Egan).

Egan's dealings with TWC in connection with his involvement in acquisition, operation and sale of Holdings, Mr. Egan also worked in conjunction with TWC as a result of the sale of Cablevision Industries, Mr. Egan's previous employer, to TWC. Tr. at 5159:15–5160:7 & 5244:15-21. These extensive and profitable dealings with TWC clearly call into question Mr. Egan's objectivity and independence.

62. In light of the numerous indicia of unreliability related to Mr. Egan's testimony, the Presiding Judge should afford his testimony and opinions contained therein no weight.

2. WealthTV Had Superior Attributes Over MOJO To Which Defendants Did Not Accord Due Weight

63. 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 4332:17–4333:6 (Asch); Cox Ex. 84 at 19, ¶ 67. In contrast, in addition to its HD service, WealthTV was also available as an SD down-converted feed. WealthTV Ex. 144 at 1-2. WealthTV was also available and offered to Defendants almost three full years before iN DEMAND Launched MOJO in 2007. WealthTV Ex. 144 at 1.

64. 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, ¶ 12. Defendants did not give either of these attributes due weight in their carriage decisions.

65. WealthTV had been offering HD VOD since 2006. WealthTV Ex. 144 at 33. MOJO didn't offer HD VOD until August of 2007. *Id.* at 37. WealthTV offered four times the hours of content compared to MOJO. WealthTV worked closely with TWC and GDMX, a video

company that had had problems in the past when relied upon by TWC to help TWC Launch others' HD VOD. *Id.* at 34. WealthTV was the first Video Programming Network to successfully deploy free HD VOD for TWC in San Antonio, five months ahead of MOJO's HD VOD offering. *Id.* at 33.

66. Unlike MOJO, WealthTV is carried by all three traditional telecommunications companies to Launch video services, namely AT&T U-verse, Verizon FiOS, and Qwest. WealthTV Ex. 144 at 23. In addition, WealthTV received carriage on VOOM, the DBS platform that was shut down in 2005. *Id.* To date, WealthTV has over 125 Linear video distribution partners providing WealthTV's 24/7 network into homes across the United States. *Id.* at 23.

67. WealthTV offered its services free to the Defendants from 2004 through the end of 2008. *See* WealthTV Ex. 144 at 29. Compared to the amounts that Defendants paid iN DEMAND for INHD and MOJO for the same period, the cost savings to Defendants and their subscribers were substantial, representing tens of millions of dollars and potentially even more.

3. Defendants Paid iN DEMAND Excessive Amounts in the Tens of Millions of Dollars in 2007 Alone While Claiming that WealthTV's Offer, Which Included Free Carriage Through 2008, Was Too Expensive

68. Defendants claim that WealthTV's carriage was not of interest to them because of the "high license fees" that WealthTV sought. Defs. PFOF ¶ 89. But the figures furnished in Defendants' witnesses' testimony demonstrate that Defendants paid their wholly owned subsidiary, iN DEMAND – tantamount to paying themselves – in excess of \$50 million dollars in 2007 for MOJO.¹⁶ Moreover, this amount – \$50.4 million dollars – represents a wholesale

¹⁶ Melinda Witmer testified that Defendants were paying iN DEMAND \$0.14 per month per Digital subscriber in 2007 for INHD and MOJO. Tr. at 4020:20–4021:15. Mr. Asch testified that the Defendants collectively had well over 30 million Digital subscribers. Cox Ex. 84 at 19,

amount, not the retail amount charged to or absorbed by the consumer insofar as some of the Defendants required additional payments by subscribers to view INHD and MOJO. Tr. at 5007–5008 (Wilson). This same rate structure was evidently in effect prior to 2007, going back to the Launch of INHD in 2003. Cox Ex. 84 at 22, ¶ 80. iN DEMAND did not offer a free period for INHD or MOJO. Tr. at 4648 (Bond). Thus, Defendants paid iN DEMAND tens of millions of dollars during the same years that WealthTV was indisputably offering its service for free which would have been a sizeable savings to Defendants and their subscribers.

III. Defendants’ Efforts To Downplay INHD and MOJO Are Unsupported by the Record and Do Not Excuse Their Favoritism Toward Those Affiliates

A. INHD and MOJO Were Not the Same Programming Services

69. Defendants argue that MOJO and INHD were the same programming service and that MOJO was merely a Rebranding of INHD. Defendant Cox asserts that it cannot have discriminated against WealthTV because it agreed to carry INHD beginning in 2003 before WealthTV was available for Launch. Cox asserts that the transition to MOJO was merely a Rebranding of INHD that did not require a subsequent carriage decision. The other Defendants

¶ 67. This sums up to \$50.4 million in payments from Defendants to iN DEMAND in 2007 (\$0.14 * 12 months * 30 million subscribers).

While these figures come directly from Defendants’ witnesses’ sworn testimony, they do not square with information provided by iN DEMAND’s management to its Board of Directors.

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also assert that MOJO was merely a Rebranding of INHD. This claim of Rebranding, however, is not supported by the record evidence.

70. In WealthTV's Proposed Findings, WealthTV highlighted record evidence showing that MOJO was much more than a Rebranding of INHD. WTV PFOF ¶¶ 26-33 & 268-269. The transition from INHD to MOJO involved retiring certain programming, including children's programming, developing, and Launching new and original series, identifying a target demographic for MOJO (INHD did not have a target demographic¹⁷), and bringing what Defendants' witnesses conceded was very random programming more into line with MOJO's target demographic. This belies Defendants' assertion that INHD focused on a "steady diet of sports, action movies, rock concerts and similar events." Defs. PFOF ¶ 238.

B. INHD and MOJO Were Not Temporary, Placeholder Programming Offerings

71. As developed below in Complainant's Proposed Reply Conclusions of Law, Defendants' argument that INHD and MOJO were temporary, placeholder channels has no legal significance or relevance because the law contains no exception allowing for discrimination in favor of temporary offerings. *See* WTV RCoL ¶ 127. Moreover, despite Defendants' assertions, INHD and MOJO were not temporary, placeholder offerings that were meant to be shut down when HD feeds of existing SD channels became available. *See* Defs. PFOF ¶ 134. Instead, they were genuine Affiliate offerings that took up Bandwidth on Defendants' Systems that could have been made available for carriage of WealthTV. Collectively, Defendants carried INHD and MOJO on their Systems for five years. This is consistent with Mr. Bond's testimony that when the

¹⁷ Defendants assert that INHD and MOJO had the same demographic. Defs. PFOF ¶ 256. But the record evidence refutes this, showing that INHD lacked any focus on a target demographic. Tr. at 4297-98 & 4363-65. Part of the process for turning INHD into MOJO involved making it more appealing as a destination for male viewers. Tr. at 4326-4327.

channels were Launched, he could foresee long-term carriage if they developed a compelling offering. Tr. at 4737:17–4738:12 (Bond). MOJO developed and produced original content in the form of several new series, Cox Ex. 84 at 15-16, ¶¶ 50 & 54, hardly an investment befitting a stopgap offering.

72. iN DEMAND marketed INHD and MOJO to other MVPDs. Tr. at 4349–4351 (Asch). There is no record evidence that in pitching such MVPDs for carriage, including Cablevision Systems Corp. (“Cablevision”), which carried MOJO, and DIRECTV and the DISH Network, which refused carriage, that iN DEMAND disclosed or highlighted the allegedly temporary nature of the offering. For “non-owners” such as Cablevision that carried MOJO, “iN DEMAND tied distribution of MOJO to other products” to enhance the appeal of MOJO. Cox Ex. 31 (undated email from Wilson to Witmer and Bond).

73. David Asch testified that the decision to shut down MOJO was a disappointment to the management of iN DEMAND because they intended to continue to build and grow the brand and had pitched it to the Board of Directors as such. Tr. at 4410:6-16 (Asch).

74. What actually fueled the shut down of MOJO was Mr. Wilson’s discovery that few viewers watched it. See Cox Ex. 35 (Wilson email outlining results of viewership study indicating low MOJO viewership behind everything except Animal Planet). Far from supporting Defendants’ contention that Launching INHD and MOJO were stopgap strategies, the presentations to the Board of Directors indicate a desire to grow the business represented by the channels. **BEGIN HIGHLY CONFIDENTIAL** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **END HIGHLY CONFIDENTIAL**

75. Moreover, there was nothing temporary about the business proposition for INHD, which was to provide a competitive answer to the HD programming offered by the Defendants' competitors. Tr. at 4880 (Wilson), which carried HD Net. *Id.* at 4870:14–4871:5. As Mr. Wilson describes it, “So [iN DEMAND’s] idea was, let’s give our owners two channels to try to have the equivalent of what our competition had.” *Id.* at 4880:11-14.

76. The two channels Mr. Wilson referred to in his testimony were INHD and INHD2, both launched and carried by Defendants. By 2005, INHD and INHD2, however, no longer resonated as channel names from the marketing perspective. Tr. at 3972:11-16 (Witmer); *see id.* at 4327:2-8. INHD would have to evolve from a network that aired random programming, , designed to showcase HD technology. Tr. at 4312:6-12 & 4344:7-20 (Asch); Cox Ex. 84 at 6, ¶ 18. Instead of shutting down the twin channels in line with Defendants’ alleged stopgap strategy with respect to them, beginning in mid-2005, iN DEMAND spent considerable efforts to develop a long term strategy for the channels.

77. iN DEMAND’s research preceding its proposals to its Board of Directors related to INHD and INHD2 included studying other Video Programming Networks, soliciting proposals from other cable industry participants, and considering the model of Plum TV, which Mr. Asch testified that iN DEMAND decided “not to emulate.” Cox Ex. 84 at 11-12, ¶¶ 37-39. iN DEMAND proposed to its Board of Directors, to turn INHD2 into a competition or sports enthusiast channel to be called H2H for “Head to Head” and to turn INHD into a “lifestyle

channel” for the young male demographic to be called “MOJO.” Tr. at 4327:2–4328:8 (Asch). Thus, iN DEMAND’s recommendation provided for two separate themed channels focused on lifestyle and competition sports content. Tr. at 4388:18–4389:1 (Asch). iN DEMAND’s Board of Directors rejected the proposal for H2H. Cox Ex. 84 at 14, ¶ 47.

78. iN DEMAND concluded that it would compete more significantly in a lifestyle themed channel as opposed to a competition or sports themed channel. Tr. at 4389:2-13 (Asch). It believed that a lifestyle themed channel might fulfill an underserved marketplace by targeting a male demographic between the younger-skewing and older-skewing existing networks, *id.* at 4388:7–4389:13, and, therefore, took steps to turn INHD into MOJO, a lifestyle themed network. *Id.* at 4389:2-12.

79. According to Mr. Egan, Defendants’ expert witness, “lifestyle” is a common Genre nomenclature in the cable industry, Tr. at 5247:4-12 (Egan) and WealthTV offers a lot of lifestyle programming. *Id.* at 5176:15–5177:6. Consistent with its skew to male viewers between the ages of 25 and 49, WealthTV also describes itself as a lifestyle Video Programming Network. *See* WealthTV Ex. 144 at 17. Thus, at the time that Defendants were Launching MOJO as a new lifestyle Video Programming Network in HD, WealthTV was also available as a competitive lifestyle Video Programming Network available in HD and in a down-converted SD service.

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

A. A Programming Service’s Ability To Attract National Advertisers Depends Upon the Number of Subscribers it Reaches

80. Gary Turner, WealthTV’s advertising expert, testified that, in order for a Video Programming Network to attract national General Market Advertisers, it is necessary for the

Video Programming Network to obtain at least 20 million subscribers. WealthTV Ex. 146, at 2-3, ¶ 6 (Turner Direct Test.). Until a programming service reaches this threshold, it may be unable to even obtain meetings with national general market advertisers. *Id.* Because Defendants combined represent between 40 and 45 million of the approximately 65 million cable video subscriber households in the U.S., Tr. at 2795:9-14 (Turner), their refusal to give fair carriage consideration to WealthTV has had the effect of preventing WealthTV from meeting the 20 million subscriber threshold. As a result, Defendants' conduct has prevented WealthTV from being a viable candidate for General Market Advertising and has thereby unreasonably restrained WealthTV's ability to compete fairly.

81. Defendants attempt to discredit Mr. Turner's testimony in several ways. First, by misrepresenting Mr. Turner's testimony, they attempt to demonstrate that he has provided inconsistent testimony. During the trial and in their Proposed Findings, Defendants quote a portion of Mr. Turner's testimony in which he states that "WealthTV, like all other emerging networks, needs to meet the 20 million subscriber threshold in order to become a viable national advertising source for national general market advertisers." Defs. PFoF ¶ 315; Tr. at 2798:10-20 (Turner); WealthTV Ex. 146 at 2-3, ¶ 6. Defendants attempt to characterize this testimony as an assertion by Mr. Turner that no Video Programming Network will ever, without exception, attract national General Market Advertisers, unless it meets the 20 million subscriber threshold. Defs. PFoF ¶ 315; Tr. at 2798:10-20 (Turner). Defendants then proceed to characterize a statement by Mr. Turner during the trial that the 20 million subscriber threshold is a rule of thumb as inconsistent with his written testimony, thereby making his testimony unreliable. Defs. PFoF ¶ 315; Tr. at 2798:10-20.

82. Defendants' attempt to misconstrue and misrepresent Mr. Turner's testimony in this manner is inconsistent with and ignores statements by Mr. Turner to the contrary. Mr. Turner's statement during his testimony at trial that the 20 million subscriber threshold is a rule of thumb is not the first time he made this point. In fact, Mr. Turner states that the 20 million subscriber threshold is a rule a thumb in his written direct testimony in the paragraph immediately preceding the paragraph containing the statement quoted by the Defendants. WealthTV Ex. 146 at 2-3, ¶ 6. This is inconsistent with an interpretation of Mr. Turner's testimony that attributes to him an opinion that the 20 million is more than a rule of thumb. Defendants' allegation that Mr. Turner provided inconsistent testimony is, therefore, without merit.

83. Second, Defendants attempt to discredit Mr. Turner by pointing out that he was not familiar with and could not identify whether Video Programming Networks with fewer than 20 million subscribers included on a SNL Kagan list were able to attract General Market Advertisers. Defendants claim that this fact proves that Mr. Turner has no support for his opinion regarding the 20 million subscriber threshold. Defs. PFoF ¶ 317; Tr. at 2803:14–2804:10 (Turner); TWC Ex. 64. However, Defendants' position completely ignores the perspective from which Mr. Turner's opinions are offered. Mr. Turner has over 25 years of experience in the media industry, including experience soliciting national General Market Advertisers on behalf of Video Programming Networks. WealthTV Ex. 146 at 1, ¶ 1. Mr. Turner's opinions are, therefore, based on his direct experience speaking to and soliciting advertising executives on behalf of Video Programming Networks and not on an analysis of networks on an SNL Kagan list in an attempt to come up with theories about the behavior of General Market Advertisers. As a result, Defendants' allegations that his testimony is unreliable because of his lack of knowledge of the experiences of certain networks is without merit.

84. Finally, Defendants attempt to discredit Mr. Turner’s opinion that Defendants denial of carriage prevented WealthTV from reaching the 20 million subscriber threshold by pointing out that WealthTV could obtain 20 million subscribers even without being carried by Defendants. Defs. PToF ¶ 320. However, adoption of these arguments would effectively gut Section 616 of the 1992 Cable Act and the Commission’s regulations thereunder of their substance. Their adoption would lead to the result that no individual MVPD can be held liable for discrimination under these provisions because a Video Programming Network like WealthTV has the option of obtaining subscribers by entering into Affiliation Agreements with other, non-discriminatory MVPDs.

B. Defendants’ Discriminatory Conduct Has Impeded WealthTV’s Ability To Receive Fair Consideration for Carriage From Other MVPDs and Has Unlawfully and Unreasonably Restrained its Ability To Compete

85. Defendants acknowledge that MVPDs look at one another’s Channel Line-Ups in connection with carriage decisions. *See, e.g.*, Tr. at 3917:10–3918:1 (Witmer). That is one of the reasons, they allege, that WealthTV’s absence of a carriage agreement with the DBS providers counted against it. *See* TWC Ex. 81 at 14-15, ¶ 32. Defendants also acknowledge WealthTV’s “rapid growth” in subscribers even though WealthTV still is not carried by the country’s largest cable operators, namely the Defendants. Defs. PToF ¶ 309. Defendants argue that WealthTV could enter into Affiliation Agreements with other MVPDs such as Cablevision, and raise WealthTV’s lack of success to date in obtaining such an Affiliation Agreement as evidence that Defendants did not discriminate against WealthTV in their carriage decisions. Defs. PToF ¶¶ 28 & 321. But Cablevision furnishes an example of the significant influence Defendants have in the industry to impede WealthTV’s pursuit of carriage. Specifically, Cablevision cancelled a visit with WealthTV stating “there is not much to gain from such a

meeting, particularly based on your recent pattern of issues with other distributors.” WealthTV Ex. 144 at 51.

86. The record evidence offers other examples of the Defendants’ influence on other MVPDs in the industry. Similar to the way in which BHN can and does ride the TWC Affiliation Agreements, the undisputed testimony of Mr. Herring is that he was directly informed that other cable operators, including Bresnan Communications and Insight Communications, have the ability to ride the Comcast Affiliation Agreements. WealthTV Ex. 144 at 51.

C. Defendants Took Specific Steps That Unreasonably Restrained WealthTV’s Ability To Compete

87. Allen Dannenbaum of Comcast denied in his Written Direct Testimony and in his testimony at trial that he had made a call to Judy Meyka of Adelphia during the time that Comcast’s acquisition of certain Adelphia Systems was awaiting regulatory approval to tell her not to allow WealthTV to replace Chronicle as a channel offering on Adelphia’s Systems. Comcast Ex. 8 at 5, ¶ 12; Tr. at 4754:21–4755:2 (Dannenbaum). WealthTV had signed an agreement with OlympuSat, the company offering Chronicle, to replace Chronicle on Adelphia’s Systems. WealthTV Ex. 144 at 44. But on cross-examination, Mr. Dannenbaum was forced to acknowledge that he had learned that the other party to the call affirmed that he had called her. Tr. at 4778:21–4780:4 (Dannenbaum). Mr. Dannenbaum’s call revoked WealthTV’s opportunity for carriage on Adelphia’s Systems, resulted in a costly lawsuit between WealthTV and OlympuSat, WealthTV Ex. 144 at 44, and unreasonably restrained WealthTV’s ability to compete.

88. Cox refused to allow KLAS, a CBS Affiliate in Las Vegas, to give effect to its agreement with WealthTV for use of one of the multicast feeds to which KLAS was entitled under its

Retransmission Consent agreement with Cox. The KLAS-WealthTV agreement would have enabled WealthTV to reach viewers in the Las Vegas market served by Cox. Tr. at 5296:15–5297:19 (Brennan). Leo Brennan, then the General Manager of the Cox System in Las Vegas, acknowledged that he had the authority to modify Cox’s Retransmission Consent agreement with KLAS to permit the KLAS-WealthTV agreement to go into effect, but refused to do so. Tr. at 5310:18 – 5311:2 (Brennan). Cox thus unreasonably restrained WealthTV’s ability to compete.

V. WealthTV’s Proposed Remedy is Fair and Reasonable

A. Defendants’ Claimed Necessity of Dropping a Carried Channel To Accommodate a Carriage Remedy for WealthTV Is No Barrier To Ordering Appropriate Relief

89. Defendants were on notice of WealthTV’s lawsuits well in advance of the filing of WealthTV’s complaints because of the pre-filing notices required by the Commission’s regulations. The record evidence documents that they continually added new channels throughout the pendency of this litigation. *See* TWC Ex. 56; TWC Ex. 81 at 4-5, ¶ 10; Tr. at 4560:9-11 (Bond); Tr. at 4907:12–4908:3 (Wilson) (20 to 25 channels added in 2007). Moreover, when Defendants ceased carriage of MOJO in December 2008, they freed up Bandwidth to Launch another channel. *See, e.g.*, Tr. at 4741:8-11 (Bond). Thus, Defendants’ claim that imposition of mandatory carriage of WealthTV as a remedy in this case would force them to drop a channel they are already carrying is without merit as a reason for the Presiding Judge to decline to order an appropriate remedy, because if the Defendants’ claim is true, they have put themselves in that position.

B. The Terms and Conditions Sought By WealthTV are Commensurate to Those Accorded to MOJO and are Reasonably Designed To Inhibit Defendants' Retaliation

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

91. [REDACTED]
[REDACTED]
[REDACTED] **END HIGHLY CONFIDENTIAL**

WealthTV has proposed a rate of less than half this amount. At the time of MOJO's Launch on May 1, 2007, the rate was **BEGIN HIGHLY CONFIDENTIAL** [REDACTED] **END HIGHLY CONFIDENTIAL**

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

[REDACTED]

93. [REDACTED]

[REDACTED]

94. [REDACTED]

[REDACTED]

95. [REDACTED]

[REDACTED]

[REDACTED]

96. [REDACTED]

97. [REDACTED]

[REDACTED] END HIGHLY CONFIDENTIAL

COMPLAINANT'S PROPOSED REPLY CONCLUSIONS OF LAW

I. Introduction

98. As Defendants themselves acknowledge, Section 616 of the Cable Act and the Commission's program carriage regulations require WealthTV to make two straightforward showings: (1) that Defendants discriminated in the selection, terms, or conditions of carriage "on the basis of affiliation or nonaffiliation," and (2) that such discrimination "unreasonably restrain[ed] the ability of [WealthTV] to compete fairly." Defs. PCoL ¶ 7; *accord* WTV PCoL ¶ 234. The straightforward, undisputed facts of this case show that WealthTV has satisfied its burden. The evidence is undisputed that Defendants gave preferential treatment to its own affiliated programming vendor, iN DEMAND, in the form of automatic carriage to iN DEMAND's programming services, INHD, INHD2, and MOJO. In doing so, Defendants deprived WealthTV of the ability to compete fairly for carriage on Defendants' systems and obtain access to more than 70% of video cable subscribers in the United States.

99. The core prohibition of Section 616 of the Cable Act and the Commission's program carriage regulations is that multichannel video programming distributors ("MVPDs"), such as Defendants, may not "discriminate . . . on the basis of affiliation or nonaffiliation." 47 U.S.C. § 536(a)(3). Congress directed the Commission to promulgate the program carriage rules out of concern that vertically integrated cable operators would act on their natural structural incentive to "favor their affiliated programming services" over unaffiliated services such as WealthTV. S. Rep. No. 102-92, at 25 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158 ("Senate Report").

Prohibiting such favoritism toward MVPDs' own affiliated programming vendors was a critical objective of Congress.¹⁸

100. The evidence in this case is undisputed that, just as Congress feared, Defendants have, in fact, favored their affiliated programming vendor, iN DEMAND, and its home-grown network, MOJO, to the detriment of WealthTV, which did not have the benefit of such affiliation. That evidence includes the following undisputed facts:

a. The four Defendants, directly or indirectly, were the joint owners of iN DEMAND. WTV PFOF ¶ 16. They also exerted comprehensive control over iN DEMAND via control of iN DEMAND's board of directors. WTV PFOF ¶ 17.

b. All four Defendants carried INHD and INHD2, and then later MOJO, without applying the criteria that they claim to apply when considering carriage for unaffiliated programming networks such as WealthTV. Rather, Defendants' carriage of INHD, INHD2, and MOJO was taken as given because of the relationship between iN DEMAND and its owners, the Defendants. Tr. at 4000-01 (WTV PFOF ¶ 48).

c. TWC's witness, Melinda Witmer, testified that she did not even think of the decision to carry MOJO "in terms of offering carriage." Tr. at 4000-4001 (WTV PFOF ¶ 48). The obvious import of Ms. Witmer's statement is that no decision to "offer carriage" was required, because the Defendants viewed carriage as flowing naturally from their ownership of iN DEMAND.

d. Likewise, Cox's principal witness, Robert Wilson, testified that carriage of MOJO was not the culmination of an evaluation of any enumerated criteria that it applied

¹⁸ Defendants' assertion (Defs. PFOF ¶ 67) that they had no motive to favor their own affiliate, MOJO, is not only unsupported by any record evidence, but also flatly contrary to Congress's dispositive judgment in enacting Section 616.

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 (WTV PFoF ¶ 51).

e. Not only was the decision to carry MOJO automatic, but all four Defendants carried MOJO without any negotiations regarding the terms or conditions of carriage, and without so much as a formal carriage agreement. The reason was simple: Defendants treated MOJO as if it was *their own* network because they owned iN DEMAND. In doing so, they clearly violated the Commission's program carriage rules, which prohibit precisely such favoritism toward affiliated programming services.

101. In contrast to their treatment of iN DEMAND and MOJO, Defendants testified at length that they applied a long list of criteria to WealthTV and other unaffiliated vendors that sought carriage on Defendants' networks. *See, e.g.*, WTV PFoF ¶¶ 56, 193; WTV RFoF ¶¶ 14-26. Defendants, in their own proposed findings of fact, tout those very criteria as legitimate business reasons for denying carriage to WealthTV. Defs. PFoF ¶¶ 114, 142-144. But those purported explanations cannot shield Defendants from liability because Defendants have no evidence – and (with the exception of Cox) do not even argue – that they *ever* applied those criteria to INHD, INHD2, or MOJO. Indeed, the evidence is clear that, had Defendants applied the criteria they claim they applied to WealthTV, MOJO would not have satisfied many of them. *See* WTV PFoF ¶¶ 56-57, 79; WTV RFoF ¶¶ 13-26. The application of two different sets of criteria – one to affiliated vendors such as iN DEMAND and MOJO and another to unaffiliated vendors such as WealthTV is the *essence* of discrimination.

102. Mr. Dannenbaum, then Comcast's Senior Vice President for Content Acquisition, stated that Comcast had no interest in launching WealthTV unless it had a direct ownership interest in

the network. WealthTV Ex. 144 at 44 (WTV PFoF ¶ 154). Not only did Comcast apply arduous carriage standards to WealthTV that it never applied to MOJO, but Mr. Dannenbaum’s testimony indicates that WealthTV was excluded solely on the basis of its lack of affiliation with Comcast.

103. The record evidence also proves that Defendants’ favoritism toward iN DEMAND “unreasonably restrain[ed] the ability of [WealthTV] to compete fairly.” 47 C.F.R. § 76.1301(c). WealthTV’s ability to compete was impaired in two significant ways. First, WealthTV was clearly deprived of the ability to compete on a level playing field with MOJO for carriage on Defendants’ systems. WealthTV had no opportunity to compete for the right to be carried in the slot that Defendants had already reserved for MOJO, on the basis of their affiliation with iN DEMAND. Reserved carriage for affiliates unreasonably restrained the ability of WealthTV to compete fairly.

104. Moreover, Defendants’ favoritism toward their own affiliate unreasonably restrained WealthTV from competing for an enormous segment of the U.S. cable viewership – approximately 45 million video subscribers or 70 percent of the total number of cable video subscribers in the United States. *See* WTV PCoL ¶ 272; WTV PFoF ¶¶ 13, 11. Discrimination that impedes a programming vendor like WealthTV from access to such a large number of potential customers obviously restrains that company’s ability to “compete fairly” in the market for programming services.

II. WealthTV Has Presented Ample Proof that Defendants Discriminated on the Basis of Affiliation Or Non-Affiliation, in Violation of Section 616 and the FCC’s Program Carriage Rules

A. Defendants Misstate the Applicable Legal Framework for Proof of Discrimination

105. As Defendants recognize (Defs. PCoL ¶ 17-18), under well established discrimination principles,¹⁹ proof of discrimination may be established by direct evidence, indirect (*i.e.*, circumstantial) evidence, or a combination of both. WTV PCoL ¶ 237. The classic form of direct evidence is statements by relevant decision-makers that indicate that the decision was based on considerations that are legally prohibited – here, consideration of a company’s “affiliation or nonaffiliation,” 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c). Where a plaintiff lacks direct evidence, it may nevertheless prove discrimination through circumstantial evidence – *i.e.*, by evidence from which a court or jury could infer that the decision-maker relied on forbidden considerations. *See, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

106. Contrary to Defendants’ contention (Defs. PCoL ¶ 8; *see also id.* ¶ 19), it is not the case that no claim of discrimination can be proven without evidence that two companies are similarly situated. In the context of federal employment discrimination law, the requirement of similar situation has been established in cases where a plaintiff seeks to rely on *circumstantial* evidence. The reason for the requirement is straightforward: absent direct evidence of discrimination, a

¹⁹ There is no need to reconcile Defendants’ claim that Congress intended the Commission to be guided by existing discrimination precedents regarding “normal business practices,” Defs. PCoL ¶ 11 & n.722, against the Media Bureau’s view that the *McDonnell Douglas* standard did not apply in a different action involving TWC, *see id.* ¶ 12 & n.724. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Even assuming that the existing discrimination jurisprudence under Title VII of the Civil Rights Act of 1964 – including *McDonnell Douglas* – does apply, WealthTV has satisfied its burden of proof.

plaintiff that merely shows that she was treated differently from another candidate, without showing that the other candidate was similarly situated, has not created any inference of discrimination based on impermissible considerations. *See, e.g., Taylor v. ADS, Inc.*, 327 F.3d 579, 581 (7th Cir. 2003) (“Because he does not have any direct evidence of discrimination, Herbert Taylor must show that similarly situated non-black employees were treated more favorably than he was.”).

107. Critically, however, “the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination.” *Thurston*, 469 U.S. at 121. Where the plaintiff has direct evidence – *e.g.*, testimony by the relevant decision-maker that the decision was based on impermissible considerations – there is no additional requirement to show similar situation. Similar situation is a required element of proof only “when the plaintiff lacks direct evidence of discrimination.” *Benjamin v. Brachman*, 246 F. App’x 905, 923 (6th Cir. 2007) (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir.1992)).

108. Accordingly, under well established discrimination standards, WealthTV may prove Defendants’ discrimination either through direct evidence of such discrimination, or through circumstantial evidence that Defendants treated WealthTV and similarly situated affiliated programming vendors differently. *See, e.g., Lowery v. Hazelwood School Dist.*, 244 F.3d 654, 657 (8th Cir. 2001) (“Sufficient evidence of discrimination [to support ADA] claim may be demonstrated *either* through direct evidence of discrimination, *or* through a disparate-treatment showing that [employee] was treated differently than similarly situated employees.”) (emphases added).

109. Defendants also misstate the burdens of proof and production that apply to a discrimination claim under Section 616 and the Commission’s program carriage rules. As set

forth in WealthTV’s Proposed Conclusions of Law, proof of discrimination is properly judged according to a burden-shifting framework. If WealthTV establishes a *prima facie* case of discrimination, the burden then shifts to the Defendants to justify their conduct by establishing a legitimate, non-discriminatory motive. *See generally* WTV PCoL ¶¶ 227-231. WealthTV continues to urge that the *HDO*’s finding that WealthTV had established a *prima facie* case of discrimination constitutes a binding determination and the law of this case. *See id.* ¶ 235. Nonetheless, even if the Presiding Judge rules that WealthTV continues to bear the burden of proof, as set forth below, the evidence in this case clearly meets that burden.

B. Defendants Have Failed To Rebut WealthTV’s Direct Evidence That Defendants Favored MOJO On the Basis of Its Ownership of iN DEMAND

110. Defendants contend – in a single paragraph of their proposed conclusions of law – that “WealthTV failed to provide any direct evidence that any of the four Defendants discriminated on the basis of affiliation.” Defs. PCoL ¶ 17 (quoted language capitalized in original).

Defendants simply ignore, however, the unrefuted direct evidence that Defendants agreed to carry MOJO (1) without applying any of the criteria applicable to other, unaffiliated carriers; (2) without any negotiation regarding the terms or conditions of carriage; and (3) without even a carriage agreement. *See generally* WTV PFoF ¶¶ 46-86; WTV RFoF ¶¶ 8-26. Defendants’ witnesses – in particular, Ms. Witmer and Mr. Wilson – also testified that Defendants’ carriage of MOJO (as well as INHD and INHD2) was automatic, and taken as a given, precisely because of the Defendants’ ownership of iN DEMAND.

111. This evidence of affiliation-based favoritism is sufficient to establish discrimination “on the basis of affiliation or nonaffiliation” under Section 616 of the Cable Act and the Commission’s program carriage rules. As set forth above, the central, overarching purpose of

the Act and the Commission's regulations was to prevent vertically integrated MVPDs from *favoring* their own affiliates' programming. The legislative record is replete with expressions of Congress's concern that vertical integration "gives cable operators the incentive and ability to *favor their affiliated programming services.*" Senate Report at 25, 1992 U.S.C.C.A.N. at 1158 (emphasis added). As the Senate Committee reporting the Cable Act put it:

Because of the trend toward vertical integration, *cable operators now have a clear vested interest in the competitive success of some of the programming services seeking access through their conduit.* 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 availabilities, and to the disadvantage of those services, including local Independent broadcasting stations, in which he does not have an equity position.

Id. at 25-26, 1992 U.S.C.C.A.N. at 1158-59 (emphases added).

112. Despite this clear legislative history, Defendants contend that their favoritism toward MOJO did not constitute discrimination under Section 616 and the program carriage rules because their executives denied specifically taking MOJO and iN DEMAND into consideration in deciding whether to extend carriage to WealthTV. That contention turns Section 616 on its head. Section 616 prohibits discrimination on the basis of either "affiliation *or* nonaffiliation." 47 U.S.C. § 536(a)(3) (emphasis added). Defendants clearly discriminated on the basis of affiliation by giving INHD, INHD2, and MOJO automatic coverage, while supposedly requiring WealthTV to pass through the gauntlet of onerous criteria that Defendants claim impose on unaffiliated vendors. Even according to the standards adopted by Defendants, the affiliation between Defendants and iN DEMAND had a "determinative influence" and "actually motivated" Defendants' decision to carry MOJO. Defs. PCoL ¶ 13 & nn.726-727 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). The contention that Defendants must

also have had iN DEMAND specifically in mind when it considered whether to carry WealthTV pursuant to these unequally applied criteria finds no basis in the statute, and flies in the face of its overarching purpose to prevent the kind of favoritism that Defendants engaged in here.

113. Moreover, Defendants' contention is contrary to well established discrimination principles. The evidence proves beyond doubt that MOJO, because it was an affiliated network, was given automatic carriage by Defendants on informal terms; WealthTV, which did not have the benefit of affiliation, was subjected to wholly different criteria that MOJO never had to satisfy. That two-track system for determining whether to carry a programming network, and on what terms and conditions, is patently discriminatory. *See, e.g., Eldredge v. Carpenters 46 N. California Counties Joint Apprenticeship & Training Comm.*, 94 F.3d 1366, 1369 (9th Cir. 1996) (holding that a "two-track" system where male employees were subject to a "first-job requirement" that did not apply to women was "not gender-neutral" and therefore discriminatory). That is obviously so even if, in applying the criteria that apply only to those on the second, disadvantageous track, the relevant decision-makers gave no express consideration to the fact that others were completely exempt from those criteria. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating Richmond's set-aside program where minority-owned subcontractors were exempted from the normal bidding process and were given preferential access to subcontracting jobs); *Hopwood v. State of Texas*, 861 F. Supp. 551, 582 (W.D. Tex. 1991) (finding University of Texas law school admissions system discriminatory because it applied different criteria to minority and non-minority applicants, even though non-minority applicants were never explicitly compared to minority applicants but rather evaluated on a completely separate track).

114. WealthTV has therefore presented clear and direct evidence that Defendants discriminated “on the basis of affiliation or nonaffiliation,” in violation of Section 616 and the Commission’s program carriage rules.

C. Defendants Have Also Failed To Rebut WealthTV’s Additional, Circumstantial Evidence of Affiliation-Based Discrimination

115. In addition to WealthTV’s direct evidence, which is alone sufficient to prove discrimination, WealthTV presented ample circumstantial evidence that buttresses the direct evidence of Defendants’ favoritism toward MOJO on account of affiliation.

1. Defendants Granted Carriage to MOJO, But Denied Carriage To WealthTV, Even Though the Two Networks Are Substantially Similar

116. First, the evidence shows that Defendants granted carriage to MOJO, but denied carriage to WealthTV, even though WealthTV and MOJO were “substantially similar” networks. *HDO* ¶ 12.²⁰ Defendants contend that WealthTV’s evidence that MOJO and WealthTV are substantially similar programming networks was rebutted by Defendants’ evidence that “the two networks programmed contrasting genres, had a very different look and feel and targeted different demographics.” Defs. PCoL ¶ 19. These arguments give short shrift to WealthTV’s evidence of the two networks’ programming similarities. *See generally* WTV PFoF ¶¶ 87-106.

117. WealthTV and MOJO had substantial similarities. WealthTV and MOJO both appealed to economically well-to-do, educated male viewers, aged 25 to 49, through programming that focused on exotic sports cars, adult beverages, gadgets and technology, boats, planes, motorcycles, finance, cigars, and other similar upscale, male-oriented themes. WTV PFoF ¶¶ 88,

²⁰ 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*”).

96, 100-104. Both channels sought similar advertisers, like the Grey Goose vodka company. WTV PFoF ¶¶ 91, 94.

118. The testimony of Defendants' expert, Michael Egan, is not reliable and should not be credited. Mr. Egan gave inconsistent testimony regarding the target demographic of MOJO; used a "genre analysis" that he admitted is not standard in the industry; and lacks credibility due to his pervasive ties to TWC. Mr. Egan's assessment of the "look and feel" of MOJO and WealthTV is also unreliable, as it was purely subjective and not based on any reliable methodology. WTV PCoL ¶¶ 256-259; Defs. PCoL ¶ 21.

119. Defendants do not dispute that, under the program carriage rules, a complainant need not show that its programming is identical to an affiliated network in order to demonstrate discrimination. Rather, the relevant inquiry is whether the two networks are "substantially similar." *See* WTV PCoL ¶ 252. WealthTV satisfied that standard here.

2. MOJO Would Not Have Satisfied Many of the Criteria That Defendants Allegedly Relied on To Deny WealthTV Carriage

120. Defendants also claim that they "presented un rebutted evidence demonstrating that [their] consideration of whether to provide carriage to WealthTV was based on non-discriminatory, good faith, editorial and business judgments." Defs. PCoL ¶ 23. The evidence is clear, however, that the criteria that Defendants used to guide these supposedly non-discriminatory business judgments were never applied to MOJO. The evidence of Defendants' application of these supposedly legitimate criteria to WealthTV thus supports WealthTV's discrimination claim, rather than disproving it.

121. Simply put, it is not "non-discriminatory" to apply one set of standards to non-affiliated companies such as WealthTV while giving MOJO automatic carriage due to its affiliate status.

See supra WTV RCoL ¶ 113 . No matter how reasonable the standards themselves may be, the fact that Defendants never applied them to MOJO, and only applied them to unaffiliated vendors like WealthTV, is strong evidence that they engaged in discrimination on the basis of affiliation.

122. Furthermore, as set forth comprehensively in WealthTV’s proposed findings of fact and conclusions of law, the evidence demonstrates that MOJO would have failed to satisfy many of those criteria had they been applied. *See* WTV PFoF ¶¶ 56-84. Although Defendants claim that WealthTV was denied carriage, among other things, because its management lacked programming experience and it was not carried by competitors such as DirecTV and DISH, the same was true of MOJO.

123. Tellingly, *only Cox* contends in its proposed findings of fact that it applied its standard criteria to INHD and MOJO. Defs. PFoF ¶¶ 164-169. But Cox’s assertion is unsupported by the record, *see* WTV RFoF ¶¶ 10-12 , and also fails to address the unrefuted evidence that MOJO lacked many of the attributes that Defendants cited as reasons for not carrying WealthTV.

124. The evidence is clear that the criteria Defendants supposedly relied upon were both themselves discriminatory and, moreover, pretextual. Defendants’ reliance on these criteria thus creates no basis for avoiding liability. *See McDonnell-Douglas*, 411 U.S. at 807 (explaining that a plaintiff can prove discrimination by proving that the defendant’s articulated non-discriminatory reason was pretextual).

D. Defendants’ Other Defenses To Liability Are Meritless

125. Defendants make a number of other arguments why their favoritism toward INHD and MOJO should simply be overlooked. None of these arguments is persuasive. *See* WTV PCoL ¶¶ 261-269. Two warrant further discussion here.

126. First, Defendants continue to insist that MOJO was just a “rebranding” of INHD, not a “new channel.” Given the fundamental differences between INHD and MOJO, the evidence does not support Defendants’ contention. *See* WTV PFoF ¶¶ 26-32. Moreover, this semantic debate (“rebranding” versus “re-launch”) is simply irrelevant because the uncontroverted fact is that, when Defendants determined that they would not continue either INHD or INHD2 in their existing incarnation, they could have replaced those networks with WealthTV rather than MOJO. *See* WTV PCoL ¶¶ 268-269. However, Defendants gave preferential treatment to MOJO because of their affiliation with iN DEMAND.

127. Second, Cox argues that INHD and INHD2 were temporary, placeholder channels that the Defendants never intended to have permanent carriage. This, too, is unpersuasive. Neither Section 616 nor the FCC’s program carriage rules sanctions “temporary” discrimination on behalf of affiliated networks, even for a limited time. Such an exception would carve an enormous exception into Section 616, without even a hint of support in the text, history, or structure of the statute. Moreover, even if Defendants’ favoritism toward INHD and INHD2 was too “temporary” to count as discrimination, Defendants continued their discriminatory conduct by giving automatic carriage to MOJO after they decided to phase out INHD and INHD2. Cox makes no suggestion that *MOJO* was always meant to be temporary. The supposedly temporary nature of INHD and INHD2 thus provides Defendants no sanctuary from liability.

III. WealthTV Has Proven that Defendants' Discrimination Unreasonably Restrained WealthTV's Ability To Compete Fairly

A. Defendants Misstate the Applicable Legal Framework for Determining When Discrimination Unreasonably Restrains an Unaffiliated Network's Ability To Compete Fairly

128. Once again, Defendants seek to distort the applicable legal standards in their effort to overcome clear evidence that Defendants' discrimination unreasonably impaired WealthTV's ability to compete fairly. Defendants urge the adoption of a novel legal principle that discrimination does not "unreasonably restrain" the victim's ability to "compete fairly" unless "the cable company's conduct actually presented a restraint that was 'unreasonably restrictive of competitive conditions.'" Defs. PCoL ¶ 26 & n.768 (quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911) (construing Section 1 of the Sherman Act)).

129. Defendants' proposed reading of Section 616 is baseless and constitutes nothing less than an effort to read Section 616 out of the federal statute books. That reading, if adopted, would mean that discrimination on the basis of affiliation would go wholly unremedied unless the discriminatory conduct was itself an unreasonable restraint on trade in violation of the antitrust laws. *See* Defs. PCoL ¶ 26 & n.768 (proposing adoption of the "unreasonable restraint of trade" standard of Section 1 of the Sherman Act). That is squarely contrary to the intent of Congress. Indeed, the Senate Report explicitly states that Section 616 "provides *new FCC remedies* and does not amend existing antitrust laws. All antitrust and other remedies which can be pursued under current law by multichannel video programming distributors are therefore unaffected by this section. Such existing remedies would still be available to challenge practices of both affiliated and independent programmers." Senate Report at 29, 1992 U.S.C.C.A.N. at 1162 (emphasis added).

130. Defendants’s citation of authority for the proposition that “Congress had in mind an antitrust type of analysis for [Section 616 of the Cable Act],” Defs. PCoL ¶ 26, is highly misleading. Defendants rely on the House Energy and Commerce Report on the 1992 Cable Act amendments, *see* H.R. Rep. No. 102-628, at 41, 42 (1992), *available at* 1992 WL 166238 (“House Report”), but the cited portion of the report relates to *horizontal* mergers among MSOs. *See id.* at 42 (“Horizontal concentration refers to the share of cable subscribers accounted for by the largest MSOs. Under traditional antitrust analysis, the two prevailing measures of market concentration are the top four firm concentration ratio (Four Firm Ratio) and the Herfindahl-Hirschman Index (HHI).”).

131. The main concern of Section 616(a), by contrast, was not *horizontal* concentration, but *vertical* integration. On that issue, the House Report expressed deep concern that “vertically integrated companies reduce diversity in programming by threatening the viability of rival cable programming services.” House Report at 41. The House Committee’s concern was based on evidence “that some vertically integrated MSOs have agreed to carry a programming service only in exchange for an ownership interest in the service.” *Id.* Moreover, critically, the Committee was concerned “that 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.*” *Id.* (emphasis added). The legislative history certainly does not support Defendants’ interpretation, and instead suggests that the relevant question under the program carriage rules is whether an MSO’s discriminatory conduct unreasonably impaired the unaffiliated vendor’s ability fairly to “compete with [the MSO’s] *existing programming services.*” *Id.* (emphasis added).

132. Indeed, even with respect to horizontal concentration, Congress did not advocate incorporating traditional antitrust standards into the Cable Act. Rather, the House Report explicitly stated:

Both Congress and the Commission have historically recognized that diversity of information sources can only be assured by imposing limits on the ownership of media outlets that are *substantially below those that a traditional antitrust analysis would support*. For example, a wide array of rules limits horizontal and vertical integration in the broadcasting industry. In many instances the Commission's structural regulations are *more stringent than those used to analyze concentration under the antitrust laws*. The Committee believes that concentration of media presents *unique problems* that must be considered by the Commission.

House Report at 42 (emphases added). The Defendants' contention that the antidiscrimination standards of Section 616 should be limited to an "antitrust type of analysis" under "traditional antitrust" standards (Defs. PCoL ¶ 26 & n.767) is wholly contrary to the legislative history of the Cable Act.

133. Defendants' alternative interpretation not only lacks any support in the text or history of the Cable Act, but it is also flatly inconsistent with the basic objectives of Section 616. The antitrust laws are the "Magna Carta of free enterprise," prohibiting those practices which threaten the basic fabric of a competitive market. *United States v Topco Assocs. Inc.*, 405 U.S. 596, 610 (1972). But Congress sought to go further in Section 616 – to ensure that unaffiliated programming vendors can compete on a level playing field with vendors that are affiliated with MSOs and thereby to ensure that the incentives for the creation of new, unaffiliated programming remain robust. *Cf. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 405-06 (2004) (recognizing that Congress created competition-enhancing obligations in the Telecommunications Act of 1996 that go beyond the antitrust laws).

134. Unlike the antitrust laws, which protect competition rather than competitors, *see Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962), Section 616 clearly protects *competitors* against the harms of affiliation-based discrimination. Substituting the limited strictures of the Sherman Act for Section 616’s more robust anti-discrimination requirement would eviscerate Congress’s goals in passing Section 616.

135. Finally, contrary to Defendants’ suggestion (Def. PCoL ¶ 26), there is no basis to conclude that the words “unreasonably” and “unfairly” impose a heavy burden on a plaintiff that has proven affiliation-based discrimination to prove that its competitive standing has been gravely harmed. *See* WTV PCoL ¶ 271. Defendants’ attempt to read additional elements of proof into these words rests on a fundamental misreading of the statutory phrase (“unreasonably restrain the ability . . . to compete fairly”). 47 C.F.R. § 76.1301(c). Plainly, the word “unreasonably” does not refer to the *extent* of the restraint imposed by the discriminatory conduct of the Defendant, but rather the *character* of the conduct that created the restraint. Congress did not intend to permit discrimination that causes restraints on competition that are supposedly “reasonable”; rather, it meant to prohibit all such discrimination as “unreasonable”. So, too, the phrase “compete fairly” does not imply that some discrimination is permissible because it only restrains a plaintiff’s ability to “compete” (but not to “compete fairly”). Defendants’ contrary reading is squarely foreclosed by the text and legislative history of the Cable Act, which make clear that Congress viewed all affiliation-based discrimination as an “unreasonable” practice that would unfairly prevent unaffiliated networks from being able to compete on a level playing field with affiliated networks for carriage on the systems of vertically integrated MVPDs. *See supra* ¶¶ 98-99, 110-114; *see also* Senate Report at 27, 1992 U.S.C.C.A.N. at 1160 (“To ensure that cable operators do not favor their affiliated programmers

over others, the legislation bars cable operators from discriminating against unaffiliated programmers.”).

B. The Evidence Clearly Shows That Defendants’ Discrimination Unreasonably Restrained WealthTV’s Ability To Compete Fairly

136. WealthTV’s evidence in this case clearly demonstrates that WealthTV’s ability to compete fairly was unreasonably restrained by Defendants’ discriminatory conduct. First, Defendants’ discriminatory refusal to offer carriage to WealthTV foreclosed WealthTV from access to more than *45 million* cable subscribers in the United States – more than *70%* of the total number of subscribers. MOJO, by contrast, had automatic access to those same subscribers by virtue of its being an affiliated vendor. Defendants’ favoritism toward MOJO thus heavily and artificially tilted the playing field in favor of MOJO, and against WealthTV, and thereby unreasonably impaired WealthTV’s ability to compete fairly against MOJO in the market for video programming services.

137. Defendants’ discriminatory conduct also impaired WealthTV’s ability to compete in the market for video programming services more generally. Defendants do not dispute – nor can they – that 45 million cable video subscribers represents a significant subscriber base that would be important to any programming vendor. Especially given that an unaffiliated vendor requires a minimum of approximately 20 million subscribers to attract general national advertisers, *see* WTV RFoF ¶ 80, foreclosing a subscriber base of 45 million potential viewers poses a significant impediment to WealthTV’s ability to compete on a national basis.

138. Defendants assert that WealthTV “failed to establish *any* causal link” between foreclosure of access to Defendants’ subscriber base and WealthTV’s ability to compete in the marketplace, because “MVPDs *other than Defendants* serve some 50 million subscribers.” Defs.

PCoL ¶ 29 (emphases added). Once again, Defendants’ legal argument seeks to read Section 616 out of existence. Defendants’ suggestion – that a victim of affiliation-based discrimination simply look elsewhere for carriage – has been flatly and correctly rejected by the Media Bureau, on the ground that it “‘would effectively exempt all MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs.’” WTV PCoL ¶ 271 (citing *HDO* ¶¶ 19, 30, 42, 54). Cox and BHN’s contention that they are too small to restrain trade is nothing more than a variation on the same foreclosed argument that discrimination victims simply look for carriage elsewhere.

139. Likewise, Defendants’ assertion that WealthTV “‘could have achieved distribution to tens of millions of subscribers simply by entering into contracts with the satellite providers DirecTV and Dish network or by accessing any number of alternative methods of distribution” is yet another variation on the same argument. Defs. PCoL ¶ 30. The Media Bureau has, again, properly rejected that argument, holding that “‘the program carriage statute . . . does not excuse an MVPD’s discriminatory conduct based on the possibility of alternative distribution platforms.’” WTV PCoL ¶ 271 (quoting *HDO* ¶ 54).

140. Finally, Defendants claim that their discriminatory conduct did not impair WealthTV’s ability to compete fairly because “‘WealthTV has grown steadily without carriage on any of the four Defendants’ systems.’” Defs. PCoL ¶ 32. This is a blatant *non sequitur*. It is equally likely – and indeed, much more plausible – that WealthTV’s expansion has occurred *despite* the severe impediments posed by Defendants’ discriminatory refusal of carriage. Obviously WealthTV’s ability to grow and compete would be significantly enhanced if it had not been denied access to Defendants’ 45 million additional subscribers.

IV. WealthTV's Proposed Remedy Is Reasonable and Consistent With the First Amendment

141. WealthTV's proposed remedy for Defendants' violation of Section 616 is eminently fair, reasonable, and constitutionally appropriate. The Commission's regulations expressly authorize the imposition of mandatory carriage as appropriate relief. See 47 C.F.R. § 76.1302(g)(1). Indeed, those regulations permit the Commission to order mandatory carriage even if it would "require the defendant multichannel video programming distributor to delete existing programming from its system to accommodate carriage of a video programming vendor's programming." *Id.*; see also 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, ¶ 27 (1993) ("*FCC Implementing Order*") (noting that mandatory carriage, on a case by case basis, is a "reasonable and meaningful method of enforcing Section 616"). Such relief is also consistent with general principles of discrimination law. See, e.g., *Hopwood*, 999 F. Supp. 872, 901-902 (W.D. Tex. 1998) (noting that the "most appropriate and equitable remedy the Court could fashion" for race-based discrimination in law school admissions would be an injunction ordering admission of the excluded students).

142. The terms of WealthTV's proposal for mandatory carriage are reasonable and based on market realities. Specifically, WealthTV proposes that Defendants be required to carry WealthTV at a rate of 7.5 cents per digital subscriber per month for a 10-year term, starting in June 2009.

143. Defendants protest (PCoL ¶ 33) that this rate is "unilaterally-dictated," but they provide no argument or evidence why the proposed rate does not reflect the market value of WealthTV.

Indeed, it is uncontroverted that WealthTV's proposed rate is less than *half* what WealthTV receives from its largest distribution partner, Verizon FiOS. WTV PFoF ¶ 223; *see also FCC Implementing Order* ¶ 27 (noting that a factor in developing a reasonable remedy is "existence of comparable terms in other program carriage agreements to which either the complainant or the defendant is a party"). Comcast was also willing in April 2008 to pay approximately \$0.08 per subscriber per month for WealthTV's SD feed. WTV PFoF ¶ 224. WealthTV's proposal is thus reasonable and appropriate.

144. Defendants' alternative is that WealthTV be given a hunting license, for no more than 18 months, with unlimited drop and retying rights, an MFN provision, and the option to carry WealthTV in SD, HD, or both. That proposal is truly "unilaterally dictated," and it is wholly unreasonable. The evidence in this case shows that Defendants discriminated in favor of MOJO, and against WealthTV, on the basis of affiliation. Yet Defendants contend that the remedy for that discrimination ought to be a hunting license, which would permit Defendants *never to agree to carry WealthTV at all*, with unilateral drop rights, which would permit Defendants to drop WealthTV at will even if they do initially agree to carry it. Defendants would also have the unilateral discretion to set other critical terms and conditions of carriage, such as the rate, the service (HD or SD), and the tier on which WealthTV is carried (if at all). Defendants' proposed remedy is completely illusory because it would effectively impose *no* obligations on Defendants with respect to WealthTV. Rather, it would once again leave WealthTV at the mercy of Defendants' unilateral decision-making. The Defendants' effort to negate any meaningful remedy under Section 616 should be squarely rejected.

145. Finally, Defendants' constitutional objections to mandatory carriage have been rejected by the Supreme Court. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994)

(*Turner I*); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 189-91 (1997) (*Turner II*). In fact, the Court in *Turner II* recognized Congress’s legitimate concern that “vertical integration of cable operators combined to give cable systems the incentive and ability to . . . to favor affiliated cable programmers,” and it affirmed that the FCC’s must-carry rules represented a constitutionally permissible means to address that concern. 520 U.S. at 191. Mandatory carriage as a remedy for *proven* affiliation-based discrimination even more clearly passes First Amendment muster as a narrowly tailored to the government’s important interest in “promoting fair competition in the market for television programming.” *Id.* at 189 (quoting *Turner I*, 512 U.S. at 662).

CONCLUSION

For the foregoing reasons, WealthTV requests that the foregoing Reply Findings of Fact and Conclusions of Law be adopted by the Presiding Judge in support of WealthTV’s recommended decision finding that Defendants violated Section 616 and the Commission’s program carriage rules, and granting the relief requested by WealthTV.

Respectfully submitted,

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June 24, 2009

CERTIFICATE OF SERVICE

I, Kathleen Wallman, hereby certify that, on June 24, 2009, I caused copies of the

foregoing document to be served on the following:

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