

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of: MB Docket No. 08-214
HERRING BROADCASTING, INC.
D/B/A WEALHTV,
Complainant, File No. CSR-7709-P
v.

TIME WARNER CABLE, INC.
Defendant.

HERRING BROADCASTING, INC.
D/B/A WEALHTV,
Complainant, File No. CSR-7822-P
v.

BRIGHT HOUSE NETWORKS, LLC,
Defendant.

HERRING BROADCASTING, INC.
D/B/A WEALHTV,
Complainant, File No. CSR-7829-P
v.

COX COMMUNICATIONS, INC.,
Defendant.

HERRING BROADCASTING, INC.
D/B/A WEALHTV,
Complainant, File No. CSR-7907-P
v.

COMCAST CORPORATION,
Defendant.

Volume 10

Tuesday, April 21, 2009
10:00 a.m.

The Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
Hearing Room TW-A363

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Chief Administrative Law Judge

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1 P R O C E E D I N G S

2 10:04 A.M.

3 JUDGE SIPPEL: We will go on the
4 record. We are back in session. It is the
5 21st of April and we left off yesterday with
6 receiving all the documentary evidence from
7 WealthTV, with some exceptions, some
8 variations.

9 Do we have any -- can somebody
10 give me a report this morning as to where
11 things stand on the negotiated items?

12 Ms. Wallman?

13 MS. WALLMAN: Yes, Your Honor.
14 The witness, Mr. Herring, has been working to
15 reform his testimony in light of the
16 evidentiary rulings of yesterday.

17 JUDGE SIPPEL: Thank you. That's
18 very much appreciated.

19 MS. WALLMAN: Pleased to do it,
20 Your Honor.

21 That work is on-going. And is
22 continuing now as we speak. We had thought we

1 might be able to meet with someone from
2 Defendants' side this morning to try to close
3 that down, but it's just taken more time than
4 anticipated. So if we can revisit the timing
5 of a meeting about that with Defendants'
6 counsel when we're finished here today.

7 MR. COHEN: We're prepared to meet
8 --

9 JUDGE SIPPEL: I can adjust the
10 time here. I would be glad to do that to
11 accommodate what you're doing. What you're
12 doing as far as I'm concerned is the most
13 important thing that's being done.

14 So if you need time, if time is
15 the question and -- let me know. And we can
16 break early. We can break early at lunch
17 time. We can break early in the afternoon.

18 MS. WALLMAN: Thank you, Your
19 Honor. I think a sound way to proceed might
20 be for us to make some progress here this
21 morning and at an appropriate point I'll call
22 and check with my co-counsel who is working to

1 finish that project so that the meeting can
2 occur profitably. And I can give a report on
3 where they are and what time of meeting might
4 make sense to have.

5 JUDGE SIPPEL: Okay, okay. I'll
6 just let you know that I would -- this is not
7 a must thing, but I do have another -- I don't
8 want to call it a commitment. I do have
9 another phase of my life, I guess, I will say
10 at around noon today, but that's plus or
11 minus. We're here. We're doing stuff. We're
12 going to stay here and do stuff.

13 But if that's in the cards, I just
14 wanted to give you the heads up on it.

15 MS. WALLMAN: Thank you, Your
16 Honor.

17 JUDGE SIPPEL: So where do we want
18 to start this morning?

19 MR. COHEN: I think, Your Honor,
20 we're going to follow the same -- Time Warner
21 Cable documents.

22 JUDGE SIPPEL: Okay.

1 MR. COHEN: You should have one
2 binder, Your Honor.

3 JUDGE SIPPEL: One binder. We do,
4 we do.

5 Are all the Blackberries off? I'm
6 sure they are.

7 MR. COHEN: Your Honor, let me
8 just say as a preliminary matter, we have
9 exchanged objections so as we did with Wealth,
10 so we should make some speedier progress than
11 others in some documents. And there are some
12 documents in our direct exhibits that are
13 highly confidential documents of both Wealth
14 and Time Warner Cable. I don't see any reason
15 why we can't discuss the evidentiary
16 objections in a way that would not require
17 hearing in the room, but I did want to alert
18 the Court to that, so we don't inadvertently
19 and I'll try, as we go through it, if I get to
20 a highly confidential document alert, Your
21 Honor --

22 JUDGE SIPPEL: Thank you.

1 MR. COHEN: So we don't -- I
2 think this should be perfectly appropriate to
3 be able to do the evidentiary piece in open
4 session.

5 MS. WALLMAN: I don't see any
6 difficulty with it.

7 JUDGE SIPPEL: We'll do the best
8 we can.

9 I'm sorry, Mr. Schonman, anything
10 from you?

11 MR. SCHONMAN: Nothing, sir.

12 MR. COHEN: Okay, Your Honor, if
13 we start with Time Warner Cable Exhibit 1,
14 it's a description of the programming on iNHD
15 and iNHD2. Just to put us in perspective.
16 iNHD and iNHD2 were the two networks that Mr.
17 Harding talked about yesterday that were run
18 by iN DEMAND eventually rebranded as Mojo. So
19 its predecessor networks. And it's Exhibit 1.
20 And there's no objection, as I understand it.

21 JUDGE SIPPEL: No objection?

22 MS. WALLMAN: That's correct, no

1 objection.

2 JUDGE SIPPEL: Okay, 1 is
3 identified and received in evidence. Now what
4 am I going to call this. Oh, I see, TWC No.
5 1.

6 (Whereupon, the above-referred to
7 document was marked as TWC Exhibit
8 1 for identification and was
9 received.)

10 MR. COHEN: Yes, we're calling the
11 Time Warner Cable documents TWC documents.

12 JUDGE SIPPEL: So then each party
13 is going to have their own exhibits?

14 MR. COHEN: Yes, Your Honor.

15 JUDGE SIPPEL: Now will you tell
16 me, just what does I-N what does it stand for?

17 MR. COHEN: In High Definition.

18 JUDGE SIPPEL: In High Definition.

19 MR. COHEN: Recall that iNHD was
20 launched in about 2003 right at the beginning
21 of the start of the sale of HD television sets
22 in the United States that could receive HD

1 signals. And iNHD was one of the first two
2 networks. The other being a nonparty HD
3 network that were launched to be high
4 definition networks. Wealth, as well, when it
5 launched in 2004, was launched as high
6 definition network.

7 JUDGE SIPPEL: Please.

8 MR. HERRING: And we're also
9 standard definition.

10 JUDGE SIPPEL: And this is
11 WealthTV?

12 MR. HERRING: Yes, sir.

13 JUDGE SIPPEL: Okay, so -- that's
14 fine. I'm not looking to give points one way
15 or the other on this. I just want to find out
16 what these letters, what all this shorthand
17 stands for. So that's In High Definition.
18 And that's a form of technology.

19 MR. COHEN: Yes, Your Honor.

20 JUDGE SIPPEL: And it's using it
21 as a term for programming?

22 MR. COHEN: The networks acquired

1 the name iNHD. It's essentially -- in the way
2 that ESPN means something relating to sports?

3 JUDGE SIPPEL: Right.

4 MR. COHEN: S I know stands for
5 sports. I don't know what all the other
6 initials stand for.

7 MR. MILLS: iNHD was specifically
8 chosen because it was such a descriptive name.
9 Obviously iNHD means In HD. HD means high
10 definition. It was just an obvious way to say
11 that the channel that high definition --

12 JUDGE SIPPEL: Program broadcast
13 high definition.

14 MR. MILLS: Right. iNHD couldn't
15 be more descriptive than iNHD.

16 JUDGE SIPPEL: Thank you.

17 MS. WALLMAN: Your Honor, my first
18 objection occurs with Exhibit 12, if that
19 would help move things along.

20 JUDGE SIPPEL: That would help.
21 Let's do it as a group then. We'll take 1
22 through 11.

1 MR. COHEN: Your Honor, we would
2 move the admission of Exhibits 1 through 11
3 into evidence. There are some highly
4 confidential documents in these exhibits, just
5 so we're all aware. TWC 3 is a highly
6 confidential document of WealthTV. It is one
7 of their affiliation agreements. Let me just
8 spend a second because this will come up.

9 JUDGE SIPPEL: Sure go right
10 ahead.

11 MR. COHEN: It would be helpful to
12 the Court.

13 The agreements that govern the
14 contractual relationships between program
15 networks and cable operators such as Time
16 Warner Cable and Comcast are typically called
17 either affiliation agreements or carriage
18 agreements. And you'll hear that from both.
19 We are going to be offering into evidence a
20 number of the affiliation agreements of
21 WealthTV and all of those have been designated
22 as highly confidential.

1 MS. WALLMAN: Correct. Maybe this
2 is the time to point out that the word
3 affiliate or affiliation is used in two
4 different ways in the pleadings and probably
5 the testimony that will define the case.

6 If used in the way that Mr. Cohen
7 has just indicated, it's also used to describe
8 a relationship between a cable operator and a
9 vertically integrated programming cable. So
10 in that sense, Mojo is an affiliate of Time
11 Warner Cable, for example.

12 JUDGE SIPPEL: I'm hesitating. It
13 just leads me to a question. The fact that
14 Mojo and this is again all hypothetical, Mojo
15 is, in that context is an affiliate of Time
16 Warner.

17 MS. WALLMAN: Yes.

18 JUDGE SIPPEL: And probably also
19 would be considered an affiliate of the other
20 members of the joint venture?

21 MS. WALLMAN: Correct, Your Honor.
22 This is a defined term in the regulations.

1 JUDGE SIPPPEL: Right, I'm not
2 fighting that. But that could also apply if
3 the programmer was not a part of a vertically
4 integrated cable company, then it still could
5 be an affiliate of let's say Time Warner, but
6 it would be independent of Time Warner. And
7 so it's a different kind of affiliation,
8 right? That would be an affiliation
9 agreement?

10 MS. WALLMAN: Correct.

11 JUDGE SIPPPEL: A one shot thing.

12 MS. WALLMAN: Correct, it would
13 not be an affiliate within the meaning of the
14 regulations that are at stake here. In the
15 programming sales business, the process, the
16 agreement is called an affiliation agreement.
17 It doesn't make the members of that
18 contractual relationship an affiliate within
19 the meaning of the regulations.

20 JUDGE SIPPPEL: All right. It's
21 hard to believe that in Black's Dictionary
22 they could have found another word, but

1 affiliation goes both ways.

2 MR. COHEN: Your Honor, let me be
3 clear. There is no Exhibit 7. We have
4 intentionally omitted it, so we're offering to
5 be more precise.

6 JUDGE SIPPEL: Thank you.

7 MR. COHEN: One through 6 and 8
8 through 11 and in addition to Exhibit 3,
9 Exhibit 10, TWC 10 is another carriage
10 agreement, affiliation agreement of WealthTV
11 that's highly confidential.

12 JUDGE SIPPEL: So you would call
13 it either -- the term carriage agreement and
14 affiliation agreement would be the same?

15 MR. COHEN: Yes, although this
16 document on its face is actually called an
17 affiliation agreement.

18 JUDGE SIPPEL: Fine. I hope you
19 all know about the glossary that I started out
20 with. That gave me another experience after
21 a thousand years of doing this kind of thing.

22 It turned into a -- kind of a --

1 it sort of became a litigation document. I
2 thought it would be the easiest thing to do to
3 get a great, very objective passive kind of
4 description of what we're talking about. No,
5 no, no. No, no, no.

6 So I'm going to require the
7 parties to work it out when you come in with
8 your final
9 -- I know I announced it here, but I announced
10 it in the other case that the -- rather than
11 doing a proposed draft of a decision in
12 connection with proposed findings, wait until
13 the very end. Do it with reply findings and
14 also an agreed to glossary of terms with the
15 definitions that are agreed to.

16 Okay, I'm sorry. 10 is a carriage
17 agreement, affiliation agreement. I might as
18 well ask you who is it with?

19 MR. COHEN: Well, let me give it
20 to you for both of them, Your Honor.

21 JUDGE SIPPEL: Yes.

22 MR. COHEN: No. 3 is an

1 affiliation agreement between WealthTV and
2 what we call the NCTC which is the National
3 Cable Television Cooperative. It is a
4 cooperative of small cable systems. This
5 actually goes back to one of your questions of
6 yesterday which is that Time Warner and
7 Comcast, for example, are called MSOs. It's
8 in our glossary, because they're multi-system
9 operators. They own many systems. There are
10 a bunch of smaller systems that are either
11 single, have single systems. Sometimes they
12 have a small number of multiple systems and
13 they have formed a cooperative called the NCTC
14 which negotiates the terms on affiliation
15 agreements on their behalf, presumably because
16 they think they get better terms representing
17 this large group than any of the small cable
18 systems that comprise the NCTC would get.

19 We, in this case, will refer to it
20 as the NCTC agreement.

21 JUDGE SIPPPEL: Cooperative is good
22 enough -- yes, that's fine, but I mean, I'm

1 just making a note for my own purposes as a
2 cooperative. That's all that -- that's fine
3 for these purposes.

4 MR. COHEN: And Exhibit 10 is an
5 affiliation agreement between Wealth and an
6 MSO called Insight. I-N-S-I-G-H-T.

7 JUDGE SIPPET: That's an MSO.

8 MR. COHEN: Yes, sir.

9 JUDGE SIPPET: I got some of this
10 education in the NFL Comcast case, but there's
11 nothing like a little review. This is the
12 first time cooperative, that's a new concept.
13 That's interesting.

14 I know, because I have a -- I know
15 somebody, I should say, a relative of mine who
16 is out in Delaware has a -- receives -- it's
17 electricity from a coop. And the rates are --
18 now why would that be? The rates are better
19 than people who don't deal with the coop?

20 MR. COHEN: When I used to live in
21 the suburbs, you could joint a heating oil
22 cooperative.

1 JUDGE SIPPEL: It doesn't have
2 anything to do with price gauging or anything
3 like that.

4 MR. COHEN: I don't think so. My
5 cousin used that term.

6 JUDGE SIPPEL: Okay, next one.

7 MR. COHEN: So they're received,
8 Your Honor, 1 through 6?

9 JUDGE SIPPEL: 1 through 6 and 8
10 through 11 as identified are identified for
11 the record as your exhibits and are received
12 in evidence as your exhibits.

13 MR. COHEN: Thank you.

14 (Whereupon, the above-referred to
15 documents were marked as TWC
16 Exhibits 2 through 6 and 8 through
17 11 for identification and were
18 received in evidence.)

19 JUDGE SIPPEL: Without objection,
20 and appreciate that from WealthTV.

21 MR. COHEN: Exhibit 12, Your
22 Honor, if you would turn to Tab 12, TWC 12 is

1 a document about which there is an objection.
2 This is a research study that is a highly
3 confidential document that was done for iNHD,
4 the network we talked about earlier. It has
5 information in here about iNHD's viewership
6 and other information about the network. It
7 is a document, the significance of this
8 document is where the parties are at cross
9 purposes here, is that Wealth claims that when
10 iNHD became Mojo, they changed their
11 demographic of the network. That iNHD was a
12 general purpose network and that Mojo was a
13 men's network.

14 JUDGE SIPPPEL: What does Mojo
15 exactly stand for?

16 There is no --

17 MR. COHEN: I don't think so, Your
18 Honor.

19 JUDGE SIPPPEL: Like money or jobs
20 or something?

21 MR. COHEN: No, I don't think so.
22 Mojo is a slang term.

1 JUDGE SIPPPEL: Like excellent?

2 MR. HARDING: It's a Cajun or

3 Creole type term.

4 JUDGE SIPPPEL: That's enough

5 information.

6 MR. COHEN: So this document is a
7 document that was relied upon by our expert,
8 Mr. Egan, with respect to reaching an opinion
9 that's contrary to the Wealth opinion. Mr.
10 Egan is going to testify that the target
11 demographic, the demographic that was served
12 by Mojo and iNHD was actually the same. Mr.
13 Egan has reviewed this document. In addition,
14 Mr. Asch, who is going to testify will also be
15 available to talk about this document. This
16 is a study that was relied upon by the expert.
17 It was done for iNHD. The iNHD witness who is
18 familiar with it will testify about this as
19 well. So this testimony is coming in. I'm
20 not -- it's the kind of document that an
21 expert like Mr. Egan customarily relies upon.

22 JUDGE SIPPPEL: And it's prepared

1 by who? By iNHD?

2 MR. COHEN: By a research firm.

3 It's actually quoted in some of the documents

4 that Wealth entered as evidence yesterday.

5 One of the Mojo documents that -- the one

6 duplicative exhibit, I think it was Wealth

7 Exhibit 66, Your Honor. That actually quotes

8 Magid data for Mojo. This is the equivalent

9 data for the actual underlying data for an

10 earlier period of time.

11 JUDGE SIPPEL: For what purpose

12 was it prepared?

13 MR. COHEN: It was prepared to

14 have the network understand what their

15 demographics were. But if you look at the

16 front page, Your Honor, again, this is a

17 highly confidential document, but it's an HDTV

18 and iNHD viewer attitudes, usage and

19 awareness. So it's market research done for

20 the network.

21 Mr. Asch, not only is Mr. Egan,

22 our expert familiar with this document and

1 relied on it, but Mr. Asch, who will testify,
2 can be questioned about it since it's part of
3 his job.

4 JUDGE SIPPEL: Expert Egan, relied
5 on.

6 MR. COHEN: Relied on it.

7 JUDGE SIPPEL: Now, so it was not
8 prepared for purposes of litigation or was it?

9 MR. COHEN: No, Your Honor. It
10 was 2005.

11 JUDGE SIPPEL: The date was
12 significant. Okay. That's good enough for me
13 right now.

14 What's the other objection, Ms.
15 Wallman?

16 MS. WALLMAN: Your Honor, this
17 document is offered with Michael Egan as the
18 sponsoring witness. He didn't write it. He
19 can't authenticate it. He can't say whether
20 anything in it is correct. He can certainly
21 talk about what he relied upon, but that
22 doesn't overcome the hearsay and

1 authentication objection with respect to this
2 document.

3 In addition, and some of the
4 explanation that Mr. Cohen offered when he was
5 showing what the document was about, the
6 demographic is only one thing that WealthTV
7 contends changed when iNHD became Mojo, just
8 for purposes of clarification.

9 Michael Egan can't overcome the
10 hearsay problem with this document and he
11 can't authenticate it and he can't say whether
12 anything in this is correct because he didn't
13 write it. A different company wrote it that
14 he does not work for.

15 MR. COHEN: Your Honor, if I could
16 respond briefly. This is the difference
17 between fact and expert testimony. I mean the
18 experts rely on documents like this all the
19 time in the course of the work and experts are
20 entitled to rely on hearsay. It would be
21 helpful to the Court in evaluating Mr. Egan's
22 testimony to have the documents that it relied

1 upon.

2 We have tried to present in our
3 direct case the documents that Mr. Egan relied
4 upon so Your Honor can assess after the
5 testimony is over whether you think he has
6 appropriately interpreted the documents.

7 JUDGE SIPPPEL: Who is sponsoring
8 this? Who is the witness?

9 MR. COHEN: Mr. Egan can sponsor
10 it, but I mean if they want it to come in
11 through Mr. Asch, it can come in through Mr.
12 Asch. Mr. Egan is going to be shown this
13 document during his direct. It can be shown
14 to Mr. Asch as well. I don't think there's
15 going to be any question with respect to
16 authenticity.

17 JUDGE SIPPPEL: I mean, before
18 there was an objection and I think at a
19 minimum at least in the interest of fairness
20 she certainly is entitled to a voir dire of
21 the witness, sponsoring witness before it's
22 formally ruled on. And I think we should

1 wait.

2 Either -- whoever you feel is the
3 appropriate witness. And then you'll be able
4 to conduct a voir dire on this brief with Mr.
5 Wallman.

6 MS. WALLMAN: I'm very glad to
7 have the opportunity to do that, but in no
8 event will I be given an opportunity to cross
9 examine the person who actually wrote it to
10 ask them how they came to these conclusions
11 and figures and graphs and so forth.

12 JUDGE SIPPEL: That's very true.
13 But just take a close look at the rules on
14 experts and what they can rely on and let's
15 see how the people who are testifying about
16 this -- how they relate, how they relate
17 themselves to it and all those things can be
18 explored.

19 MS. WALLMAN: Yes, Your Honor. I
20 certainly would do that.

21 JUDGE SIPPEL: Liability is what
22 I'm interested in. The genuineness of the

1 document, I don't have any questions about
2 that. This is what it is. It's a study that
3 was prepared for the purpose that Mr. Cohen
4 elicited and that's a genuine. We can get the
5 original maybe. But we're not interested in
6 that.

7 MS. WALLMAN: My objection is not
8 best evidence and I concede that the expert
9 can testify about what he relied upon. But
10 that doesn't make the document admissible.
11 There's still a hearsay problem and an
12 authenticity problem --

13 JUDGE SIPPEL: We'll take it up
14 with the witness in your voir dire.

15 I'll just put reserve on this.

16 MR. COHEN: That's fine, Your
17 Honor.

18 JUDGE SIPPEL: Okay, and your next
19 --

20 (Whereupon, the above-referred to
21 document was marked as TWC Exhibit
22 12 for identification.)

1 MR. COHEN: 13 is another
2 intentionally omitted document which we
3 culled. So the next one would be 14, Your
4 Honor to which I think there's no objection.
5 It's a series of emails of WealthTV that
6 relate to their efforts to get carriage on
7 Charter, another MSO.

8 MS. WALLMAN: There's no
9 objection.

10 JUDGE SIPPEL: No objection. Let
11 me just put down -- I'm describing this as a
12 series of emails --

13 MR. COHEN: Relating to Charter.

14 JUDGE SIPPEL: Relating to
15 Charter, relating to Wealth and Charter. And
16 you say that it shows that Wealth is seeking
17 to get on -- have this programming broadcast
18 through charter?

19 Am I saying that right?

20 MR. COHEN: Yes, it's a
21 complicated story which I think we'll get
22 into.

1 JUDGE SIPPET: Bottom line is, I
2 got it. Okay, so 14 is identified as Mr.
3 Cohen describes and it is not objected to.
4 It's received in evidence as TWC 14.

5 (Whereupon, the above-referred to
6 document was marked as TWC Exhibit
7 14 for identification and was
8 received in evidence.)

9 JUDGE SIPPET: Next one, sir?

10 MR. COHEN: 15, Your Honor, is a
11 document that was relied upon by our expert,
12 Mr. Homonoff.

13 JUDGE SIPPET: Please spell his
14 name.

15 MR. COHEN: H-O-M-O-N-O-F-F, which
16 I frequently misspell. Mr. Homonoff has a
17 long history in the industry. He relied upon
18 this document for the points that there are
19 more cable networks chasing slots, channels,
20 on cable systems than are available number of
21 channels and it's been growing over time.

22 The document is exactly the kind

1 of industry document prepared in the ordinary
2 course that an expert like Mr. Homonoff would
3 rely on. It's actually prepared by the NCTA.

4 JUDGE SIPPEL: Which is --

5 MR. COHEN: National Cable Trade
6 Association for the cable industry.

7 And it's on their website. I
8 don't think that there's a big dispute, and
9 again, Mr. Homonoff is going to testify about
10 this. We think it's useful for Your Honor to
11 see that our experts are relying upon well-
12 established industry publications. So it
13 certainly is a market report within that
14 exception to the hearsay rule. It comes from
15 the NCTA website. It has all the indicia of
16 reliability and it's the type of hearsay that
17 experts typically rely on. We offer it for
18 that purpose.

19 JUDGE SIPPEL: Any objection?

20 MS. WALLMAN: I would have a
21 hearsay objection, except the source
22 identified as a Federal Communications

1 Commission --

2 JUDGE SIPPEL: The source?

3 MS. WALLMAN: The source

4 identified for the graph.

5 JUDGE SIPPEL: Oh, I see. The
6 source is the FCC.

7 MR. COHEN: Are you withdrawing
8 your objection?

9 MS. WALLMAN: I will withdraw the
10 objection.

11 JUDGE SIPPEL: How many pages?

12 MR. COHEN: One page, Your Honor.

13 JUDGE SIPPEL: Okay, and there's
14 nothing that's super confidential or anything.

15 MR. COHEN: No, Your Honor.

16 JUDGE SIPPEL: So 15 as identified
17 to which there is no objection is received in
18 evidence as TWC 15.

19 (Whereupon, the above-referred to
20 document was marked as TWC Exhibit
21 No. 15 for identification and was
22 received in evidence.)

1 JUDGE SIPPEL: Thank you.

2 MR. COHEN: 16, Your Honor, we

3 intentionally omitted.

4 17 is --

5 JUDGE SIPPEL: 16 is omitted.

6 MR. COHEN: Omitted. This might

7 be the end of our omitted documents.

8 JUDGE SIPPEL: That's all right.

9 I have never had a problem with omitted
10 documents.

11 (Laughter.)

12 JUDGE SIPPEL: Unless I can't find
13 them.

14 MS. WALLMAN: Your Honor, in the
15 interest of expediting things, my next
16 objection is going to be Exhibit 29.

17 JUDGE SIPPEL: Thank you.

18 MR. COHEN: That will be very
19 helpful.

20 JUDGE SIPPEL: Do you want me to
21 admit 17 through 28?

22 MR. COHEN: We can take 27 through

1 28. I just do want to identify for the record
2 which ones are highly confidential.

3 JUDGE SIPPEL: Please do.

4 MR. COHEN: So that Exhibit 17 is
5 a highly confidential strategy document of
6 Time Warner Cable.

7 Exhibit 18 is a highly
8 confidential affiliation agreement of WealthTV
9 between Wealth and Charter. Charter we talked
10 about before was a large MSO.

11 JUDGE SIPPEL: Wealth and Charter.
12 Got it.

13 MR. COHEN: Exhibit 21 is another
14 highly-confidential strategy document of Time
15 Warner Cable with respect to their High
16 Definition TV strategy.

17 JUDGE SIPPEL: And it's the
18 strategy document of Time Warner?

19 MR. COHEN: Time Warner, yes, sir.

20 JUDGE SIPPEL: And what did you
21 say the strategy was related to?

22 MR. COHEN: High Definition

1 programming.

2 JUDGE SIPPEL: Okay, thank you.

3 MR. COHEN: Remember, both of
4 these networks were seeking carriage on the
5 High Definition tier of the various cable
6 services and you'll hear about that.

7 Exhibit 24 is a highly -- 23, I
8 apologize; 23 is a highly confidential
9 document of WealthTV that is related to --
10 it's essentially an amendment to the charter
11 agreement. It relates to the charter
12 agreement that we discussed before.

13 JUDGE SIPPEL: Got it.

14 MR. COHEN: 26 --

15 JUDGE SIPPEL: 24 and 25, no
16 problem. 26.

17 MR. COHEN: 26 is no objection.
18 26 has been designated confidential as opposed
19 to High Def confidential. It's Time Warner's
20 VOD agreement. Video On Agreement with
21 WealthTV.

22 And Your Honor, we discussed this

1 a little bit yesterday which is that there is
2 programming that you can get On Demand by
3 going to certain channels on your cable system
4 and simply saying I'd like to watch this show
5 now. And you'll hear later in the course of
6 the testimony about a period of time in which
7 WealthTV had a Video On Demand agreement with
8 Time Warner.

9 JUDGE SIPPEL: When I go to visit
10 my daughter and son-in-law, it's the only time
11 I learn about this. I have no clue as to what
12 you're talking about in terms of my
13 relationship to my own machinery. But the
14 concept I understand and I know that young
15 people can do it very, very quickly.

16 MR. COHEN: Every generation gets
17 faster and faster.

18 JUDGE SIPPEL: That's good.
19 That's good.

20 MR. COHEN: So that takes us
21 through 28 in terms of the --

22 JUDGE SIPPEL: So 27, so 27 and 28

1 are just normal documents?

2 MR. COHEN: Yes.

3 JUDGE SIPPEL: Let me go back to
4 my checklist here. We received 15, so 16 is
5 omitted. So we started with 17 through 28.
6 Is that correct?

7 MS. WALLMAN: Yes, Your Honor.

8 JUDGE SIPPEL: 17 through 28 as
9 identified and as discussed and as noted with
10 respect to confidentiality are identified and
11 17 through 28 as identified are received in
12 evidence as TWC exhibits 17 through 28,
13 exclusively. Thank you.

14 (Whereupon, the above-referred to
15 documents were marked as TWC
16 Exhibits 17 through 28 for
17 identification and were received
18 in evidence.)

19 Thank you.

20 MR. COHEN: 29, Your Honor, for
21 which there is an objection and also is a
22 highly-confidential document. We may revisit.

1 We may try to release some of the highly-
2 confidential terms in the course of what you
3 said yesterday, but let me not do that on the
4 fly without discussing with my client.

5 JUDGE SIPPPEL: That's fine.

6 MR. COHEN: 29 is a series of
7 internal emails at Time Warner with respect to
8 the level of interest in WealthTV. One of the
9 central allegations in this case is that
10 Wealth
11 -- against Time Warner Cable, is that WealthTV
12 claims that as we heard a little bit
13 yesterday, they went to visit lots of systems.
14 There's was lots of interest in Time Warner
15 Cable, Wealth alleges, and the corporate folks
16 at Time Warner resisted.

17 We obviously have a very different
18 view of what happened. This document goes to
19 what was going on within Time Warner Cable.
20 One of the -- several of the recipients of
21 these emails and one of the authors of these
22 emails, Mr. Goldberg, who is a senior director

1 of programming; Mr. Carter, who is going to
2 testify, who is a former director of
3 programming at Time Warner Cable, are involved
4 in this email chain. It informed their
5 thinking and I'm not offering it for the truth
6 of what the hearsay says. I'm offering it for
7 what these witnesses believed to the level of
8 interest.

9 The allegation is specifically
10 made of Mr. Herring's testimony that Mr.
11 Carter understood that there was lots of
12 interest from the field. This document which
13 was transmitted to him contemporaneously tells
14 a different story. I'm not offering it for
15 the truth of what this person saw, but for the
16 state of mind of Mr. Carter and his
17 negotiations. with WealthTV.

18 JUDGE SIPPEL: And Mr. Carter is?

19 MR. COHEN: He's now at Fox. He's
20 a former director of programming, I think was
21 his title.

22 JUDGE SIPPEL: At Time Warner?

1 MR. COHEN: Time Warner Cable in
2 the relevant time and he will testify.

3 JUDGE SIPPEL: Okay, former
4 director of -- what was it?

5 MR. COHEN: Programming. He was
6 in the programming department.

7 Again, Your Honor, on the cable
8 side, if the affiliation side is what the
9 networks call their relationship with the
10 cable networks, cable operators, the cable
11 operators typically have programming
12 departments that deal with the networks. So
13 an affiliate person from Wealth would talk to
14 a programming person at Time Warner Cable.

15 JUDGE SIPPEL: I follow that. And
16 there is an objection to this?

17 MS. WALLMAN: Yes. The objection
18 is --

19 JUDGE SIPPEL: I'm sorry, are you
20 finished?

21 MR. COHEN: I'm finished, Your
22 Honor.

1 JUDGE SIPPET: And so your
2 objection, ma'am?

3 MS. WALLMAN: The objection is
4 hearsay. Although it's correct as Mr. Cohen
5 says that the sponsoring witness, Mickey
6 Carter, whose given name is Arthur, is one of
7 the contributors in this email chain, is one
8 of eight emails and there are several
9 correspondents listed here who are not going
10 to be available for cross examination.

11 If the exhibit could be reformed
12 so that all that is presented for evidence is
13 what Mr. Carter says, then I have no problem
14 with the exhibit.

15 But to have all these other people
16 adding their reactions and that's all hearsay.

17 JUDGE SIPPET: But they're not
18 offered -- he was very careful to say that
19 they are not offered to establish for the
20 truth of the matter of those things that are
21 in the email. It's the state of mind of Mr.
22 Carter.

1 MS. WALLMAN: If it's limited to
2 that purpose, and I'm permitted to voir dire
3 on that, then I would limit my objection.

4 JUDGE SIPPEL: Will Mr. Carter
5 will be a witness?

6 MR. COHEN: Yes.

7 JUDGE SIPPEL: You'll have plenty
8 of opportunity -- thank you, that's fine.

9 Yes, so I will put it in the
10 reserve column. You may briefly voir dire Mr.
11 Carter on it and we'll take it from there, but
12 it obviously meets many of the criteria, if
13 not all of the criteria.

14 (Whereupon, the above-referred to
15 document was marked as TWC Exhibit
16 No. 29 for identification.)

17 MR. COHEN: And just so we would
18 be clear, there are actually two witnesses in
19 this chain and just so I don't want Ms.
20 Wallman to be surprised, Mr. Goldberg, who is
21 currently in the programming department is
22 also involved in this time period and is on

1 this chain. And both of these witnesses may
2 actually wind up speaking to it. But Mr.
3 Carter is the sponsoring witness. And I have
4 no problem with you voir diring either one
5 with respect to this document.

6 JUDGE SIPPEL: I'm hoping I can
7 rule on admissability after Mr. Carter's voir
8 dire, but let's see what we can do. It
9 depends on the order of your witnesses, of
10 course.

11 What is Mr. Goldberg's full name?

12 MR. COHEN: His name is Eric
13 Goldberg. There are several Goldbergs in the
14 Time Warner -- it's Eric Goldberg, Your Honor.

15 JUDGE SIPPEL: What's his
16 position?

17 MR. COHEN: He is director, senior
18 director of programming. He's currently --

19 JUDGE SIPPEL: Program director?

20 MR. COHEN: Director of
21 programming at Time Warner Cable, was at the
22 time at Time Warner Cable and continues to be

1 employed.

2 JUDGE SIPPEL: In that same
3 position?

4 MR. COHEN: Yes, sir.

5 JUDGE SIPPEL: Thank you. So
6 that's reserved.

7 We were talking about 29. It's
8 identified, but it's reserved.

9 MR. COHEN: And I think 30 to 43,
10 there are no objections, am I right, Ms.
11 Wallman?

12 MS. WALLMAN: No, I have an
13 objection to 31.

14 MR. COHEN: Okay, so let me do it
15 one at a time.

16 So 30 is a document that involves
17 communications between WealthTV and
18 Cablevision. There was a document admitted
19 yesterday, a later document offered by
20 WealthTV about their dealing with Cablevision.
21 This is an earlier document about the
22 negotiations. I don't understand the repeat

1 objection.

2 MS. WALLMAN: No objection, Your
3 Honor.

4 JUDGE SIPPEL: Okay, then No. 30
5 as identified by Mr. Cohen is received as TWC
6 30 and is in evidence.

7 (Whereupon, the above-referred to
8 document was marked as TWC Exhibit
9 No. 30 for identification and was
10 received in evidence.)

11 JUDGE SIPPEL: 31.

12 MR. COHEN: 31, Your Honor, is a
13 highly confidential document. It is a list of
14 HD services that have been launched by Time
15 Warner cable in the period June 2007 through
16 November 2008. The allegation that is being
17 made in this case is that we, Time Warner
18 Cable, would not launch WealthTV because they
19 are not affiliated with us. We don't have an
20 affiliation with them. It is one of the
21 allegations that is being made.

22 This is a document which shows all

1 of the services that Time Warner Cable has
2 launched, including those that are not
3 affiliated. Mr. Egan has relied on this
4 document in his expert work.

5 In addition, this was all done
6 under the direction of, now that I know that
7 there is an objection, let me also say that
8 Ms. Witmer, I will give you another name,
9 Melinda Witmer, W-I-T-M-E-R, runs the
10 programming function at Time Warner Cable and
11 she is the Executive Vice President in charge
12 of programming. Ms. Witmer can talk to this
13 document as well.

14 Ms. Wallman expressed the
15 objection,
16 but this is a summary document, rather than
17 putting in a voluminous document with respect
18 to every agreement and there is both the
19 expert, both relied on it, and the programming
20 department folks who negotiate these
21 agreements, two of them will be here to
22 testify, three of them will be here to

1 testify, including the person who runs the
2 department.

3 MS. WALLMAN: Your Honor, WealthTV
4 objects. The sponsoring witness offered for
5 this document is Michael Egan.

6 JUDGE SIPPEL: Is who?

7 MS. WALLMAN: Michael Egan?

8 JUDGE SIPPEL: Egan the expert?

9 MS. WALLMAN: It is hearsay with
10 respect to him. He can't authenticate it. It
11 is not represented that he wrote this
12 document, whether he performed the research
13 that lead to the creation of this document.
14 This is a document that was created by Time
15 Warner Cable and handed to an expert for
16 purposes of supporting a significant part of
17 his opinion about what other HD services had
18 been launched.

19 In addition, this document doesn't
20 speak at all to the question that Mr. Cohen
21 identified, correctly, as important to this
22 case and that is whether any of these services

1 are affiliated or not. The asker prefers the
2 right to distribute securing a certain period,
3 but not launch until a certain period. It has
4 nothing to do with affiliation or not, the key
5 issue in this case.

6 So we object. Michael Egan, it is
7 hearsay with respect to him. He can talk
8 about relying on it in this testimony, but it
9 does not overcome the hearsay objection. It
10 has no indicia of reliability. It was created
11 by Time Warner Cable, not part of a regular
12 business record, as far as I can from the face
13 of it, and it was created for the litigation
14 to support the opinion of an expert.

15 JUDGE SIPPEL: Well, let me ask
16 that question up front. Was it supported?

17 MR. COHEN: It's a summary. Your
18 Honor, I would love to apply *Goose vs. Gander*,
19 yesterday when we sat here and we looked at
20 all of these documents that --

21 JUDGE SIPPEL: I was going to do
22 that --

1 MR. COHEN: By Mr. Herring.

2 JUDGE SIPPEL: I haven't pulled my
3 best one out yet.

4 MR. COHEN: But this is a
5 demonstrative exhibit. We have two choices.
6 I mean, we can talk about, and Ms. Witmer will
7 talk about it. There are three senior people
8 from the programming department and if I have
9 to amend my list to say that Ms. Witmer will
10 sponsor that as well, although I think it is
11 perfectly appropriate for Mr. Egan to rely
12 upon it, but this is a summary way of getting
13 information to the Court about the affiliation
14 agreements that Time Warner has done. And the
15 witnesses will testify about which are
16 affiliated and which are not affiliated, and
17 this document will assist and expedite that.

18 So, you know, I mean, I think it
19 is hypertechnical to say that Mr. Egan can't
20 sponsor it. He certainly can rely on it and
21 I don't think there is an objection to that,
22 but this will be an efficient way of getting

1 the information to the Court and there will be
2 three people here to be cross examined about
3 its accuracy.

4 JUDGE SIPPET: That's all well and
5 good. I'll tell you exactly what I'm coming
6 out. I'm going to do again, it's going to go
7 in the reserve column because it can be easily
8 dealt with a brief, voir dire, and all these
9 inquiries that WealthTV has now briefly
10 explored, and then I will make a ruling.

11 I'm also doing it for purposes of
12 some balance of fairness. I'm trying to give
13 as much of the same rulings as I can to both
14 sides knowing full well that that is
15 impossible to do, but I'm doing my best to do
16 it on an even keel.

17 MS. WALLMAN: Just for purposes --

18 JUDGE SIPPET: But let me, I'm
19 sorry, one more question that I have, Mr.
20 Cohen. What was the purpose for which this
21 was prepared?

22 MR. COHEN: Prepared for the

1 purpose of assisting the testimony in this
2 case.

3 JUDGE SIPPPEL: Thank you. Okay,
4 all right. A part of preparation document?

5 MR. COHEN: Well, demonstrative
6 exhibit, Your Honor.

7 JUDGE SIPPPEL: A demonstrative
8 exhibit. And it is that. It is
9 demonstrative. Now, I don't know if it is
10 totally that, but it is definitely a
11 demonstrative document and also there was a
12 similar types of documents in the sense that
13 they were lengthy lists of items in that
14 respect that were subject to these same
15 objections that I have permitted over the
16 objection of Mr. Cohen in your case in chief.
17 So again, there is an element of balance here,
18 but I agree with you.

19 It was prepared for the purposes
20 of use by an expert in this case. You are
21 certainly entitled to voir dire the witnesses
22 before it comes. If it comes in.

1 MS. WALLMAN: And I think the
2 colloquy to mean that Mr. Cohen anticipates
3 that there could be examination by Melinda
4 Witmer and Mr. Rosenberg and Mr. Goldberg.

5 JUDGE SIPPEL: Well, it depends.
6 The first witness up is whoever it is. I
7 don't know what your order is, but the first
8 witness up who you feel is, can authenticate
9 this, can support this document, we'll try it
10 there. If it's not enough, we'll again keep
11 it on the reserve list, but this is going to
12 be testified to. What I ultimately do with it
13 is going to be a ruling at the appropriate
14 time.

15 MS. WALLMAN: If I may, while
16 we're looking at this document, this document
17 is marked highly confidential.

18 MR. COHEN: I said I will review
19 those. I think in my review today, I think
20 that this is one we're likely to remove that
21 designation.

22 MS. WALLMAN: Thank you. I'm glad

1 to hear that.

2 MR. COHEN: We'll try to do that
3 today.

4 JUDGE SIPPEL: I'm not, I would be
5 in favor of that, but that's my inclination in
6 general. I'm very familiar, believe it or
7 not, I am very familiar with a lot of these
8 names.

9 (Whereupon, the above-referred to
10 document was marked as WTC Exhibit
11 31 for identification.)

12 JUDGE SIPPEL: So this is 32 next?

13 MR. COHEN: 32 is a highly
14 confidential document of WealthTV's and it,
15 well, it is highly confidential document of
16 ours. Excuse me, my apology. It relates to,
17 I'm going to strike the highly confidential
18 almost right now Exhibit 32. I didn't think
19 I realized that it was designated highly
20 confidential.

21 MS. WALLMAN: Thank you, since it
22 is a letter to my client. I appreciate that.

1 MR. COHEN: It is a letter from
2 your client.

3 MS. WALLMAN: Pardon me, from my
4 client. Thanks.

5 MR. COHEN: This is why I'm
6 crossing out the highly confidential as we
7 speak.

8 MS. WALLMAN: Thank you.

9 JUDGE SIPPEL: That's on the
10 bottom of the page? Highly confidential?

11 MR. COHEN: Yes.

12 JUDGE SIPPEL: So I can do that?
13 I can just eliminate that?

14 MR. COHEN: Right. It is a letter
15 from Mr. Herring to Time Warner Cable with
16 respect to the VOD, which I don't understand
17 there being an objection.

18 MS. WALLMAN: No, no objection.

19 JUDGE SIPPEL: 32, no objection,
20 it's in. Not confidential either?

21 The document identified as TWC
22 Exhibit 32 is received in evidence at this

1 time as TWC 32.

2 (Whereupon, the above-referred to
3 document was marked as TWC Exhibit
4 32 for identification and was
5 received in evidence.)

6 MS. WALLMAN: There is also no
7 objection to 33.

8 JUDGE SIPPEL: Thank you. Same
9 thing. These look like emails?

10 MR. COHEN: With respect to
11 Charter, Your Honor.

12 JUDGE SIPPEL: Well, slash
13 Charter?

14 MR. COHEN: Yes, that's
15 Wealth/Charter.

16 JUDGE SIPPEL: Okay, and no
17 objection as identified as Wealth/Charter
18 related emails. They are received in
19 evidence, first identified and then received
20 in evidence as TWC 33.

21 (Whereupon, the above-referred to
22 document was marked as TWC Exhibit

1 33 for identification and was
2 received in evidence.)

3 JUDGE SIPPEL: 34?

4 MR. COHEN: Your Honor, 34 is a
5 document that was the letter from the Director
6 of Marketing, Mr. Aitken, at Time Warner
7 Cable, to Mr. Herring. There was this period
8 of for which the parties had a VOD, video on
9 demand, agreement. It was terminated by
10 WealthTV. This was the letter that was sent
11 in response to the termination letter. It is
12 a business record of Time Warner's. Mr.
13 Goldberg has testified in his direct, written
14 direct, that he participated in its
15 preparation. And actually, we're not really
16 offering it for the truth as much as
17 information that was conveyed to Mr. Herring
18 and what he did in response.

19 JUDGE SIPPEL: Any objection?

20 MS. WALLMAN: Yes, Your Honor, I
21 object. The author of this document is a man
22 named Dean Aitken. The sponsoring witness is

1 identified as Eric Goldberg. I don't see how
2 he is going to authenticate a document that he
3 didn't write.

4 MR. COHEN: He testified in his
5 direct testimony that he participated in the
6 preparation of this document, in the same way
7 that you are argued when Mr. Herring did a
8 document for his assistant. So I mean, this
9 is somebody who participated in preparation of
10 the document.

11 MS. WALLMAN: As I recollect, we
12 lost on that one.

13 MR. COHEN: I understand that.
14 I'm talking about the argument you made.

15 MS. WALLMAN: In addition, Your
16 Honor, just for purposes of clarification, Mr.
17 Cohen referred to the termination of the VOD
18 agreement by WealthTV. The contract was
19 written so that it would automatically renew
20 unless notice was provided. Since this was on
21 loss leader for WealthTV and they weren't
22 getting anywhere with negotiations for Time

1 Warner, they decided not to allow the
2 agreement to renew.

3 JUDGE SIPPEL: But it would have
4 to be done by notice.

5 MS. WALLMAN: Yes.

6 MR. COHEN: We're going to be here
7 for a while if each one of these involves into
8 the merits, because we do have a response.
9 I'm not going to take the opportunity to
10 respond now.

11 JUDGE SIPPEL: I'm going to
12 overrule the objection and I'm going to
13 receive it.

14 (Whereupon, the above-referred to
15 document was marked as TWC Exhibit
16 34 for identification and was
17 received in evidence.)

18 It's a business document and it's
19 not even offered for the truth of the matters
20 asserted. It's received in evidence as TWC
21 34.

22 Let's try and move -- you're doing

1 very well, but let's try and move --

2 MR. COHEN: 35. I don't think
3 there's an objection. It's an email from Mr.
4 Herring to Mr. Goldberg attaching a proposed
5 terms of carriage between Time Warner Cable
6 and WealthTV.

7 MS. WALLMAN: There's no
8 objection.

9 JUDGE SIPPEL: Thank you. And is
10 there anything after that to which there's no
11 objection?

12 I think we can go to the next
13 document.

14 MS. WALLMAN: If I can catch up
15 for one moment.

16 JUDGE SIPPEL: Okay, yes, we just
17 did -- I'll put 35 then as in evidence as TWC
18 35. Both identified and received.

19 (Whereupon, the above-referred to
20 document was marked as TWC No. 35
21 for identification and was
22 received in evidence.)

1 MR. COHEN: Is there an objection
2 to 36?

3 MS. WALLMAN: To 36, yes, there is
4 an objection.

5 MR. COHEN: 36 is a business
6 record of WealthTV. It's an admission. It's
7 a series of emails internal to WealthTV and
8 also to one external email to Echo Star. It
9 relates to WealthTV's efforts to get carriage
10 on Echo Star. One of our arguments, as Your
11 Honor knows earlier in this case is that one
12 of the things that Your Honor will have to
13 consider in determining the bona fides of our
14 decision making are the actions of cable
15 operators and DVS operators, big satellite
16 companies who also do not carry WealthTV from
17 which we were going to argue, you can draw an
18 inference that there are legitimate business
19 reasons not to take WealthTV. So that's what
20 this is offered for. This is one of the few
21 documents that we have that relate to the Echo
22 Star negotiations which have not resulted in

1 carriage.

2 MS. WALLMAN: Your Honor, object
3 on grounds of relevance. The reasons that
4 other people who don't have integrated
5 programming interests at issue here with Mojo,
6 the reasons that they said no, or haven't said
7 yes yet are not relevant to the reasons that
8 have to be adjudicated here about why an
9 integrated programmer said no.

10 JUDGE SIPPEL: Well, he's made a
11 proffer of relevance. From my purposes, it's
12 more of a question of weight. The weight is
13 a bit iffy because of the reasons that you
14 say.

15 MR. COHEN: Your Honor, can I
16 respond briefly because we have had some
17 communications about this before?

18 The argument that's made here for
19 them to prevail as I understand it,
20 ultimately, and this is an important threshold
21 issue, is that they need to demonstrate that
22 the reason why we didn't carry was that it was

1 a discrimination on the basis of affiliation.

2 With all due respect, Your Honor,
3 and we hope we'll convince you over the course
4 of the case, there are lots of business
5 reasons not to carry WealthTV. And we believe
6 that it is strong, corroborative evidence of
7 what you're going to hear about our decision
8 making to see that others reached the same
9 decision. And so I think it's centrally
10 relevant to the issues that are before Your
11 Honor.

12 I mean we are going to put on
13 business people who are going to say I made
14 the decision not to carry WealthTV for reasons
15 A, B, C, D, and E. And we are going to see in
16 the course of this case that Wealth's efforts
17 to get carriage on other cable operators and
18 DBS operators, what they heard were the exact
19 same reasons that we think we are going to
20 prove that we made that. So I think it's
21 completely corroborative of our
22 nondiscriminatory intent.

1 You'll hear the testimony as we go
2 along.

3 JUDGE SIPPEL: Well, I'm not
4 convinced of your argument being completely
5 formed. I mean, as I said, I would take these
6 one at a time and ascribe the appropriate
7 weight to them. But to me, that's too much at
8 this stage of the case.

9 MS. WALLMAN: Your Honor, I'm
10 satisfied with that ruling of equal weight
11 would be the many carriage agreements that
12 WealthTV does have. So I'm satisfied with the
13 ruling that you're suggesting you might make
14 with respect to this agreement.

15 JUDGE SIPPEL: That's a good
16 point. All right, it's in evidence, under the
17 limitations that I've indicated. Actually,
18 it's in evidence for all purposes. It's just
19 that the weight to ascribe it is another
20 question.

21 This is 36. This is 36, as
22 described by Mr. Cohen, so it's identified and

1 received as 36.

2 (Whereupon, the above-referred to
3 document was marked as TWC Exhibit
4 36 for identification and was
5 received in evidence.)

6 Next document.

7 MR. COHEN: 37 is a series of
8 emails between Time Warner Cable and Wealth
9 with respect to the efforts to get carriage.
10 It's been marked confidential. I'm going to
11 strike the confidential marking on 37.

12 JUDGE SIPPEL: Thank you.

13 MR. COHEN: There's no objection,
14 as I understand.

15 MS. WALLMAN: There is no
16 objection to that, Your Honor.

17 JUDGE SIPPEL: Okay. There's no
18 objection, so 37 as identified is received as
19 TWC 37.

20 (Whereupon, the above-referred to
21 document was marked as TWC Exhibit
22 37 for identification and was

1 received in evidence.)

2 MR. COHEN: 38, Your Honor, there
3 is an objection. 38 are emails, an email and
4 then a distribution of an email by Time Warner
5 Cable employee with respect to current deals.
6 This is a highly confidential document. It's
7 a state of negotiations with respect to
8 various networks. I understand the objection
9 to be hearsay. This is information that Mr. -
10 - it's not being offered for the truth of this
11 document, but it's information that Mr.
12 Rosenberg is going to testify, Mr. Rosenberg
13 being another member of the programming
14 department, vice president of programming at
15 Time Warner Cable. He will testify in this
16 case that it's information that he relied upon
17 in his decision making that he's going to
18 describe. So it's being offered with respect
19 to Mr. Rosenberg's state of mind, not with
20 respect to the truth of the matter asserted by
21 Ms. Simon in the bulk of the email.

22 JUDGE SIPPEL: And there is an

1 objection?

2 MS. WALLMAN: Well, my objection
3 is as to hearsay. The author of the document
4 is not available for cross examination. I
5 have no idea what the method was for this
6 having been compiled. I don't know whether
7 it's reliable and I don't have anyone that I
8 can ask. If I can just ask Mr. Rosenberg did
9 you rely on this and do you know if it was
10 right?

11 JUDGE SIPPEL: Well, you could ask
12 him a couple of other questions that relate to
13 it, but I'm going to put it on the reserve
14 column.

15 (Whereupon, the above-referred to
16 document was marked as TWC Exhibit
17 38 for identification.)

18 And you can voir dire Mr.
19 Rosenberg. He's going to be a witness?

20 MR. COHEN: Yes, sir.

21 JUDGE SIPPEL: SO you can voir
22 dire him and I'll make a ruling right then and

1 there.

2 MR. COHEN: Okay. Ms. Wallman, I
3 believe there's no objection to 39, 40, and
4 41?

5 MS. WALLMAN: That's correct.

6 MR. COHEN: Okay, let me just --
7 39, Your Honor, is marked confidential. I'm
8 going to strike that.

9 JUDGE SIPPEL: 39 is going to get
10 stricken as confidential.

11 MR. COHEN: It's confidential, but
12 not for the record.

13 JUDGE SIPPEL: Yes.

14 MR. COHEN: 39, 40, and 41. 39 is
15 an email from Mr. Herring to Mr. Goldberg and
16 attaching a term sheet for proposed carriage
17 of WealthTV.

18 40 and 41 are emails that relate
19 to WealthTV's efforts to get carriage on
20 Cablevision.

21 JUDGE SIPPEL: As identified,
22 Exhibits 39 through 41 are received as TWC 39,

1 40, and 41.

2 (Whereupon, the above-referred to
3 documents were marked as TWC
4 Exhibit 39, 40, and 41 for
5 identification and were received
6 in evidence.)

7 Next one would be 42?

8 MR. COHEN: Right.

9 JUDGE SIPPEL: Any objection to
10 42?

11 MR. COHEN: There is an objection,
12 Your Honor.

13 MS. WALLMAN: There is an
14 objection, Your Honor.

15 MR. COHEN: 42 is a document that
16 was presented with respect to a strategy
17 document of their overview of -- where Time
18 Warner Cable is. It's a highly confidential
19 document with respect to HD carriage. It was
20 prepared by Ms. Simon. It was given to -- the
21 to list says TWC EVPs and Melinda Witmer, who
22 is both an EVP and a CC. She actually gets it

1 twice, because she's both an EVP and a named
2 CC. It's a document that she relies upon in
3 the course of her work. She runs the
4 programming department, Your Honor. I mean
5 we're calling three witnesses, four witnesses,
6 three current and one former member of the
7 programming department. This is a document
8 with which she is familiar. It was presented
9 to her for her to act upon and guide the
10 strategy of the company, so I understand that
11 there's a hearsay objection and Ms. Simon is
12 not here, but I think it's highly formalistic.
13 It's a business record of Time Warner.

14 The person at whose direction, for
15 whose benefit this document was created is
16 going to testify. And I think we heard a lot
17 of argument yesterday that Mr. Herring is
18 responsible for his company. Ms. Witmer runs
19 a programming department. And these are
20 documents that are created for the purpose of
21 assisting the programming department in doing
22 their job. And she is perfectly capable of

1 being cross examined as to the accuracy of any
2 entry on this exhibit. And it is not feasible
3 or realistic to think that we're going to trot
4 in every witness who created a single
5 document, but we are calling four.

6 JUDGE SIPPEL: What is the -- what
7 is the position of Julie Simon?

8 MR. COHEN: Julie Simon is VP
9 Video and Advanced Marketing. She essentially
10 has a research function as I understand, is
11 that right? She did at the time. A research
12 function that supported the programming
13 department.

14 And you'll see there are documents
15 coming into evidence, presentations were
16 actually made to Ms. Simon in the course of
17 WealthTV's efforts to get carriage. So I
18 understand that there's a hearsay objection.
19 This is a business record and we're going to
20 have a witness who is perfectly capable of
21 testifying about it.

22 JUDGE SIPPEL: Ms. Wallman?

1 MS. WALLMAN: I do object on
2 hearsay grounds. The author of the document
3 is not available. Mr. Cohen is right. We had
4 argument like this yesterday where we urged
5 that since the call reports, for example, were
6 business records presented to Mr. Herring in
7 his supervisory capacity, we should be able to
8 rely on them not just for the fact that they
9 happened and they make a record, but for what
10 was in them, a record of what happened in the
11 meeting. And Your Honor ruled that that was
12 not permissible.

13 If Ms. Witmer is going to come in
14 and say I read all of this and it was given to
15 me, and I trust my people, I don't know why
16 she should be any more entitled to rely on the
17 truth of what's in here than Your Honor ruled
18 that Mr. Herring could not with respect to the
19 call reports.

20 MR. COHEN: Your Honor --

21 JUDGE SIPPEL: The call reports
22 were problematic. A person -- first of all,

1 it's a sales type of document. It's got a
2 little more wiggle room to it than something
3 like this would have.

4 And the salesman, if I recall
5 correctly, too, I think he's left the company.
6 Isn't that correct. He's down in Texas some
7 place?

8 MS. WALLMAN: In the particular
9 example that Your Honor may be thinking of,
10 yes, he is no longer with the company.

11 JUDGE SIPPEL: So --

12 MR. COHEN: Your Honor, if we look
13 at --

14 JUDGE SIPPEL: Well, let me
15 finish.

16 MR. COHEN: Sorry.

17 JUDGE SIPPEL: I just have a
18 little -- I just put them in a different
19 category. This is a document, the person in
20 the course as described -- and of course, Ms.
21 Wilmer, Witmer?

22 MR. COHEN: Witmer, W-I-T-M-E-R.

1 JUDGE SIPPEL: M-E-R, Ms. Witmer
2 can go into this in much more detail. I don't
3 mean detail in the sense of being more
4 specific and having more firsthand knowledge
5 of it.

6 I don't even think this fits in
7 the category of putting it on the reserve
8 shelf because it's not a study or -- well, it
9 is a study.

10 MR. COHEN: No, Your Honor, it's a
11 status report. So let me just --

12 JUDGE SIPPEL: There's a whole
13 bunch of stuff here.

14 MR. COHEN: You know, if this
15 document doesn't come in, we're going to
16 prolong the testimony. But this is --

17 JUDGE SIPPEL: Spreadsheet.

18 MR. COHEN: Yes, it's the status
19 of where Time Warner is with respect to HD
20 carriage and what their plans are for a large
21 group of networks.

22 JUDGE SIPPEL: It seems to me it's

1 a good document that you'd want to have.

2 MS. WALLMAN: May I ask for a
3 legible copy of page 42-15?

4 JUDGE SIPPET: Absolutely. You'll
5 get it. Absolutely.

6 MR. COHEN: Okay.

7 JUDGE SIPPET: But I am going to -
8 - it just has everything -- it has all the
9 indicia of a reliable document and I don't see
10 any reason to -- I mean it's a business
11 document. This is what the company does. I
12 just -- it certainly would be a lot of
13 hullabaloo raised if it hadn't been turned
14 over to you in discovery.

15 Well, my ruling is that I'm going
16 to overrule the objection and receive it into
17 evidence as TWC 42. So it's in.

18 (Whereupon, the above-referred to
19 document was marked as TWC Exhibit
20 42 for identification and was
21 received in evidence.)

22 Okay, but do give -- you will, I'm

1 sure.

2 MR. COHEN: Of course. We'll
3 figure something out. Each side has had some
4 trouble with some electronically-produced
5 documents that don't always format all that
6 well, but we'll figure out a way to make them
7 legible.

8 JUDGE SIPPEL: All right.

9 MR. COHEN: 43, Your Honor, is an
10 email from Cablevision to Mr. Herring and
11 continuing efforts to get carriage. I
12 understand there is an objection which I'm
13 surprised by because there was no objection to
14 40. There was no objection to 41, and 43 is
15 just the last email in the chain that
16 continues from 40 and 41 between Cablevision
17 and WealthTV.

18 MS. WALLMAN: I'm going to
19 withdraw the objection.

20 JUDGE SIPPEL: Thank you.

21 MR. COHEN: Am I right that
22 there's no objection to 44 to 49?

1 JUDGE SIPPET: While you're
2 thinking about that, 43 is identified and
3 received as TWC's Exhibit 43.

4 (Whereupon, the above-referred to
5 document was marked as TWC Exhibit
6 43 for identification and was
7 received in evidence.)

8 MS. WALLMAN: My next objection is
9 to exhibit 50.

10 JUDGE SIPPET: So if we can go
11 from 44 to 49?

12 MR. COHEN: Yes, Your Honor. It's
13 a series of emails between Time Warner Cable
14 and Wealth, offers back and forth. You'll
15 hear a lot of testimony. There are some
16 confidential and highly confidential markings
17 on this. I will amend those. I need to
18 consult with a client about one of them, but
19 we will make every effort to make all those
20 public documents.

21 MS. WALLMAN: Which ones are you
22 referring to?

1 MR. COHEN: 44 to 49.

2 MS. WALLMAN: Okay.

3 JUDGE SIPPEL: No objection. They
4 are identified and they are received in
5 evidence, TWC 44, 45, 46, 47, 48, and 49.

6 (Whereupon, the above-referred to
7 documents were marked as TWC
8 Exhibits 44, 45, 46, 47, 48, and
9 49 for identification and were
10 received in evidence.)

11 Thank you.

12 MR. COHEN: 50, Your Honor, is
13 another one of these documents. This is a
14 highly confidential document that deals with
15 the HD programming strategy of Time Warner
16 Cable. It's 9/25/07, the EVP meeting is a
17 meeting that Ms. Witmer, as the EVP in charge
18 of programming would have attended. She will
19 talk about this document. She will
20 authenticate this document. It's prepared by
21 her department for the purpose of determining
22 which channels they're going to watch.

1 It's a business record in the
2 ordinary course.

3 JUDGE SIPPEL: Is there an
4 objection to this?

5 MS. WALLMAN: My objection is I
6 don't know who wrote it. It's an
7 authentication objection.

8 MR. COHEN: And I'm saying that
9 Ms. Witmer will authenticate it.

10 JUDGE SIPPEL: All right, this was
11 -- well, was this -- for what purpose was this
12 prepared?

13 MR. COHEN: It was prepared in the
14 ordinary course of business in September of
15 '07 with respect to their HD strategy so they
16 could run their business at the site which
17 networks carry.

18 JUDGE SIPPEL: It's got all the
19 indicia of just that. I'm going to receive it
20 in evidence. Your objection is basically who
21 prepared -- yes, well, since Ms. Witmer is
22 going to explain all of that anyway, I'm going

1 to receive it in evidence. I'm going to
2 receive it as identified and it's coming in as
3 TWC No. 50. It's in evidence now.

4 (Whereupon, the above-referred to
5 document was marked as TWC Exhibit
6 50 for identification and was
7 received in evidence.)

8 MS. WALLMAN: My next objection
9 will be Exhibit 54.

10 JUDGE SIPPEL: So let me make a
11 note of this, 51 to 53, no objection.

12 MR. COHEN: Let me just say for
13 the record, Your Honor, 51 is a highly-
14 confidential document of Wealth's. It's an
15 amendment to its affiliation agreement with
16 Charter.

17 52 and 53, they are confidential
18 legends which I'm going to withdraw now on
19 both documents.

20 JUDGE SIPPEL: 52 and 53, we can
21 eliminate confidential. Okay, thank you. And
22 they seem to be again in this email variety?

1 MR. COHEN: Yes, Your Honor.

2 JUDGE SIPPEL: As identified they
3 are received as TWC 51, 52, and 53.

4 (Whereupon, the above-referred to
5 documents were marked as TWC
6 Exhibits 51, 52, and 53 for
7 identification and was received in
8 evidence.)

9 MR. COHEN: 54, Your Honor, is a
10 demonstrative exhibit that underlies Mr.
11 Egan's expert opinion. We're going to get
12 back to our favorite French word yesterday,
13 but both Mr. Egan and Comcast expert, Mr.
14 Gerbrandt, have done what we will call genre
15 analyses. They've done it different ways.
16 They have each looked at programming over
17 different periods of time. This is Mr. Egan's
18 document that he prepared of his analysis of
19 genres. He's going to testify at great length
20 about that in his -- he has in his written
21 direct, and this is the document that supports
22 his opinion. So I'm not quite sure what the

1 objection is.

2 JUDGE SIPPEL: It's entitled
3 Wealth TV Mojo programming breakdown.

4 MR. COHEN: This is exactly what
5 he did. There is lots of text that goes
6 around his analysis, but this is the
7 underlying analysis from which he draws his
8 conclusions.

9 JUDGE SIPPEL: Who was it prepared
10 by?

11 MR. COHEN: Mr. Egan, our expert.

12 JUDGE SIPPEL: Oh. Prepared by
13 Egan. And he's going to testify to it?

14 MR. COHEN: Yes, sir.

15 JUDGE SIPPEL: Is there an
16 objection to this?

17 MS. WALLMAN: If this is offered
18 solely as a demonstrative exhibit, then I have
19 no objection to it being offered for that
20 purpose.

21 MR. COHEN: It's offered to
22 demonstrate his analysis. What Ms. Wallman is

1 saying is she disagrees with how he's put
2 programming to genre which I know she does,
3 that's the subject of cross examination, but
4 it's not a reason to exclude from evidence the
5 document.

6 JUDGE SIPPEL: It definitely does
7 have a demonstrative element to it.

8 MR. COHEN: Yes, but it's also a
9 compilation of his opinion. It's a summary.
10 Otherwise, we'd have to put in every single
11 piece of paper which said here's the show I
12 watched and here's the genre, and frankly, we
13 have that analysis. It's all available for
14 cross examination.

15 JUDGE SIPPEL: The documentation,
16 of course, has been delivered to Wealth?

17 MR. COHEN: Yes, Your Honor.

18 JUDGE SIPPEL: I'm going to
19 overrule the objection. Now of course, in the
20 course of your cross examination, if something
21 comes up and you're showing it to be
22 completely off the wall or something, we can

1 always entertain a motion to strike or
2 something, but so far I'm convinced of
3 everything that Mr. Cohen says about the
4 document. I'm interested to hear what Mr.
5 Egan has to say about the document.

6 54 is identified and received in
7 evidence as 54.

8 (Whereupon, the above-referred to
9 document was marked as TWC Exhibit
10 54 for identification and was
11 received in evidence.)

12 I overrule the objection. Okay,
13 thank you. Let's go.

14 MR. COHEN: 55, Your Honor, to
15 which I believe there is an objection, this a
16 series of emails between Mr. Herring and Ms.
17 McCaskill, M-C-C-A-S-K-I-L-L. She is the
18 programming, senior programming person at
19 Sudden Link which is another MSO. This again
20 goes to the issue which we're going, I
21 understand, to take up one at a time as to why
22 others did not carry. Clearly, the email in

1 the middle from Mr. Herring is an admission
2 and a business record of WealthTV and frankly,
3 Your Honor, we offer the bottom for the sake
4 of completeness because Mr. Herring is
5 incorporating part of the email at the bottom
6 of Ms. McCaskill's in his response and there's
7 really no real way to make sense of what Mr.
8 Herring is saying without putting Ms.
9 McCaskill's email in at the bottom.

10 JUDGE SIPPEL: Sudden Link. And
11 that's an MSO, you say?

12 MR. COHEN: Yes, sir.

13 JUDGE SIPPEL: If I can remember
14 the term right now, but in last week's
15 litigation the term of overbuilds was used, am
16 I right?

17 MR. COHEN: Yes.

18 JUDGE SIPPEL: That would be what
19 Sudden Link would be?

20 MR. COHEN: No, Sudden Link would
21 be an MSO.

22 JUDGE SIPPEL: MSO --

1 MR. COHEN: Is usually a small
2 cable system that comes in and competes with
3 an MSO.

4 JUDGE SIPPEL: Okay.

5 MR. COHEN: In a geographic area.
6 Did I get that right, Mr. Harding?

7 MR. HARDING: Well, I would
8 characterize AT&T and Verizon as overbuilds as
9 well and they're not exactly so small.

10 MR. COHEN: I knew I needed to
11 turn to Mr. Harding.

12 JUDGE SIPPEL: All right, I'm
13 starting to go into deep water here. Let's
14 move it.

15 We have an objection to 55?

16 MS. WALLMAN: On the ground of
17 relevance.

18 JUDGE SIPPEL: Relevance?

19 MS. WALLMAN: They're going to
20 borrow the reasons of another cable operator.

21 JUDGE SIPPEL: Same ruling, same
22 ruling. It's coming in as relevant, but

1 everything goes to weight.

2 55 is identified as received as

3 55, TWC's exhibits. Thank you.

4 (Whereupon, the above-referred to
5 document was marked as TWC Exhibit
6 55 for identification and was
7 received in evidence.)

8 MR. COHEN: 56, Your Honor, to
9 which there is an objection, a sponsoring
10 witness for this. This was used by our
11 expert, Mr. Egan. We're also going to sponsor
12 it through Ms. Witmer's testimony. Again, the
13 question of how these parties have acted in
14 the relevant time period is centrally
15 relevant. This is a list of all of the
16 networks that Time Warner Cable has launched
17 since January of 2004. January of 2004 being
18 a little bit before the time that WealthTV
19 first launched.

20 I don't remember, I think the
21 first contact with Time Warner Cable was
22 roughly in April of 2004. This is obviously

1 a summary document, Ms. Witmer and others in
2 the programming department are familiar with
3 it and it's a demonstrative exhibit to show
4 what we've done, rather than have the
5 witnesses testify one by one by one by one
6 with respect to the decisions of Launch. And
7 I was confused before. This is the document
8 that actually distinguishes between affiliated
9 and non-affiliated networks. So the networks
10 that are affiliated are in bold. All the
11 other networks are not and --

12 MS. WALLMAN: Your Honor, I had an
13 objection to this, but I'll withdraw it.

14 JUDGE SIPPEL: Thank you.

15 MR. COHEN: Thank you.

16 JUDGE SIPPEL: No objection, 56 is
17 received as TWC 56.

18 (Whereupon, the above-referred to
19 document was marked as TWC Exhibit
20 56 for identification and was
21 received in evidence.)

22 MR. COHEN: Are you going to

1 withdraw 57 as well?

2 MS. WALLMAN: No.

3 MR. COHEN: Okay.

4 JUDGE SIPPET: 57?

5 MR. COHEN: 57 is a document that
6 Mr. Egan relied upon. Mr. Egan has as part of
7 an opinion talks about networks that he thinks
8 that he has said that Time Warner Cable has
9 launched that serve a similar demographic as
10 WealthTV.

11 This information was compiled for
12 him by the programming department at Time
13 Warner Cable and it's a document that he
14 relied upon in the course of his expert work.
15 And any member of the programming department
16 at Time Warner Cable can be examined about
17 this document of which there will be three
18 witnesses.

19 JUDGE SIPPET: And the objection
20 is?

21 MS. WALLMAN: If I can examine
22 others and my objection is narrowed, but my

1 question is what does the heading WealthTV
2 Case Subscriber Request mean?

3 MR. COHEN: Well, you'll have an
4 opportunity to ask Mr. Egan, but as I
5 understand it, it's a request that he made for
6 the number of subscribers to Time Warner
7 Cable. It's exactly that. Mr. Egan said tell
8 me for these networks how many subscribers you
9 have in these contracts. It's actually his
10 language, as I understand it.

11 MS. WALLMAN: Thank you for the
12 clarification. I will withdraw the objection.

13 MR. COHEN: Thank you.

14 JUDGE SIPPEL: I had the same
15 question in my mind too.

16 All right, TWC 57 is identified
17 and received in evidence as TWC 57.

18 (Whereupon, the above-referred to
19 document was marked as TWC Exhibit
20 57 for identification and was
21 received in evidence.)

22 MS. WALLMAN: I'm going to

1 withdraw an objection to 58 and my next
2 objection will be to 60.

3 JUDGE SIPPEL: 58. Quickly, what
4 is 58? It's the program schedule.

5 MR. COHEN: It's another document
6 prepared by Mr. Egan that he relied upon in
7 connection with his analysis of program on
8 WealthTV.

9 And 59 is an actual schedule that
10 comes off of, if I recognize correctly, the
11 format. That's the way it prints off the
12 WealthTV website.

13 JUDGE SIPPEL: What is 58 as
14 compared to 59?

15 MR. COHEN: 58 is for a different
16 time period. 58 is the week.

17 JUDGE SIPPEL: I see, week of,
18 yes.

19 MR. COHEN: December 8th and 59 is
20 the week of December 15, 2008, both weeks that
21 he discusses in the context of his report in
22 his testimony.

1 JUDGE SIPPET: And there's no
2 objection to this? Is that right?

3 MS. WALLMAN: That is correct.

4 JUDGE SIPPET: Fine, that's fine.
5 58 and 59 are received as TWC 58, 59 as they
6 have been identified. Thank you.

7 (Whereupon, the above-referred to
8 documents were marked as TWC
9 Exhibit 58 and 59 for
10 identification and were received
11 in evidence.)

12 MR. COHEN: 60 is a document that
13 was relied upon by our expert, Mr. Homonoff.
14 It comes from multichannel.com. It's a
15 document that, as I understand it, is
16 published in the ordinary course. The source
17 down at the bottom for these various things is
18 Nielsen information. It's compiled by
19 multichannel. It's the kind of hearsay that
20 experts rely upon. I think it fits within the
21 exception for market reports under 803.17. It
22 has all the indicia of reliability. So we

1 offer it.

2 JUDGE SIPPET: It's not a market
3 report. It was not prepared by TWC?

4 MR. COHEN: Yes, and if you look
5 at the bottom it's based on Nielsen -- it's
6 based on multichannel.com based on Nielsen
7 information.

8 JUDGE SIPPET: Any objection?

9 MS. WALLMAN: Yes, Your Honor. We
10 object on grounds of hearsay. Moreover, Mr.
11 Cohen says this was relied upon by Mr.
12 Homonoff. The sponsoring witness is offered as
13 Michael Egan.

14 MR. COHEN: I was looking at the
15 wrong -- it's actually Mr. Egan and not Mr.
16 Homonoff. I misspoke. Thank you.

17 MS. WALLMAN: Multichannel News is
18 a news source. We would have liked to have
19 relied on materials produced by Multichannel
20 News and they were excluded. They went to a
21 website maintained by the same news
22 organization on whose reports we wanted to

1 rely. This strikes me as hearsay. An expert
2 is entitled to rely on it, but it doesn't
3 overcome the objection to the document.

4 MR. COHEN: Your Honor, it's not a
5 newspaper article. It's a compilation of data
6 that's, as I understand it, published in the
7 ordinary course and sourced. So it's
8 completely different than newspaper articles.

9 JUDGE SIPPEL: It has the -- as I
10 say, it has all the appearances of -- let me
11 say at least legitimacy or objectivity. I'm
12 going to overrule the objection and receive
13 it.

14 So 60 is identified and received
15 in evidence at this time.

16 (Whereupon, the above-referred to
17 document was marked as TWC Exhibit
18 60 for identification and was
19 received in evidence.)

20 MR. COHEN: 61, Your Honor, is --
21 there's no objection to it. It is a highly
22 confidential document. It is the most recent

1 agreement, affiliation agreement between
2 WealthTV and NCTC. So you actually have two
3 agreements that are coming into evidence, the
4 one that we had marked earlier was back in
5 2004 and this one is dated January 1, 2009.

6 JUDGE SIPPEL: Any objection?

7 MS. WALLMAN: No, Your Honor, and
8 in fact, I'm going to withdraw an objection to
9 No. 62 and my next objection would be to 64.

10 JUDGE SIPPEL: Thank you. 61 is
11 received in evidence. No objection as
12 identified and 61 is received, TWC 61.

13 (Whereupon, the above-referred to
14 document was marked as TWC Exhibit
15 61 for identification and was
16 received in evidence.)

17 TWC 62 and 63, no objection?

18 MS. WALLMAN: No objection to 62
19 and 63.

20 (Whereupon, the above-referred to
21 documents were marked as TWC 62
22 and 63 for identification and were

1 received in evidence.)

2 JUDGE SIPPEL: 62 and 63 are

3 basically what?

4 MR. COHEN: Let me go to 64 then,

5 Your Honor.

6 JUDGE SIPPEL: Well, just quickly,

7 what are 62 and -- just very briefly.

8 MR. COHEN: 62 is just to tell you

9 that the NCTC, it was just to make it easier

10 for Your Honor, a little discussion that we

11 had at the beginning. We just thought we'd

12 give you the website so you would understand

13 what they were.

14 JUDGE SIPPEL: Thank you.

15 MR. COHEN: And 63 is programming

16 that's available. It's a piece of Mr.

17 Homonoff's testimony that goes to competition

18 is going to talk about nontraditional, you can

19 call it ways of distributing video

20 programming. One of the arguments we are

21 making is that the way to look at the world is

22 not simply to look at cable in the emerging

1 world of the internet. This is an example of
2 one of those services that Mr. Homonoff will
3 talk about.

4 JUDGE SIPPEL: All right, 63. Is
5 this a way of transmitting a program that is
6 different than cable?

7 MR. COHEN: Yes. One of the
8 things that Mr. Homonoff will say is one of
9 the things that is changing for you to
10 consider in your competitive analysis if you
11 need to get there is that there are different
12 ways to reach consumers. Like Apple TV. You
13 can buy things directly. Hulu, there are
14 aggregators of programming that exist only on
15 the internet and don't have traditional linear
16 distribution by a cable or a telecos or DBS.

17 JUDGE SIPPEL: What about iPods?

18 MR. COHEN: Apple TV, which is
19 available on your iPod, on your computer is
20 actually one of those things. You can buy
21 programming directly. You don't have to be a
22 Time Warner Cable subscriber. If you want to

1 buy your TV that way, you can.

2 JUDGE SIPPEL: I will admit to
3 having an iPod, but it's in a box and I
4 haven't taken it out yet.

5 (Laughter.)

6 But I can't keep it in my ear.
7 They don't work in my ear.

8 MR. COHEN: So unrelated to this
9 case, you have to buy different headphones.
10 I can't use the iPod headphones, but you can
11 buy replacement headphones.

12 64, Your Honor --

13 JUDGE SIPPEL: Thank you.

14 MR. COHEN: This is a compilation
15 that's put out every year by an organization
16 called Kagan. I know you heard some testimony
17 from Mr. Gerbrandt in the last trial.

18 JUDGE SIPPEL: Yes, I did.

19 MR. COHEN: And Mr. Gerbrandt for
20 many years was at Kagan. Kagan is the
21 authoritative, an authoritative source for
22 market information for the cable industry.

1 Everybody relies upon it. We are not offering
2 it for the truth of any single number and I
3 can readily see on this document that the
4 Wealth number is different than what Mr.
5 Herring is going to testify to, but we are
6 offering it as to what the market reports
7 about cable networks. It will be useful to
8 the Court in a lot of testimony. Some piece
9 of testimony, in this case, is whether or not
10 the cable network can achieve any kind of
11 advertising with 221 million subscribers.
12 This is a document that will be useful in the
13 context of that.

14 Mr. Homonoff relied upon it in his
15 report. I mean this is classic expert market
16 report. The Kagan information has been put
17 out for years and widely subscribed to in the
18 industry.

19 JUDGE SIPPEL: So okay, this is
20 subscription information basically.

21 MR. COHEN: Number of subscribers
22 by each network.

1 JUDGE SIPPPEL: Any objection?

2 MS. WALLMAN: Yes, Your Honor, on
3 the ground of hearsay for the following
4 reason. Normally, you would assign a high
5 degree of reliability to a regularly produced
6 report of this kind, except for the experience
7 that WealthTV has had. WealthTV's experience
8 has been that periodically, perhaps annually,
9 they get a call from a representative of this
10 organization saying here's what we think your
11 subscriber numbers are, please confirm.

12 WealthTV regards those numbers as
13 proprietary and does not respond, does not
14 participate in cable and the numbers reported
15 for WealthTV are routinely wrong. So if that
16 is their methodology with respect to others
17 reported upon here, it does not have any
18 indicia of reliability.

19 MR. COHEN: Your Honor, every
20 expert who will testify in this case on both
21 sides are competent. They will say the Kagan
22 data is routinely used. That is wrong with

1 respect to Wealth. I'm not offering it for
2 the truth of the Wealth number. It's not the
3 purpose for which it's being offered.

4 I will also say there was a period
5 of time in this case which we just frankly
6 didn't have subscriber information for Wealth.
7 We have subsequently cured that. We now know
8 what the reports are, but there was a long
9 period of time at which we just didn't have
10 their subscriber information.

11 MS. WALLMAN: Well lest Your Honor
12 think that was recalcitrance on our part, let
13 me just explain that in the document request
14 that we received from the Defendants they had
15 ten apiece. Nowhere did the words actual
16 subscriber numbers appear. We had a
17 disagreement about whether WealthTV should
18 have interpreted their request to call for
19 that information. There was a disagreement
20 about it. It was the subject of a motion to
21 be held before Your Honor. But rather than
22 protract the debate, WealthTV decided to

1 supply those figures. But my point here is
2 that if the method of the report is the way
3 Wealth views the experience, here's what we
4 think you are, respond, and we're going to
5 publish it anyway. And make our money
6 charging people to see our data, it is not
7 reliable.

8 MR. COHEN: Your Honor, there a
9 lots of numbers that match the public company
10 numbers. Kagan wouldn't be in business all
11 these years and people wouldn't buy this data
12 if WealthTV's experience was representative.
13 So I'm not suggesting that anything Ms.
14 Wallman says is not right with respect to
15 WealthTV, but this is a document that would be
16 useful to Your Honor in getting the lay of the
17 land. The experts relied upon it. It's
18 authoritative. We're not relying upon the
19 WealthTV number.

20 JUDGE SIPPEL: Well, for all the
21 limitations on the usage and the fact that it
22 is -- apparently, it's used in the trade, is

1 that a fair way to say it?

2 MR. COHEN: Yes, Your Honor.

3 JUDGE SIPPEL: I think it's an
4 exception, specific exception to that anyway,
5 under hearsay. I'm not going to parse it out,
6 but sure, if you get the findings and you can
7 go into Kagan and show that it's unreliable in
8 some way, that's an appropriate finding, but
9 right now I'm going to move this case along.
10 We're going to receive it as an exception to
11 the hearsay rule, as identified, 64 is
12 received as TWC 64.

13 (Whereupon, the above-referred to
14 document was marked as TWC Exhibit
15 64 for identification and was
16 received in evidence.)

17 MR. SCHONMAN: Your Honor, I just
18 have a brief question. On my copy of Exhibit
19 64, there's a horizontal line that goes across
20 on the first --

21 JUDGE SIPPEL: After A&E?

22 MR. SCHONMAN: Yes, and after the

1 next page after VH1 Classic and on the next
2 one after WealthTV.

3 JUDGE SIPPEL: I see that.

4 MR. SCHONMAN: And the next one
5 after --

6 MR. COHEN: And then on page 5.
7 Are you asking why the tables are different?

8 MR. SCHONMAN: No, my question
9 just goes to this line. Was that in the
10 original? Did someone -- is that from a
11 photocopy?

12 MR. COHEN: I think it's the
13 photocopy. I'll replace it with something
14 without the line, if that's preferable. It
15 wasn't intended to be.

16 MR. SCHONMAN: It doesn't disturb
17 me. I'm just curious as to --

18 MR. COHEN: I don't want to say
19 that because I see that there's a line under
20 WealthTV and I don't know whether somebody did
21 that or not. So we will replace, Your Honor,
22 64 with a clean copy of that so there's no

1 underlining.

2 Thank you, Mr. Schonman. I just
3 don't know if it was photocopying or not.

4 MS. WALLMAN: And just by way of
5 clarification --

6 JUDGE SIPPEL: Thank you, Mr.
7 Schonman. Go ahead.

8 MS. WALLMAN: Just by way of
9 clarification I understand Mr. Cohen to be
10 representing that they do not offer for the
11 truth of the number attributed to WealthTV.

12 JUDGE SIPPEL: That's correct. He
13 said that, yes.

14 So with those reservations it's
15 received. And the reporter should get one
16 without the lines, the official copy. I'm not
17 worried about my lines,

18 MR. COHEN: We'll replace it all
19 around, Your Honor, so everybody has the same
20 copy.

21 JUDGE SIPPEL: I could treat it as
22 a motion to strike the lines.

1 (Laughter.)

2 MR. COHEN: That would be outside
3 the lines, Your Honor.

4 JUDGE SIPPET: 65.

5 MR. COHEN: 65 and 66 are actually
6 the DVDs that Your Honor had ruled on in the
7 motion.

8 JUDGE SIPPET: Those are not being
9 received, but they will be marked and they'll
10 go with the record. Maybe somebody on the 8th
11 Floor wants to watch them.

12 (Whereupon, the above-referred to
13 DVDs were marked as Exhibit 65 and
14 66 for identification and were
15 received in evidence.)

16 MR. COHEN: I think there are no
17 objections until 70. Is that right, Ms.
18 Wallman?

19 MS. WALLMAN: Yes.

20 MR. COHEN: Let me just say
21 briefly then 67, 68, and 69; 67 explains Mr.
22 Egan's methodology for doing his genre

1 analysis or as he calls it in English his
2 program classification methodology. And 68
3 and 69 are just a list of the documents that
4 our two experts, Mr. Egan and Mr. Homonoff
5 relied upon so Your Honor will have a sense of
6 the work that was done by them in connection
7 with their expert opinions.

8 JUDGE SIPPEL: And the source of
9 the documents, were they prepared by Mr. Egan?

10 MR. COHEN: 67 was prepared by Mr.
11 Egan. 68 is Mr. Egan's list of the documents,
12 the overall documents that he relied upon, and
13 69 is Mr. Homonoff's list of the documents
14 that he relied upon for his expert testimony.

15 JUDGE SIPPEL: Any objection to
16 that?

17 MS. WALLMAN: We're on 69?

18 JUDGE SIPPEL: 67, 68, 69.

19 MR. COHEN: I think there's no
20 objection.

21 MS. WALLMAN: No, I have no
22 objection.

1 JUDGE SIPPET: They're received as
2 identified as TWC 67, 68, and 69. Thank you.

3 (Whereupon, the above-referred to
4 documents were marked as TWC
5 Exhibits 67, 68, and 69 for
6 identification and were received
7 in evidence.)

8 MR. COHEN: 70 is a highly-
9 confidential document, Your Honor. I mean
10 again, I don't want to get into an extended
11 discussion on the merits. There was some
12 discussion yesterday. There will be a lot of
13 testimony about hunting licenses. And hunting
14 licenses are --

15 JUDGE SIPPET: That's all right.
16 There's a definition in the glossary.

17 MR. COHEN: One of the things that
18 you heard yesterday from I think it was by Ms.
19 Wallman was the comment that a hunting license
20 wouldn't be any good because they've already
21 gone through that process.

22 This is a document that people in

1 the programming department have compiled as
2 demonstrative for the purpose of this
3 litigation. It demonstrates the many numbers
4 of networks that are on Time Warner Cable on
5 a hunting license deal. This is a centrally
6 relevant piece of evidence. It is a
7 demonstrative exhibit. The people who will
8 testify from the Defendant can be cross
9 examined by it. It's being sponsored -- it
10 was initially used by our experts, but it will
11 be sponsored by Mr. Rosenberg and Ms. Witmer,
12 who will be able to testify about how this
13 list was compiled and what information was in
14 it and that, in fact, these are a list of the
15 hunting licenses that Time Warner Cable has
16 with various cable networks.

17 JUDGE SIPPEL: And the objection?

18 MS. WALLMAN: My objection is
19 hearsay and authentication. I was aware that
20 Mr. Homonoff used this in his report and I had
21 a chance to examine him about it in his
22 deposition. I wasn't aware that Mr. Egan

1 relied upon it, so I didn't ask him about it.

2 But this is not a document that
3 Mr. Homonoff can validate or authenticate and
4 he said as much in his deposition, if this had
5 been prepared and given to him by people in
6 Time Warner, It's hearsay as far as he's
7 concerned and when I asked him about some
8 specific examples on the list that didn't make
9 any sense on their face, he couldn't answer
10 the questions. So I don't -- hearsay as to
11 both Homonoff and Egan and can't be
12 authenticated by them.

13 MR. COHEN: But Mr. Rosenberg is
14 going to authenticate it. He's the vice
15 president of programming and he's going to
16 tell the Court, we didn't have fact
17 depositions. That doesn't mean that we can't
18 offer an exhibit into evidence.

19 JUDGE SIPPEL: What I'm going to
20 do, I'm sorry, I didn't mean to cut you off.
21 What I'm going to do is I'm going to put this
22 again on the reserve shelf. You can voir dire

1 and I'll make a ruling then.

2 (Whereupon, the above-referred to
3 document was marked as TWC Exhibit
4 70 identification.)

5 MR. COHEN: 71 --

6 JUDGE SIPPEL: I'm sorry, TWC 70
7 by the way is identified for the record.

8 MR. COHEN: I don't think we have
9 any objections until 74, is that right?

10 MS. WALLMAN: Yes, and let me just
11 consider 74 for a minute.

12 JUDGE SIPPEL: So TWC 71 to 73 are
13 listings?

14 MR. COHEN: Right, this is again
15 more information. This is -- 71 and 72 are
16 Mr. Egan's work product for his genre analysis
17 so that everyone can understand easily how he
18 arrived at the opinions that he arrived at
19 with respect to what the genres of programming
20 are.

21 71 deals with Mojo.

22 JUDGE SIPPEL: That's all right.

1 That's enough of a description.

2 What about 73?

3 MR. COHEN: 73 is a list of shows
4 that he watched, additional DVDs.

5 JUDGE SIPPEL: That's fine. No
6 objection?

7 MS. WALLMAN: No objection.

8 JUDGE SIPPEL: They're received in
9 evidence as TWC 71, 72, and 73.

10 (Whereupon, the above-referred to
11 documents were marked as TWC 71,
12 72, and 73 for identification.)
13 74.

14 MS. WALLMAN: I did have an
15 objection to 74, but I withdraw it.

16 JUDGE SIPPEL: Thank you. 74 is?

17 MR. COHEN: Let me just say it's a
18 highly-confidential document of WealthTV and
19 it relates to their contractual relationship
20 with Charter.

21 JUDGE SIPPEL: Looks like
22 correspondence. All right, confidential

1 documents, WealthTV, no objection. They, as
2 identified, TWC 74 is received in evidence as
3 TWC 74.

4 (Whereupon, the above-referred to
5 document was marked as TWC Exhibit
6 74 for identification and was
7 received in evidence.)

8 Thank you, Ms. Wallman.

9 75.

10 MR. COHEN: 75 is a demonstrative
11 exhibit that Time Warner Cable prepared with
12 respect to where WealthTV is carried. I'll do
13 this on cross examination with Mr. Herring, if
14 they will withdraw their objection. I don't
15 think any of the information here is
16 incorrect.

17 I'll show it to him if he thinks it's
18 incorrect. He can correct. So I'm going to
19 authenticate this through Mr. Herring.

20 It's a demonstrative exhibit just
21 to demonstrate one place where WealthTV is
22 carried for the ease of the Court.

1 JUDGE SIPPPEL: Do you have an
2 objection to that?

3 MS. WALLMAN: I'm not going to
4 object if he wants to use it on cross
5 examination. It was offered in case in chief
6 and it was supposed to be sponsored by Mr.
7 Rosenberg. It's not complete. It doesn't
8 list the many MVPDs where WealthTV is carried.
9 It may be demonstrative, but it's not clear on
10 its face what it's demonstrative of. It's
11 certainly not a complete picture of MVPD
12 carriage of WealthTV.

13 MR. COHEN: It's intended to be 1
14 to 25. These are the 25 largest MVPDs and
15 whether or not Wealth is actually available on
16 them. We'll do it on cross with Mr. Herring.

17 JUDGE SIPPPEL: Well, we'll
18 identify. I'm going to leave it as an
19 identified exhibit since it's going to be
20 used.

21 MR. COHEN: We'll tie it up, Your
22 Honor.

1 JUDGE SIPPEL: Thank you.

2 Identified today only.

3 (Whereupon, the above-referred to
4 document was marked as TWC Exhibit
5 75 for identification.)

6 MR. COHEN: 76, Your Honor, is I
7 assume is falling by the wayside under the
8 video ruling of Your Honor. 76 is actually
9 WealthTV's own document. They created
10 something called a sizzle reel. Sizzle reel
11 are kind of highlights film which programming
12 networks use in connection with trying to get
13 carriage, but I assume you're not admitting
14 videos, so I assume you're not admitting 76.

15 MR. MILLS: Just for
16 clarification, is this an old 45 record?

17 MR. COHEN: I can't afford the
18 current version, and they apparently gave it
19 to you, so I don't know.

20 (Laughter.)

21 JUDGE SIPPEL: Well, yes, that's
22 the situation as I understand it.

1 MR. COHEN: Can I see your copy,
2 Mr. Mills, because I actually misspoke with
3 respect to 76.

4 Apparently I'm the only one who
5 doesn't have a current copy. We are actually
6 offering the cover of this page, so let me be
7 clear and I had forgotten about this and I
8 couldn't read it on my copy of 76 for an
9 admission by WealthTV. So Your Honor, you've
10 heard already that there is one significant
11 issue is whether or not WealthTV is
12 principally targeted at a male demographic.
13 Their own sizzle reel says broad appeal across
14 all demographics on the left. You're going to
15 hear a lot of testimony about that. So we're
16 actually offering the front page of the sizzle
17 reel and I was just confused as I went through
18 this, rather than the sizzle reel itself.
19 We're not offering the video.

20 JUDGE SIPPPEL: Is there any
21 objection?

22 MS. WALLMAN: I think it has no

1 probative value, but that's for Your Honor to
2 determine.

3 JUDGE SIPPEL: All right, it's
4 identified and received as TWC 76, but no
5 video, no CD, just this picture.

6 (Whereupon, the above-referred to
7 document was marked as TWC Exhibit
8 76 for identification.)

9 MR. COHEN: 77 was actually a
10 video which understand Your Honor is not going
11 to take.

12 JUDGE SIPPEL: No.

13 MR. COHEN: But we're going to
14 submit it for the record, Your Honor, 77.
15 It's a Mojo sizzle reel.

16 JUDGE SIPPEL: Oh, I see.

17 MR. COHEN: It falls into Your
18 Honor's ruling with respect to DVDs.

19 JUDGE SIPPEL: Yes, it's
20 identified, but it's not received.

21 (Whereupon, the above-referred to
22 document was marked as TWC Exhibit

1 77 for identification.)

2 JUDGE SIPPEL: What's on this?

3 Can I ask that without --

4 MR. COHEN: It's --

5 JUDGE SIPPEL: What's --

6 MR. COHEN: We had intended, Your
7 Honor, as you know, with respect to both Mr.
8 Egan's work and also the sizzle reels was to
9 give Your Honor a view of what the experts,
10 our experts will say is the difference in look
11 and feel between WealthTV and Mojo.

12 JUDGE SIPPEL: That's adequately
13 described. We've handled that in writing so.
14 It's identified though, but not received.

15 Yes, ma'am.

16 MS. WALLMAN: Just to be clear.
17 My book includes an actual DVD as well. If
18 the number 77 DVD goes up with the record, I
19 would like No. 76 DVD go up with the record as
20 well.

21 JUDGE SIPPEL: Well, I'm sorry.

22 MS. WALLMAN: I don't want to be

1 confused by the fact that you got the picture
2 admitted.

3 MR. COHEN: That's acceptable to
4 us.

5 JUDGE SIPPEL: That's a god point.

6 MS. WALLMAN: And I have no
7 objection to any of the remaining exhibits of
8 Time Warner Cable.

9 JUDGE SIPPEL: That's through 80,
10 78 through 80?

11 MR. COHEN: Right, yes, Your
12 Honor.

13 JUDGE SIPPEL: No objection.

14 MR. COHEN: We will give you tabs
15 at the appropriate time, beginning with our
16 direct testimony.

17 JUDGE SIPPEL: I see, okay. But
18 that completes the documents aside from the
19 written testimony?

20 MR. COHEN: Yes, Your Honor.

21 JUDGE SIPPEL: 78 through 80 are -
22 - well, obviously, 78 is a description of a

1 document -- Homonoff bio and 79 is a --

2 MR. COHEN: A letter from Ms.

3 Wallman, actually, Your Honor.

4 JUDGE SIPPEL: From Ms. Wallman to

5 Mr. Lawrence Apfelbaum, filing notice of FCC

6 complaint, and Mr. Egan's bio. 78 through 80

7 as described are received -- there being no

8 objection are received in evidence, TWC 78

9 through 80.

10 (Whereupon, the above-referred to

11 documents were marked as TWC 78,

12 79, and 80 for identification and

13 were received in evidence.)

14 And that concludes the documents

15 of TWC with written testimony to be identified

16 by the individual witnesses of the Defendant

17 and we'll move them at that point.

18 Is that okay with you, Ms.

19 Wallman?

20 MS. WALLMAN: Yes, Your Honor.

21 JUDGE SIPPEL: Very well, we're at

22 a point now, why don't we go off the record

1 and see what we want to do?

2 (Off the record.)

3 JUDGE SIPPET: We're back on the
4 record.

5 All BlackBerries off.

6 How are you doing with your
7 transmission, Ms. Reporter? I'm sure you'd
8 tell me if it was a problem.

9 THE REPORTER: It's very good
10 today.

11 JUDGE SIPPET: That's great, great
12 news.

13 All right, and who is going to go
14 next? Will it be Mr. Solomon?

15 MR. SOLOMON: Sure, I can go next.

16 MS. WALLMAN: Your Honor, would it
17 be useful to hear --

18 JUDGE SIPPET: Yes, of course.

19 I'm sorry. Yes, yes, please.

20 MS. WALLMAN: So here's what I
21 expect. A draft is being worked on that we
22 think can be delivered to Defendants for

1 review, to begin discussions about whether it
2 meets their objections and conforms to our
3 mutual understanding of your evidentiary
4 rulings. We think that could happen at about
5 two o'clock today.

6 JUDGE SIPPEL: Fine.

7 MS. WALLMAN: And I think that
8 we've agreed that it's important before the
9 testimony begins for us to finish the work of
10 the document admission session.

11 JUDGE SIPPEL: Well, yes, we will.
12 That's going to happen.

13 MS. WALLMAN: Yes. Mr. Turner
14 will be ready to testify. I don't know at
15 what hour all of these other tasks will be
16 accomplished, but he'll be ready to testify if
17 there's time today, and if not, we'll plan for
18 tomorrow.

19 JUDGE SIPPEL: How long do you
20 think he -- I mean, I know this can't be
21 answered -- but how long do you think? The
22 direct won't take long at all, I take it.

1 MS. WALLMAN: No. I think direct
2 might be 30 minutes.

3 JUDGE SIPPEL: Any idea?

4 MR. COHEN: An hour of cross. I'm
5 surprised by the length of direct. So I think
6 I'd pause on the cross, but 30 minutes and he
7 only has nine paragraphs in his written direct
8 statement.

9 JUDGE SIPPEL: Let's see how we
10 can do. Let's see how much we can do.

11 Now, the other question I had is
12 the opening statements. Wasn't there a
13 request for opening statements?

14 MR. COHEN: We had talked since we
15 had done trial briefs and to move things along
16 we'd go right to testimony.

17 JUDGE SIPPEL: Is that okay, Ms.
18 Wallman?

19 MS. WALLMAN: Yes, we're agreed
20 with that.

21 JUDGE SIPPEL: Okay. That's fine.
22 That's fine.

1 MS. WALLMAN: We, of course, want
2 to do whatever is useful for Your Honor.

3 JUDGE SIPPEL: No, no, no. That's
4 up to you. I mean, some parties just, you
5 know, want to do that. I don't have a strong
6 feeling one way or the other. You know, it's
7 always good to hear from the lawyers in the
8 case.

9 MS. WALLMAN: Well, I --

10 JUDGE SIPPEL: Don't, don't, don't
11 take that as anything on my part. Everything
12 is fine the way it is.

13 MS. WALLMAN: Okay.

14 JUDGE SIPPEL: Okay. Why don't we
15 start with the next document thing, Mr.
16 Solomon.

17 MR. SOLOMON: Sure. As I
18 mentioned yesterday, we're going to withdraw
19 Exhibits 1 and 2.

20 MS. WALLMAN: Pardon me just a
21 minute. I thought you'd be going to Bright
22 House next.

1 JUDGE SIPPET: Well, I'm just
2 going down the table. There's no particular
3 reason why I'm selecting one over the other.

4 MR. SOLOMON: Your Honor, our
5 exhibits are in a spiral bound notebook that
6 you have there.

7 JUDGE SIPPET: Yeah.

8 MR. SOLOMON: I think that's a
9 notebook copy. There's only one volume.

10 JUDGE SIPPET: And your first
11 Exhibits 1 and 2 are omitted; is that it, or
12 withdrawn?

13 MR. SOLOMON: Yes, we're
14 withdrawing those, Your Honor.

15 JUDGE SIPPET: Thank you.

16 (Whereupon, the documents referred
17 to as Comcast Exhibit Nos. 1 and 2
18 were withdrawn from evidence.)

19 MR. SOLOMON: Exhibit 3 is one of
20 our direct testimony. Do you want us to move
21 to admit that now or wait until we present the
22 witness?

1 JUDGE SIPPET: I think we should
2 wait until the witness.

3 MR. SOLOMON: Okay. Exhibits 4
4 through 7, which I understand Ms. Wallman has
5 an objection to; is that correct?

6 MS. WALLMAN: Yes.

7 MR. SOLOMON: These are a series
8 of E-mails between Mr. Bond, who testified
9 last week, an executive at Comcast, and Mr.
10 Shell, another executive at Comcast who is not
11 testifying. They're offered for the truth of
12 what Mr. Bond says in these E-mails and also
13 for his state of mind in the E-mails that he
14 received, with respect to the E-mails that he
15 received.

16 JUDGE SIPPET: Okay, and what were
17 his -- well, that's all right. Is there
18 objection to these?

19 MS. WALLMAN: My objection--

20 MR. SOLOMON: These are highly
21 confidential. Excuse me. These are highly
22 confidential.

1 JUDGE SIPPEL: I see.

2 MS. WALLMAN: My objection was
3 insofar as Comcast might rely upon the out-of-
4 court statements of the current not available
5 for testimony. If the limitation is that it's
6 going to be relied on for the purposes that
7 Mr. Solomon has just put in the record, then
8 I don't object.

9 JUDGE SIPPEL: That's fine. I
10 take it that it's only the person that's
11 testifying, Mr. Bond, as to which the
12 documents would be offered for the truth. So
13 he'd be able to cross-examine. Bond you can
14 cross-examine. The other ones are just
15 offered as business records.

16 MR. SOLOMON: Just for the state
17 of mine --

18 JUDGE SIPPEL: The state of mind
19 type thing. That's fine. Well, there's no
20 objection. So as identified in Exhibits 4
21 through 7 of Comcast are received as Comcast
22 4, 5, 6, and 7.

1 (Whereupon, the documents referred
2 to were marked as Comcast Exhibit
3 Nos. 4 through 7 for identifica-
4 tion and were received in
5 evidence.)

6 MR. SOLOMON: Exhibit 8 is Mr.
7 Dannenbaum's direct testimony. So we'll skip
8 that for now.

9 Exhibit 9, I'm not sure whether or
10 not -- well, Exhibit 9 is an E-mail exchange
11 between a witness, Mr. Dannenbaum, a Comcast
12 executive and someone else at Comcast. It's
13 offered, again, for truth of what Mr.
14 Dannenbaum says, as well as his state of mind
15 from the fact that he received E-mails.

16 MS. WALLMAN: On that basis, I
17 withdraw my objection.

18 JUDGE SIPPEL: As identified,
19 Exhibit 9 is received in evidence as Comcast
20 Exhibit 9..

21 (Whereupon, the document referred
22 to was marked as Comcast Exhibit

1 No. 9 for identification and
2 received in evidence.)

3 MR. MILLS:A And I would note that
4 that one is labeled confidential.

5 MR. SOLOMON: Yes, this one is
6 labeled confidential.

7 JUDGE SIPPEL: And it is
8 confidential.

9 MR. SOLOMON: I think there are no
10 more objections. So we can go through them
11 quickly.

12 MS. WALLMAN: I do have objections
13 to 15 and 16 and 17.

14 JUDGE SIPPEL: Well, you don't
15 have them for 11 through 14?

16 MS. WALLMAN: That's correct.

17 MR. SOLOMON: Okay.

18 JUDGE SIPPEL: Is there a quick,
19 shorthand way of identifying?

20 MR. SOLOMON: Sure.

21 JUDGE SIPPEL: And then we'll
22 bring them right in.

1 MR. SOLOMON: Ten we'll skip
2 because that's the direct testimony of our
3 expert, Larry Gerbrandt.

4 Eleven, which we'd move to
5 introduce, is his curriculum vitae.

6 Twelve, 13 and 14 -- 12 and 13 are
7 charts summarizing his report, and 14 is
8 Wealth TV material that he relied on in his
9 report. It's two pages.

10 JUDGE SIPPEL: Thank you.

11 Exhibits as identified by Mr.
12 Solomon, Exhibits 11, 12, 13 and 14, are
13 received as Comcast Exhibits 11, 12, 13 and
14 14.

15 (Whereupon, the documents referred
16 to were marked as Comcast Exhibit
17 Nos. 11 through 14 for identifica-
18 tion and were received in
19 evidence.)

20 MR. SOLOMON: And some of those
21 are -- 12 and 13 are labeled confidential.

22 JUDGE SIPPEL: All right.

1 MR. SOLOMON: Exhibit 15, which is
2 also labeled confidential, is material which
3 Mr. Gerbrandt relied. It comes from
4 Mediamark, and it's demographic data. The
5 source is listed at the bottom, Mediamark
6 Research.

7 JUDGE SIPPEL: Let me see what
8 that looks like.

9 There's an objection to this?

10 MS. WALLMAN: Yes, Your Honor.

11 JUDGE SIPPEL: And --

12 MS. WALLMAN: My objection was --

13 JUDGE SIPPEL: Go ahead.

14 MS. WALLMAN: -- was hearsay, but
15 I was considering withdrawing it given the
16 trend of your rulings this morning about
17 reliance on third party market reports, but
18 it's not clear that this fits that mold.

19 There's a column on the far right
20 "fit criteria."

21 MR. SOLOMON: Your Honor, I
22 actually think I misdescribed this. This is

1 a chart that Mr. Gerbrandt prepared based on
2 that material.

3 JUDGE SIPPEL: Well, did he just
4 add his comments to the far right and
5 everything else was published?

6 MR. SOLOMON: I'm not prepared
7 because I didn't realize she was planning to
8 object to this. It wasn't on her list. So I
9 apologize, Your Honor.

10 PARTICIPANT: He gathered the data
11 from Mediamark and created that page.

12 MR. SOLOMON: He gathered the data
13 from Mediamark and created the table, and
14 obviously he can be cross-examined on how he
15 prepared this chart.

16 JUDGE SIPPEL: And what about that
17 comment "fit criteria"? What about that
18 comment on the far right?

19 MR. SOLOMON: My understanding,
20 I'm not positive that that's all from the
21 report, but he can be cross-examined on that.

22 JUDGE SIPPEL: What I'm going to

1 do is reserve on this. You can voir dire Mr.
2 Gerbrandt and take it from there.

3 MR. SOLOMON: That was labeled
4 confidential.

5 (Whereupon, the document referred
6 to was marked as Comcast Exhibit
7 No. 15 for identification.)

8 MR. SOLOMON: Exhibit 16, 17 or --
9 excuse me -- 16 and 17 are additional tables
10 summarizing Mr. Gerbrandt's report. Those are
11 confidential.

12 JUDGE SIPPEL: Summaries. Okay,
13 and these are objected to?

14 MS. WALLMAN: Yes, Your Honor, on
15 grounds of hearsay. I did have a chance to
16 ask Mr. Gerbrandt about the analysis that went
17 into Exhibit 16 and 17 at his deposition. To
18 my recollection, this is based on a third
19 party data reporting service called Tribune
20 Media Services, and normally, as I understand
21 the trend of Your Honor's evidentiary rulings,
22 there's desire to be sure of the indicia of

1 reliability.

2 Mr. Gerbrandt acknowledged in his
3 deposition that his analysis relied on the
4 correctness of the underlying database. He
5 also acknowledged that some of the entries
6 that he downloaded in order to form this
7 analysis were blank and had to be filled in
8 manually, and further in his deposition, he
9 indicated that he relied upon the category and
10 genre information in the database selectively.

11 So I don't think the report or the
12 underlying database present the indicia of
13 reliability that invite credence or
14 reliability.

15 MR. SOLOMON: Your Honor, Mr.
16 Gerbrandt is here as an expert witness. This
17 is data that's based substantially on Turner
18 data, as she mentioned. That's reliable data
19 that's used by the industry. The Commission
20 has referred to it in some of its reports.
21 Her own expert has referred to this data.

22 Mr. Gerbrandt has discussed in his

1 direct testimony that obviously isn't
2 introduced yet, but will be introduced, how he
3 went through the data, how he analyzed it, any
4 corrections or adjustments he made in the
5 data.

6 That's what experts do. They take
7 data and they analyze the data. They provide
8 the reports. She can cross-examine him as she
9 did in her deposition as to how he used the
10 data, how he adjusted the data, and the basis
11 for his report. But this is the kind of
12 information that's exactly what gets
13 introduced for experts. They're explaining
14 the basis for their expert opinion and how
15 they analyze data.

16 JUDGE SIPPEL: I'm going to let --
17 this is going to be handled again by voir
18 dire. We're going to reserve it. Voir dire
19 will not be very long.

20 Obviously there's a presumption of
21 reliability here, but I want to be sure that
22 Ms. Wallman gets her points across before we

1 rule on it.

2 I haven't made up my mind that
3 they're going to come in, but the burden is
4 going to be on the voir dire to keep them out.

5 MS. WALLMAN: Your Honor, just for
6 the clarity of the record, the Tribune Media
7 Service or Turner Media --

8 MR. SOLOMON: Turner Media. I'm
9 sorry. I misspoke.

10 JUDGE SIPPEL: Turner? Tribune?

11 MR. SOLOMON: Tribune. Thank you,
12 Ms. Wallman.

13 JUDGE SIPPEL: So this basically -
14 - is this trade association data that's
15 comparable in the industry?

16 MR. SOLOMON: No, this is an
17 entity that puts together data that is spread
18 throughout the industry. It's essentially
19 electronic program guide information like
20 electronic TV Guides, and it categorizes the
21 programming into different program categories.

22 Mr. Turner -- excuse me -- Mr.

1 Gerbrandt then took the Tribune data and
2 analyzed it to show that the categories of
3 programming that Wealth TV has are
4 substantially different than the categories of
5 programming that Mojo has, and his expert
6 testimony will go to the issue of whether the
7 programming is substantially similar.

8 And he took neutral third party
9 data and analyzed it, as Ms. Wallman
10 indicated, and as explained in his direct
11 testimony, when he was analyzing the data he
12 did make adjustments, and he has explained all
13 of those.

14 JUDGE SIPPEL: What is this
15 category of mixed? I'm sorry. It's not a
16 category, rather, but the column "mix," and
17 he's got a percentage. Are those his numbers?

18 MR. SOLOMON: Yes, those are the
19 percentages of programming in those
20 categories, programming minutes in those
21 categories. So for that time period for Mojo
22 from looking now at Exhibit 17, the first one

1 is martial arts. During that period 13.6
2 percent of the programming on Mojo fell into
3 that category based on the Tribune data.

4 JUDGE SIPPET: Based on the
5 Tribune data, but it was his calculation that
6 got it to the 13.6.

7 MR. SOLOMON: Yes. He took the
8 Tribune data, which Ms. Wallman has the
9 underlying data, and he did mathematical
10 calculations with it.

11 JUDGE SIPPET: You can voir dire
12 on that.

13 MS. WALLMAN: Again, just for the
14 clarity of the record, our expert did not rely
15 on Tribune Media.

16 JUDGE SIPPET: Did they rely upon
17 anything better?

18 MR. SOLOMON: I believe she
19 mentioned that is something she uses, correct,
20 Ms. Wallman?

21 MS. WALLMAN: Not to my
22 recollection, but I don't mean to litigate it.

1 JUDGE SIPPET: No, that's all
2 right. That's got no relevance. I mean,
3 that's why --

4 MR. SOLOMON: She acknowledged
5 that it was widely used.

6 JUDGE SIPPET: And I'm sure that
7 we'll learn from Mr. Gerbrandt more about it.
8 I mean, I've given you a lot. So you're
9 getting a reserved on those two. You know why
10 I was asking that question primarily though is
11 that, you know, what's so secretive about this
12 information that's got to be confidential. I
13 take it it's the calculation of the mix.

14 MR. SOLOMON: No, the reason it's
15 confidential, and you can redesignate it if
16 you'd like, Your Honor, this database was
17 purchased pursuant to a licensing agreement
18 that says we've supposed to make efforts to
19 keep it confidential, but if you determine
20 that it's not, then that's the end of it.

21 JUDGE SIPPET: Well, that's the
22 end of it.

1 (Laughter.)

2 MR. SOLOMON: That's fine, Your
3 Honor.

4 JUDGE SIPPEL: Okay.

5 MR. SOLOMON: We were just trying
6 to carry out the licensing agreement.

7 JUDGE SIPPEL: Well, I understand
8 that. You're doing what you should be doing.
9 You know, if it's that -- okay. You've
10 explained. Never mind. That's my ruling

11 MR. SOLOMON: Okay.

12 JUDGE SIPPEL: So this is going to
13 be Exhibit 16 and 17 are no longer
14 confidential. What about 15? Fifteen is in
15 a different category, I would say.

16 MR. SOLOMON: Fifteen would be the
17 same thing. I believe, am I correct, you
18 reserved on 15?

19 JUDGE SIPPEL: Oh, these are
20 reserved on how we're going to treat them, but
21 that has go nothing to do with
22 confidentiality. My reservations are this

1 woman can voir dire the witness as to how he
2 used them, how he prepared them, what he
3 intends to do with them, and then they're in
4 or out or in with reservations, something like
5 that. Do you know what I'm saying?

6 MR. SOLOMON: Yes.

7 JUDGE SIPPEL: It has got nothing
8 to do with confidentiality, which is a whole
9 different kettle of fish.

10 MR. SOLOMON: Yes. You can
11 redesignate 15 as well.

12 JUDGE SIPPEL: So I can do it.
13 All right. Well, then it's out. No
14 confidential protection for 15, 16, and 17.

15 MS. WALLMAN: Your Honor, WealthTV
16 does not have objections to the remainder of
17 the Comcast exhibits.

18 JUDGE SIPPEL: Okay. Let's go off
19 the record for a minute.

20 (Whereupon, the foregoing matter
21 went off the record at 12:18 p.m.
22 and went back on the record at

1 12:18 p.m.)

2 JUDGE SIPPEL: Let's go back on
3 the record.

4 I haven't ruled on these.

5 Fifteen, 16 and 17, exhibits, Comcast, for
6 identification as they've been identified, but
7 the ruling on their receipt into evidence is
8 being reserved until the witness that is
9 sponsoring them will be voir dired by Ms.
10 Wallman, by WealthTV.

11 MS. WALLMAN: Understood, Your
12 Honor.

13 (Whereupon, the documents referred
14 to were marked as Comcast Exhibit
15 Nos. 15 and 16 for identifica-
16 tion.)

17 JUDGE SIPPEL: Okay. Now, let's
18 go off the record just a minute.

19 (Whereupon, the foregoing matter
20 went off the record at 12:19 p.m.
21 and went back on the record at
22 12:19 p.m.)

1 JUDGE SIPPET: Let's go back on
2 the record.

3 I'm going to just make the
4 statement that the Commission appreciates it
5 very much. Ms. Wallman is waiving all
6 objection to the rest of these Comcast
7 exhibits, which 18 through 31, and Mr. Solomon
8 is going to identify them and we will move
9 them in as rapidly as we can.

10 Go ahead, sir.

11 MR. SOLOMON: Exhibits 18 and 19
12 are electronic versions of spreadsheets that
13 were backup to Mr. Gerbrandt's calculations.

14 JUDGE SIPPET: So identified, 18
15 and 19 are in as Comcast 18 and 19.

16 (Whereupon, the documents referred
17 to were marked as Comcast Exhibit
18 Nos. 18 and 19 for identification
19 and were received in evidence.)

20 MR. SOLOMON: Exhibits 20 and 21
21 are E-mail exchanges that involve in the case
22 of Exhibit 20 WealthTV personnel and in the

1 case of Exhibit 21 WealthTV personnel and also
2 Comcast personnel.

3 JUDGE SIPPEL: As identified,
4 Exhibits 20 and 21 are received as Comcast
5 exhibits.

6 (Whereupon, the documents referred
7 to were marked as Comcast Exhibit
8 Nos. 20 and 21 for identification
9 and were received in evidence.)

10 MR. SOLOMON: Exhibits 22, 23 and
11 24 are WealthTV presentation materials.

12 JUDGE SIPPEL: As identified, 22,
13 23 and 24 are received as Comcast Exhibits 22,
14 23, and 24.

15 (Whereupon, the documents referred
16 to were marked as Comcast Exhibit
17 Nos. 22 through 24 for identifica-
18 tion and were received in
19 evidence.)

20 MR. SOLOMON: Exhibit 25 is a
21 highly confidential E-mail with WealthTV
22 subscriber information.

1 JUDGE SIPPET: As identified, it's
2 received as Comcast 25.

3 (Whereupon, the document referred
4 to was marked as Comcast Exhibit
5 25 for identification and received
6 in evidence.)

7 MR. SOLOMON: And Exhibits 26
8 through 31 are affiliation agreements or term
9 sheets involving WealthTV and other MVPDs.

10 JUDGE SIPPET: As identified,
11 Exhibits 26 through 31 are received in
12 evidence as Comcast 26, 27, 28, 29, 30 and 31.

13 (Whereupon, the documents referred
14 to were marked as Comcast Exhibit
15 Nos. 26 through 31 for identifica-
16 tion and were received in
17 evidence.)

18 MR. MILLS: All of those in that
19 last group are highly confidential.

20 MR. SOLOMON: Twenty-six through
21 31 are confidential.

22 MR. MILLS: Highly.

1 MR. SOLOMON: Highly confidential
2 and 25 is also highly confidential.

3 JUDGE SIPPEL: Thank you.

4 That concludes the documents with
5 the exception, of course, of the testimony,
6 which is a different procedure, procedure at
7 a different time.

8 Thank you very much, Mr. Solomon,
9 and thank you, Ms. Wallman.

10 The next documents will then be
11 from Bright House; is that right?

12 MR. BECKNER: I have a very short
13 list, and this is a thin one. Here we go.

14 JUDGE SIPPEL: I was going to say
15 I'm going to have a shorthand as this is --
16 we're going to get the five percent now.

17 MR. BECKNER: Actually it's two
18 and a half percent.

19 (Laughter.)

20 JUDGE SIPPEL: All right. Let's
21 have your two and a half cents on this. Oh,
22 well. Bright House is being represented by

1 Mr. Beckner, and, Mr. Beckner, you have been
2 quite and anxious to go. So we're going to
3 go.

4 MR. BECKNER: All right. Bright
5 House Exhibit 1 is a copy of an E-mail from
6 John Scaro to Stephen Colafrennesco, who is a
7 Bright House employee, and if I can get
8 through the -- and that's being offered --
9 it's going to be sponsored by a Bright House
10 witness, Ann Stith. It relates to Exhibit 2,
11 which is a copy of an E-mail from Ann Stith to
12 Stephen Colafrennesco, and what she's going to
13 testify to is that Exhibit 1, the first E-
14 mail, was forwarded to her by Mr.
15 Colafrennesco, and Exhibit 2 is her response
16 to that E-mail and to Mr. Colafrennesco.

17 JUDGE SIPPEL: So the two are
18 related. I mean one and two are related.

19 MR. BECKNER: That's correct.
20 That's correct, and that's why I'm mentioning
21 both at the same time.

22 JUDGE SIPPEL: Is there any

1 objection?

2 MS. WALLMAN: I don't have any
3 objection to Exhibit 1, Your Honor, but
4 Exhibit 2 doesn't look complete to me. I'd
5 like to see the whole thing. It is on its
6 face, how that I understand that it's going to
7 be sponsored by Ann Stith, that's helpful when
8 I cross-examine, but it refers to the same guy
9 that Michelle and I met with. There's no
10 forwarding E-mail indicating who that might
11 be. I supposed we are invited to infer that
12 that's John Scaro, but this page doesn't look
13 complete to me.

14 JUDGE SIPPEL: All right. Mr.
15 Beckner.

16 MR. BECKNER: This is the record
17 that we have, and I'll just mention that this
18 document is filed in Bright House's answer to
19 the WealthTV complaint, and I don't think we
20 have the complete E-mail here, but the point
21 is that we have the witness who will testify
22 about the E-mail, and I know she can testify

1 about her recollection as to what this E-mail
2 was, and she can identify this as her
3 response, and she can say whether or not this
4 Exhibit 2 is, in fact, in response to Exhibit
5 1.

6 JUDGE SIPPEL: All right. I don't
7 mean to interrupt, but I got another
8 BlackBerry alert. I just ditched my own, in
9 other words, turned off. I think if you are
10 in the direct line with the reporter I think
11 it might be more of a -- definitely turn it
12 off.

13 Okay? We have our own little
14 sonar system.

15 (Laughter.)

16 JUDGE SIPPEL: All right. Let me
17 go back to this. Are we okay? We're still
18 on the record.

19 The question is though is this the
20 complete document or was part of it cut off.
21 Is that basically the question, Ms. Wallman?

22 MS. WALLMAN: Yes.

1 MR. BECKNER: Well, I mean, the
2 witness is going to testify that this is her
3 complete method.

4 JUDGE SIPPEL: Yes, but that's not
5 the question. It's when it was taken, when it
6 was pulled from the records and it was
7 prepared as an exhibit, was something cut off
8 or is this the way it was taken out of the
9 file?

10 MR. BECKNER: This is the way we
11 have it in the hard copy, and again, the
12 witness can be asked about this.

13 JUDGE SIPPEL: I understand, but
14 if we know ahead of time, we can maybe clarify
15 it. We just don't know yet.

16 MS. WALLMAN: Well, if the witness
17 can testify about it and can be cross-examined
18 about it, if she has difficulty recalling it,
19 I don't object to this being used to refresh
20 her recollection. I just don't think it can
21 be properly admitted in its current state on
22 the same ground that the E-mail between Donna

1 smith and Alan Dannenbaum yesterday because of
2 its incompleteness could not be admitted.

3 JUDGE SIPPEL: Well, I'll reserve
4 on -- how about the first one? The first one
5 is okay though.

6 MS. WALLMAN: Exhibit 1 I have no
7 objection to.

8 JUDGE SIPPEL: All right. Now,
9 Exhibit 1 is identified and received as Bright
10 House Exhibit 1.

11 (Whereupon, the document referred
12 to was marked as Bright House
13 Exhibit No. 1 for identification
14 and was received in evidence.)

15 JUDGE SIPPEL: What do you use?
16 BHN is going to be your abbreviation?

17 MR. BECKNER: Yes, sir.

18 JUDGE SIPPEL: Thank you. That's
19 a good, short one.

20 What I'm going to do is give you
21 an opportunity to check back with the client
22 and see, unless you're absolutely sure right

1 now that that's a complete document and
2 there's nothing else that it was taken from.

3 In other words, you know, what I'm
4 saying.

5 MR. BECKNER: Yes, sir.

6 JUDGE SIPPEL: Was it taken off as
7 being the only thing relevant? And it might
8 have been a good idea. On the other hand, Ms.
9 Wallman has a point.

10 MR. BECKNER: Well, I always tell
11 my witnesses to be leery of questions that
12 have "absolutely sure" in them. So I will do
13 that, to be absolutely sure that we don't have
14 it.

15 JUDGE SIPPEL: Okay, all right.
16 That's fine, and we'll just reserve on that.
17 That is true. Ms. Wallman is entitled to the
18 same treatment on this . It's going to have
19 to come in through the traditional way,
20 through the witness if it's going to be
21 received and used in the traditional way. So
22 that's reserved. But one is in.

1 MR. BECKNER: All right.

2 JUDGE SIPPEL: Thank you.

3 (Whereupon, the document referred
4 to was marked as Bright House
5 Exhibit No. 2 for identification.)

6 MR. BECKNER: All right, and then
7 Exhibit 3, which is entitled an HD programming
8 study that was done by Bright House. It's
9 dated July 20, '07, and actually Exhibit 3 and
10 Exhibit 4 are related in that Exhibit 4 is
11 sort of the back-up for this study, and Ms.
12 Stith is going to sponsor this, and she'll
13 testify that this was done by the company in
14 an effort to determine what kind of high
15 definition channels that her subscribers might
16 like to see on the Bright House cable systems.

17 And these were done in multiple
18 markets that Bright House serves, and the
19 market breakdowns are in Exhibit 4.

20 JUDGE SIPPEL: So these studies
21 have to do --

22 MR. BECKNER: this was not

1 produced for the litigation or anything like
2 that. This was produced, generated in the
3 ordinary course of Bright House business and
4 that's what she'll testify.

5 JUDGE SIPPEL: These are the HD
6 markets that were served by Bright House or
7 that were contemplated to be served?

8 MR. BECKNER: No, these are like
9 if you look at Exhibit 4, you know, you'll
10 have the survey results for Indianapolis.
11 Indianapolis is a market where Bright House
12 has cable systems.

13 The next page is Tampa, and the
14 next page is Birmingham. The next page is
15 Bakersfield and so on. These are all
16 geographic markets that are served by Bright
17 House, you know, Indianapolis, Birmingham and
18 so on, Tampa, central Florida.

19 JUDGE SIPPEL: But I take it that
20 the percentages that are next to the program,
21 is that an internal calculation or is this,
22 again, something that came from I guess it

1 would be a commercial study?

2 MR. BECKNER: Well, that is the
3 results of the study, you know, of the survey
4 that they did at the time. In other words,
5 that --

6 JUDGE SIPPEL: This was a Bright
7 House survey then?

8 MR. BECKNER: Right. In other
9 words, for instance, on Exhibit 4, the first
10 page, Indianapolis HD interest, 51 percent of
11 the people surveyed ranked, you know,
12 Discovery HD as something that they would
13 watch if offered.

14 JUDGE SIPPEL: All right.

15 MR. BECKNER: And so on.

16 JUDGE SIPPEL: Exhibit 3 is not
17 marked as confidential, but Exhibit 4 is
18 marked as highly confidential. Is there a
19 specific reason for that?

20 MR. BECKNER: I think that's an
21 error.

22 JUDGE SIPPEL: In what direction?

1 MR. BECKNER: In the sense that it
2 shouldn't have been marked as highly
3 confidential.

4 JUDGE SIPPEL: It should not have
5 been marked that way.

6 MR. BECKNER: Correct.

7 JUDGE SIPPEL: All right. Well,
8 do you want to confirm that or should I just
9 strike it now?

10 MR. BECKNER: Let me just double
11 check that, but I believe that this should not
12 have been marked as highly confidential.

13 JUDGE SIPPEL: All right. Now,
14 there is an objection; is that correct?

15 MS. WALLMAN: Yes, Your Honor.

16 JUDGE SIPPEL: And it being?

17 MS. WALLMAN: It's hearsay, Your
18 Honor. James Mead is not going to be
19 available for cross-examination. This is a
20 survey with some level of detail apparently
21 that is going to be used, I presume, to show
22 that not very many Bright House Network

1 subscribers were interested in watching
2 WealthTV.

3 I should be permitted to do a
4 detailed cross-examination concerning how the
5 study was conducted, the methodology, margin
6 of error, in what order were the questions
7 asked, and I can tell none of that from the
8 face that was offered in three or four, and
9 James Mead is not made available, and so it's
10 hearsay for purposes of this hearing, both
11 three and four, would be my objection.

12 JUDGE SIPPEL: How did you intend
13 to introduce this or what witness is going to
14 use this?

15 MR. BECKNER: Well, Ann Stith was
16 going to be the sponsor of that, and Ann Stith
17 at the relevant time was a programming manager
18 of the Bright House system in central Florida,
19 and what she was going to do was to say that
20 the company's decision about carriage or non-
21 carriage of WealthTV was, in part, based on
22 this survey.

1 So we're not offering the survey
2 for its truth in the sense that saying that,
3 you know, only one percent of the people in
4 the world want to watch WealthTV as the survey
5 indicates, but simply that we did this survey.
6 We looked at these results, and these results
7 were part of the reason why we decided we
8 didn't want to carry WealthTV.

9 JUDGE SIPPEL: All right. Well,
10 then obviously it's relevant and it's a pretty
11 significant document.

12 MR. BECKNER: And I think Mr.
13 Miron, you know, also of this survey, was the
14 CEO of Bright House Networks and will also be
15 a witness here.

16 MS. WALLMAN: Your Honor, if I
17 may, that notion that it's not being offered
18 for the truth, it's being offered for these
19 other purposes, most respectfully, I think is
20 a dodge in this case. This document is
21 offered, I think, for no other reasonable
22 purpose except to say very few people wanted

1 to watch WealthTV.

2 Moreover, Ms. Stith, if she's the
3 sponsoring witness, my exhibit index from
4 Bright House Network doesn't identify who's
5 sponsoring anything. So that makes it
6 difficult to know who to cross-examination
7 unless there's a proffer here.

8 If it's Ms. Stith, I'd note that
9 if her responsibilities go to central Florida,
10 Exhibit 4 includes data from Indianapolis,
11 Birmingham, Bakersfield, which I believe is in
12 California, and Detroit. But I don't know
13 what her competence ability would be to talk
14 to me about how the survey was conducted in
15 Detroit.

16 This is a very significant
17 document. I should be entitled to examine a
18 person who is deeply knowledgeable about how
19 the survey was conducted. You will hear
20 significant criticism of surveys that WealthTV
21 conducted for the very same reasons and
22 arguments that I'm articulating here, and

1 that's my objection.

2 JUDGE SIPPEL: All right.

3 MR. BECKNER: If I can just
4 respond, Your Honor.

5 JUDGE SIPPEL: Yeah. Be careful
6 what you wish for because Ms. Wallman said
7 it's a dodge, and if it's a dodge and the
8 dodge is successful, that works in your
9 benefit, I would think.

10 But I hear exactly what you're
11 saying. I'm very concerned about it, too.
12 I'd like to know exactly what we can and what
13 we cannot rely on with respect to this
14 evidence because to me it's pretty significant
15 stuff as far as decision making goes.

16 Now, maybe I'm wrong. Maybe Mr.
17 Miron will shed a different light on it, but
18 let's hear --

19 MR. BECKNER: Mr. Miron --

20 JUDGE SIPPEL: Wait just a second
21 now. Let's hear the testimony of the
22 sponsoring witness, who will be Ms. Stith. If

1 that's not good enough, we'll wait until Mr.
2 Miron gets on the stand, and he gets his input
3 into it. We'll just take it one step at a
4 time, but they can certainly be questioned on
5 the document, but they can also testify to it.

6 MR. BECKNER: Well, and they can
7 testify as to how the survey was done.

8 JUDGE SIPPEL: Absolutely.

9 MR. BECKNER: I want to make a
10 crucial distinction, and that is that the
11 criticism of the survey that you're going to
12 hear with regard to WealthTV is that, you
13 know, the survey that they conducted that
14 purports to show that their audience for
15 WealthTV is X percent male, and you know,
16 that's a fact that they're trying to establish
17 in this case. We're not trying to establish
18 in this case as a fact that only one percent
19 of the viewers want to watch WealthTV.

20 What we're trying to establish is
21 the fact in this case that one of the reasons
22 why we decided not to carry WealthTV is that

1 we had a survey done and the survey told us
2 for whatever it was worth that only one
3 percent of the viewers wanted to watch
4 WealthTV as opposed to 35 percent wanting to
5 watch an HD version of the History Channel,
6 for example.

7 JUDGE SIPPPEL: All right. That
8 makes your burden lighter, but it makes the
9 weight of it, you know, lesser obviously.

10 Am I clear on that? I mean, look.
11 I don't want to dig any deeper into this.
12 You've got your ruling. It's reserved. You
13 can cross examine on the voir dire and we'll
14 move, you know; we'll go from there. We'll go
15 from there, but keep in mind the purpose for
16 which it's being offered.

17 MR. BECKNER: And I just also want
18 to correct Ms. Wallman. In our filing we said
19 these exhibits will be introduced through
20 testimony of White House witness Ann Stith.
21 So there's no mystery as to who the sponsoring
22 witness is going to be --

1 JUDGE SIPPEL: Witness will be.

2 MR. BECKNER: -- for these first
3 four exhibits.

4 MS. WALLMAN: I apologize. I do
5 see that. May I just have clarification
6 though? There's three and four sponsored by
7 Stith and Miron or just Stith?

8 MR. BECKNER: I mean, I said
9 Stith.

10 MS. WALLMAN: When Your Honor just
11 said --

12 MR. BECKNER: I also said that
13 Miron could testify.

14 JUDGE SIPPEL: He said Miron was
15 familiar with it, right?

16 MR. BECKNER: Familiar with it,
17 yes.

18 JUDGE SIPPEL: So he can be asked
19 about it.

20 MR. BECKNER: I mean not the E-
21 mails but the survey.

22 JUDGE SIPPEL: The survey, yeah,

1 yeah. And he would logically be asked about
2 it anyway even if it comes in through Stith.
3 He still is going to be asked about it, I'm
4 assuming. All right.

5 (Whereupon, the documents referred
6 to were marked as Bright House
7 Exhibit Nos. 3 and 4 for identifi-
8 cation.)

9 MR. BECKNER: All right. If I can
10 move on.

11 JUDGE SIPPEL: Yes, sir, please
12 do.

13 MR. BECKNER: Okay. The next
14 three exhibits are taken out of the expert
15 report of Janusz Ordoover, and those are Bright
16 House Exhibits 5, 6 and 7. Those are part of
17 his report. Now, the exhibits were compiled
18 by him or by people working at his specific
19 directions. He can testify about how they
20 were put together.

21 The exhibits indicate actually on
22 their face the data source, and of course, he

1 can testify about the data source. So this
2 is, you know, the typical kind of expert
3 material that we've been discussing, I think,
4 all morning today.

5 JUDGE SIPPEL: I see at least on
6 seven it says the source is Kagan. All right.
7 Well, these are marked. They're identified as
8 five, six, and seven. Is there any objection
9 to these?

10 MS. WALLMAN: Your Honor, insofar
11 as six relies on Kagan, I don't have it at my
12 fingertips the ruling that Your Honor made
13 with respect to Kagan.

14 JUDGE SIPPEL: Kagan is pretty
15 good. I mean, you know, in the first
16 instances they're pretty good.

17 MS. WALLMAN: With the observation
18 that this is being used to identify the number
19 of WealthTV subscribers have grown over time,
20 and it's completely wrong because it relies on
21 Kagan.

22 JUDGE SIPPEL: Well, doesn't that

1 work in your favor if you can bring that out?

2 MS. WALLMAN: Sure. I'm happy to
3 do that, but there is a reliability problem
4 with the witness' reliance on hearsay in this
5 instance.

6 JUDGE SIPPEL: Well, like I say --

7 MR. BECKNER: I mean, that's --
8 any time any expert testifies, you know, part
9 of the cross-examination of the expert is
10 about the quality of the data sources that he
11 relied on, and that obviously would, you know,
12 go to the weight of his testimony.

13 I would note that Dr. Ordover,
14 after we finally receive the exact subscriber
15 numbers from WealthTV's counsel, we
16 transmitted those to Dr. Ordover immediately,
17 and you know, in his prefiled direct, he makes
18 some comments about the effect of that
19 different data on his conclusions. So he has
20 already addressed the issue, but he certainly
21 is entitled to rely -- you know, he certainly
22 will defend his reliance on Kagan data as

1 being the best evidence that he had in the
2 time available to him.

3 JUDGE SIPPEL: Good. Well, I have
4 no problem with that, and what is it? Five is
5 census data from the American Community
6 Survey, three-year estimates available, such
7 and such, and then it gives a site, a Website.

8 MR. BECKNER: Yes.

9 JUDGE SIPPEL: That's regular --
10 what will I call that? -- trade data or --

11 MR. BECKNER: Well, that's from
12 the U.S. government actually.

13 MS. WALLMAN: Yes, Your Honor. I
14 would think that would be reliable as an
15 alternative basis for the community part of
16 Mr. Herring's testimony because he relied on
17 data from the U.S. Census Bureau.

18 JUDGE SIPPEL: So that's okay.

19 MS. WALLMAN: But that's an
20 objection that I would think you could work
21 out.

22 JUDGE SIPPEL: Well, I'm going to

1 receive this evidence. You've got legitimate
2 cross-examination points to raise with respect
3 to their use, but as far as the objective
4 reliability of the documents for what they
5 purport to be, there's enough there to receive
6 them now as identified, five, six, and seven.
7 They're now received in evidence as five, six
8 and seven, and your objection is overruled,
9 but you certainly have the right to go into
10 everything that you've raised on cross-
11 examination with the witnesses.

12 (Whereupon, the documents referred
13 to were marked as Bright House
14 Exhibit Nos. 5 through 7 for
15 identification and were received
16 in evidence.)

17 JUDGE SIPPEL: It's more
18 important, I think, in terms of how they were
19 used and what conclusions were reached from
20 that just receiving them in evidence. They're
21 in, Mr. Beckner. Those are in, five, six, and
22 seven.

1 MR. BECKNER: And then I
2 understand, Your Honor, your preference is
3 that the prefiled direct testimony be offered
4 at the time the witness takes the stand.

5 JUDGE SIPPPEL: Yes, I think so.

6 MR. BECKNER: That's fine.

7 JUDGE SIPPPEL: If you're on the
8 stand, let's do it that way.

9 MR. BECKNER: If you just forgive
10 me since I can barely walk and chew gum at the
11 same time, I can't talk and write at the same
12 time, and I just want to write down what your
13 decisions on 1, 2, 3 and 4. I think you
14 reserved --

15 JUDGE SIPPPEL: Oh, boy, you're
16 going to make me go back over them now?

17 MR. MILLS: Two was reserved.
18 Three and four were reserved.

19 MR. BECKNER: One is in.

20 JUDGE SIPPPEL: One is definitely
21 in with no objection.

22 MR. BECKNER: Right.

1 JUDGE SIPPEL: Two is reserved.

2 Four is certainly reserved. I'm not sure what

3 I did with three.

4 PARTICIPANTS: Reserved.

5 JUDGE SIPPEL: On that also,

6 probably so because they're kind of tied

7 together.

8 MR. BECKNER: All right, fine. I

9 just wanted to make sure.

10 JUDGE SIPPEL: So you've got one

11 in, one pre-reserved, and then you've got the

12 last three came in.

13 MR. BECKNER: Thank you very much.

14 That's all we have.

15 JUDGE SIPPEL: And as I say,

16 reserved is pretty close to coming in. On the

17 other hand, Ms. Wallman is entitled to make

18 her points and then make an objection on the

19 record.

20 Let's go. That's it for Bright

21 House?

22 MR. BECKNER: Two and a half

1 percent, yes, sir.

2 JUDGE SIPPEL: Thank you, sir.

3 (Laughter.)

4 JUDGE SIPPEL: I'm not going to
5 say any more, but thank you, Mr. Beckner.

6 All right. Then we only have one
7 party left, which is Mr. Mills; is that right?

8 MR. MILLS: Yes.

9 JUDGE SIPPEL: that would be Cox
10 Communication.

11 MR. MILLS: Correct, Your Honor.

12 JUDGE SIPPEL: Thank you.

13 MR. MILLS: All right. Starting
14 with Exhibit 1, this is an internal
15 memorandum. I believe there is an objection
16 to this. So I'll explain the context of
17 this. As Mr. Wilson explained in his direct
18 testimony, he did actually author this and had
19 it sent out to general managers throughout --
20 I'll give you a chance to --

21 JUDGE SIPPEL: Go ahead. Keep
22 talking. I've got it.

1 MR. MILLS: Okay. Bob Wilson is
2 the Senior Vice President of Programming at
3 Cox. He runs the department, and he has
4 throughout the entire period, and he is still
5 there, and he will testify in this case.

6 JUDGE SIPPEL: Is there objection
7 to this?

8 MS. WALLMAN: Yes, Your Honor.
9 The exhibit index indicates that Bob Wilson
10 authored this document, but the document
11 itself is to general managers from two other
12 individuals who are not available for cross
13 examination, and Mr. Wilson is listed as a
14 recipient on page 3 of the document, not as
15 its author.

16 JUDGE SIPPEL: Is that right? Is
17 he a recipient?

18 MR. MILLS: This is one of those
19 memos where the person who sends it puts
20 himself down as a cc so that he receives it
21 himself.

22 JUDGE SIPPEL: Oh, I see. Yeah, I

1 see.

2 MR. MILLS: I mean, he's not
3 listed as on the "from" line, but he did
4 participate in the preparation of this, and he
5 had it sent out to his general managers. This
6 is a highly confidential internal document
7 about the strategy at Cox. It goes to the
8 heart of the matter as to their HD strategy,
9 and Mr. Wilson will be here to testify about
10 it.

11 JUDGE SIPPEL: All right.

12 MS. WALLMAN: Well, Your Honor, I
13 think it bears a little more examination.
14 Yesterday we had a document excluded on the
15 basis that John Ghiorzi sent it to himself.

16 JUDGE SIPPEL: I recall that. I
17 don't recall the document that clearly as you
18 probably do, but I do recall the incident.

19 MS. WALLMAN: So although it may
20 be a common practice to send documents to
21 oneself, the precedent and the ruling is that
22 you don't establish that you wrote it that

1 way.

2 JUDGE SIPPEL: What was the name
3 of the person that I excluded, that I ruled
4 against you on?

5 MS. WALLMAN: John Ghiorzi.

6 JUDGE SIPPEL: Isn't he gone or is
7 he still there?

8 MS. WALLMAN: He is a former
9 employee.

10 JUDGE SIPPEL: He's gone then.
11 He's no longer at WealthTV.

12 MS. WALLMAN: That's correct.

13 JUDGE SIPPEL: Is he going to be a
14 witness in the case?

15 MS. WALLMAN: No, he's not.

16 JUDGE SIPPEL: Well, I think that
17 entered into the decision. This man is going
18 to be -- he is still the -- what is his
19 position?

20 MR. MILLS: He's the Senior Vice
21 President of the Programming at Cox
22 Communication.

1 JUDGE SIPPEL: All right. He's in
2 that. It's a pretty high position, and he's
3 still with the company in that position and
4 going to be here to testify about the
5 document. I just think that it saves time
6 that we -- that's the whole purpose for this
7 document, document day. I think we'll bring
8 it in.

9 So I'm going to overrule the
10 objection.

11 (Whereupon, the document referred
12 to was marked as Cox Exhibit No. 1
13 for identification and was
14 received in evidence.)

15 MR. MILLS: The second exhibit.

16 JUDGE SIPPEL: Go ahead.

17 MR. MILLS: The second exhibit is
18 a presentation, internal, and I don't believe
19 there's any objection to it. So I'll just
20 identify it as a 2008 senior management
21 meeting presentation.

22 MS. WALLMAN: No objection.

1 JUDGE SIPPEL: Thank you.

2 MR. MILLS: It is highly
3 confidential.

4 JUDGE SIPPEL: Thank you.

5 That's identified and received as
6 Cox No. 2.

7 (Whereupon, the document referred
8 to was marked as Cox Exhibit No. 2
9 for identification and was
10 received in evidence.)

11 MR. MILLS: Exhibit 3, I believe
12 there is an objection to. This is also a
13 highly confidential document. This is an E-
14 mail from Bob Wilson, whom I mentioned
15 previously, to one of his people who works
16 with him, and it has a good deal of
17 information about In Demand.

18 But I'll tell you I understand the
19 objection is to the first large portion of
20 it. At the very, very bottom of the first
21 page there's an observation that is the sole
22 purpose that I'm using this for.

1 JUDGE SIPPET: The two lines at
2 the end?

3 MR. MILLS: There's two lines.

4 JUDGE SIPPET: Yes, I see them.

5 MR. MILLS: And that's the
6 relevance of that document from my
7 perspective. The rest of it does relate to a
8 conversation with Mr. Bond of Comcast, and I
9 understand there's an objection to that
10 portion of the E-mail, and I'm perfectly happy
11 to redact that portion to address the
12 objection.

13 MS. WALLMAN: On that basis, I
14 withdraw the objection.

15 JUDGE SIPPET: All right. We'll
16 receive it in that fashion with the redaction.

17 The redaction is for purposes of
18 it's irrelevant, but you still have a
19 confidential document; is that right, even
20 with the redaction? Am I correct or not?

21 MR. MILLS: I'm just taking a
22 look. We've got redaction. We'll leave the

1 header on it, and we'll leave the two lines at
2 the bottom of the first page, and then on the
3 second page I guess just the BW for Bob
4 Wilson, and then with those redactions, I
5 don't think that this is highly confidential.

6 But when we produce this and
7 distribute it with the redactions, we'll
8 remove the designation.

9 JUDGE SIPPEL: That's fine. It's
10 received in evidence as you've described it,
11 and it's just a question of just substituting
12 the pages with the redactions as you've
13 indicated. Exhibit 3 is in.

14 (Whereupon, the document referred
15 to was marked as Cox Exhibit No. 3
16 for identification and was
17 received in evidence.)

18 MR. MILLS: Exhibit 4, there's no
19 objection. This is an internal document Mr.
20 Wilson will just testify to as a list of all
21 what he called the "wannabe" networks that
22 were available at a certain point in time that

1 wanted carriage on Cox.

2 JUDGE SIPPEL: Good enough. No
3 objection. It's identified and received as
4 Cox Exhibit 4.

5 (Whereupon, the document referred
6 to was marked as Cox Exhibit No. 4
7 for identification and was
8 received in evidence.)

9 MR. MILLS: Exhibit 5 I believe
10 there was an objection to. This is an E-mail
11 from Nico Fasano, who I understand is a
12 salesperson, was a salesperson at WealthTV.
13 This is dated May 10, 2004, and it is
14 addressed to someone at Cox.

15 MS. WALLMAN: I withdraw the
16 objection.

17 JUDGE SIPPEL: As identified, it
18 is received in evidence as Cox Exhibit 5.

19 (Whereupon, the document referred
20 to was marked as Cox Exhibit No. 5
21 for identification and was
22 received in evidence.)

1 MR. MILLS: I don't believe the
2 next objection --

3 MS. WALLMAN: Ten.

4 MR. MILLS: -- until ten. So I'll
5 just describe six, seven, eight and nine
6 briefly.

7 JUDGE SIPPEL: Thank you.

8 MR. MILLS: Six is a presentation
9 made by WealthTV to Cox.

10 JUDGE SIPPEL: Good enough.

11 MR. MILLS: Seven is an E-mail
12 exchange between WealthTV and Cox. I'm sorry.
13 It's an internal E-mail at Cox.

14 Let me explain one thing that
15 might clarify a couple of different E-mails,
16 Your Honor.

17 JUDGE SIPPEL: Is it necessary? I
18 mean, I just want to get these in the record.

19 MR. MILLS: Yeah, okay. Well, I
20 think it would be extremely helpful. There's
21 a person named at the top of some of these E-
22 mails whose name is pronounced Paezle Harris,

1 and she is a secretary who printed these out.
2 So that will explain, I believe. She works
3 for Bob Wilson.

4 Exhibit 8 is presentation made by
5 WealthTV to Cox, materials sent, I should say,
6 as opposed to an in person presentation.

7 JUDGE SIPPEL: Does that account
8 for all of them?

9 MR. MILLS: This entire Exhibit
10 8 --

11 JUDGE SIPPEL: Nine. We have one
12 more.

13 MR. MILLS: Oh, yeah, nine. Nine
14 is an internal Cox document that relates to
15 strategy discussions. It's a presentation,
16 and it is highly confidential.

17 JUDGE SIPPEL: Okay. If there's
18 no objection, these are identified and
19 received as Cox Exhibits 6, 7, 8 and 9.

20 (Whereupon, the documents referred
21 to were marked as Cox Exhibit Nos.
22 6 through 9 for identification and

1 were received in evidence.)

2 MR. MILLS: I should say that
3 seven is also labeled confidential.

4 JUDGE SIPPEL: Confidential.

5 Okay.

6 MR. MILLS: Seven.

7 JUDGE SIPPEL: We will keep it
8 that way unless you tell me otherwise.

9 MR. MILLS: Right. Exhibit 10.

10 JUDGE SIPPEL: Any objection to
11 ten?

12 MS. WALLMAN: Maybe I could ask a
13 question and then I may not have an objection.
14 Is this a complete document?

15 MR. MILLS: Exhibit 10 is not a
16 complete document. Exhibit 10 is one slide
17 taken from a presentation that was made to
18 Cox. It was referred to in the direct
19 testimony of Mr. Wilson and identified as just
20 a single slide.

21 I'm not offering it for the truth
22 of the contents. This relates to a previous

1 discussion we had yesterday about a WealthTV
2 exhibit. This purports to show that there was
3 strong support at Cox Systems for the WealthTV
4 channel, and you'll hear quite a bit of
5 testimony that challenges that whole notion,
6 but the right-hand column contains a number of
7 comments allegedly made by people at Cox, and
8 we're not offering it for the truth of that.
9 We're offering this simply as a slide that was
10 presented by WealthTV to Cox.

11 MS. WALLMAN: My objection is not
12 about hearsay. My objection is that it's not
13 a complete document.

14 JUDGE SIPPPEL: But there's nothing
15 in there -- as described to me, it seems
16 there's nothing in there that's damaging to
17 you.

18 MS. WALLMAN: No, I don't think
19 that it does.

20 JUDGE SIPPPEL: You just don't like
21 the idea of an incomplete document.

22 MS. WALLMAN: Why not use the

1 whole?

2 MR. MILLS: The rest of the slide
3 presentation is produced in a separate
4 document. The whole document is produced in
5 the separate exhibit.

6 JUDGE SIPPEL: Can you identify
7 what that exhibit is now?

8 MR. MILLS: Sure. Exhibit 23.

9 MS. WALLMAN: On that basis I have
10 no objection.

11 MR. MILLS: Page 22 of Exhibit 23.

12 JUDGE SIPPEL: If you have no
13 objection, we're okay on this one. Exhibit 10
14 is identified as received in evidence as Cox
15 No. 10. Thank you.

16 (Whereupon, the document referred
17 to was marked as Cox Exhibit No.
18 10 for identification and was
19 received in evidence.)

20 MR. MILLS: Exhibit 11, this was
21 produced by Cox, and the way it was found in
22 Cox's files, I believe it's a bit jumbled, and

1 I just want to explain that.

2 There's the last page of the
3 exhibit is an E-mail from Bob Wilson to Andy
4 Albert responding to an E-mail from Andy
5 Albert to Bob Wilson, and it includes an
6 attachment which is a term sheet that was
7 submitted to Cox as WealthTV's proposed
8 carriage agreement.

9 JUDGE SIPPEL: What number are we
10 on?

11 MR. MILLS: We're on Exhibit 11.
12 The first page of it is a card, is a copy of
13 a --

14 JUDGE SIPPEL: It's a business
15 card?

16 MR. MILLS: Yes.

17 JUDGE SIPPEL: The second page is?

18 MR. MILLS: The second page looks
19 like another copy of perhaps the reverse of
20 that.

21 JUDGE SIPPEL: The reverse side of
22 the card probably.

1 MR. MILLS: The third page and the
2 fourth page and the fifth page are the term
3 sheet.

4 JUDGE SIPPEL: It says "Founder
5 Affiliate Term Sheet." That's what it says,
6 between Herring and Cox.

7 MR. MILLS: That's right.

8 JUDGE SIPPEL: For launch of
9 WealthTV. Is there a date on this document?

10 MR. MILLS: At the bottom in the
11 right hand.

12 JUDGE SIPPEL: Yes.

13 MR. MILLS: It's September of '04.

14 JUDGE SIPPEL: I see that, yes.

15 MR. MILLS: And then if you look -
16 - you have to skip page 6 for a moment, and
17 you see page 7.

18 JUDGE SIPPEL: Go to it. Just a
19 second. I'm there.

20 MR. MILLS: Okay. Page 7 is also
21 dated in September of '04 and refers to the
22 term sheet, that's the term sheet that was

1 attached to that E-mail. This was just in the
2 reverse order when it was stuck in the file.

3 JUDGE SIPPPEL: I see. This is --
4 I see.

5 MR. MILLS: And I have to explain.
6 Page 6, if you go back a page, I believe, does
7 not really belong with this, but was stuck in
8 the file with it. This is actually dated July
9 26th, 2004. It relates to something else that
10 Mr. Fasano had sent to Andy Albert and just
11 ended up stuck in the file.

12 I didn't want to produce this out
13 of the order in which it was kept, but I don't
14 believe that this has anything to do with it,
15 and I don't have any reason to introduce this
16 page with this exhibit, and if it's not
17 objectionable to Ms. Wallman, I'm happy to put
18 the exhibit in proper order.

19 JUDGE SIPPPEL: Can we just strike
20 it? Do you mean -- well, you respond to it,
21 please, Ms. Wallman. On that particular
22 point, do we need page 6? Is page 6 as Mr.

1 Mills describes it?

2 MR. MILLS: It just adds some
3 confusion is all.

4 MS. WALLMAN: I'm happy that you
5 put it in the proper order. I don't have an
6 objection to the exhibit as it's offered.

7 MR. MILLS: Okay. Well, I mean, I
8 would like to remove this page 6 and put it in
9 the proper order. That's all.

10 JUDGE SIPPEL: Oh, I see. You
11 mean six comes out altogether and then just
12 renumber the other pages.

13 MR. MILLS: That's correct.

14 JUDGE SIPPEL: Six is gone now.

15 MR. MILLS: Page 6 would be gone.
16 It doesn't belong with the exhibit.

17 JUDGE SIPPEL: Absolutely,
18 absolutely perfect.

19 MR. MILLS: Thank you, Your Honor.

20 JUDGE SIPPEL: A perfect solution.
21 Six goes. Just tear it out and just renumber.

22 MR. MILLS: We'll do that and

1 we'll distribute a new copy.

2 JUDGE SIPPEL: Well, you can do it
3 by striking it with a pen and doing it. You
4 don't really --

5 MR. MILLS: Fair enough.

6 MS. WALLMAN: My next objection
7 will go to Exhibit 16.

8 MR. MILLS: So we'll do 11 through
9 15 quickly. Eleven is an E-mail, internal E-
10 mail at Cox. I'm sorry. 12.

11 JUDGE SIPPEL: We just did 11.

12 MR. MILLS: I misspoke, Your
13 Honor. I apologize.

14 JUDGE SIPPEL: Eleven we just did.
15 Is there still an objection to that?

16 MR. MILLS: No. Oh, sorry.

17 JUDGE SIPPEL: Are we all set on
18 11, Ms. Wallman?

19 MS. WALLMAN: Yes.

20 JUDGE SIPPEL: All right. So as
21 identified Exhibit 11 is received as Cox
22 Exhibit 11.

1 (Whereupon, the document referred
2 to was marked as Cox Exhibit No.
3 11 for identification and was
4 received in evidence.)

5 MR. MILLS: Exhibit 12 --

6 JUDGE SIPPEL: Twelve through 15;
7 is that what you said?

8 MR. MILLS: Yes. So 12 is an
9 internal E-mail at Cox. Is that sufficient,
10 Your Honor?

11 JUDGE SIPPEL: Yeah. That's all.

12 MR. MILLS: Thirteen is a listing
13 of HD channels launched at Cox.

14 Fourteen is an NHD board
15 presentation. It's an In Demand board
16 presentation about the NHD channel in January
17 of '06.

18 MS. WALLMAN: Mr. Mills, I
19 apologize. I need to ask a question about 14
20 that relates to an objection.

21 MR. MILLS: Sure.

22 MS. WALLMAN: With respect to 14,

1 16, 20 and 21, these are all In Demand board
 2 presentations. It is proposed that Mr. Wilson
 3 will sponsor them. Evidently he didn't
 4 prepare them. He received them.

5 MR. MILLS: Correct.

6 MS. WALLMAN: Are they being
 7 offered in any sense for the truth of what
 8 they assert?

9 MR. MILLS: They are being
 10 presented as business records of In Demand
 11 that were presented to Mr. Wilson and kept as
 12 business records of Mr. Wilson. They
 13 definitely go to one of the allegations in
 14 this case is the intent and state of mind at
 15 Cox. So they go to that.

16 I believe with regard to the same
 17 presentations that are sponsored by Mr. Ash,
 18 he can authenticate, and he can talk about the
 19 substance of these.

20 So I believe they're being offered
 21 as exhibits by Mr. Ash as well, and he can
 22 verify the substance of the truth of the

1 matters asserted. But Mr. Wilson was not at
2 In Demand, but he was the only recipient of
3 the presentations.

4 MS. WALLMAN: Thank you.

5 JUDGE SIPPEL: I take it there's
6 no objection.

7 MS. WALLMAN: On that basis, no
8 objection.

9 JUDGE SIPPEL: Received then as
10 identified, Cox Exhibits 12 through 15, 12,
11 13, 14, and 15 are received in evidence.

12 (Whereupon, the documents referred
13 to were marked as Cox Exhibit Nos.
14 12 through 15 for identification
15 and were received in evidence.)

16 MR. MILLS: Eleven, 12, 14 and 15
17 are highly confidential.

18 JUDGE SIPPEL: Thank you.

19 MR. MILLS: Are we on --

20 JUDGE SIPPEL: Sixteen.

21 MR. MILLS: Sixteen. Is that the
22 same objection, Ms. Wallman?

1 MS. WALLMAN: It was the same
2 concern, but as you've represented it, I don't
3 object to 16.

4 MR. MILLS: Sixteen is another In
5 Demand board presentation.

6 JUDGE SIPPEL: That's identified
7 and received as 16.

8 (Whereupon, the document referred
9 to was marked as Cox Exhibit No.
10 16 for identification and was
11 received in evidence.)

12 MR. MILLS: Is your next
13 objection --

14 MS. WALLMAN: It would be to 20,
15 but I would withdraw it based on the same
16 understanding operative with respect to 14 and
17 16.

18 MR. MILLS: Okay. So we'll go 17,
19 18, 19 are all E-mails between Cox and
20 WealthTV.

21 JUDGE SIPPEL: And there's no
22 objection. Those will be identified and

1 received as your exhibits. Cox 17, 18, and 19
2 are in evidence.

3 (Whereupon, the documents referred
4 to were marked as Cox Exhibit Nos.
5 17 through 19 for identification
6 and were received in evidence.)

7 MR. MILLS: Twenty and 21 are
8 board presentations with In Demand.

9 JUDGE SIPPEL: Twenty and 21,
10 board presentation.

11 MR. MILLS: And 20 and 21 are
12 both, again, highly confidential.

13 JUDGE SIPPEL: And there's no
14 objections to those based on their usage; is
15 that correct?

16 MS. WALLMAN: Yes, Your Honor.

17 JUDGE SIPPEL: Twenty and 21 are
18 now in evidence as Cox 20 and 21.

19 (Whereupon, the documents referred
20 to were marked as Cox Exhibit Nos.
21 20 and 21 for identification and
22 were received in evidence.)

1 MR. BECKNER: Twenty-two is a
2 packet of material that was sent to Cox by Mr.
3 Herring.

4 MS. WALLMAN: In the interest of
5 progress, the next objection that I'm going to
6 have is to 29.

7 MR. MILLS: Okay.

8 JUDGE SIPPEL: So let's do 22
9 through 28. Would that be it?

10 MR. MILLS: Yes.

11 JUDGE SIPPEL: Twenty-two to 28.
12 Now, I notice in my 22 anyway, that's pretty
13 impossible to read, page 6, for example.

14 MR. MILLS: We should have
15 provided new color copies for you. So that
16 was one of the reasons we did that, was
17 because they were so difficult to read.

18 JUDGE SIPPEL: Oh, I see. Okay.
19 I didn't know I had them. So I'm okay. I'm
20 okay.

21 MR. MILLS: Yes.

22 JUDGE SIPPEL: We have both ways.

1 So I'm okay. So Exhibits 22 to 28, is there
2 any --

3 MR. MILLS: Twenty-two is a
4 presentation by material from WealthTV to Cox.

5 Twenty-three is a presentation to
6 Mr. Wilson from WealthTV. Again, it includes
7 the slide that we mentioned and we're not
8 offering that slide for the truth.

9 Twenty-four -- 23 and 24 are
10 programming line-ups. I'm sorry. Twenty-four
11 and 25 are programming line-ups.

12 Twenty-six is a another packet of
13 material that was provided from WealthTV to
14 Cox.

15 Twenty-seven is an internal E-mail
16 at Cox with some strategic information about
17 HD carriage, and that is highly confidential.

18 So 28 is correspondence between
19 Bob Wilson and Charles Herring.

20 JUDGE SIPPEL: As identified, 22
21 through 28 with no objections, those documents
22 are received at this time as Cox 22, 23, 24,

1 25, 26, 27, and 28.

2 (Whereupon, the documents referred
3 to were marked as Cox Exhibit Nos.
4 22 through 28 for identification
5 and were received in evidence.)

6 JUDGE SIPPEL: The next exhibit
7 will be 29.

8 MR. MILLS: Twenty-nine, I don't
9 believe I knew that you were going to object
10 to this, but this is an internal E-mail at Cox
11 from Bob Wilson to someone who works for him.
12 I don't know the nature of the objection. So
13 I'm not sure what information to provide.

14 This is information. This is an
15 internal record of the company, and it's
16 relevant because it does talk about HD
17 launches and mentions the view of the author
18 by Wilson who will be here to testify that
19 WealthTV has marginal content.

20 MS. WALLMAN: Your Honor, this is
21 a highly confidential document. So I'm going
22 to take care not to read out the content of

1 it.

2 JUDGE SIPPEL: Thank you.

3 MS. WALLMAN: But my objection is
4 hearsay. This has Mr. X told me and Mr. X
5 told me he has always told Mr. Y. If it's
6 being offered for purposes of those
7 statements, it's hearsay.

8 MR. MILLS: Your Honor, I think
9 just again it goes to the same point Mr.
10 Beckner was making. There's a big distinction
11 in this case between the type of proof that
12 WealthTV needs to make with regard to the
13 programming and what the Defendants are trying
14 to establish.

15 This has nothing -- it doesn't
16 matter whether it's true, whether WealthTV has
17 marginal programming or not. The point is the
18 allegation about the intent of the parties at
19 Cox, their state of mind, whether they
20 intentionally discriminated is an issue in
21 this case, and if his view was or if he had
22 information that this was marginal

1 programming, that goes to his state of mind.

2 JUDGE SIPPEL: Okay. Any
3 objection to that under those circumstances?

4 MS. WALLMAN: Well, my concern was
5 before the words "marginal content" come into
6 this document. It was kind of X told Y and Y
7 told me he always told X. Is that material to
8 your use of the document?

9 JUDGE SIPPEL: But you say whether
10 it's true or not. That's not really the
11 burning issue. The point is that this
12 information was out there and it indicates
13 that the state of mind was not for purposes of
14 discrimination were they turning down the
15 program but for other reasons.

16 MS. WALLMAN: If that's the
17 proffer as to use, then I'll withdraw the
18 objection.

19 JUDGE SIPPEL: Did I say that
20 correctly?

21 MR. MILLS: Yes, you did, Your
22 Honor. Thank you.

1 JUDGE SIPPEL: Objection
2 withdrawn, 29 as identified is received as Cox
3 29. It's in evidence. Thank you.

4 (Whereupon, the document referred
5 to was marked as Cox Exhibit No.
6 29 for identification and was
7 received in evidence.)

8 MR. MILLS: What is the next
9 objection?

10 MS. WALLMAN: Let's see. The next
11 thing that I expect to have objections to may
12 already be taken care of. They are board
13 presentations, 32 offered by Wilson. I think
14 we've covered that. So the way in which
15 you --

16 MR. MILLS: Thirty is internal
17 notes by Bob Wilson that he can testify about.

18 Thirty-one is an E-mail. This is
19 an E-mail from Bob Wilson to other members of
20 the In Demand board. Again, it says Paezle
21 Harris at the top, but it is from Bob Wilson.

22 Exhibit 32 is a board

1 presentation, In Demand, which we've
2 discussed.

3 Exhibit 33 is an E-mail exchange
4 with another board member of In Demand.

5 Thirty-four, 34 relates to
6 information gathered internally at Cox
7 regarding the reasons for terminating Mojo.

8 Thirty-five is an internal E-mail
9 relating to the same subject. I should say
10 that there are some highly confidential
11 documents I should have mentioned if I didn't
12 already: 27, 29, 30, 31, 32, 33, and 34.

13 MS. WALLMAN: I'm not going to
14 have objections to any of the documents.

15 MR. MILLS: Great. Thank you.

16 Thirty-five is also highly
17 confidential. It is -- I've already described
18 it.

19 Thirty-six is also an E-mail
20 relating to that same project, and it's highly
21 confidential.

22 Thirty-seven is an E-mail exchange

1 internally at Cox relating to programming
2 strategy. It's highly confidential.

3 Thirty-eight is an E-mail exchange
4 between sales person at WealthTV and a person
5 at Cox. It is not highly confidential, not
6 confidential at all.

7 Thirty-nine is an E-mail from 2003
8 demonstrating the origin of the ideas of the
9 In Demand channel.

10 Forty is a board presentation
11 relating to the brand transition of NHD to
12 Mojo.

13 Forty-one, 42, and 43 are also
14 board presentations at In Demand.

15 What was the last one that I said
16 was highly confidential? Thirty-eight. So 39
17 through 43 are also highly confidential.

18 JUDGE SIPPEL: Forty-three, is
19 that the last of them?

20 MR. MILLS: Forty-three was the
21 last one in that binder.

22 JUDGE SIPPEL: Then let me do it

1 as a grouping here. Cox exhibits for
 2 identification 30 through 43 are both
 3 identified and are hereby received in evidence
 4 as Cox Exhibits 30 through 43. So they're in
 5 evidence.

6 MR. MILLS: Thank you, Your Honor.

7 JUDGE SIPPEL: Thank you.

8 (Whereupon, the documents referred
 9 to were marked as Cox Exhibit Nos.
 10 30 through 43 for identification
 11 and were received in evidence.)

12 MR. MILLS: Exhibit 44 is the
 13 expert report of Janusz Ordover, but we're not
 14 introducing that at this time, I believe; is
 15 that right? Are we?

16 JUDGE SIPPEL: No.

17 MR. MILLS: We're not. So we're
 18 holding off until these experts testify,
 19 correct, Your Honor?

20 JUDGE SIPPEL: Yeah, we'll just
 21 have them identify their testimony, and if
 22 there are any questions then -- well, let's

1 bring it in through the witnesses.

2 MR. MILLS: Okay. So that's 44

3 and 45.

4 Forty-six is an internal document

5 at one of the Cox systems.

6 Forty-seven and 48 are also

7 internal documents at the Cox New England

8 System.

9 JUDGE SIPPEL: Is there going to

10 be any objection to any of these?

11 MS. WALLMAN: No, Your Honor. I

12 have no objection to the remainder of the

13 documents that are being offered by Cox.

14 JUDGE SIPPEL: Okay. So that's 46

15 through what's the last tab?

16 MR. MILLS: The last tab is going

17 to be --

18 JUDGE SIPPEL: Seventy-seven?

19 MR. MILLS: -- 93.

20 JUDGE SIPPEL: Whoa.

21 MR. MILLS: You've got the --

22 yeah, there are --

1 JUDGE SIPPPEL: Well, let's just
2 take it one by -- this is Volume 2.

3 MR. MILLS: There's not a Volume
4 3. I think we substituted.

5 JUDGE SIPPPEL: Well, the last tab
6 I have, unless there is another, they're all
7 -- okay. They're in another book.

8 MR. MILLS: You should be able to
9 use the second binder starting with 44, right?

10 Oh, okay. We may have a third
11 binding I understand.

12 JUDGE SIPPPEL: All right. Well,
13 the thing is that the numbers go from 46 and
14 what is the --

15 MR. MILLS: The last one will be
16 93.

17 JUDGE SIPPPEL: All right. So 46
18 to 93, and there are no objections to those.

19 MS. WALLMAN: That's correct, Your
20 Honor.

21 MR. MILLS: That's right. That's
22 correct, but there are some that we're not

1 offering necessarily for the truth, like there
2 are a number of call reports, for example, as
3 we discussed yesterday that are only being
4 offered as records that such reports were
5 kept. So if that's not a significant
6 distinction, and there's also --

7 JUDGE SIPPPEL: I just don't think
8 it's worth spending the time on it.

9 MR. MILLS: That's fine, and there
10 are some that are prefiled testimony. So
11 maybe I should -- if you don't want to --
12 maybe the best way to do this is to do it in
13 big chunks, large groups, but 79, for example
14 through 85 is prefiled direct testimony. So
15 I don't assume that you want to admit them
16 that now. So I could say --

17 JUDGE SIPPPEL: Well, let me ask:
18 are these lesser -- I don't want to say it
19 that way, but I mean are these witnesses
20 witnesses who which there is going to be no --
21 you're satisfied with their written testimony
22 and they can come in as is or do you want to

1 ask a few questions on it?

2 MS. WALLMAN: I'm sorry. I wish I
3 could say yes in the interest of saving time,
4 but no.

5 JUDGE SIPPEL: You can't. All
6 right. Well, then let's take it your way.
7 Let's do it in as large groupings as you
8 possibly can.

9 MR. MILLS: I think the last
10 document, Exhibits 46 through 78.

11 JUDGE SIPPEL: Can you generically
12 describe what they might be? Very
13 generically?

14 MR. MILLS: Evidence that
15 demonstrates that Cox did not discriminate
16 against WealthTV.

17 (Laughter.)

18 JUDGE SIPPEL: Well, I walked into
19 that one.

20 (Laughter.)

21 JUDGE SIPPEL: Let's try it again.

22 MR. MILLS: I apologize for that.

1 There are E-mails, presentations and
2 affiliation agreements relevant to the case.

3 JUDGE SIPPEL: E-mails,
4 presentations and what was the last category?

5 MR. MILLS: There are also some
6 affiliation agreements.

7 JUDGE SIPPEL: And some
8 affiliation agreements. All right, and --

9 MR. MILLS: That's through 78.

10 JUDGE SIPPEL: -- I don't think
11 you have to designate which ones or say for
12 the record which ones are confidential. It's
13 going to appear right on the face of the
14 document.

15 MR. MILLS: Okay.

16 JUDGE SIPPEL: So as described,
17 Exhibits 46 through 78 as to which WealthTV
18 has no objections are identified and received
19 in evidence as Cox Exhibits 46 through 78.

20 (Whereupon, the documents referred
21 to were marked as Cox Exhibit Nos.
22 46 through 78 for identification

1 and were received in evidence.)

2 MR. MILLS: And then the remainder
3 of the ones that we are identifying here and
4 admitting for some purpose are 86 through 93,
5 which takes us to the end.

6 JUDGE SIPPEL: All right.

7 MR. MILLS: Just so you know, the
8 gap in the middle, 78 through 85, is prefiled
9 testimony that we're not moving at this time.

10 JUDGE SIPPEL: Seventy-nine is
11 testimony.

12 MR. MILLS: Correct. And then 86
13 through 93 are primarily call reports, and one
14 presentation, and we are only offering those
15 for business records, not for the truth of the
16 matters within them.

17 JUDGE SIPPEL: All right, and
18 there being no objection, as identified
19 Exhibits 86 through 93 are identified as Cox
20 exhibits and are received in evidence at this
21 time as Cox Exhibits 86 through 93, and the
22 last 79 through 85 will be taken up

1 individually as the witnesses are proffered
2 for cross-examination.

3 MR. MILLS: Thank you, Your Honor.
4 (Whereupon, the documents referred
5 to were marked as Cox Exhibit Nos.
6 86 through 93 for identification
7 and were received in evidence.)

8 JUDGE SIPPEL: That's it?

9 MR. MILLS: Thank you.

10 JUDGE SIPPEL: Thank you very
11 much, and thank you, Ms. Wallman.

12 So that concludes the documentary
13 phase of the case. We have a witness, but it
14 is quarter after one. What is the -- I think
15 it would be appropriate to break for lunch.

16 MR. COHEN: And preferable, Your
17 Honor.

18 JUDGE SIPPEL: And preferable.
19 Well, yes. We could talk to each other, but
20 the reporter is going to go to lunch.

21 (Laughter.)

22 JUDGE SIPPEL: We're off the

1 record and we'll come back -- well, let me
2 see. No, we're not off the record yet.

3 What time does that clock say back
4 there, Mary? One, fifteen, is that what it
5 says? I can't -- there's a glare.

6 All right. We'll come back at
7 2:30, 2:30 to start with the testimony, and
8 this will be -- your witness, ma'am?

9 MS. WALLMAN: Our intention is to
10 present Gary Turner.

11 JUDGE SIPPEL: How do you spell --
12 Turner, like Turner?

13 MS. WALLMAN: Turner, yes.

14 JUDGE SIPPEL: And what is his
15 position at Wealth or with or in connection
16 with Wealth?

17 MS. WALLMAN: He's an expert
18 witness, Your Honor.

19 JUDGE SIPPEL: He's your expert.
20 I should know that. Of course. All right.
21 We'll start with Turner and --

22 MR. COHEN: Your Honor, can I ask

1 one clarifying question just to speed up the
2 cross? Do you have a preference for how we
3 mark cross-documents? Do you want the
4 documents to be sequential?

5 It will be a lot easier for us
6 just to mark a bunch of potential cross-
7 documents with exhibit numbers and then
8 they'll come in with whatever numbers they
9 come in with.

10 JUDGE SIPPEL: I don't care.

11 MR. COHEN: Okay.

12 JUDGE SIPPEL: Yeah, we did it
13 that way with I think it was Comcast's cross
14 primarily, and I don't know. For some reason
15 or other they had some documents that were in
16 the 400 series and some were in the 500
17 series.

18 MR. COHEN: Right.

19 JUDGE SIPPEL: There was
20 absolutely no sequence to them, but it's clear
21 from the record what we're talking about.

22 MR. COHEN: Right. All right.

1 This way we can pre-mark them.

2 JUDGE SIPPEL: No problem with
3 that, Ms. Wallman?

4 MS. WALLMAN: That's fine, Your
5 Honor.

6 JUDGE SIPPEL: Let's do it.
7 Let's have lunch and come back at
8 2:30.

9 MS. WALLMAN: Your Honor, if I
10 may, there was one issue outstanding from
11 yesterday regarding Exhibit 97, and it was a
12 question of the Time Warner deck and should it
13 be excluded because it was for settlement
14 purposes. What I'd like to do is during the
15 lunch break discuss it with Mr. Cohen and Mr.
16 Harding, and I think we may be able to
17 straighten it out.

18 JUDGE SIPPEL: All right. So
19 you're discussing this would be WealthTV 97?

20 MS. WALLMAN: Exhibit 97, yes.

21 JUDGE SIPPEL: All right. Thank
22 you. Thanks for the heads up.

1 And also the testimony, the status
2 of the testimony?

3 MR. COHEN: Wealth 97?

4 JUDGE SIPPEL: Yes, I said that.

5 MR. COHEN: I'm sorry.

6 JUDGE SIPPEL: Yes, WealthTV 97,
7 and the status of the testimony is it's
8 supposed to be ready to come in tomorrow
9 morning; is that correct?

10 MS. WALLMAN: That's our
11 intention, Your Honor, yes.

12 JUDGE SIPPEL: Okay. All right.
13 Well, you don't have to give a report when we
14 come back, but if you know anything more you
15 can let us know. Otherwise have a good lunch.

16 Thank you.

17 (Whereupon, at 1:20 p.m., the
18 hearing was recessed for lunch, to reconvene
19 at 2:30 p.m., the same day.)

20 JUDGE SIPPEL: We're on the
21 record, and do we have a witness?

22 MR. ROSE: We do, Your Honor.

1 WealthTV would like to call Mr. Gary Turner to
2 the stand.

3 JUDGE SIPPEL: Sir, will you come
4 forward, please. I'm going to ask you to
5 stand right here, if you'd raise your right
6 hand.

7 WHEREUPON,

8 GARY TURNER
9 was called as a witness and, after having been
10 first duly sworn, was examined and testified
11 as follows:

12 JUDGE SIPPEL: Please be seated.
13 Does the witness have a water bottle?

14 MR. COHEN: I'll be happy to get
15 it, Your Honor.

16 MR. ROSE: Thank you.

17 JUDGE SIPPEL: Thank you. You can
18 use our glasses as you see fit. Get yourself
19 set there, and make sure you -- okay? Are you
20 all set?

21 THE WITNESS: I am.

22 JUDGE SIPPEL: Mr. Rose.

1 MR. ROSE: Good afternoon, Mr.
2 Turner.

3 THE WITNESS: Good afternoon.

4 DIRECT EXAMINATION

5 BY MR. ROSE:

6 Q Would you describe your education
7 and experience for the Court, please?

8 A I graduated the University of
9 Colorado. I've been in the television media
10 business for over 25 years. The majority of
11 that time I spent as CEO of Turner Media
12 Group. Turner Media Group represented
13 advertising for cable, satellite, and
14 broadcast television networks and
15 distributors. We also owned and operated
16 eight nationally distributed television
17 networks, as well as developed interactive
18 applications for advertisers and distributors.

19 Q And have you in your experience in
20 the advertising business sold advertisements
21 for distributors?

22 A Yes. During my time at Turner

1 Media Group, we sold between 60-70 million
2 advertising avails and delivered well over a
3 billion dollars of revenue to our media
4 partners.

5 Q Have you also sold advertisements
6 for programming networks?

7 A Yes.

8 Q And have you sold advertisements
9 that are paid for by manufacturers?

10 A Yes, we've sold advertising
11 directly to manufacturers and advertising
12 agencies.

13 MR. ROSE: We'd like to proffer
14 Mr. Turner as an expert in the cable TV
15 advertising business, now into the market in
16 the programming network.

17 JUDGE SIPPEL: Very well. We have
18 some voir dire first, at least.

19 MR. COHEN: Well, Your Honor, let
20 me just state my objection, which is the
21 proffer is over-broad. I mean, I don't -- is
22 he an advertising expert, or is he an expert

1 on program networks? What is -- I don't know
2 what the last part of the proffer is. If he's
3 being tendered as an expert on advertising
4 involving the cable business, I don't have any
5 objection.

6 MR. ROSE: Advertising involving
7 the cable business, and I didn't ask the
8 questions about programming networks, but we
9 can ask those, if you'd like.

10 MR. COHEN: Well, I'll ask them,
11 if you're not going to ask them. But I think
12 the proffer is totally inadequate, as is. I'd
13 be happy to voir dire the witness.

14 JUDGE SIPPEL: Well, it's up to
15 you. He's got a written -- are you going to
16 have his testimony marked and offered into
17 evidence? That might -

18 MR. ROSE: Yes.

19 JUDGE SIPPEL: Do you have your
20 written testimony before you, sir? You will
21 have it in a minute.

22 THE WITNESS: Thank you.

1 MR. ROSE: I'm sorry. I thought
2 it was already in evidence.

3 JUDGE SIPPPEL: Well, you weren't
4 here this morning, so -- the procedure is
5 going to be that the witness is going to
6 identify his testimony, then it's going to be
7 offered. So they're not just coming as the
8 other documents are coming in.

9 MR. ROSE: If you can give me
10 about a minute, I can get it from the other
11 room.

12 JUDGE SIPPPEL: Yes. Why don't we
13 go off the record for about two to three
14 minutes. Go ahead.

15 MR. ROSE: Sorry about that.

16 (Whereupon, the proceedings went
17 off the record at 2:40:27 p.m., and went back
18 on the record at 2:42:55 p.m.)

19 JUDGE SIPPPEL: We're on the
20 record. I'm going to -- we have to know a
21 number. Let me ask the witness, again, I'm
22 sorry. We were off the record.

1 THE WITNESS: Okay.

2 JUDGE SIPPEL: You have identified
3 your signature at the end of that document.
4 Is that correct, sir?

5 THE WITNESS: Yes, Your Honor.

6 JUDGE SIPPEL: Your written
7 testimony.

8 THE WITNESS: Yes.

9 JUDGE SIPPEL: Okay. Now, what
10 number are we giving this document?

11 MR. ROSE: I believe we'd like to
12 mark it as 146, Your Honor.

13 JUDGE SIPPEL: 146. That'll be
14 WealthTV's, WTV 146 for identification.

15 (WHEREUPON, THE DOCUMENT REFERRED
16 TO WAS MARKED AS WTV EXHIBIT 146
17 FOR IDENTIFICATION.)

18 JUDGE SIPPEL: Okay. And you want
19 to go. You acknowledge that this is your
20 written testimony that you intend to be cross
21 examined on today?

22 THE WITNESS: Yes.

1 JUDGE SIPPEL: All right. Is
2 there any objection to receiving it into
3 evidence?

4 MR. COHEN: Your Honor, are we
5 going to deal with the proffer? It depends on
6 the scope of his expertise. I would like to
7 deal with the proffer of his expertise at the
8 same time.

9 JUDGE SIPPEL: Go right ahead.

10 VOIR DIRE

11 BY MR. COHEN:

12 Q Mr. Turner, are you testifying as
13 an expert on programming?

14 A No.

15 Q So, your expertise is limited to
16 advertising?

17 A Yes, in this case.

18 MR. COHEN: I have no objection to
19 him being admitted as an expert with respect
20 to advertising.

21 JUDGE SIPPEL: Thank you. So,
22 then we can move the document into evidence?

1 MR. COHEN: Yes.

2 JUDGE SIPPEL: WTV 146 is
3 proffered as evidence. We are receiving it in
4 evidence. I am receiving it in evidence as
5 WTV 146. It's in evidence.

6 (WHEREUPON, THE DOCUMENT REFERRED
7 TO, PREVIOUSLY MARKED WTV EXHIBIT
8 146 FOR IDENTIFICATION, WAS
9 RECEIVED IN EVIDENCE.)

10 JUDGE SIPPEL: You may proceed.
11 Are you tendering the witness now, I take, for
12 cross.

13 MR. ROSE: I was actually going to
14 ask him a few questions on direct.

15 JUDGE SIPPEL: That's quite all
16 right. You may go. Go ahead.

17 DIRECT EXAMINATION

18 BY MR. ROSE:

19 Q Mr. Turner, who are the biggest
20 players in cable distribution, in your
21 experience?

22 A Comcast is number one, DirectTV is

1 number two, Time Warner is number three, and
2 Dish Network is number four.

3 Q And do you have any estimate of
4 the share of the cable market that's
5 subscriber-based that's controlled by Time
6 Warner, Bright House, Comcast, and Cox, the
7 Defendants in this action?

8 MR. COHEN: Objection, Your Honor.
9 It's beyond the scope of his written direct
10 testimony. I mean, the man submitted written
11 direct testimony. It doesn't deal with the
12 subject at all.

13 JUDGE SIPPEL: What's the purpose
14 for eliciting this information?

15 MR. ROSE: Just as a general
16 market factor.

17 JUDGE SIPPEL: Background?

18 MR. ROSE: Background, yes.

19 JUDGE SIPPEL: Background. Can
20 you answer the question?

21 THE WITNESS: Yes. I think it's
22 40-45 percent of the subscription television

1 business.

2 BY MR. ROSE:

3 Q And are you familiar with the
4 term -

5 JUDGE SIPPPEL: Wait a second. The
6 total of all four accounts for 40-45 percent?

7 THE WITNESS: No, I would --
8 Comcast is approximately 23 million
9 subscribers.

10 JUDGE SIPPPEL: What percent would
11 they be?

12 THE WITNESS: It would be -- well,
13 if you say the subscription television
14 business is approximately 100 million
15 subscribers, then that would be 23 percent.
16 Time Warner is approximately 15 percent. I
17 would think that Bright House is around 5
18 percent, and Cox is similar, I believe.

19 JUDGE SIPPPEL: Now, you say as far
20 -- well, that's all right. I heard what you
21 said. Go ahead. Go ahead, sir.

22 BY MR. ROSE:

1 Q Mr. Turner, I'd like to define a
2 couple of terms for background, also. Can you
3 tell me what a general market advertiser means
4 in your business?

5 A A general market advertiser is an
6 advertiser that is seeking to advertise for
7 impressions. They put their products out, get
8 people's awareness of the products that
9 they're trying to sell, or services.

10 Q And is the size of a network
11 subscriber base an important factor that
12 general market advertisers consider in placing
13 ads, in your experience?

14 A Yes. They're looking for
15 impressions, they're looking -- they measure
16 it by gross rating points, cost per million,
17 cost per point.

18 Q Is there a particular threshold
19 number of subscribers that you find general
20 market advertisers are looking for?

21 A The general consensus in the
22 industry is that a network needs to be

1 approximately 20 million subscribers before
2 they're a viable candidate for general market
3 advertising.

4 Q And what do you base that
5 statement on?

6 A From my experience in the
7 business, as well as information, Kagan
8 information, from the Kagan research. We've
9 had testimony from several networks to the
10 FCC, to the Committees, that people testified
11 that that's what a cable network needs to
12 reach before they're a viable candidate for
13 general market advertising.

14 Q Now, can you define the term
15 "direct response advertiser"? What does that
16 mean in your business?

17 A Direct response advertising is an
18 advertiser that is looking to directly sell a
19 product to the consumer over the television.
20 They measure their success by how many
21 products they can sell from a given
22 advertising avail.

1 Q And is subscriber base also an
2 important factor in their decisions?

3 A Sure. The more people that see
4 the product, the more likely they are to sell
5 more widgets.

6 Q Are you familiar with the term
7 "rate card" as it's used in cable TV
8 advertising business?

9 A I am.

10 Q What does it mean?

11 A Rate card is what you take to the
12 advertisers to start the negotiations. That's
13 what an advertising network or distributor
14 thinks that their inventory is worth, by day
15 part, by program, by network. And it's
16 usually a start of a negotiation process.

17 Q Do the rates stated on the rating
18 card tend to be flexible?

19 A Yes.

20 Q And another term I'd like to
21 define is "preemptive rates". Do you know
22 that term?

1 A I do.

2 Q And what does it mean?

3 MR. COHEN: Your Honor, again, I'm
4 going to object. There's not a single one of
5 these questions that was addressed. There
6 must be some division between -- it might be
7 helpful for Your Honor to actually have his
8 testimony. I can give the witness -

9 JUDGE SIPPEL: I have it. Well, I
10 had it.

11 MR. COHEN: I understand that.

12 (Simultaneous speech.)

13 JUDGE SIPPEL: Can you make the
14 objection?

15 MR. COHEN: I have his
16 declaration. It's just identical to this. I
17 don't have the marked copy, but it's the same
18 declaration he submitted with his expert
19 report. Is that right, Mr. Rose?

20 MR. ROSE: As far as I know.

21 JUDGE SIPPEL: Take a look at it?

22 MR. ROSE: I'm not going to

1 quibble with that. We don't need to get into
2 grand debates. I was just trying to provide
3 some background, Your Honor.

4 JUDGE SIPPPEL: All right. We'll
5 skip preemptive rates, and move on.

6 BY MR. ROSE:

7 Q Mr. Turner, in your experience,
8 what do distributors look for -- I'm sorry.
9 I should back up and give some foundation.
10 Strike that question, please.

11 Do you have experience operating -
12 - with programming networks?

13 A I do.

14 Q And what is your experience with
15 programming networks?

16 A We owned and operated eight
17 nationally distributed television networks, as
18 well as I sold inventory in national cable
19 television networks, and for distributors that
20 distribute nationally cable networks.

21 Q And in operating those networks,
22 did you have discussions with distributors

1 about carrying programming?

2 A Yes.

3 Q And, in your experience, what are
4 the distributors looking for when they choose
5 networks?

6 MR. COHEN: Objection, Your Honor.
7 It's beyond the scope. He's just tendered as
8 an advertising expert, and now he's -- they're
9 trying to get him to testify about what net --
10 first of all, it's hearsay. And, second, to
11 the extent that he's testifying as an
12 advertising expert, has nothing to do with
13 gaining distribution. So, yes, it may be true
14 that in his own business, and I'll come to it
15 on cross, he, from time to time, negotiated
16 with cable operators, that's not what he's
17 proffered here for. He's proffered as an
18 expert in advertising. That is not an
19 advertising-related question.

20 JUDGE SIPPEN: Well, then I'm
21 going to take -- I'll take that into consider,
22 but he said in his testimony that he at one

1 time owned eight TV networks? He must know
2 something about distribution, if he's owned
3 eight networks.

4 MR. COHEN: Not, actually. I could
5 do this on voir dire. They're not actually
6 networks in the sense that we're talking
7 about, Judge. If you want me to voir dire the
8 witness, I'd be happy to do that.

9 JUDGE SIPPEL: No, I'm not going
10 to ask you to do that.

11 MR. COHEN: But I can -- I mean, I
12 don't think that's a foundation, and I can
13 establish that on voir dire.

14 JUDGE SIPPEL: All right. Well,
15 that's legitimate. I'm satisfied that he's
16 close enough to the cable community that he
17 can -- in general, he can tell us whether he
18 can answer the question. I'm going to permit
19 counsel to develop a foundation with this
20 witness, within reason, as he sees fit. I
21 don't think there's any prejudice to that.

22 MR. COHEN: No, no, no.

1 JUDGE SIPPET: And you said you're
2 going to cross examine him, anyway.

3 MR. COHEN: Yes. Let me just --
4 because I have a suspicion about where we're
5 going. So, if I may, for a moment, or I could
6 wait. But let me just tell you what the
7 problem is.

8 The testimony that Mr. Turner has
9 submitted today is identical to his expert
10 report without a change that was submitted on
11 February 18th, 2009. If there was a need to
12 try to supplement that testimony, the time to
13 do that, if it were appropriate, would have
14 been when the written directs were submitted
15 on April 6th. I deposed him on his testimony
16 in March. They submitted written directs on
17 April 6th. The written direct that was
18 submitted on April 6th is identical to the
19 expert report from February. So, now, we're
20 going to have an oral direct that says well,
21 I want to explore some new areas. I didn't
22 really feel like changing the written

1 testimony. I didn't amplify it in any way.

2 It's not an appropriate use of the direct.

3 JUDGE SIPPEL: Mr. Rose?

4 MR. ROSE: What I'm getting at
5 here has to do with Paragraph 8 of his direct.
6 And if you'll allow me some leeway, we'll get
7 there pretty quickly.

8 JUDGE SIPPEL: Well, let's see.
9 It says "distributed closely, watched the
10 lineups in the top cable providers are on the"
11 -- is that correct? Is that what you're
12 looking for?

13 MR. ROSE: Yes. The distributors
14 watch the other distributors, essentially,
15 follow-the-leader mentality is the term he
16 uses, emerging networks. He talks about -

17 JUDGE SIPPEL: All right. I hear
18 you. Is that enough of a connection?

19 MR. COHEN: Well, other than it's
20 beyond the scope of his expert testimony,
21 since he's testified that he's only an expert
22 on advertising. I mean -

1 MR. ROSE: I did originally try to
2 proffer him as an expert in the networks,
3 also, and I would proffer him for that
4 purpose, simply to get to Paragraph 8.

5 JUDGE SIPPEL: Well, it doesn't
6 work that way.

7 MR. ROSE: I tried to proffer him
8 that way, and then we -

9 JUDGE SIPPEL: It doesn't work
10 that way, Mr. Rose. It's not that simple.
11 You've got him in here now as an expert on
12 advertising, and that's what we want to hear.
13 His testimony on what the strict distribution
14 or distributors are would not be accepted as
15 expert testimony. We're going to have other
16 testimony on that. I guess we don't need it.
17 Mr. Cohen is persisting in this objection. I
18 don't feel -- I feel, technically, he's right.
19 He's right. I would be more lenient, but,
20 technically, he's right. I'm going to have to
21 go along with him, and instruct you not to
22 have this witness testifying as to

1 distribution. Stick to his expertise, stick
2 to his written testimony, and let's go
3 forward.

4 MR. ROSE: Okay.

5 JUDGE SIPPEL: So, no distribution
6 questions.

7 BY MR. ROSE:

8 Q Turning your attention to
9 Paragraph 8 of your written testimony, Mr.
10 Turner. Do you have that in front of you?

11 A Yes.

12 Q You can see in the second sentence
13 it says, "Historically, there's been a follow-
14 the-leader mentality." What did you mean by
15 that? What does that mean, in your mind?

16 MR. BECKNER: Your Honor, I object
17 to this whole process. We have a pre-filed
18 direct.

19 JUDGE SIPPEL: That's right.

20 MR. BECKNER: And it's not
21 appropriate for counsel to then elaborate on
22 it.

1 JUDGE SIPPTEL: I am going to
2 sustain the objection. It sounds like you're
3 cross examining your own witness. You've got
4 the -- his testimony is in.

5 MR. ROSE: Okay.

6 JUDGE SIPPTEL: You've gotten --
7 all your direct testimony is in the record
8 right now the way it is. It's frozen. The
9 witness can't -- no wiggle room. So, I think
10 that you ought to tender him for cross
11 examination, and let's move on. How about
12 that, Mr. Rose?

13 MR. ROSE: Well, Your Honor is
14 running the courtroom, so I can hardly argue
15 with you.

16 JUDGE SIPPTEL: Well, that's not
17 the point. That is -- well, yes, it is the
18 point, but it's not the only point.

19 (Laughter.)

20 JUDGE SIPPTEL: I mean, this is the
21 way the traffic flows. This is why we do this
22 written testimony business, so that we don't

1 have to go through the direct examination.

2 It's tough to do direct examination. I agree
3 with you.

4 I'm going to take you at your word
5 on what you have said last. He's tendered for
6 cross examination. Are you going to start,
7 Mr. Cohen?

8 MR. COHEN: Yes, Your Honor.

9 CROSS EXAMINATION

10 BY MR. COHEN:

11 Q Mr. Turner, we met in March, did
12 we not?

13 A Yes, we did.

14 Q Sir, Exhibit 146, Wealth Exhibit
15 146, that's identical to the declaration, your
16 expert report that you signed on February
17 18th, is it not?

18 A This right here?

19 Q Yes, sir.

20 A Yes.

21 Q Okay. And you haven't made any
22 changes since then in that testimony, have

1 you?

2 A No.

3 Q And you haven't offered any
4 corrections today, have you?

5 A No.

6 Q Now, let me -- and you signed that
7 under oath back in February, and you
8 reaffirmed that today. Correct?

9 A Correct.

10 Q Now, sir, I want to talk about how
11 you got to be an expert in this case. You had
12 a discussion with Mr. Herring, Mr. Charles
13 Herring, back in November or December of last
14 year?

15 A I believe it was December, yes.

16 Q And then in February -

17 A Oh, go ahead, sir. Yes.

18 Q And then in February of 2009, he
19 asked you if you would be willing to help him
20 out by submitting an affidavit in this case.
21 Correct?

22 A That's correct.

1 Q And, in fact, what Mr. Herring
2 did, is he drafted this declaration for you.
3 Did he not?

4 A He gave me a draft, and then I
5 went through and changed it to be more
6 correct.

7 Q But what you received from the
8 first draft of this exhibit, Exhibit 146, was
9 not written by you, it was written by Mr.
10 Charles Herring. Correct?

11 A The first draft, yes.

12 Q And you received that on what,
13 February 15th or 16th?

14 A I believe so.

15 Q And you sent it out on the 18th?

16 A Yes, sir.

17 Q And in the two days that you
18 worked on your expert report in this case,
19 what did you spend, five or six hours?

20 A That's correct.

21 Q Inclusive of the amount of times
22 that your wife helped you with?

1 A Yes.

2 Q So, of the five hours that you
3 spent in preparing your expert report in this
4 case, how many hours did you spend, and how
5 many hours did your wife spend?

6 A We worked on it together.

7 Q Can you estimate -- all five
8 hours? You spent five hours of your time?

9 A Yes, I did.

10 Q And all of the work that you did
11 that's reflected in these opinions was done in
12 that five hours. Is that not right?

13 A Yes.

14 Q Now, turn, if you would, to
15 Paragraph 3 of your testimony. And the first
16 sentence of Paragraph 3 says, "WealthTV has
17 always described itself as an upscale luxury
18 male-focused channel." Do you see that, sir?

19 A Yes, I do.

20 Q And in the last sentence you say,
21 "This type of content", meaning Wealth's
22 content, "is consistent with attracting a

1 heavily male audience, 25-49 years of age,
2 which is WealthTV's self-described audience."

3 Do you see that, sir?

4 A Yes.

5 Q Now, you didn't write that
6 sentence. Mr. Herring wrote that sentence for
7 you, did he not?

8 A I don't recall, but, as I said, I
9 went through this, and corrected it to be
10 accurate to my opinion.

11 Q Would you like me to refresh your
12 recollection with your deposition? Do you
13 think your recollection was better on who
14 wrote that sentence in March, than it is now?

15 A It may be. WealthTV has always
16 described themselves to me as affluent male
17 demographic.

18 Q I'm asking you whether you wrote
19 that sentence as an expert, or Mr. Herring
20 wrote that sentence. Can you recall?

21 A I don't recall.

22 Q Let me see.

1 MR. COHEN: Your Honor, may I
2 approach the witness?

3 JUDGE SIPPEL: You may.

4 BY MR. COHEN:

5 Q I've marked as Exhibit 103 Mr.
6 Turner's deposition.

7 JUDGE SIPPEL: You don't have to
8 mark it.

9 MR. COHEN: Okay. Let me -- I
10 have some copies for counsel.

11 JUDGE SIPPEL: All right. You
12 just have to show him what he -- the language
13 that he said, and he can read what he said,
14 and he can read the paragraph around what he
15 said. And when he's ready to answer you, ask
16 him a question.

17 BY MR. COHEN:

18 Q Sir, would you look at page 121 of
19 your deposition that I took on March 9th of
20 2009. And did I ask you these questions?

21 A Yes.

22 Q And did you give this answer?

1 "Where did you get that from, 25 to 49? How
2 did you derive your view that their content is
3 consistent with attracting a heavily male
4 audience 25-49 years of age, which is
5 WealthTV's self-described audience? Is that
6 your words, or Mr. Herring's words? That
7 would have come from WealthTV. That would
8 have come from WealthTV, so Mr. Herring wrote
9 that sentence. Correct? Answer: Wrote the
10 sentence? Question: Yes. No, but I know I
11 read that he was targeting the 25-49 year old
12 male demographic. Where did you read it? I
13 read it in the materials that he's given me.
14 They are disclosed in connection with your
15 expert declaration. Do you know what was
16 disclosed?" Did you give those answers, sir?

17 A Yes, I did.

18 Q Okay. Have you ever seen any
19 demographic information prior to executing
20 your declaration of WealthTV?

21 A Demographic information was sent
22 to my company. I don't recall actually seeing

1 it that time. I have seen it since, the
2 information that they sent to my company, and
3 it was consistent with what the demographic
4 was stated.

5 Q At the time that you wrote -- you
6 signed your expert report under oath, had you
7 seen any demographic information from
8 WealthTV?

9 A I don't recall. I know that they
10 had sent it to us. I'm sure that I viewed it,
11 but I didn't recall exactly when it was.

12 Q So, at the time that you had --
13 you signed this declaration, you could not
14 recall seeing any demographic information.
15 Correct?

16 A That's correct.

17 Q And the only document that he gave
18 you in connection with the preparation of this
19 declaration was the draft statement that he
20 gave you that said that the demographic was
21 25-49. Correct?

22 A No, he gave me a lot of

1 information. I don't recall exactly what it
2 all was, but I did read a lot of information
3 that he sent to me.

4 Q Sir, can you tell me -

5 JUDGE SIPPEL: Are you getting --
6 is he speaking loud enough? Do you want him
7 to speak up?

8 COURT REPORTER: It's okay.

9 JUDGE SIPPEL: Okay. Thank you.

10 BY MR. COHEN:

11 Q Sir, can you identify for me any
12 document that you saw prior to executing this
13 declaration under oath in which WealthTV
14 described itself as an upscale luxury male-
15 focused channel?

16 A I cannot.

17 Q You took Mr. Herring's word for
18 it, did you not?

19 A Yes. That's what he's always
20 described the network as, as long as I've
21 known him.

22 Q And you can't identify for me any

1 demographic information that you relied on,
2 can you?

3 A I have looked back at the
4 information that they sent when we were
5 representing their advertising inventory, and
6 yes, it is consistent with what he told me.

7 Q At the time you signed your
8 declaration under oath, you hadn't looked at
9 any of that information, had you?

10 A I may glanced at it. I didn't
11 recall exactly when it was.

12 JUDGE SIPPEL: Just so there's no
13 confusion here, you're talking about the
14 declaration in February.

15 MR. COHEN: Which is the same as
16 his testimony.

17 JUDGE SIPPEL: I understand that.

18 MR. COHEN: Yes.

19 JUDGE SIPPEL: But that's what
20 you're talking about.

21 MR. COHEN: Yes, sir.

22 JUDGE SIPPEL: Okay.

1 BY MR. COHEN:

2 Q So you can't tell me under oath,
3 can you, that you were relying on any specific
4 demographic information with respect to
5 Paragraph 3?

6 A Information that I had that
7 WealthTV has told me, and my experience with
8 them, the demographics that they were
9 targeting, yes.

10 Q Have you seen any research prior
11 to February of 2000 when you signed your
12 statement under oath?

13 A They sent us research. Since I've
14 signed my declaration, I've looked at that
15 research. It is consistent with what they've
16 told me.

17 Q That's not my question, sir. You
18 signed something under oath in February of
19 2009. You didn't go back and look at that
20 information before you signed your
21 declaration, did you?

22 A I did not.

1 Q And then I took your deposition,
2 and in an effort to sustain your opinion, you
3 went back and did some research. Right?

4 A Yes.

5 Q Now, one of the things that Mr.
6 Herring sent you in those couple of days where
7 you worked on your report was a programming
8 lineup for WealthTV. Correct?

9 A Yes.

10 MR. ROSE: You just said he's not
11 testifying about programming.

12 MR. COHEN: I'm cross examining
13 him with respect to his opinion.

14 JUDGE SIPPEL: I'm going to
15 overrule the objection, if that's an
16 objection. Go ahead, Mr. Cohen.

17 BY MR. COHEN:

18 Q Isn't it true, Mr. Turner, that
19 when you looked at the programming lineup in
20 February that Mr. Herring sent you, it seemed
21 inconsistent with chasing purely a male
22 demographic?

1 A No.

2 Q Did not seem inconsistent?

3 A The programming that I saw from
4 WealthTV?

5 Q The programming lineup, sir, that
6 you got from Mr. Herring.

7 A He sent me DVDs of actual programs
8 that they had on, and I had viewed on previous
9 occasions the type of programming that they
10 ran on WealthTV.

11 Q And he sent you a program lineup,
12 did he not?

13 A I don't recall.

14 Q You don't recall. Look at page 77
15 of your deposition. Did I ask you this
16 question, and did you give this answer, 77,
17 line 11. Are you with me, sir?

18 "And what about when you looked at
19 the programming lineup, did that confirm to
20 you that they were chasing a purely male
21 demographic? Answer: No. I didn't think it
22 was a purely male demographic." And that was

1 true testimony, was it not?

2 A Yes.

3 Q Now, sir, in fact, you know from
4 the work that you've done for WealthTV that
5 they have shows that appeal primarily to
6 women, as well as to men. Correct?

7 A Some of the information that you
8 showed me during my deposition, yes.

9 Q And they have shopping shows.
10 Correct?

11 A Yes.

12 Q "Let's Shop". Is that right?

13 A That's correct.

14 Q And they have beauty shows, do
15 they not?

16 A I don't recall.

17 Q Do they have food shows?

18 A Yes.

19 Q And those appeal to both men and
20 women. Correct?

21 A Yes.

22 Q And they have other programming

1 that appeals to men and women, do they not?

2 A They do.

3 Q And that information that I showed
4 you, which I'll show you again, at your
5 deposition, that had never been shared by Mr.
6 Herring with you, had it?

7 A Not that I recall.

8 Q Now, sir, you testify in Paragraph
9 3 about, "In my opinion", you say, "much of
10 WealthTV's content is similar to what can be
11 found in upscale men's magazines, such as "The
12 Robb Report", "QC Magazine", and "Forbes". Do
13 you see that, sir?

14 A Yes.

15 Q All right. And I think we
16 established at your deposition, we could do it
17 again, that you don't even know what "QC
18 Magazine" is, do you?

19 A No, I thought that was GQ
20 Magazine.

21 Q Right. Because that's another
22 sentence in your sworn expert report that Mr.

1 Herring wrote. Correct?

2 A It may have been, yes.

3 Q And, in fact, Mr. Herring, in
4 connection with this report that you wrote in
5 the two days in February, didn't share with
6 you any of his materials that showed that he
7 viewed his magazine competitive set to be much
8 more broader than men's magazines. Correct?

9 A Not that I recall.

10 MR. COHEN: May I approach, Your
11 Honor?

12 JUDGE SIPPEL: Yes.

13 BY MR. COHEN:

14 Q Let me show you a document that
15 has been received in evidence as Time Warner
16 Cable 22. It's a presentation of Wealth -

17 MR. COHEN: Do you need copies?

18 BY MR. COHEN:

19 Q Now, sir, would you turn to page
20 22-3. Do you see something called, "The
21 Magazine Complementary Set"?

22 A I do.

1 Q And this is a document, a slide
2 from WealthTV that we went through at your
3 deposition. Correct?

4 A Yes.

5 Q And if you turn to the -
6 MR. COHEN: It's page 22-3, Your
7 Honor.

8 JUDGE SIPPEL: I have it.

9 BY MR. COHEN:

10 Q The Magazine Complementary Set, it
11 has the "The Robb Report", which you reference
12 in your testimony. Right?

13 A Yes.

14 Q And that's a men's magazine?

15 A That's correct.

16 Q And it has -- and this Magazine
17 Complementary Set, you understand from all
18 your time in the advertising business, is that
19 this is WealthTV telling someone who their
20 overlapping audience is. Correct?

21 A Yes.

22 Q Right? And they're saying these

1 are the magazines who have readers who are
2 similar to our viewers. Correct?

3 A I would think so.

4 Q "The Robb Report" is a men's
5 magazine. Right? As you say in your
6 testimony.

7 A It is.

8 Q And the second magazine is
9 "Architectural Digest"?

10 A Yes.

11 Q And that's not a men's magazine,
12 is it?

13 A I wouldn't say that it's exclusive
14 to men.

15 Q It's not a men's magazine in the
16 sense of "The Robb Report", is it?

17 A Not in the sense of "The Robb
18 Report", but I read "Architectural Digest",
19 and I'm a man.

20 Q Is it an upscale man's magazine,
21 Mr. Turner?

22 A I would say it's an upscale

1 magazine.

2 Q Not an upscale men's magazine.

3 Correct?

4 A I don't think that it has a --
5 it's genre-specific.

6 Q And "Town and Country", you know,
7 do you not, that is a women's magazine.

8 Correct?

9 A Yes.

10 Q And "Gourmet" is a women's
11 magazine, is it not?

12 A I think that could be men or
13 women.

14 Q You think "Gourmet" is an upscale
15 men's magazine in the sense that you use it in
16 Paragraph 3?

17 A I don't think that it's an upscale
18 men's magazine, but I don't think it's sex-
19 specific. I think men and women both cook,
20 and would read it.

21 Q And you think it tilts towards
22 men. Is that your testimony?

1 A I'm not saying that. Emeril
2 Lagasse is a chef, and he's a man. There's
3 several male chefs out there. Men like to
4 cook, just as much as women do.

5 Q Is it an upscale men's magazine?

6 A I did not say that.

7 JUDGE SIPPEL: Hold on just a
8 second, Mr. Turner. You have to raise your
9 voice a bit. Maybe pull that mic a little bit
10 closer. The Court Reporter has to be sure
11 that it's coming through.

12 THE WITNESS: Okay?

13 JUDGE SIPPEL: Thank you.

14 BY MR. COHEN:

15 Q And, sir, next to "Gourmet", what
16 is that magazine? Is that "W"?

17 A It is.

18 Q It's a women's fashion magazine.
19 Correct?

20 A Correct.

21 Q And in all of the time that Mr.
22 Herring and WealthTV were representing to you

1 that they were chasing a male demographic, did
2 they ever show you a slide that they were
3 making presentations with that showed a
4 Magazine Complementary Set that includes "W",
5 "Gourmet", "Town and Country", and
6 "Architectural Digest"?

7 A No.

8 Q So this is not one of the
9 documents they shared with you.

10 A No.

11 Q And this document would be
12 inconsistent, would it not, with your
13 statement that WealthTV's content is similar
14 to what could be found in upscale men's
15 magazines.

16 A Some of their content is similar,
17 but not all of it.

18 Q Right. Some is similar, and some
19 is not. Correct?

20 A Correct.

21 JUDGE SIPPEL: Did you ask about
22 "The New Yorker"?

1 MR. COHEN: I'll ask about "The
2 New Yorker."

3 BY MR. COHEN:

4 Q "The New Yorker" is not a men's
5 magazine. It appeals to both men and women,
6 does it not?

7 A It does.

8 Q And "Departures" appeals to both
9 men and women, does it not?

10 A I believe so.

11 Q And "Travel and Leisure" appeals
12 to both men and women, does it not?

13 A Yes.

14 Q And "Traveler" appeals to both men
15 and women, does it not?

16 A I would think so.

17 Q And "Forbes" appeals to men?

18 A Yes.

19 Q So, two of the ten magazines are
20 upscale men's magazines. Correct?

21 A Yes.

22 Q And at least two are upscale

1 women's magazines, and some number of the
2 remainder appeal to both.

3 A Yes.

4 Q And in all of the time that you
5 have known Mr. Herring, he never shared with
6 you, and you never saw before your deposition
7 presentations made by WealthTV in which it
8 showed people that its Magazine Complementary
9 Set included women's magazines, and magazines
10 that apply to both men and women. Isn't that
11 so?

12 A Yes, not that I recall.

13 Q Now, there are other shows, as you
14 said, on WealthTV that have nothing to do with
15 men, like "Wealth on Art". Right?

16 A I'm not familiar with "Wealth on
17 Art."

18 Q But didn't you review the program
19 guide that Mr. Herring sent you in the two
20 days, or did you not have time to look at
21 that?

22 A I looked at it, but I reviewed

1 programs, such as "Wealth on Wheels", their
2 tech show, the content that was more geared
3 towards men.

4 Q Okay. Let's try to clarify. On
5 the 15th of February, or so, you got some
6 materials from Mr. Herring. Right?

7 A Yes.

8 Q And that included a program guide
9 for a week of programming on WealthTV, did it
10 not?

11 A I believe so.

12 MR. COHEN: Okay. May I approach,
13 Your Honor?

14 JUDGE SIPPEL: Yes, you may.

15 MR. COHEN: And show you what
16 we've marked as Time Warner Cable 100 for
17 identification.

18 JUDGE SIPPEL: Thank you.

19 BY MR. COHEN:

20 Q Now, Time Warner Cable 100 for
21 identification is the program guide that Mr.
22 Herring sent you to help you in the five or

1 six hours that you were going to spend on your
2 expert report. Right?

3 A Yes.

4 Q And you reviewed it, did you not?

5 A I looked at it, yes.

6 MR. COHEN: Okay. I offer Time
7 Warner Cable 100, Your Honor.

8 JUDGE SIPPEL: Is there any
9 objection to that? Hearing none, it's
10 received in evidence as TWC 100.

11 (WHEREUPON, THE DOCUMENT REFERRED
12 TO, PREVIOUSLY MARKED TWC EXHIBIT
13 100 FOR IDENTIFICATION, WAS
14 RECEIVED IN EVIDENCE.)

15 BY MR. COHEN:

16 Q Now, sir, I'd like you to -- now,
17 in addition to getting the programming guide,
18 I'm going to ask you about that in a moment,
19 Mr. Herring sent you some DVDs of Wealth's
20 shows. Right?

21 A Yes.

22 Q And they're about cars, and

1 gadgets, and things like that. Right?

2 A That's correct.

3 Q And he selected the DVDs for you.
4 You didn't go out and find them yourself, did
5 you?

6 A No.

7 Q Okay. And did he tell you how he
8 selected the shows that he sent you?

9 A He didn't tell me, and I didn't
10 ask him.

11 Q Okay. Now, look at the first
12 page. It's 6:00 in the morning across the
13 week, Wealth has something called "Wealth
14 International News". Do you see that?

15 A Yes.

16 Q Did Mr. Herring send you any news
17 shows?

18 A He did not, but I saw "Wealth
19 International News" being produced in his
20 studios.

21 Q And how about the show, "Let's
22 Shop". Is that one of the shows that he sent

1 you?

2 A No.

3 Q Does that sound like a men's show
4 to you?

5 A It could be. I've seen men's
6 shopping shows.

7 Q Is that what you think "Let's
8 Shop" is?

9 A I don't know. I didn't review it.

10 Q Have you ever seen a presentation
11 by WealthTV in the time that you've known Mr.
12 Herring in which Wealth -- "Let's Shop" was
13 described as a women's show, skewed to women?

14 A Before my declaration?

15 Q Before your declaration, sir.

16 A No.

17 Q Yes. At the time you swore under
18 oath that your written testimony was true, had
19 you seen any presentation made by WealthTV in
20 which it described "Let's Shop" as a women's
21 show?

22 A No.

1 MR. COHEN: Let me show you
2 another document, sir, that I think we looked
3 at your deposition, and this is in evidence as
4 Time Warner Cable 4.

5 JUDGE SIPPET: Thank you. Do we
6 have one more for the -

7 MR. COHEN: Oh, of course. I'm
8 sorry, Ms. Gosse.

9 BY MR. COHEN:

10 Q Now, sir, just to put this in
11 context, because it's in your written
12 statement, but just so the Judge has it in
13 mind. In January of 2008, you were actually
14 hired to be an advertising rep for WealthTV.
15 Correct? Your company.

16 A My company was, yes.

17 Q And what means is that you took on
18 the job of trying to sell advertising for
19 WealthTV to advertisers. Correct?

20 A Correct.

21 Q Exactly the kind of experience you
22 had had prior to taking on this assignment for

1 WealthTV. Correct?

2 A That's correct.

3 Q And one of the things that you
4 have to do when you sell advertising for a
5 network, is you have to understand something
6 about the programming, do you not?

7 A Yes.

8 Q And you testified today that Mr.
9 Herring told you that the network's
10 demographic was 25-49 year old men. Correct?

11 A Yes.

12 Q And prior to executing your
13 declaration, he hadn't shown you any research.
14 Correct?

15 A He had sent us research, yes.

16 Q You had not seen it.

17 A I didn't recall seeing it at the
18 time.

19 Q And you did not have it in mind
20 when you wrote your testimony and swore under
21 oath. Correct?

22 A Just the conversations that I have

1 had with him.

2 Q All right. And he also had not
3 shared with you presentations that he had made
4 to advertisers showing that his shows were not
5 purely geared towards men, had he?

6 A He sent us information about -- he
7 sent us a media kit, and some decks that he
8 had previously sent out. But those decks
9 didn't target women, no.

10 Q Right. And Time Warner Cable
11 Exhibit 4 in evidence, which was a
12 presentation made to "Forbes Magazine", that's
13 not one of the decks that Mr. Herring sent
14 you, is it?

15 A No.

16 Q Would you turn to the second page
17 of Exhibit 4, sir?

18 MR. ROSE: Objection; foundation.
19 He's testified he's never seen this.

20 MR. COHEN: I'm trying to
21 establish, Your Honor, that he was given
22 selective information. And that his opinion

1 is not entitled to any weight, because to the
2 extent he said that WealthTV had always
3 represented to him that they were chasing that
4 demographic, there are prior inconsistent
5 statements of WealthTV that weren't shared
6 with him.

7 MR. ROSE: He's already said he
8 wasn't given this. You've established that.

9 JUDGE SIPPEL: Well -

10 MR. COHEN: I think it goes to his
11 credibility.

12 MR. ROSE: Trying to get in the
13 content of this through this witness is
14 improper. You already did it with the
15 previous exhibit.

16 JUDGE SIPPEL: Well, I think he's
17 -- again, there's leeway in cross examination.
18 And he's proffered the reason as to why he
19 wants to show this. How did this document
20 come about? You got this in discovery?

21 MR. COHEN: In discovery, Your
22 Honor. This is a presentation.

1 JUDGE SIPPET: And it was received
2 in evidence.

3 MR. COHEN: It's in evidence.

4 JUDGE SIPPET: There was no
5 objection to it, or was there objection?

6 MR. COHEN: No objection, Your
7 Honor.

8 JUDGE SIPPET: You can use it.
9 I'll permit it. It's cross examination.

10 BY MR. COHEN:

11 Q And, Mr. Turner, just so the Judge
12 knows, we went through this document at your
13 deposition. This is not the first time you
14 are seeing it, is it?

15 A No. We did go through this at my
16 deposition, right.

17 Q And what this document shows,
18 beginning on page 2, is a description by
19 WealthTV of the demographic for its featured
20 programming in 2004, correct?

21 A Yes.

22 Q And, for example, the first one

1 says Wealth on Water, high income, and in fact
2 it says male skewed, right?

3 A That is correct.

4 JUDGE SIPPEL: What does "skewed"
5 mean?

6 THE WITNESS: That means it is
7 targeted towards a male demographic.

8 JUDGE SIPPEL: That is skewed?

9 THE WITNESS: Skewed.

10 JUDGE SIPPEL: Is that an
11 advertising word kind of, or is that --

12 THE WITNESS: Yes. A demographic
13 is skewed towards a male viewer.

14 JUDGE SIPPEL: All right.

15 BY MR. COHEN:

16 Q And, by the way, you said that Mr.
17 Herring always told you that his male audience
18 was 25 to 49?

19 A Yes.

20 Q This in fact says 25 to 55-plus,
21 does it not?

22 A Yes, it does.

1 Q And he never told you that his
2 audience was 25 to 55-plus, did he?

3 A No.

4 Q Now, sir --

5 A 25 to 49 is used in the industry
6 in advertising in categories.

7 JUDGE SIPPEL: We can't -- you are
8 dropping your voice at the end. Could you
9 repeat that answer, please?

10 THE WITNESS: 25 to 49 is a
11 typical way to describe an age demographic --
12 25 to 54, or 25 to 49.

13 JUDGE SIPPEL: Once you turn 50,
14 you no longer can be in that demographic?

15 THE WITNESS: Well, you can, but
16 they segment it usually in the industry to
17 give people an idea of categories.

18 JUDGE SIPPEL: What people are
19 they -- who wants those ideas?

20 THE WITNESS: Advertisers.

21 JUDGE SIPPEL: All right. Thanks.

22 BY MR. COHEN:

1 Q But in fact Wealth was not
2 segmenting it in its pitch to Forbes, was it,
3 that way?

4 A No. They -- no.

5 Q And the second show, Doing Well,
6 doesn't say it is a male skew, does it?

7 A It says high income, educated, 25
8 to 55-plus.

9 Q But not male skewed, correct?

10 A No.

11 Q And World of Wealth is male
12 skewed, right?

13 A It says male skewed, yes.

14 Q And on the next page, Wealth
15 International News, that is not male skewed,
16 is it?

17 A It doesn't say that it is. I
18 would assume that it would be.

19 Q But WealthTV was not describing it
20 as male skewed, was it, in its own materials?

21 A No.

22 Q And Wealth Polo it wasn't

1 describing as male skewed, was it?

2 A No, it doesn't.

3 Q And Mistletoe CHIC! was -- is
4 female skewed, 25 to 55-plus, correct?

5 A That is what it says here, yes.

6 Q And in connection with your work
7 for Mr. Herring, did he tell you that he had
8 shows that were female skewed on his network?

9 A I don't recall having a
10 conversation about that, no.

11 Q You don't remember that, do you?

12 A No.

13 Q Let's turn to the next page,
14 featured programming, Let's Shop. And you
15 said shopping shows could be male skewed or
16 female skewed, but apparently in Wealth's View
17 Let's Shop is a female skewed show, correct?

18 A That is what it says, yes.

19 Q And at the time that you executed
20 your declaration, your sworn testimony, were
21 you aware that WealthTV was representing to
22 potential advertisers that it had shows that

1 were female skewed?

2 A No, I wasn't aware of that.

3 Q Okay. And are you aware that

4 Let's Shop is still on WealthTV?

5 A I don't know.

6 Q Okay. Are you aware that CHIC! is

7 still on WealthTV?

8 A I am not aware if it is or not.

9 Q And that is because you are really
10 not very familiar with the programming on
11 WealthTV, are you?

12 A I am familiar with the programming
13 that I have viewed on WealthTV, but it is not
14 distributed in the area that I live, so I
15 don't have the ability to watch it on a 24-
16 hour basis.

17 Q Right. And in fact although you
18 offer opinions in your written direct
19 testimony about that programming, you are not
20 very familiar at all with the programming, are
21 you?

22 A I am familiar with what WealthTV

1 has told me that their demographic programming
2 is. I have seen programming. I have been in
3 their studios and watched them produce
4 programming. But other than that, I haven't
5 seen the program -- I haven't seen the network
6 on a 24-hour basis.

7 Q Let's just try to explore how much
8 you know about it. In 2004, you went to the
9 studio?

10 A Yes.

11 Q And you spent part of a day there
12 watching some programs, right?

13 A I spent a full day there.

14 Q But you watched programs for part
15 of the day.

16 A Yes. And then, we took it to --

17 Q And that --

18 A -- facilities.

19 Q -- is the only WealthTV
20 programming you saw in the year 2004, correct?

21 A I believe so.

22 Q Okay. And in 2005, you didn't see

1 any WealthTV programming, correct?

2 A I may have, but not that I recall.

3 Q You can't remember any that you

4 can tell me about, can you?

5 A No.

6 Q And in 2006, you went back to

7 WealthTV's studio for a day, right?

8 A That is correct.

9 Q And you watched part of a day of
10 programming?

11 A Yes.

12 Q And that consisted of all of the
13 WealthTV programming that you saw in the year
14 2006, right?

15 A That I recall, yes, right.

16 Q So as you sit here today, in the
17 years 2004, 2005, and 2006, you saw a little
18 bit of -- you saw parts of two days of
19 programs, correct, in three years?

20 A Yes, maybe two days.

21 Q As many as two days, but certainly
22 no more, fair?

1 A Yes.

2 Q And in 2007, you never saw a
3 Wealth show, right?

4 A I may have, but not that I recall,
5 no.

6 Q Can you tell me -- you are under
7 oath. Can you tell me any show you saw in
8 2007?

9 A I cannot.

10 Q And then, in 2008, when you took
11 on your advertising responsibilities for
12 WealthTV, you also didn't see any shows, did
13 you?

14 A Not that I recall. I am sure that
15 they were sent to my -- passed on to my Sales
16 Department.

17 Q I am not asking you about your
18 Sales Department. So in 2008, when you were
19 repping WealthTV that entire year, you can't
20 tell me a single show you saw, right?

21 A Not that I recall.

22 Q And then, when Mr. Herring asked

1 you to do this declaration, he sent you some
2 DVDs, right?

3 A Yes.

4 Q And he sent you some DVDs of some
5 male skewed shows, correct?

6 A That is correct.

7 Q And then, you swore in paragraph 3
8 of your testimony that the content of WealthTV
9 is consistent with attracting a heavily male
10 audience 25 to 49 years of age, is that so?

11 A I said in my opinion much of the
12 Wealth content is similar to what can be found
13 in upscale men's magazines, yes.

14 Q But all you knew about the content
15 was this couple of days of watching TV, and
16 then some videos that Mr. Herring self-
17 selected for you, correct?

18 A Correct.

19 Q He didn't send you CHIC!, did he?

20 A Not that I recall.

21 Q He didn't send you Let's Shop, did
22 he?

1 A Not that I recall.

2 Q Did he send you a show called

3 Etiquette 101?

4 A I don't think so, no.

5 Q Do you know what that show is?

6 A No.

7 Q Do you know what The Boomer Show

8 is on WealthTV?

9 A I can guess.

10 Q Well, do you know, sir? You are

11 the one who testified under oath about the

12 content of the programming.

13 A I testified that the content that

14 I saw was a male skewed demographic.

15 Q And can you show me where in

16 paragraph 3 you informed us that you had only

17 seen a couple of shows on the whole network in

18 the last five years?

19 A I don't say that I haven't. I say

20 that I saw shows on cars, cigars, spirits,

21 wine, beer, yachts, planes, high-tech gadgets.

22 That is what I testified to.

1 Q And what is the name of the travel
2 show you saw?

3 A I don't recall the name of it
4 right now, but it was --

5 Q And what is the name of the
6 financial show you saw?

7 A I don't recall exactly what that
8 name is right now, but I did see shows,
9 financial shows, and I saw travel shows.

10 Q Go back, please, to the exhibit
11 that we marked, which is the program index.

12 A Okay.

13 Q Exhibit 100 in evidence. Do you
14 see that? That is the schedule that Mr.
15 Herring sent you, only mine is green and yours
16 isn't.

17 A Yes.

18 Q Did he send you Window to the
19 Louvre on the first page, 7:00 in the morning
20 on Tuesday, the 24th? Let's look at the 7:00
21 hour. Did he send you that show?

22 A Not that I recall, no.

1 Q Did he send you Inside Islam?

2 A I don't recall that he did.

3 Q Why don't you turn the page,
4 please, and let's look at 9:00 in the morning
5 on WealthTV. Do you know what year this is
6 the schedule for?

7 A I do not.

8 Q Did he send you The Luxury Travel
9 Show?

10 A He may have, but I don't recall.

11 Q Did he send you Wow?

12 A Again, I don't recall.

13 Q Do you know whether Luxury Travel
14 Show is a men's show or a show that has appeal
15 to both men and women?

16 A I don't.

17 Q Do you know whether Wow is a men's
18 show or it has appeal to both men and women?

19 A No.

20 Q Would you turn the page, please,
21 and let's look at 9:30 in the morning on page
22 0087 of Time Warner Cable Exhibit 100. Did he

1 ever send you Wealth on Art?

2 A Not that I recall.

3 Q And in your experience selling
4 advertising for TV shows, are art shows male
5 -- upscale men's shows, or do they appeal to
6 a broader demographic?

7 A In my opinion, they would appeal
8 to a broader demographic.

9 Q Okay. What about What to Wear on
10 Thursday at 9:30 in the morning? Do you know
11 anything about that show?

12 A No.

13 Q Okay. And are fashion shows
14 exclusively upscale men's shows, in your
15 experience selling advertising?

16 A It depends on the content of the
17 show itself.

18 Q And do you know anything about the
19 content of What to Wear?

20 A I don't.

21 Q Go to the 10:00 hour. Did he send
22 you any tapes of Design for Living?

1 A Not that I recall.

2 Q How about the Homes by Design, did
3 you ever see that show?

4 A No.

5 Q Do they sound like upscale men's
6 shows to you?

7 A They -- no, they could be a
8 broader demographic.

9 Q Turn the page, please, to the
10 11:00 hour. Start on Monday. Have you ever
11 seen a show called Wealth on Health? It has
12 been on this network for years. Have you ever
13 seen it?

14 A Yes.

15 Q That is not a men's show, is it?

16 A I think it appeals to men, yes.

17 Q And to women, correct?

18 A Yes.

19 Q Right? So that is not a male
20 skewed show, like a cigar show, is it?

21 A No.

22 Q Sir, can you tell us whether, at

1 the time that you swore under oath that the
2 content on WealthTV was consistent with
3 attracting a heavily male audience, what
4 percentage of that content had you viewed?

5 A I don't know what percent of the
6 content that I viewed.

7 Q Would you agree with me, by
8 reference to this programming guide, it is a
9 pretty small percentage?

10 A Yes.

11 Q And most of the stuff that you did
12 see is the stuff, the shows, that were hand-
13 selected for you by Mr. Herring, correct?

14 A Correct.

15 Q And did the DVDs that he sent you
16 of his men's shows, did they come at the same
17 time as the draft of your testimony, same box?

18 A I don't recall. I don't think so.
19 I think it was separate.

20 Q Did the shows come first, or did
21 they come after he gave you the testimony?

22 A I think that he sent -- I don't

1 recall exactly what the timing was, but he
2 sent me -- he FedExed me information, DVDs,
3 and articles, and I believe that he e-mailed
4 me the draft.

5 Q And in connection with the
6 preparation of this sworn testimony, you
7 looked at the articles that Mr. Herring sent
8 you, correct?

9 A Yes.

10 Q You didn't look at any other
11 articles, did you?

12 A Other than what he sent?

13 Q Correct.

14 A No.

15 Q So you based your sworn testimony
16 on some hand-picked articles selected for you
17 by Charles Herring, isn't that so?

18 A And my experience with my
19 relationship with them over the years and the
20 information that I had gotten previous to the
21 information that they sent.

22 Q You looked at some articles about

1 Mojo?

2 A Yes.

3 Q And, actually, you address Mojo in
4 paragraph 5 of your sworn testimony, do you
5 not, sir?

6 A I do.

7 Q Now, prior to February 15, 2009,
8 when Mr. Herring sent you a draft of your
9 sworn testimony, had you ever seen a show on
10 Mojo?

11 A I only saw the shows that he had
12 sent me, and I looked at the -- their website,
13 right.

14 Q At this direction?

15 A No, on my --

16 Q On your own.

17 A Yes.

18 Q And he sent you some newspaper
19 articles about Mojo?

20 A Yes.

21 Q Did you do any research to see if
22 those newspaper articles were accurate?

1 A No.

2 Q You just relied on what Mr.

3 Herring sent you, correct?

4 A Correct.

5 Q And you looked at the shows that

6 Mr. Herring showed you, correct?

7 A Yes.

8 Q And had you ever seen a Mojo show

9 prior to 2009?

10 A No.

11 Q And then, the six months in 2008

12 when you were acting as an ad representative

13 for WealthTV, can you tell me how many people

14 told you that Mojo and WealthTV were similar

15 networks?

16 A No one. No one had ever mentioned

17 Mojo to me.

18 Q Right. And the first person ever

19 to suggest to you that Mojo and WealthTV were

20 somehow similar was Mr. Herring, correct?

21 A I looked at the programming that

22 he sent, and I considered it to be similar

1 genres.

2 Q After he sent you the programming.

3 A Yes.

4 Q Had you done an exhaustive
5 analysis of Mojo's lineup in connection with
6 writing paragraph 5?

7 A Like I said, I looked at DVDs that
8 were sent to me as well as their website.

9 Q Right. Did you look at anything
10 else? Did you look at their programming
11 lineup?

12 A Their programming lineup wasn't
13 available.

14 Q Can you tell me what was on prime
15 time on Mojo?

16 A Mojo had been off the air by the
17 time I looked at it.

18 Q But I am asking you, sir, can you
19 tell me anything about the prime-time lineup
20 of Mojo?

21 A No.

22 Q Can you tell me the name of any

1 show on Mojo that Mr. Herring didn't send you
2 the DVD for?

3 A There were some shows that I saw
4 on the web that Mr. Herring did not send me
5 the DVD for.

6 Q What were the names of those?

7 A I don't recall at this time.

8 Q Look at the last sentence of
9 paragraph 5, sir. You say, "With an identical
10 targeted audience, similar content, and appeal
11 to the same advertisers, Mojo is very similar
12 to WealthTV." Do you see that, sir?

13 A Yes.

14 Q Okay. And that sentence is based
15 on the DVDs and articles that Mr. Herring sent
16 you?

17 A Yes, and the stuff that I saw on
18 the Mojo website.

19 Q And nothing else.

20 A No.

21 Q And how much time did you spend --
22 is that part of the five hours --

1 A No.

2 Q -- that you were visiting the Mojo
3 website? Or that is in addition to the five
4 hours you spent on your testimony?

5 A In addition to.

6 Q How much time did you spend on the
7 Mojo website?

8 A Three or four hours.

9 Q What are the names of the shows on
10 Mojo?

11 A Uncorked.

12 Q That was sent to you by Mr.
13 Herring?

14 A That was, but I saw it on the
15 website as well.

16 Q Tell me the name of a show that
17 Mr. Herring didn't send you.

18 A I don't recall exactly what their
19 shows were, but I do recall that there was a
20 music show, there was a technology show.

21 Q Did Mr. Herring send you those?

22 A Not that I recall.

1 Q What is the name of the technology
2 show?

3 A I don't recall at this moment.

4 Q What is the name of the music
5 show?

6 A Again, I don't recall.

7 Q What is the name of the music show
8 on WealthTV?

9 A I don't recall.

10 Q Does Mojo have movies?

11 A Yes.

12 Q Does WealthTV have movies?

13 A Not that I know of.

14 Q Does Mojo have sports?

15 A Yes.

16 Q Does WealthTV have sports?

17 A Not that I know of.

18 Q Now, sir, let's turn to your
19 advertising opinion, beginning in paragraph 6.

20 A Okay.

21 Q You say at the carryover sentence
22 of paragraph 6, "Most national advertisers

1 prefer to place business with networks or
2 distributors that have substantial coverage in
3 at least the top 25 DMAs." Do you see that,
4 sir?

5 A Yes.

6 Q Okay. Let me show you a document
7 that Wealth introduced into evidence during
8 our document admission session, and this is
9 Wealth Exhibit 48.

10 May I, Your Honor?

11 JUDGE SIPPEL: Please.

12 MR. COHEN: Ms. Gosse, let me not
13 forget you this time. I will bypass the
14 Judge, so I remember.

15 JUDGE SIPPEL: That is quite all
16 right.

17 BY MR. COHEN:

18 Q Sir, this is a document apparently
19 Mr. Herring created. Does this look like the
20 top 25 DMAs in the United States on the left
21 column?

22 A Yes.

1 Q Okay. And just so we are all on
2 the same page, a DMA is a designated market
3 area?

4 A That is correct.

5 Q And is that a term for -- that is
6 used in the TV industry to designate
7 advertising and viewership areas?

8 A Yes.

9 Q So New York is a DMA, and Los
10 Angeles is a DMA, and the like, right?

11 A That is correct.

12 Q Now, the largest cable operator in
13 the New York, which is the largest DMA, is
14 Cablevision, is it not?

15 A It is either Cablevision or Time
16 Warner.

17 Q Well, let's look at this document.
18 This says that Cablevision has 600,000 more
19 subs than Time Warner. Is that consistent
20 with your experience in this business?

21 A Time Warner is more focused on
22 Manhattan I believe, and Cablevision is the

1 surrounding New York areas.

2 Q Right. And what is missing from
3 the New York DMA are the other distributors
4 who present or who sell video programming or
5 distribute video programming to consumers,
6 correct?

7 A Yes.

8 Q So, for example, I think you --
9 and you testified earlier on, the second
10 largest provider of video programming in the
11 United States is not a cable operator, it is
12 DirecTV, correct?

13 A Correct.

14 Q And DirecTV has how many subs, did
15 you say, 18 million?

16 A 17-1/2 million.

17 Q 17-1/2 million. And DirecTV is
18 available in every single one of these 25
19 DMAs, is it not?

20 A Yes, it is.

21 Q All right. And so if we really
22 wanted to know what the choices were for the

1 receipt of video programming in a DMA, we have
2 to look not just at the cable operators but
3 also at DirectTV, right?

4 A Yes.

5 Q Because unlike the cable
6 operators, DirectTV has a national footprint,
7 is that so?

8 A That is correct.

9 Q And there is a second one, is
10 there not, a second large DBS operator?

11 A Yes.

12 Q And that is EchoStar, with whom
13 you had a long relationship, correct?

14 A That is correct.

15 Q And EchoStar has 13-1/2 million
16 subs, is that roughly right?

17 A Yes.

18 Q And EchoStar is available
19 throughout the country, correct?

20 A It is.

21 Q So if we wanted to know what the
22 choices were for subscribers in a given

1 market, we would have to include both DirecTV
2 and EchoStar, correct?

3 A Yes.

4 Q And you also know from your
5 experience in selling ads in the cable
6 business that telephone companies have now
7 entered the video program delivery market,
8 correct?

9 A That is correct.

10 Q And Verizon is rolling out its
11 service across the country?

12 A Yes.

13 Q And AT&T is rolling out its
14 service across the country?

15 A That is correct.

16 Q And then, there are small cable
17 companies that are overbuilders, correct?

18 A Yes.

19 Q And you could reach a substantial
20 number of people in, say, the Los Angeles DMA,
21 if you didn't have carriage on Time Warner,
22 could you not?

1 A I am not exactly sure what the
2 numbers are, but, yes, you could reach -- you
3 can reach subscribers.

4 Q So if you actually -- because I
5 want to go back -- you say in your testimony
6 in paragraph 6 that to be successful you need
7 substantial coverage in at least the top 25
8 DMAs, correct?

9 A Yes.

10 Q And one way that you would build
11 substantial coverage would be to get
12 nationwide coverage on EchoStar and DirecTV,
13 correct?

14 A That is correct.

15 Q And you know from your work --
16 from working for WealthTV that EchoStar and
17 DirecTV don't carry Wealth, correct?

18 A That is correct.

19 Q Mr. Herring told you that,
20 correct?

21 A Yes. And I know that they don't
22 carry DirecTV.

1 Q And you know that the largest
2 cable system in New York, Cablevision, also
3 doesn't carry WealthTV, correct?

4 A Not to my knowledge, right.

5 Q And in fact when you were working
6 as an ad representative for WealthTV, it had
7 about, what, three million subscribers?

8 A Yes.

9 Q And you testified today that the
10 Defendants in this case collectively you
11 thought had, what, about 40 million? I don't
12 want to put words in your mouth. Was it 40 or
13 45?

14 A Between 40 and 45.

15 Q Okay. And can you sit here and
16 tell us why WealthTV has been unable to
17 achieve carriage on the -- in the 50 million
18 video homes that are not served by one of
19 these defendants?

20 A No.

21 Q And would your job as an ad
22 representative for WealthTV have been easier

1 if WealthTV had gotten carriage on DirecTV?

2 A Yes, much easier.

3 Q Or on EchoStar?

4 A Yes.

5 Q Now, sir --

6 JUDGE SIPPEL: Are those satellite
7 companies?

8 THE WITNESS: Yes, Your Honor.

9 JUDGE SIPPEL: That really doesn't
10 make a difference, though, does it?

11 THE WITNESS: Not once your TV is
12 on.

13 JUDGE SIPPEL: Thank you.

14 BY MR. COHEN:

15 Q Now, sir, the 20 million number
16 that you testified to --

17 A Yes.

18 Q -- earlier today, and just to make
19 sure we understand your testimony, do you
20 think that you need on the order of magnitude
21 20 million subscribers to get some traction
22 with national advertisers?

1 A That has been my experience, yes.

2 Q And one of the challenges that you
3 had when you were working for WealthTV as an
4 ad representative in the first half of 2008
5 was that they didn't have 20 million
6 subscribers.

7 A Yes.

8 Q Right. If they had been on
9 DirecTV and on EchoStar across their entire
10 platform, you wouldn't have had a problem,
11 would you?

12 A If they were distributed on their
13 entire platform, no.

14 Q No. Because you would have had at
15 least 31 million subscribers, correct?

16 A That is correct.

17 Q And is it your testimony under
18 oath, sir, that there is not a single network
19 in the United States with fewer than 20
20 million subscribers that has been able to
21 attract national advertising?

22 A No, that is not my testimony.

1 Q Okay. So in fact, although you
2 say at the end of paragraph 6 that WealthTV,
3 like all other emerging networks, needs to
4 meet the 20 million subscriber threshold in
5 order to become a viable national advertising
6 source for national general market advertisers
7 -- that is your testimony, correct? The "all"
8 is wrong, is it not?

9 A Where is the sentence? I'm sorry.

10 Q The last sentence -- I will read
11 you the last sentence of paragraph 7 of your
12 sworn testimony. "Roughly six months later we
13 confirmed via our actual efforts, not just
14 theoretical assumptions, that WealthTV, like
15 all other emerging networks, needs to meet the
16 20 million subscriber threshold in order to
17 become a viable national advertising source
18 for national general market advertisers." Do
19 you see that, sir?

20 A Yes.

21 Q And in fact the "all" is just
22 simply wrong, is it not?

1 A It is a rule of thumb.

2 Q Okay. So it is not all, right?

3 A Like I said, it is a rule of
4 thumb.

5 Q And would you tell the Court what
6 networks you are aware of that have actually
7 attracted national advertisers with fewer than
8 20 million subs?

9 A I am not aware of -- I can't tell
10 you exactly who that would be.

11 Q Well, you know The Tennis Channel
12 did, did you not?

13 A I don't know exactly what The
14 Tennis Channel has been able to accomplish in
15 national --

16 Q Did you testify at your deposition
17 that The Tennis Channel was able to attract
18 national advertising with fewer than 20
19 million subs? Don't remember?

20 A I don't remember, but I -- I
21 believe that they have gotten national
22 advertisers. I don't know how many subs they

1 had when they attracted national advertisers.

2 Q How about Mojo?

3 A I don't -- I am not aware of any
4 national advertisers that advertised on Mojo.

5 Q Okay. Didn't you testify in your
6 written direct that Mojo had actually achieved
7 national advertising?

8 A I don't recall.

9 Q You don't recall. And you don't
10 recall your testimony about The Tennis
11 Channel. Why don't you turn to page 110 of
12 your deposition, beginning at line 4. Do you
13 remember the following questions and the
14 following answers?

15 "Is it your testimony that Mojo is
16 the only network in America with fewer than 20
17 million subs that has national non-direct
18 response advertising?" There is an objection,
19 and the answer is, "No."

20 "Is it your testimony," on line
21 16, "under oath, that Mojo is the only network
22 in America with fewer than 20 million subs

1 that has been successful in selling national
2 general advertising? Answer: "No, that is
3 not my testimony."

4 "Are you aware of any others that
5 have had the same success as Mojo?" "No."

6 Question: "With fewer than 20
7 million subs?" "No. But I haven't studied
8 it. I am sure that The Tennis Channel I am
9 sure has secured general market advertisers."

10 Did I ask you those questions?

11 Did you give those answers?

12 A Yes.

13 Q And was it true?

14 A You were assuming that I was
15 saying that Mojo has secured national general
16 market advertisers.

17 Q And you don't know that to be a
18 fact?

19 A No.

20 Q And --

21 A I was saying no, that I am not
22 testifying that Mojo is the only one. I don't

1 know that Mojo had sold national general
2 advertising.

3 Q How about The Tennis Channel?

4 A I had heard that The Tennis
5 Channel has secured national general market
6 advertisers, but I am not sure how many
7 subscribers that they had when they did that.

8 Q And if I gave you a list of cable
9 networks, would you be able to tell me which
10 cable networks with fewer than 20 million subs
11 have national advertisers and which don't?

12 A Not unless I was the advertising
13 representative for those networks.

14 Q So in fact, in connection with
15 your opinion that you need 20 million subs,
16 you have in fact done no research of cable
17 networks to see if cable networks with fewer
18 than 20 million subs have in fact been
19 successful in attracting national advertising.
20 Is that so?

21 A I have done research on that.

22 Q How about HD Theater, do you know

1 whether they have national advertisers?

2 A I do not.

3 Q How about NBA TV, do you know if
4 they have national advertisers?

5 A No.

6 Q Are you familiar with Kagan
7 materials?

8 A I am.

9 Q And does Kagan report subscribers?

10 A Yes.

11 Q Okay. Sometimes accurate,
12 sometimes not as accurate?

13 A Correct.

14 Q Okay. Let me show you Exhibit 64
15 in evidence, Time Warner Cable Exhibit 64. I
16 am going to direct your attention to page 64-
17 7. Have you ever seen this document before?

18 A I may have, yes.

19 Q This is the kind of Kagan
20 information you have seen over the course of
21 time?

22 A Yes.

1 Q Let's start at 19 million mark on
2 page 64-7. Is it your testimony under oath
3 that Palladia has been unable to attract
4 national advertising because it has fewer than
5 20 million subs?

6 A Well, saying that they have been
7 able to attract national advertising, I
8 believe most channels can attract national
9 advertising. But it is usually direct
10 response advertising. Direct response
11 advertising doesn't have the threshold that a
12 general market advertiser would have.

13 Q Let me clarify my question. Thank
14 you for making it -- you did earlier testify
15 -- is it your testimony under oath that
16 Palladia, which has fewer than 20 million
17 subs, has been unable to attract national non-
18 direct advertising?

19 A I don't know what general market
20 advertisers that they have been able to
21 attract.

22 Q How about HD Theater with 18

1 million subs? Do you know whether they have
2 national advertising?

3 A I am sure they have national
4 advertising, but I don't know if they have
5 national general market advertising.

6 Q You don't know one way or the
7 other, correct?

8 A No.

9 Q Okay. How about NBA TV with fewer
10 than 20 million subs, do they have national
11 non-direct advertising?

12 A Not that I know of.

13 Q Have you studied it?

14 A No.

15 Q So you don't know one way or the
16 other?

17 A No.

18 Q Do you know whether HD Net carries
19 national non-direct advertising?

20 A I do not.

21 Q Do you know whether the Hallmark
22 Movie Channel carries national non-direct

1 advertising?

2 A No.

3 Q Do you know whether Universal HD
4 carries national non-direct advertising with
5 12 million subs?

6 A No.

7 Q Do you know whether Crime and
8 Investigation Network, with 11-1/2 million
9 subs, has national non-direct advertising?

10 A No, I do not.

11 Q Do you know whether The Sportsman
12 Channel has national non-direct advertising?

13 A I do not know for sure, no.

14 Q Would sponsorship of an evening of
15 programming be direct or non-direct
16 advertising?

17 A I am sorry?

18 Q What if I -- if a network sells
19 Monday Night to an advertiser, that is non-
20 direct advertising under your scenario,
21 correct, under your definition?

22 A It depends. I have seen

1 advertising where they solicit direct response
2 on a sponsorship, yes.

3 Q And how about a network in which
4 an evening of programming, like Monday Night
5 Hunting and Shooting Brought to You by
6 Remington, is that direct advertising or non-
7 direct advertising?

8 A I believe it is non-direct
9 advertising.

10 Q Okay. Now, sir, are you familiar
11 with media kits that cable networks put out?

12 A Yes.

13 Q And lots of them are on the web,
14 correct?

15 A Yes.

16 Q Okay. Now, let me show you what
17 we have marked as Time Warner Exhibit 101 for
18 identification, which is a printout of the
19 2009 advertiser media kit for The Sportsman
20 Channel.

21 (Whereupon, the above-referred to
22 document was marked as TWC Exhibit

1 No. 101 for identification.)

2 Have you ever done business with

3 The Sportsman Channel?

4 A No, but I have had conversations
5 with them.

6 Q Right. And The Sportsman Channel
7 has fewer than 20 million subscribers, does it
8 not?

9 A I know they just signed a deal
10 with DirecTV. I am not sure how many
11 subscribers that they are carried on with
12 DirecTV, but previously, no, they did not have
13 20 million subscribers. However, they do have
14 a unique value proposition that would change
15 the equation, and that is their multiple
16 magazines that they publish to the industry.

17 Q I am just asking you, sir,
18 whether, to the best of your knowledge, they
19 have fewer than 20 million subscribers?

20 A I am not sure today if they do
21 have less than 20 million subscribers.

22 Q Kagan reports that they have 10

1 million, correct?

2 A I haven't seen a recent Kagan
3 report, no.

4 Q I am showing you -- I showed you
5 -- look at Exhibit 64, page 64-7. Does it
6 report -- this is in evidence -- that The
7 Sportsman Channel has 10 million subscribers?

8 A I don't see Sportsman on here. Is
9 this --

10 MR. ROSE: Objection. Are you
11 asking the witness a question, or did you ask
12 him to read the report, which wasn't put in
13 for the truth of what is in it?

14 MR. COHEN: I am asking him to see
15 if he can refresh his recollection.

16 BY MR. COHEN:

17 Q Look between American Life and Fox
18 SportsNet and --

19 MR. ROSE: Objection. Lack of
20 foundation. He never said he had a
21 recollection of whether they had this
22 viewership.

1 JUDGE SIPPET: Well, I am going to
2 let Mr. Cohen get at it this way. I don't see
3 anybody being prejudiced by it. The witness
4 seems to have a general idea what is going on.

5 MR. COHEN: I will move on, Your
6 Honor. That is all right.

7 BY MR. COHEN:

8 Q Would you turn to -- in Exhibit
9 101 to TWC 101-8.

10 JUDGE SIPPET: Is this The
11 Sportsman --

12 MR. COHEN: The Sportsman Channel.

13 JUDGE SIPPET: And what page on
14 101?

15 MR. COHEN: 101-8.

16 BY MR. COHEN:

17 Q And you see that what The
18 Sportsman Channel has are different nights of
19 programming, correct?

20 A Yes.

21 Q For example, Monday Night Hunting
22 and Shooting Traditions Brought to You by

1 Remington, right?

2 A Yes.

3 Q And Thursday Night Shooting Focus
4 Brought to You by USA Midway, correct?

5 A Correct.

6 Q And one way for an emerging
7 network to try to sell advertising is to get
8 sponsorship, either of a show or a whole
9 evening of shows, correct?

10 A That is correct.

11 Q And you were trying to do
12 precisely this kind of advertising for
13 WealthTV, were you not?

14 A I was.

15 Q And in fact if The Sportsman
16 Channel is accurate in its representation on
17 the web -- and you don't think it is
18 inaccurate, do you?

19 A No.

20 Q Then, they in fact have sold
21 national advertising to sponsor Monday night,
22 Tuesday night, Wednesday night, Thursday

1 night, Saturday night, and Sunday night,
2 correct?

3 A That is correct.

4 Q National non-direct advertising
5 for a network with fewer than 20 million
6 viewers, correct?

7 A Again, they have a unique value
8 proposition, because they are nationally-
9 distributed magazines, and the advertisers
10 advertise in the magazines as well as on their
11 television programs.

12 Q Could you answer my question, sir?

13 A Yes.

14 Q And if we went through this entire
15 list of networks of Kagan on 64-7 and 64-8,
16 which we are not going to do, you would not be
17 able to tell me, would you, in support of your
18 opinion which networks have national non-
19 direct advertising and which don't?

20 A I don't know. This list also goes
21 from 1993 to 2007.

22 Q And that is the data launch of the

1 network, Mr. Turner, isn't it?

2 A I don't know that.

3 Q Why don't you look at page 64-5,
4 so you can see that I am telling you the
5 truth.

6 A Okay.

7 Q Now, sir, in connection with Mr.
8 Herring hiring you as an advertising rep in
9 January of 2008, did he tell you that he had
10 tried to sell a sponsorship to Morgan Stanley
11 in the summer of 2007 for some of their shows?

12 A Not that I recall.

13 Q Let me show you a document that
14 has been received in evidence as Wealth
15 Exhibit 119. I apologize for the number of
16 documents. And Wealth 119 in evidence is a
17 presentation made by Wealth to Morgan Stanley
18 in August of 2007, right?

19 A Yes.

20 Q And these are the kinds of
21 presentations that your company made in 2008
22 on behalf of Wealth, correct?

1 A Correct.

2 Q And just so we are clear, you
3 started to work for Wealth in January of 2008?

4 A January or February.

5 Q And it ended when?

6 A It was approximately -- it was
7 under a year.

8 Q Under a year. And Mr. Herring
9 fired you, did he not?

10 A We mutually agreed to discontinue.

11 Q Was it his decision or yours?

12 A We had a conversation, and it
13 wasn't beneficial to either one of us.

14 Q Okay. And when you went to work
15 for WealthTV -- would you turn, please, to
16 page 4663? It says "series sponsor" on it.
17 Do you see that?

18 JUDGE SIPPEL: You're referring to
19 the Bates Numbers?

20 MR. COHEN: The Bates Numbers.
21 The exhibit is not actually internally
22 numbered, Your Honor.

1 JUDGE SIPPEL: Proceed, as long as
2 the witness understands.

3 BY MR. COHEN:

4 Q Do you see 4663 at the bottom?

5 Thank you, Your Honor.

6 A I do.

7 Q Okay. And this is the kind of
8 thing that you were trying to do for WealthTV,
9 which is to sell sponsorship of individual
10 shows, correct?

11 A We were trying to sell -- well,
12 first of all, we went in and sold -- filled up
13 their avails with direct response advertising.

14 Q Right.

15 A And then, we -- our goal was to
16 try to create a unique value proposition,
17 because their footprint was so small. So we
18 looked at creating interactive applications to
19 attract general market advertisers.

20 After further review of their
21 distribution, we saw that the set-top boxes
22 that their programming was distributed to

1 didn't have a lot of interactive capabilities
2 and found it not cost effective to be able to
3 create a unique value proposition from
4 interactive television. So, then, we went
5 after targeted advertisers that met the
6 demographic that WealthTV was --

7 Q And did Mr. Herring, in any of his
8 conversations with you, tell you that he was
9 trying to sell a show called The Boomer Shower
10 with broad appeal to 35 to 60-plus?

11 A I don't recall having a
12 conversation about that, no.

13 Q All right. And did he ever tell
14 you that he was trying to sell a show called
15 Giving Back with broad appeal to 18 to 55-
16 plus?

17 A Again, I don't recall having a
18 conversation with him about that.

19 Q So in the conversations with Mr.
20 Herring in which he told you that his
21 demographic was 25 to 49, he just didn't
22 mention these shows to you?

1 A No. He mentioned the show Giving
2 Back. I remember having a conversation with
3 him about that.

4 Q Did he tell you that Giving Back
5 was a show that appealed to 25 to 49-year old
6 men exclusively?

7 A I don't recall him saying that,
8 no.

9 Q Did he tell you anything about The
10 Boomer Show?

11 A I don't recall having a
12 conversation about The Boomer Show.

13 Q Now, am I correct, Mr. Turner,
14 that this year at around the time you did your
15 testimony you went out to San Diego and you
16 had a visit with Mr. Herring?

17 A Yes.

18 Q And you went out there to see if
19 you could do some business with him, right?

20 A I went out to see what they were
21 up to, and, yes, I talked to him about doing
22 some business.

1 Q Right. And one of the things that
2 you discussed -- now, go back to something you
3 said before. At the end of your year of
4 working with Mr. Herring, you both concluded
5 that it just didn't make any sense for you to
6 continue being an ad rep for WealthTV, because
7 they didn't have enough subscribers, right?

8 A Right. The conversation that we
9 had was I had an exclusive representation
10 contract with them, and we agreed to make it
11 non-exclusive, that we would still try to sell
12 advertising for him, however, we were not --
13 he wasn't exclusively tied to us in that
14 sense.

15 Q Right. And did you have a
16 conversation with him this year in which you
17 had a -- in which you had a discussion about
18 whether you would resume working for Mr.
19 Herring in the event that he was able to get
20 additional carriage?

21 A Yes. I asked him what he was
22 doing with advertising, and they weren't doing

1 a lot. However, if they were able to gain
2 more subscriber penetration, that it would be
3 a viable advertising play.

4 Q And what Mr. Herring told you in
5 that conversation was that in the event that
6 he was able to secure additional carriage
7 through this litigation, there might be an
8 opportunity for your company to resume working
9 for WealthTV, isn't that so?

10 A Well, he said that he didn't want
11 to talk about it until after this litigation.

12 Q Turn to page 118 of your
13 deposition, sir, beginning at line 9. Let me
14 know when you are there. 118. Are you with
15 me?

16 A Yes.

17 Q And did I ask you this question,
18 and did you give this answer under oath? "So
19 Mr. Herring told you that in the event that
20 they are able to secure additional carriage
21 through this litigation there might be an
22 opportunity for your company to resume its

1 work repping of WealthTV, correct?" Answer:

2 "Yes."

3 A I must have misunderstood what you
4 were saying. That is not correct.

5 Q So that is not truthful testimony?

6 A No.

7 MR. COHEN: Okay. No further
8 questions, Your Honor.

9 JUDGE SIPPEL: Redirect? Oh, I'm
10 sorry. We do have -- excuse me. Sorry to --

11 MR. BECKNER: You go ahead.

12 BY MR. MILLS:

13 Q Mr. Turner, I am David Mills from
14 Cox. We also met once before, right, during
15 your deposition?

16 A Yes.

17 Q I have a few questions. Looking
18 back at this exhibit that Mr. Cohen showed
19 you, which is WealthTV Exhibit 48, the top 25
20 DMAs, okay? Do you have that?

21 A Hold on a second. Yes.

22 Q I am going to refer back to your

1 testimony as well. In paragraph 6 of your
2 testimony, at the bottom of -- the pages
3 aren't numbered, but in paragraph 6, I believe
4 Mr. Cohen read to you the sentence, "Most
5 national advertisers prefer to place business
6 with networks or distributors that have
7 substantial coverage in at least the top 25
8 DMAs." Do you remember that?

9 A Yes.

10 Q Okay. Are you aware that WealthTV
11 actually targeted the top 25 DMAs in its
12 effort to gain coverage or to get better
13 advertising, national advertising?

14 A I was not aware of that, no.

15 Q Not aware of that fact.

16 A No.

17 Q When you worked for WealthTV, you
18 weren't trying to target the top 25 DMAs?

19 A When I worked -- when I was
20 selling advertising for WealthTV, we were
21 selling the distribution that they had gained.
22 I wasn't involved in securing distribution for

1 WealthTV.

2 Q Okay. So your testimony that you
3 have submitted is about, in general, networks
4 try to get coverage in the top 25 DMAs,
5 correct?

6 A That is correct.

7 Q And that is because those are
8 urban markets with higher population center?

9 A That is correct.

10 Q Okay. And that would be true for
11 WealthTV, correct?

12 A Yes.

13 Q Okay. And that is because
14 WealthTV is targeting an upscale audience, do
15 you agree with that?

16 A Yes, that is correct.

17 Q I mean, for example, a network
18 that might be looking, as I believe you use an
19 example at one point, of a hunting and fishing
20 network might not be as interested in urban
21 markets as WealthTV would be, correct?

22 A Correct.

1 Q Okay. Do you know the phrase
2 "critical urban market"? Have you ever heard
3 that before?

4 A No.

5 Q Okay. That is not an advertising
6 industry phrase?

7 A Not that I am aware of.

8 Q Okay. On that Exhibit 48, do you
9 see at the bottom a list of networks of -- I'm
10 sorry, MSOs, cable operators, listed at the
11 bottom and totaled up?

12 A Yes, I do.

13 Q Okay. And that is a total of the
14 subscribers that are served by those six
15 multiple system operators, correct?

16 A Yes.

17 Q Okay. And there are six of them.
18 Which one is listed as sixth?

19 A It looks like Charter.

20 Q Okay. Do you see anything even
21 below Charter?

22 A Cox.

1 Q Cox.

2 A Yes.

3 Q Fewer than one and a half million
4 subscribers in the top 25 urban markets,
5 correct?

6 A Yes.

7 Q Okay. Do you know -- and when you
8 are -- this testimony is all about digital
9 subscribers, correct, or basic subscribers?
10 Do you know?

11 A What this refers to?

12 Q Well, let me ask you, your 20
13 million subscriber number that you have been
14 talking about, is that basic subscribers?

15 A That is subscribers in general,
16 whether --

17 Q All subscribers to cable services
18 or satellite services, correct?

19 A Right. They could be analog or
20 digital. It doesn't really matter.

21 Q If a network is only carried as an
22 HD network, as HD only, does your 20 million

1 threshold apply to HD only networks?

2 A My testimony was about standard
3 definition networks.

4 Q Okay. Not HD networks, correct?

5 A No.

6 Q I am correct when I say that,
7 aren't I?

8 A Yes.

9 Q Thank you. In paragraph 8, you
10 are not being offered as an expert in -- on
11 distributors, correct? I believe that is a
12 fact in this proceeding.

13 A Yes.

14 Q But I still want to ask you about
15 paragraph 8. You are talking about a follow-
16 the-leader mentality. And your testimony is
17 that the largest distributors of video
18 programming somehow affect other distributors
19 of programming?

20 A Yes.

21 Q Okay. And when you are talking
22 about that, you are talking about the top four

1 -- when you wrote this testimony, you were
2 talking about the top four multi-channel
3 distributors, correct?

4 A I was talking about the top four?
5 I was talking about multi-video programming
6 distributors in general. However, it is more
7 applicable to the top four.

8 Q Okay. More applicable to the top
9 four. And that would be -- two of those top
10 four would be the DBS providers DirectTV and
11 EchoStar, correct?

12 JUDGE SIPPPEL: Excuse me. We have
13 got another BlackBerry alert. Please check
14 them. No? Did we find anything?

15 MR. COHEN: Who would admit it,
16 Your Honor?

17 (Laughter.)

18 JUDGE SIPPPEL: Whoever wants to
19 get shot. I don't know.

20 (Laughter.)

21 Go ahead.

22 BY MR. MILLS:

1 Q When you are talking about a first
2 mover, are you talking about a large MVPD of
3 a distributor of networks, a distributor of
4 programming carrying a network, and,
5 therefore, somehow influencing the decisions
6 of other MVPDs, correct?

7 A Correct.

8 Q And one example would be Charter,
9 and you did not believe that Charter was a
10 first mover that would affect other carriers,
11 correct?

12 A Well, they -- what I was trying to
13 get across was distributors are interested in
14 subscriber acquisition, subscriber retention,
15 subscriber value, and revenue per unit. If a
16 network is carried on a large distributor,
17 they have -- first of all, they are a much
18 more viable play because they have a chance to
19 survive as a network if they have
20 distribution.

21 Q And your testimony about that was
22 relating to the top four MVPDs, which includes

1 the two DBS providers, correct?

2 A Yes. It depends -- yes.

3 Q Okay. Thank you.

4 MR. MILLS: I have nothing

5 further, Your Honor.

6 JUDGE SIPPEL: Mr. Breckman? I'm

7 sorry. Mr. Beckner?

8 MR. BECKNER: Thank you, Your

9 Honor.

10 BY MR. BECKNER:

11 Q Mr. Turner, good afternoon. My

12 name is Bruce Beckner. I represent Bright

13 House Networks in this case. I just want to

14 ask you a couple of questions about your

15 responses to the oral examination by

16 WealthTV's counsel.

17 I believe you said that there are

18 roughly 100 million multi-channel households

19 in the United States, is that correct?

20 A A hundred million subscription

21 television households?

22 Q Yes.

1 A Yes.

2 Q Okay. And what percentage of
3 those did you say were served by Bright House
4 Networks?

5 A I didn't say. I don't know. I
6 think it is fairly small. I know that -- I
7 believe that Bright House and Time Warner are
8 together as far as subscribers are concerned.
9 That has been my experience when I have gotten
10 distribution from my networks on Time Warner,
11 that they also were able to give me
12 distribution on Bright House. But I don't
13 know.

14 I believe that Bright House is
15 around -- at the time that I last looked, it
16 was only three or four million subscribers, I
17 believe.

18 Q So you are not testifying today as
19 to any particular number or percentage of the
20 universe of what you call subscription TV
21 households being attributable to Bright House,
22 is that correct?

1 A Again, I don't know exactly what
2 the distribution of Bright House is on its
3 own.

4 Q All right.

5 A I believe it is -- it would
6 probably be three or four percent of the
7 subscription television households.

8 Q But it could be less than that?

9 A Could be.

10 MR. BECKNER: Nothing further.

11 Thank you.

12 JUDGE SIPPEL: Mr. Solomon?

13 MR. SOLOMON: No questions.

14 JUDGE SIPPEL: Nothing? Mr.

15 Schonman?

16 MR. SCHONMAN: No, sir. No

17 questions.

18 JUDGE SIPPEL: I have no

19 questions. Do you have any redirect?

20 MR. ROSE: I would like to ask him

21 a few redirect questions, if I may, Your

22 Honor.

1 JUDGE SIPPET: Go ahead.

2 MR. ROSE: Before I do that, I
3 would like to fix a problem that was -- with
4 an exhibit yesterday that I would like to use
5 in Mr. Turner's testimony, just to make it --

6 MR. COHEN: May I approach the
7 bench, Your Honor?

8 JUDGE SIPPET: Yes, you may.
9 Let's see what you have got.

10 MR. ROSE: In Exhibit 29 there was
11 an e-mail chain that was missing the first
12 link, so to speak. And we would simply like
13 to replace the first page of what was -- the
14 first two pages of what was marked as Exhibit
15 29 with two pages, which include the first --

16 MR. MILLS: Your Honor, if we
17 could see that and know -- and agree before it
18 is actually substituted as an exhibit, I think
19 that would --

20 MR. ROSE: I distributed this
21 before the hearing today. It is simply the
22 first two pages that would replace the two

1 other pages that were distributed.

2 MR. COHEN: Your Honor, the
3 problem that I have with this is this exhibit,
4 if our notes are correct from yesterday, is
5 Mr. Herring will have to testify to clean this
6 exhibit up. There were missing pages.

7 And I don't think it is
8 appropriate through Mr. Turner, who is
9 certainly not going to be in a position to
10 tell us why a page was missing yesterday,
11 whether this is the actual e-mail or not. So
12 I don't -- subject to verification,
13 verification by Mr. Herring, who is the author
14 of -- purportedly the author of this first e-
15 mail.

16 MR. ROSE: Our position is simply
17 I would like to use the attachment to the e-
18 mail and --

19 JUDGE SIPPEL: For what purpose?

20 MR. ROSE: It is a document that
21 was sent to Mr. Turner by WealthTV at the time
22 he was retained to represent them, and it

1 indicates what they told him.

2 JUDGE SIPPEL: Why can't we use
3 that? It is just -- it is a portion of what
4 --

5 MR. COHEN: I need to understand
6 precisely which portion this is --

7 JUDGE SIPPEL: Yes. We will.
8 But, I'm sorry, it is a portion of what
9 exhibit that is --

10 MR. ROSE: Exhibit 29 as it was
11 produced.

12 JUDGE SIPPEL: WealthTV 29?

13 MR. ROSE: WealthTV 29, as it was
14 produced, had two --

15 JUDGE SIPPEL: Well, that is all
16 right. You don't have to go beyond that.

17 MR. ROSE: -- cover e-mails.

18 JUDGE SIPPEL: What you have is a
19 portion of WealthTV 29, and it is just a one-
20 page e-mail, is that right? That is what you
21 were holding up.

22 MR. ROSE: I am replacing the

1 first two pages of what was marked yesterday
2 with two pages that include an additional e-
3 mail on the front page.

4 MR. COHEN: Here is my problem,
5 Your Honor. This evident -- this document is
6 not in evidence, because there is apparently
7 a missing page. What Your Honor said was that
8 you would reserve judgment until the
9 sponsoring witness, who is Mr. Herring, would
10 clean this up.

11 So now there is a representation
12 made about this is the correct two pages, but
13 I don't think we can do that through Mr.
14 Turner. And I think that it requires Mr.
15 Herring to explain how this new exhibit came
16 out.

17 JUDGE SIPPEL: I have no intention
18 of using this witness to reconstruct the
19 exhibit as Exhibit 29. I simply would say:
20 is there an e-mail in there that goes between
21 Mr. Herring and Mr. Turner, or vice versa?

22 MR. ROSE: We are offering the

1 exhibit for the attachment of --

2 JUDGE SIPPEL: Don't offer
3 anything. Just tell me -- can you answer my
4 question?

5 MR. ROSE: Mr. Turner was copied
6 on the e-mail. He was not -- he was not
7 listed as a recipient. He was copied on the
8 e-mail.

9 JUDGE SIPPEL: He was copied on an
10 e-mail.

11 MR. ROSE: Yes, sir.

12 JUDGE SIPPEL: And an e-mail was
13 from Mr. Herring to who?

14 MR. ROSE: To an employee of Mr.
15 Turner by the name of Larry.

16 JUDGE SIPPEL: All right. Now, I
17 want to permit him to show it to the witness.
18 And it is a portion of Exhibit 29, to be
19 reconstructed by -- through Mr. Herring, not
20 now, and you can ask him if you have a
21 specific question about that specific e-mail.
22 That is only one page, right? The e-mail that

1 you are showing him is only one page, isn't
2 that right?

3 MR. ROSE: Yes. But I wasn't even
4 intending to ask him questions about the e-
5 mail, simply the attachment to it.

6 JUDGE SIPPEL: Well, what is the
7 attachment to it?

8 MR. ROSE: It is an advertising
9 deck that was attached to the e-mail.

10 MR. COHEN: The advertising deck,
11 as we said yesterday, on its own, I think that
12 is fine.

13 MR. ROSE: We move to reconstruct
14 the exhibit. I thought the exhibit wasn't in
15 for that reason. We would just like to get
16 the advertising deck portion of it in at this
17 point.

18 MR. MILLS: Well, I think the
19 advertising deck may already be in.

20 JUDGE SIPPEL: I think it is in in
21 a different place.

22 MR. MILLS: Without the e-mail, it

1 is in.

2 MR. COHEN: Well, we don't have
3 any objection to any -- to any use of just the
4 advertising decks that were created by
5 WealthTV in the ordinary course that were
6 produced to us in discovery. And I believe
7 that this deck was produced to us. This is
8 the General Motors deck, Mr. Rose? Is that
9 what we are talking about?

10 MR. ROSE: It is, yes. October --

11 MR. COHEN: All right. If you
12 want to examine him about that, we don't have
13 any --

14 JUDGE SIPPEL: Do you want to ask
15 him about that?

16 MR. ROSE: That is all I wanted to
17 ask him about is the deck that was part of
18 Exhibit 29.

19 JUDGE SIPPEL: Well, that is okay.
20 Put the deck in -- give him the deck and let's
21 go.

22 MR. ROSE: We will get there in a

1 minute, yes. We will get to this in a moment,
2 okay?

3 REDIRECT EXAMINATION

4 BY MR. ROSE:

5 Q Mr. Turner, you were asked a
6 number of questions about how you know what
7 WealthTV is targeting for a demographic. I
8 would like to follow up. In your experience
9 in the advertising business, how does a
10 company like yours know how to describe
11 networks it represents when it is making calls
12 to advertisers?

13 A We get the information from the
14 network on the demographic that they are
15 targeting, the programs that they have, and
16 then we try to match those up with general
17 market advertisers or direct response
18 advertisers.

19 Q And, typically, in the business do
20 advertisers ask for a lot more detail than the
21 information that the companies provide you?

22 A No. They ask us for the

1 information from the media kit, and then they
2 make their decisions off that media kit.

3 Q And I will show you what is in
4 front of you as Exhibit 29, without the e-
5 mails. Is that a media kit of the sort you
6 are referring to?

7 A This is a version of a media kit.
8 This is actually a presentation directly to
9 General Motors.

10 Q And do you recognize this
11 particular media kit?

12 A I do.

13 Q What is it?

14 A It is a media kit from -- it is a
15 presentation from WealthTV to General Motors
16 for advertising.

17 Q And is it a media kit that
18 WealthTV sent to your company?

19 A Yes.

20 Q And is it a media kit that your
21 company records show was used in pitching to
22 advertisers?

1 A Yes.

2 Q I would like you to take a look at
3 page 15 of the exhibit, which --

4 JUDGE SIPPPEL: Are they hand-
5 marked?

6 MR. ROSE: They are hand-marked.

7 JUDGE SIPPPEL: Okay. And that is
8 the WealthTV rate card?

9 MR. ROSE: It is called
10 "Demographics."

11 PARTICIPANT: Mine says "WealthTV
12 Rate card."

13 MR. ROSE: Oh. Well, my copy is
14 marked 14 is the rate card, 15 is the
15 demographics.

16 JUDGE SIPPPEL: Well, let's see
17 what the witness has. What do you have on
18 page -- marked page 15? Do you --

19 BY MR. ROSE:

20 Q Can you read the heading on
21 page 15 of the exhibit, please?

22 A Mine says "Demographics."

1 Q So the page marked "demographics,
2 high income"?

3 A Yes.

4 Q That is a page from the deck that
5 WealthTV sent you?

6 A Yes.

7 Q Sent your company?

8 A Yes.

9 Q And --

10 JUDGE SIPPEL: That is page 16 on
11 my copy, but --

12 MR. ROSE: I apologize, Your
13 Honor, if there was some confusion in marking.

14 JUDGE SIPPEL: Well, that is all
15 right, but demographics, high income is what
16 we are looking at. That is the document.

17 That is what you have, Mr. Turner?

18 THE WITNESS: Yes, sir.

19 JUDGE SIPPEL: All right. Let's
20 go.

21 BY MR. ROSE:

22 Q And this is the information that

1 WealthTV gave you to represent to advertisers?

2 A Yes.

3 Q And as far as you know, that is
4 what your company did represent to advertisers
5 in selling WealthTV?

6 A Yes.

7 Q And how does it describe the
8 demographic in terms of gender?

9 A Predominantly male, 71 percent.

10 Q And how does this describe the
11 demographic in terms of age?

12 A Thirties to forties, 82 percent.

13 MR. MILLS: I'm sorry. I may be
14 on the wrong page of this. I see 35 to 49-
15 plus. Are we on the same page?

16 MR. ROSE: Yes.

17 MR. MILLS: Mine is a different
18 page number. That is why I asked.

19 JUDGE SIPPEL: Mine is, too.

20 THE WITNESS: 35 to 49-plus, 82
21 percent.

22 MR. MILLS: Okay.

1 JUDGE SIPPEL: I have page 16.

2 MR. MILLS: I have 17.

3 JUDGE SIPPEL: But I don't -- I
4 can see he has got the same document --

5 MR. MILLS: All right.

6 JUDGE SIPPEL: -- in front of him,
7 so --

8 MR. MILLS: Okay.

9 MR. ROSE: It is the page marked
10 "Demographics" in any event from the deck that
11 is part of Exhibit 29.

12 BY MR. ROSE:

13 Q And was that the demographic you
14 were asked to reach in selling advertisement
15 for WealthTV?

16 MR. COHEN: Objection. Calls for
17 hearsay, Your Honor.

18 JUDGE SIPPEL: Do you want to
19 rephrase that question? Yes. This is your
20 witness, and you are on redirect, not recross.

21 BY MR. ROSE:

22 Q It that the demographic your

1 company in fact targeted in seeking to sell
2 advertisement for WealthTV?

3 MR. COHEN: Now I will object
4 because he is leading.

5 JUDGE SIPPEL: Yes. That is
6 clearly a leading question.

7 MR. MILLS: Your Honor, I also
8 object to the whole line and move to strike.
9 There is no foundation. He said -- if I
10 remember his direct testimony, he said he did
11 not -- that there was some material sent to
12 his company, but he does not know what it was,
13 and he didn't see it. So I don't understand.

14 I think there is no foundation for
15 this line of questioning or for this witness
16 to put this into evidence and read this into
17 evidence.

18 JUDGE SIPPEL: Hold on just a
19 second. Have you ever seen this document
20 before today?

21 THE WITNESS: I have, actually.
22 During my deposition they asked me to produce

1 more documents. I went back to my company.
2 I had my sales manager send me the documents
3 that were requested, and this was one of the
4 documents. This was what he was using to sell
5 the network --

6 MR. COHEN: Your Honor, if I could
7 do a little voir dire -- Mr. Mills' point is
8 somewhat different -- if I may.

9 JUDGE SIPPEL: All right. Well,
10 yes.

11 MR. COHEN: It is about this
12 document. I mean --

13 JUDGE SIPPEL: Go ahead.

14 VOIR DIRE EXAMINATION

15 BY MR. COHEN:

16 Q Mr. Turner, you didn't do anything
17 yourself to sell advertising for Wealth, did
18 you?

19 A No.

20 Q You didn't go to any meetings with
21 advertisers, correct?

22 A Correct.

1 Q You didn't make any presentation
2 to General Motors, correct?

3 A That is correct.

4 Q You didn't make any presentations
5 to any advertisers, correct?

6 A Correct.

7 Q And you are not testifying under
8 oath, are you, that you saw this deck prior to
9 March of 2009 when I asked you to go back and
10 check your records?

11 A Not prior to --

12 Q March of 2009.

13 A No. I got this information after
14 you asked me to get more information.

15 Q Right. And my question is
16 slightly different. Can you tell us -- you
17 can't, can you, tell us under oath that this
18 deck is a deck that you saw in the ordinary
19 course of working for WealthTV in 2008?

20 A This was sent to us to sell their
21 advertising, and it is consistent with what
22 they have told me they are --

1 Q I am asking you a different
2 question. Can you testify whether you saw
3 this deck before I asked you about it at your
4 deposition in March of this year?

5 A I cannot.

6 MR. COHEN: We move to strike the
7 redirect, Your Honor.

8 MR. MILLS: Including the line of
9 questioning on redirect on this exhibit.

10 MR. COHEN: That is what I meant
11 to say.

12 MR. MILLS: I'm sorry.

13 MR. COHEN: Thank you.

14 JUDGE SIPPEL: Yes, we will strike
15 it.

16 MR. COHEN: Thank you, Your Honor.

17 JUDGE SIPPEL: I don't have any
18 choice. I'm sorry, Mr. Rose. Do you have
19 anything further?

20 MR. ROSE: I do, Your Honor.

21 REDIRECT EXAMINATION (cont'd)

22 BY MR. ROSE:

1 Q Are you aware of a demographic
2 your company was targeting when selling
3 WealthTV?

4 MR. COHEN: Objection.
5 Foundation, Your Honor.

6 JUDGE SIPPEL: Whatever he knew is
7 in his direct testimony. Again, is there
8 something specific that you have to redirect
9 him on on what he was specifically asked on
10 cross examination? I don't mean generically
11 now.

12 MR. ROSE: Well, he was asked
13 copious questions about the demographic that
14 WealthTV was targeting based on, you know,
15 documents that are in evidence.

16 JUDGE SIPPEL: He has answered
17 those questions. I mean, it is -- you can't
18 go back and explore the whole area. You don't
19 have anything specific? Do you have a
20 specific -- something specific to bring to his
21 attention, but not by leading him, an area
22 that he can testify to that he hasn't

1 testified to already?

2 BY MR. ROSE:

3 Q At the time you were representing
4 WealthTV in 2008, were you aware of the
5 demographic that you were asked to target,
6 your company was asked to target?

7 A Yes.

8 JUDGE SIPPEL: That is all right.
9 That is all right. I will let that in. Go
10 ahead.

11 BY MR. ROSE:

12 Q What was that demographic?

13 A It was a male demographic.

14 Q And is that demographic consistent
15 with what is written on Exhibit 29, the page
16 entitled "Demographics"?

17 MR. COHEN: Objection, Your Honor.

18 JUDGE SIPPEL: Well, wait a
19 minute. It is consistent -- he has already
20 testified as to what -- am I -- as I am
21 reading this, he testified as to what the
22 demographics were that he was attempting to go

1 after in his written exhibit, his written
2 testimony.

3 MR. ROSE: Yes, okay. I think
4 that is all on that line.

5 JUDGE SIPPEL: So there is no
6 sense in referring it back to that, because we
7 know that.

8 MR. ROSE: Let me try one more
9 line, Your Honor, if you will bear with me.

10 BY MR. ROSE:

11 Q Mr. Cohen asked you several
12 questions regarding distribution, specifically
13 with regard to paragraph 8 of the -- of your
14 written testimony. And with regard to the
15 satellite distributors, do you recall that --

16 MR. COHEN: I didn't ask any
17 questions with respect to Exhibit 8, Your
18 Honor. Objection.

19 MR. ROSE: You didn't, no. He was
20 asked questions --

21 JUDGE SIPPEL: There was an
22 objection. Go ahead. My notes show that

1 there was an objection to trying to use him as
2 an expert on distribution. That is the only
3 notation I have. So if there is no questions
4 that were asked on 8, then there is nothing to
5 redirect him on.

6 BY MR. ROSE:

7 Q Do you recall a question from Mr.
8 Cohen about satellite TV distribution?

9 A I do.

10 Q And he asked you if your job would
11 be easier if WealthTV had carriage on these
12 satellite distributors?

13 A Correct.

14 Q Why is carriage on large
15 distributors such as those satellite
16 distributors important in seeking advertising
17 dollars?

18 A Because the larger the footprint
19 of a network, the more subscribers or viewers
20 that it has, the more viable it is as a
21 general market advertising play.

22 JUDGE SIPPEL: Somehow or other

1 that sounds familiar to me.

2 MR. ROSE: I am trying to make a
3 point, Your Honor. Thank you. No more
4 questions.

5 JUDGE SIPPEL: Is that it?

6 MR. COHEN: Yes, Your Honor. No
7 further questions from us.

8 JUDGE SIPPEL: Mr. Schonman?

9 MR. SCHONMAN: No questions.

10 JUDGE SIPPEL: Nothing from the
11 Bureau. I have no questions.

12 As far as I am concerned, Mr.
13 Turner can fly back to -- where is it, Denver?

14 THE WITNESS: Denver.

15 JUDGE SIPPEL: Colorado.

16 THE WITNESS: That is right.

17 JUDGE SIPPEL: Have a safe flight,
18 sir.

19 THE WITNESS: Thank you, sir.

20 (Whereupon, the witness was
21 excused.)

22 JUDGE SIPPEL: What time is it? I

1 can't see the clock.

2 MR. COHEN: 4:30, Your Honor.

3 JUDGE SIPPEL: Okay. Well, let's
4 just go off the record a minute and see where
5 we are.

6 (Whereupon, the proceedings in the
7 foregoing matter went off the
8 record at 4:34 p.m. and went back
9 on the record at 4:37 p.m.)

10 JUDGE SIPPEL: Let's go back on
11 the record for a minute.

12 I just want to point out for the
13 record that Mr. Feld has entered the courtroom
14 with several copies of a revised version of
15 Mr. Herring's written testimony, proposed
16 written testimony, which needs to be reviewed,
17 with the idea of getting it finalized before
18 Mr. Herring takes the stand. And so, as a
19 result, we are going to be in recess until
20 1:00 p.m. tomorrow afternoon.

21 And if there is any change in that
22 schedule, or an attempt to change the

1 schedule, or a necessity to change the
2 schedule, just contact my office, e-mail,
3 telephone, whatever.

4 We are in recess until 1:00 p.m.
5 tomorrow. Thank you very much.

6 (Whereupon, at 4:38 p.m., the
7 proceedings in the foregoing
8 matter recessed, to reconvene at
9 1:00 p.m., the following day.)

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abbreviation 2649:16	accomplished 2620:16	2616:12	2804:20 2812:9	affidavit 2736:20
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