

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

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| HERRING BROADCASTING, INC., Complainant, |) | |
| v. |) | File No. _____ |
| TIME WARNER CABLE, INC. Defendant |) | |

CARRIAGE AGREEMENT COMPLAINT

TO: The Commission:

Complainant, Herring Broadcasting, Inc., (“Herring Broadcasting”) doing business as WealthTV, (“WealthTV”), as its Complaint against the defendant, Time Warner Cable, Inc., (“TWC”) alleges as follows:

1. This Complaint is brought pursuant to Section 616 of the Communications Act of 1934 (“Section 616”) and Section 76.1301(c) of the Commission’s rules, 47 C.F.R. §76.1301(c), arising from TWC’s unreasonable, discriminatory, and ongoing refusal to carry WealthTV, or even to negotiate meaningfully and in good faith for carriage. During the period of such refusal, TWC agreed to carry an affiliated programming service called MOJO that is substantially similar to WealthTV in all material respects, including programming content, branding, look and feel, target demographic, and target advertisers. TWC owns MOJO along with three other cable industry partners. TWC’s refusal to carry or even negotiate for carriage in good faith with WealthTV, while agreeing to carry a substantially

similar affiliated programming service, MOJO, constitutes discrimination in the selection, terms, and conditions of carriage, in violation of the Commission's rules, and TWC has thereby restrained WealthTV's ability to compete fairly.

PARTIES AND JURISDICTION

2. TWC, a Delaware corporation, has its principal office at One Time Warner Center, North Tower, New York, NY 10019. TWC's main telephone number is (212) 364-8200. TWC, directly and through its affiliates, provides cable service over cable systems and is a cable operator and a multichannel video programming distributor, as defined in 47 C.F.R. §76.1300 (d).
3. Herring Broadcasting, a California corporation, has its principal office and place of business at 4757 Morena Blvd., San Diego, CA 92117. Herring Broadcasting does business as WealthTV. Herring Broadcasting's main telephone number is (858) 270-6900. Herring Broadcasting has been distributing WealthTV's twenty-four hours per day, seven days per week ("24/7") programming to cable operators and other multichannel video programming distributors since June 1, 2004, and is a video programming vendor as defined in 47 U.S.C. §536(b) and 47 C.F.R. §76.1300(e). WealthTV provides a 24/7 high definition ("HD") feed and a simulcast 24/7 standard digital feed for subscribers not currently receiving high definition services. In addition, WealthTV has Video on Demand ("VOD") and HD VOD packages available.

4. On or about May 7, 2007, Herring Broadcasting furnished to TWC written notice of its intent to file a complaint with the Commission, served as required by 47 C.F.R. § 76.1302(b). A copy of the notice is attached as Exhibit 1.

5. By May 20, 2007, TWC responded orally by telephone to WealthTV's written notice. A series of meetings and email exchanges ensued, but as described in detail below TWC did not negotiate in good faith and the parties were unable to reach a carriage agreement.

6. Attached hereto as Exhibit 2 is an affidavit executed by Charles Herring, Co-Founder and President of WealthTV, complainant, as required by 47 C.F.R. § 76.1302(c)(2).

7. Attached hereto as Exhibit 3 is an affidavit executed by Robert Herring, Sr., Co-Founder and Chief Executive Officer of WealthTV, complainant, in further support of the allegations herein.

FACTS

8. Herring Broadcasting produces WealthTV, a video programming service that focuses on inspirational and aspirational programming about prosperous and fulfilling lifestyles. Wealth TV's programming themes focus on enjoyable aspects of financial success, including travel, fine wines, luxury transportation, studies of other cultures, and opportunities for philanthropy. WealthTV's programming lineup includes *Wealth on Wheels*, a series on high end automobiles and other vehicles, *Taste! The Beverage Show*, a show on fine wines and spirits,

with a travel and cooking component, and *Innov8*, a series on the latest and greatest gadgets and gizmos.

9. In contrast to many programming services, WealthTV is a truly independent stand-alone programming service, founded and solely owned by innovator and entrepreneurial businessman Robert Herring, Sr. and his two sons, Robert, Jr. and Charles, without support by any cable operators or other program distribution companies including broadcasters, telcos, or direct broadcast satellite companies. WealthTV is one of only a few truly independent programmers to have successfully launched a new network in recent years. Since its launch on June 1, 2004, WealthTV has secured carriage agreements on over 75 incumbent cable systems, cable overbuilders, and telco video systems, including GCI, Charter Communications, Verizon FiOS TV, WideOpenWest, Qwest, Armstrong Cable, Surewest, Metrocast, Grande Communications, Service Electric, Sunflower Cable, Western Broadband, AT&T U-Verse and OEN Fision.

10. AOL/Time Warner, Inc. is the world's largest media and entertainment conglomerate.¹ TWC, its subsidiary, is the second largest cable operator in the United States. It operates cable systems in 33 states that pass approximately 26 million homes. TWC is the largest cable provider in the nation's two largest cities, Los Angeles and New York, well known for setting the trends in fashion, cuisine, lifestyle and business across the nation, and thus are ideal markets for WealthTV's programming services. Systems owned, managed and controlled by TWC control access to a total of 13.4 million basic video subscribers. In addition,

¹ See: "The Biggest Media Merger Yet," New York Times Editorial, January 11, 2000, at: <http://query.nytimes.com/gst/fullpage.html?res=940DE4DA1F3BF932A25752C0A9669C8B63&n=Top/News/Business/Companies/Time%20Warner%20Inc>.

Bright House Networks, the nation's sixth largest cable operator, with approximately 2.3 million subscribers, rides the TWC programming agreements and has informed WealthTV that it will launch a programming service only after TWC has concluded a written agreement with the programmer.

11. TWC owns in whole or in part a number of affiliated programming networks and therefore has incentives to favor these affiliates over competing unaffiliated programming networks. Among the TWC-owned programming services are Adult Swim, Boomerang, Cartoon Network, Cinemax, CNN, Court TV, HBO, MOJO, Pogo, TBS, TCM, and TNT HD. TWC is also part owner of MOJO according to the press release announcing its launch. (See Exhibit 4)

**WEALTHTV'S ATTEMPTED NEGOTIATIONS WITH TWC PRIOR TO
THE LAUNCH OF MOJO**

12. WealthTV first approached TWC to initiate carriage negotiations prior to WealthTV's launch on June 1, 2004. Since that time, WealthTV has visited nearly every TWC system across the United States and has met in person with various senior representatives of TWC in Stamford, Connecticut, the headquarters for TWC's corporate programming and marketing personnel. In addition, WealthTV coordinated visits with key senior representatives of TWC corporate programming and marketing at various industry events, including trade shows. During the course of these meetings and other exchanges, WealthTV provided TWC with detailed information about its service, including sample and complete episode programming, research, and periodic updates thereof. At the specific

request of Karsten Amelie, director of programming for TWC's corporate programming department, WealthTV provided an eight-hour sample of its programming in 2004. WealthTV also demonstrated that its programming, which has strong appeal to affluent viewers, brings higher advertising rates, which would be of direct financial benefit to TWC because WealthTV offers its distribution partners two minutes of advertising time on the channel per hour.

13. Officials of several TWC cable systems, including but not limited to those in Ohio, Texas, North Carolina, South Carolina, California, New York, Wisconsin, Nebraska and Indiana, have expressed interest in providing WealthTV to their customers. TWC officials at these locations told WealthTV officials, however, that they are not permitted to sign system-level agreements because there is no corporate level master agreement between TWC and WealthTV. As described herein, TWC has refused to negotiate in good faith for such an agreement.

14. During the past two years, TWC corporate programming officials, specifically Mickey Carter and Eric Goldberg, have on occasion expressed interest in concluding an agreement with WealthTV. After strong support was communicated to TWC corporate programming officials by TWC field locations, Mr. Carter expressed interest in early 2006 and again in early 2007 to have carriage discussions with WealthTV. (Mr. Carter has since departed TWC.) Yet WealthTV was unable to get TWC to further engage in such discussions. Once again in mid-2007, after WealthTV sent TWC a notice of its intent to file a program carriage complaint, Mr. Goldberg expressed interest in concluding an

agreement with WealthTV. But as before, although multiple back and forth exchanges took place, TWC evinced a lack of willingness to have meaningful discussions.

15. The delay entailed in this tactic has allowed TWC to develop its own WealthTV-like brand, namely MOJO, while keeping WealthTV at bay by disguising its true intent while tying up the time and resources of WealthTV and its officials.

THE PROVEN CONSUMER APPEAL OF WEALTHTV'S
PROGRAMMING

16. WealthTV's programming service has proven consumer appeal, as evidenced by the large number of carriage deals it has already secured.² To date, WealthTV has secured linear carriage (that is, on a tier where it is available for full time viewing 24/7 by cable subscribers) with over 75 cable operators, overbuilders, and telcos. WealthTV airs on-going interstitials soliciting viewers to provide feedback via WealthTV's website. The compiled data show overwhelming support for the channel. Additional proof of the market appeal comes from the reactions to WealthTV's service by officials of TWC's San Antonio system, described below.

17. On December 28, 2006, Scott Pleyte, programming marketing manager of TWC – San Antonio, ("TWC – SA") emailed WealthTV's Vice President of Affiliate Sales stating, "*One of my colleagues watched your channel in Dallas*

² Further evidence of the consumer appeal and popularity of WealthTV is evidenced by the strongly positive viewer feedback it has received. A small sampling of emails from viewers reflecting the channel's popularity is attached as Exhibit 20.

last week and liked the content. I was wondering if you have an agreement with Time Warner Cable so that we could consider adding you to our lineup.” (See Exhibit 5) WealthTV representatives met with TWC – SA shortly thereafter. Scott Pleyte and his boss Dean Aitken expressed their strong interest in carrying WealthTV’s 24/7 standard definition feed and high definition feed. TWC – SA had available space and was currently launching an aggressive preemptive marketing campaign that included HD services responding to competition in the local market from new entrant AT&T, which carried WealthTV 24/7 in linear standard definition and high definition. Mr. Pleyte offered to make calls to TWC’s corporate programming group at headquarters to express his desire to carry WealthTV and to help facilitate the conclusion of a master corporate programming agreement. Such calls took place in January 2007 with Mr. Pleyte reporting that “Mickey [Carter, director of programming, TWC corporate] said he would work on a Corporate agreement for us.” (See Exhibit 6)

18. Because of the enthusiastic reaction of the TWC – SA officials, and the positive reactions from corporate headquarters that were reported to WealthTV, WealthTV took, at its own expense, several steps to facilitate the introduction of WealthTV’s programming into the TWC – SA system.

19. For example, in order to be in position to launch its linear services at TWC - SA, WealthTV offered to supply two units of Motorola Integrated Receiver Decoder (“IRD”) authorization equipment to TWC – SA to permit the system to receive and distribute WealthTV’s standard definition and high definitions linear

feeds. The equipment was accepted with express authorization from TWC's headquarters corporate programming group.

20. With a corporate agreement believed to be imminent, in the interim WealthTV agreed to provide TWC – SA with its highly sought after HD VOD content. TWC – SA signed a high definition video on demand (“HD VOD”), agreement directly with WealthTV. (See Exhibit 7) WealthTV agreed to provide TWC – SA with its HD VOD product free of charge for a period of six months, believed to be more than sufficient time for conclusion of the TWC corporate master agreement. On March 1, 2007, WealthTV's HD VOD service launched on TWC – SA. (See Exhibit 8) It was the first major deployment of HD VOD on a TWC system. In order to prepare the TWC – SA market for the launch of WealthTV's HD VOD and subsequent linear offerings, WealthTV supported, at its own expense, without compensation or subsidy by TWC – SA or TWC headquarters, radio campaigns in the San Antonio market on two radio stations airing during both morning and afternoon commute times for a period of 30 days. In addition, WealthTV provided website landing pages and banner ads (see Exhibit 9) to TWC – SA for promoting the service to its subscribers.³

21. Thus, despite the documented consumer interest in and market appeal of WealthTV's programming, with TWC – SA's dealings with WealthTV being the most prominent example thereof, interest at the system level has been squelched

³ Subsequently, on July 31, 2007, just before the end of WealthTV's six- month HD VOD deal with TWC – SA, MOJO announced the launch and premiere of its own HD VOD product, which, like the MOJO linear offering, imitates WealthTV's programming in the ways described below. (See Exhibit 12)

by TWC's corporate headquarters in apparent furtherance of TWC's preference for and self-interest in carrying MOJO.

LAUNCH OF MOJO

22. The launch of MOJO was announced on March 19, 2007. (See Exhibit 4) It was created by transforming an existing channel, INHD, into the new channel called MOJO as of May 1, 2007. The new channel, MOJO, is substantially similar to WealthTV. The old channel, INHD, was completely different from what MOJO is today. INHD was a *general* entertainment high definition programming service that had no unifying theme other than that all of its programming was in high definition format. Thus, viewers might see children's programming such as *Santa vs. The Snowman*, a children's cartoon, as equally likely as they might see programming for adults, such as *The Twilight Zone*.

23. MOJO is wholly owned by four cable MSOs: TWC, Cox Cable, Comcast and Bright House.

24. The new channel, MOJO, presented itself as a well-defined themed programming service aimed at "*active affluents*", ages 25 to 49.⁴ In the press release announcing its launch, MOJO described its programming as being characterized by "*new series spanning adventure travel, comedy, finance, music, cuisine and spirits and high tech toys*" and "*diverse shows includ[ing] an eclectic*

⁴ See Exhibit 4; See also Exhibit 10; "INHD's New Moniker: MOJO," Mike Reynolds, Multichannel News, March 19, 2007 (www.multichannel.com/article/CA6425787.html) (Emphasis supplied)

mix of witty and urbane comedy, sports, adventurous travel, music and the finer pleasures of food and drink.”⁵ (See Exhibit 4)

25. MOJO’s definitive programming transformation caused an increase in advertising by 37% according to Robert D. Jacobson, president and CEO of iN DEMAND Networks as reported in a March 22, 2007 TV Week article entitled “Q&A: Robert D. Jacobson, iN DEMAND Networks.”⁶ (See Exhibit 11) Upon the launch of MOJO, TWC agreed to offer the channel across all its systems carrying high definition throughout the United States.

26. By the time of MOJO’s launch announcement on March 19, 2007, TWC had engaged in numerous discussions with WealthTV over several years and was intimately familiar with WealthTV. TWC by then had had access to the eight-hour sampling of WealthTV’s programming that TWC had requested and was able to view and did view WealthTV’s product where it was launched on non-TWC MVPD systems, some of which competed with TWC’s systems. TWC also had access to WealthTV’s programming and evidence of its consumer appeal because of the WealthTV HD-VOD launch on TWC’s own San Antonio, Texas system. TWC also had access to information available publicly and through industry sources about WealthTV’s success, viewer appeal and appeal to advertisers. TWC also had access to materials provided to TWC during presentations and follow-up visits, including marketing materials, presentations, and sample programming DVDs,

⁵ “*MOJO is rising!! IN DEMAND prepares for a May 1 Lightswitch when the hi-def cable channel becomes MOJO*” MOJO Press Release, March 19, 2007.

⁶ For full text of this article see:
www.tvweek.com/news/2007/03/qa_robert_d_jacobson_in_demand.php

27. Thus, TWC had the opportunity, knowledge and motivation to launch a WealthTV-like programming service. TWC benefited financially more from launching its own MOJO service than it would have by launching the substantially similar and established independent programming services of WealthTV. TWC thus was motivated to string WealthTV along with expressions of interest, not offered in good faith, while it readied its own affiliated programming service based on WealthTV's proven successful model.

**MOJO IS A SUBSTANTIALLY SIMILAR PROGRAMMING SERVICE
TO WEALTHTV**

28. MOJO is substantially similar to WealthTV in numerous material respects as detailed below.

29. **Programming:** A comparison of programming on MOJO and WealthTV reveals numerous examples of MOJO's program offerings that mirror WealthTV's programming:

- a. In June, 2004, upon launch of its network, WealthTV launched *Taste! The Beverage Show*, a male hosted series with a travel and fine food component that focuses on educating viewers about wines and spirits. The goal of *Taste!* is to democratize wines and spirits so that all viewers can enjoy them without feeling overwhelmed by what they do not know. Roughly three years later, MOJO aired its first episode of *Uncorked* in April of 2007. *Uncorked* is described on the MOJO website as a travel, foods, and spirits show whose host will "ask the

dumb question so you don't have to.” WealthTV’s *Taste, The Beverage Show* offers more than six times as many episodes as *Uncorked*.

- b. In June 2004, upon launch of its network, WealthTV launched *Wealth on Wheels*, which focuses on the latest trends in automotive technology and hottest cars. Episodes have included automotive factory tours, automotive shows and test drives in some of the most sought after vehicles on the road. WealthTV has aired more than 50 episodes of this series and its predecessor. In August of 2007 MOJO announced a series called *Test Drive*, an automotive technology show with highlights of some of the most sought after cars. For example, one of the four episodes is entitled “*Ultimate Test Drive*” and the description from MOJO’s web site is as follows, “*They’re powerful, luxurious and carry a heavy price tag. Can you handle it? Craig J. Jackson takes a fast ride in the exotic automobile lane and uncovers an economical way to put the pedal to the Bentley, Lamborghini and Ferrari metal.*” (Emphasis supplied) Most importantly, both WealthTV’s *Wealth on Wheels* and *Test Drive* target the identical demographics with similar programming.
- c. In November 2004, WealthTV produced its first *Charlie Jones, Live to Tape* show. This series is a hosted one-on-one talk show that features legendary football sportscaster and one of the first voices of the American Football League, Charlie Jones, who interviews remarkable

athletes, coaches, and celebrities of yesteryear and features their untold stories. MOJO features *Timeless*, which apparently debuted in 2006 on ESPN2, then migrated to MOJO. *Timeless* is a one-on-one style talk show in which the NFL Linebacker and host, Dhani Jones, “*taps into the classic themes of sports and competition, the plight of the underdog, the impossible play, the unlikely hero and their remarkable talent. Their stories are off-beat, inspiring and, of course ... timeless*”, according to MOJO’s website. (Emphasis supplied)

- d. In mid-2004, WealthTV launched *Taste of Life*, which focuses on educating viewers about the behind the scenes experiences associated with travel, spirits and especially food. Viewer interest in this series generated so many inquiries that WealthTV devoted a section of its website to posting over 180 recipes that have been featured on the show. In June 2006, MOJO launched *After Hours*, a series that gives viewers a behind the scenes look at Los Angeles restaurants, claiming that “*Some of life’s best lessons are learned after hours.*” Celebrity Chef Daniel Boulud hosts the show and “*...takes his exclusive dinner parties to SoCal, feting celebrities from shows such as Boston Legal, the Office and Crash. The guests are as interesting as the menu, the conversation flows as easy as the wine, and the vibe is distinctly After Hours.*” (Emphasis supplied) MOJO has also copied WealthTV’s practice of posting series-related recipes to its website; as of December 18, approximately a dozen recipes have appeared.

e. In April 2005, WealthTV launched *Innov8*, in which each episode features the latest “*gadgets and gizmos*” from around the world, according to WealthTV’s website. WealthTV has also produced a special show on the 2007 CES show in Las Vegas highlighting the best of CES from the latest gadgets to the biggest TVs. WealthTV has 14 shows on gadgets of all types. In December 2006, MOJO premiered *Geared Up*, which is described on its website as follows: “*MOJO plugs in and shows off the latest and greatest from the world of high-end electronics on Geared Up, the ultimate guide to the ultimate in technology.*” (Emphasis supplied) Shortly after its initial airing, MOJO’s *Geared Up* copied WealthTV in airing a special focused around CES 2007.

30. **Target Demographic:** Robert D. Jacobson, Chief Executive Officer of iN DEMAND, has explained to reporters that MOJO is for “...**men making more than \$100,000 per year...**” (See Exhibit 11; emphasis supplied). Multichannel News reported in a March 19, 2007 article that MOJO is designed to appeal to **25 to 49 year old** (see Exhibit 10) “*active affluents*” who are “...*dynamic, intelligent, and adventurous*” with a skew towards **men.** (Emphasis supplied). MOJO’s own press release reiterates that the channel was “created exclusively for the discerning male, with attitude, wit and style” (see Exhibit 4). A summary comparison of WealthTV’s Target Audience provided in WealthTV’s standard presentation to potential distribution partners, including TWC, dating back to 2004 (See relevant excerpt at Exhibit 12) compared to MOJO’s target audience,

announced three years later, clearly indicates that MOJO is targeting the exact audience as WealthTV.

31. **Target Audience:** The following table summarizes the close similarities between WealthTV's and MOJO's target audiences:

| | WealthTV | MOJO |
|------------------|------------------------|------------------------------|
| Age | <i>25 to 49</i> | <i>25 to 49</i> |
| Sex | <i>Skewed Male</i> | <i>Males</i> |
| Education | <i>Skewed Educated</i> | <i>Intelligent</i> |
| Income | <i>Above \$100,000</i> | <i>"more than \$100,000"</i> |

32. **Look and Feel:** The non-themed, general entertainment service INHD was transformed into a themed service offering original programming in high definition similar to WealthTV. Robert D. Jacobson, Chief Executive Officer of iN DEMAND, talking about the transformation of INHD to MOJO states, "*We know we wouldn't compete with ESPN on sports, or USA and TNT as general entertainment programming.*" (See Exhibit 13; emphasis supplied). In effect, the "*general entertainment programming*" offered by channel INHD was failing and was morphed directly into the path of the proven WealthTV lifestyle and entertainment theme, serving a near identical demographic with similar programming.

33. **Uniqueness of WealthTV's Programming Theme Copied by MOJO:** MOJO's targeted programming theme is directly from WealthTV's 2004 playbook described in presentations to TWC. Prior to the launch of MOJO, Mr.

Jacobson of iN DEMAND acknowledged that a high definition channel can no longer be just a showcase for the new HD format and must be appealing to viewers for other, additional features. (See Exhibit 11) By March 2007, iN DEMAND executives expected that the market for high-definition programming would grow, but believed that there would be a lack of themed dedicated channels. As of March 2007, iN DEMAND viewed the market for original programming aimed at affluent males ages 25 to 49 as underserved. Thus, as iN DEMAND was “...evaluating the programming landscape to make sure (it) had a programming landscape that was sustainable”, (see Exhibit 11) it struck upon and copied WealthTV’s successful model.

34. In the March 19, 2007 press release, announcing MOJO’s launch, significant similarities between WealthTV and MOJO were highlighted.

- a. In the release, MOJO defined its brand as comprised of “...new series spanning adventure travel, comedy, finance, music, cuisine and spirits and high tech toys.” WealthTV had been featuring programming in each of these categories years before MOJO launched its programming service.
- b. MOJO used the term “active affluents” in its press release to describe its targeted audience. WealthTV, with its well defined and targeted programming, comprised of among other things adventure travel, had become synonymous with “active affluents”.

35. Mr. Jacobson of iN DEMAND addressed the viability and demographics of MOJO stating “...there are not many [channels] that speak to the active

affluents – men making more than \$100,000 a year and who are active. It’s a sustainable channel option.” (See Exhibit 11; emphasis supplied) Mr. Jacobson also said, *“Fortunately, we were right in our projections. We were confident that there would be strong appeal for exclusive content aimed at high-end males.”* (See Exhibit 10; emphasis supplied) Though Mr. Jacobson correctly stated that there are not many other channels that speak to the “active affluent”, the obvious and prominent example of the one that does, well known to Mr. Jacobson and his partners at TWC was WealthTV, which was established **three years before** MOJO morphed from iN DEMAND to a WealthTV like service with an identical target demographic.⁷

36. **Target Advertisers:** In a January 2004 interview, Charles Herring, president of WealthTV was reported to be *“optimistic that the channel will attract advertisers looking to reach an audience that can afford high-end luxury goods”*. (See Exhibit 14; emphasis supplied) With the same target audience and nearly identical programming, WealthTV and MOJO target the same advertising market. As an example, both programmers feature shows on wine and spirits and both companies have targeted the same advertising agency for Grey Goose Vodka.

37. In view of their similarities, WealthTV has inquired of TWC why it was able to find room on its systems for MOJO, an affiliated channel similar to WealthTV, but not for the pioneer of the aspirational wealth lifestyle channel, WealthTV, even though WealthTV was offered on favorable carriage terms to

⁷ According to the March 19 press release announcing MOJO’s launch, its cable company owners were aware of and supportive of its transformation. (See Exhibit 4).

TWC years before the launch of MOJO. No satisfactory answer has been received.

**OUTREACH BY WEALTHTV TO TWC SUBSEQUENT TO THE
LAUNCH OF MOJO**

38. Within days of MOJO's launch, WealthTV notified TWC of its intent to file a carriage agreement complaint. WealthTV voiced concerns that TWC's refusal to negotiate or execute a carriage agreement with WealthTV while simultaneously finding room on its systems for a substantially similar service evidenced impermissible discrimination in TWC's decisionmaking.

39. TWC, after discussions with WealthTV on June 27, 2007 related to the pre-complaint notice sent by WealthTV to TWC, agreed to have carriage discussions with WealthTV.

40. On July 18, 2007, Robert Herring and Charles Herring, accompanied by the undersigned, traveled to Stamford, Connecticut for further discussions with representatives of TWC, including Eric Goldberg, senior director, programming regarding possible carriage. No definitive agreement was reached at that meeting, but the parties agreed to continue to discuss a possible carriage agreement.

41. On July 19, 2007, Charles Herring sent to Eric Goldberg the letter of intent attached as Exhibit 15, as requested by Mr. Goldberg.

42. After a series of email exchanges following the July 18th meeting, Charles Herring and Eric Goldberg spoke on August 6th. Mr. Goldberg enumerated for Mr. Herring in that telephone conversation the key points needed in a term sheet

to form the basis of a formal agreement. Mr. Goldberg indicated that the term sheet should be drafted by WealthTV, although the key points and acceptable terms originated with and were provided orally by Mr. Goldberg.

43. In accordance with Mr. Goldberg's instructions, Charles Herring provided to him a term sheet on August 7th, 2007. (See Exhibit 16) By August 23rd, TWC, through Mr. Goldberg, provided highlighted comments to the August 7th term sheet. (See Exhibit 17) Charles Herring initialed and dated the term sheet on September 5, 2007. (See Exhibit 18)

44. The key terms demanded by TWC through Mr. Goldberg, that developed during discussions, included:

- a. WealthTV would have merely the right to solicit TWC systems to see if they wanted to carry WealthTV on a linear basis, commonly referred to in the industry as a "hunting license."
- b. TWC would be permitted to drop WealthTV at any time.
- c. TWC would be permitted to move WealthTV to a different tier at any time for any reason or no reason at all.

45. During each of the telephone conversations in this period, Mr. Goldberg provided context for and reassurances about the one-sided terms he had specified. He reiterated that TWC does not conclude such a deal if it does not plan to launch a network and that networks are generally launched on a national basis. In addition, Mr. Goldberg stated that TWC does not participate in the practice of dropping networks, inviting Charles Herring not to be overly concerned about agreeing to such a provision. Nevertheless, TWC's right, stated in the term sheet,

to drop WealthTV and TWC's right, without the obligation, to carry WealthTV's linear feeds were major concerns for Charles Herring.

46. Because Mr. Goldberg's oral assurances were in direct conflict with the written terms Mr. Goldberg was specifying, Charles Herring tried via email and by phone to negotiate these two points, namely, the drop clause and the absence of an obligation to launch linear carriage under specified conditions, with Mr. Goldberg and his boss Andrew Rosenberg. TWC was unyielding.

47. On August 27th, Charles Herring conceded on eight of the nine points in Mr. Goldberg's highlighted comments of August 23rd. The final point that remained alive was WealthTV's desire for a commitment that the launch of its free HD-VOD product would be accompanied by the linear launch of the channel in at least one TWC market. This point was included in the term sheet that Charles Herring initialed and sent back to Mr. Goldberg on September 5, 2007.

48. Even with this one point desired by WealthTV, the term sheet to which WealthTV expressed assent on September 5, 2007 specified no valuable consideration by TWC and amounted essentially to according WealthTV a right to solicit TWC locations. Yet, WealthTV, finding itself in no position to demand better terms from TWC and bolstered by and in reliance upon Mr. Goldberg's assurances, provided Time Warner with this revised initialed term sheet on September 5, 2007.

49. At that time, Charles Herring was advised by Mr. Goldberg that he had received the initialed term sheet, and that the terms would need to be approved internally, prior to TWC's legal department working on a long form agreement.

50. By October 8, 2007, after several unanswered calls and emails from Charles Herring to Mr. Goldberg, Robert Herring Sr., and Charles Herring became frustrated by TWC's excessive delays in approving a term sheet whose terms TWC had specified in the first place. Robert Herring wrote and emailed a letter to Mr. Goldberg outlining his concerns. (See Exhibit 19)

51. On October 19th, Mr. Goldberg called Charles Herring to inform him that the September 5, 2007 term sheet had been accepted by TWC and TWC's legal department would begin drafting a master agreement in a timely fashion.

52. However, in telephone conversations on October 31 and November 1, 2007, Mr. Goldberg informed Charles Herring that TWC would not accept, after all, the September 5, 2007 term sheet that Charles Herring had signed, and which Mr. Goldberg previously indicated TWC approved. Instead, Mr. Goldberg said, a further amendment to the agreement in TWC's favor would be necessary in order to secure TWC's affirming signature. Specifically, Mr. Goldberg said that it would be necessary for WealthTV to agree that with respect to WealthTV's free HD VOD service, TWC would have the right to launch WealthTV's HD VOD service whenever and wherever TWC wished, with no termination date, and no attendant commitment, at any time, to launch the WealthTV channel as a linear offering. Mr. Goldberg thus demanded WealthTV's concession on the final point of significance to WealthTV, which had until that moment, remained alive.

53. In other words, subsequent to WealthTV's having made every concession sought by TWC to secure agreement for carriage on a linear basis, TWC changed tack and demanded a deal enabling it to offer WealthTV's free product, which

WealthTV normally and reasonably offered at a loss on a promotional or preview basis, infinitely, with no actual or contingent agreement to enter into a real carriage agreement. WealthTV concluded that TWC had not negotiated in good faith.

RETALIATION AGAINST WEALTHTV

54. On December 7, 2007, officials of WealthTV became aware of disparaging remarks made against WealthTV on a December 6, 2007 podcast by Engadget.

55. Engadget, like TWC, is a subsidiary of AOL/Time Warner, Inc.

56. The remarks vividly denigrated the quality of WealthTV's programming and urged Verizon's termination of WealthTV's carriage contract. The following is a transcript of the relevant portions of the podcast:

Ben Drawbaugh: Have you ever watched WealthTV?

Steve Kim: I've never watched WealthTV. Have you?

* * *

Drawbaugh: ...[T]his channel is the most worthless channel. Like, it's terrible. It's the worst channel ever. So, that's the only reason I put it there. I have it, I've tried to watch it and it's awful.

Kim: But it's in HD, now in Louisiana.

[Both laughing]

Drawbaugh: It's in HD and I wish that Verizon would just cut it off because it's a terrible, terrible channel.

Kim: Oh, man.

Drawbaugh: I just wanted to put that there...that is the only reason why I threw that on there because **I just wanted to throw it under the bus** (emphasis supplied). If you ever felt bad about not getting this channel, don't. It's the worst channel there is. (Emphasis supplied.)

57. The disparaging podcast was aired within 30 days of WealthTV's visits to the Commission in support of comprehensive carriage agreement complaint process reform. As reported in its ex parte filings subsequent to the meetings, WealthTV used its unsatisfactory experience in seeking a carriage agreement with TWC as an example of why process reforms are essential.

58. The vicious remarks in the podcast aired and sponsored by an affiliate of TWC constitute evidence of retaliation.⁸

TWC'S PATTERN AND PRACTICE OF DISCRIMINATION AGAINST INDEPENDENT PROGRAMMERS

59. TWC is a vertically integrated provider and distributor of programming. The Commission's attention has been directed to numerous studies documenting the opportunities and incentives that such vertically integrated programmer-distributors have to favor affiliated programming over non-affiliated programming. Among these studies, adverted to in the Commission's prior and ongoing proceedings, such as in MB Dockets 05-192, 06-151 and 07-42 are:

- a. Chen, D., and D. Waterman (2007), "Vertical Ownership, Program Network Carriage and Tier Positioning in Cable Television: An Empirical Study," *Review of Industrial Organization*, Vol. 30, No. 3.

⁸ Apparently confirming the connections among AOL/Time Warner subsidiaries, the post on Engadget announcing WealthTV's launch on several Charter systems in Louisiana contained a one-click link to promotional materials for MOJO.

- b. Singer, H. & Sidak, G., “Vertical Foreclosure in Video Programming Markets: Implications for Cable Operators,” *Review of Network Economics*, Vol. 6, 2007, available at <http://ssrn.com/abstract=1004369>.
- c. Clements & Abramowitz, *Ownership Affiliation and the Programming Decisions of Cable Operators* (2004), <http://web.si.umich.edu/tprc/papers/2004/289/TPRC2004.pdf>

60. Studies also have demonstrated that vertically integrated programmer-distributors in fact favor affiliated programming over non-affiliated programming.

61. TWC’s own channel lineup demonstrates the inclination to disfavor independent programming. For example, TWC’s channel lineup for subscribers in New York City offers up to 581 channels according to TWC’s website. Upon review of the channels offered, only a handful, fewer than half a dozen, are recognizable as general interest channels that are independent of the cable industry and the broadcasters.⁹

62. The high improbability of an independent programmer gaining carriage on TWC has significant financial consequences for an independent programmer seeking such carriage. Programming services are never financially successful in the long run without carriage by one or both of TWC or Comcast. Other smaller cable companies follow the programming leads of these cable giants. This is because advertisers, upon whose revenues independent programmers rely for financial success, are less interested, if interested at all, in placing their advertisements with programming services available to fewer than 20 million households. Without carriage on at least one of the top two MSOs, it is infeasible to reach this benchmark.

⁹ This count excludes music, religious programming and foreign language channels.

63. The high and usually impossible bar for independent programmers to gain carriage has significant consequences for the diversity of programming available to the public and raises costs for consumers by excluding lower cost independent programming.

64. The recourse supplied by Section 616 of the Communications Act of 1934, as amended, and the Commission's rules for complaints against MVPDs that discriminate against independent programmers are seldom used. The open-ended nature of the complaint process, with no deadlines, and the inherent difficulties of litigating against wealthy incumbent MVPDs are often cited as the reasons for the procedures' underuse.

65. The Commission recently reportedly considered reforms to the carriage access complaint process to address these deficiencies, but contrary to the expectations and hopes of the independent programmer community did not act on these reforms at its November 2007 meeting.

66. WealthTV alleges that the evidence of a pattern and practice of discrimination by TWC is substantial and should be duly considered by the Commission in its deliberations upon and disposition of this complaint.

FIRST COUNT: VIOLATION OF 47 C.F.R. § 76.1301(c)

67. Paragraphs 1 through 64 above are repeated and realleged as it fully set forth herein.

68. 47 C.F.R. § 76.1301(c) makes it unlawful to "engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video

programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.”

69. Insofar as TWC has refused carriage to WealthTV even though WealthTV has agreed to every demand of TWC, TWC has violated Section 76.1301(c).

70. Separately and in addition, insofar as TWC has refused carriage to WealthTV, an independent programming service, and granted carriage to its affiliate MOJO, a substantially similar programming service, TWC has violated Section 76.1301(c).

CONCLUSION

71. WealthTV has exhausted all reasonable opportunities to come to any agreement regarding carriage with TWC. It is now clear that achieving such an agreement is impossible because of TWC’s policies and practices of discrimination against independent programmers in favor of its own affiliated programming. For all of the reasons set forth above, complainant seeks the Commission’s relief, as described below.

RELIEF SOUGHT

WHEREFORE, WealthTV respectfully requests, pursuant to 47 C.F.R. § 76.1301 and 76.1302, that the Commission:

- (a) Order TWC to provide WealthTV carriage on all TWC systems, pursuant to the terms of a carriage agreement similar to MOJO;
- (b) Order that such carriage be implemented and effectuated without delay;
- (c) Order that if one or more TWC systems claim to lack capacity to add carriage of WealthTV, such system delete a programming service affiliated with TWC in order to accommodate addition of WealthTV;
- (d) Order the expedited handling of this complaint including prompt referral of this complaint to an Administrative Law Judge (“ALJ”) of the Commission, with instructions that the complaint shall be resolved no later than 120 days after the date of the filing of this complaint;
- (e) Order the following procedural relief in furtherance of prompt and just resolution of this complaint:
 - a. TWC’s prompt compliance with such documentary and interrogatory discovery as may be reasonably necessary to illuminate the decisionmaking process by which TWC elected to grant carriage to MOJO but not to WealthTV, and the extent to which, consistent with its apparent pattern and practice, TWC rejected independent programming in favor of programming affiliated with itself and industry partners, including other cable companies and broadcasters, upon WealthTV’s motion for such discovery;

- b. The ALJ's implementation of and adherence to so-called "baseball style arbitration" rules in resolution of the proceedings, and
- (f) Grant such other and further relief as may be just and proper.

Dated: December 20, 2007

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "K Wallman", written in black ink.

Kathleen Wallman
Kathleen Wallman, PLLC
9332 Ramey Lane
Great Falls, VA 22066
202-641-5387
Attorney for WealthTV

Certificate of Service

Complainant Herring Broadcasting, Inc., by its attorney Kathleen Wallman, PLLC,
hereby certifies that the foregoing Carriage Agreement Complaint has been served upon
the following individuals on this 20th day of December by Federal Express.

Marc Lawrence-Apfelbaum, Esq.
Executive Vice President, General Counsel and Secretary
Time Warner Cable, Inc.
290 Harbor Drive
Stamford, CT 06902

Arthur Harding
Fleischman and Harding, LLP
1255 23rd Street, NW
Eighth Floor
Washington, DC 20037

Very truly yours,

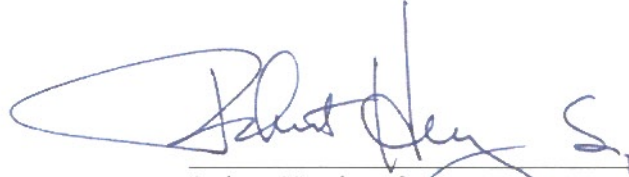
A handwritten signature in cursive script, appearing to read 'KWallman', is written over a horizontal line.

Kathleen Wallman
Kathleen Wallman, PLLC
Attorney for WealthTV

Complainant's Signature

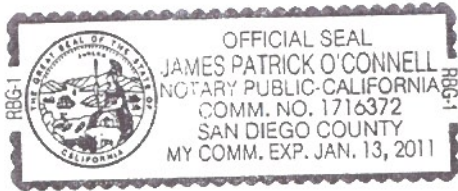
Robert Herring, Sr., Chief Executive Officer of Herring Broadcasting, Inc., and Charles Herring, President of Herring Broadcasting, Inc., hereby sign this Carriage Access Complaint on behalf of Herring Broadcasting, Inc.

December 20, 2007



Robert Herring, Sr.
Chief Executive Officer
Herring Broadcasting, Inc.
4757 Morena Blvd.
San Diego, CA 92117
(858) 270-6900

State of California, County of San Diego
Subscribed and sworn to (or affirmed) before me
on this 19 day of December, 2007,
by Robert + Charles Herring
personally known to me or proved to me on the
basis of satisfactory evidence to be the person(s)
who appeared before me.
Signature: James Patrick O'Connell



Charles Herring
President
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