

1 CASE NUMBER: BC 316833
2 CASE NAME: UNIVISION VS. NIELSEN
3 LOS ANGELES, CALIFORNIA THURSDAY, JULY 1, 2004
4 DEPARTMENT CE 50 HON. J. STEPHEN CZULEGER
5 REPORTER: CHRISTINE KWON-CHANG
CSR NO. 12143

6
7 TIME: P.M. SESSION

8 (THE FOLLOWING PROCEEDINGS WERE
9 HELD IN OPEN COURT:)

10
11 THE COURT: IN THE CASE OF UNIVISION VERSUS
12 NIELSEN, LET THE RECORD REFLECT ALL COUNSEL ARE
13 PRESENT.

14 AT THE OUTSET, I WOULD LIKE TO THANK
15 COUNSEL FOR THE PRESENTATIONS. AND DESPITE THE LENGTH
16 OF THEM, EXCELLENT PAPERWORK. IT'S ACTUALLY A PLEASURE
17 TO READ GOOD PLEADINGS, AND THESE WERE VERY GOOD
18 PLEADINGS ON BOTH SIDES.

19 AND I PREFACE -- OR I SAY THAT BECAUSE I
20 APOLOGIZE. I DON'T TYPE, AND SO I HANDWRITE EVERYTHING
21 OUT, SO I'M GOING TO GIVE YOU A RULING THAT, THOUGH
22 IT'S WELL THOUGHT OUT, IT'S PROBABLY NOT WELL WRITTEN
23 OUT, SO I'LL APOLOGIZE IN ADVANCE FOR ANY GRAMMAR. BUT
24 I KNOW THAT TIME IS OF THE ESSENCE IN THIS MATTER, AND
25 WE DON'T HAVE THE WEEKS NECESSARY TO DRAFT A FORMAL
26 ORDER.

27 PLAINTIFF UNIVISION MOVES FOR A
28 PRELIMINARY INJUNCTION ENJOINING DEFENDANT NIELSEN FROM
1 UTILIZING A NEW RATINGS METHOD WHICH INCLUDES USE OF A
2 DEVICE CALLED THE LOCAL PEOPLE METER OR L.P.M. NIELSEN
3 INTENDS TO BEGIN THIS NEW PROGRAM ON JULY 8TH, 2004.

4 PLAINTIFF AND OTHERS CONTRACT WITH
5 NIELSEN TO PROVIDE RATINGS SERVICES OF T.V. BROADCASTS.
6 THESE RATINGS ARE UTILIZED IN SETTING ADVERTISING RATES
7 AND ASSIST MEDIA ORGANIZATIONS AND ADVERTISERS IN

8 DETERMINING WHO IS WATCHING WHAT AND FOR HOW LONG.

9 IT GOES WITHOUT SAYING THAT A HIGHLY
10 RATED PROGRAM OR STATION CAN COMMAND HIGHER ADVERTISING
11 RATES THAN THOSE WITH LOWER NIELSEN RATINGS.

12 SINCE NO ONE CAN EVER KNOW EXACTLY HOW
13 MANY PEOPLE ARE WATCHING WHICH SHOWS AT ANY GIVEN TIME,
14 NIELSEN OFFERS WHAT IT BELIEVES IS A STATISTICAL
14 SNAPSHOT OF THE VIEWING POPULATION.

16 VIRTUALLY ALL T.V. MEDIA, LOCALLY AND
17 NATIONALLY, RELY ON THIS SERVICE, AND PLAINTIFF
18 CONTRACTS WITH DEFENDANT TO GAIN ACCESS TO ITS
19 STATISTICAL DATA.

20 HERETOFORE, DEFENDANT HAS RELIED ON A
21 DIFFERENT METHODOLOGY AND SYSTEM FOR OBTAINING ITS DATA
22 OTHER THAN UTILIZING THE L.P.M. THIS CURRENT
23 METHODOLOGY RELIES MORE ON A LOG PREPARED BY SELECTED
24 VIEWERS WHICH -- WHILE L.P.M. RELIES ON A BLACK BOX, A
25 PUSH BUTTON COMMUNICATION SYSTEM WITH SOME ACCURACY
26 ADVANTAGES.

27 IN EITHER SYSTEM, THE POPULATION WHICH IS
28 SURVEYED IS SELECTED THROUGH A STATISTICAL ANALYSIS
1 WHICH IS DESIGNED TO REFLECT THE VIEWING POPULOUS OR
2 SOME SUBSET OF THAT POPULOUS.

3 PLAINTIFF ARGUES THAT THE POPULATION
4 SELECTED BY DEFENDANT AND THE METHODOLOGY WHICH IT HAS
5 CHOSEN TO USE HAS THE EFFECT OF NOT TRULY REFLECTING
6 THE SPANISH-SPEAKING HISPANIC-AMERICAN CORE WHICH
7 PLAINTIFF SEEKS TO REACH WITH ITS T.V. PROGRAMMING.

8 IN EFFECT, PLAINTIFF ARGUES THAT THE NEW
9 RATINGS SYSTEM IS DECEPTIVE, UNFAIR, AND UNLAWFUL.

10 PLAINTIFF SUBMITS THAT IT WILL RESULT IN A GROSSLY
11 INACCURATE UNDERSTATEMENT OF THE TARGETED VIEWING
12 PUBLIC AND, ACCORDING TO PLAINTIFF, LOWER RATINGS FOR
12 CERTAIN KEY SEGMENTS.

14 SINCE DEFENDANT IS A VIRTUAL MONOPOLY AND
15 RELIED ON BY ALL IN THE TELEVISION MEDIA, PLAINTIFF
16 ARGUES THAT DEFENDANT'S FAILURE TO ADEQUATELY REFLECT
17 THE TARGETED POPULATION WILL RESULT IN LESS INCOME,
18 FEWER PROGRAMS, LOSS OF JOBS, AND A DISPARATE IMPACT ON
19 THE LATINO/SPANISH-SPEAKING COMMUNITY. IT, THEREFORE,
20 PLAINTIFF ARGUES, IS IN VIOLATION OF BUSINESS &
20 PROFESSIONS CODE SECTION 17200 AND 17500.

22 DEFENDANT RESPONDS THAT IT IS THE "GOLD"
23 STANDARD FOR TELEVISION RATING AND THAT OVER THE
24 DECADES IT HAS DEVELOPED AND REDEVELOPED ITS
25 METHODOLOGY TO BEST REFLECT IN A STATISTICAL SENSE THE
26 TRUE PICTURE OF THE VIEWING PUBLIC.

27 DEFENDANT ARGUES THAT IT SPENDS MILLIONS
28 OF DOLLARS AND THOUSANDS OF HOURS ATTEMPTING TO PERFECT
1 ITS SERVICES.

2 DEFENDANT SUBMITS THAT THE L.P.M. IS
3 SIMPLY THE LATEST VARIATION ON THAT PROGRESS THAT IT
4 HAS MADE IN PROVIDING SERVICE TO ITS CUSTOMERS,
3 INCLUDING UNIVISION.

6 DEFENDANT STANDS BY ITS NEW METHODOLOGY,
7 REJECTS PLAINTIFF'S CONCLUSION THAT THE NEW SYSTEM
8 UNDERCOUNTS THE VIEWING PUBLIC AS DESCRIBED BY
9 PLAINTIFF, THAT WITHIN THE COMMUNITY WITHIN WHICH THE
10 PARTIES CO-EXIST, EVERYONE KNOWS THE LIMITATIONS OF
11 DEFENDANT'S SERVICES, AND FINALLY THAT THE INJUNCTION
13 SOUGHT HERE IMPLICATES FIRST AMENDMENT CONSIDERATIONS.

13 IN OTHER WORDS, DEFENDANT REJECTS
14 COMPLETELY PLAINTIFF'S ALLEGATIONS AND STANDS BY ITS
15 PROCESS AND CLAIMS THE RIGHT TO ROLL OUT ITS NEW
15 PROGRAM WITHOUT INTERFERENCE BY THE COURT.

17 THIS MOTION MUST BE DENIED AND MUST BE
18 DENIED FOR SEVERAL REASONS.

19 THE TRIAL COURTS EVALUATE TWO
20 INTERRELATED FACTORS WHEN DECIDING WHETHER TO ISSUE A
21 PRELIMINARY INJUNCTION: (1) THE LIKELIHOOD THAT THE
22 PLAINTIFF WILL PREVAIL ON THE MERITS AT TRIAL; AND (2)
23 THE INTERIM HARM THAT THE PLAINTIFF WILL LIKELY SUSTAIN
24 IF THE INJUNCTION WERE DENIED, AS COMPARED TO THE HARM
25 THAT THE DEFENDANT WILL LIKELY SUFFER IF THE INJUNCTION
26 WERE ISSUED.

27 IN EVALUATING INTERIM HARM, THE TRIAL
28 COURT COMPARES THE INJURY TO THE PLAINTIFF IN THE
1 ABSENCES OF AN INJUNCTION TO THE INJURY THE DEFENDANT
2 IS LIKELY TO SUFFER IF AN INJUNCTION IS ISSUED.

3 AS TO THE ISSUE OF LIKELIHOOD OF
4 PREVAILING, THE MOTION IS DENIED BECAUSE PLAINTIFFS
5 HAVE FAILED TO SHOW THAT THE LOCAL PEOPLE METER RATING
6 SYSTEM, WHICH UTILIZES MECHANICAL RATING DEVICES,
7 VIOLATES THE UNFAIR COMPETITION LAW.

8 TO ESTABLISH A CLAIM UNDER BUSINESS &
9 PROFESSIONS CODE SECTION 17200, A PLAINTIFF MUST SHOW
10 THAT THE DEFENDANT'S CONDUCT WAS UNLAWFUL, UNFAIR, OR
11 FRAUDULENT.

12 THE CALIFORNIA SUPREME COURT,
13 UNFORTUNATELY, HAS IN MANY WAYS INTENTIONALLY LEFT THE
14 DEFINITION OF WHAT CONSTITUTES "UNFAIR" -- WHAT
15 CONSTITUTES AN "UNFAIR" BUSINESS PRACTICE TO THE

16 DISCRETION OF THE TRIAL COURTS.

17 THE TEST OF WHETHER A BUSINESS PRACTICE
18 IS UNFAIR INVOLVES AN EXAMINATION OF THAT PRACTICE'S
19 IMPACT ON THE ALLEGED VICTIM, BALANCED AGAINST THE
20 REASONS, JUSTIFICATIONS AND MOTIVES OF THE ALLEGED
21 WRONGDOER.

22 UNFAIR BUSINESS PRACTICES OFFEND
22 PUBLIC -- STRIKE THAT.

24 UNFAIR BUSINESS PRACTICES OFFEND PUBLIC
25 POLICY OR IS IMMORAL, UNETHICAL, OR INJURIOUS TO THE
26 CONSUMERS. FOR FRAUDULENT BUSINESS ACTIVITIES, THE
27 PLAINTIFF MUST SHOW THAT THE MEMBERS OF THE PUBLIC ARE
28 LIKELY TO BE DECEIVED.

1 HERE, PLAINTIFFS HAVE FAILED TO SHOW THAT
2 THE L.P.M. RATINGS SYSTEM CONSTITUTES AN UNFAIR,
3 UNLAWFUL, OR FRAUDULENT BUSINESS PRACTICE. PLAINTIFFS'
4 EVIDENCE ONLY EXHIBITS SOME PUBLIC AND EXPERT
4 DISAPPROVAL OF THE SYSTEM -- OF THE SYSTEM, PERIOD.

6 THIS EVIDENCE DOES NOT ACTUALLY SHOW THAT
7 THE RATINGS SYSTEM IS FLAWED. PLAINTIFFS' WITNESS,
8 MS. SHAGRIN, FAILS TO ESTABLISH TO THE COURT'S
9 SATISFACTION L.P.M.'S FLAWED PROCESS, SAMPLING, OR
9 WEIGHTING.

11 MS. SHAGRIN STATES THAT THE SAMPLES
12 CONTAIN FAR TOO MANY HISPANIC HOUSEHOLDS THAT ARE
13 ENGLISH-SPEAKING AND TOO FEW SPANISH-SPEAKING AND
14 HISPANIC HOUSEHOLDS WITH THE HEAD OF THE HOUSEHOLD IN
17 THE 18 TO 34 DEMOGRAPHIC SUBGROUP.

16 MS. SHAGRIN FAILS TO PROVIDE ANY EVIDENCE
17 OR ANALYSIS BUT RELIES ON THE CHART, ATTACHED AS

18 EXHIBIT 9. MS. SHAGRIN HAS FAILED TO PROVIDE ANY
19 SUBSTANTIAL FOUNDATION EXHIBITING THAT THE L.P.M.
20 SYSTEM IS CLEARLY FLAWED AND THEREFORE UNFAIR,
21 UNLAWFUL, OR FRAUDULENT.

22 PLAINTIFFS ALSO FAILED TO SHOW ANY
23 DECEPTIVE IMPACT ON THE PUBLIC. FURTHERMORE, FOR AN
24 UNFAIR PRACTICE, THIS COURT MUST FOCUS ON THE
25 DEFENDANT'S MOTIVE. BUT THE L.P.M. SYSTEM WAS
26 IMPLEMENTED TO ERADICATE THE ERRORS OF THE DIARY
27 SYSTEM, WHICH EXHIBITS DEFENDANT'S INNOCENT MOTIVE.

28 PLAINTIFFS HAVE FAILED TO SHOW THAT THE
1 UNDERLYING L.P.M. SYSTEM IS FLAWED; AND, THEREFORE, THE
2 MOTION MUST BE DENIED ON THIS BASIS.

3 MORE TROUBLING TO THE COURT ARE THE
4 IMPLICATIONS REGARDING FREE SPEECH. BECAUSE OF THIS,
5 THE MOTION, AGAIN, SHOULD BE DENIED BECAUSE PLAINTIFFS
5 SEEK TO ENJOIN DEFENDANT'S FIRST AMENDMENT RIGHTS.

7 HERE, THE RATINGS SYSTEM MAY QUALIFY AS A
8 NON-COMMERCIAL SPEECH BECAUSE, THOUGH DEFENDANT IS A
9 COMMERCIAL SPEAKER, THE INTENDED AUDIENCE IS NOT
10 NECESSARILY LIKELY TO BE ACTUAL BUYERS OF DEFENDANT'S
10 SERVICES.

12 THOUGH ADVERTISING SELLERS AND BUYERS
13 RELY ON THE RATINGS SYSTEM, THE RATINGS SYSTEM ITSELF
14 DOES NOT PROPOSE A COMMERCIAL TRANSACTION. THEREFORE,
15 THE SPEECH CAN BE AFFORDED FULL FIRST AMENDMENT
18 PROTECTION.

17 AND AS THE INJUNCTIVE RELIEF SOUGHT IS
18 OVERLY-BROAD AND CONTENT-BASED, THE MOTION, I BELIEVE,
19 MUST BE DENIED WITHOUT ANY ADDITIONAL SHOWING TO
19 OVERCOME THE FIRST AMENDMENT PROHIBITIONS.

21 BUT EVEN IF THE SPEECH IS CONSIDERED
22 COMMERCIAL, PLAINTIFFS HAVE FAILED TO SHOW THAT THE
23 SPEECH IS FALSE. A COURT MAY ENJOIN FALSE COMMERCIAL
23 SPEECH.

25 HOWEVER, AS I'VE JUST MENTIONED, THE
26 PLAINTIFFS HAVE FAILED TO SHOW TO THE COURT'S
28 SATISFACTION THAT THE L.P.M. SYSTEM IS, IN FACT, FALSE.

28 FURTHERMORE, AS TO INTERIM AND
1 IRREPARABLE HARM, THE MOTION SHOULD BE AND MUST BE AND
2 IS DENIED BECAUSE THE INTERIM HARM DOES NOT WEIGH IN
3 FAVOR OF THE PLAINTIFFS.

4 HERE, PLAINTIFFS RELY ON SPECULATIVE
5 DECLARATIONS TO WARRANT INJUNCTIVE RELIEF. PLAINTIFFS
6 FAIL TO SUBMIT ANY EVIDENCE TO SUPPORT A LOSS OF
6 GOODWILL OR REPUTATION.

8 FURTHERMORE, ANY LOSS IN REVENUE IS
9 CALCULABLE. PLAINTIFFS HAVE ALSO FAILED TO SHOW THAT
10 THE INTERIM HARM WEIGHS IN THEIR FAVOR. AS JUST
11 MENTIONED -- STRIKE THAT. AS POINTED OUT BY DEFENDANT,
12 IT WILL INCUR SUBSTANTIAL COSTS FROM THE DELAY OF
12 IMPLEMENTATION OF THE L.P.M. -- L.P.M. SYSTEM.

14 DEFENDANT ALSO CORRECTLY POINTS OUT THAT
15 THIRD PARTIES, INCLUDING COMPETING NETWORKS, MAY
16 BENEFIT FROM THE NEW SYSTEM, WHICH HAS NOT BEEN SHOWN
17 TO BE FLAWED TO THE COURT'S SATISFACTION BY THE
18 PLAINTIFF. THEREFORE, THE MOTION IS DENIED ON THIS
20 BASIS AS WELL.

20 FINALLY, PLAINTIFFS' INJUNCTION SEEKS
21 ENJOINMENT OF ALL PUBLICATION OR DISSEMINATION OF DATA
22 FOR THE LOS ANGELES AREA BASED ON SAMPLES THAT

23 UNDER-REPRESENTS THE HISPANIC COMMUNICATION AND IS
24 OVERBROAD.

25 THIS COURT CANNOT ASCERTAIN AT THIS TIME
26 WHETHER L.P.M. ACTUALLY UNDER-REPRESENTS THE HISPANIC
27 COMMUNITY. AND, IN ANY EVENT, ANY INJUNCTION BASED ON
29 SO BROAD A REQUEST CREATES DIFFICULTY IN ENFORCEMENT.

1 AND THE MOTION WOULD, THEREFORE -- IS DENIED ON THIS
2 BASIS AS WELL.

3 A COMPLETE RESOLUTION OF THIS WEIGHTY
4 ISSUE MUST FOLLOW A FULL TRIAL ON THE MATTER, NOT THE
5 LIMITED SNAPSHOT OF THE EVIDENCE WHICH THE COURT HAS
6 BEFORE IT IN THE CURRENT VEHICLE OF A MOTION FOR A
7 PRELIMINARY INJUNCTION.

8 FOR THESE REASONS THE MOTION IS,
8 THEREFORE, DENIED.

10 DEFENDANT TO GIVE NOTICE.

11

12 (FOLLOWING PROCEEDINGS WERE
13 REPORTED BUT NOT ORDERED
14 TRANSCRIBED AT THIS TIME.)