

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.<sup>8</sup>

**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.

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<sup>8</sup> 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.<sup>9</sup>

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.

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<sup>9</sup> 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 "Kathleen Wallman".

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 20<sup>th</sup> 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,

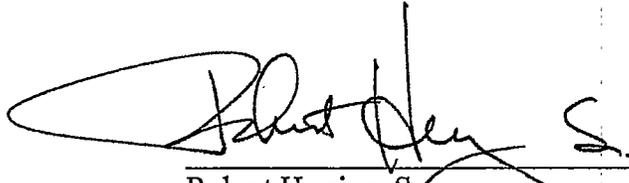


Kathleen Wallman  
Kathleen Wallman, PLLC  
Attorney for WealthTV

**Complainant's Signature**

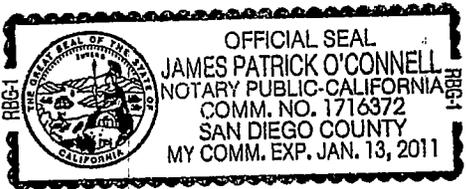
Robert Herring, Sr., Chief Executive Officer of Herring Broadcasting, Inc., and  
Charles Herring, President of Herring Broadcasting, Inc., hereby sign this Carriage  
Access Complaint on behalf of Herring Broadcasting, Inc.

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, 20 07,  
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  
Herring Broadcasting, Inc.  
4757 Morena Blvd.  
San Diego, CA 92117  
(858) 270-6900

## LIST OF EXHIBITS

- Exhibit 1: Prefiling Notice - Letter from Kathleen Wallman on behalf of WealthTV to Marc Apfelbaum-Lawrence, May 7, 2007
- Exhibit 2: Affidavit of Charles Herring
- Exhibit 3: Affidavit of Robert Herring, Sr.
- Exhibit 4: iN DEMAND Press Release, "MOJO is Rising!! INHD Prepares for a May 1 Lightswitch when the HI-DEF Cable Channel Becomes MOJO," March 3, 2007
- Exhibit 5: E-mail from Time Warner Cable – San Antonio programming and marketing manager Scott Pleyte to WealthTV's Vice President of Affiliate Sales, John Ghiorzi
- Exhibit 6: E-mail from Time Warner Cable – San Antonio programming and marketing manager Scott Pleyte to Mickey Carter, Time Warner Cable headquarters, regarding carriage of WealthTV
- Exhibit 7: Time Warner Cable, Inc. – San Antonio Agreement with WealthTV for High Definition Video on Demand
- Exhibit 8: Time Warner Cable Inc. – San Antonio Press Release, "TIME WARNER CABLE AND WEALTHTV DELIVER FREE ON DEMAND HIGH DEFINITION PROGRAMMING TO SAN ANTONIO VIEWERS, Major HD VOD Roll-out Hits San Antonio Customers First," March 2, 2007
- Exhibit 9: WealthTV Banner Ad provided to Time Warner Cable, Inc. – San Antonio and displayed on the Time Warner Cable, Inc. – San Antonio website.
- Exhibit 10: "INHD's New Moniker: MOJO," Mike Reynolds, Multichannel News, March 19, 2007 ([www.multichannel.com/article/CA6425787.html](http://www.multichannel.com/article/CA6425787.html))
- Exhibit 11: "Q&A: Robert D. Jacobson, iN DEMAND Networks," James Hibberd TVWeek, March 22, 2007)  
[www.tvweek.com/news/2007/03/qa\\_robert\\_d\\_jacobson\\_in\\_demand.php](http://www.tvweek.com/news/2007/03/qa_robert_d_jacobson_in_demand.php)
- Exhibit 12: WealthTV's Standard MSO Presentation 2004, Target Audience Slide
- Exhibit 13: MOJO's High Definition Video on Demand Press Release dated July 31, 2007.
- Exhibit 14: "Start-Up Cable Company to Focus on the Rich", Rachel Laing, San Diego Union Tribune, January 21, 2004

- Exhibit 15: Letter of Intent furnished by WealthTV to Time Warner Cable, Inc. on July 19, 2007
- Exhibit 16: Term sheet furnished by WealthTV to Time Warner Cable, Inc.
- Exhibit 17: Comments of Eric Goldberg, Time Warner Cable, on term sheet furnished by WealthTV to Time Warner Cable, Inc.
- Exhibit 18: Term sheet initialed by Charles Herring, President of WealthTV and returned to Time Warner Cable, Inc, dated September 5, 2007
- Exhibit 19: Letter Dated October 8, 2007 from Robert Herring, Sr, of WealthTV to Mr. Eric Goldberg of Time Warner Cable, Inc.
- Exhibit 20: Sampling of WealthTV Viewer Comments and Requests

**Exhibit 1:**

Prefiling Notice - Letter from Kathleen Wallman on behalf of WealthTV to  
Marc Apfelbaum-Lawrence, May 7, 2007

KATHLEEN WALLMAN  
WALLMAN CONSULTING, LLC  
9332 RAMEY LANE  
GREAT FALLS, VIRGINIA 22066

May 7, 2007

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

Via Certified Mail and Fax at 203-328-0690

**Re: WealthTV -- Pre-Filing Notice of FCC Complaint**

Dear Mr. Lawrence-Apfelbaum:

By this letter, Herring Broadcasting, Inc., doing business as WealthTV (hereinafter "WealthTV"), is providing the pre-filing notice required by Section 76.1302(b) of the rules of the Federal Communications Commission in advance of the filing of a carriage agreement complaint for your company's violation of Sections 76.1301 of the FCC's rules.

WealthTV is an independent programming vendor. As Time Warner Cable (hereinafter "TWC") is aware, WealthTV has been seeking access from TWC continuously for approximately three years, and TWC has refused to grant access to WealthTV on the ground that there is no room in TWC's channel line up for WealthTV. As TWC also knows, WealthTV had several conversations with senior TWC officials during the time that it has been seeking such access, and during that time, has discussed WealthTV's existing programming and plans for future programming offerings. Particularly in light of these discussions, WealthTV was especially troubled to learn that TWC plans to launch an affiliated channel, MOJO, which offers programming that is substantially similar to that offered by WealthTV. TWC's ability to find room in its channel line up for its imitation of WealthTV but for WealthTV itself is further evidence of TWC's intentional discrimination against WealthTV in favor of its own affiliated programming in violation of the applicable laws and regulations.

TWC's unlawful conduct has caused WealthTV significant and continuing damages by denying WealthTV access to TWC's subscribers. Specifically, WealthTV believes that TWC is in violation of Section 76.1301(a), which prohibits TWC from requiring "a financial interest in any program service as a condition for carriage...", which is the effect of TWC's decision to find room for its own version of WealthTV but not WealthTV itself. WealthTV also believes that TWC is in violation of Section 76.1301(c), which prohibits TWC from engaging 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."

Please indicate at your earliest convenience your availability to discuss WealthTV's forthcoming FCC complaint and the evidence to be included therein during the ten day window provided for in the regulations. You may contact me at the above address, by telephone at 202-641-5387 or by email at [wallmank@wallman.com](mailto:wallmank@wallman.com)

Very truly yours,

*//signed//*

Kathleen M.H. Wallman  
Adviser to WealthTV

**Exhibit 2:**

Affidavit of Charles Herring



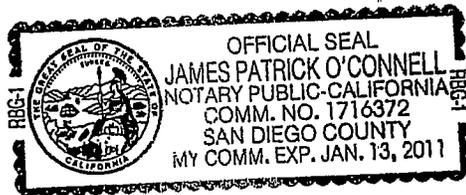
Charles Herring

Subscribed and sworn before me this 19<sup>th</sup> day of December, 2007.

James Patrick O'Connell  
Name of Notary

My Commission expires: Jan 13, 2011

State of California, County of San Diego  
Subscribed and sworn to (or affirmed) before me  
on this 19 day of December, 2007,  
by 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



**Exhibit 3:**

Affidavit of Robert Herring, Sr.

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

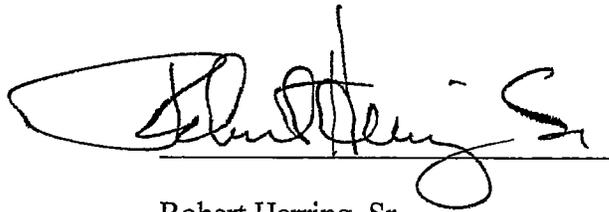
HERRING BROADCASTING, INC., Complainant,	)	
	)	
v.	)	File No. _____
	)	
TIME WARNER CABLE, INC.	)	
Defendant	)	

**Affidavit of Robert Herring, Sr.**

County of San Diego        )  
  )  
State of California        )

Robert Herring, Sr., being duly sworn, hereby states the following:

1.       My name is Robert Herring, Sr. I am Chairman and Chief Executive Officer of Herring Broadcasting, Inc., the complainant, which does business as WealthTV, of which I am Co-Founder and Chief Executive Officer. This affidavit is made pursuant to Section 76.1302 (c)(2) of the Rules of the Federal Communications Commission.
  
2.       I have read the complaint in this matter. To the best of my knowledge, information and belief formed based upon my participation in the events recounted in the complaint and after reasonable inquiry, the complaint is well grounded in fact and is warranted under Commission regulations and policies. The complaint is not interposed for any improper purpose.

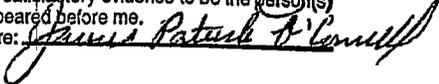


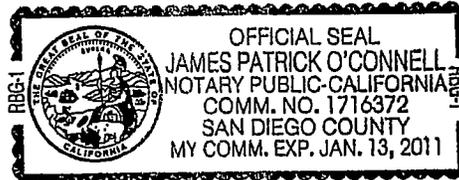
Robert Herring, Sr.

Subscribed and sworn before me this 19 day of December, 2007.

  
Name of Notary

My Commission expires: Jan 13, 2011

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



**Exhibit 4:**

Press Release of MOJO dated 3/19/07, see:  
<http://www.MOJOhd.com/press/view/2>

**MOJO IS RISING!! INHD PREPARES FOR A MAY 1 LIGHTSWITCH WHEN  
THE HI-DEF CABLE CHANNEL BECOMES MOJO**

**Network Unveils Spring 2007 Slate of Original Hi Def Programming: King of  
Miami, I Bet You, London Live, Three Sheets and Uncorked with Billy Merritt**

**NEW YORK - March 19, 2007** - On May 1, 2007, high definition cable channel **INHD** officially changes its name to **MOJO**, announced Robert D. Jacobson, President & CEO, iN DEMAND Networks (MOJO's parent company). **MOJO** was born in June, 2006 as a prime-time programming block on the **INHD** network, with original high-def series geared to males who are "active affluents" - dynamic, intelligent, adventurous. Since then, the network has further developed the **MOJO** brand and expanded its slate of programming, with new series spanning adventure travel, comedy, finance, music, cuisine and spirits and high tech toys. **MOJO** is one of the most widely distributed HD networks, carried by every major US cable provider.

As part of the transition, **MOJO** is rolling out new original programming throughout prime time beginning immediately. The new spring slate is produced around the globe, filmed with HD cameras and presented full-time in exquisite 1080i format and Dolby 5.1 sound. The diverse shows include an eclectic mix of witty and urbane comedy, sports, adventurous travel, music and the finer pleasures of food and drink. Premiering over the next several months are *Uncorked with Billy Merritt*, *King of Miami*, *I Bet You* and *The Show*. Returning are two favorites, *London Live* and *Three Sheets* (starring the popular Zane Lamprey).

**MOJO's spring slate of originals include (production credits at end of release):**

**London Live** explodes out of the gate with season two of the high velocity series hosted by Joe Mace at the Koko Club. Twenty new episodes showcase the bands that are rocking the UK music scene. Just a few of the 60+ performers include The Killers, My Chemical Romance, Beck and The Charlatans. (Returning Series Premiered February 16)

**Three Sheets** - American comedian Zane Lamprey returns for season two of this colorful and unconventional travelogue/international pub-crawl to learn about new cultures; meet and befriend locals; and visit breweries, restaurants, pubs, and watering holes across Europe, Asia and the Americas. (Returning series - Premiered March 14. Every Wed. at 9PM ET/PT)

**Uncorked with Billy Merritt** introduces comedian Billy Merritt, a man with ordinary beer tastes who seeks to raise his sophistication level by learning all about wine. He visits vineyards, festivals and gourmet restaurants in North America and Europe. In this "guy's guy guide to wine," Merritt discovers that wine lovers are real people, too. Merritt is known to audiences as a regular on *Late Night with Conan O'Brien*. (New Original Series - Premiered: March 14 Every Wed. at 9:30PM ET/PT)

**King of Miami** In an innovative series that blurs the lines between fiction, reality and comedy, comedian Dave Hill moves from his parents' basement in suburban Cleveland to undertake a bold (if misguided) journey to become THE guy in Miami. Donning a fake tan and an ill-fitting white suit, he aspires to become one of the beautiful people. He interviews important Miami trendsetters - realtors, personal trainers and politicians - to unearth the secrets to his potential success. Despite his "wannabe" persona in the series, the real Dave Hill was just named one of the "10 Comics to Watch" by Variety Magazine (2.28.07) (New Original Series - Premieres May 7 at 9:30PM ET/PT)

**I Bet You** - What happens when two best friends who are championship-caliber poker pros decide to bet and dare each other on anything outrageous that inspires them? In this high-energy series, Phil ("the Unabomber") Laak and Antonio ("The Magician") Esfandiari wander the streets of America wagering on everything: from who can make more tips tending bar, to who can find Danny DeVito's home using the Hollywood "Map to the Stars," to who can better coach an amateur poker player. (New Original Series - Premieres May 7. Every Monday at 9PM ET/PT)

**The Show** follows six driven and talented baseball prospects as they attempt to make the leap from The Arizona Diamondbacks' Triple A affiliate to the major leagues. Viewers will see what goes on beyond the dugout and why these guys will sacrifice almost anything to achieve their dream: getting to "the show." Joe Mantegna (Godfather III, Searching for Bobby Fischer) narrates. (New Series Premieres in Summer)

"This spring, we've brought back some of our viewers' favorite shows," said David Asch, Senior Vice President of Programming, iN DEMAND Networks. "But we've pushed the envelope by adding some truly unique original series. We hope this combination further ingrains **MOJO** as a destination for compelling, unique and ultimately entertaining programming."

**About INHD/MOJO** Since it launched in 2003, **INHD** has been a pioneer in hi-def television and is among the most widely distributed HD networks on cable. It consistently earns high marks from HD viewers for the pristine quality of its 1080i picture and Dolby 5.1 sound and ranks as a viewer favorite. **MOJO** was created exclusively for the discerning male, with attitude, wit and style, and becomes the network name as of May 1, 2007. Original shows are about lifestyle interests including high tech, finance, adventurous travel, music, cuisine and spirits. Other programming includes comedy-reality series, high profile professional and college sports, movies, concerts and big events. The network is **100% hi-definition and available as part of the hi-definition offerings from such cable operators as Time Warner Cable, Comcast, Cox Communications, Bright House Networks, Cablevision, Mediacom and Patriot.** INHD is owned by iN DEMAND Networks, whose shareholders are Comcast iN DEMAND Holdings, Inc., Cox Communications Holdings, Inc., and Time Warner Entertainment - Advance/Newhouse Partnership.

**Production credits below: For all shows, Executive Producer for INHD is Emilio Nunez. Siobhan Graham is Supervising Producer.**

**London Live** is produced by 3DD Entertainment of London. Series Producer is Dominic Lobo. Executive Producers are Andrew Higgin and Dominic Saville.

**I Bet You** is produced by NorthSouth Productions. Mark Hickman and Thom Hinkle, Executive Producers.

**Three Sheets** is produced by Screaming Flea Productions. Matt Chan and Mike Kelly are Executive Producers. Christina Kindwall is Field Producer.

**Uncorked** is produced by Helicon Media. Sandy Green is Executive Producer.

**King of Miami** is produced by Local Woman Films. Elyse Roth is Executive Producer.

**The Show** is produced by Al Roker Productions.

For more information, please write to [pressoffice@indemand.com](mailto:pressoffice@indemand.com) or call 646.638.8206.

###

**Exhibit 5:**

E-mail from Time Warner Cable – San Antonio programming and marketing manager Scott Pleyte to WeathTV's Vice President of Affiliate Sales, John Ghorzi

**From:** Pleyte, Scott [mailto:scott.pleyte@twcable.com]  
**Sent:** Wednesday, January 17, 2007 4:27 PM  
**To:** John Ghorzi  
**Subject:** RE: Thank you

Hi John,

I just talked to Mickey and also Charles. I told them both that we like your programming and would like to add you once we go Switch Digital. Mickey said he would work on a Corporate agreement for us. I also mentioned the possibility with sampling some FOD content which he sounded interested in pursuing as well.

Thank you,  
Scott

Scott Pleyte  
Time Warner Cable-San Antonio  
210-582-9413

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**From:** John Ghorzi [mailto:john.ghorzi@wealthtv.net]  
**Sent:** Wednesday, January 17, 2007 4:18 PM  
**To:** Pleyte, Scott  
**Subject:** RE: Thank you

Hey Scott,

I missed the call...was at another appointment. Charles says the call went well, but it would certainly be helpful if you would drop Mickey an E-mail with your support and your thoughts on WealthTV and TW San Antonio. I am sure you have his E-mail (but just in case) [Mickey.carter@twcable.com](mailto:Mickey.carter@twcable.com).

I think working together we can get this done and have it prove very successful for Time Warner Cable San Antonio as well as WealthTV.

I look forward to working with you.

Let me know what I can do to assist you.

Thanks Scott.  
John

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**From:** Pleyte, Scott [mailto:scott.pleyte@twcable.com]  
**Sent:** Wednesday, January 17, 2007 3:30 PM  
**To:** John Ghorzi  
**Subject:** RE: Thank you

Hi John,

Thank you for the message. Were you on the call with Mickey Carter today? How did it go?