IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
COX ENTERPRISES, INC., SET-TOP CABLE TELEVISION BOX ANTITRUST LITIGATION	)	**12-ML-02048-C**
	)	
This document relates to:	)	
	)	
Richard Healy,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Cox Communications, Inc.,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S OPPOSITION TO
COX'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW,
OR IN THE ALTERNATIVE FOR A NEW TRIAL

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I. INTRODUCTION

After hearing nine days of evidence and deliberating for close to three days, a jury of ten Oklahomans found that: (1) Defendant Cox Communications, Inc. ("Cox") violated the antitrust laws by tying its provision of Premium Cable to the rental of a set-top box ("STB") from Cox and (2) this tie injured the class of Oklahoma City Cox Premium Cable subscribers certified by this Court in the amount of $6.313 million. The jury's verdict was more than justified given the evidence at trial and the Court's carefully considered jury instructions and there is no reason for this Court to now overturn this verdict.

Indeed, Cox's Renewed Motion for Judgment as a Matter of Law, or in the Alternative for a New Trial (Docket No. 417) lacks any discussion of the evidence at trial in light of the instructions actually given to the jury. Rather, many of Cox's arguments explicitly or implicitly involve the Court's refusal to give certain jury instructions requested by Cox, such as its version of the substantial foreclosure instruction and its proposed instructions on the rule of reason tying claim and the "package" approach to damages. But the Court's jury instructions accurately stated the law and provide no basis for a new trial. And erroneous or incomplete jury instructions certainly cannot support entry of judgment in favor of Cox. *See Affiliated FM Ins. Co. v. Neosho Const. Co., Inc.*, 192 F.R.D. 662, 668 n.1 (D. Kan. 2000) ("The remedy for misleading jury instructions … is a new trial, not judgment as a matter of law."); *Power Integrations, Inc. v. Fairchild Semiconductor Intern., Inc.*, 585 F. Supp. 2d 562, 567 (D. Del. 2008) ("As for Fairchild's argument regarding error in the jury instructions, the Court notes at the outset that

judgment as a matter of law is not the appropriate remedy for such errors.") The Court should therefore deny Cox's motion and enter judgment in favor of Plaintiff in accordance with the jury's verdict.

II. ARGUMENT

A. Standard of Review

A motion for judgment as a matter of law pursuant to Fed. R. Civ. Proc. 50(b) "may only be granted where the evidence points all one way and is susceptible of no reasonable inferences that sustain the position of the party against whom the motion is made." *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 680 (10th Cir. 1981) (internal quotation omitted); *see also Crumpacker v. Kan. Dept. of Human Resources*, 474 F.3d 747, 751 (10th Cir. 2007) ("[U]nless the proof is all one way or so overwhelmingly in favor of the movant as to permit no other rational conclusion, judgment as a matter of law is improper.") (Internal quotation omitted.) Thus, "[t]he court may not reweigh the evidence or substitute its judgment for the jury's." *Klein v. Grynberg*, 44 F.3d 1497, 1503 (10th Cir. 1995). A Rule 50 motion should be "cautiously and sparingly granted" because it "deprives the nonmoving party of a determination of the facts by a jury." *Joyce*, 651 F.2d at 680.

The standard for a motion for judgment as a matter of law is the same as that for a Rule 56 motion for summary judgment. *Farthing v. City of Shawnee, Kan.*, 39 F.3d 1131, 1140 n.10 (10th Cir. 1994). The similarity of these standards is especially significant here because Cox's post-trial motion is largely a rehash of its unsuccessful motion for

summary judgment (Docket No. 143) and the Court has already considered and rejected many of the arguments Cox makes here.

The Court's consideration of Cox's instant Rule 50(b) motion should differ from its consideration of Cox's earlier Rule 50(a) motion for two reasons. First, the Court must consider *all* the evidence presented at trial, not just the evidence presented in Plaintiff's case. *See Peterson v. Hager*, 724 F.2d 851 (10th Cir. 1984) ("Even though the court may have erred in denying the initial [Rule 50(a)] motion, this error is cured if subsequent testimony on behalf of the moving party repairs the defects of his opponents case."), *quoting* 9 Wright & Miller, *Federal Practice and Procedure: Civil* § 2534 (1971). Second, the Court must assess this evidence in light of the Court's actual instructions to the jury. *See SEC v. Battenberg*, No. 06-14891, 2011 WL 3472619, *4 (E.D. Mich. Aug. 9, 2011) (evaluating defendant's Rule 50b motion in light of jury instructions because "[t]he law of the case is reflected in the instructions to the jury").

B. Plaintiff Presented Ample Evidence in Support of Each Element of His Claim

Cox argues that Plaintiff "failed to present evidence sufficient to get to a jury on at least three separate elements of [his] claim: (1) coercion, (2) substantial foreclosure of commerce and (3) market power." (Docket No. 417 at 2.) In fact, Plaintiff presented documents and testimony from a number of witnesses to support all three of these elements, and the jury properly found in Plaintiff's favor on these elements.

1. Plaintiff Proved Coercion

Cox argues that the jury could not find that it coerced its subscribers into renting its own STBs in order to get Premium Cable for two reasons. "First, plaintiffs offered no evidence that Cox's conduct forced consumers to lease a set-top box from Cox to get two-way services." (Docket No. 417 at 2.) "Second, where the tied product generally was not available for sale from another firm through no fault of the defendant, there cannot be any coercion as a matter of law." (*Id.*)

When Cox moved for summary judgment, it made these same arguments. The Court denied summary judgment, stating that "[t]he evidence presented by Plaintiff establishes that access to Defendant's premium cable is conditioned upon rental of a set-top box." (Docket No. 198 at 4.) The evidence Plaintiff presented at trial is even stronger than the evidence submitted to oppose summary judgment.

This evidence showed that Cox created, maintained, and exploited the tie throughout the class period for its financial benefit. With respect to whether Cox's tie "force[d] or compel[led]" Cox Premium Cable subscriber "into the purchase" of an STB that they "might have preferred to purchase elsewhere on different terms," the evidence was overwhelming. (Docket No. 422, Instruction No. 12.)

Cox Premium Cable subscribers are entitled to all the services for which they paid

Cox's trade name for what Plaintiff described as Premium Cable is Advanced TV. Cox's Advanced TV includes dozens of linear channels as well as interactive services such as pay-per-view ("PPV"), video-on-demand ("VOD") and an interactive programming guide ("IPG"), and Cox subscribers pay more to receive this level of

service. 10/15 AM Tr. 71:24–72:19 (Steve Necessary). Because class members pay for these services, they are of course entitled to access them. *Id.* 72:20-23. Despite this, as set forth below, Cox consistently told its Advanced TV subscribers that they could not access *all* the services they paid for unless they also rented an STB from Cox. And despite withholding these services from subscribers who chose not to rent an STB from Cox, Cox never offered a discount to those subscribers to account for the services they were unable to access. *Id.* 107:11-18.

Cox told its Advanced TV customers that they could not receive all the benefits of the services they had paid for unless they also rented an STB from Cox

Cox consistently announced to Cox subscribers, both in Oklahoma City and nationwide, that they could not access all the features of Cox Advanced TV without renting an STB from Cox. This announcement was contained on its customer website for Oklahoma City, PX-032,[1] and in the "one source of truth" document used to train its salespeople in Oklahoma City, PX-033, p. 17. Cox also told customers who ordered their service through the Internet and over the telephone that they must order an STB from Cox if they wanted to receive two-way services. Court Exhibit 1, Deposition of Colleen Langner, 61:3-63:25; Court Exhibit 2, Deposition of Charles Wise, 12:13—13:19. In short, as Steve Necessary confirmed, during the class period a Cox subscriber was required to lease an STB from Cox to receive all the content and services of Cox's Advanced TV. 10/15 AM Tr. 73:22-25. *See also* 10/13 PM Tr. 59:19–60:9 (Percy Kirk).

[1]Mr. Kirk testified that the language on the website regarding the need to rent an STB from Cox to receive all two-way services was consistent throughout the class period. 10/13 PM Tr. 60:1-5.

Although Cox's witnesses tried to disclaim the existence of any Cox "policy" requiring subscribers to rent an STB from Cox to access two-way services, Cox's consistent statements to its customers summarized above had the same effect as an express corporate policy and the jury was entitled to credit Cox's contemporaneous documents over its witnesses' after-the-fact testimony. *See Tic-X Press, Inc. v. Omni Promotions Co. of Ga.*, 815 F.3d 1407, 1418 (11th Cir. 1987) (coercion may be found where "the facts and circumstances surrounding the transaction as a practical matter forced the buyer into purchasing the tied product").

Cox's announcement of the tie did not simply state the truth about the limitations of CableCARD devices

Cox argued that these statements to its customers did not constitute coercion but were rather truthful statements about the capabilities of non-Cox CableCARD devices. But this argument was contradicted by the testimony of Cox's own witnesses. Cox executives testified that the equivalent to two-way services were actually available for CableCARD subscribers.[2] Both Percy Kirk and Mollie Andrews, for example, testified that Cox PPV was readily available over the telephone. 10/14 AM Tr. 8:11-21 & 10/21 AM Tr. 124:22–125:10. Ms. Andrews also testified that VOD content was available over the Internet. 10/22 AM Tr. 34:19-25.[3]

[2] Although both Cox STBs and third-party STBs used CableCARDs, as used here "CableCARD customer" refers to customers who accessed Cox Premium Cable through a device other than an STB rented from Cox.

[3] Cox witnesses also testified that equivalent services to Cox VOD and the IPG were also available from other sources. 10/14 AM Tr. 97:8–98:1 (Percy Kirk) (CableCARD customers had access to other IPGs and VOD libraries); 10/16 PM Tr. 39:16-25 (Dallas

Cox, however, disseminated inaccurate information about these alternatives to discourage use of CableCARD devices. Cox instructed its Oklahoma City sales personnel to emphasize "the benefits of services they will be missing such as … PPV events and sports programming," PX-033, p. 17, even though PPV sporting events such as University of Oklahoma football games had *always* been available by telephone in Oklahoma City. 10/21 PM Tr. 14:12-18 (Mollie Andrews). And at a corporate level, Cox made a conscious decision not to publicize the increased availability of PPV programming to CableCARD customers. PX-039, p. 1 ("We aren't planning any announcements or marketing around the new policy, but essentially customers with a tuning adopter in your market should be allowed to purchase PPV Events and Sports Packages.")

Cox intentionally failed to market CableCARDs as an alternative to its STBs

More generally, Cox made a conscious decision at the very beginning of the class period to strangle CableCARD in its cradle, and thus prevent even nascent competition for its own leased STBs. According to a Cox internal guide for implementation of CableCARD, "[n]o proactive marketing initiatives are planned for the launch of Cox One-Way Digital Plug-and-Play Services." PX-034, p. 14. This was because, according to Cox, "[e]very subscriber that receives digital cable through the use of a CableCARD

Clement) (non-Cox VOD was available through Redbox and the Internet); 10/21 PM Tr. 32:15–33:2 & 10/22 AM Tr. 40:22–41:3 (Mollie Andrews) (Cox purportedly found its customers preferred to receive VOD content from sources other than Cox and the IPG was not important because TiVo customers, for example, received a different IPG). Even if this testimony were credited by the jury, Cox never informed its subscribers about these alternatives.

device is one less subscriber who has access to two-way interactive services such as EOD, iPPV and Cox's IPG." *Id.,* p. 13-14. And as Lawrence Harte testified, Cox's "launch" of this new service did not conform to industry standards for the launch of a new product. 10/15 AM Tr. 25:7—26:1. Finally, Mr. Necessary admitted that Cox did not inform its customers between 2005 and 2008 that it would support an STB obtained from any source other than Cox. 10-15 PM Tr. 5:19—6:1.

Cox also implemented CableCARD so as to cause inconvenience and unnecessary costs to customers who chose this option. This served as another method of hindering the development of a competitive market for STBs. At one time, Cox as a matter of corporate policy decided not to launch certain new channels to CableCARD customers because of the mere possibility that those channels would in the future be delivered through switched video. PX-042, p. 4 ("[W]e are mandated by corporate to not launch new HD channels to cable card customers" because "[t]he feeling was that if we launched switched we would have to take channels away.")[4] Cox also treated CableCARD customers worse than Cox STB customers by prohibiting self-installation of CableCARDs for most of the class period and thus imposing an installation fee that STB customers could avoid. Court Exhibit 2, Deposition of Charles Wise, 20:7-15. To compound these problems, Cox minimized the extent of CableCARD installation problems in its reporting to the FCC by deciding that a problem resolved by a "repeat truck roll" would not be reported despite the obvious inconvenience to the customer from the need for repeated visits by Cox to

[4]Oklahoma City was not a switched video market. But as is clear from PX-042, certain channels were withheld from CableCARD customers because of the possibility that it may become a switched video market in the future.

install a CableCARD. PX-044, p. 1; Court Exhibit 5, Deposition of Mark Ader, 58:3–59:23.

The failure of CableCARDs to create a competitive market for STBs for Cox customers both presaged and contributed to the eventual failure of Tru2Way. For example, Best Buy was reluctant to support Tru2Way because of its perception that cable companies had not supported CableCARDs. DX-205 ("They did not want the experience of the one-way cable card product to happen again.")

Despite agreeing to the "Two-Way MOU" to avoid regulation, Cox merely claimed to support Tru2Way without actually doing so

According to Cox's internal analysis comparing the financial benefits of continued leasing of STBs with a Tru2Way retail market, Cox concluded that there was no "compelling financial reasons to push Tru2Way." PX-069. Cox acted accordingly. Cox resisted a Tru2way retail market, and sought only grudging "technical compliance" with the Tru2Way requirements it had agreed to – so it could say it had deployed Tru2Way with a "straight face" while "holding our nose." PX-052. And while Cox spent a substantial amount of money to prepare its "head ends" for Tru2Way, as Mr. Necessary admitted, such expenditures were required by the terms of the Two-Way MOU, to which Cox agreed to avoid additional regulation by the FCC. 10/16 AM Tr. 56:7-25. Furthermore, Cox benefited from these expenditures despite the failure of Tru2Way at retail because adopting Tru2Way standards for the STBs it leases to customers allowed Cox to standardize equipment across its markets. 10/15 PM Tr. 81:7-16.

Cox did inform customers in small-print annual notices starting in 2009 that it would support Tru2Way when products came to market (*e.g.* DX-064). But no such disclosure was provided through means by which customers would actually be likely to obtain information, such as the Cox website or calls with Cox customer service representatives. The difference in the amount and quality of marketing Cox devoted to discouraging customers from using CableCARDs as opposed to informing customers about alternatives speaks for itself.

Cox delayed TiVo's entry into the market for two-way STBs

Both TiVo and Cox witnesses testified that TiVo wanted to sell an STB at retail that provided access to Cox's two-way services and that the parties entered into an agreement in 2010 to do so. 10/15 PM Tr. 28:6-25 (Steve Necessary); Court Exhibit 9, Deposition Jeff Klugman, 153:5—155:5.[5] Cox and TiVo went so far as to announce this new initiative to the FCC and, as Mr. Necessary testified, they would not have made this announcement had it not been technologically feasible to bring this product to market quickly. 10/15 PM Tr. 29:12-21. Despite this, there was no such product during the class period. *Id.* 28:10-12; Court Exhibit 9, Deposition Jeff Klugman, 157:6-10.

[5]Cox argues, on the basis of *Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), that it had no obligation to assist third parties and the jury was so instructed. As *Trinko* itself recognized, however, the right to refuse to deal with other firms is not unqualified. In discussing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the Court noted that it "found significance in the defendant's decision to cease participation in a cooperative venture" because "[t]he unilateral termination of a voluntary (*and thus presumably profitable)* course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko*, 540 U.S. at 409 (emphasis and alterations in original). Similarly, the jury here could readily infer that Cox's recalcitrance in executing its voluntary ventures, such as the TiVo deal and the MOUs, shows its conduct worked towards an "anticompetitive end."

According to TiVo, the reason no such product existed during the class period was because of an indemnification issue between Cox and Motorola and not any technical constraint. Court Exhibit 9, Deposition Jeff Klugman, 157:6-161:8. The jury could reasonably have found that this purported "indemnification issue" was manufactured by Cox to prevent the TiVo deal from being completed. This is particularly true in light of Mr. Necessary's attempt to blame the delay on an indemnification issue between TiVo and Motorola, contrary to Mr. Klugman's testimony. 10/16 AM Tr. 31:16-18. Of course, the jury was entitled to weigh the relative credibility of these two accounts.

Cox unjustifiably refused to allow a secondary market

Cox had a policy not to support STBs purchased on eBay. PX-036. Although the purported reason for this policy was the possibility of theft, Cox had no evidence that the STB at issue had been stolen. 10/23 AM Tr. 50:9-12 (Sean Prince). And while Cox claimed that its decision on this STB purchased on eBay was an isolated occurrence, Mr. Prince agreed that the purpose of the conference call involving numerous Cox personnel in which Cox formulated this policy was to "figure out, generally, what you [*i.e.,* Cox] were going to do about devices like this that were purchased on eBay." *Id.* 48:2-10.

Almost all Cox Advanced TV customers complied with the tie

All of Cox's conduct points in the same direction. At every turn and from the beginning of the class period to its end, Cox hindered or delayed the emergence of any viable competitor for Cox's own STBs. And although Cox claims that this was the result of market forces beyond its control, the jury could note that all these purported market forces "conveniently" worked in way to maximize financial benefit to Cox.

As a result of Cox's representations and conduct as outlined above, it is no surprise that almost all Cox Advanced TV customers complied with the tie. Mr. Necessary admitted that only a "small percentage" of Cox Advanced TV customers leased a CableCARD rather than an STB from Cox. 10/15 AM Tr. 74:10-13. And Professor Justine Hastings testified that less than one-half of one percent of Cox's Advanced TV subscribers leased a CableCARD instead of a Cox STB. 10/20 AM Tr. 13:2-8. *See also* PX-049, pp. 5-7. Evidence of such a high rate of compliance with the tie is enough to avoid judgment as a matter of law on the coercion element of a tying claim. *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 915 (9th Cir. 2007) ("The fact that only … about 14% made a separate purchase may indicate some degree of coercion, placing this issue in the realm of disputed facts that must be tendered to the jury.")

It strains credulity to believe that this extraordinarily high rate of compliance was the result of voluntary choice by Cox Advanced TV subscribers rather than coercion or conditioning by Cox. There is no reason to believe these customers so overwhelmingly preferred renting to purchasing or that they were so fond of Cox that they would not even consider alternative suppliers. Indeed, when offered the option to rent modems from Cox or purchase modems from another source to access Cox's Internet service, Cox customers almost always choose to purchase. PX-049, p. 22.

The conditions for "zero foreclosure" are not present here

Cox also argues that "where the tied product generally was not available for sale from another firm through no fault of the defendant, there cannot be any coercion as a matter of law." (Docket No. 417 at 3.) This is simply a renewal of Cox's rejected

summary judgment argument that "[i]f no one else offered two-way set-top boxes on a standalone basis at retail, then Cox is entitled to summary judgment because there were no competing sales that could have been foreclosed." (Docket No. 143 at 22.) In rejecting this argument, the Court reasoned that "the evidence presented by Plaintiff would support a jury's determination that it was Cox's improper tying arrangement and anti-competitive conduct that precluded entry of any competitor into the marketplace." (Docket No. 198 at 4–5 (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984)).) Furthermore, "the fact that there are no competitors in the marketplace does not foreclose the finding that [Cox] engaged in anti-competitive behavior, but rather suggests that its ability to foreclose the market was significant enough to be responsible for the lack of competition." (Docket No. 198 at 5.)

Cox's argument fails for several additional reasons. First, to the extent Cox is suggesting that Plaintiff has a burden to show which manufacturers were likely to offer STBs for sale at retail in the absence of a tie, Cox is wrong; the *per se* test requires no examination of the dynamics of the market for the tied product, with a limited exception (discussed below) that does not apply here. For more than 50 years, the Supreme Court has recognized that the very purpose of the *per se* rule, including the *per se* rule against tying, is to "avoid[] the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). That is exactly the inquiry Cox is demanding when it asks Plaintiff to

delve into the "go-to-market decisions of set-top box manufacturers" who are not parties to the case. (Docket No. 417 at 4.)[6]

Instead, the test for *per se* illegality is much simpler: "(1) two separate products, (2) a tie—or conditioning of the sale of one product on the purchase of another, (3) sufficient economic power in the tying product market, and (4) a substantial volume of commerce affected in the tied product market." *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Pubs., Inc.*, 63 F.3d 1540, 1546 (10th Cir. 1995). An examination of the anticompetitive effects of the tie is not on this list, nor could it be, because such an examination is relevant only to the rule of reason. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1017 (10th Cir. 1998) ("A rule of reason analysis first requires a determination of whether the challenged restraint has a substantially adverse effect on competition.").

Second, the limited exception for which an analysis of the tied product market is necessary is called "zero foreclosure" but the conditions to find zero foreclosure do not apply here. "Zero foreclosure exists where the tied product is completely unwanted by the buyer." *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1089 (9th Cir. 2009). *See also Jefferson Parish Hosp.*, 466 U.S. at 12 ("[W]hen a purchaser is 'forced' to buy a product he would *not have otherwise bought* even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.") (Emphasis

[6]As described below, Plaintiff did present evidence that the consumer electronics industry wanted to participate in the market for two-way STBs and that Panasonic and Samsung actually manufactured and sold at retail Tru2Way televisions.

added.) Cox, however, has never claimed that Premium Cable customers do not want STBs. To the contrary, it is undisputed that these customers need an STB or its equivalent to enjoy all the features of Premium Cable.

Zero foreclosure can also exist when no one other than the seller of the tying product was *capable* of selling the tied product. For example, the Second Circuit held that the Sherman Act did not prohibit the Buffalo Bills from tying the purchase of season tickets to the purchase of preseason tickets because the Bills had a *lawful* monopoly on the sale of preseason tickets; "there were neither actual nor *potential* competitors to the Bills in the professional football market." *Coniglio v. Highwood Servs., Inc.*, 495 F.2d 1286, 1291 (2d Cir. 1974) (emphasis added). Because no one else could sell Bills preseason tickets even without the tie, no competition was foreclosed. *Id.* at 1291–92. Cox does not claim that it (or anyone else) has a lawful monopoly on STBs that are compatible with its Premium Cable services but rather admits the opposite: "[M]ultiple consumer electronics companies made two-way set-top boxes that were fully compatible with Cox's system between 2005 and 2012 . . . ." (Docket No. 417 at 4.)[7] And as David Davies testified, Cisco STBs have been capable of accessing all Cox two-way services

[7] In *Jefferson Parish Hospital*, the Supreme Court held that the defendant hospital did not coerce patients into using anesthesiologists they would not otherwise have chosen "on the merits" for two reasons idiosyncratic to the health care industry: health insurance eliminated the patients' incentives to compare costs, and the patients were unable to compare the quality of anesthesiologists. 466 U.S. at 7–8, 27–29. Cox has never argued that these conditions hold in the consumer electronics industry. In fact, testimony at trial showed that the consumer electronics industry is characterized by strong competition on price and quality. Court Exhibit 8, Deposition of Brian Markwalter, 66:5–69:1. Moreover, jurors are entitled to use their life experience and common sense to conclude that shoppers for consumer electronics compare prices and quality.

since 2005 and Cisco licensed its security technology so other manufacturers would have the same ability. 10/22 AM Tr. 50:1-4 & 54:14—55:7.

Unless there are *no potential* sellers of the tied product (other than the seller of the tying product), it simply does not matter that no one has yet chosen to sell the tied product. *See Fox Motors, Inc. v. Mazda Distribs. (Gulf) Inc.*, 806 F.2d 953, 957 (10th Cir. 1986) ("Power in one market may not be employed to impair competition on the merits with existing *or potential* rivals in another market, nor may purchasers be denied the freedom to select the best buy in the latter market.") (emphasis added) (citing *Jefferson Parish Hosp.*, 466 U.S. at 15–16). This is because, as courts have recognized, the existence of a tie itself discourages competition by raising barriers to entry by potential competitors. *See Tic-X-Press, Inc.,* 815 F.2d at 1417–18 ("[I]t is unlikely that any prospective competitor in the ticketing services market would be willing or able to invest the amount of money required to develop a computerized system in light of the virtual impossibility of ever getting any of the Omni business so long as there is a tying arrangement."); *see also* Docket No. 422, Instruction No. 14 ("[I]f you find that Defendant's conduct hindered the development of a market, you may consider this evidence of coercion.")

There is ample evidence of actual competitors in the STB market such that the zero foreclosure principle does not apply. Mr. Necessary testified that there was a competitive market for STBs in Oklahoma City because TiVo was available here. 10/15 AM Tr. 104:2-9. And while TiVo (and other one-way STBs) were in Plaintiff's view an imperfect substitute for an STB rented from Cox, Cox's witnesses testified that the two

were comparable. *See, e.g.,* 10/16 AM Tr. 23:4-18 (Mr. Necessary testified that TiVo offered all Cox channels and customers could access Cox PPV over the telephone) and note 3, *supra*. Jud Cary from CableLabs testified that 25-30 manufacturers were certified to offer CableCARD-enabled products at retail. 10/21 AM Tr. 102:13-22. Resellers on eBay are another actual competitor.

And the record discloses a plethora of additional, potential competitors. Cox itself expected that consumer electronics companies would participate in the retail market for two-way STBs, PX-066, p. 4 and DX-041, p. 7, and Mr. Markwalter testified to widespread interest among the CEA's membership in such a market. Court Exhibit 8, Deposition of Brian Markwalter, 78:2–79:2 and 98:10–100:4. Panasonic and Samsung actually manufactured and sold Tru2Way capable televisions. 10/15 PM Tr. 94:25—95:11 & 10/16 AM Tr. 16:11—17:7 (Steve Necessary). And CableLabs certified a number of other Tru2Way products for sale at retail, including those from Sony, LG, and ADB. 10/21 AM Tr. 106:14—107:5 (Jud Cary).

Moreover, in Canada, where there is no tying and the market for cable services is about the same size as Cox's customer base, STBs are available for purchase at retail. 10/19 AM Tr. 25:10—26:23 (Justine Hastings) & PX-105. Similarly, Stephen Goldstein testified that Samsung sells STBs at retail all over the world. 10/21 AM Tr. 87:2-10. The Canadian and worldwide market for STBs are no different than the potential market for STBs absent Cox's tie. If Cox had not effectively locked away its $500 million per year

market for STBs through the tie,[8] the jury could have easily inferred that consumer electronics companies would have rushed to compete for this enormous market.

In short, Plaintiff more than satisfied his burden to present objective evidence that would allow a reasonable jury to conclude that Cox "force[d] or compel[led]" Cox Advanced TV subscribers to lease STBs from Cox they "might have preferred to purchase elsewhere on different terms." (Docket No. 422, Instruction No. 12.) And the zero foreclosure principle does not apply here or, at the very least, there is a genuine factual dispute as to whether it applies, a dispute that must be resolved in favor of Plaintiff.

2. Plaintiff Offered Undisputed Evidence That the Tie Affected a Substantial Volume of Commerce

Cox's argument regarding "substantial foreclosure" completely disregards the instruction given to the jury on that element. The jury was instructed to find in favor of Plaintiff on this element "[i]f the dollar amount of defendant's lease of set-top boxes was substantial." (Docket No. 422, Instruction No. 19.) As Cox cannot dispute, Plaintiff proved this element in accordance with this instruction. 10/13 PM Tr. 67:23—68:18 (Percy Kirk); 10/15 PM Tr. 6:3-7 (Steve Necessary); 10/19 AM Tr. 23:6—24:19 (Justine Hastings); PX-049, pp. 16-17.

[8]Cisco sells about $500 million of STBs to Cox per year. 10/22 AM Tr. 58:23—59:13 (David Davies). Because Cox's STBs are purchased centrally from Atlanta, 10/14 AM Tr. 86:23—87:8 (Percy Kirk), it is appropriate to judge the size of the potential STB market based on Cox's overall STB purchases and not just those for Oklahoma City.

This instruction was correct. Under Tenth Circuit law, if Plaintiff proves the first three elements of his claim (Premium Cable and STB are separate markets, Cox uses Premium Cable to coerce subscribers into leasing a Cox STB, and Cox has sufficient market power in the market for Premium Cable to restrain trade), the foreclosure element requires only that the *dollar value* of the affected commerce be "substantial"—nothing more. *Multistate Legal Studies, Inc.*, 63 F.3d at 1547 ("A tie-in constitutes a per se section 1 violation if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied product market."); *see also Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048, 1097 (D. Colo. 2004) (in a *per se* tying case, "once the defendant is found to have appreciable market power in the tying market, the ability to leverage this power to restrain trade in the tied market is presumed" and the "substantial volume of commerce" element requires only "greater than a *de minimis*" effect).

Finally, Cox faults Plaintiff for failing "to offer any evidence regarding the geographic scope of the tied product market." Again, the Court declined to instruct the jury on this issue. And as Plaintiff explained in his motion to reject Cox's proposed jury instruction on this issue, there is no support whatsoever for Cox's claim that a plaintiff must define the geographic scope of the tied product market in a *per se* case. (Docket No. 403.)

3. Plaintiff Presented Extensive Evidence of Cox's Market Power

This Court has already held that Plaintiff has offered enough evidence of market power for this issue to be submitted to the jury. In denying Cox summary judgment on this issue, the Court stated that "Plaintiff has offered evidence from which a reasonable jury could determine that Defendant had sufficient market power to compel acceptance of the tied product." (Docket No. 198 at 4.) This conclusion was based on the expert report of Professor Justine Hastings, who testified about market power in accordance with that report at trial. There is no reason for a different conclusion now.

An accepted method of determining market power is to analyze the structure of the relevant market, including the number of competitors, market share of each competitor, concentration, and barriers to entry. *Cohlmia v. St. John Medical Ctr.*, 693 F.3d 1269, 1282 (10th Cir. 2012) ("Power over price and competition may depend on various market characteristics, such as market trends, number and strength of other competitors, and entry barriers.") (internal quotation omitted); *see also* Docket No. 422, Instruction No. 18 (instructing the jury that it should consider Cox's market share and that if it over 30 percent, "you must then consider whether that is an indicator of its power to raise prices without loss of appreciable business")

Professor Hastings worked within this well-established framework and calculated that Cox's market share for Premium Cable in the Oklahoma City Market during the relevant time period ranged from 72.2% and 58.1%, well above the threshold on which the jury was instructed. She also considered the competitors in that market, market concentration, and barriers to entry. 10/20 AM Tr. 46:1—48:8 & 53:23—62:14. Finally,

she summarized "direct evidence" of Cox's market power, such as its ability to engage in price discrimination and its use of strategic pricing behavior. *Id.* at 62:15—73:21.

Beyond Professor Hastings's testimony, Plaintiff presented significant evidence from which the jury could find that Cox itself believed it had market power in the relevant product and geographic market. Cox's presentations to its lenders provide evidence of Cox's strong market position. *See* PX-002 - 007 (*e.g.*, PX-006, p. 11 – Cox noting to lenders "we enjoy a first mover advantage and maintain a strong competitive position in the market.") And other documents show that Cox was undertaking pricing as a dominant firm in the market would and believed it could raise prices without losing an appreciable amount of customers. *See, e.g.*, PX-085 ("Pricing in an Oligopoly"). Taken together, these documents provide direct evidence that Cox viewed itself as the dominant player in the tying product market with the power to control the prevailing prices in that market.

There can be no doubt that there was sufficient evidence of Cox's market power in the market for Premium Cable in Oklahoma City to support the jury's verdict. To avoid this obvious conclusion, Cox moves the goalposts and relies (as it did on its motion for summary judgment) on effectively defining the relevant product market as two-way services. But Cox's own expert does not claim that this is the relevant product market and the Court held that Cox could not advance this argument at trial. (Docket No. 370 at 2-3.) While Cox attempts to evade this ruling by claiming that Plaintiff is somehow required to prove that Cox has market power in just the *part* of the relevant product market that includes two-way services, this argument is nonsensical and contrary to the Court's jury

instructions, which asked the jury to consider whether Cox had market power "in the market for 'Premium Cable.'" (Docket No. 422, Instruction No. 15.) Cox has offered no authority for requiring proof of market power in *part* of a relevant product market. And there is no way to prove this even if it were required because two-way services are not an actual product. Mr. Necessary established this at trial, when he admitted that Cox does not sell PPV, VOD, and the IPG apart from its Advanced TV product. 10/16 AM Tr. 47:14-21.

C. Plaintiff's Evidence Supported a *Per Se* Instruction

This Court, over frequent objections by Cox, declined to instruct the jury on the elements of a rule of reason tying claim and instead only instructed the jury on the elements of a *per se* tying claim. This was correct because a tying arrangement is unlawful *per se* if four elements are met: "(1) two separate products, (2) a tie-or conditioning of the sale of one product on the purchase of another, (3) sufficient economic power in the tying product market, and (4) a substantial volume of commerce affected in the tied product market." *Multistate Legal Studies, Inc.*, 63 F.3d at 1546. Plaintiff's evidence at trial, which supported all four elements, justified the *per se* instruction that the Court gave to the jury.[9]

[9]Even if the rule of reason instruction was appropriate, because of the NCRPA or for another reason, as set forth above the remedy is a new trial with a rule of reason instruction and not entry of judgment in favor of Cox. *See Affiliated FM Ins. Co.*, 192 F.R.D. at 668 n.1; *Power Integrations, Inc.*, 585 F. Supp. 2d at 567.

1. Plaintiff Established a Substantial Potential for Impact on Competition

Cox argues that *per se* treatment of its tying claim is inappropriate because Plaintiff has not shown a substantial potential for impact on competition. Like many other issues that Cox has raised, this was settled on summary judgment when the Court held:

> The evidence presented by Plaintiff establishes that access to Defendant's premium cable is conditioned upon rental of a set-top box. Second, as the Court found in the class certification phase, Plaintiff has offered evidence from which a reasonable jury could determine that Defendant had sufficient market power to compel acceptance of the tied product. And finally, the evidence presented by Plaintiff demonstrates Defendant's actions affect a substantial volume of commerce. *Thus, Plaintiff has offered evidence from which a reasonable jury could find that a likelihood of exploitation exists.* "Fulfillment of these conditions establishes a *presumption* of an unlawful restraint of trade and generally warrants per se condemnation under the antitrust laws."

(Docket No. 198 at 4 (quoting *Fox Motors, Inc.*, 806 F.2d at 957 (emphasis added). Because Plaintiff offered enough evidence at trial to support the jury's finding in his favor on each of these elements, as explained above, this evidence also supports a finding or presumption of the impact of competition from Cox's tie. In fact, the case from which Cox takes the phrase "substantial potential for impact on competition," *Jefferson Parish Hospital*, held that "[w]hen the seller's share of the market is high, . . . the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate." 466 U.S. at 17 (citations omitted). Plaintiff's evidence of market power easily met this standard as set forth above.

2. The National Cooperative Research and Production Act Does Not Protect Cox's Tying Arrangement

The National Cooperative Research and Production Act, 15 U.S.C. § 4301 *et seq.*, ("NCRPA") has nothing to do with this case. Neither its plain terms nor its purpose requires that tying arrangements be judged by the rule of reason.

The NCRPA requires the rule of reason when evaluating the conduct of:

> (1) any person in making or performing a contract to carry out a joint venture, or
>
> (2) a standards development organization while engaged in a standards development activity

15 U.S.C. § 4302. The first time Cox raised the NCRPA as potentially controlling the rule of decision was in a letter sent to the Court and Plaintiff's counsel two days before the docket call, and eight days before the start of trial. (Docket No. 383-1.) Even then, Cox did not have its story straight. Cox argued that its own actions should be protected because it is a party to CableLabs, a "standards development organization." *Id.* at 2. But Cox either failed to realize or failed to disclose that the NCRPA states that "[t]he term 'standards development organization' shall not, for purposes of this chapter, include the parties participating in the standards development organization." 15 U.S.C. § 4301(a)(8). This was fatal to Cox's argument.

Having hit a brick wall, Cox changed its story in the middle of trial, arguing in its Rule 50 motion that "CableLabs is a joint venture . . . , and Cox has been a member of

CableLabs since it was founded in the late 1980s." (Docket No. 406 at 10–11.)[10] The first problem with this argument is that the NCRPA does not apply to anything a joint venture's members might do; it only applies to conduct "in making or performing a contract to carry out a joint venture." 15 U.S.C. § 4302(1). Tying the purchase of Premium Cable to the rental of an STB is not "making or performing a contract to carry out a joint venture," and Cox has not claimed otherwise. Deceiving customers about whether they could access PPV without an STB is not "making or performing a contract to carry out a joint venture," and Cox has not claimed otherwise. Dissuading subscribers from using CableCARD-compatible devices is not "making or performing a contract to carry out a joint venture," and Cox has not claimed otherwise. In fact, Cox has never proffered any "contract to carry out a joint venture" or explained what provision in that contract is relevant to Plaintiff's case. The reason is obvious: this argument was made up on the fly sometime between October 5 and October 21.

Another problem with Cox's argument is that the NCRPA is not a "get out of jail free" card for activities that are otherwise unlawful *per se*. The Senate Report accompanying the National Cooperative Research Act of 1984, Pub. L. No. 98-462, which is the source of the provision on which Cox relies, states that "[t]he rule of reason analysis prescribed in Section [4302] does not affect or alter antitrust analysis of

[10]On the morning of October 21, after Plaintiff rested his case, Cox's counsel represented to the Court, "We can file [our Rule 50 motion] as soon as somebody makes a phone call." 10/21 AM Tr. 55:18–19. Several hours passed without a filing, during which time Mr. Cary of CableLabs testified. After he was excused, Cox filed its motion, which included a brand-new assertion regarding CableLabs' activities and its qualification under the NCRPA as a "joint venture." By waiting to file its motion, Cox denied Plaintiff his only opportunity to explore Cox's assertion with a witness employed by CableLabs.

agreements not within the scope of this Act." S. Rep. 98-427, 1984 U.S.C.C.A.N. 3105, 3110; *see also id.* at 3114 ("Section [4302] clarifies existing legal standards solely with respect to joint R&D programs . . . ."). More recently, the Department of Justice and Federal Trade Commission have issued guidance stating, "The NCRPA accords rule of reason treatment to certain production collaborations. However, the statute permits per se challenges, in appropriate circumstances, to a variety of activities, including agreements to jointly market the goods or services produced or to limit the participants' independent sale of goods or services produced outside the collaboration." Dept. of Justice and Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors, at 13 n.37 (*available at* https://www.ftc.gov/sites/default/files/documents/public_events/ joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ ftcdojguidelines-2.pdf). The type of tying that Cox has committed was unlawful *per se* for decades before the NCRPA was enacted, and it is unlawful *per se* today.

To shoehorn Plaintiff's claim into the NCRPA, Cox cites isolated instances of the word "problem" in descriptions of CableCARD in opening statements. (Docket No. 417 at 15.) In context, it is clear that each of these references was to the fact that CableCARD is not a reasonable substitute for an STB, not to CableCARD's "design parameters," as Cox describes it. *Id.* Similarly, Professor Hastings's testimony did not discuss any "design limitations" of CableCARD; she simply stated that CableCARD is not a reasonable substitute for an STB. None of this testimony remotely implicates the design of CableCARD. And even if it did, it would not trigger the rule of reason because

Plaintiff has not alleged that there was anything unlawful about Cox's participation in that design.

Further, Cox wildly overstates its cherry-picked selection of Mr. Harte's testimony related to CableCARD. As an aside in his testimony about steps he would have expected Cox to take upon a new product launch, he made one mention of a personal problem with a CableCARD he purchased:

> In a normal product launch, like the one that I was involved with in Canada, you're going to do many things when you launch a product. You're going to have training sessions for your staff. You're going to meet with retailers. You're going to have a war room and deal with the bugs. You've heard some talks about the CableCARDs. I had a CableCARD. I had problems with it. You're going to do a lot of things.
>
> In my research to find out what Cox did and did not do, I looked at their activities, I went through their depositions, I went through what their senior people did, and I found that they just didn't take the steps that a normal company would do when you're launching a new product.
>
> Q. Okay.
>
> A. I also looked at other companies that were offering retail set-top boxes and the things that they did. And Cox didn't do those things.

10/15 AM Tr. 25:14-26:5. Mr. Harte was criticizing Cox's product launch, and its ability to deal with problems, not relying on problems with CableCARD itself or suggesting any conspiracy by CableLabs. Cox simply mischaracterizes his testimony.

This case could barely be a worse fit for the NCRPA. As far as Plaintiff can tell, no court has ever invoked the NCRPA to provide the rule of decision in any case, much less in a tying case. This case should not be the first.

D. Plaintiff Proved Antitrust Injury, Causation, and Damages

1. The Evidence at Trial Supports the Jury's Damages Verdict

The evidence at trial showed that Cox's tie caused its subscribers to pay supra-competitive prices to rent STBs from Cox. Cox's conduct was the cause of these overcharges because Cox alone set and charged these prices. More fundamentally, as Professor Hastings explained, a tie forecloses competition on the merits because it takes customers out of the market for competing goods, thus discouraging entry. 10/19 AM Tr. 19:14—20:15. And as even Cox agreed, a market with real competition for STBs would lead to lower prices, both for Cox and for its customers. 10/15 AM Tr. 109:8-14 (Steve Necessary); 10/15 PM Tr. 67:17-25 (Steve Necessary: Tru2Way "would increase competition for set-top boxes" and "with competition came lower prices and more innovation"). This is consistent with the testimony of Mr. Markwalter of the CEA, who testified based on his extensive experience with the consumer electronics industry that competition has led to constant innovation and lower prices for consumers. Court Exhibit 8, Deposition of Brian Markwalter, 66:5—69:1.

The STB market is a notable exception to the general rule of competition in consumer electronics that lead to falling prices. As Professor Hastings observed, Cox increased its rental prices for STBs while Cox's acquisition price for STBs have steadily decreased. 10/21 AM Tr. 29:6—30:6. And Cox was able to obtain extraordinary returns on its investment in STBs, 18 per cent according to Professor Hastings, 10/20 AM Tr. 86:14-17, and 68 per cent for certain models of STBs according to an internal Cox document, PX-065, p. 10. Such extraordinarily high returns would inevitably attract

competition and thus lower prices in the absence of a tie. 10/20 AM Tr. 80:2—81:12 (Justine Hastings) (excess returns attract entry by competitors until price is bid down to a competitive level).

To be sure, other factors may have contributed to the lack of a competitive market for STBs. But Plaintiff is not required to prove that Cox's conduct was the *sole* cause of harm to consumers. *Law v. Nat'l Collegiate Athletic Ass'n*, 185 F.R.D. 324, 333 (D. Kan. 1999) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9 (1969)); Docket No. 422, Instruction No. 20 ("Plaintiff is not required to prove that Defendant's alleged antitrust violation was the sole cause of his injury; nor need Plaintiff eliminate all other possible causes of injury.") And while Cox claimed it was too small to affect the STB market, the number of its subscribers is similar to the number of subscribers of Canada's largest cable companies, which is sufficient to support a robust STB market with options for consumers to purchase STBs at retail or on the secondary market. 10/21 PM Tr. 11:20—12:4 (Justine Hastings).

Furthermore, Plaintiff's theory of injury is that Cox's tie caused Cox customers to pay supra-competitive prices for STBs by preventing competition in the market for STBs. This is a paradigmatic example of antitrust injury. As the Court instructed the jury, "[i]f Plaintiff's injuries were caused by a reduction in competition, acts that would lead to a reduction in competition, or acts that would otherwise harm consumers, then Plaintiff's injuries are antitrust injuries." (Docket No. 422, Instruction No. 20); *see also* Herbert Hovenkamp, *et al.*, IP and Antitrust, § 6.3b1 (2d ed. 2014) ("The clearest case for

antitrust damages is the purchaser who pays too much as a result of an antitrust violation. These overcharges are a classic form of antitrust injury.")

Finally, Professor Hastings' damages model is well-supported by precedent, as this Court implicitly found in rejecting Cox's *Daubert* challenge to that model. Calculating the gross overcharge has been an accepted method of determining damages in antitrust cases since at least *Hanover Shoe, Inc. v. Hanover Shoe Machine Corp.*, 392 U.S. 481, 489 (1968); *see also In re Relafen Antitrust Litig.*, 218 F.R.D. 337, 344 (D. Mass. 2003) ("Overcharges, the difference between the actual price and the *presumed competitive price* multiplied by the quantity purchased, provide what the Supreme Court has *long recognized* as the *principal measure of damages* for plaintiffs injured as customers, rather than as competitors.") (Emphasis added.)

In tying cases specifically, courts have upheld this same formula. *See, e.g.*, *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1347 (8th Cir. 1976) (in a tying case, damages are measured as "the amount of the overcharge, or the difference between the price paid for the tied items and the *fair market value* of the tied items at the time of purchase") (emphasis added). Damages for a tie can also be based on prices for the tied product on the open market. *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1054 (5th Cir. 1982) ("In a tying arrangement, the ordinary measure of damages would be the difference between the price actually paid for the tied product and the price at which the product could have been obtained on the open market."); *Pogue v. International Industries, Inc.*, 524 F.2d 342, 344 (6th Cir. 1975) (same). But where, as here, Cox's own conduct has prevented the development of an

open market, calculating prices based on a competitive market provides a "just and reasonable" method for estimating damages. (Docket No. 422, Instruction No. 22); *see also Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainly which his own wrong has created.")

In challenging the jury's verdict on damages, Cox again relies on *Comcast Corp. v. Behrend*, __ U.S. __, 133 S. Ct. 1426 (2012). This Court already considered the impact of *Comcast* on Professor Hastings' damages model and found that her model does not suffer from the flaws identified in *Comcast* because it "seeks to measure the harm suffered by class members as a result of the single theory advanced by Plaintiff – illegally tying rental of an STB to the purchase of 'Premium Cable.'" (Docket No. 123, p. 26.) There is no reason for a different conclusion now.

Cox also relies on *Berkey Photo v. Eastman Kodak Co.*, 603 F.2d 263, 297-98 (2nd Cir. 1979) and *Allegheny Pepsi-Cola Bottling Co. v. Mid-Atlantic Coca-Cola Bottling Co.*, 690 F.2d 411, 415 (4th Cir. 1982). *Berkey Photo*, however, dealt with allegedly supra-competitive prices caused at least in part by the defendant's lawful exercise of market power. This case would perhaps be relevant if Plaintiff were challenging Cox's prices for Premium Cable, but he is not. If, as the evidence at trial proved, Cox used its legitimate market power in Premium Cable to extract supracompetitive prices in the separate market for STBs, Cox is not entitled to any amount of "earned" excess profit in that second market. *Allegheny Pepsi-Cola Bottling Co.* is also inapposite, as it dealt with a suit between competitors and alleged damages

that flowed in part from legitimate competition between them, rather than from the complete lack of competition proven in this case.

2. The "Package Price Test" Does Not Apply Here

Cox's final argument, that Plaintiff has offered no evidence of the "price of the tied and tying package absent the alleged anticompetitive conduct," addresses an issue Plaintiff has briefed extensively, filed at Docket No. 388 and incorporated here by reference. In summary, this Court approved Professor Hastings' damages model, which calculates damages based on a competitive price for the tied product. While the "package price test" has been applied in some instances, here it belies economic reality because there is no evidence that Cox reduced the price of Premium Cable to offset its overcharges for STBs — in fact, this sort of subsidization is unlawful under Section 629 of the Communications Act of 1996. Moreover, the Tenth Circuit has never endorsed the package price test, and many courts have adopted an approach similar to Dr. Hastings' as set forth above. Thus, the jury could and did calculate damages based on Professor Hastings' opinions about the competitive price of STBs.

E. There is No Basis for a New Trial

As explained throughout this memorandum, the Court's jury instructions accurately stated the applicable law on a *per se* tying claim. Thus, the instructions (or lack of instructions requested by Cox) do not mandate a new trial. Furthermore, each of the jury's findings are well supported by the evidence at trial so such finding were certainly not "clearly or overwhelmingly against the weight of the evidence." *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 616-17 (10th Cir. 1984).

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Cox's motion for judgment as a matter of law, or in the alternative, for a new trial.

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Respectfully submitted,

/s/ Jason Kim
Todd M. Schneider
Jason Kim
Kyle G. Bates
SCHNEIDER WALLACE COTTRELL KONECKY WOTKYNS, LLP
2000 Powell Street, Suite 1400
Emeryville, California 94608
(415) 421-7100 (Telephone)
(415) 421-7105 (Facsimile)

Michael J. Blaschke, OBA No. 868
MICHAEL J. BLASCHKE, P.C.
3037 N.W. 63rd Street, Suite 205
Oklahoma City, Oklahoma 73116
(405) 562-7771 (Telephone)
(405) 285-9350 (Facsimile)

Rachel Lawrence Mor, OBA No. 11400
RACHEL LAWRENCE MOR, P.C.
3037 N.W. 63rd Street, Suite 205
Oklahoma City, Oklahoma 73116
(405) 562-7771 (Telephone)
(405) 285-9350 (Facsimile)

S. Randall Sullivan, OBA No. 11179
RANDALL SULLIVAN, P.C.
1900 N.W. Expressway, Suite 605
Oklahoma City, Oklahoma 73118
(405) 236-2264 (Telephone)
(405) 236-2193 (Facsimile)

A. Daniel Woska, OBA No. 9900
WoskaLawFirm, PLLC

772 N. Broadway, Mezzanine
Oklahoma City, OK 73102
(405) 657-2271 (Telephone)
(405) 285-7626 (Facsimile)

Allan Kanner
Cynthia St. Amant
KANNER & WHITELEY, LLC
701 Camp Street
New Orleans, Louisiana 70130
(504) 524-5777 (Telephone)
(504) 524-5763 (Facsimile)

Garrett W. Wotkyns
SCHNEIDER WALLACE COTTRELL
KONECKY WOTKYNS, LLP
8501 North Scottsdale Road, Suite 270
Scottsdale, Arizona 85253
(480) 428-0141 (Telephone)
(866) 505-8036 (Facsimile)

Joe R. Whatley, Jr.
WHATLEY KALLAS, LLP
380 Madison Avenue, 23rd Floor
New York, New York 10017
(212) 447-7070 (Telephone)
(212) 447-7077 (Facsimile)

W. Tucker Brown
WHATLEY KALLAS, LLP
2001 Park Place North
1000 Park Place Tower
Birmingham, Alabama 35203
(205) 328-9546 (Telephone)
(205) 328-9669 (Facsimile)

Henry C. Quillen
WHATLEY KALLAS, LLP
159 Middle Street, Suite 2C
Portsmouth, New Hampshire 03801
(603) 294-1591 (Telephone)
(800) 922-4851 (Facsimile)

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2015, I electronically transmitted the attached document to the Court Clerk using the ECF System for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to all ECF registrants.

/s/ Jason Kim