Nos. 15-6218 & 15-6222

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD HEALY,
Plaintiff/Appellant
vs.
COX COMMUNICATIONS, INC.,
Defendant/Appellee

ON APPEAL FROM THE ORDER GRANTING
DEFENDANT'S RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Case No. 5:12-ML-2048-C
The Honorable Robin J. Cauthron, United States District Judge

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PLAINTIFF/APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

GLOSSARY

Cox: Cox Communications, Inc. and its affiliates

FCC: United States Federal Communications Commission

Healy: Plaintiff / Appellant Richard Healy

IPG: Interactive Program Guide

MVPD: Multi-channel video programming distribution

Nationwide class action: *In re: Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation*, MDL No. 2048, No. 09-ML-02048-C (W.D. Okla.)

Oklahoma City Market: Those areas in and around Oklahoma City, Oklahoma where Cox has franchise agreements to provide cable services

One-Way MOU: A Memorandum of Understanding dated December 12, 2002 for the implementation of a "plug-and-play" standard to allow cable customers to access cable programming through a standardized device which came to be known as a CableCARD

PPV: Pay-per-view

Plaintiff: Appellant Richard Healy

Rule 50(b) Order: The district court's November 12, 2015 order granting judgment as a matter of law to Cox

STB: Set-top box

Two-Way MOU: An April 25, 2008 Memorandum of Understanding among Cox, other cable companies, and consumer-electronics companies covering two-way services (such as Cox's IPG, VOD, and PPV services) under the brand name "Tru2Way"

VOD: Video on demand

RELATED APPEALS

This appeal arises from a putative nationwide class action and regional class actions against Defendant / Appellee Cox Communications, Inc. and its affiliates ("Cox") alleging antitrust violations. There have been four prior appellate proceedings before this Court regarding this case. As discussed below, those appeals involved procedural issues regarding class certification and arbitration. This appeal is the first instance in which this Court has been asked to consider the substantive merits of the claims of the Plaintiff class.

In 2011, the plaintiffs in a case consolidated as MDL No. 2048, *In re: Cox Enterprises Inc. Set-Top Cable Television Box Antitrust Litig.,* before the Honorable Robin J. Cauthron, sought certification of a single, nationwide class of certain Cox cable television subscribers to litigate antitrust tying claims (the "nationwide class action"). The district court denied class certification and the plaintiffs petitioned this Court for interlocutory appeal pursuant to Fed. R. Civ. Proc. 23(f). This Court denied the petition. *Gelder v. Coxcom Inc.*, 696 F.3d 966 (10th Cir. 2012).

Prior to this Court's denial of the petition, counsel for the plaintiffs in the nationwide class action filed complaints in various federal district courts against Cox seeking certification of regional classes, *i.e.*, Cox cable television subscribers in certain geographic markets where Cox provides services, raising the same antitrust claims as were raised in the nationwide class action. These actions were again consolidated into MDL No. 2048 and proceeded again before Judge Cauthron as No. 12-ML-02048-C.

The parties agreed that the case for the Oklahoma City market, *Healy v. Cox Communications, Inc.* (the case from which this appeal arises), would be tried first as a bellwether. The district court certified a class of Cox Oklahoma City cable subscribers. Cox petitioned this Court for interlocutory appeal of the class certification order pursuant to Fed. R. Civ. Proc. 23(f) and this Court denied the petition. *In re: Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litig.*, No. 14-601, March 10, 2014.

After the class was certified in *Healy* and shortly before trial, Cox filed a motion to compel arbitration as to a large part of the Oklahoma City class. The district court denied the motion, finding that Cox had waived its purported right to arbitrate by its extensive litigation of *Healy*. Cox appealed and this Court affirmed the district court's finding of waiver. *In re: Cox Enterprises, Inc. Set-Top Cable Television Antitrust Litig.*, 790 F.3d 1112 (10th Cir. 2015). The Supreme Court denied Cox's petition for a writ of certiorari on January 11, 2016.

While the arbitration issue in *Healy* was on appeal, the district court allowed two other regional class actions, *Alwert v. Cox Communications, Inc.* and *Feldman v. Cox Communications, Inc.*, to proceed. Cox again filed motions to compel arbitration and the district court granted the motions. The plaintiffs in those cases appealed and the appeals were consolidated under No. 15-6076. Briefing and oral argument have been completed but this Court has not yet issued a decision.

JURISDICTIONAL STATEMENT

This appeal arises from an action filed in the United States District Court for the Western District of Oklahoma asserting claims under, among other things, the Sherman Antitrust Act, 15 U.S.C. § 1. Thus, the district court had original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and Fed. R. App. Proc. 4(a)(1)(A). The district court entered final judgment in favor of Defendant Cox Communications, Inc. ("Cox") on November 12, 2015. (Joint Appendix ("JA") III: 680, Doc. 439).[1] Plaintiff / Appellant Richard Healy ("Healy" or "Plaintiff") filed his notice of appeal on November 16, 2015 and has otherwise complied with all requirements to perfect this appeal.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by disregarding Supreme Court and Tenth Circuit precedent holding that a per se claim for unlawful tying under the Sherman Act is proven where, as here, the plaintiff shows that a tying arrangement imposed

[1] References to the Joint Appendix filed concurrently with this brief are JA followed by volume number and page(s). Where references are to a docket entry, the docket number is also provided after "Doc." Trial exhibit cross-references are provided as, respectively, "PX" (Plaintiff Exhibit), "DX" (Defendant Exhibit), or "CX" (Court Exhibit). Where the record citation is to trial testimony, a parenthetical after the citation identifies the witness whose testimony is being referenced.

by a defendant with market power over the tying product affects a substantial volume of commerce in the tied product market.

2. Whether the district court erred by requiring that Plaintiff identify the specific competitors who were unable to enter the market for set-top boxes ("STBs") as a result of Cox's tying arrangement in addition to proving that Cox's tying arrangement affects a substantial volume of commerce in the tied product market.

3. Whether the district court disregarded substantial evidence in the record identifying specific competitors who were deterred from entering the STB market or which faced entry barriers as a result of Cox's tying arrangement.

4. Whether, even if Plaintiff was required to identify the specific competitors who were unable to enter the market for STBs as a result of Cox's tying arrangement, the fact that such purported requirement was not set forth in the district court's jury instructions rendered those instructions misleading to the jury and necessitated a new trial rather than judgment in favor of Cox.

STATEMENT OF THE CASE

Plaintiff-Appellant Richard Healy, for himself and on behalf of the plaintiff class, appeals the judgment of the United States District Court for the Western District of Oklahoma in favor of Cox entered on November 12, 2015. (JA III: 680, Doc. 439.) The judgment followed a nine-day trial and three days of deliberations, after which the jury found that: (1) Cox had violated federal antitrust laws by tying its provision of Premium Cable to rental of an STB from Cox; and (2) this tie injured the plaintiff class in the amount of $6.313 million. (JA III: 613-14, Doc. 423.) Notwithstanding the jury's verdict, the district court entered judgment as a matter of law pursuant to Fed. R. Civ. Proc. 50(b) in favor of Cox. (JA III: 675-79, Doc. 438, hereinafter the "Rule 50(b) Order.")

Healy alleged that Cox engaged in a per se violation of Section 1 of the Sherman Act by employing an unlawful tying arrangement that required class members to rent STBs from Cox when they purchased Cox's Premium Cable services. Under Tenth Circuit precedent, the elements of a Section 1 tying claim are "(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. Publ's*, 63 F.3d 1540, 1546 (10th Cir. 1995). The plaintiff is also required to show that he suffered antitrust injury as a result of the tying arrangement.

At trial, the jury found that Plaintiff and the class had proven each and every element of the unlawful tying claim by a preponderance of the evidence. The jury found that Cox forced the class members to rent an STB from Cox as a condition of purchasing Premium Cable. (JA III: 613-14, Doc. 423.) The jury also found that

Cox's unlawful tying arrangement affected a substantial volume of commerce, which was proven by undisputed evidence that Cox obtained over $200 million in revenues from renting STBs during the class period. (*Id.*) Finally, the jury also found that Cox took advantage of its tying arrangement to charge the class members a substantial premium in the amount of $6.313 million above the price that it would have been able to charge them in an open market in the absence of Cox's tying arrangement and that this constituted antitrust injury caused by the tie (*Id.*)

In the Rule 50(b) Order, the district court found that the Plaintiff class had established all of the elements of a per se tying claim with two exceptions. (JA III: 675-79, Doc. 438.) First, the court found that the Plaintiff class had not satisfied the fourth element requiring that it show that "the alleged tying arrangement has foreclosed a substantial volume of commerce in Oklahoma City to other sellers or potential sellers of set-top boxes in the market for set-top boxes." (*Id.* at 676.) Second, the court found that the Plaintiff class had failed to show injury to its "business or property because of the alleged tying arrangement." (*Id.* at 679.)

With respect to the purported foreclosure element, the district court disregarded the jury's finding that the tying arrangement involved substantial revenues to Cox from renting STBs in Oklahoma City and its own instruction to the jury and previous rulings that such a finding would be sufficient to establish this element. The jury's finding, however, easily satisfies the applicable Tenth Circuit standard that "a tying arrangement must foreclose to competitors of the tied product a 'not insubstantial' volume of commerce," *Fox Motors, Inc. v. Mazda Distribs. (Gulf), Inc.*, 806 F.2d 953, 957 (10th Cir. 1986) (quoting *Northern Pac. Ry. Co. v. United States*, 365 U.S. 1, 5-6 (1958)), which is measured simply by the volume of sales affected by the tie, *Fortner Enters. Inc. v. United States Steel Corp.,* 394 U.S. 495, 499 (1969).

Where a tying arrangement affects such a large amount of commerce and is employed by a defendant with market power over the tying product, the arrangement is presumed to foreclose competition because in its absence competitors would likely come forward to compete for market share. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984) (the tying arrangement "could either harm existing competitors or create barriers to entry of new competitors in the market for the tied product"). For this reason, the Supreme Court has held that where, as here, a tying arrangement is imposed by a defendant with market power over the tying product and affects a substantial volume of commerce, "per se condemnation" is mandated. *Id.* at 16; *see also Systemcare, Inc. v. Wang Laboratories Corp*., 117 F.3d 1137, 1139 (10th Cir. 1997) ("A tying arrangement constitutes an unreasonable restraint of trade 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 market.'") (quoting *Eastman Kodak Co. v. Image Technical Servs., Inc.,* 504 U.S. 451, 462 (1992)).

Instead of following the traditional legal standard for finding that the tie affects a substantial volume of commerce, the district court entered judgment in favor of Cox because Plaintiff had allegedly failed to meet novel and additional proof requirements that the court fabricated out of whole cloth and imposed at the last minute after several years of litigation on these issues. Specifically, the district court required Plaintiff to identify the particular competitors that wanted to sell STBs at retail in Oklahoma City which did not enter the market because of Cox's tying arrangement. (JA III: 676, Doc. 417.) ("The Court finds that Plaintiff failed to offer evidence from which a jury could determine that any other manufacturer wished to sell set-top boxes at retail or that Cox acted in a manner to prevent any other manufacturer from selling set-top boxes at retail."). The district court did not cite any authority for its newly minted standard. As discussed below, this additional requirement that an antitrust plaintiff present evidence identifying the specific competitors who were excluded from the tied product market as a result of a tying arrangement is contrary to Supreme Court and Tenth Circuit precedent. Moreover, even if the district court's erroneous legal standard for this requirement were correct (which it is not), the record contains substantial evidence of specific competitors who were excluded from the STB market as a result of Cox's unlawful tying arrangement.

Finally, the District Court erred in disregarding substantial evidence that the Plaintiff class had suffered injury to its property by paying $6.313 million in supracompetitive STB rental rates as a result of Cox's tying arrangement. Accordingly, the district court's decision granting judgment in favor of Cox must be reversed and the jury's verdict restored.

I. Procedural History

A. The Proposed Nationwide Class Action

In 2009, subscribers to Cox's cable television service filed class actions in various jurisdictions against Cox for tying its Premium Cable service to rental of an STB from Cox in violation of federal and state antitrust laws.[2] At Cox's request, the United States Judicial Panel on Multidistrict Litigation consolidated these actions and transferred them to the Western District of Oklahoma for pretrial proceedings.

The plaintiffs moved to certify a nationwide class of certain Cox cable subscribers. The district court determined that the action could not proceed as a nationwide class and this Court declined to accept interlocutory appeal of the district court's order denying class certification. *Gelder*, 696 F.3d 966.

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[2] The procedural history of the nationwide MDL is recounted at *Gelder*, 696 F.3d at 968.

B. Litigation of the *Healy* Case and Pretrial Proceedings

Because the district court denied certification of a nationwide class, in 2012 Cox cable television subscribers refiled virtually identical class actions across the country, including *Healy*, which sought certification of a class of Cox subscribers in and around Oklahoma City, Oklahoma. (JA I: 65-92.) The district court granted Healy's motion to certify a class of Cox Oklahoma City subscribers pursuant to Fed. R. Civ. Proc. 23(b)(3) (JA 122-147, Doc. 123). The class was defined as:

> All persons in Cox's Oklahoma City Market who subscribed to Cox for residential Premium Cable from February 1, 2005 to the present and:
>
> (a) paid Cox a monthly rental fee equal to the Oklahoma City "rate card" charge for a recording STB (whether standard definition or high definition) including the separate "DVR Service Fee"; and/or
>
> (b) paid Cox a monthly rental fee equal to the Oklahoma City "rate card" charge for a non-recording high definition STB from February 2005 through February 2007 and/or February 2010 through December 2012; and/or
>
> (c) paid Cox a monthly rental fee equal to the Oklahoma City "rate card" charge for a non-recording standard definition STB from March 2007 through December 2007 and/or February 2012 through December 2012.[3]

[3]With respect to class members who rented STBs without the digital video recording ("DVR") feature, the class was defined to include only those months in which Plaintiff's expert calculated that Cox charged a supra-competitive rate.

(JA I: 123.) Cox petitioned this Court for permission to appeal the district court's order on class certification and the petition was denied. *In re: Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litig.*, No. 14-601, March 10, 2014.

As trial approached in *Healy*, Cox moved to compel arbitration against a large part of the plaintiff class and for summary judgment against the class on the same day. With respect to arbitration, the district court found that Cox had waived its purported right to compel arbitration and this finding has been upheld on appeal. *In re: Cox Enterprises, Inc. Set-Top Cable Television Antitrust Litig.*, 790 F.3d 1112.

The district court largely denied Cox's motion for summary judgment,[4] rejecting many of the same arguments Cox later raised in its successful Rule 50(b) motion. (JA I: 161-68, Doc. 198.) Specifically, while Cox argued that Plaintiff was required to prove that there were other willing sellers of STBs in the Oklahoma City Market during the class period, the district 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." (*Id.* at 164-65.) Furthermore, "the fact that there are no competitors in the marketplace does not foreclose the finding that

[4] Cox prevailed on one issue: the district court held that certain members of the Oklahoma City class could not pursue their claims Cox's rates were regulated for certain periods of time and for certain parts of Cox's Oklahoma City service area. That ruling is not on appeal.

[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." (*Id.* at 165.)

C. The *Healy* Trial

The trial in *Healy* was delayed while the arbitration issue was on appeal. A jury trial commenced on October 13, 2015. The trial lasted for nine days. During the trial, the jury heard evidence from 23 witnesses (live or by deposition), including four expert witnesses, and over 100 exhibits were introduced by the parties.

The case was submitted to the jury on only a per se tying theory. The district court instructed the jury on the so-called "foreclosure" element of the per se tying claim as follows:

> In determining whether Defendant has foreclosed a substantial amount of commerce in the relevant market for set-top boxes, you should first consider the total dollar amount of Defendant's leases of set-top boxes in Oklahoma City achieved by the tying arrangement in absolute terms. *If the dollar amount of Defendant's leases of set-top boxes was substantial, then you should find that Defendant has foreclosed a substantial amount of commerce.*

(JA III: 601, Doc. 422 (emphasis added).) This instruction was consistent with the district court's class certification order and order denying Cox summary judgment. (JA I: 144, Doc. 123 ("Plaintiff must show that a substantial amount of commerce in the tied product is involved, which is evaluated in terms of dollar volume, not market percentage."); JA I: 164-65, Doc. 198.)

After three days of deliberation, on October 29, 2015, the jury returned a special verdict in favor of Plaintiff and the class. (JA III: 613-14, Doc. 423.) The district court instructed the jury to find that Premium Cable and the STB are separate products. (JA III: 588, Doc. 422.) As to the issues on the special verdict form, the jury found that:

> 1. Defendant sold "Premium Cable" in the Oklahoma City subsystem only on the condition that Plaintiff also lease a set-top box from Defendant or … Defendant coerced Plaintiff into leasing a set-top box[;]
>
> 2. "Premium Cable" is a relevant product market and … Defendant has sufficient market power in the Oklahoma City subsystem in the market for "Premium Cable" to enable it to restrain trade in the market for set-top boxes[;]
>
> 3. The alleged tying arrangement foreclosed a substantial volume of commerce in the Oklahoma City subsystem to other sellers or potential sellers of set-top boxes in the market for set-top boxes[;]
>
> 4. Plaintiff was injured in his business or property because of the alleged tying arrangement[;] and
>
> 5. [The] amount of damages, if any, [that] the Plaintiff class [is] entitled to recover … [is] $6.313 million.

(JA III: 613-14, Doc. 423.)

D. Cox's Rule 50(b) Motion and This Appeal

After the jury returned its verdict, Cox filed its Renewed Motion for Judgment as a Matter of Law, or in the Alternative for a New Trial (JA III: 543-72, Doc. 417.)[5] Plaintiff opposed the motion. (JA III: 627-66, Doc. 435.) In the Rule 50(b) Order, entered November 12, 2015, the district court granted judgment as a matter of law to Cox pursuant to Fed. R. Civ. Proc. 50(b), finding that Plaintiff had failed to prove one element of the *per se* tying claim and failed to prove antitrust injury. (JA III: 675-79, Doc. 438.) First, the district court concluded that Plaintiff had failed to prove that "the alleged tying arrangement has foreclosed a substantial volume of commerce in Oklahoma City to other sellers or potential sellers of set-top boxes in the market for set-top boxes" because "Plaintiff failed to offer evidence from which a jury could determine that any other manufacturer wished to sell set-top boxes at retail or that Cox had acted in a manner to prevent any other manufacturer from selling set-top boxes at retail." (*Id.* at 676.) Second, with respect to antitrust injury, the district court concluded that "Plaintiff has failed to offer evidence from which a jury could return a verdict in his favor on this issue, because he has failed to demonstrate that Cox's customers were harmed because of the alleged tie." (*Id.* at 679.) This was because "[f]or the reasons noted above

[5] Cox had previously filed a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) after the close of Plaintiff's case, but the district court did not rule on that motion prior to submitting the case to the jury.

demonstrating that there is no evidence that a competitor wished to sell set-top boxes at retail, Plaintiff cannot establish that any harm came to them because of any tying activity." (*Id.*)

The district court entered judgment in favor of Cox on November 12, 2015. (JA III: 680, Doc. 439.) Plaintiff filed his notice of appeal on November 16, 2015. Cox subsequently filed a cross-appeal under No. 15-6222.

II. The Evidence at Trial

A. Premium Cable and Set-Top Boxes

This case involves Cox's "Premium Cable" (the tying product) and the STBs (the tied product) which were required to receive all the services and features of Premium Cable.

Cox is one of the nation's largest providers of cable multi-channel video programming distribution ("MVPD"). It sells MVPD services in various markets throughout the country, including the Oklahoma City Market.[6]

Cox offers MVPD services in different tiers and packages. Premium Cable is a category of such tiers, defined for the jury as follows:

> Plaintiff alleges that the tying product is "Premium Cable," Throughout this case you have heard a portion of this tying product referred to as "interactive services" or "two way services." These are services that require

[6] The "Oklahoma City Market" consists of those areas in and around Oklahoma City, Oklahoma where Cox has franchise agreements to provide cable services.

> communication between a device and the provider of the services. The two-way services at issue in this case are Video on Demand, Interactive Program Guide, and Pay-Per-View services. Both Plaintiff and Defendant agree that there are other aspects of "Premium Cable", that are one way services such as the ability to watch live TV on cable channels, and premium channels like HBO, Showtime and ESPN.

(JA III: 590, Doc. 422.) Cox refers to this service as its digital video service or under the brand name "Advanced TV."

While Cox Premium Cable is available in a variety of tiers and packages, *all* Cox Premium Cable customers can, if they also rent an STB from Cox, receive Cox's Interactive Program Guide ("IPG"), which enables subscribers to navigate quickly through their substantial channel lineup – and thus determine when and where particular programs will appear – as well as access Cox's substantial video on demand ("VOD") and pay-per-view ("PPV") programming, which permits subscribers to view a great array of free and purchased movies, television shows, and specialty events. (*See, e.g.,* JA XXXVI: 4952, PX-32.) As explained further below, Cox Premium Cable customers who do not rent an STB from Cox are unable to access Cox's IPG or the full array of VOD and PPV programming despite the fact that they pay the same monthly subscription fees for Premium Cable as the fees paid by those who rent an STB from Cox.

B. The 1996 Telecommunications Act and the MOUs

In 1996, Congress passed the 1996 Telecommunication Act. Section 629 of the Act called for the Federal Communications Commission ("FCC") to "adopt regulations to assure the commercial availability, to consumers … of … equipment used … to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor." 47 U.S.C. § 549. According to the FCC:

> Through Section 629, Congress sought to provide consumers with the opportunity to purchase competitive navigation devices from sources other than their MVPD. Congress emphasized the importance of such competition, stating that "[c]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality."

(JA XXXVI: 4912, PX-13, *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices,* Third Further Notice of Proposed Rulemaking, CS Docket No. 97-80 (June 29, 2007), *quoting* H.R. Rep. No. 104-204, at 112 (1995).)

In lieu of further regulation by the FCC, Cox and other cable companies on the one hand and consumer-electronics companies on the other hand entered into a Memorandum of Understanding dated December 12, 2002 for the implementation of a "plug-and-play" standard to allow cable customers to access cable programming through a standardized device which came to be known as a CableCARD (the "One-Way MOU").[7] (JA XXXIV-XXXV: 4833-910, PX-9.) The One-Way MOU would, in theory, allow cable customers to access at least unidirectional (*i.e.,* one-way) cable services through televisions or other equipment from a source other than the MVPD providing such service, as intended by Section 629. *Id.* On April 25, 2008, Cox and other cable companies and consumer-electronics companies entered into a new Memorandum of Understanding to cover two-way services (such as Cox's IPG, VOD, and PPV services) under the brand name "Tru2Way" (the "Two-Way MOU"). (JA XXXVI: 4930-41, PX-15.) As set forth below, Cox made only token public efforts to support these initiatives while privately undermining them to retain its substantial profits from the rental of STBs to its customers.

[7] CableCARD was part of an effort to implement the FCC's "integration ban," which to further Section 629 prohibited cable companies from integrating those functions of STBs that regulated access to cable services (*e.g.* to ensure that subscribers received only those channels that they paid to subscribe to) from other non-security functions of STBs. *See generally Charter Communications, Inc. v. F.C.C.*, 460 F.3d 31 (D.C. Cir. 2006).

C. Cox Repeatedly Told its Customers That They Could Not Receive All the Benefits of the Premium Cable Services They Had Paid For Unless They Also Rented an STB From Cox

As one Cox executive, Steve Necessary,[8] admitted, Cox subscribers pay additional fees to access the Premium Cable level of service. (JA LI: 6414-15, Tr. 71:24-72:19.) And he further admitted that, because class members pay for these services, they are entitled to access them. (*Id.* at 6415, Tr. 72:20-23.)

Despite this, Cox consistently and repeatedly told its Premium Cable subscribers that they could not access *all* the services they were paying for unless they also rented an STB from Cox. And despite withholding certain services from the few Premium Cable 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. (JA LI: 6450, Tr. 107:11-18 (Necessary).)

Cox announced to Cox subscribers, both in the Oklahoma City Market and nationwide, that they could not access all the features of Cox Premium Cable without renting an STB from Cox. This announcement was contained on its customer website for Oklahoma City, (JA XXXVI: 4952, PX-32),[9] which stated

[8] Steve Necessary is the Vice President of Video Development & Management at Cox. (JA LI: 6413, Tr. 70:18-19.)

[9] Percy 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. (JA L: 6166, Tr. 60:1-5.) Mr. Kirk is a senior vice president and general manager of Cox's operations in Oklahoma. (*Id.* at 6161, Tr. 55:17-20.)

that "[i]n order to receive interactive TV services offered by Cox, such as the [IPG, VOD, and PPV], and all digital programming options, you *must rent* a digital receiver." (Emphasis added.) A document used to train salespeople in Oklahoma City, (JA XXXVII: 4955-73, PX-33), which was described by Mollie Andrews[10] as a document intended to be the "one source of truth" for them,[11] contained similar statements. This document unambiguously states that "Cox Digital One-Way Plug & Play customers [*i.e.,* CableCARD customers] will not have access to the following services: Digital PPV (including movies, events and sports packages), Entertainment on Demand, [and] Interactive Program Guide." (*Id.* at 4971.) Accordingly, Cox salespeople were instructed to discourage selection of the CableCARD option in lieu of renting an STB from Cox:

> During the sales process, we should inform the consumer on both the service they will have access to and the services they will not be able to access. We should highlight the benefits of the services they will be missing such as the [IPG, VOD] and PPV events and sports programming.

(*Id.*)

Cox also told customers who ordered its service through the Internet and over the telephone that they must rent an STB from Cox if they wanted to receive

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[10] Mollie Andrews is Vice President of Marketing Operations at Cox. (JA LIV: 7131, Tr. 116:12.)

[11] JA LIV: 7164, Tr. 19:14-22.

two-way services such as the IPG, VOD, and PPV. (JA XXVII: 4015-17, CX-1, Langner[12] Depo., 61:3-63:25; CX-2; JA XXVII: 4026-27, Wise[13] Depo., 12:13-13:19). In short, as Mr. Necessary confirmed, during the class period, a Cox subscriber was required to rent an STB from Cox to receive all the content and services of Cox's Premium Cable. (JA LI: 6416, Tr. 73:22-25.)

D. Cox Misrepresented and Exaggerated the Limitations of CableCARD

As set forth above, CableCARD was intended to be a competitor to STBs rented from cable companies. Cox, however, made a conscious decision at the 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." (JA XXXVII: 4987, PX-34.) This was because, according to Cox, "[e]very subscriber that receives digital cable through the use of a CableCARD device is one less subscriber who has access to two-way interactive services such as EOD, iPPV and Cox's IPG." (*Id.* at 4986-87.)

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[12] Colleen Langer was, as of the date of her deposition (July 8, 2011), Vice President of Marketing for Cox. (JA XXVII: 4014, CX-1, 9:8-10.)

[13] Charles Wise was, as of the date of his deposition (May 24, 2011), Vice President of Customer Care for Cox. (JA XXVII: 4021, CX-2, 4:21.)

Although it is true that CableCARD did not allow access to all the features and services of Premium Cable, Cox misrepresented and exaggerated the limitations of CableCARD. Cox executives testified that the equivalent of at least some two-way services were actually available for CableCARD customers,[14] even though customers were not informed of this fact. Both Mr. Kirk and Ms. Andrews, for example, testified that Cox PPV was readily available over the telephone. (JA L: 6190, Tr. 8:11-21; JA LIV: 7139-40, Tr. 124:22–125:10.) Ms. Andrews also testified that VOD content was available over the Internet. (JA LV: 7281, Tr. 34:19-25.)[15]

As set forth above, however, Cox instructed its Oklahoma City sales personnel to emphasize to CableCARD customers "the benefits of services they

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

[15] Cox witnesses also testified that equivalent services to Cox VOD and the IPG were also available from other sources. (JA L: 6279-80, Tr. 97:8–98:1 (Kirk) (CableCARD customers had access to other IPGs and VOD libraries); JA LII: 6739, Tr. 39:16-25 (Dallas Clement) (non-Cox VOD was available through Redbox and the Internet); JA LIV: 7177-78, Tr. 32:15–33:2 & JA LV, 7287-88, Tr. 40:22–41:3 (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).) This testimony disregards the fundamental fact that customers who received VOD services from another provider such as Netflix, for example, had to pay for a subscription to that service in addition to the amounts they were already paying to access Cox's VOD.

will be missing such as … PPV events and sports programming" (JA XXXVII: 4971, PX-33), even though PPV sporting events such as University of Oklahoma football games had *always* been available by telephone in Oklahoma City (JA LIV: 7159, Tr. 14:12-18 (Andrews)). And at a corporate level, Cox made a conscious decision not to publicize the availability of PPV programming via telephone to CableCARD customers. (JA XXXIX: 5177, PX-39 ("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 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.[16] (JA XXXIX: 5183, PX-42 ("[W]e are mandated by corporate to not launch new HD channels to

[16] "Switched video" is a technology that allowed cable providers to offer additional channels despite limited bandwidth by "switching" the transmittal of video signals through the system based on demand. Oklahoma City was not a switched video market. But as is clear from PX-42, certain channels were withheld from CableCARD customers because of the *possibility* that it may have become a switched video market in the future.

cable card customers" because "[t]he feeling was that if we launched switched we would have to take channels away.").)

Cox also treated CableCARD customers worse than Cox STB customers by prohibiting self-installation of CableCARDs for most of the class period, thus imposing an installation fee that STB customers could avoid. (JA XXVII: 4031, CX-2, Wise Depo., 20:7-15.) To compound these problems, Cox minimized the extent of CableCARD installation problems in its required reporting to the FCC of CableCARD issues by unilaterally deciding that a problem resolved by a "repeat truck roll" would not be reported to the FCC despite the obvious inconvenience to the customer from the need for repeated visits by Cox to install a CableCARD. (JA XL: 5191, PX-44; JA XXVII: 4213-44, CX-5, Ader[17] Depo., 58:3-59:23.)

The failure of CableCARD to create a competitive market for STBs for Cox customers both presaged and contributed to the eventual failure of Tru2Way, as described below. For example, national electronics retailer Best Buy was reluctant to support Tru2Way because of its belief that cable companies had not supported CableCARD. (JA XLVI: 5622, DX-205 ("They did not want the experience of the one-way cable card product to happen again.").)

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[17] Mark Ader was, as of the date of his deposition (May 15, 2011), Director of Product Management for Core Video for Cox. (JA XXVII: 4195, CX-5, 18:15-18.)

E. 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." (JA XLI: 5325, PX-69.) Cox acted accordingly. Cox showed its true intentions in an internal email exchange, where Cox admitted it was seeking only "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." (JA XL: 5231, PX-52.) As Cox admitted, despite this purported deployment, "[i]t is extremely unlikely that a real Cox customer will actually use a real Tru2Way device on our network in 2008." (*Id.*) And while Cox spent a substantial amount of money to prepare its systems 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. (JA LII: 6621, Tr. 56:7-25.)[18]

Cox did inform customers in small-print annual notices starting in 2009 that it would support Tru2Way when products came to market. (*E.g.* JA XLVI: 5616-17, DX-64.) But no such disclosure was provided through means by which

[18] Furthermore, Cox benefited from these expenditures because adopting Tru2Way standards for the STBs it leases to customers allowed Cox to standardize equipment across its markets. (JA LI: 6536, Tr. 81:7-16.)

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 CableCARD as opposed to informing customers about potential alternatives to renting a Cox STB speaks for itself.

F. 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.[19] (JA LI: 6483, Tr. 28:6-25 (Necessary); JA XXVIII: 4396-98, CX-9, Klugman[20] Depo., 153:5-155:5.) 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. (JA LI: 6484, Tr. 29:12-21.)

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[19] Apart from this agreement, a TiVo available at retail could access Cox's linear programming by using a CableCARD but could not access Cox's two-way services such as IPG, VOD, and PPV. (JA LI: 6447, Tr. 104:10-23.) Despite this, Mr. Necessary stated that TiVo was a competitor to Cox in the market for STBs. (*Id.*, Tr. 104:2-9.)

[20] Jeff Klugman was, as of the date of his deposition (Sept. 28, 2011), Senior Vice President of Products and Revenue for TiVo. (JA XXVIII: 4342, CX-9, 26:15-18.) TiVo is a consumer electronics company whose primary product of the same name is a retail STB that allows customers to record and "time-shift" television shows. (*Id.* at 4344, CX-9, 34:1-8.)

Despite this, there was no such product during the class period. (*Id.* at 6483, Tr. 28:10-12 (Necessary); JA XXVIII: 4400, CX-9, Klugman Depo., 157:6-10.)

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. (JA XXVIII: 4400-04, CX-9, Klugman Depo., 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. (JA LII: 6596, Tr. 31:16-18.) The jury was entitled to weigh the relative credibility of these two accounts.

G. Cox Unjustifiably Refused to Allow a Secondary Market for STBs

Cox had a policy not to support used STBs purchased on eBay. (JA XXXVII: 4993-5000, PX-36.) This policy was developed in the course of discussing a customer's request that one such STB be activated so as to operate on Cox's system. *Id.* Although the purported reason for this policy was the possibility of theft, Cox had no evidence that the STB at issue had been stolen. (JA LVI: 7463, Tr. 50:9-12 (Prince[21]). And while Cox claimed that its decision on this STB

[21] As of 2009, Sean Prince was the Manager of Quality in Tech Support for Cox. (JA LVI: 7423, Tr. 11:17-18.)

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.* at 7461, Tr. 48:2-10 (emphasis added).)

H. Almost All Cox Premium Cable Subscribers Complied With the Tie

All of Cox's conduct pointed 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, all these purported market forces worked in a way to maximize financial benefit to Cox. Cox received over *$200 million* in STB rental revenue during the class period. (JA L: 6173-74, Tr. 67:23-68:18 (Kirk); JA LI: 6461, Tr. 6:3-7 (Necessary); JA LIII: 6830-31, Tr. 23:6-24:19 (Hastings[22]); JA XL: 5222-23, PX-49.)

As a result of Cox's representations and conduct as outlined above, it is no surprise that almost all Cox Premium Cable customers in the Oklahoma City Market complied with the tie. Mr. Necessary admitted that only a "small percentage" of Cox Premium Cable customers leased a CableCARD rather than an

[22] Justine Hastings, Ph.D. is a tenured professor of economics and international and public affairs at Brown University and was Plaintiff's expert economist at trial. (JA LII: 6772, Tr. 9:8-23.)

STB from Cox. (JA LI: 6417, Tr. 74:10-13.) In fact, less than *one-half of one percent* of Cox's Premium Cable subscribers leased a CableCARD instead of a Cox STB. (JA LIII: 6820, Tr. 13:2-8 (Hastings); JA XL: 5211-13, PX-049.)

I. There Were Numerous Actual and Potential Competitors in the Market for Retail STBs

As Cox itself admitted, "multiple consumer electronics companies made two-way set-top boxes that were fully compatible with Cox's system between 2005 and 2012." (JA III: 551, Doc. 417.) And as David Davies of Cisco[23] testified, Cisco STBs have been capable of accessing all Cox two-way services since 2005 and Cisco freely licensed its security technology so other manufacturers would have the same ability. (JA LV: 7297, Tr. 50:1-4 & 7301-032, Tr., 54:14—55:7.) In short, there was no technical constraint on the development of a retail market for Cox-compatible two-way STBs.

Indeed, Mr. Necessary testified (contrary to the Court's finding on foreclosure) that there was in fact a competitor to Cox STBs in Oklahoma City because TiVo was available there. (JA LI: 6447, 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. (JA LII:

[23] Cisco manufactured the STBs used in Cox's Oklahoma City system. David Davies is the head of Global Product Management for Cisco's connected device business, which includes the Cox-compatible STBs at issue in this case. (JA LV: 7292, Tr., 47:1-8.)

6588, Tr. 23:4-18 and note 14, *supra.*) And TiVo was not alone: Jud Cary from CableLabs[24] testified that 25-30 manufacturers were certified to offer CableCARD-enabled products at retail. (JA LIV: 7177, Tr. 102:13-22.)

The record discloses a plethora of additional, potential competitors even if competitors are defined only to include two-way STBs. Cox itself expected that consumer electronics companies would participate in the retail market for two-way STBs. (JA XLI: 5315, PX-66; JA XLIV: 5557, DX-41.) Brian Markwalter of the Consumer Electronics Association[25] testified to widespread interest among its membership in such a market. (JA XXVIII: 4293-94 and 4299-301, CX-8, Markwalter Depo., 78:2–79:2 and 98:10–100:4.) Panasonic and Samsung actually manufactured and sold Tru2Way capable televisions. (JA LI: 6549-50, Tr. 94:25-95:11 & LII: 6581-82, Tr. 16:11-17:7 (Necessary).) And CableLabs certified a number of other Tru2Way products for sale at retail, including those from Sony, LG, and ADB. (JA LIV: 7121-22, Tr. 106:14-107:5 (Cary).) Resellers on eBay or other resale platforms are another potential competitor.

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[24] CableLabs is a joint venture formed and operated by the cable industry. One of its primary purposes is to develop common standards to be used across the industry. (JA L: 6269, Tr., 87:15-18 (Kirk).) Jud Cary is the Vice President and General Counsel of CableLabs. (JA LIV: 7103, Tr. 88:11.)

[25] The CEA is a nonprofit trade association with members from the entire consumer electronics industry. (JA XXVIII: 4261, CX-8, 14:17-22.) Brian Markwalter was, as of the date of his deposition (February 16, 2011), Vice President of Research and Standards of the CEA. (*Id.*, CX-8, 14:7-9.)

Moreover, in Canada, where cable providers do not tie the purchase of cable programming to the rental of STBs, STBs are available for purchase at retail. (JA LII: 6788-89, Tr. 25:10-26:23 (Hastings).) Similarly, Stephen Goldstein of Samsung[26] testified that Samsung sells STBs at retail all over the world. (JA LIV: 7102, AM Tr. 87:2-10.)

SUMMARY OF ARGUMENT

The district court erred in granting judgment as a matter of law in favor of Cox on Plaintiff's tying claim contrary to the jury's verdict. As the jury properly found, Cox's tying of STBs to its provision of Premium Cable violated antitrust law and this tie injured the class.

While the district court found that Plaintiff had failed to prove the so-called foreclosure element of his per se tying claim, it is well-settled that this element only requires consideration of the gross volume of commerce affected by the tie. *See, e.g.*, *Fortner Enters.,* 394 U.S. at 501. Accordingly, the district court instructed the jury that this was all that was required to prove foreclosure. Plaintiff met this requirement by the undisputed evidence that Cox obtained over $200 million in revenues from renting STBs during the class period. Plaintiff was

[26] Samsung sells and markets consumer electronics and in America, sells STBs to cable companies. (JA LIV: 7073, Tr. 58:2-23.) Stephen Goldstein is Vice President and General Manager of Samsung's set-top box group. (*Id.*, Tr. 58:10-12.)

required to prove nothing more, and specifically was not required to prove anticompetitive effects in the tied product market.

Furthermore, even if this fact were relevant to foreclosure, the district court erred in concluding that there was no evidence in the record of actual or potential competitors in the STB market. There was ample evidence at trial of both actual competitors who sold STBs at retail and potential competitors who may well have done so absent the tie.

The district court's error with respect to this element also infected its erroneous conclusion that Plaintiff failed to prove antitrust injury to the class. Plaintiff and the class were overcharged for Cox STBs. Overcharges to consumers are a paradigmatic and traditional example of an antitrust injury. Damages for tying are based on the difference between the actual price of the tied product and the competitive or open-market price for such a product. Plaintiff offered proof through a qualified expert using a well-accepted methodology that Cox's STB prices exceeded the competitive price.

Finally, even if the foreclosure element requires proof of more than the volume of commerce affected by the tie, the district court's instruction to the jury on this element was erroneous. Where the jury has received an erroneous or misleading instruction on an element of liability, the proper remedy is a new trial under corrected jury instructions, not judgment in favor of Cox.

ARGUMENT

I. Standard of Review

This Court engages in *de novo* review of the district court's entry of judgment as a matter of law pursuant to Fed. R. Civ. Proc. 50(b). *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 680 (10th Cir. 1981). A motion for judgment as a matter of law "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." *Id.* (internal quotation omitted). *See also Crumpacker v. Kansas 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). *See also United States v. Morgan*, Nos. 13-6025, 13-6052, _ F. App'x _, 2015 WL 6773933, at *16 (10th Cir. Nov. 6, 2015) (holding that this district court committed clear error by substituting "its view of the evidence … for the jury's verdict").

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). 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.

II. Plaintiff Proved That Cox's Tie Foreclosed a Substantial Amount of Commerce in STBs

A. Elements of a Per Se Tying Claim

"[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp.*, 466 U.S. at 12. "When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Id.*

The per se variety of tying claim is well-established in antitrust law. *Jefferson Parish Hosp.*, 466 U.S. at 9 ("It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and are therefore unreasonable 'per se.'") "Per se condemnation – condemnation *without inquiry into actual market conditions*," *id.* at 15 (emphasis added), is appropriate where as here "the seller's share of the market is high" because "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," *id.* at 17. *See also Multistate Legal Studies,* 63 F.3d at 1546 ("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.") As the jury found here, and as the district court's Rule 50(b) Order does not dispute, Cox "has sufficient market power in the Oklahoma City subsystem in the market for 'Premium Cable' to enable it to restrain trade in the market for set-top boxes." (JA III: 613-14, Doc. 423.)

In the Tenth Circuit, there are four elements of a per se tying claim: (1) the existence of two separate products, (2) the conditioning of the sale of one product (the tying product) on the purchase of another (the tied product), (3) "sufficient economic power" held by the defendant in the tying-product market, and (4) a "substantial volume of commerce affected in the tied-product market." *Multistate Legal Studies,* 63 F.3d at 1547; *see also Sports Racing Servs. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 886 (10th Cir. 1997).

Of these four elements, the district court found that Plaintiff had failed to prove only one: that the tie affected a "substantial volume of commerce in the tied-product market," which the district court referred to as the foreclosure element.

B. The Substantial Volume of Commerce Element Requires Only Evidence of the Dollar Volume of Commerce Covered by the Tie, Which Plaintiff Proved

In *Multistate Legal Studies,* 63 F.3d at 1547, this Court did not require proof of "foreclosure," but rather described this element as requiring proof merely of a "substantial volume of commerce *affected* in the tied-product market." (Emphasis added.) This interpretation of the so-called foreclosure element is based on *Fortner Enters.,* 394 U.S. at 501. In that case, the Supreme Court interpreted this element as not requiring consideration of "the scope of any particular market or to the share of that market foreclosed by the tie" because "the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie …." *Id.* More specifically, the "relevant figure" for determining the amount of commerce foreclosed by the tie is simply "the total volume of sales tied by the sales policy." *Id.* at 502.

Other courts have similarly interpreted the foreclosure element as requiring nothing more than proof of the volume of commerce covered by the tie. *See, e.g., Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1424-25 (9th Cir. 1995) (tied sales of $100,000 per year in hardware services with respect a single purchaser was sufficient to show foreclosure); *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048, 1097 (D. Colo. 2004); ("[A]ll that is required is that the restraint in the tied market caused by the tie affect a substantial volume of commerce, which in this context means only an amount greater than a *de minimis*."); *Audell Petroleum Corp. v. Suburban Paraco Corp.*, 903 F. Supp. 364, 371 (E.D.N.Y. 1995) ("[T]he relevant inquiry is *not* the amount of damages allegedly suffered as a result of an illegal arrangement, but the *volume of sales* tied by that arrangement.") (emphasis in original); *U.S. v. Mercedes-Benz of North America, Inc.*, 517 F. Supp. 1369, 1387 (N.D. Cal. 1981) ("[a] determination of amount of commerce affected is based on the volume of sales allegedly foreclosed … [i]t is not a requirement of this … element to demonstrate actual foreclosure").

According to one leading authority, in a per se tying case:

> [T]he only effect required for condemnation is that a challenged tie cover a "not insubstantial" dollar volume of trade in the tied product, regardless of the share of the market for the tied product that might be foreclosed, unless it is clearly de miminis. This requirement is typically met and often not even in dispute.

Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1720 at 258 (3rd ed. 2011). And "the volume is question is merely the dollar value of tied sales rather than the share of any defined market." *Id.* ¶ 1721 at 284.

Under this standard, Plaintiff proved that Cox's tie affected a substantial volume of commerce in the market for STBs. Cox obtained over $200 million in revenues from STB rentals during the class period. (JA L: 6173-74, Tr. 67:23-68:18 (Kirk); JA LI: 6461, Tr. 6:3-7 (Necessary); JA LIII: 6830-31, Tr. 23:6-24:19

(Hastings[27]); JA XL: 5222-23, PX-49.) This was the amount of trade "foreclosed to competitors from the tie" pursuant to *Fortner Enters.*, 394 U.S. at 501 and is far more than *de minimis*.

No further proof is required. Specifically, proof of actual anticompetitive effects in the tied product market is not required as part of the so-called foreclosure element. *Datagate, Inc.*, 60 F.3d at 1425 ("The foundational principle of per se antitrust liability is that some acts are considered so inherently anticompetitive that no examination of their impact on the market as a whole is required."); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 477 (3d Cir. 1992) ("[I]f the defendant is found to have market power [in the tying product market], the plaintiff is, in theory, relieved of proving actual harm to competition and of rebutting justifications for the tie-in."); *Wells Real Estate, Inc. v. Greater Lowell Bd. Of Realtors*, 850 F.2d 803, 815 (1st Cir. 1988) ("This is not to say that a plaintiff necessarily must prove the actual scope of anti-competitive effects in the market – the per se rule eliminates such a requirement."); *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336, 1347 (9th Cir. 1984) ("[A] detailed analysis of competitive conditions in the tied product market is inappropriate in a per se

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[27] Justine Hastings, Ph.D. is a tenured professor of economics and international and public affairs at Brown University and was Plaintiff's expert economist at trial. (JA LII: 6772, Tr. 9:8-23.)

[tying] case."); *Nobody in Particular Presents, Inc.*, 311 F. Supp. 2d at 1093 ("Plaintiff is not required to show anticompetitive effects in the tied market.").

Proof of specific anticompetitive effects is not required because the doctrine of per se tying seeks to protect *potential* competition as well as actual existing competition. As the Supreme Court recognized in *Jefferson Parish Hospital*, tying forecloses not only existing competitors but may also "create barriers to entry of *new competitors* in the market for the tied product." 486 U.S. at 14 (emphasis added). *See also Fox Motors,* 806 F.2d at 957 ("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); *Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia,* 815 F.2d 1407, 1417–18 (11th Cir. 1987) ("[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."); Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1722 at 302 (per se tying claim requires "*some minimal showing* that an alleged tie is of the type that *could cause* the kind of foreclosure that antitrust rules seek to prevent") (emphasis added). As set forth below, there is ample evidence in the record of actual and potential competitors in the market for STBs.

Furthermore, any requirement to prove foreclosure beyond the dollar volume of commerce affected by the tie would run afoul of the very purpose for per se rules of antitrust liability. 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. U.S.*, 356 U.S. 1, 5 (1958). Thus, detailed analysis of the effect of the tie on competition in the tied product market is a requirement of a rule of reason tying claim, not a per se tying claim. *See Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1016 (10th Cir. 1998) ("The *per se* rule condemns practices that 'are entirely void of redeeming competitive rationales.' Once a practice is identified as illegal *per se*, a court need not examine the practice's impact on the market or the procompetitive justifications for the practice advanced by the defendant before finding a violation of antitrust law.") (quoting *SCFC ILC, Inc. v. Visa USA, Inc.,* 36 F.3d 958, 963 (10th Cir. 1994)); *Nobody in Particular Presents*, 311 F. Supp. at 1093 (relying on *Law* in a tying case).

In its earlier order denying summary judgment to Cox, the district court recognized and applied this doctrine, stating 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," and "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." (JA I: 164-65, Doc. 198.) Plaintiff's evidence on this issue at trial was not materially different from its evidence on summary judgment and the district court did not try to reconcile its denial of summary judgment before trial with its entry of judgment in Cox's favor after trial.

C. The "Zero Foreclosure" Doctrine Does Not Apply Here

The only situation in which the specifics of the tied market are considered in a *per se* tying claim is where there is "zero foreclosure" of the tied market. The conditions to find zero foreclosure, however, 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 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 reasons extrinsic to the tie. 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. Similarly, in *Friedman v. Adams Russell Cable Servs.*, 624 F. Supp. 1195, 1996 (S.D.N.Y. 1986), the court held there was no foreclosure where the defendant that allegedly engaged in tying had a lawful franchise agreement to provide cable services that excluded for a period of time any competing providers.

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." (JA III: 551, Doc. 417.) And there were no technical constraints to development of Cox-compatible STBs, as illustrated by among other things Mr. Davies' testimony regarding Cisco's licensing of its security technology. (JA LV: 7297, Tr. 50:1-4 & 7301-02, Tr., 54:14-55:7.) As set forth below, there is ample evidence of actual and potential competitors (TiVo, resellers, and CableCARD or Tru2Way device manufacturers, among others) in the STB market such that the zero foreclosure principle does not apply.

D. The District Court's Foreclosure Finding Was Contrary to its Jury Instruction and the Facts Proven at Trial

The district court instructed the jury in accordance with the above authorities. The jury was instructed that "[i]f the dollar amount of Defendant's leases of set-top boxes was substantial, then you should find that Defendant has foreclosed a substantial amount of commerce." (JA III: 601, Doc. 422.)

By contrast, no jury instruction or even applicable authority supports the district court's requirement in the Rule 50(b) Order that, to prove the foreclosure element, Plaintiff was also required to prove that "any other manufacturer wished to sell set-top boxes at retail or that Cox had acted in a manner to prevent any other manufacturer from selling set-top boxes at retail." (JA III: 676, Doc. 438.) As set forth above, such considerations have nothing to do with the so-called foreclosure requirement in a per se case, which focuses solely on the dollar volume of commerce affected by the tie. And, as the district court failed to appreciate, the very existence of the tie discourages entry by competitors and thus the fact that competitors have purportedly failed to enter the market in no way negates foreclosure. *See Tic-X-Press, Inc.,* 815 F.2d at 1417–18. Indeed, it follows from the district court's rationale that a defendant that had engaged in a tying practice so successful as to discourage even any potential competitors would be insulated from liability.

In any event, the district court's Rule 50(b) Order disregards substantial evidence in the record of dozens of actual and potential competitors for Cox-compatible STBs. As Cox itself admitted, "multiple consumer electronics companies made two-way set-top boxes that were fully compatible with Cox's system between 2005 and 2012." (JA III: 551, Doc. 417.) And as David Davies of Cisco testified, Cisco STBs have been capable of accessing all Cox two-way services since 2005 and Cisco freely licensed its security technology so other manufacturers would have the same ability. (JA LV: 7297, Tr. 50:1-4 & 7301-02, Tr., 54:14-55:7.)

As Mr. Necessary admitted, TiVo was another actual competitor for STBs in the Oklahoma City Market. (JA LI: 6447, Tr. 104:2-9.) And 25-30 manufacturers were certified to offer one-way CableCARD-enabled products at retail. (JA LIV: 7177, Tr. 102:13-22.)

With respect to two-way STBs, Cox expected that consumer electronics companies would participate in a retail market, (JA XLI: 5315, PX-66; JA XLIV: 5557, DX-41,) and the CEA confirmed great interest in such a market among its members (JA XXVIII: 4293-94 and 4299-301, CX-8, Markwalter Depo., 78:2–79:2 and 98:10-100:4). Panasonic and Samsung actually manufactured and sold Tru2Way capable televisions. (JA LI: 6549-50, Tr. 94:25-95:11 & LII: 6581-82, Tr. 16:11-17:7 (Necessary).) And CableLabs certified a number of other Tru2Way products for sale at retail. (JA LIV: 7121-22, Tr. 106:14-107:5 (Cary).) Resellers on eBay or other platforms are another potential competitor.

STBs are available at retail in Canada and other countries. (JA LII: 6788-89, Tr. 25:10-26:23 (Hastings) & LIV: 7102, Tr. 87:2-10 (Goldstein).) There is no reason to believe that the U.S. market in general, or the Oklahoma City Market in particular, would be any different in the absence of tying.

Based on the correct instruction given to the jury and the undisputed evidence of the volume of Cox's STB sales, the jury properly found foreclosure.

The district court erred by entering judgment in favor of Cox because of Plaintiff's purported failure to prove this element.

III. Plaintiff Proved Antitrust Injury

The jury found that Plaintiff and the class had proven antitrust injury and quantified this injury as a $6.313 million overcharge across the class. (JA III: 614, Doc. 423.) The district court did not take issue with the extensive expert and other evidence the jury heard on that point. Instead, its conclusion that Plaintiff had failed to prove that he and the class suffered antitrust injury as a result of the tie was based solely on its faulty reasoning with respect to the foreclosure element. For the reasons set forth above, this reasoning was contrary to well-settled law and the evidence at trial.

Cox's tie caused Cox customers to pay supra-competitive prices for STBs by preventing free competition in the market for STBs. This is a paradigmatic example of antitrust injury. *See Sports Racing Servs.,* 131 F.3d at 884-85 (direct purchaser had antitrust injury where it alleged overcharge); 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.")

Calculating overcharges has been an accepted method of determining injury and damages in antitrust cases for decades. *See, e.g.*, *Hanover Shoe*, *Inc. v.*

Hanover Shoe Machine Corp., 392 U.S. 481, 489 (1968); *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 (*i.e.*, untied) 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 actual open market, calculating prices based on a constructed 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 uncertainty which his own wrong has created.")

The evidence at trial showed that Cox's tie caused its subscribers to pay supra-competitive prices to rent STBs from Cox. To determine the "competitive" STB rental rate, and thus the overcharge, Plaintiff's expert economist, Professor Justine Hastings, relied on a well-established formula that calculates a competitive return on the capital invested by Cox to purchase the STBs, taking into account operational costs such as installation, repair, and maintenance costs. (JA LIII: 6885-88, Tr. 78:24-81:12.) This formula is based on the uncontroversial premise that, under conditions of competition, the rate of return for invested capital equals zero economic profit.[28] (*Id*. at 6887, Tr. 80:2-20.) The competitive price was then converted to a monthly rental rate so as to allow comparison with the monthly rental rates charged by Cox during the class period to determine if class members were overcharged and the amount of such overcharges.

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

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[28] "Zero economic profit" does not mean that Cox would not obtain any profit from rentals of STBs. Rather, zero economic profit equates to no excess profit, *i.e.*, Cox would receive the same profit it would otherwise receive from its activities in a competitive market. (JA LIII: 6887-88, Tr. 80:24-81:12.)

forecloses competition on the merits because it takes customers out of the market for competing goods, thus discouraging entry and resultant price competition. (JA LII: 6782-83, Tr. 19:14-20:15.) And as even Cox agreed, a market with robust competition for STBs would lead to lower prices, both for Cox and for its customers. (JA LI: 6452, Tr. 109:8-14 & 6522, Tr. 67:17-25 (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 (JA XXVIII: 4282-85, CX-8, Markwalter Depo., 66:5-69:1), and is also consistent with Congress's intent in enacting Section 629 of the 1996 Telecommunications Act.

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 rates for STBs while Cox's acquisition price for STBs steadily decreased. (JA LIV: 7044-45, Tr. 29:6-30:6.) And Cox was able to obtain extraordinary returns on its investment in STBs, 18 percent overall according to Professor Hastings (JA LIII: 6893, Tr. 86:14-17), and 68 percent for certain models of STBs according to an internal Cox document (JA XLI: 5301, PX-65). Such extraordinarily high returns would inevitably attract competition and thus lower prices in the absence of a tie. (JA LIII: 6887-88, Tr. 80:2-81:12 (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 higher-than-competitive prices 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)).

Based on the evidence at trial, the jury reasonably found that Cox's tie caused antitrust injury to both Plaintiff and the class in the form of supracompetitive rental rates for STBs. The district court erred by holding to the contrary.

IV. If the Court's Foreclosure Instruction Was Erroneous, the Proper Remedy Was a New Trial

As set forth above, the district court properly instructed the jury on the so-called foreclosure element of the per se tying claim. The district court's decision in the Rule 50(b) Order, however, inexplicably disregarded this instruction and imported additional elements of proof as to which the jury was not instructed. If the district court's foreclosure instruction was erroneous (and it was not for the reasons set forth above), the proper remedy was a new trial based on a corrected instruction, not entry of judgment in favor of Cox.

Failure to properly instruct the jury requires a new trial "if the jury might have based its verdict on the erroneously given instruction." *Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1242 (10th Cir. 2002) (quotation omitted). Thus, incorrect or incomplete jury instructions cannot support entry of judgment in favor of a party. *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.") If the district court's foreclosure instruction was erroneous or incomplete, Plaintiff and the class are entitled to a trial under proper jury instructions rather than to have judgment entered against them on the basis of purported elements of proof that the jury was never informed of or given the chance to consider.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and restore the jury verdict in favor of Plaintiff and the class. Alternatively, this Court should vacate the judgment of the district court and remand this case for a new trial.

REQUEST FOR ORAL ARGUMENT

Plaintiff/Appellant requests oral argument because this appeal raises significant issues of antitrust law and involves a complex factual record.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. Proc. 28.1(e)(2)(A)(i) because this brief contains 13,704 words, excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii). This brief also complies with the type style requirements of Fed. R. App. Proc. 32(a)(6) because this brief has been prepared in a proportionately-spaced typeface using Microsoft Word in size 14 Times New Roman font.

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I hereby certify that a copy of the foregoing as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the VIPRE Business, v6.2.5528.0, Updated 02/29/16 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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The undersigned certifies on this 29th day of February, 2016, that seven (7) hard copy filings were submitted to the clerk's office.

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