Case Nos. 15-6218 and 15-6222

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

In re: Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation

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Richard Healy,

Plaintiff-Appellant/Cross-Appellee,

v.

Cox Communications, Inc.,

Defendant-Appellee/Cross-Appellant.

On Appeal from the United States District Court for the
Western District of Oklahoma, Case No. 12-ML-02048-C
Hon. Robin J. Cauthron, United States District Judge

BRIEF OF DEFENDANT-APPELLEE/CROSS-APPELLANT COX COMMUNICATIONS, INC.

ORAL ARGUMENT REQUESTED

Margaret M. Zwisler
J. Scott Ballenger
Jennifer L. Giordano
Andrew J. Robinson
LATHAM & WATKINS LLP
555 Eleventh St. NW, Suite 1000
Washington, DC 20004
(202) 637-2200

Alfred C. Pfeiffer, Jr.
LATHAM & WATKINS LLP
505 Montgomery St., Suite 2000
San Francisco, CA 94111
(415) 391-0600

D. Kent Meyers
CROWE & DUNLEVY, P.C.
Braniff Building
324 N. Robinson Ave., Suite 100
Oklahoma City, OK 73102
(405) 235-7700

CORPORATE DISCLOSURE STATEMENT

Cox Communications, Inc. is owned by Cox Enterprises, Inc. and Cox DNS, Inc. Cox DNS, Inc. is a wholly owned subsidiary of Cox Enterprises, Inc. No publicly held corporation owns 10% or more of Cox Communications, Inc.'s stock.

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GLOSSARY

CEM:	Consumer Electronics Manufacturer
DVR:	Digital Video Recorder
IPG:	Interactive Program Guide
NCRPA:	National Cooperative Research and Production Act
PPV:	Pay Per View
STB:	Set-Top Box
VOD:	Video On Demand

STATEMENT OF RELATED CASES

Healy v. Cox Communications, Inc., No. 15-6218 is plaintiff's pending appeal of the district court's judgment in favor of Cox Communications, Inc. ("Cox"), and No. 15-6222 is Cox's conditional cross-appeal, presenting issues that this Court need not reach if it affirms the judgment of the district court.

This case was previously before this Court on Cox's Rule 23(f) petition seeking review of class certification, which this Court denied on March 11, 2014, *Cox Communications, Inc. v. Healy*, No. 14-601, and on Cox's appeal of the district court's order denying Cox's motion to compel arbitration, *Healy v. Cox Communications, Inc.*, No. 14-6158, in which this Court affirmed the district court's decision on June 24, 2015.

Two other cases from the multidistrict litigation with the same district court docket number are also currently pending before this Court. Contrary to plaintiff's statement, these appeals were not from "this case." Pl.'s Br. at xi. The plaintiffs in those cases have appealed the district court's orders compelling arbitration of their claims in *Alwert v. Cox Communications, Inc.*, No. 15-6076, and *Feldman v. Cox Communications, Inc.*, No. 15-6077. The cases are fully briefed and oral argument was held on November 17, 2015. The substance of the *Alwert* and *Feldman* appeals is not related to the issues raised in this cross-appeal or in Mr. Healy's current appeal.

Finally, a predecessor case, brought by different plaintiffs on behalf of a different class of subscribers was previously before this Court as *Gelder v. Coxcom Inc.*, No. 12-706. This Court denied plaintiffs' request for interlocutory appeal of the district court's order denying class certification. That case remains pending on behalf of the named plaintiffs only, and is currently stayed before the district court.

JURISDICTIONAL STATEMENT

On November 12, 2015, the district court granted Cox's renewed motion for judgment as a matter of law. JA675. Plaintiff filed a timely notice of appeal on November 16, 2015, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291. Cox timely filed its notice of conditional cross-appeal on November 24, 2015. *See* Fed. R. App. P. 4(a)(3); *Cook v. Rockwell Int'l, Corp.* 618 F.3d 1127, 1153 (10th Cir. 2010) ("A party who prevails in the district court is permitted to conditionally raise issues in a cross-appeal because if the appellate court decides to vacate or modify the trial court's judgment, the judgment may become adverse to the cross-appellant's interests.").

ISSUES FOR REVIEW

(1) Whether plaintiff's failure to provide evidence that Cox restrained customers from dealing with competitors or prevented competitors' ability to sell a competing set-top box requires judgment for Cox.

(2) Whether judgment must be entered for Cox because a tying product cannot include a mix of services, only some of which are unavailable without the tied product.

(3) Whether plaintiff's failure to offer any evidence of the relevant geographic market for the tied product requires judgment for Cox.

(4) Whether plaintiff's failure to offer any valid theory of damages requires judgment for Cox.

(5) Whether Cox is entitled to judgment because of the protections of the National Cooperative Research and Production Act.

(6) Whether a new trial is necessary, at a minimum, because the jury instructions did not accurately convey the essential elements of a tying claim, particularly on these facts.

(7) Whether Cox is entitled to judgment as a matter of law against the class members whose damages derive from DVR fees.

(8) Whether the verdict in this case provides a permissible basis for awarding damages to the individual class members.

INTRODUCTION

"Tying" is a "refusal to sell two products separately" that coerces consumers to purchase a second product that they "might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 US 2, 11-12 (1984), *superseded by statute on other grounds as stated in Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). Plaintiff accuses Cox of "tying" the sale of premium cable services to the rental of set-top boxes ("STBs") which are technologically necessary to enable a limited set of "two-way" services such as Video On Demand ("VOD"). But as the district court recognized, plaintiff failed to prove the minimum threshold requirements for such a claim. Cox did not require anyone to rent an STB. And while Cox happened to be the only company offering STBs in Oklahoma City at this time, the district court recognized that Cox had nothing to do with the absence of other choices. JA676. "Because a set-top box could not be purchased elsewhere, through no fault of Defendant, there is no exploitation of the market or a stifling of competition." JA677.

Those facts doom plaintiff's claim. It is not "tying" for Ford to offer both trucks and tow hitches for sale, separately—even though there are some things that a truck can do only if it has a hitch, and even if there happen to be no other sellers of hitches in a particular community, through no fault of Ford's. There are other reasons why this Court should affirm the judgment in any event, and reasons why

Cox would be entitled, at a minimum, to a new trial. But the district court's straightforward observation that "[p]laintiff 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," JA676, is sufficient to resolve this appeal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. STATEMENT OF FACTS

A. "Premium Cable" Is A Concept That Plaintiff Invented For This Litigation, Not A Real Product That Cox Sold

Cox is a family owned media and communications company. JA6704 (4:10-11); JA6615 (50:14-17). Cox provides video entertainment, home telephone, high-speed broadband internet and home security services to subscribers in and around Oklahoma City, Oklahoma. JA7135 (120:15-25).

As a video entertainment provider, Cox's business is packaging and selling entertainment programs, including movies, television shows and music, to its subscribers. Cox purchases all of this content from content providers, such as Disney and ESPN. *See* JA6720 (20:2-20). Cox provides live television channels to its subscribers in a variety of tiers and packages. The least expensive package is known as "Basic" and includes about 30 standard definition channels. JA7136-37 (121:20-122:20). The next tier, "Expanded Basic," is more expensive and offers more standard definition channels than the Basic tier. *Id.* The final tier is

"Advanced TV." Advanced TV is a digital service with between 300 and 400 channels, depending on the package selected. *Id.* Advanced TV subscribers also have the option of subscribing to premium channels, such as HBO, Starz, Showtime and Cinemax. *Id.*

In addition to live television, Cox innovated and expanded its content offerings by providing additional interactive services. Cox subscribers can access an Interactive Program Guide ("IPG"), which is a menu of available channels that allows subscribers to search and navigate through the channel options and set recordings. JA6166 (60:13-18); JA6421 (78:1-5); JA6425 (82:1-9). Cox also responded to subscribers' desire to watch programming when and where they want by offering Digital Video Recorders ("DVRs"), VOD and Pay Per View ("PPV") services. DVR service allows subscribers to record programs and to pause live television. JA7139 (124:15-18). VOD allows customers to access Cox's content library of roughly 35,000 titles at their convenience, and to use controls like fast-forward and rewind when viewing the programs. JA6494-95 (39:14-22, 40:3-5); JA7140 (125:14-21). Cox subscribers can access roughly three-fourths of the VOD content for free and pay an extra fee to watch the remaining programs. JA6494-95 (39:23-40:2). PPV allows customers to purchase and view an event, like a sporting event, at the time when it airs. JA6496-97 (41:22-42:3). Subscribers in Oklahoma City can access PPV offerings by calling the customer service line to order or by selecting the program on the remote (this option is called "impulse PPV"). JA7157 (12:8-15); JA7159 (14:4-18).

The channels offered in the Basic, Expanded Basic and Advanced TV tiers, and PPV ordered by phone are what is known as "one-way" services. With a one-way service, the subscriber just needs to tune to the specific channel that she wants to watch from among the many channels that Cox transmits from its central cable system (called the "head-end"). JA6500-01 (45:23-46:12); JA6588 (23:6-22). In contrast, both VOD and impulse PPV are "two-way" services. JA6514 (59:21-23).[1] When a subscriber selects a program or event on her remote, the device in her home sends a signal to Cox's head-end. The head-end responds by sending the requested program or event through the cable system. JA6166-67 (60:25-61:4).

In defining the supposed "tying" product in this case, plaintiff mixes-and-matches some, but not all, of the channels and services that Cox offered into a wholly fictional "product" that he calls "Premium Cable." Cox witnesses testified across the board that they did not sell, and were not familiar with, any product called "Premium Cable." JA7138 (123:10-12, 18-20); JA6488 (6-19); JA6739 (39:11-12). Plaintiff describes this "product" as including "the level of video

[1] IPG is not necessarily a two-way service. JA6514-15 (59:24-60:3). Instead, it is loaded onto the STB or other device. Subscribers who leased a Cox box received the Cox IPG on their boxes, while subscribers who used another box or device received the IPG installed on that box. JA6279 (97:8-18); JA 7287-88 (40:22-41:3). TiVo, for example, has a well-regarded IPG. JA6452 (109:17-110:1).

programming service above expanded basic and which includes interactive features, such as the interactive programming guide, video-on-demand, and pay-per-view." JA6793 (30:6-9). That definition describes an amalgam of various services and packages that Cox offered in Oklahoma City and includes channels and services that Cox views and markets as separate products. JA6498 (43:2-16). It also includes a mixture of one-way services, including the channels in the Advanced TV tier such as HBO and Showtime, and the two-way VOD and impulse PPV services. JA6793 (30:3-18).

B. Cox Subscribers in Oklahoma City Did Not Need To Lease A Set-Top Box From Cox In Order To Access The Vast Majority Of The Content That Plaintiff Says Is "Premium Cable"

Because the content providers require that Cox encrypt the channels in the Advanced TV tier as a condition of their sale of the content, JA6503 (48:20-23), subscribers must have a device that decrypts the signal. JA6503-04 (48:1-49:5). Throughout the entire relevant period, subscribers in Oklahoma City could use two different methods. First, subscribers could lease from Cox a device called a set-top box that included the decryption software. JA6503 (48:1-16). An STB is a piece of equipment that allows the customer to see what is available, tunes to the desired channel, and decrypts the channel so it can be viewed. JA6502-03 (47:7-48:6).

Cox does not manufacture STBs. JA6501(46:19-20). During the relevant period, Cox bought STBs in bulk from consumer electronics manufacturers

("CEMs") including Cisco, Motorola and Pioneer, in order to make them available for lease to its customers. JA6501-02 (47:19-48:3). Cisco manufactured the STBs that Cox offered for lease in Oklahoma City. JA6511 (56:5-8). All of Cox's competitors in the video entertainment market in Oklahoma City—AT&T U-Verse, DISH and DirecTV—offered an STB for lease to their subscribers, to permit them to access all of the entertainment programming that they sell. JA7205 (60:17-21).

As an alternative, Cox subscribers in Oklahoma City could lease from Cox a piece of hardware about the size of a credit card called a CableCARD, which contains the software logic necessary to decrypt and view encrypted content. JA6507 (52:22-24). CableCARDs can fit directly into certain TVs that are designed to accept them, and also into various STBs, DVRs, or other products that the customer might own. JA6530 (75:14-21); JA6507 (52:18-24). They are based on an open industry standard that any manufacturer can utilize.[2] Cox leased CableCARDs to its subscribers in Oklahoma City during the entire relevant period. JA7151-52 (6:21-7:7). By 2008, Cox was leasing CableCARDs to roughly 800

[2] At the direction of the Federal Communications Commission ("FCC"), members of the cable industry, including Cox, worked with a cable industry joint venture called CableLabs and CEMs to develop and create CableCARDs. JA6506-07 (51:21-52:8); JA6728-30 (28:18-30:9). CableLabs is a nonprofit research and development corporation qualified under the National Cooperative Research and Production Act to draft specifications and conduct research and development for the cable industry. JA7105 (90:5-8, 11-14); *see also* 53 Fed. Reg. 34,593 (Sept. 7, 1988).

customers. JA7152 (7:8-10). That number nearly doubled by December 2012. JA7152 (7:8-12); JA7154 (9:15-17). Only Cox offers this option in Oklahoma City. The FCC only requires cable providers like Cox to lease CableCARDs and fiber and satellite providers do not provide CableCARDs as an alternative to their leased STBs at all. JA7206 (61:7-15).

Throughout the relevant period, many CEMs sold STBs and other devices at retail that subscribers used in conjunction with a CableCARD to access encrypted programming from Cox. In fact, during the relevant period, CableLabs certified CableCARD-equipped devices made by 25-30 manufacturers, all of which were eligible for retail sale. JA7117 (102:11-22). These products included high-end televisions, STBs and a device that connects to a computer. JA7117-18 (102:23-103:1). TiVo, a DVR sold at retail, is the best known of these devices. JA4343-46 (33:23, 34:1-36:2). During the relevant period, a TiVo customer using a CableCARD could access all of Cox's "one-way" channels, and could receive PPV ordered by phone. JA6588 (23:6-22).

However, CableCARDs cannot on their own allow subscribers to access two-way services. Any two-way capability must be enabled by other elements of the device in which the CableCARD is installed. JA6521 (66:4-12); JA7166 (21:19-23). During the relevant period, no manufacturer sold at retail in Oklahoma

City a device that could access Cox's two-way services. JA6538 (83:23-25); JA6466 (11:19-23); JA6366 (23:10-15).

C. Cox Helped Develop And Implement The Tru2way Standard

Under the watchful eye of the FCC, and the protections of the National Cooperative Research and Production Act ("NCRPA"), 15 U.S.C. § 4301 et seq., the cable operators and CEMs signed a Memorandum of Understanding agreeing to work together to develop a standard that would allow CEMs to manufacture and sell retail devices with the technological capability to access two-way services across the country. JA4930 (PX0015). These groups again worked with CableLabs to develop a uniform two-way standard known as OCAP or OpenCable, and branded as tru2way. JA6514 (59:1-10); JA6515 (60:4-15). As explained to the jury by Cox's Vice President of Video Product Management, Steve Necessary, Cox believed that the tru2way initiative was a "big deal…a big initiative for the industry, and we wanted to be part of it." JA6519-20 (64:21-65:15). Cox believed that tru2way would benefit Cox and its subscribers by increasing competition for STBs, giving customers a choice in how they accessed Cox's video services and allowing Cox to decrease capital expenditures. JA6522-23 (67:19-68:9).

Plaintiff concedes that Cox "spent a substantial amount of money to prepare its systems for Tru2Way." Pl.'s Br. at 23. Mr. Necessary testified that Cox spent several million dollars installing hardware and software on the head-ends of each of its local markets, modifying the IPG, and working with Cisco to ensure that it installed tru2way software on the boxes that Cox purchased. JA6530-31 (75:22-76:1); JA6519-20 (64:25-65:15); *see also* JA4168-69 (64:13-65:7). Cox not only completed all of the expensive required changes, it did so by the agreed-upon date in the cable companies and the CEMs' Memorandum of Understanding. JA6521-22 (66:16-67:1, 67:10-18). At the time of the trial in October 2015, Cox had tru2way running on over 2 million boxes and its "best guide" running exclusively with tru2way software. JA6536 (81:4-8).

The testimony and contemporaneous business records introduced as exhibits also confirm that Cox fully expected tru2way to result in robust offerings for two-way devices sold at retail. JA6514 (59:11-14); JA6524 (69:15-19); JA6526 (71:10-21); JA7162-63 (17:23-18:22); JA5551 (DX0041).

D. Despite Cox's Best Efforts, Manufacturers Chose Not To Bring Two-Way Devices To Market For Their Own Independent Business Reasons

Unfortunately, however, the CEMs failed to develop and market retail tru2way-compatible devices as quickly as Cox expected. As detailed below, many CEMs developed and considered selling (and in limited cases, actually sold) STBs and televisions capable of accessing Cox's two-way services. In most cases, Cox *helped* these CEMs to do so. But at the end of the day, no CEM chose to sell those products to Cox subscribers in Oklahoma City during the relevant period. JA6737

(37:7-15); JA6740 (40:9-11); JA7078 (63:11-15); JA7301 (54:11-13); JA7302 (55:19-22). The evidence shows that each CEM made that decision for its own independent business reasons, and plaintiff presented no evidence that would permit any different conclusion.

Cisco: During the relevant period, Cox purchased two-way capable STBs from Cisco. JA6501-02 (46:19-47:6); JA5625 (DX0497). At any time, Cisco could have sold those same boxes at retail in Oklahoma City or in any area in which a cable company had implemented tru2way on its head-ends. However, as Cisco employee David Davies testified, Cisco decided for its own independent business reasons not to sell these two-way boxes at retail. JA7296-99 (49:22-52:21). Mr. Davies confirmed under oath that this decision had *nothing to do with Cox*. JA7299-7300 (52:22-53:4, 9-19). Instead, he disavowed any suggestion that Cox influenced Cisco's marketing strategy, declaring that "there's nothing that would prohibit us from selling at retail if we decided that there was a retail market." JA7300 (53:17-19); *see also* JA7305 (58:12-17) ("If Cisco would have wanted to sell our boxes at retail, there was nothing that would have prohibited us from selling our boxes at retail.").

Cisco licensed its technology to other manufacturers, including Pace, Pioneer and Panasonic. JA7301-02 (54:23-55:10). Importantly, *Cox* had no right or ability to provide this technology to any manufacturer because Cisco owned it and was the sole licensor. JA6512-13 (57:22-58:2). Each of these companies manufactured two-way boxes that worked on Cox's system, but they also chose not to sell those devices at retail. JA7302-03 (55:8-56:7). Mr. Davies testified again that Cox had nothing to do with these decisions, JA7302 (55:23-25), and plaintiff did not present any evidence to the contrary.

Samsung: Stephen Goldstein of Samsung testified that Samsung developed tru2way televisions, JA5628-29 (DX0507), and STBs, JA5626-27 (DX0506), and tested them on Cox's network to ensure that they worked with Cox's two-way services. JA7076 (61:1-8); JA7083-84 (68:7-69:4). Although Samsung tru2way STBs worked on Cox's systems and could access Cox's VOD and PPV, Samsung did not sell these products to Cox subscribers at retail. JA7077 (62:8-19). Mr. Goldstein testified that Cox had nothing to do with Samsung's decision not to sell tru2way boxes at retail. JA7078-79 (63:20-64:3) ("Cox doesn't really play a role in Samsung's decisions about the products that we introduce and sell through Best Buy and retail in general."). Samsung did briefly sell at retail a tru2way television. JA7079 (64:15-19). This television was also fully compatible with Cox's system and Cox worked with Samsung to test the television. JA7079-80 (64:24-65:1); JA7083-84 (68:7-69:14). Mr. Goldstein confirmed that Cox did not play any role in Samsung's decision to stop selling the tru2way television at retail. JA7085 (70:2-5).

Panasonic: Panasonic also developed tru2way enabled televisions. JA6540 (85:11-16). Cox worked with Panasonic to test them, and they could access Cox's two-way services. *Id.*; JA4444-48 (55:5-56:21, 57:25-59:7); JA4479-81 (169:9-171:15); JA6549-50 (94:22-95:6). Panasonic also sold this television for a limited time in certain Comcast markets. JA6548-49 (93:23-94:21); Suppl. App. 59 (DX0025); JA5623 (DX0476). However, Panasonic's stated concern that "integrating Tru2way support adds cost to a TV--$300 per unit," JA5624 (DX0476), was the only evidence presented to the jury about why Panasonic stopped selling the television. Cox did nothing to discourage Panasonic from selling a tru2way television at retail. JA6578 (13:16-18).[3]

TiVo: TiVo and Cox worked extensively to develop a TiVo STB that could access Cox's two-way services. However, for reasons known only to TiVo, TiVo refused to use the uniform tru2way standard. JA6593 (28:5-10). Instead, TiVo insisted that Cox use TiVo's proprietary software, which complicated and delayed the project. JA6593-94 (28:23-29:16). Plaintiff presented no evidence that *Cox* delayed the project with TiVo. Mr. Jeffrey Klugman of TiVo testified in his

[3] Cox also worked with Funai, LG, Sony, and ADB on similar projects that would have brought retail options to the market. JA6582-85 (17:18-20:3); JA4442 (53:7-23); JA4488-89 (178:23-179:21); JA4494-95 (184:3-185:16). Plaintiff did not present any evidence that Cox did anything to stop these manufacturers from selling tru2way products at retail. To the contrary, Jud Cary of CableLabs testified that Cox did "nothing" to "prevent consumer electronics companies from getting certification of their retail devices or to block the development of a retail market for set-top boxes." JA7122 (107:9-15).

deposition in September 2011 that the project was ongoing, and the parties were "very engaged in the development process." JA4400-01 (157:6-158:11).[4] Mr. Klugman testified that the process had been delayed by a software update issue between Cox and Motorola, but that in his view it was "not an illegitimate reason." JA4400-04 (157:6-159:17, 160:2-3, 160:10-161:8). Contra plaintiff's suggestion, Mr. Necessary did not contradict Mr. Klugman's testimony. Instead Mr. Necessary testified that this initial project ultimately failed three years later, in 2014, because of an indemnification issue between Motorola and TiVo that again had nothing to do with Cox. JA6596-97 (31:16-32:13). Cox and TiVo then pursued a third, ultimately successful, initiative. JA6597 (32:14-16); JA6284-85 (102:13-103:1).

E. Cox Has Always Allowed Subscribers To Use Their Own Devices To Access All Parts Of The Product Plaintiff Calls Premium Cable

Plaintiff does not dispute that subscribers could access all of Cox's one-way services, including premium channels such as HBO, by using televisions and set-top devices such as TiVo that were sold in Oklahoma City during the relevant period. *E.g.*, JA5630 (DX0508). Cox made clear to its subscribers that they could use these devices and did not have to lease an STB from Cox. The document that plaintiff admits is the "single source of truth" for Cox's teams in Oklahoma City,

[4] Plaintiff chose to present Mr. Klugman's deposition testimony from September 2011 to the jury at trial rather than bring him as a live witness.

JA4955 (PX0033), clearly explains that "[p]lug-and-play is a service that allows a customer that purchased a digital cable-ready television to receive digital cable without a set-top box." JA7164-65 (19:14-20:22). Similarly, the website print-out admitted as PX0032 (JA4952) told consumers that "[i]f you own a One-way Digital Cable Ready (DCR) TV or other display device that is CableCARD compatible, you may lease either a CableCARD or a digital set-top receiver in order to receive Cox Advanced TV."

At the same time, Cox also honestly told its customers that these one-way devices were not technologically capable of accessing two-way services. *See, e.g.*, JA5190 (PX0043) ("Unfortunately, the current digital cable ready device technology cannot support two-way interactivity…."). Although plaintiff tries to infer something nefarious from Cox's statements, the clear record from trial is that Cox simply told its subscribers the truth that "[i]f you've got a one-way device, you cannot get two-way services." JA7166 (21:22-23); JA7170-71 (25:24-26:2). It was critical that Cox do so in order to comply with FCC rules and correctly set subscribers' expectations. JA4987 (PX034) (reflecting FCC rule); JA7166-67 (21:24-22:15) (it is "fundamental" that customers be told the truth); JA7182 (37:17-23) (importance of "setting the expectation" for customers). Especially in a competitive market with other video entertainment providers, Cox wanted its customers to understand what services they would be able to access with and without a two-way capable STB. JA6280 (98:6-22).

In September 2009, Cox alerted its subscribers to tru2way technology through its Annual Customer Notice, explaining that "tru2way televisions and devices will be available in the future, and Cox is committed to supporting that technology when it becomes available." JA5616 (DX0064); JA7161-63 (16:2-7, 17:23-18:12). Cox fully anticipated that a "plethora" of tru2way devices would become available for retail sale and that subscribers would buy them for use with their Cox video services. JA7160-61 (15:16-16:1); JA7163 (18:16-22). In fact, for at least the next three years, Cox repeatedly notified its subscribers that tru2way retail devices were on the horizon *and* that Cox was committed to supporting them. JA5186 (PX0043); JA5612 (DX0062); JA5614 (DX0063); JA5616 (DX0064); JA5618 (DX0065).

Plaintiff claims without basis that these FCC-required Annual Notices did not provide sufficient information to subscribers, and implies that Cox provided contrary information through "the Cox website or calls with Cox customer service representatives." Pl.'s Br. at 23-24. But plaintiff did not provide *any* such evidence to the jury. Instead, plaintiff's own exhibits confirm that Cox clearly and consistently told its customers that they could use their own boxes to access one-way services, and would be able to use their own boxes to access two-way services once manufacturers started selling boxes with that capability. JA5186 (PX0043); JA4952 (PX0032); JA4955 (PX0033); JA4974 (PX0034).

Plaintiff's rhetoric that Cox "with[held] certain services" from subscribers who did not rent an STB from Cox, Pl.'s Br. at 17, is just word play. It is an undisputed technological fact that two-way services require a two-way capable device, and for a period Cox simply was the only company offering two-way devices in the Oklahoma City area. *See supra* pp. 11-12. Plaintiff introduced no evidence at trial that Cox ever refused to sell any service to subscribers who did not lease an STB from Cox, or otherwise prohibited any subscriber in Oklahoma City who possessed a two-way capable box from accessing Cox's two-way services. Plaintiff claims that Cox "unjustifiably refused to allow a secondary market for STBs," Pl.'s Br. at 25, but did not present evidence at trial that *any* Oklahoma City subscriber wanted to use a box purchased second-hand or that Cox stymied such an effort. Plaintiff introduced evidence that Cox refused to serve one customer in Tulsa who had purchased an STB on eBay. JA7428 (15:11-14). But Cox explained without contradiction that it only refused to provide access to this subscriber because it reasonably believed that the STB was stolen. JA6227-28 (45:25-46:4); JA6283 (101:7-12); JA7441-42 (28:20-29:9); JA7452 (39:10-18); JA7461-62 (48:22-49:10).

II. PROCEEDINGS BELOW

Mr. Healy filed this suit on April 30, 2012. On January 9, 2014 the district court certified a class composed of

> 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.

JA123. The district court also granted Cox's motion for summary judgment to exclude any damages for the periods during which the FCC regulated Cox's STB rates. The parties agreed on a stipulation that eliminated all claims for damages prior to April 8, 2008 (as well as some claims after that date). *See* JA169.

Plaintiff's expert calculated purported "overcharges" on a month-by-month basis for each subscriber. JA6902 (95:5-13). The vast majority of plaintiff's claimed damages—approximately $42 million of the $48 million sought—were the result of claimed overcharges on DVR fees. JA6903-04 (96:4-97:4); JA6909 (102:4-20). Cox repeatedly objected to that portion of the damages claim, and to the inclusion of persons claiming injury only through DVR fees in the class. JA1941-42; JA1945-46; JA356-57. The Court held that plaintiff's ability to recover for DVR overcharges was a question for the jury to decide, but a substantial number of class members would have no damages, under plaintiff's own model, if DVR fees were excluded from the damages figure. JA1946.

Trial lasted for 10 days. It included live testimony from six Cox witnesses, four expert witnesses, three third-party witnesses involved in the consumer electronics industry, and the named plaintiff, Mr. Healy. It also included deposition testimony from six Cox witnesses and three third parties involved in the consumer electronics industry. The court admitted 99 exhibits. Cox moved for judgment as a matter of law after the close of plaintiff's case, and the Court took the motion under advisement. JA476; JA7070-71 (55:5-56:1). After several days of deliberations the jury returned a verdict for the plaintiff, with damages in the amount of $6.313 million. JA613-14. Cox immediately orally renewed its motion for judgment as a matter of law, JA7723-24 (7:23-8:20), and filed its renewed motion the same day. JA543.

Two weeks later, on November 12, 2015, the district court granted Cox's renewed motion for judgment as a matter of law, finding that plaintiff had presented no evidence that Cox foreclosed any competition that otherwise would have existed, or caused any of the alleged damages. JA675-79. Specifically, the district court concluded that "Plaintiff failed to offer evidence from which a jury could determine that any other manufacturer wishes 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," JA676, and "failed to demonstrate that Cox's customers were harmed because of the alleged tie," JA679. Because plaintiff failed to offer any "evidence that a competitor wished to sell set-top boxes at retail," he could not "establish that any harm came to them because of any tying activity." *Id.*

SUMMARY OF THE ARGUMENT

The district court correctly recognized that Cox is entitled to judgment as a matter of law because the evidence showed that Cox did nothing that limited, coerced, or distorted consumer decision-making in any separate market for STBs. As far as Cox was concerned, consumers were free to acquire an STB from anyone they wanted to, or no one at all (although of course that would limit their access to certain two-way features). Cox's decision to offer STBs to its customers that want them cannot be transformed into *per se* illegal "tying" merely because other manufacturers are, for their own reasons, not yet offering a competing product. As the district court explained, "[b]ecause a set-top box could not be purchased elsewhere, through no fault of Defendant, there is no exploitation or a stifling of competition," JA677, and therefore no tying claim.

Plaintiff argues that in past cases the defendant's own sales have been treated as sufficient proof that a tie foreclosed a substantial volume of commerce. But in every one of the cases that plaintiff cites, there was proof that the defendant *did something* to coerce consumers to make different choices than they would prefer in the market for the allegedly "tied" product—usually refusing to sell Product A unless the customer also purchased Product B. No court has ever suggested that it is unlawful "tying" for a company to sell two products—without doing *anything* to coerce the buyers of product A to also buy product B—just because there happen to be no other sellers of product B in the area. The issue in tying cases is whether "anticompetitive forcing is likely" and whether *that forcing* forecloses a substantial volume of commerce in the market for the allegedly tied product. *Jefferson Parish*, 466 U.S. at 16-18. The fact that Cox's own sales might be "substantial" is irrelevant in the absence of any evidence that those sales implicated any "anticompetitive forcing" that the law could be concerned about. *Id.*

Plaintiff's position would take the tying out of tying law, and condemn a broad range of pro-competitive, pro-consumer behavior. For example, if a hospital had power in the local market for some surgical procedure (*e.g.*, hip replacement), it could not offer complementary services (*e.g.*, nursing, anesthesia, post-surgical pain management or rehabilitation) unless it somehow took responsibility for ensuring that there would always be independent, alternative suppliers for each of them. If Ford had market power in some category of light trucks, it could not offer trailer hitches as an option unless someone else sold a competing model. Antitrust law scrutinizes attempts to impose unreasonable restraints on trade; it does not punish a company for failing to conjure into existence competition that does not exist, for reasons that are not its fault. Doing so would perversely *narrow* consumer choices—the exact opposite of what tying law is supposed to achieve.

If there were any doubt about that, there are several independent alternative reasons to affirm the judgment below—including the requirements of the National Cooperative Research and Production Act, the fact that Cox made most elements of "Premium Cable" available to customers without any STB, and plaintiff's failure to prove an appropriate geographic market or any acceptable measure of damages. And if for some reason this Court reversed the Rule 50 judgment, Cox would be entitled to a new trial under different instructions, judgment as a matter of law against those whose claimed damages were based solely on DVR fees, and assurance that no uninjured class member would share in any damages award.

STANDARD OF REVIEW

After hearing the witnesses' testimony and reviewing the record, the district court held that plaintiff failed to present any "evidence upon which the jury could properly find" for him. *See Century 21 Real Estate Corp. v. Meraj Int'l Inv. Corp.*, 315 F.3d 1271, 1278 (10th Cir. 2003) (quotation and citation omitted). This Court reviews that determination *de novo*, and can affirm "on any ground supported by the record." *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1485 (10th Cir. 1996) (citation omitted).

This Court reviews *de novo* any legal objections to the jury instructions "in light of the entire record to determine if they 'fairly, adequately and correctly state the governing law and provide the jury with an ample understanding of the applicable principles of law and factual issues confronting them.'" *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1154-55 (10th Cir. 2012) (citation omitted). Objections to specific jury instructions are reviewed under an abuse of discretion standard to decide "whether the jury was misled in any way and whether it had a[n] understanding of the issues and its duty to decide those issues." *Id.* (citation omitted). If the trial court erred, "the judgment must be reversed if the jury might have based its verdict on the erroneously given instruction." *Id.* (alteration and citation omitted).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE JUDGMENT BELOW BECAUSE THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFF FAILED TO PRESENT ANY EVIDENCE THAT COX PREVENTED ANYONE FROM ACQUIRING A SET-TOP BOX FROM A COMPETITOR

The district court held that plaintiff failed to present any non-speculative evidence that Cox was responsible, in any way, for the fact that manufacturers chose not to sell two-way STBs at retail in Oklahoma City during the relevant period. The record demands that conclusion, and it is fatal to plaintiff's claim. As the district court recognized, it means that plaintiff failed to prove substantial foreclosure in the market for the purportedly "tied" product, or any injury causally traceable to an anticompetitive aspect of Cox's conduct. And although the district court did not say so, the same basic insight also means that plaintiff failed to prove that Cox coerced or "forced" consumers to purchase a product they otherwise would have purchased elsewhere, and establishes that Cox is entitled to a business justification defense as a matter of law.

A. Plaintiff Submitted No Evidence That Cox Prevented Any Manufacturer From Selling Set-Top Boxes At Retail

Plaintiff asked the jury to rely on unsupported speculation that Cox must somehow be to blame for the lack of STB competition. The district court correctly rejected each piece of "evidence" that plaintiff presented as insufficient to prove his case.

1. Plaintiff Cannot Rely On Pure Speculation To Meet His Burden

Plaintiff offered no evidence that anything Cox did forced consumers to lease an STB from Cox. In fact, it is undisputed that Cox *did* sell so-called "Premium Cable" services even to those who did not lease an STB. *See* Pl.'s Br. at 17 (noting the existence of "Premium Cable subscribers who chose not to rent an STB from Cox"). Plaintiff complains that "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," *id.*, but again that was simply a true statement in light of existing technology and the products available in the marketplace. JA7166 (21:6-23). It does not negate the evidence that Cox told its subscribers that they could use retail two-way devices if the manufacturers of those devices decided to sell them. *See supra* Facts § I.E. Unfortunately none of the manufacturers of two-way devices chose to sell them at retail in the relevant period. *See supra* Facts § I.D. But the district court correctly recognized that plaintiff presented no evidence from which a reasonable jury could infer that *Cox* was responsible for those decisions, JA676-77, which were made by sophisticated independent companies like Cisco, Samsung, and Panasonic. *See supra* Facts § I.D.

As the district court recognized, plaintiff's case on that key point amounted to speculation and conjecture. JA676-77. Plaintiff argues that the jury could infer that Cox did something to coerce its subscribers to lease an STB simply from the fact that two-way capable STBs existed but were not sold at retail, speculating that the absence of competing products must be proof that the (supposed) "tie discourage[d] entry by competitors." Pl.'s Br. at 42. Plaintiff's speculation ignores the undisputed evidence that STB manufacturers frequently targeted cable companies (rather than consumers) as their preferred market, and had their own financial reasons not to sell directly at retail. JA7295 (48:3-6); JA7297-7300

(50:9-53:4); JA7078-79 (63:11-64:3); JA4131-32 (19:23-20:2); JA 4146 (39:3-12). Plaintiff says the Consumer Electronics Association "confirmed great interest" in a retail market for STBs, Pl.'s Br. at 43, but it did not identify a single manufacturer that actually was interested in selling two-way STBs at retail. The district court recognized that plaintiff's evidence "ended with a discussion of the desire," and "never was there any evidence the desire was prevented or blocked by actions from Cox." JA678. The mere existence of potential competing products does not permit a jury to make "the leap in logic necessary" to infer that Cox must somehow be responsible for the fact that companies like Samsung and Cisco chose not to sell them at retail. *Id.*

The district court likewise rejected as "unsupported speculation" plaintiff's argument that Cox prevented TiVo from offering a two-way device by failing to resolve an indemnification issue. JA677. The evidence on this issue was limited to testimony from a TiVo executive who disclaimed personal knowledge, JA4401 (158:17-20), and described the indemnification issue as "not an illegitimate reason" for postponing the Cox-TiVo project. JA4404 (161:11-12). As the district court recognized, there is no basis to speculate that this indemnification issue was "manufactured by Cox to prevent the TiVo deal from being completed." JA677. The evidence also was clear that TiVo could have offered two-way services to

Cox's subscribers at any point by complying with the tru2way standard. JA6593 (28:5-15).

Plaintiff claims that "[r]esellers on eBay or other platforms are another potential competitor." Pl.'s Br. at 43. But the district court recognized that plaintiff failed to show a single individual in Oklahoma City who wanted to purchase an STB through resellers but was unable to do so. The one example of a Cox subscriber who purchased an STB on eBay but then was not able to use it (because Cox reasonably believed that the STB was stolen) came from Tulsa, and the district court rejected it as an "isolated and minimal incident" as well as insufficient evidence of foreclosure in Oklahoma City. JA678.

Plaintiff points to testimony from Cisco, Panasonic, Samsung, and CableLabs, but David Davies of Cisco testified that "Cox didn't play a role" in Cisco's decision not to sell its STBs at retail since 2005 and that Cox had not "done anything to prevent Cisco from selling its set-top boxes at retail." JA7299-300 (52:25-53:4). Panasonic decided to withdraw its tru2way products from the market because "integrating Tru2way support adds cost to a TV--$300 per unit." JA5624 (DX0476). Stephen Goldstein from Samsung testified that "Cox doesn't really play a role in Samsung's decisions about the products that we introduce and sell through Best Buy and retail in general." JA7078-79 (63:25-64:2); JA7085 (70:2-4). And CableLabs testified that Cox did "nothing" to "prevent consumer electronics companies from getting certification of their retail devices or to block the development of a retail market for set-top boxes." JA7122 (107:9-15).

Plaintiff attempts to rely on the fact that STBs are available for sale in other countries, speculating that "[t]here 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." Pl.'s Br. at 43. Again, Cox did nothing here that can fairly be described as "tying." And as plaintiff knows, the district court explained in the predecessor litigation that "differences regarding regulations and costs imposed" made the Canadian market an inappropriate comparison. *In re Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litig.*, No. 09–ML–2048–C, 2011 U.S. Dist. LEXIS 149656, at *68 (W.D. Okla. Dec. 28, 2011). Dr. Wall explained key differences between the U.S. and Canadian markets in this case, particularly that Canadian STBs were not required to support CableCARDs. JA7385 (73:13-25).

Indeed, plaintiff did not even prove that there were customers in Oklahoma City who would have wanted to purchase a two-way box from another company at retail if one had been available. The *only* consumer evidence plaintiff offered was from Mr. Healy. Mr. Healy testified that, all else being equal, he would actually still purchase his STB from Cox. JA6313 (17:13-17). His complaint was that he wanted to buy an STB rather than lease one, JA6310 (14:9-14), and the district court correctly instructed the jury (without objection from plaintiff) that Cox's decision to only offer STBs for lease rather than sale was irrelevant to the tying claim. *See* JA592. Mr. Healy also never testified how much he might be willing to pay for an STB, but the uncontradicted evidence at trial was that the retail cost for a two-way STB was a reason that consumers ultimately chose not to buy their own STBs. JA7297-98 (50:16-51:2); JA4163-64 (59:25-60:5); JA6737-38 (37:7-38:13); *see also* JA4190 (95:12-18) (tru2way added $300 to retail cost, but consumers valued tru2way features at only $127).

"[E]vidence must be based on more than mere speculation, conjecture, or surmise." *Kirkbride v. Terex USA, LLC*, 798 F.3d 1343, 1351 (10th Cir. 2015) (citation omitted); *accord Brown v. Reardon*, 770 F.2d 896, 904 (10th Cir. 1985). Even if plaintiff had presented sufficient non-speculative evidence to make out a prima facie case, the Court must look at *all* the evidence and decide whether a reasonable jury could have found in plaintiff's favor. *See, e.g.*, *Jackson v. NTMedia, LLC*, 233 F. App'x 770, 773 (10th Cir. 2006) (requiring court to "give credence to 'evidence supporting the moving party that is uncontradicted and unimpeached'" (citation omitted)); *Dillon v. Mountain Coal Co.*, 569 F.3d 1215, 1220 (10th Cir. 2009) (considering defendant's evidence to undercut plaintiff's argument regarding sufficiency of evidence presented at trial). Where plaintiff's case relies on speculative inferences that are expressly contradicted by Cox's uncontradicted *evidence*, he fails to meet that standard.

2. Plaintiff's Argument That Cox Did Not Do Enough To Support Manufacturers Is Legally Irrelevant And Factually Unsupported

Having no evidence that Cox did anything to *prevent* manufacturers from selling STBs at retail, plaintiff accuses Cox of failing to *encourage* or *assist* that possibility with sufficient vigor. Specifically, plaintiff complains that Cox did not see a "compelling financial reason[] to push Tru2Way," and that Cox only informed subscribers about tru2way products in "small-print annual notices" rather than "through means by which customers would actually be likely to obtain information." Pl.'s Br. at 23-24 (citation omitted).

First, it is well-established that "the Sherman Act 'does not restrict the long recognized right of a trader or a manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal.'" *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). As here, the plaintiff in *Trinko* alleged that defendant violated the antitrust laws by not moving quickly enough to create conditions that would foster competition. 540 U.S. at 404-05. The Supreme Court rejected that claim, finding that any "alleged insufficient assistance" to competitors could not give rise to antitrust liability, even where that assistance was mandated by federal communications law. *Id.* at 410-11. This Court reached a similar holding in *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188 (10th Cir. 2009), where it declared that "[t]he Sherman Act does not force [a business] to assist a competitor in eating away its own customer base, especially when that competitor is offering … nothing in return." *Id.* at 1197. Plaintiff simply cannot establish antitrust liability by claiming that Cox provided what he thinks was insufficient support to STB manufacturers.

Second, the evidence presented at trial contradicts plaintiff's contention in any event—demonstrating that Cox took numerous steps to assist manufacturers in making two-way devices available for sale at retail, including TiVo, Samsung, Sony, Panasonic, and LG. *See, e.g.*, JA4442 (53:7-23); JA4488-89 (178:25-179:21); JA6539 (84:9-16); JA6590-97 (25:4-32:16); JA7083-84 (68:7-69:17); JA7121-22 (106:14-107:20). The uncontradicted evidence also shows that Cox spent millions of dollars to implement the technology necessary for these third-party manufacturers to sell retail devices that operated on Cox's system. *Supra* at pp. 12-13.

B. The District Court Correctly Recognized That There Can Be No Tying Claim Without Evidence That Cox Restrained Customers From Dealing With Competitors

The district court correctly recognized that "[b]ecause a set-top box could not be purchased elsewhere, through no fault of Defendant, there is no exploitation or a stifling of competition," JA677, and therefore no tying claim. That legal conclusion is clearly correct. As the Supreme Court has made clear, it is the "exploitation of [the seller's] 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" that provides the "essential characteristic of an invalid tying arrangement." *Jefferson Parish*, 466 U.S. at 12. *Jefferson Parish* requires "a substantial potential for impact on competition" as a "threshold matter" "in order to justify *per se* condemnation." *Id.* at 16. If there are no other suppliers, for reasons that are not Cox's fault, then Cox's lease of an STB does not foreclose anyone else's market opportunity and there is no substantial potential for any impact on competition. Any theory that would impose liability on Cox in those circumstances would turn tying law against its own basic objectives—*narrowing*, not protecting, consumer choice in the purportedly "tied" market.

When a claim is this fundamentally wrongheaded, the defect often can be seen through several different doctrinal lenses. The district court discussed two—lack of foreclosure, and lack of antitrust injury. But the same core defect also means that plaintiff failed to prove coercion, and that Cox is entitled to a business justification defense.

1. Cox Did Not Foreclose Any Commerce In Set-Top Boxes

As the district court recognized, plaintiff cannot prove that Cox "foreclosed a substantial volume of commerce in Oklahoma City to other sellers or potential sellers of set-top boxes" because there were no other sellers, for reasons that were not Cox's fault. JA676-77.

Plaintiff argues that in past cases courts have found "foreclosure" based merely on the volume of the defendant's own sales of the purportedly "tied" product. But in every single one of those cases, the court examined the defendant's conduct and found that it was *doing something* that was likely to force consumers to purchase the "tied" product from the defendant when they otherwise would have bought it from someone else. Typically the defendant outright refused to sell the "tying" product without the "tied" product, under circumstances where that was likely to coerce consumer choices in the "tied" product market. Almost all of plaintiff's cases clearly fit that classic pattern. Two required some analysis to determine that the defendant effectively procured that result.[5] And the remaining two cases—*Jefferson Parish*, 466 U.S. 2, and *Fox Motors, Inc. v. Mazda Distribs. (Gulf), Inc.*, 806 F.2d 953 (10th Cir. 1986)—found no tie at all, for reasons unrelated to the defendant's sales volume. All of these cases examined the relationship between the two markets to evaluate, as *Jefferson Parish* requires, whether "forcing" of consumer decisions in the allegedly "tied" product market was probable. 466 U.S. at 15. *None* of them held, as plaintiff would have it, that a

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5 *See Nobody In Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048 (D. Colo. 2004); *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407 (11th Cir. 1987).

defendant's sale of two complementary products could be condemned as "tying" purely on the grounds that no other competitor was selling one of them, and the defendant's sales were "substantial."

This is just simple logic. You cannot infer that the sale of a million beach balls will cause *substantial* harm to fish without threshold evidence that beach balls harm fish at all. And you similarly cannot infer that Cox's leasing of a million dollars of two-way STBs will cause *substantial* foreclosure of other competitive choices without proof that there are other competitive choices to foreclose—or that there would have been, but for something wrongful that Cox did. Plaintiff's notion would take the "foreclosure" out of "substantial foreclosure," and condemn defendants merely for selling a product that consumers need, when no one else will.

When plaintiff says that a *per se* claim requires "only evidence of the dollar volume of commerce covered by the tie," Pl.'s Br. at 33, he is glossing over the fundamental threshold requirement of proof that the arrangement or business practice is likely to force or foreclose consumer decisions—*i.e.*, that anything like "tying" is happening to consumers at all. Plaintiff's argument attempts to resurrect an approach to tying law associated with the *Fortner* decision that is inconsistent with *Jefferson Parish* and, as the Supreme Court recently explained, "has not been endorsed in any opinion since" *Fortner* itself. *Ill. Tool Works Inc. v. Indep. Ink,* *Inc.*, 547 U.S. 28, 34-36 (2006). The Supreme Court no longer views a plaintiff's invocation of the "tying" label as sufficient to justify *per se* condemnation. Each case requires an analysis, "as a threshold matter," of whether the defendant's conduct presents "a substantial potential for impact on competition." *Jefferson Parish*, 466 U.S. at 16; *Fox Motors*, 806 F.2d at 958.

Precedent from this Court and other circuits confirms that there can be no tying claim without proof that the defendant is responsible for some important distortion of consumer choice in the purportedly "tied" market. This Court held in *Fox Motors* that the plaintiff "did not satisfy the requirements of a *per se* tie" because the plaintiff had failed to show that the alleged conduct "foreclose[d] competing manufacturers of the [tied product]." 806 F.2d at 958. A First Circuit case cited by plaintiff confirms that a *per se* claim requires "some minimal showing of real or potential foreclosed commerce caused by the tie." *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 815 n.11 (1st Cir. 1988). And the Second Circuit's decision in *Konik v. Champion Valley Physicians Hospital Medical Center*, 733 F.2d 1007, 1018 (2d Cir. 1984), is particularly illuminating. There, the defendant hospital required surgical patients to receive their anesthesia from someone with privileges at its hospital. The hospital did not artificially restrict its admitting privileges, and there was no evidence that it would have refused to grant those privileges to the plaintiff. But in fact only one anesthesia practice—AAP—had taken the necessary steps. Although the court recognized that the "practical effect" was "that patients have only the AAP anesthesiologists from whom to choose," it held that circumstance to be "legally insufficient in the circumstances of this case to establish that the Hospital has tied its operating facilities to the services of AAP." *Id.* Because the lack of alternatives was (as here) the consequence of third-party decisions that were not the hospital's fault, nothing *the hospital did* was likely to force consumer decision-making in the anesthesia market and there was no "tying."

Plaintiff tries to segregate this precedent, claiming that it applies only in "zero foreclosure" cases where the tied product is "completely unwanted." Pl.'s Br. at 39 (citation omitted). Plaintiff tries to distinguish those cases on the ground that "it is undisputed that customers need an STB," *id.* at 39-40, implying that sales would have occurred even without the purported tie. That is a *non sequitur*. The Supreme Court recognized in *Jefferson Parish* that "[i]t is safe to assume that every patient undergoing a surgical operation *needs* the services of an anesthesiologist," but nonetheless held that because "this record contains no evidence that the hospital 'forced' any such services on unwilling patients" the *per se* rule could not apply. 466 U.S. at 28-29 (emphasis added). The "zero foreclosure" cases are not about whether there would have been no sales of the tied product without the alleged tie. Instead, they address whether there is any basis for finding an "adverse effect on competition." *Coniglio v. Highwood Servs., Inc.*, 495 F.2d 1286, 1292-93 (2d Cir. 1974). If not, there can be no *per se* claim.

Plaintiff distorts the district court's holding by claiming that the court required him to identify "specific competitors" who were kept out of the STB market. Pl.'s Br. at 2, 6. The district court imposed no such requirement. The court looked for proof that Cox did something anticompetitive that would have the natural tendency to exclude *any* competitor, named or unnamed, from selling STBs at retail, and recognized that "there simply is no evidence from which a reasonable jury could determine that [Cox's practices] led to a foreclosure of commerce." JA678. Of course if there were proof that a defendant's conduct made it impossible for any competitor to enter a "tied" product market, a jury might be able to infer substantial foreclosure even if the plaintiff or the jury could not specifically identify the competitors who would otherwise have entered. But that observation is a complete red herring in a case like this, where the dispute was about whether Cox did anything at all to prevent *anyone* from selling STBs at retail—and the potential sellers are, in any event, well known.

Plaintiff's failure to show "a substantial potential for impact on competition," *Jefferson Parish*, 466 U.S. at 16, means that he did not satisfy a basic threshold requirement for invoking the *per se* rule against tying. *See* JA488-90; JA558-61. That defect is fatal. Plaintiff expressly disavowed any rule of reason claim, *see* JA348, and offered no evidence on the essential element of a rule of reason claim that anticompetitive effects outweigh any procompetitive justifications. *See Gregory v. Fort Bridger Rendezvous Ass'n*, 448 F.3d 1195, 1205 (10th Cir. 2006) (describing plaintiff's burden under the rule of reason).

2. Plaintiff Suffered No Injury To His Business Or Property Causally Related To Anything Cox Did

The district court also correctly recognized that the same basic insight means that plaintiff fundamentally failed to prove causation and antitrust injury—a "loss or injury [that] arose from [any] competition-reducing aspect of Defendant's behavior." JA678. A tying plaintiff must prove "that the alleged tying arrangement, as distinct from consumer demand, influenced the level of" purchases in the allegedly "tied" product market. *Fox Motors*, 806 F.2d at 958. As the district court explained, without evidence that any competitor wanted to sell STBs at retail, or that Cox somehow prevented one from doing so, "[p]laintiff cannot establish that any harm came to them because of any tying activity" even if it occurred. JA679.

Plaintiff tries to sidestep that burden by claiming that antitrust injury can be found in allegations that Cox overcharged its own subscribers. Pl.'s Br. at 46. But the Supreme Court has made clear that the defendant's *pricing* cannot inflict the kinds of harms that tying law is concerned with. *See Jefferson Parish*, 466 U.S. at 14-15. The district court correctly held that, under this Court's opinion in *Elliott*

Industries Limited Partnership v. BP America Production Co., 407 F.3d 1091, 1024-25 (10th Cir. 2005), plaintiff had to prove that the alleged overcharges resulted from a competition-reducing aspect of Cox's conduct. Setting a high price is not competition-reducing or anticompetitive in any way; it *fosters* competition, even if that competition does not emerge immediately. *See Trinko*, 540 U.S. at 408 (rejecting argument that charging of monopoly prices could constitute anticompetitive conduct because "charging. . . monopoly prices[] is not only not unlawful; it is an important element of the free-market system").

Plaintiff suggests that his expert's damages model can prove causation and antitrust injury, Pl.'s Br. at 44-46, but it simply did not address the relevant issues. Dr. Hastings did not even have an opinion that "at least one customer would buy a set-top box at retail" in the but-for world, if Cox did not supply STBs. JA6965-66 (52:19-53:1). She also did not identify any "sellers [that] would be in the 'but for' market." JA6955 (42:12-13). And her model measured damages as a function of the price that Cox would have charged in a "perfectly competitive market." JA6934-35 (21:20-22:19). That is a "hypothetical" construct of economic theory, not an analysis of whether the posited "perfectly competitive market" would have existed but for an anticompetitive aspect of some conduct attributable to Cox. JA6941-42 (28:2-29:11). Nothing about Dr. Hastings' analysis speaks to *why* there were no STBs offered at retail in Oklahoma City during this period. JA6956

(43:21-23). Her analysis essentially *assumed* that Cox was responsible for the identified lack of competition. It cannot substitute for actual proof of that allegation.

3. Plaintiff Did Not Prove That Cox Coerced Any Consumer To Lease An STB

Although the district court did not frame its holding in these terms, the court's basic conclusions about the evidence also establish—as a matter of law—that plaintiff failed to prove the element of *coercion* that is fundamental to any tying case. Indeed, plaintiff cannot satisfy the most basic requirement of a tying claim—that "purchases of the tying product must be conditioned upon purchases of a distinct tied product." *Fox Motors*, 806 F.2d at 957. Plaintiff introduced no evidence that Cox itself "conditioned" the sale of "Premium Cable" upon the lease of an STB, or did anything else to limit or distort choices that consumers otherwise would have had. *See* JA482-84; JA550-52.

Plaintiff asserts that 99% of people who purchased Premium Cable from Cox also leased an STB from Cox. *See* Pl.'s Br. at 26-27. But against the backdrop that there were no competing suppliers of STBs, for reasons that are not Cox's fault, the most that the purchasing behavior proves is that consumers needed STBs to access two-way services (and plaintiff introduced no evidence that any subscriber leased STBs solely to obtain Cox's VOD). That was the holding in *Jarrett v. Insight Communications Co.*, No. 09-0093, 2014 U.S. Dist. LEXIS

103079 (W.D. Ky. July 29, 2014), which rejected the same tying claim that plaintiff brings here. That court recognized that this sort of evidence merely shows that the "decisions of third parties 'produce[d] the practical effect' of limited consumer choices," *not* that consumers were coerced by anything Cox did. *Id.* at *12-13 (quoting *Konik*, 733 F.2d at 1018).

As explained more fully below, the district court's instructions likely misled the jury, because they allowed a finding of coercion even without a finding that Cox in any way limited its subscribers' choices in STBs. *See infra* Argument § III.B. To the extent that the jury found true coercion, however, that finding is unsupported by the record evidence for all of the reasons explained above. *See supra* Argument § I.A. This Court should affirm on that basis as well.

4. Cox Would Be Entitled To A Business Justification Defense

Finally, there is a well-recognized affirmative defense to *per se* tying claims that allows the defendant to establish a business justification for requiring that two products be purchased together. Where the defendant proves that the alleged tie was "implemented for a legitimate purpose and no less restrictive alternative is available," it is not liable even if the plaintiff has proven each of the elements of a *per se* tie. *See Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1349 (9th Cir. 1987) (affirming jury verdict for defendant because "the tying arrangement is necessary to assure quality control and to protect its goodwill");

Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653, 655 (1st Cir. 1961) (finding business justification where purchases from alternative suppliers led to dissatisfied customers and frequent returns of and refunds for the tying product); *see also* ABA Section of Antitrust Law, *Model Jury Instructions in Civil Antitrust Cases*, Tying Arrangements Instruction 10 at B-112-13 (2005).

Here, Cox presented evidence that, even if a consumer's technological need to lease an STB in order to access two-way services could be described as "tying" (it cannot), Cox's offering of STBs for lease would be justified by those same technological and marketplace imperatives. Plaintiff concedes in his brief that "it is undisputed that [Premium Cable] customers need an STB or its equivalent to enjoy all the features of Premium Cable." Pl.'s Br. at 40. With no manufacturers selling two-way STBs at retail, therefore, Cox could not sell two-way services at all without offering those STBs itself. The district court refused to instruct the jury on business justification principles, *see* JA7600 at 9:13-20, which would at a minimum require a new trial, *see infra* Argument § III.C. But the undisputed facts actually establish that Cox is entitled to a business judgment defense as a matter of law, and the judgment can be affirmed on that basis.

C. Plaintiff Is Not Entitled To A New Trial

Plaintiff argues that he is entitled to a new trial because the district court imposed a different standard on him in its Rule 50 order than it provided to the jury in the jury instructions. Pl.'s Br. at 48. Given the complete absence of evidence that Cox did anything to prevent manufacturers from selling two-way STBs at retail, plaintiff was not entitled to the foreclosure instruction that required the jury to find nothing more than that "the dollar amount of Defendant's leases of set-top boxes was substantial." JA601. But the fact that plaintiff led the district court into error at the instructions conference does not entitle him to a new trial.

Of course the district court committed no error by applying a correct understanding of the law when evaluating Cox's renewed Rule 50 motion, despite the erroneous jury instructions. "[J]ury instructions are not the law of the case." *See City of Blaine v. Golder Assocs., Inc.*, No. 03-0813, 2006 U.S. Dist. LEXIS 73796, at *11-12 (W.D. Wash. Oct. 10, 2006). Indeed, Federal Rule of Civil Procedure 50(b) expressly provides the district court with the authority to submit the case to the jury "subject to the court's later deciding the legal questions raised by the motion." And in reviewing a district court's grant of judgment as a matter of law, this Court applies the appropriate controlling law, not the law as set forth in the jury instructions. *See Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1518 (10th Cir. 1984) (stating that when reviewing a district court's opinion on a Rule 50 motion, "it is the applicable law that is controlling, and not what the trial court announces the law to be in his [or her] instructions").

Nor can plaintiff seriously contend that he pulled his punches at trial on the key issues because the instructions improperly lightened his burden. For one thing, Mr. Healy procured that erroneous instruction *after the close of the evidence*. *See* JA7588-90 (68:16-70:8) (close of evidence); JA7595 (4:16-25) (court providing proposed instructions and referencing "Friday afternoon" charge conference). And regardless, plaintiff clearly understood that he needed to prove that Cox was responsible in some way for the absence of STBs sold at retail. As explained above, the absence of such proof would be fatal to his claims in several different ways, unrelated to the foreclosure instruction. And most of the trial was devoted to plaintiff's efforts to prove that Cox was responsible for the lack of competitive alternatives—he simply failed to do so. The fact that the district court subsequently permitted the jury to find the foreclosure element in his favor under too-lenient instructions changes nothing about that basic evidentiary insufficiency, and certainly does not entitle Mr. Healy to a second chance to muster evidence that he failed to identify after years of litigation.

II. THE JUDGMENT SHOULD BE AFFIRMED ON ALTERNATIVE GROUNDS IN ANY EVENT

Regardless, this Court would have to affirm the judgment below on four distinct and individually sufficient alternative grounds.

A. The District Court Erred In Allowing Plaintiff To Proceed On The Theory That "Premium Cable" Was The Tying Product

First, "Premium Cable" is not a real product in the marketplace, and cannot perform the role of an allegedly "tying" product in tying analysis. The theory of a tie is that the defendant uses his power over one product to coerce the customer to buy another product. *See supra* Argument § I.B. Such coercion is not possible where consumers can purchase the tying product without also purchasing the tied product. *See Jefferson Parish*, 466 U.S. at 11-12. But it is undisputed in this case that consumers could purchase and receive the great majority of the bundle of services that plaintiff arbitrarily lumps together and calls "Premium Cable" *without* leasing an STB from Cox, and that Cox permitted them to do so. A precise and accurate description of the tying product is essential to a tying claim is because it is the foundation of any analysis of whether the defendant can use that product "to impair competition on the merits in another market." *Id.* at 14. Plaintiff's decision to frame his claim this way makes it impossible to properly analyze coercion, or for him to carry his burden on that element.[6]

This is not the first case to challenge a cable company's decision to lease STBs as an unlawful tie. Four judges in three different districts have held that the

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[6] Cox warned of this problem and asked the district court to structure the evidence presented at trial accordingly. JA177. When it refused, JA356, Cox moved for judgment as a matter of law on the basis that plaintiff failed to show market power in any product that could coerce anyone. JA487-87; JA557.

precise tying product identified by plaintiff in this case cannot provide the basis for a tying claim. As the court explained in *In re Time Warner Inc. Set-Top Cable Television Box Antitrust Litigation*, "[o]nly those services which were unavailable to consumers who opted to use the alternative CableCARD to access secured channels, despite paying an additional fee for the service, caused consumers to be actually coerced into renting a cable box." No. 08 MDL 1995, 2010 U.S. Dist. LEXIS 22369, at *26 (S.D.N.Y. Mar. 5, 2010). Because the plaintiff failed to limit its tying product to those services that were unavailable without the tying product (*i.e.* two-way services), the district court granted a motion to dismiss, noting that "the existing pleading fails to allege actual coercion between the tying and tied products." *Id.* at *29.

The court hearing tying claims against cable company Insight Communications reached the same conclusion—twice. First, it rejected the same tying product that Healy alleges here because that plaintiff did not state a "plausible allegation of coercion as to the whole of the designated tying product." *Downs v. Insight Commc'ns Co.*, No. 09-0093, 2010 U.S. Dist. LEXIS 54577, at *13 & n.1 (W.D. Ky. June 3, 2010). As in *Time Warner Cable*, the plaintiff in *Insight* defined the tying product as a mix of one-way and two-way services, but it was only the two-way services that were unavailable without the lease of an STB. A second judge in that court agreed that "the existence of . . . a reasonable substitute that allows for many of the same features offered by Premium Cable" meant that a desire for "Premium Cable" as a whole could not coerce consumers to lease an STB. *Downs v. Insight Commc'ns Co.*, No. 09-0093, 2011 U.S. Dist. LEXIS 29616, at *4-5 n.1 (W.D. Ky. Mar. 22, 2011).

The court in *Marchese v. Cablevision Systems Corp.* likewise recognized that the fact that subscribers could access some of the tying product (*i.e.* one-way services) without also leasing the tied product was "the antithesis of coercion." No. 10-2190, 2010 U.S. Dist. LEXIS 85752, at *19 (D.N.J. Aug. 18, 2010).

The evidence at trial in this case conclusively showed that subscribers could access Cox's one-way services, including any premium channels, without leasing an STB. JA7138 (123:21-24); JA6739 (39:5-15). What subscribers could not access without leasing an STB from Cox was Cox's two-way services, *i.e.* Cox's VOD programming and the ability to watch Cox's PPV events without calling Cox.[7] JA7166 (21:5-23). There is simply no way to know whether any particular subscriber leased the allegedly "tied" product because it wanted Cox's *one-way* services and found the lease of an STB from Cox to be more convenient or desirable than purchasing a one-way STB (like TiVo) or CableCARD-enabled television at retail, or whether the subscriber instead leased the STB from Cox

[7] As explained above, subscribers also may not have been able to access Cox's IPG unless the CEM allowed Cox to download its IPG onto the device. *See supra* p. 8 & n.1. Any purchaser of such a third-party device, however, had access to that device's own IPG. JA6279 (97:8-18).

because it desired Cox's *two-way* services and had no other way to receive them. This is why, when faced with identical alleged tying products in *Time Warner Cable*, *Insight*, and *Cablevision*, the courts found that "Premium Cable" could not permit an appropriate coercion analysis in a tying case.

The Court should understand that plaintiff's decision to call "Premium Cable" the tying product also was not a pleading error or oversight on his part. If he had proposed a more sensible definition of the "tying" product limited to those services that actually require a two-way STB, the fundamental shortcomings of his claim would have been even more apparent. The trial record in this case shows how difficult it would have been for plaintiff to prove that Cox has market power in any market limited to VOD, IPGs, or PPV services. Plaintiff introduced no evidence that Cox has such power. *See* JA6950-53 (37:12-40:16). To the contrary, the evidence at trial showed that Cox faced stiff competition from "over the top" competitors such as Netflix and Hulu, JA6254 (72:1-9); JA7177-79 (32:15-33:2, 33:25-34:7); JA7225 (80:3-13); JA4050-51 (24:16-25:22), that satellite providers had a strong VOD offering, JA6648 (83:9-15), and that TiVo differentiated itself with its IPG, JA6591-92 (26:25-27:10); JA6452 (109:17-24).

Plaintiff made the strategic choice to frame a *per se* tying claim around an alleged "tying" product that is not a real product, and that does not permit the kind of focused analysis that such a claim requires. That defect independently requires affirmance of the judgment below.

B. Plaintiff Offered No Evidence To Prove The Relevant Geographic Market In Which To Measure Foreclosure

This Court should also affirm the district court's judgment on the alternative ground that plaintiff failed to prove the relevant geographic market for the allegedly tied product. *See* JA485-86; JA556.

Numerous tying opinions make clear that a proper market definition is necessary to any analysis of substantial foreclosure. *See, e.g.*, *Jefferson Parish*, 466 U.S. at 12 (plaintiff must prove that "competition on the merits in the market for the tied item is restrained"); *Fox Motors*, 806 F.2d at 957 (tying unlawful only if defendant can "impair competition on the merits with existing or potential rivals in another market"); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1546 (10th Cir. 1995) (tying is *per se* illegal "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"). And it is hornbook antitrust law that "[i]n defining the relevant market, two aspects must be considered: The product market and the geographic market." *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1024 (10th Cir. 2002). It is impossible to analyze a defendant's allegedly coercive power in the tying product, and any risk of substantial anticompetitive effects on consumer decisions about the tied product, except by reference to the competitive landscape in some geographical region. *See, e.g.*, *Jefferson Parish*, 466 U.S. at 29 (faulting the plaintiff for not defining the relevant market for the tied product, and noting that "[t]he market [for the tied product] is not necessarily the same as the market [for the tying product]; it . . . might be statewide or merely local"). Indeed, plaintiff concedes the point by arguing that some nefarious inference should be drawn from the fact that the retail market for two-way STBs is more competitive in Canada than in the United States. Pl.'s Br. at 43.

Plaintiff's expert admitted that she had conducted no analysis of the geographic parameters of any STB market. JA6972 (59:10-22); JA6973-76 (60:20-63:9) (explaining that the relevant geographic market must comport with "commercial realities" and that she did not examine the "commercial realities" of the STB market). Even on appeal, plaintiff fails to take a position on what the relevant geographic market is. Pl.'s Br. at 43.

The evidence at trial indicated that consumer electronics companies sold some two-way capable devices in locations outside of Oklahoma City. JA7294-95 (47:24-48:20) (Cisco's STB sales); JA4350-4352 (43:24-45:15) (TiVo's retail sales); JA4156-57 (52:21-53:4) (Panasonic's tru2way TV sales); JA7076-78 (61:18-62:7, 63:2-7) (Samsung's tru2way STB sales); JA7084 (69:23-24) (Samsung's tru2way TV sales). Plaintiff's claim is premised on confining his focus to Oklahoma City—and yet he never laid the most basic groundwork to justify that focus as a matter of antitrust economics. Is the market for two-way STBs local or is it national—driven by national retailers like Best Buy or Amazon? Could Cox's alleged market power in video entertainment services in Oklahoma City or other essentially local cable markets ever give it the power to substantially coerce consumer behavior in a regional, national, or global market for portable electronics equipment? Antitrust law requires a rigorous geographic market definition because it needs to be able to answer questions like these. Plaintiff's failure to offer any proof on the relevant geographic market for the tied product market he alleges therefore independently requires affirmance of the district court's judgment.

C. Dr. Hastings' Inadequate Damages Theory Is An Independent Reason For Affirming Judgment In Cox's Favor

Plaintiff also failed to present any minimally acceptable evidence and theory regarding damages, which is fatal to his case. The measure of damages must carefully distinguish the effects of the alleged anticompetitive conduct from the consequences of natural market forces, or competitive distortions the defendant is not responsible for. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (stating that plaintiffs are "entitled only to damages resulting from" their "theory of antitrust impact"). In this case the overwhelming evidence indicates, as the district court recognized, that Cox is not responsible for *any* reduction in competition in a retail market for STBs. JA676-77. But even if that were not true, plaintiff cannot possibly deny that there were more factors at work in this (hazily identified) market than anything Cox did. And yet plaintiff's damages model was almost absurdly simplistic. It compared what Dr. Hastings said was the prevailing market price with a speculative market price in a hypothetical *perfectly competitive market*. JA6991-92 (78:24-79:12) (providing basic overcharge theory); JA6934-35 (21:12-22:19) (explaining reliance on perfectly competitive market price); *see also* JA494-95; JA564-65.

Obviously no reasonable factfinder could conclude, on the evidence in this case, that but for something Cox did the (supposed) "market" for retail two-way STBs in Oklahoma City would have been *perfectly competitive*, with competing manufacturers driving prices down to marginal costs. Even Dr. Hastings was unwilling to say that. Indeed, she testified that the "perfectly competitive market" is "difficult to find in the real world," JA6942 (29:5-11), that the model is "directly relevant to only a few markets," JA6942 (29:12-14), and that she could not "point to one specific firm" that made "zero economic profit" as would be the case in a "perfectly competitive market." JA6947 (34:9-25).

Dr. Hastings' damages model also did not allow the jury to conclude that the alleged tie, as a whole, caused any injury. *See* JA495-98; JA566-69. Damages in a tying case are the difference in the combined price of the tied and tying product package versus the price that the two products purchased individually would have commanded in the absence of the alleged anticompetitive conduct. That is because "[a] determination of the value of the tied products alone would not indicate whether the plaintiff indeed suffered any net economic harm, since a lower price might conceivably have been exacted by the [seller] for the tying product." *Kytpa v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir. 1982); *see also Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC*, 763 F.3d 1280, 1284 &, n.3 (11th Cir. 2014) (Ebel, J., U.S. Circuit Judge for the Tenth Circuit, sitting by designation); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 (7th Cir. 1985) ("[U]nless the plaintiff shows that the package price was elevated the suit must be dismissed without further ado."). Yet Dr. Hastings offered no opinion as to the competitive price for the tying product, JA6935 (22:23-23:1); JA6968 (55:15-21), instead considering only the price of the tied product. JA6885-86 (78:23-79:12). Plaintiff offered no other document, evidence, or opinion regarding the competitive price of the allegedly tying product or the package of the allegedly tied and tying product. Thus, plaintiff failed to offer any evidence that the jury could have used to calculate damages caused by any tie. That fundamental failure of proof entitles Cox to judgment as a matter of law. *See Century 21 Real Estate*, 315 F.3d at 1278-80.

D. The National Cooperative Research And Production Act Requires Judgment for Cox

Even if plaintiff had established the threshold requirements for a *per se* tying claim under *Jefferson Parish*, in this case he also must satisfy a final statutory prerequisite before qualifying for the *per se* standard: that the claim not be based on the conduct of a joint venture. Mr. Healy failed to do so. *See* JA490-92; JA561-64.

The NCRPA states that "the conduct of . . . any person in making or performing a contract to carry out a joint venture . . . shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness." 15 U.S.C. § 4302. A "joint venture" includes activities like "the production of a product, process or service," *id.* § 4301(a)(6)(D), and the "collection, exchange, and analysis of research or production information," *id.* § 4301(a)(6)(F). The record evidence establishes that CableLabs is a joint venture that engages in research and development activities for technology standards for the cable industry, *see supra* p.10 n.2, and that Cox has been a member of CableLabs since it was founded in the late 1980s. JA6506-07 (51:21-52:2); JA6516 (61:5-14); JA6706 (6:2-10); JA7103 (88:6-9); JA7105 (90:2-8); JA7108 (93:10-17). Plaintiff's claims in this case are based on conduct inextricably intertwined with the CableLabs joint venture, and protected by the NCRPA.

Plaintiff's claim has always rested in substantial part on allegations that the CableCARD had a defectively limited design. CableLabs (with Cox's participation) developed the CableCARD technology. *E.g.*, JA6506-07 (51:21-52:8); JA6728-30 (28:18-30:9); JA7117 (102:3-6). In opening statements plaintiff claimed, for example, that a "problem with the CableCARDs are you had none of the two-way interactivity," JA6134 (28:16-18), that "[a] second problem you had with CableCARDs is they lost content," *id.* at 28:18-19, and that potential competing providers of set-top boxes TiVo and Moxi suffered from "all the problems of a CableCARD," JA6135 (29:14-18). His expert, Lawrence Harte, testified about alleged "problems" with the CableCARD, *see* JA6368-69 (25:14-26:1), and his other expert, Justine Hastings, offered testimony that CableCARDs' alleged design limitations led to a reduction in consumer choice of STBs, *see* JA6842-43 (35:16-36:19). In closing statements plaintiff argued that Cox used CableCARDs to "stop other people from coming into the market" by not providing two-way services and requiring service visits to fix "problems." JA7658 (67:9-22).

All of that evidence and argument was directed at joint venture conduct protected by the NCRPA, and entitled to the statute's protections. Plaintiff therefore should have been required to proceed under the rule of reason. 15 U.S.C. § 4302. Since plaintiff disavowed any rule of reason claim and utterly defaulted on the necessary proof, *supra* pp. 40-41, the judgment should be affirmed for that reason as well.

III. IN THE ALTERNATIVE, COX IS ENTITLED TO A NEW TRIAL

If this Court were to reverse the district's judgment for Cox as a matter of law, Cox would be entitled at a minimum to a new trial due to faulty jury instructions. Cox presented these issues to the district court, JA570, but the district court declined to resolve them because of its Rule 50 judgment. Cox therefore renews them in this Court by conditional cross-appeal. *See, e.g.*, *Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1153 (10th Cir. 2010).

A. The District Court Failed To Properly Instruct The Jury Regarding Foreclosure

Cox proposed an instruction that would have made clear to the jury that it could not find substantial foreclosure of commerce if purchasers would not have bought STBs from another seller in the absence of the alleged tying arrangement. JA225-26; JA7603-04 (12:6-13:3); JA484. Cox's proposed instruction comes directly from *Jefferson Parish*. *See* 466 U.S. at 16. And in the circumstances presented here, that instruction was necessary to prevent jury confusion on the core issue. Cox's evidence at trial was largely directed at proving that Cox was not responsible for the failure of CEMs to offer two-way STBs at retail, and that consumers did not want to purchase STBs at retail—particularly not at the prices that the evidence shows they would have cost. *See supra* Facts § I.D. The district court erred in not instructing the jury to consider this evidence in reaching its foreclosure verdict.

The jury easily could have been confused by the instructions. Instruction 10 stated that plaintiff must prove "[t]hat 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," JA589—language that was repeated at the beginning of Instruction 19, JA601—but then stated that "the total dollar amount of Defendant's leases of set-top boxes in Oklahoma City" was the only factor to consider. *Id*. Cox's proposed language—that the total amount of sales of STBs was only the *first* factor to consider, *see* JA225-26—would have provided the jury with a complete understanding of the legal issue and the appropriate legal framework for analyzing foreclosure.

As explained above, the district court also should have instructed the jury that plaintiff must prove that Cox harmed competition in the STB market and that it is not substantial foreclosure if only a small percentage of sales of STBs were affected by the tying arrangement. *See supra* Argument § I.B.1; JA225-26; JA7603-04 (12:6-13:3); Suppl. App. 46-47 (court's original proposed instructions containing two sentences referenced in transcript). And the district court should have instructed the jury that plaintiff must prove the relevant geographic market for the tied product in which to examine foreclosure. *See supra* Argument § II.B; JA7603 (12:1-4).

These errors were not harmless. Indeed, the district court's decision to grant Cox's motion for judgment as a matter of law on the foreclosure element demonstrates that the jury did not properly understand the issues and did not focus on the appropriate facts in reaching its decision.

B. The District Court Failed To Properly Instruct The Jury Regarding Coercion

The district court's instructions on the coercion element of a tying claim were insufficient for similar reasons. The district court's instruction told the jury that coercion could be found if subscribers "might have preferred to purchase [set-top boxes] elsewhere on different terms." JA591. That instruction allowed the jury to find coercion merely because some consumers might have wanted other options, did not have other options, and leased an STB from Cox. As explained in detail above, that is not legally sufficient to establish that Cox coerced anyone. *Supra* Argument § I.B.3. It does not establish that Cox is *responsible* for the lack of other options, in any way, or that anything Cox did limited or distorted consumer choices in any market. Coercion requires more than a finding that subscribers lacked a choice that they may have preferred to have.

Cox presented two potential instructions to address this issue. First, Cox requested that the district court instruct the jury that it must find at least one willing and able seller of the allegedly tied product before it could find that Cox coerced the lease of STBs. JA216-17; JA7602 (11:3-9). Second, Cox requested that the district court instruct the jury that the fact that the majority, or even 100%, of consumers purchase two products together is not alone proof of coercion. JA216-17; JA7602 (11:16-20). As the *Insight* court explained in adopting the law of the Second Circuit, "[w]here decisions of third parties 'produce[] the practical effect' of limited consumer choices [in the tied product market], that is 'legally insufficient' to establish coercion for a tying claim." *See Insight*, 2014 U.S. Dist. LEXIS 103079, at *12-13 (quoting *Konik*, 733 F.2d at 1018).

Cox also objected to the district court's instruction that the jury could consider any allegations regarding its insufficient assistance to CEMs, to the extent that it "hindered the development of a market." JA593. This is directly contrary to well-settled law. *See supra* Argument § 1.A.2.

Each of Cox's proposed instructions would have required the jury to focus on *Cox*'s conduct, and whether Cox did anything wrongful that contributed to the problem that consumers faced. In the circumstances of this case, some instruction along those lines was essential. And, again, the jury's finding in plaintiff's favor on this record clearly illustrates that it was confused by the instructions given, and that the district court's failure to provide greater clarity was not harmless. JA613-14.

C. The District Court's Failure To Instruct The Jury On The Proper Measure Of Damages In A Tying Case Requires A New Trial

As explained above, damages in a tying case are based on an overcharge on the package of the tying and the tied products. *See supra* Argument § II.C. The district court not only refused to instruct the jury that this was the law, but refused to instruct the jury *at all* about how to measure damages. JA7604 (13:4-13). Without any direction on what constitutes legally sufficient damages for a tying claim under the antitrust laws, the jury was left to accept plaintiff's expert's damages model at face value. This was not a harmless error. As explained above, plaintiff presented no evidence regarding the competitive price of the tying product. *See supra* Argument § II.C. At a minimum, Cox is entitled to a new trial where the jury is instructed properly regarding the measure of damages. *E.g.*, JA459.

D. The District Court's Failure To Instruct The Jury On Cox's Business Justification Defense Also Requires A New Trial

For reasons explained above, Cox was at a minimum entitled to defend itself by proving an affirmative defense of business justification. *See supra* Argument § II.B.4. The district court refused to instruct the jury on that defense. JA236-38; JA7600 (9:13-20). Particularly in light of the other instructional failures discussed above, that error could not have been harmless. Proper instructions on the business justification defense (like proper instructions on foreclosure or coercion) would have focused the jury's attention on the core deficiencies in plaintiff's case that ultimately required the court to grant judgment as a matter of law in Cox's favor, and would have given the jury a framework to evaluate the overwhelming evidence that Cox was not responsible for the limited choices that consumers faced.

E. Cox Would, At A Bare Minimum, Be Entitled To A New Trial Under Rule Of Reason Instructions

As explained *supra* Argument §§ I.B.1, II.D, plaintiff renounced any rule of reason claim and completely defaulted on his obligation to supply evidence on the issues that would be fundamental in any rule of reason case. Plaintiff offers no reason why this Court should forgive that waiver, and there is none. But for the avoidance of all doubt, if for some reason this Court reversed the Rule 50 judgment it could not reinstate the jury's verdict—which was produced by *per se* instructions that should never have been given. *See supra* Argument §§ I.B, I.B.1, II.D. At a bare minimum, Cox would be entitled to a new trial under rule of reason instructions. JA7599 (8:20-24).

IV. AT A MINIMUM, COX IS ENTITLED TO JUDGMENT AGAINST CLASS MEMBERS WHOSE DAMAGES DERIVE SOLELY FROM DVR FEES, AND THEY CANNOT PARTICIPATE IN ANY RECOVERY

A substantial proportion of the class suffered damages, under plaintiff's own theory and evidence, only because they paid fees related to DVR services. Those fees are not recoverable as a matter of law. The jury's verdict indicates that it correctly evaluated this issue, since the damages award is, to the exact dollar, the number that plaintiff urged the jury to award if it rejected any claim based on DVR fees. Cox is entitled to a binding judgment against those class members even if this Court sets aside the district court's judgment against the entire class. An entry of judgment *against* Cox on these DVR-related claims, or an award of damages to persons whose claim derives only from DVR fees, would be unconstitutional.

A. Cox Is Entitled To Judgment As A Matter Of Law Against The Class Members Who Claimed Only An Overcharge On DVR Fees

Cox is entitled to judgment as a matter of law against those class members whose damages claim, under their own theory and model, derived only from DVR fees. DVR services are not a part of the allegedly tied or tying products. JA7010-11 (97:24-98:4) (Dr. Hastings has "no opinion" on whether "Cox has tied the DVR service fee to the rental of a DVR-capable set-top box"); JA7066 (51:10-14) (STBs and DVR service can be purchased separately); JA7005 (92:22-25) (DVR not part of tying product). It is possible to lease an STB that includes the hardware necessary to provide DVR capability, but not pay the DVR service fees required to use that function on the STB. JA7192-93 (47:5-48:22); JA7196 (51:1-7). In fact, there were thousands of subscribers during the class period that had a DVR-capable STB but did not pay a DVR service fee. JA7195 (50:16-25); JA7512 (99:16-20). Subscribers could also purchase "Premium Cable" from Cox and DVR service from TiVo, for example. JA7006 (93:19-24); JA7007 (94:14-21); JA7139

(124:19-21); JA4351-52 (44:24-45:7) (describing TiVo DVR service plans). Plaintiff offered no evidence that DVR services were part of any tie. Subscribers could purchase "Premium Cable" without purchasing DVR service, customers could purchase "Premium Cable" from Cox and DVR service from another company, and customers who leased a DVR-capable STB could turn on and off their DVR service without changing their "Premium Cable" subscription.

As explained above, damages in a tying case are limited to the overcharge on the combined tying and tied product package. *See supra* Argument § II.C. Where the uncontradicted evidence is that DVR service was not part of the tying or tied product, and was not forced upon anyone who purchased either the tying or tied product, there can be no antitrust injury based on DVR service fees.

Cox calculated below, without contradiction by plaintiff, that a minimum of 75,000 class members only alleged an injury based on DVR fee overcharges. JA1946. This Court should direct judgment as a matter of law against this subset of the class, even if it reverses the remainder of the district court's Rule 50 judgment.

B. The Jury's Verdict Requires Judgment For Cox Against Those Class Members With Solely DVR Overcharges, And Makes It Essential For The District Court To Ensure That No Uninjured Class Member Receives Any Damages

Even if Cox were not entitled to judgment as a matter of law against those class members claiming injury only from DVR fees, the jury clearly rejected their claim. Plaintiff's counsel suggested to the jury during closing arguments that "[i]f you determine that the DVR fee should not be included in our damages, Dr. Hastings has given you a number. It's $6.313 million." JA7644 (53:5-7). This is the precise figure that the jury awarded. *See* JA614.

No matter what else happens in this appeal, this Court should direct the district court to enter judgment on the jury's verdict for Cox against those class members claiming injury only from DVR fees. The jury obviously found that those persons have no claim and suffered no injury. Including them within a favorable judgment or permitting them to share in a damages award, when the jury clearly agreed with Cox that their claims had no merit, would violate Cox's rights under the Seventh Amendment and the Due Process Clause, exceed the Article III power of the court, and permit Rule 23 to modify the substantive law in a manner forbidden by the Rules Enabling Act. *See* 28 U.S.C. § 2072(b) (procedural rules cannot "abridge, enlarge or modify any substantive right"). The Supreme Court recently confronted a very similar situation in *Tyson Foods, Inc. v. Bouaphakeo*, where the jury's verdict suggested that it may have concluded that some members of a class had no injury or claim. The Court remanded for the district court to determine whether it would be possible to identify those class members whose claims were rejected by the jury, and to exclude them from any recovery. No. 14-1146, 2016 U.S. LEXIS 2134, at *27-30 (Mar. 22, 2016). If not, it was unclear whether any damages could be awarded to anyone. As the Chief Justice explained, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *See id.* at *37 (Roberts, C.J., concurring).

This case presents the same set of issues, but here both the problem and the solution are much more obvious than in *Tyson Foods*. As the exchange between the principal majority opinion and the Chief Justice's concurrence illustrates, *id*. at *27-30 (majority op.); *id.* at *30-38 (Roberts, C.J., concurring), the basis of the jury's discounted damages figure in *Tyson Foods* was not entirely clear. Here there is no ambiguity, and certainly no ambiguity that plaintiff can complain about, because the jury did exactly—to the dollar—what plaintiff told them they should do if they rejected the DVR fee claims. And any arguable ambiguity in the jury's award is "of [plaintiff's] own making." *Id*. at *37. Over Cox's repeated objections, plaintiff procured a class definition that embraced distinct groups of persons who were not similarly situated, and whose claims would not stand or fall together "in one stroke" based on the resolution of genuinely common issues. *Wal-Mart Stores*, *Inc. v. Dukes*, 131 S. Ct. 2541, 2550-51 (2011). And when Cox asked for a verdict form that would have permitted the jury to make explicit whether it was awarding any damages for DVR fees, plaintiff opposed. *Compare* Suppl. App. 5-6 *and* Suppl. App. 10, *with* Suppl. App. 12, Suppl. App. 14, *and* Suppl. App. 16.

If it reinstates the jury's verdict in this case, this Court should follow the Supreme Court's lead from *Tyson Foods* and remand the case with directions that the district court determine whether there is a way to distribute damages only to those whom the jury found suffered an injury as a result of Cox's conduct. And if this Court orders a new trial, it should direct that the district court exclude persons with DVR-only claims from the class definition.

CONCLUSION

The district court correctly identified the fundamental flaw with plaintiff's tying claim: he failed to introduce evidence sufficient to show that Cox had done anything to harm competition. Under the facts of this case, that failure creates problems at almost every step of the tying claim, and there are numerous grounds on which this Court can and should affirm the district court's judgment. At a minimum, however, Cox is entitled to a new trial where the jury is correctly instructed on the law, to a judgment against the class members whose claims of injury rest only on DVR fees, and to procedures that ensure that uninjured class members do not receive any portion of the damages.

REQUEST FOR ORAL ARGUMENT

Cox requests that this Court grant oral argument on this appeal. Several issues raised above are issues of first impression in this Circuit, and tying law is in many ways a unique area of antitrust jurisprudence. Additionally, the Court will benefit from the parties' familiarity with the complicated and lengthy factual record in this case. Oral argument will help ensure that any legal position taken by this Court is grounded in the appropriate facts and legal background.

Dated: April 4, 2016

Respectfully submitted,

s/ Margaret M. Zwisler
Margaret M. Zwisler
J. Scott Ballenger
Jennifer L. Giordano
Andrew J. Robinson
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004
Telephone: (202) 637-1092
Facsimile: (202) 637-2201
margaret.zwisler@lw.com
scott.ballenger@lw.com
jennifer.giordano@lw.com
andrew.robinson@lw.com

Alfred C. Pfeiffer, Jr.
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
Telephone: (415) 391-0600
Facsimile: (415) 395-8095
alfred.pfeiffer@lw.com

D. Kent Meyers, OBA #6168
CROWE & DUNLEVY, P.C.
Braniff Building
324 North Robinson Avenue, Suite 100
Oklahoma City, OK 73102
Telephone: (405) 235-7729
Facsimile: (405) 272-5245

kent.meyers@crowedunlevy.com

Counsel for Appellee/Counter-Appellant
Cox Communications, Inc.

STATUTORY ADDENDUM

The following statutory provisions may be relevant to the Court's determination of the issues presented:

15 U.S.C. § 4301

(a) For purposes of this Act:

(1) The term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.

(2) The term "Attorney General" means the Attorney General of the Untied States.

(3) The term "Commission" means the Federal Trade Commission.

(4) The term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)).

(5) The term "State" has the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

(6) The term "joint venture" means any group of activities, including attempting to make, making, or performing a contract, by two or more persons for the purpose of—

(A) theoretical analysis, experimentation, or systematic study of phenomena or observable facts,

(B) the development or testing of basic engineering techniques,

(C) the extension of investigative findings or theory of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, prototypes, equipment, materials, and processes,

(D) the production of a product, process, or service,

(E) the testing in connection with the production of a product, process, or service by such venture,

(F) the collection, exchange, and analysis of research or production information, or

(G) any combination of the purposes specified in subparagraphs (A), (B), (D), (E), and (F),

(7) The term "standards development activity" means any action taken by a standards development organization for the purpose of developing, promulgating, revising, amending, reissuing, interpreting, or otherwise maintaining a voluntary consensus standard, or using such standard in conformity assessment activities, including actions relating to the intellectual property policies of the standards development organization.

(8) The term "standards development organization" means a domestic or international organization that plans, develops, establishes, or coordinates voluntary consensus standards using procedures that incorporate the attributes of openness, balance of interests, due proces, an appeals process, and consensus in a manner consistent with the Office of Management and Budget Circular Number A-119, as revised February 10, 1998. The term "standards development organization" shall not, for purposes of this Act, include the parties participating in the standards development organization.

(9) The term "technical standard" has the meaning given such term in section 12(d)(4) of the National Technology Transfer and Advancement Act of 1995.

(10) The term "voluntary consensus standard" has the meaning given such term in Office of Management and Budget Circular Number A-119, as revised February 10, 1998.

(b) The term "joint venture" excludes the following activities involving two or more persons:

(1) exchanging information among competitors relating to costs, sales, profitability, prices, marketing, or distribution of any product, process, or service if such information is not reasonably required to carry out the purposes of such venture,

(2) entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the marketing, distribution, or provision by any person who is a party to such venture of any product, process, or service, other than—

(A) the distribution among the parties to such venture, in accordance with such venture, of a product, process, or service produced by such venture,

(B) the marketing of proprietary information, such as patents and trade secrets, developed through such venture formed under a written agreement entered into before the date of the enactment of the National Cooperative Production Amendments of 1993, or

(C) the licensing, conveying, or transferring of intellectual property, such as patents and trade secrets, developed through such venture formed under a written agreement entered into on or after the date of the enactment of the National Cooperative Production Amendments of 1993,

(3) entering into any agreement or engaging in any other conduct—

(A) to restrict or require the sale, licensing, or sharing of inventions, developments, products, processes, or services not developed through, or produced by, such venture, or

(B) to restrict or require participation by any person who is a party to such venture in other research and development activities, that is not reasonably required to prevent misappropriation of proprietary information contributed by any person who is a party to such venture or the results of such venture,

(4) entering into any agreement or engaging in any other conduct allocating a market with a competitor,

(5) exchanging information among competitors relating to production (other than production by such venture) of a product, process, or service if such information is not reasonably required to carry out the purpose of such venture,

(6) entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the production (other than the production by such venture) of a product, process, or service,

(7) using existing facilities for the production of a product, process, or service by such venture unless such use involves the production of a new product or technology, and unilateral or joint activity that is not reasonably required to carry out the purpose of such venture.

(c) The term "standards development activity" excludes the following activities:

(1) Exchanging information among competitors relating to cost, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required for the purpose of developing or promulgating a voluntary consensus standard, or using such standard in conformity assessment activities.

(2) Entering into any agreement or engaging in any other conduct that would allocate a market with a competitor.

(3) Entering into any agreement or conspiracy that would set or restrain prices of any good or service.

15 U.S.C. § 4302

In any action under the antitrust laws, or under any State law similar to the antitrust laws, 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,

shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research, development, product, process, and service markets. For the purpose of determining a properly defined, relevant market, worldwide capacity shall be considered to the extent that it may be appropriate in the circumstances.

28 U.S.C. § 2072

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 28.1(e)(2)(B)(i) because this brief contains 16,216 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in size 14 Times New Roman font.

Date: April 4, 2016

s/ Margaret M. Zwisler
Margaret M. Zwisler
Attorney for Defendant-Appellee
Cox Communications, Inc.
555 Eleventh St. NW, Suite 1000
Washington, D.C. 20004
margaret.zwisler@lw.com
(202) 637-2200

CERTIFICATE OF PRIVACY REDACTIONS

This brief complies with the privacy-redaction requirements contained in Federal Rule of Appellate Procedure 25 as well as in Tenth Circuit Rule 25.5. No material that must be redacted is included in this brief.

Date: April 4, 2016

s/ Margaret M. Zwisler
Margaret M. Zwisler
Attorney for Defendant-Appellee
Cox Communications, Inc.
555 Eleventh St. NW, Suite 1000
Washington, D.C. 20004

margaret.zwisler@lw.com
(202) 637-2200

CERTIFICATE OF EXACT COPIES

The undersigned certifies that all required hard copy filings submitted to the clerk's office are exact copies of the foregoing electronic filing.

Date: April 4, 2016

s/ Margaret M. Zwisler
Margaret M. Zwisler
Attorney for Defendant-Appellee
Cox Communications, Inc.
555 Eleventh St. NW, Suite 1000
Washington, D.C. 20004
margaret.zwisler@lw.com
(202) 637-2200

CERTIFICATE OF VIRUS SCANNING

The undersigned certifies that the foregoing ECF submission was scanned for viruses with the most recent version of Microsoft System Center Endpoint Protection, updated on April 4, 2016, and according to the program is free of viruses.

Date: April 4, 2016

s/ Margaret M. Zwisler
Margaret M. Zwisler
Attorney for Defendant-Appellee
Cox Communications, Inc.
555 Eleventh St. NW, Suite 1000
Washington, D.C. 20004
margaret.zwisler@lw.com
(202) 637-2200

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2016, I electronically filed the foregoing using the court's CM/ECF system which will send notification to the following:

James S. Ballenger (Scott.Ballenger@lw.com)
Kyle Geoffrey Bates (kbates@schneiderwallace.com)
Matthew A.R. Cohen (mcohen@mintz.com)
Michael J. Blaschke (mblaschke@thelawgroupokc.com)
William Tucker Brown (tbrown@wdklaw.com)
Katherine M. Cheng (katherine.cheng@lw.com)
Jason L. Daniels (jason.daniels@lw.com)
Jennifer L. Giordano (jennifer.giordano@lw.com)
Allan Kanner (A.Kanner@kanner-law.com)
Robert G. Kidwell (rgkidwell@mintz.com)
Jason H. Kim (jkim@schneiderwallace.com)
Joshua G. Konecky (jkonecky@schneiderwallace.com)
Allyson M. Maltas (allyson.maltas@lw.com)
David Kent Meyers (kent.meyers@crowedunlevy.com)
Rachel Lawrence Mor (rmor@thelawgroupokc.com)
Al Pfeiffer (Al.Pfeiffer@lw.com)
Henry Quillen (hquillen@whatleykallas.com)
Andrew J. Robinson (andrew.robinson@lw.com)
Todd Schneider (tschneider@schneiderwallace.com)
Bruce Douglas Sokler (BDSokler@mintz.com)
Cynthia Green St. Amant (c.stamant@kanner-law.com)
Scott Randall Sullivan (randy.sullivan@coxinet.net)
Mary H. Tolbert (molly.tolbert@crowedunlevy.com)
Joe R. Whatley Jr. (jwhatley@whatleykallas.com)
Adam Wolf (awolf@schneiderwallace.com)
A. Daniel Woska (awoska@woskalawfirm.com)
Garrett W. Wotkyns (gwotkyns@schneiderwallace.com)

Date: April 4, 2016

s/ Margaret M. Zwisler
Margaret M. Zwisler
Attorney for Defendant-Appellee
Cox Communications, Inc.
555 Eleventh Street NW, Suite 1000
Washington, DC 20004

margaret.zwisler@lw.com
(202) 637-2200