

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, :
 :
 : Plaintiff, : CV No. 17-2511
 vs. :
 : Washington, D.C.
 : Tuesday, March 27, 2018
 AT&T, INC., ET AL., : 2:40 p.m.
 :
 : Day 3
 Defendants. :
-----x

AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT SENIOR JUDGE

APPEARANCES:

For the Government: Craig W. Conrath, Esquire
Eric D. Welsh, Esquire
Timothy B. Walthall, Esquire
Andrew Finch, Esquire
Nathan D. Brenner, Esquire
Melanie Kiser, Esquire
U.S. DEPARTMENT OF JUSTICE
Antitrust Division
450 Fifth Street, NW
Washington, DC 20530
(202) 532-4560
craig.conrath@usdoj.gov
eric.welsh@usdoj.gov
timothy.walthall@usdoj.gov
andrew.finch@usdoj.gov
nathan.brenner@usdoj.gov
melanie.kiser@usdoj.gov

1 Appearances Continued:

2 For Defendant AT&T Katrina M. Robson, Esquire
3 and DirecTV Group O'Melveny & Myers LLP
4 Holdings, LLC: 1625 Eye Street, NW
Washington, DC 20006
(202) 220-5052
krobson@omm.com

5
6 Daniel M. Petrocelli, Esquire
M. Randall Oppenheimer, Esquire
7 O'MELVENY & MYERS LLP
1999 Avenue of the Stars
8 8th Floor
Los Angeles, CA 90067
(310) 553-6700
9 dpetrocelli@omm.com
roppenheimer@omm.com

10
11 Michael L. Raiff, Esquire
GIBSON, DUNN & CRUTCHER LLP
12 2100 Mckinney Avenue
Suite 1100
13 Dallas, TX 75201
(214) 698-3350
mraiff@gibsondunn.com

14
15 For Defendant Kevin J. Orsini, Esquire
Time Warner, Inc.: Peter T. Barbur, Esquire
16 CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
17 825 Eighth Avenue
New York, NY 10019
(212) 474-1140
18 korsini@cravath.com
pbarbur@cravath.com

19
20 Court Reporter: Crystal M. Pilgrim, RPR, FCRR
Official Court Reporter
21 United States District Court
District of Columbia
22 333 Constitution Avenue, NW
Washington, DC 20001
(202) 354-3127
23 crystal_pilgrim@dcd.uscourts.gov

24

25

1	Table of Contents				
2		Direct	Cross	Redirect	Recross
3	On behalf of the Plaintiff:				
4	Warren Schlichting				
5	By Ms. Kiser			440	
6	By Mr. Petrocelli		399		463
7	John Martin				
8	By Mr. Welsh	468			
9					
10					
11	E-X-H-I-B-I-T-S				
12				Marked	Received
13	On behalf of the Plaintiff:				
14	Exhibit No. PX 149				473
15	Exhibit No. PX 151				479
16	Exhibit No. PX 148				483
17	Exhibit No. PX 132				500
18					
19	On behalf of the Defendants:				
20	Exhibit No. 921		410		411
21	Exhibit No. 922		419		
22	Exhibit No. 923		425		
23					
24					
25					

1 P-R-O-C-E-E-D-I-N-G-S

2 THE DEPUTY CLERK: Good afternoon, Your Honor.

3 Recalling civil action number 17-2511, the United States of
4 America versus AT&T, Inc., et al.

5 GOVERNMENT WITNESS WARREN SCHLICHTING PREVIOUSLY SWORN
6 (Witness resumes the stand.)

7 THE COURT: Witness remains under oath.

8 Mr. Petrocelli, you may proceed when you're ready.

9 MR. PETROCELLI: Thank you, Your Honor.

10 CROSS EXAMINATION

11 BY MR. PETROCELLI:

12 Q. Mr. Schlichting, you mentioned the 30,000 figure estimate
13 of sub loss before the lunch break, do you recall?

14 A. I did.

15 Q. Now I believe you testified in your deposition that's the
16 number that you believe was based on people who actually called
17 up DISH and said they were leaving on account of Turner not
18 being available; is that correct?

19 A. So there are three buckets of --

20 Q. Just stick with me.

21 On the 30,000, was that just the category or bucket of
22 people who you believe called up to say they were leaving on
23 account of Turner, am I correct or incorrect?

24 A. That's not technically correct. No.

25 Q. Okay. Well then, explain it to me?

1 A. So we have folks that call that actually say I'm leaving
2 because you're dark with Turner.

3 We have folks that call up and say I'm leaving and don't
4 give a reason.

5 I put those sort of in the same bucket because they're
6 calling us.

7 We also have subs that we're unable to acquire, never have
8 a tale.

9 So we have a rough estimate of sub blocks and that's so the
10 30,000 isn't the number that we talk about internally.

11 Q. That's the number you testified to in your deposition,
12 correct?

13 A. That is.

14 Q. When you mentioned the 30,000 in your deposition, what
15 categories did that encompass?

16 A. Well, so these are rough estimates so we stop measuring
17 after 90 days. That encompassed those buckets that I'm talking
18 about.

19 Q. Okay?

20 A. It's hard to know how long that sub loss continues.

21 Q. That wasn't counting subs that you lost in the ensuing
22 blackout with Fox News and Fox Business, correct?

23 A. It's hard to tease those apart.

24 Q. So you can't break them out whether it's Fox or Turner is
25 what you're saying?

1 A. Back to the heart attack example. You have a second heart
2 attack, which one caused it. Was it the first or the second, I
3 don't know.

4 Q. It's correct, sir, that you have not ever seen a study
5 quantifying any loss resulting from the Turner take down in
6 October and November of 2014, correct?

7 A. What do you mean by study? I have seen a spread sheet.

8 Q. Well, you don't remember a specific document that
9 contained that information, correct?

10 A. So I have seen a specific spread sheet that has a number,
11 I think 13,700 on it. Those are folks that actually
12 specifically called.

13 Q. But you remember testifying at your deposition as follows:

14 Question, did you ever see a study quantifying any loss
15 resulting from the Turner take down in October, November 2014?

16 Answer, I don't remember a specific document that has that.

17 Do you recall giving that testimony?

18 A. I do. It's been subsequent to that testimony.

19 Q. So now you have seen a document and you think the number
20 is 13,700?

21 A. That's the number of calls that we recorded that are
22 specific to this case.

23 Q. You haven't provided that document to us, have you?

24 A. I don't know.

25 Q. You didn't correct your deposition, did you?

1 A. I won't, when you say corrected.

2 Q. You didn't change it. You didn't indicate that you have
3 now seen such a document and you have new information, did you?

4 A. When would I have done that?

5 Q. When you received your deposition?

6 A. I hadn't seen it.

7 Q. No one gave you a transcript of your deposition to review
8 and sign?

9 A. That's not what I said. I said when I saw the transcript
10 I had not seen that document.

11 Q. It was after?

12 A. It was.

13 Q. Do you have that document available today?

14 A. Personally I don't.

15 Q. Okay, 13,700, is that your estimate of total subs that you
16 believe were lost on account of the take down?

17 A. Again, those are the subs that called more specifically.

18 Q. You don't know that they called. You don't know
19 personally, that's what you saw on a piece of paper, correct?

20 A. That's correct.

21 Q. Okay. Now you say those are the people who called. Does
22 the piece of paper have other numbers that attribute loss of
23 subs to Turner?

24 A. I'm not aware of it.

25 Q. Okay. You are aware of reporting subscribers in

1 connection with your statements to Turner which you render on a
2 what, monthly basis?

3 A. Yes.

4 Q. Do you recall that the statements that you rendered to
5 Turner actually reflected a lower loss of subs than the number
6 13,700?

7 A. I'm not aware of that.

8 Q. Are you aware that the report that you sent to Turner
9 indicated that this lower number of subs was consistent with
10 the number of subs lost in the year before and in the year
11 before that?

12 Do you recall that?

13 A. When you say the lower number of subs.

14 Q. Lower than 13, 13,700?

15 A. So just if you could clarify how you're doing the math.

16 Q. You report to Turner the number of subs that you net gain
17 or net lose?

18 A. That's true.

19 Q. You have that broken down by month, correct?

20 A. We pay them monthly so I think you're referring to a pay,
21 a pay reconciliation?

22 Q. Correct?

23 A. Okay.

24 Q. Then if you recall that for the month of November 2014,
25 that there was a net loss of subs, but at a number and I'm

1 deliberately not saying the number at the request of counsel?

2 A. Thank you.

3 Q. But at a number less than 13,700?

4 A. So I haven't, I don't see pay sheets, so I'm not aware of
5 the sub numbers.

6 Q. You're not aware. We'll deal with it with somebody else
7 then.

8 But whether it's 13,700 or some lower number, or even
9 30,000, we're talking about less than 1 percent of your total
10 subs at the time, correct?

11 A. Right. That was just for the CNN Networks, not including
12 TBS, TNT.

13 Q. Okay. I want to turn to, I have two more topics or areas
14 that I want to cover with you. I want to turn to the subject
15 of this merger, okay. And your testimony that everything is
16 different after the merger, okay?

17 A. Okay.

18 Q. Everything is different. So the way I want to do this is
19 I want to talk about pre merger like the day before the merger
20 and then post merger, the day after the merger, okay?

21 A. Okay.

22 Q. You don't have any calculations about how many subs DISH
23 would lose or Sling would lose if there were a blackout let's
24 say today. You haven't seen any recent calculations to that
25 effect, correct?

1 A. If they went dark pre merger?

2 Q. Yes, today?

3 A. No.

4 Q. And you wouldn't know how many, you haven't seen any
5 calculations or any data showing how many subs who might leave
6 today because of a Turner blackout would actually go to
7 DirecTV, correct?

8 A. You know, on that one we actually do try to keep track of
9 that. So we have our own internal estimates.

10 Q. What percentage do you attribute sub departs DISH that
11 will divert over to DirecTV?

12 A. So we've seen, you know, it's roughly two-third. I've
13 seen numbers as high as 70 percent.

14 Q. You don't have any documents that reflect that do you, any
15 analyzes, any calculations or anything like that, correct?

16 A. I think we do. I mean, it's normal ordinary course of
17 business, we track where people go.

18 Q. You haven't turned any of that over, right?

19 A. I wouldn't know.

20 Q. Okay. Well, you know you have turned over pricing data to
21 the government in connection with its investigation, you know
22 that?

23 A. I do know that.

24 Q. Were you aware that the pricing data that you turned over
25 to the government in the course of its investigation of this

1 merger showed that during the Turner blackout in 2014, DISH
2 actually gained net subscribers?

3 A. It doesn't sound right.

4 Q. Have you checked the data?

5 A. I haven't. It's hard to imagine gaining subscribers
6 during that period.

7 Q. But you haven't checked the data, the pricing data?

8 A. When you say pricing data, how are you relating that back
9 to sub numbers?

10 Q. Data of all of the subs not only the ones that carry
11 Turner but all subs including those few who you say don't have
12 Turner, total subs, gained during that period of months. Would
13 you, are you aware of that?

14 A. Sir, I guess what's the period you're talking about
15 because --

16 Q. October, November 2014?

17 A. Okay. So we typically look at sub losses after going dark
18 over a longer period than that.

19 Q. But the bottom line is you don't, you've not seen any
20 analysis of that data, correct?

21 A. I've not.

22 Q. Okay. Let me go back to my question about pre merger and
23 we were talking about customers that may sign up for DirecTV.

24 I think you indicated that it's not very convenient for a
25 customer to actually cancel a subscription because they got to

1 get through, they got to take the day off and all of that,
2 correct?

3 A. It's less convenient for satellite than for Sling.

4 Q. Okay. Some of those sub goes to the cable guys, right?

5 A. A portion.

6 Q. You indicated that Comcast, Comcast is the larger cable
7 provider in the country, right?

8 A. That's true.

9 Q. Over, well over 20 million subscribers, right?

10 A. That's true.

11 Q. Okay. And I think you indicated that they only cover
12 one-third of the --

13 A. Geography.

14 Q. But that's geographically, right?

15 A. That's true.

16 Q. You compete in every area where Comcast sells, sells
17 programming to subscribers, correct?

18 A. So to be clear, we're actually pushing away from urban
19 areas and into rural. Comcast is a beast and we're trying to
20 stay out of their path.

21 Q. But you said you were a national provider?

22 A. We are a national provider.

23 Q. So every one of those 20 plus million Comcast customers is
24 a potential customer of Dish, correct?

25 A. Theoretically.

1 Q. And wherever Comcast does serve customers it is the
2 dominant provider, correct?

3 A. I think that's accurate.

4 Q. Because the cable guys came in first back in, even as
5 early as the '60s and they got exclusive franchises to put
6 cable in, correct?

7 A. That's how they got started.

8 Q. And then over time then the satellite companies, DISH and
9 DirecTV got involved, but that wasn't until some time until the
10 mid '90s or so, correct?

11 A. That's correct.

12 Q. Then ten years later or so in the mid 2000 the telephone
13 company, you call them TelCos, also started to push video
14 through their phone lines, correct?

15 A. That's correct.

16 Q. So the incumbents have always been the cable companies,
17 correct?

18 A. That's true.

19 Q. Okay. Now if, so a customer who does leave DISH could
20 sign up with the cable company, correct?

21 A. They could.

22 Q. Now they could also go to one of the TelCos other than
23 AT&T and Verizon Fios, correct?

24 A. If they offer video in that area.

25 Q. But they could also decide to cut the cord?

1 A. They could.

2 Q. If they cut the cord they could go to various internet
3 distributors, correct?

4 A. That's true.

5 Q. One of them might be Sling, right? Another might be
6 DirecTV Now, true?

7 A. That's right.

8 Q. And there are others as well, there's Hulu Live, correct?

9 A. Yes.

10 Q. There's YouTube TV?

11 A. That's correct.

12 Q. There's FuboTV?

13 A. Correct.

14 Q. And there's FiloTV?

15 A. That's true, but Filo doesn't have a sports offering.

16 Q. And Filo doesn't carry Turner at the current time,
17 correct?

18 A. I think that's correct.

19 Q. And Fubo doesn't carry Turner at the current time?

20 A. I didn't realize that but I think that sounds right.
21 I know YouTube just acquired Turner rights.

22 Q. Some of these cord cutters could also go to Netflix,
23 right?

24 A. It's a different offering. Sling in particular is live
25 linear current season, live news, live sports.

1 Netflix is really all about previous seasons and more and
2 more they're, they are making original content that, you know,
3 that they fund themselves.

4 Q. But nonetheless I mean, watching Netflix shows is watching
5 television and Netflix is a company your company considers to
6 be a competitor, correct?

7 A. In the broadest sense that there's competition for
8 eyeballs but we think it's complimentary to the point that
9 we've even integrated our satellite service with Netflix.

10 Q. Sure, you know what a 10K is, right?

11 A. I do.

12 Q. You know that's a public filing of the Securities and
13 Exchange Commission, right?

14 A. I do.

15 Q. You know that a company has to be truthful and accurate in
16 what it states in their public filings, correct?

17 A. Uh-huh.

18 Q. So let's take a look at, which I'll mark as the next
19 exhibit?

20 THE DEPUTY CLERK: Defendant's 921.

21 (Defendant's Exhibit Number 921 marked for
22 identification.)

23 MR. PETROCELLI: May I approach, Your Honor?

24 THE COURT: You may.

25 MR. PETROCELLI: There is no objection to this

1 exhibit, Your Honor, so I would move it into evidence.

2 THE COURT: All right. It will be admitted.

3 (Defendant's Exhibit Number 921 received into evidence.)

4 THE WITNESS: What page are you looking at?

5 BY MR. PETROCELLI:

6 Q. Take a look at page 6.

7 Technically, the first full paragraph.

8 We also face increasing competition from content providers
9 and other companies who distribute video directly to consumers
10 over the internet.

11 Do you see that?

12 A. I do.

13 Q. And then if you skip down so I don't have to read the
14 whole thing.

15 Video content distributed over the internet includes
16 services with live linear television programming such as
17 DirecTV Now, Sony Playstation View, YouTube TV, Fubo TV, and
18 Filo TV. Single program, programmer offering such as HBO Go,
19 CBS All Access, STARZ and Showtime and offerings of large
20 libraries of On Demand content including in certain cases
21 original content by companies such as Netflix, Hulu, Apple,
22 Amazon, Alphabet and Verizon.

23 I'll represent to you that there are similar statements
24 about your facing competition from Netflix on page 27 and page
25 28.

1 And you would not dispute the statements exactly as they
2 are written in this Exhibit 921, correct?

3 A. Yes, as a competitive service, yes. It doesn't mean that
4 it's a substitute then.

5 Q. I didn't ask you about that, did I? I was asking you if
6 you faced competition from them?

7 A. You asked if somebody disconnected with Sling if they go
8 to Netflix. It's not a substitute.

9 Q. Did you put in the 10K that they're not a substitute?

10 A. I did not.

11 Q. Did your company put that in the 10K?

12 A. What was the question you asked me before?

13 Q. That's not a substitute?

14 A. I was just asking what question was two questions ago?

15 Q. Did the company put in its 10K?

16 A. I meant the one about Netflix if you leave out.

17 THE COURT: Woe, woe. Let him finish his question,
18 then you give him the answer.

19 BY MR. PETROCELLI:

20 Q. The company did not include your position that Netflix is
21 not a substitute when it made statements in its public filings
22 to the SEC, correct?

23 A. My answer was to your question.

24 Q. Can you answer that question?

25 A. Sorry, repeat it.

1 Q. The company did not make your, include your position in
2 its public filings that Netflix is not a substitute?

3 A. They did not.

4 Q. And in fact, Mr. Ergen has said Netflix is the most
5 powerful content aggregator in the world and there's nobody
6 that's even close, correct?

7 A. That's true.

8 Q. Okay. So you don't have any calculations or
9 quantifications about how many of your customers who might
10 decide to leave DISH due to a Turner blackout would go to one
11 of these numerous internet distributors?

12 A. So in a, if we went dark how many would go to a --

13 Q. My question was more specific.

14 Do you have any calculations or any quantification of the
15 percentage of customers that would go to the internet provider?

16 A. We do not.

17 Q. Okay. Now once the merger occurs, now we're the day after
18 the merger?

19 A. Okay.

20 Q. And to be sure before I go to the day after the merger,
21 the day before the merger you don't have any calculation as to
22 how much DirectTV would earn from any subscribers it might pick
23 up who left DISH, correct?

24 A. We do have those calculations.

25 Q. Based on your own internal projections of DirectTV's profit

1 margin?

2 A. No. This is based on, this is an external third party
3 study.

4 Q. Okay. And by the way, pre merger you do know that in a
5 Turner blackout, Turner would lose a substantial amount of
6 money, correct?

7 A. Potentially I don't. I mean, it all depends on the
8 assumptions.

9 Q. Let's just take, let me make up some numbers. Let's say
10 that \$6 per sub per month, okay, for the Turner Networks.

11 And let's say you have 12 million. They're subs, okay, and
12 you're dark for one month. By my math that's 72 million
13 dollars, am I correct?

14 A. Sure, if you're dark for a month.

15 Q. Yes?

16 A. That's 72 million.

17 Q. And that doesn't count the advertising, right?

18 A. That's true.

19 Q. Didn't you say in your deposition that the advertising is
20 50/50?

21 A. More or less.

22 Q. So you can throw in another, anywhere up to another 70
23 million dollars, that's a 150 million dollars a month lost to
24 Turner, correct?

25 A. If they were down for a month.

1 Q. Which they were for example in 2014 with the exception of
2 TNT and TBS, correct?

3 A. That's right.

4 Q. Let's go to the day after the merger. Turner is still
5 going to lose the same amount of programming, affiliate fees
6 and advertising, correct?

7 A. If they're down for a month those numbers are --

8 Q. The numbers are the same?

9 A. Okay.

10 Q. And we're talking about transacting in the identical
11 programming, the identical networks with the identical content
12 the day after the merger, correct?

13 A. I don't know.

14 Q. Well, you don't have any reason to believe otherwise,
15 right?

16 A. I think their incentives changed, that's what we talked
17 about yesterday.

18 Q. I know you think that. But you don't have any evidence
19 that they're suddenly going to change all their networks
20 around, correct?

21 Have you seen a document that would suggest that?

22 A. No, I think it's a fair comment. Based on my business
23 judgment though --

24 Q. Well, I'm --

25 A. I think there --

1 Q. I'm not asking about your business judgment right now.

2 I'm asking you about specific evidence, okay?

3 A. What evidence could there be?

4 Q. Did anybody tell you such a thing?

5 A. Could you define evidence?

6 Q. Did anybody tell you such a thing, yes or no?

7 A. I mean --

8 Q. Did anybody tell you that after the merger Turner is going
9 to change all of its programming around?

10 A. That they're going to ask us to take eight networks
11 instead of four in Sling?

12 Q. No. First of all, did anybody tell you they're going to
13 change their programming or their content after the merger?

14 Can you answer that performance simple question?

15 A. No.

16 Q. Have you seen a document to that effect?

17 A. To what effect? That they would --

18 Q. Change their content, change their programming?

19 A. Sir, are you saying that have I seen a document that would
20 keep everything status quo?

21 Q. Do you have trouble answering my question, sir? Let me
22 put it to you again?

23 A. I'm trying to understand your question.

24 Q. Okay, bear with me then?

25 A. Thank you.

1 Q. Have you seen any documents that would tell you that the
2 day after the merger Turner is going to change its content or
3 program from what it currently exist the day before the merger?

4 Yes or no?

5 A. No document that presents that.

6 Q. Thank you.

7 Now the negotiators on both sides are going to be the same,
8 correct?

9 A. Most likely.

10 Q. And Charlie Ergen is going to be equally as rational post
11 merger as he is pre merger?

12 A. One would think.

13 Q. Are you aware that the government's expert economist in
14 this case has given the opinion that it would not be profitable
15 for the merged company to withhold the Turner Networks from
16 DISH and other distributors?

17 A. I'm not. I'm aware of a study that shows that it would be
18 profitable.

19 Q. But you're not aware -- has the government shared that
20 with you?

21 A. I've seen an external economist study that shows that
22 temporary foreclosure would indeed be profitable.

23 Q. Well, do you understand that the government's position in
24 this case based on its economic expert that it will be calling
25 to the stand is that foreclosure of Turner Networks would not

1 be profitable?

2 Am I to understand you are not aware of that until I just
3 told you that right now?

4 A. The document that I seen shows profitability with
5 temporary foreclosure.

6 Q. Are you talking about the document from the government's
7 expert Professor Shapiro?

8 A. So I don't, I guess I'm, there must be a second document
9 if it shows lack of profitability.

10 Q. I don't know what document you are talking about. I'm
11 talking about Professor Shapiro's expert opinions submitted in
12 this matter?

13 A. I'm talking about something called the Brattle Economic
14 Analysis.

15 Q. Let's stick with Professor Shapiro's analysis?

16 A. I have not seen that.

17 Q. And you have not been told about that, correct?

18 A. No. That's the first time that they would somehow lose
19 money.

20 Q. Are you aware that the government is not contending in
21 this case that there will be a foreclosure of content from
22 MVPDs whether temporary, permanent or otherwise? Are you aware
23 of that, sir?

24 A. Can you back up and just saying that they're not
25 contending that there would be? They're speculating that they

1 would be.

2 Q. Are you aware that in this case the government has not
3 alleged and is not alleging that there will be a withholding of
4 the Turner Networks either on a temporary or on a permanent
5 basis from MVPD such as DISH?

6 A. That's just common sense. Maybe it's just me.

7 Q. So the answer is you're not aware?

8 A. I guess not, no.

9 Q. I previously showed you Mr. Ergen's testimony. Excuse me,
10 Mr. Ergen's public statements that your company could actually
11 make more money by taking programming down, correct?

12 A. I believe you said save money, and I believe when you save
13 money you could save your way all the way to zero, to zero
14 subscribers.

15 Q. Let's take a look then. Let me show you the next exhibit
16 that I will mark for identification, that's Exhibit 923.

17 THE COURT: 22.

18 MR. PETROCELLI: 22?

19 (Defendant's Exhibit Number 922 marked for
20 identification.)

21 May I approach, Your Honor?

22 THE COURT: You may.

23 BY MR. PETROCELLI:

24 Q. Could you turn to the, this is the DISH earnings called
25 transcript of February 3, 2015 and turn to page 10, please.

1 Do you have that in front of you?

2 A. I do.

3 Q. And you see where it states and you end up in a situation
4 where I said this before, the programmers will self select the
5 last for a price that's so high that we or others will just say
6 based on our viewership we make more money long term by taking
7 you down and not providing your program.

8 Do you see that?

9 A. I do.

10 Q. Okay. That statement that DISH will make more money by
11 taking down the programming and not providing it rather than
12 paying a price increase that's so high would also apply after
13 the merger, correct?

14 A. I don't think that's the case.

15 Q. So --

16 A. I can't make the connection.

17 THE COURT: Wait, wait. One at a time. Let him
18 finish his thought.

19 THE WITNESS: What is the connection between those
20 two thoughts?

21 BY MR. PETROCELLI:

22 Q. Well, if I were on the witness stand, I would answer your
23 question, but let me put another question to you, okay.

24 Your position is that just because of the merger, just
25 because of the merger and because some subscribers could leave

1 DISH and go to DirectTV, all other things being equal, that you
2 are going to recommend to your boss to pay more money for the
3 identical programming; is that correct?

4 A. I have to think about that for a second.

5 Why would we recommend that we pay more money? I mean, if
6 we've still got this sort of strange choice, right. We can
7 pay, at some point you get to a tipping point, right.

8 They can put onerous terms to us post merger. The higher
9 our prices go, the higher, the more we have to raise our
10 prices. That makes us less competitive.

11 Q. You can simply say no?

12 A. We can.

13 Q. You can say no and you can go dark as you've many, many
14 times?

15 A. That's the Hobson's choice that I mentioned yesterday.
16 You go dark and then you lose subscribers even faster.

17 Q. But you've been doing that, the company has been doing
18 that since day one.

19 And according to Mr. Ergen it actually makes more money to
20 go dark plus it teaches the programmer a lesson?

21 A. I think I've said --

22 Q. Are you suggesting that philosophy will suddenly vanish
23 just because of the merger?

24 A. I think in a declining sub market which we're in, you can
25 save money and lose subs until you're out of business.

1 Q. Well, apparently your boss doesn't agree with you.

2 A. I believe his comments are from three years ago, almost
3 four.

4 Q. I think I showed you the comment just in September of 2013
5 where he said he'd go to sleep any night not worrying about
6 taking anybody down including ESPN.

7 That wasn't three years ago was it?

8 A. I also think it wasn't a long term, long term take down
9 that he was referring to.

10 Q. By the way, Turner couldn't threaten to take you down or
11 go dark on you any way because they made a unilateral binding
12 offer never to go dark in your negotiations over the next seven
13 years, correct?

14 A. So that --

15 Q. Is that correct?

16 A. You know, I have to confess, I really don't understand
17 that offer.

18 Q. Well, did you pick up the phone and ask them?

19 A. That would have been an unusual call.

20 Q. Well, they gave you a heads up before this came out,
21 right?

22 A. See, I know our attorneys spoke.

23 Q. Did Richard Warren reach out to you?

24 A. To say that it was coming, yes.

25 Q. When you got the offer did you call him up and say you

1 know, I don't understand this part or I don't understand that
2 part?

3 A. Not really my place to do that in the midst of this.

4 Q. You really did not do it, correct?

5 A. Our attorneys, our representatives of DISH did.

6 Q. In fact, you have been a big proponent of baseball style
7 arbitration, haven't you?

8 A. In certain cases, we had --

9 Q. You've actually written to Congress people advocating that
10 they impose baseball style arbitration on programmers, haven't
11 you?

12 A. On these simpler deals I have.

13 Q. And you've also taken out ads to that effect, haven't you?

14 A. Again, simpler deals mostly about rate.

15 Q. And you've also invoked the arbitration clause in the
16 Comcast NBCU decree, didn't you?

17 A. We did notice. We never actually arbitrated.

18 Q. But you gave notice and by giving notice that they
19 couldn't go dark on you?

20 A. That's true.

21 Q. So you took advantage of that, right?

22 A. We needed more time to close the gap.

23 Q. And you negotiated under the shadow of arbitration and
24 were then able to make a deal, correct?

25 A. We, I guess if that's the way you want to characterize it.

1 Q. And you are aware even though you say you don't understand
2 everything about the Turner offer, you are aware that it does
3 provide for a standstill mechanism, a no blackout mechanism
4 very much like the Comcast NBCU one? You know that much don't
5 you?

6 A. What's to prevent HBO --

7 Q. Can you answer that question?

8 A. I'm trying to answer it.

9 Q. Answer the question. It doesn't apply to HBO so we don't
10 have to talk about HBO.

11 A. It does because if you want to get a deal done with HBO,
12 they could ask us to waive --

13 Q. I'm not asking you about all the things that you can think
14 of. I'm asking a simple question.

15 You are aware that the Turner offer contains a mechanism
16 not allowing Turner to blackout at the option and election of
17 the distributor, correct? Simple question, do you know that
18 much?

19 A. You cannot look at that in isolation.

20 MR. PETROCELLI: Your Honor, please answer the
21 question?

22 THE COURT: You really have to answer the question.
23 You can explain later on redirect.

24 THE WITNESS: Okay. I've never done this before, so
25 I apologize.

1 THE COURT: That's all right, you're doing fine.
2 Go ahead.

3 THE WITNESS: Okay.

4 BY MR. PETROCELLI:

5 Q. You are aware that it has a standstill mechanism is my
6 simple question?

7 A. For the Turner Networks.

8 Q. For the Turner Networks, correct?

9 A. Yes, I'm aware of that.

10 Q. Okay. And you've, and in fact, with respect to the
11 Comcast NBCU arbitration mechanism and the standstill mechanism
12 Mr. Ergen made public comments praising it, correct?

13 A. When was that?

14 Q. Do you remember that?

15 A. I don't remember the time or date.

16 Q. Let me show you that.

17 MR. PETROCELLI: That would be the next exhibit in
18 the order, Your Honor, for identification.

19 THE COURT: 923.

20 MR. PETROCELLI: Yes, another called July, 2016.
21 May I approach?

22 THE COURT: You may.

23 Marked for identification?

24 THE DEPUTY CLERK: Yes.

25 (Defendant's Exhibit Number 923 marked for

1 identification.)

2 BY MR. PETROCELLI:

3 Q. Could you please turn to page 18?

4 A. Okay.

5 You said July. I think this is dated April 20th.

6 Do I have the right document?

7 Q. You have the wrong one.

8 THE COURT: Mine says April also.

9 MR. PETROCELLI: So does mine, Your Honor. I'll get
10 you the right one.

11 BY MR. PETROCELLI:

12 Q. While he's looking for it let me read it and tell me if it
13 rings a bell, page 17, 18 of the July 21, 2016 analyst call.

14 Quote, and we've been very vocal about the fact that
15 baseball arbitration is a good way to do it. And by baseball
16 arbitration I mean each side picks a number of what they think
17 they should be paying and the arbitrator has to pick one of
18 those two numbers.

19 And when you do that people get pretty close before you
20 ever get to arbitration and nine times out of ten, they
21 resolve, they resolve the issue without that. It's just a
22 stimulus to get to a deal that makes sense in the first place
23 without the, and the consumer never loses their channel.

24 So we've done that baseball arbitration is something that
25 Comcast signed in the consent decree. Regional sports have had

1 it in the past. It's worked very well in the market place.

2 And I'll apologies for that mix up. This is Defendant's --

3 THE COURT: 923.

4 MR. PETROCELLI: -- 923.

5 BY MR. PETROCELLI:

6 Q. I won't reread it but you'll see that on page 17, Mr.
7 Schlichting.

8 A. I don't see it. Here, maybe page 18.

9 Q. Yes, on 18.

10 The question is were you aware that Mr. Ergen made those
11 comments?

12 A. Give me one second.

13 Right, so he's speaking of Tribune.

14 Q. Where he specifically calls out to Comcast?

15 A. Right. So we did get to a deal on Comcast. But this is
16 really with respect to retransmission consent deals.

17 Q. You are aware that under this arbitration offer that
18 Turner made, you have the ability to arbitrate any of the
19 networks that you have licensed in the next negotiation
20 including any specific bundles that you are carrying, correct?

21 A. Not aware of that.

22 Q. Well, have you reviewed the Arbitration Agreement
23 language?

24 A. I have and it's not clear.

25 Q. Well, let me just show you. I think this has previously

1 been marked, but I'll get you another copy.

2 MR. PETROCELLI: The plaintiffs already marked the
3 arbitration as 491, Your Honor.

4 THE COURT: Defendant's 491?

5 MR. PETROCELLI: No, it was plaintiff's 491.

6 THE COURT: Plaintiff's 491.

7 BY MR. PETROCELLI:

8 Q. Paragraph two of that says a claimant may demand a stand
9 alone offer or offers for a bundle of all Turner Networks or
10 any bundles of Turner Networks that Turner has licensed to
11 AT&T, the claimant or another video distributor for
12 distribution to consumers on or after October 22, 2014.

13 Now your current license agreement, I think you indicated
14 is for eight or so of the Turner Networks on --

15 A. On satellite.

16 Q. But it also allows you to put the four network bundle on
17 Sling?

18 A. I think it --

19 Q. It's the same agreement, correct?

20 A. It forces us to do that, right. We have to do both
21 together.

22 Q. But you asked to put the four networks on Sling, correct?
23 Not all eight, you wanted four?

24 A. That's right but my question is you have to arbitrate
25 together, correct?

1 Q. Well, if you have a dispute I was simply asking you, you
2 have the ability to elect arbitration with respect to the
3 entire carriage agreement including that piece of it that
4 relates to the four, four network bundle on Sling? You are
5 aware of that, correct?

6 A. Right, and we feel that's highly risky.

7 Q. Well, you said that yesterday about --

8 A. I did.

9 Q. -- highly risky?

10 A. Yeah.

11 Q. But, you know, there are other, there are other virtual
12 MVPDs, other online distributors out there and you would be
13 able to, an arbitrator would have the benefit of looking at
14 information from all of these in order to figure out for in the
15 case of Sling what might be a fair market value, correct?

16 A. That's exactly what we're worried about.

17 Q. But you, the arbitrators are required to be highly
18 qualified and experienced in the business, correct?

19 A. It says to look at comparables. We don't believe there
20 are comparables.

21 Q. Well, it goes way beyond that doesn't it? It says the
22 arbitrator can review all relevant evidence, right?

23 A. It does.

24 Q. And also it provides, I think you were talking about a
25 time out to do negotiation, it provides actually several

1 opportunities to do mediation in the course of the arbitration
2 process before a final decision is rendered, correct?

3 A. I believe it does.

4 Q. Importantly, if you elect it, Turner can't even threaten
5 any leverage to go dark on you, correct?

6 A. I know you're going to hate this, but HBO sits out apart
7 from this agreement.

8 Q. We're not talking about HBO. We are talking about the
9 Turner Networks?

10 A. I can't answer the question in isolation.

11 Q. But you've been negotiating for years a Turner agreement
12 separate from the HBO agreements?

13 A. That's true.

14 Q. Okay?

15 A. And now they would not be separate anymore.

16 Q. But they're not one contract?

17 A. They're not.

18 Q. They're not one contract and the HBO, the HBO contract has
19 nothing to do with this, correct?

20 A. That's not correct.

21 THE COURT: Let him finish his answer.

22 Go ahead.

23 THE WITNESS: So --

24 BY MR. PETROCELLI:

25 Q. You said it's not?

1 MS. KISER: Your Honor, may we approach on a
2 confidentiality issue?

3 THE COURT: Hold on.

4 Unless he's about to say something confidential
5 unknowingly, he can finish his answer. Otherwise, you can
6 approach.

7 THE WITNESS: I think I probably just did, but any
8 way --

9 THE COURT: Well then hold on, just have a seat.

10 (Witness leaves the stand.)

11 (Sealed Bench Conference.)

12 THE COURT:

13 MS. KISER:

14

15

16

17

18

19

20

21

22

23 MR. PETROCELLI:

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MS. KISER:

MR. PETROCELLI:

MS. KISER:

THE COURT:

MR. PETROCELLI:

THE COURT:

MS. KISER:

(Open Court.)

THE COURT: All right, you can proceed consistent
with the discussion at the bench.

We're going to go off to a different question at this
point.

(Witness resumes the stand.)

1 BY MR. PETROCELLI:

2 Q. Let's put Turner to the side now and talk about HBO.

3 If the HBO Networks were somehow not made available to
4 let's say DISH, DISH subscribers could readily get them over
5 the top by subscribing to HBO Now for what is it 15, \$18 a
6 month, something like that?

7 A. So only about a third of our subscribers are connected.

8 Q. But the answer is if you have internet connections you can
9 get HBO Now, correct?

10 A. That's correct.

11 Q. I want to ask you a couple of questions about this skinny
12 bundle issue?

13 A. Okay.

14 Q. And I think you were suggesting in your testimony that
15 post merger Turner might not be so willing to allow you to have
16 four bundles or words to that effect?

17 A. Certainly possible.

18 Q. Four networks. Pre merger all the programmers, all the
19 programmers want you or your company to take as many networks
20 as they can persuade you to take, correct?

21 A. That's true.

22 Q. Because if a programmer can't get a distributor to take
23 all its networks and the distributor can just pick off the one
24 or two best of them, the programmer is concerned that those
25 networks are going to die on the vine and become irrelevant and

1 they'll lose a lot of revenue and they will lose advertising
2 revenue, correct?

3 MS. KISER: Objection, compound.

4 THE COURT: I think you could reconstitute that
5 question a little more clearly.

6 MR. PETROCELLI: Will do.

7 BY MR. PETROCELLI:

8 Q. So programmers are concerned that if they can't convince a
9 distributor to take all of their networks, some of them may
10 fade away, correct?

11 A. Sure.

12 Q. And they could lose a lot of money if that happens, right?

13 A. It's subjective a lot, but there are probably a lot of
14 networks that probably should fade away.

15 Q. But that's been the battle back and forth, right, between
16 distributor and programmer?

17 A. That's true.

18 Q. And that ain't going to change post merger for
19 programmers. They are always going to want distributors to
20 take more channels than distributor really wants to take,
21 right?

22 A. It changes their ability to force those on somebody.

23 Q. First of all, on the ability point we just went over that.
24 We are now talking Turner. We are now talking the bundle of
25 four. You still have the arbitration mechanism should you

1 choose to invoke it, correct?

2 A. Yes.

3 Q. That would be available to you as an option?

4 A. I don't believe the arbitration mechanism as currently
5 worded protects us. So I'm not assured by your --

6 Q. Well, I'm not trying to assure you. I'm not your lawyer
7 --

8 A. Sounds like it.

9 Q. -- and I'm sure you have able legal counsel.

10 But there is a provision in the Arbitration Agreement that
11 does allow you to among other things identify the specific
12 bundles that you want within the license networks, correct,
13 under your carriage agreement?

14 A. Assuming we go to arbitration with our entire business,
15 that's correct.

16 Q. Now the, you testified earlier that Sling is really for
17 people who want to use it in the mobile environment on the
18 internet, right?

19 A. Those are different.

20 Q. Well, let's, let me stick to mobile environment.

21 Sling is designed for people who want to be able to access
22 the programming not just at home in the living room but
23 wherever they are, correct?

24 A. I'm curious to know when that was, the date of that
25 testimony.

1 Q. You're getting use to this, right.

2 So are you suggesting that I have a statement by Mr. Ergen
3 to that effect?

4 (Laughter in audience.)

5 A. I'm suggesting that when you go to over the past months
6 and maybe last year we have discovered that mobile customers
7 are not as high quality, they turn faster. And so folks that
8 watch television with a ten foot, you know, basically a
9 television on the wall and the couch in the living room are
10 perhaps better.

11 So that's why I'm asking for clarification.

12 Q. Let me read to you this statement from Mr. Ergen.

13 Sling is part of a strategy to take content to a more
14 mobile basis. To a more wireless basis. Because that's the
15 way the next generation is going to watch television.

16 They're going to watch as much or more television on a
17 phone or a tablet or a computer as they are in a big screen TV.

18 You recall Mr. Ergen making those comments?

19 A. That's what we thought out of the box, we're going to
20 serve millennials, we are going to make it graphical, we are
21 going to make it colorful and people like the grid guy. Not so
22 many millennials, it's just different.

23 So my guess is that's a few years old.

24 Q. But you're not suggesting that, that you're no longer
25 looking to sell Sling to people who want to use it on a mobile

1 device, are you?

2 A. I'm not.

3 Q. Okay. And you know that AT&T has a very significant
4 wireless network, right?

5 A. I do.

6 Q. So you know that people who actually watch Sling on a
7 mobile device may actually be watching it on the AT&T wireless
8 network, right?

9 A. It's possible.

10 Q. And you understand that the more people that are engaged
11 on the AT&T wireless network, that's good for AT&T's wireless
12 business, correct?

13 A. Because Sling customers will be paying for that data.

14 Q. Well, the simple point I'm asking you is that if Sling
15 customers are watching Sling on a mobile device on a wireless
16 device and they are an AT&T subscriber consumer, that's good
17 for AT&T's wireless's business, right?

18 A. I couldn't tell you.

19 Q. More use, more use on its wireless network, better for
20 AT&T?

21 A. More data use is more cost to them.

22 Q. So are you suggesting that the more people that are
23 engaged on the AT&T wireless network, the worse it is for AT&T?

24 A. I'm saying the more data they use. I'm, I don't profess
25 to be a wireless expert.

1 Q. You don't need to be a wireless expert to know that the
2 more people that are using AT&T's wireless network, the more
3 money they could be making, correct?

4 A. I don't see the connection there.

5 Q. Well, they might want to have multiple devices. You pay
6 for more multiple devices, correct?

7 A. I don't know that business.

8 THE COURT: Let's move on. Let's move on.

9 BY MR. PETROCELLI:

10 Q. Well, my point is that AT&T wireless business would
11 actually suffer if for example companies like Sling and Hulu
12 Live and Fubo and Filo no longer distributed video over the
13 internet?

14 A. I see no connection between those two.

15 MR. PETROCELLI: Your Honor, I have nothing further
16 at this time.

17 THE COURT: Okay. I need to see counsel.

18 Would you step down.

19 (Witness leaves the stand.)

20 (Sealed Bench conference.)

21 THE COURT:

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MS. KISER:

THE COURT:

MS. KISER:

THE COURT:

MS. KISER:

THE COURT:

MS. KISER:

THE COURT:

1 MS. KISER:

2 THE COURT:

3 MS. KISER:

4 (Open Court.)

5 THE COURT: All right, you may proceed with redirect.

6 (Witness resumes the stand.)

7 REDIRECT EXAMINATION

8 BY MS. KISER:

9 Q. Mr. Schlichting, let's start by talking about the
10 arbitration remedy that you were just discussing with
11 Mr. Petrocelli?

12 A. Okay.

13 Q. Well, actually first, what we'll talk about the, some of
14 the other statements that have been made related to
15 arbitration?

16 A. Okay.

17 Q. So you've advocated for these baseball style arbitration
18 and the retransmission consent context?

19 A. I have, we have as a company.

20 Q. Can you explain for the Court what retransmission consent
21 context is?

22 A. Yes. It's a basic negotiation with local affiliates. I
23 mean Broadcast affiliates, the ABC, CBS station in your
24 particular area, the contracts are fairly similar across most
25 affiliates, so it's typically about rate or the majority is

1 about rate.

2 So in that case baseball style arbitration makes sense.
3 They're easy comparables, or typically comparables in the
4 market. It's about a single number where you can have the next
5 two or three years worth of rates.

6 So we recommend baseball style arbitration when we can't,
7 when we're at an impasse on the local affiliates.

8 Q. You mentioned a few things there.

9 The first was that the contracts are pretty simple and
10 mostly similar.

11 Why are they more simple than contracts with groups like
12 Turner?

13 A. They're broadcast contracts, so they're typically not, on
14 the affiliate side by the way, on the owned and operated side
15 where Fox and NBC, they all own a few stations of their own in
16 the big markets. Those are complicated.

17 So this is really because they get embedded in the cable
18 network negotiations. So that's a big bowl of spaghetti and as
19 we've talked about, just a lot of moving parts.

20 With retransmission consent when it's only about an
21 affiliate, there just aren't other networks with which to
22 leverage negotiations or somehow there aren't that many levers
23 to pull.

24 Q. You also mentioned that there are plenty of comparables in
25 the retransmission consent context.

1 What do you mean by that?

2 A. I just mean that typically because of the FCC broadcast
3 ownership rules, you can't have more than two stations in most
4 markets. Almost all markets.

5 So even within that market there will be two other
6 affiliates where you could actually have a price comparable.
7 Part of the idea with comparables is same market, same, you
8 know, you want to have as few variables as possible.

9 So you almost always have a market comparable. Even if you
10 don't, you've got similar markets across the U.S.

11 Q. About how many local retrans markets are there?

12 A. Well, there are 210 DMAs total. I think we have deals
13 with affiliates in almost all of those, if not all.

14 So that doesn't mean there are 210 different affiliate
15 owners. There are probably at least that many that we do deals
16 with every couple years.

17 Q. DMA is designated market area?

18 A. Right, it's a Nielsen term. Designated market area which
19 is a city area, urban area.

20 Q. So if you were to arbitrate in the retransmit context, say
21 you are arbitrating with NBC, would you have a supply of
22 potentially 200 plus other NBC affiliates in different DMAs
23 across the country to compare the rates and terms?

24 A. Yeah. I want to be careful.

25 NBC typically refers to the parent company, so on the own

1 and operated put that aside because that's gummed up in all of
2 rest.

3 Q. I shouldn't have chosen NBC. Let's say CBS, is that
4 easier?

5 A. No, like you know Tribune, TEGNA, Sinclair.

6 Q. Those are groups that own local affiliates?

7 A. Right, they own many, many local affiliates across the
8 U.S.

9 So in that case you would have a pretty good idea on
10 comparables for most of their affiliates, for most of their
11 affiliate stations.

12 Q. Does DISH seek retransmission consent rights for Sling?

13 A. We don't. We've had to take a few. We've feel like it's
14 a competitive advantage for us. Those costs are spiraling.

15 So to the extent that we offer a service that doesn't have
16 these ever spiraling costs, we are going to have a structural
17 advantage. So we've been forced to take Fox 0 and 0s but we've
18 limited it to that and only in Blue.

19 Q. 0 and 0?

20 A. Sorry, owned and operated station.

21 Q. So as opposed to being owned by the Sinclair premium
22 station groups, they're owned by the --

23 A. Parent company.

24 Q. -- parent company?

25 A. That's right.

1 Q. Do consumers have other ways to watch local broadcast
2 content?

3 A. They often do. The point I was trying to make earlier was
4 that if you have internet, if you have, if you're watching
5 Sling that means by definition you have video quality internet.

6 If you have video quality internet, then we would prefer
7 that you proscribe to CBS All Access as an example and take us
8 out from this weird dynamic where when we try to negotiate for
9 better prices for our subscribers, they look at us as the bad
10 guy.

11 It's like hey, you know what, we don't make any money on
12 locals anymore or very little. So buy directly from CBS. Go
13 get CBS All Access. If the price is too high, then it's on
14 CBS's shoulders, not ours.

15 Q. How about antennas, do people use antennas anymore?

16 A. We certainly encourage it. That's a great way for
17 consumers to get TV for free. I've got a mantra internally
18 called keep free TV free. So we encourage all of our Sling
19 subscribers to go out and get an antenna.

20 They are pretty easy to use. We intergrate. We make it
21 possible to intergrate the OTA signals into our guide so you
22 are not switching inputs HDMI 1, HDMI 2. You do have to do
23 that. We're high on the idea of antennas, it's free. Frankly,
24 they're riding on tax air waives and spectrum.

25 Q. So you mentioned that you've made it easy to use antennas

1 without changing inputs. What does that mean?

2 A. Well, you know, you have got all of those remotes in front
3 of your television. One is for your television, one is for
4 your box, one is for something else.

5 We try to make it so you don't have to pick up the one for
6 your television and change from the HDMI 1 which might be Sling
7 to HDMI 2 which might be your antenna or something else.

8 We try to make that an integrated experience for the
9 consumer. Let's say you save 10, 12, \$15 by doing it and we
10 try to make it easy.

11 Q. Has DISH done anything else to make it easy for consumers
12 or their antennas to get broadcast content?

13 A. We also have two different boxes that one is a streaming
14 box and one is a WiFi transmission box.

15 If you look at what it takes, the consumers are just use to
16 not lifting a finger and then complaining about high prices.
17 So we're in this weird position where we are saying hey, much
18 lower price, really a great value but, you know, no one even
19 owns a screwdriver anymore.

20 So we are trying to make it super simple. Put an antenna
21 on the window, put the air TV box, connect it and then assuming
22 you have a smart TV or a streaming box, you should have all of
23 the locals again for free Over-the-air. So we're trying to
24 make it easy for the consumer.

25 Q. Going back to the Turner arbitration offer. I think you

1 got off a few times earlier when you were trying to explain why
2 it doesn't work for you.

3 Do you want to explain that now?

4 A. Yeah, I've love to. We've read it a few times and I just
5 want to be clear that I would never call Rich Warren about a
6 document that he sent over to start asking questions that just
7 given where we are in this trial, it was an inappropriate call.
8 Our attorneys are certainly more in touch.

9 But the idea that fair market value is a term used there.
10 So the arbitrator gets a chance to look at comparables and
11 determine fair market value.

12 I just don't know what that means. Does it mean rate? If
13 so, that's kind of woefully inadequate in terms of the span of
14 the rest of the deal.

15 If it's more than just rate, then I really don't know what
16 it means and that scars me. That's a high risk proposition to
17 put your entire business in the hand of a single arbitrator who
18 may or may not understand your business, understand your
19 contract, understand the gives and takes.

20 And then when you go to the market place for Sling, it's a
21 unique model. We feel like we've innovated on behalf of the
22 consumer and that could get blown up as well just because there
23 isn't another one like it out there.

24 Q. That was another question you were asked about earlier was
25 Mr. Petrocelli directed you to a provision in the arbitration

1 offer saying that arbitrators could consider all relevant
2 evidence.

3 Is there evidence out there that would substitute for a
4 comparable contract?

5 A. So I think that's part of the problem. That's, you're
6 putting a huge amount of responsibility on an arbitrator, who
7 knows if he's qualified or understands this.

8 And then compound, that's compounded by the idea that there
9 really isn't another comparable to Sling on a couple different
10 fronts. To us that feels like a very high risk proposition for
11 a business that is early in it's, you know, it's only three
12 years old. And we're fighting for survival against other folks
13 that are practically giving away their OTT streaming product.

14 So I, you know, that would be a hard, a very hard decision
15 to make.

16 Q. Mr. Petrocelli also pointed out to you that the arbitrator
17 would have to be highly qualified.

18 Is there anybody in this industry that you would trust to
19 make this decision?

20 A. Not that I can think of. And I'll tell you why. Nobody,
21 there's nobody that really has, unless it's somebody from DISH
22 and of course that's, I'm sure that wouldn't be allowed.

23 You just don't know all of the gives and takes. We've
24 sacrificed mightily on the satellite side to give birth to this
25 Sling entity.

1 So coming in cold and reading documents that's kind of been
2 presented here just doesn't do it justice nor does it capture
3 the hundreds of millions of dollars, you know, maybe more that
4 we've paid on satellite to actually create this skinny bundle
5 that we believe is good for the consumer.

6 Q. Just to be clear on the point about comparables, why
7 aren't the other virtual MVPDs good comparable data points for
8 what Sling is?

9 A. It's where the fear comes in frankly. Because every
10 other one of these OTT providers has been forced by the network
11 groups with leverage to take a lot of networks that they don't
12 want and don't need and people don't watch.

13 So all of these bundles, I think I mentioned this yesterday
14 but all of the packages that the other competitors offer are
15 just chopped full of stuff and we're trying so hard to get rid
16 of stuff and it's hard.

17 Every programmer comes at you oh, you have got to have X,
18 Y, Z. We're saying no. The number one complaint that the
19 consumer has is I'm paying too much for stuff I don't use and
20 don't watch.

21 So that's where we have a unique model. There are a couple
22 of things about the way our genres are structured as well, and
23 we think they are very customer friendly.

24 I mean, frankly on our side, we keep thinking if we keep
25 answering consumer's complaints, and we're trying hard, then

1 we'll win their love and win their subscription and we'll win
2 their monthly dollars.

3 So far it's been a touch and a kind of iffy existence, but
4 we're the number one live linear streamer I think because
5 customers have voted with their pocketbooks. I could go on.

6 Q. So your price is, just as a refresher, it's 20 or \$25 for
7 the base package. How much are these other virtual MVPDs
8 starting at?

9 A. The other MVPDs I believe the least expensive now is
10 DirecTV Now at 35, and YouTube TV at 40. Five O is out there
11 with an entertainment only non-sports very limited package for
12 16. But other than that, Sling is the most robust package and
13 by far the lowest starting price.

14 Q. Do you have the Arbitration offer in front of you?

15 A. I don't believe I do.

16 MS. KISER: Your Honor, may I have a moment?

17 THE COURT: Yes.

18 (Pause.)

19 BY MR. PETROCELLI:

20 Q. Do you recall Mr. Petrocelli asking you some questions
21 about whether your bundle of four networks in the base package
22 would be protected by arbitration?

23 A. I do.

24 Q. What is your understanding of your right for stand alone
25 offers?

1 A. So I don't think they are protected. I guess I note to
2 self we should just re-read that. It just doesn't feel like
3 they are protected.

4 You know, if we arbitrate for four, does that mean that we
5 can't then be stuck with more? Even before you get to the HBO
6 hammer, my reading is that there's nothing that prevents them
7 from pushing more on us.

8 Q. If you could separate satellite and Sling, would that fix
9 this issue?

10 A. It wouldn't.

11 As I mentioned, we paid handsomely with our cash flow from
12 satellite to achieve this skinny bundle. So if you put them
13 together, there's risk of being jammed with more networks,
14 higher prices or else.

15 If you take them apart, then Sling is orphaned and so we
16 don't have any leverage of the parent. So neither of those is
17 a great, you know, just from a negotiating standpoint, neither
18 of those is attractive in the least.

19 Q. I'd like to look at the language specifically of the stand
20 alone offer position.

21 May I pass up what's been marked for identification as
22 Plaintiff's Exhibit 491 which is a copy of these Arbitration
23 Agreement.

24 THE COURT: Sorry, I didn't hear you?

25 MS. KISER: May I approach to hand the witness?

1 THE COURT: You may.

2 BY MS. KISER:

3 Q. If you could turn to page 3, paragraph A 2 of the
4 arbitration offer, let me know when you're there.

5 A. So I've got large type 1, 2, but then small type 1, 2, 3,
6 4.

7 Q. That's right. It should be one without columns and two
8 pages with columns?

9 A. Okay, so which is page 3?

10 Q. So it says arbitration procedures underlined at the top?

11 A. Uh-huh.

12 Q. You see initiation of arbitration?

13 A. Yes.

14 Q. Then the second paragraph a claimant made demand?

15 A. Okay.

16 Q. So it says a claimant may demand a stand alone offer or
17 offers for a bundle of all Turner Networks or any bundles of
18 Turner Networks that Turner has licensed to AT&T, the claimant
19 or another video distributor for distribution to consumers on
20 or after October 22nd, 2014.

21 Do you have an understanding of what the word bundle means
22 here?

23 A. I believe I do.

24 Q. What do you believe it means?

25 A. It's a good question. I'm assuming it means, I'm assuming

1 it means --

2 THE COURT: Don't assume. Tell us what you think it
3 means.

4 THE WITNESS: Oh.

5 THE COURT: What do you think it means?

6 THE WITNESS: Well, what I think it means is the idea
7 that we have four networks on Sling, that that would be a
8 bundle of -- I say four networks on Sling, it could be clearer
9 for sure. A bundle probably isn't the right term there or
10 maybe I'm, I don't know. Maybe I'm misunderstanding.

11 BY MS. KISER:

12 Q. Does the word bundle have a fixed meaning in the industry,
13 a single fixed meaning?

14 A. I don't think it does, not really.

15 Q. What else could it mean if it doesn't mean that it
16 protects that, the bundle that's in the base package of Sling?

17 A. Well, we use bundle for the broader, the broader word or
18 the broader description of packages and then interesting you
19 should ask.

20 But we also, we use the term bundle for when we put
21 promotional offers out there with hardware, hardware, software
22 or we, you know. So I guess, yeah, it could be clearer.

23 Q. So if you look to the next sentence in paragraph A 2, it
24 says for the purposes of sub part one in this paragraph.

25 Bundles of Turner Networks shall include all Turner Networks

1 licensed to the video distributor whether through a single
2 carriage agreement or multiple carriage agreements.

3 Does that inform your understanding of what the word bundle
4 means here?

5 A. I guess by that description, you know, almost every one of
6 the distributors have licenses with all of the networks.

7 So let me just -- bundles of Turner Networks shall include
8 all Turner Networks licensed to a video distributor. So there
9 it gets less clear.

10 Q. Is the language clear enough that you would be willing to
11 go to arbitration on Sling based on Mr. Petrocelli's
12 interpretation?

13 A. No, definitely not.

14 Q. Moving on, Mr. Petrocelli early on asked you some
15 questions about the percentage of sports viewing that occurs
16 outside of Turner Networks.

17 Do you remember that?

18 A. I do.

19 Q. And you said you don't look at the, that metric or a few
20 others that he provided to you?

21 A. That's correct.

22 Q. Why not?

23 A. I just look at the metrics I mentioned before. I look at
24 tonnage, our people watching our networks. I mean, they could
25 have, I don't know. Whatever brings in viewers is what we're

1 interested in.

2 And so I don't try to be a programmer. Programmers are in
3 the business of hit shows, what makes a hit show, what brings
4 in viewers. I'm a little bit more part of the distribution,
5 you know, kind of, we just care about tonnage. We care about
6 how many hours people are watching networks.

7 Frankly, one of the kind of best things has happened
8 frankly is that I'm not a, personally I'm not a media junkie.
9 A lot of people in the business are. I just don't care as much
10 as a lot of folks about a hit show.

11 I care about other people watching, tonnage and how many
12 hours per household, how many dollars per hour, those are the
13 sorts of things that we, very dispassionate.

14 Q. How does Turner do on total hours and hours per household
15 and please be cautious of, to be if any of this is
16 confidential, just let me know?

17 A. Sure. They do well. I mean, I can probably give you some
18 ballpark statistics without breaking confidence or without not
19 breaking confidence, but you, know, providing confidential
20 information.

21 Q. Please do?

22 A. But I think they in terms of just tonnage, hours watched,
23 they have at least two and it depends on the time of year.
24 Sometimes where they have at least two in the top ten of all
25 networks. And they have five in the top 25, six if you include

1 HBO.

2 So they have a large share of those top 25 networks in
3 terms of the viewing.

4 Q. Mr. Petrocelli also asked you about a number of sports
5 rights that belong to programmers besides Turner?

6 A. That's right.

7 Q. Does the fact that others have those sports make Turner
8 sports any less important to you?

9 A. No. I mean, each of the sports group, each of the leagues
10 has their own following. Each of the RSNs has their own
11 crazies that either love you while you have them or leave you
12 if you don't.

13 You have all sorts of sports fans out there. So typically
14 it's one of the beauties of sports that they have these unique
15 followings of passionate people so you wouldn't substitute the
16 Masters for March Madness for instance.

17 Q. While we're on the sports subject. I'd like to ask about
18 the importance of March Madness to Sling and Turner without
19 bringing you into any confidential information.

20 How significant of an event is March Madness for Sling and
21 then just answer that to the extent you can without going into
22 confidential information?

23 A. Okay, it's pretty important to us. Probably leave it at
24 that.

25 THE COURT: Good time to take the afternoon recess?

1 MS. KISER: Yes, Your Honor.

2 THE COURT: We're going to take a 15 minute recess.

3 You remain a witness under oath in the case. Refrain from
4 discussing your testimony with anyone, even your own counsel.

5 We'll return in 15 minutes. We may or may not be going
6 with you until 5:30, but we'll be going until 5:30.

7 (Witness excused.)

8 (Recess at 4:05 p.m.)

9 (Proceedings resumed at 4:25 p.m.)

10 THE DEPUTY CLERK: Your Honor, recalling Civil Action
11 Number 17-2511, United States of America versus AT&T,
12 Incorporated, et al.

13 THE COURT: All right, you remain under oath, sir.
14 You may continue.

15 MS. KISER: Thank you Your Honor.

16 (Witness resumed the witness stand.)

17 REDIRECT EXAMINATION (Cont'd)

18 BY MS. KISER:

19 Q. Do you recall Mr. Petrocelli asking if you had done any
20 specific analysis for this litigation about the effects of the
21 merger?

22 A. I do.

23 Q. And the answer was that you haven't done an analysis
24 specifically for the negotiation -- for the litigation?

25 A. I'm sorry, say that again?

1 Q. An answer to his question was that you hadn't created an
2 analysis for the purpose of this litigation?

3 A. I have not, that's correct.

4 Q. So what you've testified about is work and information you
5 look at in the ordinary course of business?

6 A. It is.

7 Q. And you also mentioned your business judgment during
8 cross. What did you mean by that?

9 A. I just meant that it's not hard to make the leap that if
10 we lose subs, they gain subs, then it just becomes a question
11 of how many they gain and, you know, that's what I meant by my
12 business judgment. I don't need a study to know if that's
13 what's going to happen.

14 Q. Mr. Petrocelli also gave you some hypotheticals and
15 assumptions about Turner's cost, do you remember that?

16 A. I do.

17 Q. And whatever the actual costs for Turner during the CNN
18 takedown were, they did actually go dark with you, right?

19 A. They did.

20 Q. And did you have a sense of whether they were willing to
21 go dark with you again in March 2015?

22 A. We were very concerned about that. It's harder on us
23 typically to go dark a second time than it would be on them.

24 Q. And do you have -- would you expect Turner's costs of
25 going dark with DISH, the cost to Turner to be any higher after

1 it's acquired by DirecTV?

2 A. The cost of going dark? No. The cost wouldn't change,
3 they would -- I mean, they would be an offset potentially.

4 Q. So in the cost benefit equation, it's the benefit to Time
5 Warner of going dark that changes?

6 A. That's right.

7 Q. Mr. Petrocelli asked you a number of questions around the
8 2014 and 2015 negotiation, do you remember that?

9 A. Uh-huh.

10 Q. And when he was asking you about this and CNN, you
11 mentioned that you had done some analysis at the time and
12 offered to explain it, but weren't able to, do you recall that?

13 A. Analysis at the time of the going dark.

14 Q. I believe so.

15 A. I don't remember the specific, the specifics on that. We
16 do a lot of analysis for each one of these deals. So I don't
17 remember exactly which one you're talking about.

18 Q. You also mentioned CNN's more important now than it was
19 back in 2014.

20 A. That's right.

21 Q. Can you elaborate on that?

22 A. Sure. Just in terms of overall viewing hours and
23 households, but really it's more about hours per household.
24 Those have grown substantially. So overall viewing hours have
25 grown, and so you see an upward trend in terms of the amount of

1 time people spend watching CNN.

2 Q. And what had been the trend in CNN viewing at the time of
3 the 2014 takedown?

4 A. It had been going down. It had been negative, at least
5 with respect to DISH viewers. Now, that's as special cut of
6 the U.S. to be sure. But since the election, that has -- CNN
7 has really surged.

8 Q. And Mr. Petrocelli asked you some questions about some
9 statements Mr. Ergen made on that -- the earnings call or
10 during the takedown?

11 A. Oh, right.

12 Q. Do you remember that?

13 A. Uh-huh.

14 Q. And those statements were made November 4th, 2014?

15 A. That's correct.

16 Q. So that's about two weeks into the takedown?

17 A. That's right, about halfway through.

18 Q. And then two weeks later you reached an agreement with
19 Turner and put the networks back up?

20 A. We did.

21 Q. To the extent that you're comfortable, which may not be at
22 all, and that's fine, why did DISH and Turner go dark in your
23 view?

24 A. You know, the deal, these deals are complicated. You
25 start with a hundred plus open issues. Some big, some small.

1 And so as we worked through that list, we were still a long
2 ways apart, and we didn't want to take the risk that they would
3 be able to put TBS and TNT into the negotiations. And we got
4 to within six weeks. And so there were many open issues, but I
5 think the reason that the sort of straw that broke the camel's
6 back is that they would not extend the TBS, TNT contract.

7 Q. Did you -- would you have continued negotiating rather
8 than going dark had they agreed to do that?

9 A. We would have. We asked for a day per day extension.
10 Every day that they extended CNN and the rest of the Turner
11 Networks, we asked them to extend TBS and TNT the same number
12 of days and they refused.

13 Q. So to end the takedown, did DISH make concessions?

14 A. We did.

15 Q. Are any of those concessions something you'd be willing to
16 testify about in open court? And again, it's okay if it's not.

17 A. Yeah, I'd rather not. But there were a number of
18 concessions. I guess we shouldn't talk about that in open
19 court.

20 Q. All right. So without describing specifics, how
21 significant were the concessions for DISH?

22 A. Oh, significant, I mean --

23 Q. Mr. Petrocelli also quoted Mr. Ergen from the third
24 quarter earnings call from the takedown saying that DISH could
25 save a big, big check by dropping Turner, do you remember that?

1 A. I do.

2 Q. But DISH ultimately agreed to keep paying Turner that big,
3 big, big check, right?

4 A. We did, we ultimately agreed to pay them more than that
5 big, big, big check.

6 Q. Why did you do that?

7 A. We needed them. End of the day. We'll go, you know,
8 Charlie's words are that if you end up going dark with
9 somebody, you should be prepared to stay down. But I think the
10 fact that we got back together is sort of a clear sign that we
11 needed them. Hopefully they needed us, but we sure needed
12 them.

13 Q. Mr. Petrocelli also asked you about some of DISH's other
14 past blackouts, do you remember that?

15 A. I do.

16 Q. Does DISH like going dark?

17 A. We don't.

18 Q. So why does that ever happen?

19 A. You know, it's about the only recourse we really had. If
20 we're not able to close the gap, the programmer decides not to
21 extend, we can either, you know, pay these high prices or go
22 dark. And so it's very hard, I mean, we talk about negotiating
23 a lot, but I don't know what else there is to do at that stage.
24 So we, you know, we lose subs, we -- it's -- we do not like
25 doing that, but it's sometimes the only avenue we feel we have.

1 Q. What would happen if instead of going dark on any of those
2 occasions you just accepted the rates and terms the programmer
3 had proposed to you?

4 A. Well I think there are many, many distributors of pay-TV
5 who are negative. They're losing money on video. DISH is
6 still making some money on video, but our margins have been
7 compressed. You see how hard we negotiate, even so, our
8 margins, our profit margins are declining. And the programmers
9 have shown no remorse that they're killing the golden goose,
10 right. You've got plenty of cable companies out there that are
11 literally losing money on video, and the only reason they do
12 that -- the only reason they can do that is because they have
13 broadband to help subsidize theme, broadbands have very high
14 margin product.

15 We don't have that, and so from an echo system standpoint
16 we're the canary in the coal mine. We're still trying to make
17 money on video. And we're not subsidizing other products with
18 it.

19 Q. What would happen to DISH and Slings's pricing if you
20 accepted whatever price increase programmers put on the table?

21 A. You know, obviously, it would have to increase
22 significantly.

23 Q. You were asked some questions about, I believe
24 Mr. Petrocelli said Mr. Ergen wouldn't pay a nickel more after
25 the merger than he would before, do you remember that?

1 A. I do.

2 Q. And you said that things will change after the merger.
3 And then you were cut off. Can you explain how that would
4 change and why that was relevant to this question about what
5 you would accept?

6 A. Yeah, I believe I said, well, we did pay a nickel more on
7 HBO. We have paid so much more that -- maybe not in an open
8 courtroom, but that is just -- that is not a good deal for us.
9 I'll leave it at that for now.

10 And so if you imagine we were prepared to do that before
11 the merger, you can only imagine what the incentives changed.
12 Why would Time Warner budge an inch? They know that we have to
13 pay whatever price they put out there, and if we don't pay,
14 they collect our subs. So it would change 180 degrees the day
15 after the merger.

16 MS. KISER: No further questions, Your Honor.

17 THE COURT: Any cross from the redirect?

18 MR. PETROCELLI: Just a couple, Your Honor.

19 RE-CROSS-EXAMINATION

20 BY MR. PETROCELLI:

21 Q. On the arbitration issue, Mr. Schlichting, just to be
22 clear, in your arbitration election with Comcast NBCU, you did
23 testify that the thread of arbitration worked pretty well. And
24 you don't know how you would have gotten to the finish line
25 without it, correct?

1 A. Better than nothing.

2 Q. But you did give that testimony?

3 A. I did.

4 Q. And did you settle up -- you settled up without actually
5 having to go to the arbitration proceeding, right?

6 A. That's -- we got the deal that we both signed.

7 Q. Okay. And did that take care of everything, including
8 Sling?

9 A. It did not. There were networks left on the side of the
10 road that, you know, to this day I wish we -- I'm looking at,
11 now that I'm actually running Sling, I'm looking at FIFA
12 without Telemundo. So it was not satisfactory, but we did sign
13 a deal.

14 Q. And the arbitration language in the Comcast NBC mechanism
15 was also fair market value, right?

16 A. I believe it is.

17 Q. And, in fact, your company proposed an arbitration
18 mechanism in this matter last summer, correct?

19 A. I believe we did that at the request of the DOJ assuming
20 that the merger takes place.

21 Q. And the language that you folks included in your
22 arbitration proposal was also fair market value of the
23 programming carriage rights at issue, correct?

24 A. It's certainly broader than that. The proposal that our
25 team put together just takes any number of other pieces into

1 account.

2 Q. But you do agree with me that the language that was
3 submitted says the arbitrators are directed to choose the final
4 offer of the party which most closely approximates the fair
5 market value of the programming carriage rights at issue?

6 A. I do.

7 Q. Okay.

8 MR. PETROCELLI: Nothing more, Your Honor.

9 THE COURT: Let me ask a question.

10 THE WITNESS: Uh-huh.

11 THE COURT: You've talked about the skinny packages
12 being --

13 THE WITNESS: Right.

14 THE COURT: -- critical to your business model,
15 right?

16 THE WITNESS: Uh-huh.

17 THE COURT: And you've talked about how programmers
18 try to force you to accept more programs or more networks, I
19 guess you call it.

20 THE WITNESS: Right.

21 THE COURT: Than your customers are really interested
22 in having, right?

23 THE WITNESS: That's true, yes. We've tried to
24 arrange it so that if you want to see a group of networks, you
25 know, if you have kids, you buy kids, but if you don't, you

1 don't need to pay for them, yeah.

2 THE COURT: Exactly. So what I was wondering is
3 between these negotiations, let's say you have a negotiation
4 where you agree to take some networks that, as part of the
5 deal, that you know your customers aren't really going to be
6 wild about.

7 THE WITNESS: Right.

8 THE COURT: But you take them because you want to
9 make the deal.

10 THE WITNESS: Right.

11 THE COURT: Do you have the ability with your
12 technological setup the way it is to acquire data as to the
13 extent to which those networks are actually not being used at
14 all so that at the next negotiation, you can go with data to
15 the people you negotiate with and say, look, last time we
16 accepted five networks from you all that --

17 THE WITNESS: Yeah, yeah.

18 THE COURT: -- we knew our people wouldn't want.
19 Well, here's the data, they didn't watch them.

20 THE WITNESS: Yeah.

21 THE COURT: Do you have the ability to accumulate
22 that kind of data to use in subsequent negotiations?

23 THE WITNESS: We do, and we --

24 THE COURT: Do you do it?

25 THE WITNESS: We do. We say exactly that at the

1 beginning of our negotiations. We'll show, look, our data
2 shows that you've got, you know, three winners, two so-so, and
3 ten losers, and we don't want the ten. That has almost no
4 bearing on the outcome, the bearing on the outcome --

5 THE COURT: What's their argument back, you know, we
6 want you to buy things that no one is going to look at or use.
7 They can't possibly argue that with a straight face, can they?

8 THE WITNESS: It's not an argument. They tell us,
9 you know, what we're going to take, where we're going to be
10 carried, and then we will go back and forth. But almost, it's
11 very rare that we are able to unplug any network. It's not
12 logical, you know, we come in with logic, and we really try to
13 --

14 THE COURT: So you have data that you --

15 THE WITNESS: We do. I could show you reams and
16 reams of data from these negotiations where you've got these
17 networks that should never have been born in the first place,
18 people are not watching. We wouldn't receive a call. Frankly,
19 it's what kept CBS, you know, it was the heart of the CBS
20 negotiations. There are extra networks that every programmer
21 has that are just dogs, and we can show them just how bad they
22 are. So it's not a --

23 THE COURT: Does the FCC know this is how it works?

24 THE WITNESS: Well, the FCC only has jurisdiction
25 over broadcast. So for cable, it's really unregulated. Or

1 it's certainly not regulated by FCC. So it's just, you know,
2 it's I keep coming back to leverage. It's just a leverage
3 game. If they have the content that you need, then they can
4 not only coerce you to pay more, but carry these networks more
5 broadly and that's why you have hundreds of networks and these
6 bundles, and that's what we're trying to avoid with Sling.

7 THE COURT: Okay. You're excused.

8 THE WITNESS: Does that make sense?

9 THE COURT: You're excused.

10 THE WITNESS: I'm excused excused?

11 THE COURT: Yeah.

12 THE WITNESS: Okay, thank you.

13 THE COURT: Step down.

14 (Witness excused.)

15 THE COURT: Government call it's next witness.

16 MR. WELSH: Your Honor, the United States calls
17 Mr. John Martin as an adverse party witness.

18 THE COURT: All right. You may be permitted to use
19 leading question.

20 THE DEPUTY CLERK: Please raise your right hand.

21 JOHN KEVIN MARTIN, JR., GOVERNMENT WITNESS, SWORN

22 MR. WELSH: May I proceed, Your Honor?

23 THE COURT: When you're ready.

24 MR. WELSH: Thank you.

25 DIRECT EXAMINATION

1 BY MR. WELSH:

2 Q. Could you please state your name for the record, sir?

3 A. John Kevin Martin, Junior.

4 Q. Mr. Martin, nice to see you again.

5 A. Nice to see you too.

6 Q. Mr. Martin, you're employed at Turner Broadcasting,
7 correct?

8 A. Yes, that's correct.

9 Q. You are the chairman and CEO of the company; is that
10 right?

11 A. Yes.

12 Q. And you report to Jeff Bewkes; is that correct?

13 A. Yes, that's correct.

14 Q. Mr. Bewkes is the chairman and CEO of Time Warner, right?

15 A. Yes.

16 Q. Okay. Now, in your position as the chairman and CEO of
17 Turner, you've been in that position since January 1 of 2014;
18 is that correct?

19 A. Yes.

20 Q. All right. Prior to that time, in a stint you were the
21 chief financial officer and administrative officer of Time
22 Warner, true?

23 A. Yes that's true.

24 Q. Okay. And that was approximately from 1993 through 2000,
25 I believe; is that right?

1 A. That was from the year 1998 through 2000 -- the end of
2 2013.

3 Q. Okay. So you've been at Time -- with the Time Warner
4 organization for a little over eleven years total; is that
5 right?

6 A. No, that's not correct.

7 Q. How many years have you been with Time Warner, sir?

8 A. Since 1993. I did various other positions.

9 Q. Okay. You consider yourself to be pretty knowledgeable
10 about the business; is that true?

11 A. Yes, I would say so.

12 Q. About Turner and Time Warner?

13 A. Yes.

14 Q. Now, in your current position as the chairman and CEO of
15 Turner, you're accountable for the strategy, the organization,
16 setting the goals and the priorities of the company, right?

17 A. Yes.

18 Q. Okay. Ultimately you are responsible for the financial
19 performance of Turner, correct?

20 A. Yes, that's correct.

21 Q. Let's start with some basic points here if we can. Spend
22 a few minutes on this.

23 So Turner broadcasting has network programming, right?

24 A. Yes.

25 Q. You oversee those networks as the chairman and CEO,

1 correct?

2 A. Correct.

3 Q. All right. In the United States those networks would be
4 TBS, TNT, CNN, Cartoon Network with Adult Swim, true TV,
5 headline News; is that right?

6 A. That's a subset of them, but yes.

7 Q. But you do oversee those networks, right?

8 A. Yes, that's correct.

9 Q. And those networks are what we would be refer to as being
10 linear programming, right?

11 A. Yes, linear networks.

12 Q. And linear programming, we've heard some testimony about
13 it. Let's just make sure we're all on the same page. Linear
14 programming would mean that you're on a fixed schedule, right,
15 so you can pull it up at a particular time of day, correct?

16 A. Yes, that's correct.

17 Q. Okay. Now, looking at TBS and TNT, just those two,
18 networks they are by far and away the largest revenue producers
19 at Turner, correct?

20 A. Correct.

21 Q. All right. TBS and TNT are among the top ten most
22 profitable cable networks within the United States; isn't that
23 true?

24 A. I believe that to be true.

25 Q. Four of your networks, TNT, TBS, Cartoon Network and CNN,

1 those four networks account for about 85 percent of Turner
2 subscription revenue, true?

3 A. Yes, that's true.

4 Q. Now, from the time frame of 2013 to 2016, TBS was the
5 number one entertainment network; isn't that true?

6 A. Within the ad supported TV cable universe, yes.

7 Q. Okay.

8 MR. WELSH: Your Honor, I have some binders of some
9 exhibits if I may get those and hand those up to the Court as
10 well as the witness?

11 THE COURT: Fine.

12 MR. WELSH: Thank you.

13 May I approach, Your Honor?

14 THE COURT: You may.

15 BY MR. WELSH:

16 Q. Mr. Martin, I've handed you a binder that has some
17 exhibits in it. If you could turn to what we've identified and
18 marked for identification as PX 149. Tell me when you're
19 there, sir.

20 A. Yes, I am there.

21 Q. Okay. great. Now, PX 149 first off is an e-mail to you on
22 February 15, 2017, correct?

23 A. Yes, that's correct.

24 Q. All right. And the purpose of this e-mail was to provide
25 you with some materials to prepare you for a press lunch that

1 would occur in connection with a Time Warner's earnings call,
2 true?

3 A. Yes, that's true.

4 Q. Okay. And that's one of your jobs at Turner, as the
5 chairman and CEO, you participate in earnings calls, and you
6 meet with the media, specially the financial media to talk
7 about Turner's business; isn't that right?

8 A. Yes.

9 Q. Okay. Now --

10 MR. WELSH: Your Honor, I would move for admission of
11 PX 149?

12 THE COURT: Who's it from?

13 BY MR. WELSH:

14 Q. Mr. Martin, this e-mail is from a Warren Herbitz; is that
15 correct?

16 A. Yes, that's correct.

17 THE COURT: Who is she?

18 THE WITNESS: She was ex-head of communications for
19 Turner. And she's no longer with the company.

20 THE COURT: Any objection.

21 MR. PETROCELLI: No, Your Honor.

22 THE COURT: Be admitted.

23 (Plaintiff's Exhibit No. PX 149 was received in evidence.)

24 BY MR. WELSH:

25 Q. Mr. Martin, if could turn to PX 0149009. The numbers are

1 at the bottom of the page.

2 A. (Witness complies.)

3 Q. Are you there, sir?

4 A. Yes, I am.

5 Q. Okay, great. Now, this is the earnings prep materials for
6 Time Warner and Turner, more specifically for the fourth
7 quarter fiscal year 2016; is that right?

8 A. Yes, this is our internal earnings prep, yes.

9 Q. Okay. And this is dated, as we see at the top, February
10 of 2017, correct?

11 A. Yes.

12 Q. And this would be an example of the type of earnings prep
13 materials that would be provided to you as a chairman and CEO
14 of Turner so that you, again, as part of your job, your
15 responsibilities, could go out and talk to the financial media
16 about Turner and Time Warner, correct?

17 A. Yes.

18 Q. All right. And this particular page is titled, as our
19 others of this type for Turner, "Strategy updating key themes,"
20 do you see that?

21 A. Yes, I do.

22 Q. And again, these are the key themes that you would share
23 with the media, including the financial media, correct?

24 A. Yes, correct.

25 Q. And one of the things that you're prepared to tell the

1 media in February of 2017 was that Turner had the number one
2 entertainment network for the fourth consecutive year, right?

3 A. I'm just trying to see where that is.

4 Q. Sure, if you look at the section where it says TBS, TNT
5 and Adult Swim, do you see those logos on the left?

6 A. Yes, I do.

7 Q. First bullet point there says, at the end of that first
8 bullet, "TBS is number one entertainment network for the fourth
9 consecutive year," correct?

10 A. Yes, I see it now.

11 Q. So that would be the 2013 to 2016 timeframe?

12 A. Yes, I believe that's true.

13 Q. Okay. And that was correct, right, when you were getting
14 ready to talk to the financial media, that information was
15 correct, right?

16 A. I would assume so, yes.

17 Q. Okay. And let's look at the third bullet point down from
18 the top. There we have some more information which was
19 prepared so that you could share factual information correctly
20 and accurately with the financial media. Do you see that,
21 where it says, "Our efforts produced results"?

22 A. I'm sorry, again, you said third bullet point, I don't see
23 it.

24 Q. Yes, where it says, "Our efforts produced results across
25 the entire portfolio as evidenced by the following achievements

1 and highlights." Do you see that, sir?

2 A. Yes, I see it now.

3 Q. Okay. And that was information again given to you to
4 impart to the financial media in February of 2017, right?

5 A. Yes.

6 Q. So, for example, Turner had eight new marquee originals at
7 TBS and TNT, all which were renewed, right?

8 A. Sure.

9 Q. And that was important that they were renewed, right,
10 you're telling the financial media these are important marquee
11 pieces of original content, right?

12 A. Yes, it means that they were good enough to get a second
13 season.

14 Q. All right. And Turner increased it's domestic affiliate
15 revenue by 14 percent there, right?

16 A. Yes, I see that.

17 Q. Okay. And domestic affiliate revenue, what we're talking
18 about there is the revenue that Turner gains from its carriage
19 contracts with the distributors, true?

20 A. True.

21 Q. So for that period of time Turner had increased its
22 domestic affiliate revenue 14 percent, right?

23 A. Yes.

24 Q. Okay. And also during this time, you not only grew your
25 affiliate revenue, but at the same time you grew your domestic

1 advertising, didn't you?

2 A. In this period, yes.

3 Q. So your advertising went up by four percent in this
4 period; is that right?

5 A. Yes, it looks that way, yes.

6 Q. At the same time your affiliate revenues are rising.

7 Now, Turner Networks accounted for over half of all of the
8 daily top 20 telecasts in 2016, right?

9 A. Yes, with one point of clarification. May I clarify?

10 Q. Well, you can clarify with your counsel if he wants to ask
11 you questions. But that was the information that was given to
12 you, right, to go and talk to the financial media, that your
13 networks accounted for over half of all the daily top 20
14 telecasts in 2016, true?

15 A. Yes.

16 Q. Okay. And all of that information that was given to you
17 that day, that information you were ready to disseminate to the
18 financial media because it's true, right?

19 A. Yes.

20 Q. Okay. Now, in 2017, Turner had three of the top five
21 networks for prime time viewing for millennials, didn't it?

22 A. Yes, among the ad supported universe, yes.

23 Q. Well, let's turn to PX 151 in your binder, if we can.
24 Tell me when you're there.

25 A. I'm there.

1 Q. Okay. Now, first off here, this is an e-mail from Ada
2 Peyton to you sending you the earnings prep materials for
3 2/1/2017, true?

4 A. Yes, that's the way it looks, yes.

5 Q. All right. And those earning prep materials, the Q1 2017
6 earning prep materials, they're actually attached to that
7 email, right?

8 A. Yes.

9 Q. And these particular earnings prep materials, now, they're
10 dated May 2017, true?

11 A. True.

12 Q. And these -- and Ada Peyton is an employee of Time Warner,
13 correct?

14 A. Yes, it's Audie Peyton.

15 Q. Thank you for correcting my pronunciation. So Audie
16 Peyton is the Time Warner employee, correct?

17 A. Yes, he is.

18 Q. Right. And these materials were provided to you similar
19 to what we saw before with the prior exhibit. They were
20 provided to you so that you could participate in an earnings
21 call, correct?

22 A. Yes, as background materials, correct.

23 Q. So again, you could be prepared to talk knowledgeably
24 about Turner and its business to the media, including the
25 financial media and investors, correct?

1 A. Yes.

2 MR. WELSH: Your Honor, I move for admission of PX
3 151?

4 MR. PETROCELLI: No objection, Your Honor.

5 THE COURT: All right, it will be admitted.

6 (Plaintiff's Exhibit No. PX 151 was received in evidence.)

7 BY MR. WELSH:

8 Q. Mr. Martin, if you could go to PX 151-002. And this is
9 the earnings prep, starting of the earnings prep materials,
10 correct?

11 A. Yes, that's correct.

12 Q. And similar to what we saw before again, these are some of
13 the highlights that are given to you so you could present them
14 to the financial world and investors, right?

15 A. Yes.

16 Q. And if we look at the TBS, TNT, Adult Swim logos there, we
17 would see that Turner had three of the top five networks for
18 millennials during this time, right?

19 A. Sure.

20 Q. And that would be -- the reference there would be the TBS,
21 TNT and Adult Swim. Those were the three networks that you had
22 for millennials that were of the top ones, right?

23 A. Yes, that's true.

24 Q. Okay. And it also notes further down about CNN, doesn't
25 it, it talks about CNN. And it says that CNN audiences grew

1 over twenty percent in the first quarter of 2017, correct?

2 A. Yes, that's correct.

3 Q. And it notes too that the first quarter of 2017 was CNN's
4 most watched quarter in over fifteen years, right?

5 A. Right.

6 Q. And all of this information we've just gone through here,
7 all of that information was accurate, right?

8 A. To the best of my knowledge, my team provides me with
9 accurate information.

10 Q. Right. And that's what you expect of your team, to give
11 you accurate information before you go out for these different
12 meetings with the financial analysts, with the financial media,
13 earnings calls, other things like that, you expect and receive
14 correct and accurate information from your teams, right?

15 A. Yes.

16 Q. Okay. Now, Mr. Martin, Turner's distributed to 90 million
17 homes across America, right? You can put that to the side,
18 sir. We're done with that for the time being.

19 A. Each of our networks have different levels of
20 distribution. So I can't make a characterization that we're
21 just blankly delivered to 90 percent because that would not be
22 correct.

23 Q. Well, you told me in your deposition, and I'll hand it to
24 you if you'd like to look at it. But you told me in your
25 deposition that it's as many as eighty-five million homes

1 across America that Turner is distributed in, do you remember
2 that?

3 A. I don't remember that specific reference. But again, it
4 would depend, I think -- I don't know what you're looking at.
5 I thought we were talking more in average and generalities.
6 Because on average we have widely distributed networks, but our
7 networks are distributed at different percentage levels.
8 They're distributed different percentage levels on a by network
9 basis as well as on a by distributor basis.

10 Q. Certainly your core networks of TNT, TBS, CNN and Cartoon
11 Network, certainly those networks are in anywhere between 80 to
12 85 million homes across this country, you don't dispute that,
13 do you?

14 A. Well, they are some of our more distributed networks.

15 Q. Im sorry?

16 A. They are some of our most highly distributed networks.

17 Q. And as to those networks, you don't dispute that they're
18 in at least 85 million homes across America, do you?

19 A. I believe that we probably have some networks with some
20 distributors that are distributed at lower percentages. So I
21 don't have an average right off the top of my head. But fully
22 distributed would mean somewhere in the 80 to 85, possibly as
23 high as 90.

24 Q. Okay. Now, in 2016, Mr. Martin, Turner subscription
25 revenue alone for its U.S. entertainment and sports business,

1 that was 3.6 billion dollars; isn't that true?

2 A. I would have to refresh my recollection. I can't remember
3 exactly what the number was in 2016.

4 Q. All right. Look at tab -- or look at PX 148, if you
5 would, of the binder.

6 A. (Witness complies.)

7 Q. And tell me when you're there.

8 A. I'm at the tab.

9 Q. Now, PX 148 starts off with an e-mail from Chris Carpenter
10 to you and some of your colleagues at Time Warner; is that
11 right?

12 A. Yes, that's correct.

13 Q. All right. And what was going on here, we talked about
14 this in your deposition, but what was going on here was that
15 this e-mail and the PowerPoint deck that was attached to the
16 e-mail was provided to you in advance of an initial
17 get-to-know-you kind of meeting with AT&T personnel related to
18 this merger, right?

19 A. Yes.

20 Q. And it was provided by your team so that you could have
21 that information for that get-to-know-you meeting with AT&T,
22 correct?

23 A. Yes, that's correct.

24 Q. And you actually participated in both the preparation of
25 the document, the PowerPoint deck that was sent to you, as well

1 as participated in the meeting itself, correct?

2 A. Yes, I reviewed the document, I did not put it together,
3 but yes.

4 Q. Okay.

5 MR. WELSH: Your Honor, I move for admission of PX
6 148?

7 MR. PETROCELLI: No objection.

8 THE COURT: Be admitted.

9 (Plaintiff's Exhibit No. PX 148 was received in evidence.)

10 BY MR. PETROCELLI:

11 Q. Now, Mr. Martin if you'd look at PX 148-015. Again, the
12 pages are on the bottom, tell me when you're there?

13 A. I'm there.

14 Q. All right. Now, this is a page that has the Turner
15 subscription revenues that you were being -- presenting to AT&T
16 in this get-to-know-you meeting, correct?

17 A. Yes.

18 Q. And in looking at the revenue portion for U.S.
19 entertainment and sports, do you see left column?

20 A. Yes, I do.

21 Q. Okay. And what's the figure there for the subscription
22 revenue?

23 A. 3.6 billion dollars.

24 Q. 3.6 billion?

25 A. Yes, that's correct.

1 Q. Okay. So that was the amount just for the U.S.
2 entertainment and sports business in 2016 for Turner, correct?

3 A. Correct.

4 Q. All right. Now, during this timeframe of 2016, again just
5 looking at the U.S. entertainment and sports business?

6 THE COURT: What page are you on there?

7 MR. WELSH: I'm sorry, Your Honor, it's PX 148 dash
8 015. There's a chart there with -- it's 2016 in billions.

9 BY MR. WELSH:

10 Q. The left column is the U.S. entertainment and sports; is
11 that right Mr. Martin?

12 A. Yes, that's right.

13 Q. Okay. And then if we carry down in the left, the far left
14 column we have revenue with subscription advertising underneath
15 that, do you see that?

16 A. Yes.

17 Q. Okay. So the subscription figure is 3.6 billion dollars
18 for the U.S. entertainment, right?

19 A. Yes.

20 Q. Okay. And then the margins for the U.S. entertainment and
21 sports business for Turner during 2016, that was 47 percent; is
22 that correct?

23 A. Yes.

24 Q. Okay. You can put that to the side for now, thank you,
25 we'll come back to that later.

1 Now, mr. Martin, Turner's linear networks with its live
2 programming, now, that's all -- that's distributed through
3 MVPDs correct?

4 A. Yes, among others, but yes.

5 Q. Well, let's talk about MVPDs, we'll get to the others.

6 And I want to focus just on the linear programs, the CNN, TBS,
7 TNT, that type of programming, those networks, okay?

8 A. Okay.

9 Q. All right. And as to those, they're distributed through
10 MVPDs, which is the multichannel video programming deliveries,
11 correct?

12 A. Yes, that's correct.

13 Q. And that would include the cable companies such as Charter
14 and Cox, correct?

15 A. Yes.

16 Q. And then it also includes the satellite companies, so DISH
17 and DirecTV, correct?

18 A. Yes.

19 Q. All right. Now Turner also distributes its programming
20 through what are called virtual MVPDs, correct?

21 A. Yes.

22 Q. Okay. And the virtual MVPDs are the ones that would offer
23 your linear programming over the Internet, correct?

24 A. Yes, that's correct.

25 Q. All right. And so a couple of examples of those would be

1 DISH Sling, right?

2 A. Uh-huh, yes.

3 Q. Sunny View?

4 A. Yes.

5 Q. And YouTube TV recently?

6 A. Yes.

7 Q. Okay. Now, your linear programming that we're talking, so
8 CNN, TBS, TNT, those are not distributed over what are called
9 SVODs, correct?

10 A. The linear networks themselves are not delivered over
11 SVODs, but we do license individual shows to SVOD.

12 Q. But SVOD is a subscription video on demand, right?

13 A. Yes, that's correct.

14 Q. And that means I can go, and I can pull up, you know, if I
15 want to watch a rerun of something, I can go on to an SVOD and
16 pull that up whenever I want to do that, right?

17 A. Yes, on an on demand basis, yes.

18 Q. Okay. But what we're talking about is your linear
19 programming that's on that fixed schedule that we talked about
20 before. So if I want to watch something that's on your TBS
21 channel, your network at, nine o'clock at night, okay, you
22 follow me?

23 A. I follow you.

24 Q. The linear stuff?

25 A. Yes.

1 Q. All right. I can't go to an SVOD and pull that up?

2 A. That's correct.

3 Q. Okay. And the SVODs that we're talking about, just some
4 examples here would be Netflix, right, as an example?

5 A. Yes. Yes.

6 Q. I can't go on to Netflix and find TBS's linear programming
7 on Netflix?

8 A. That is being exhibited live on TNT, yes.

9 Q. That's right, that's my point. And Amazon. I can't go on
10 to Amazon, I can't pull up your linear live TBS, TNT, CNN on
11 Amazon, right?

12 A. That's correct.

13 Q. All right. So your linear networks, they're distributed
14 through the MVPs and the virtual MVPDs, those linear live
15 networks, but they're not through the SVODs?

16 A. Yes, that's true.

17 Q. Let's talk about your content and your contracts here.

18 Now, Turner Networks carry sports content, we've heard
19 something about this already in this trial. But that's true;
20 is it not?

21 A. Yes, that's true.

22 Q. Okay. So TNT carries NBA basketball games, for instance,
23 right?

24 A. Yes.

25 Q. All right. And it was the suggestion last week in this

1 courtroom by the defense counsel that Turner only carries, I
2 think it was 64 NBA games out of thousands. Now, does Turner
3 only carry 64 NBA games out of thousands?

4 A. I believe that's correct, it's less than 8 percent of all
5 of the NBA games.

6 Q. Okay. But you do carry those 64 games, right?

7 A. I believe it's 64. It's in and around 64.

8 Q. And you don't carry all the other NBA games because you've
9 secured the rights to those 64 games, and that's because you've
10 secured the rights to NBA playoff games, correct?

11 A. Yes.

12 Q. Okay. And you also have the rights to the All Star, the
13 NBA All Star games, right?

14 A. Yes, we do.

15 Q. All right. In fact, that was on TNT, I think, if I recall
16 correctly, about two months ago, right?

17 A. I believe so, yeah.

18 Q. All right. And Turner gained the rights for these NBA
19 games for a reason, because Turner wants the best games and the
20 best sports program, right?

21 A. We want popular sports programming.

22 Q. You want the best, though, in that area of NBA basketball,
23 correct?

24 A. Well, we'd like the best games in all aspects if we could
25 get it.

1 Q. Turner carries NCAA men's basketball games, right?

2 A. The men's basketball championship, yes.

3 Q. That's right, you don't carry regular season games, do
4 you?

5 A. No.

6 Q. But you carry the NCAA tournament games, right?

7 A. Yes.

8 Q. All right. You carry March Madness?

9 A. In partnership with CBS, we have a fifty/fifty partnership
10 with CBS.

11 Q. Sure, and we'll talk more about that, but you carry,
12 Turner carries the NCAA tournament games, correct?

13 A. Yes.

14 Q. All right. And you carry those games on three networks.
15 TBS, TNT and True TV, correct?

16 A. Yes.

17 Q. And you mentioned CBS. Well, this year Turner has the
18 right to the final four and the finals of the NCAA men's
19 basketball tournament, March Madness, correct?

20 A. That's true, yes.

21 Q. You alternate with CBS, so last year CBS had it, this year
22 you guys have it, correct?

23 A. Yes.

24 Q. All right. So the last time you had it was 2016, Turner
25 had it, correct?

1 A. Yes, that's correct.

2 Q. All right. And this year in this tournament, we actually
3 saw a number 16 team, the University of Maryland, Baltimore
4 County beat the number one Virginia team, right?

5 A. Yes.

6 Q. And that was on TNT, correct?

7 A. I can't recall which network it was on.

8 Q. It was on your network, wasn't it?

9 A. I believe it was one of our three, yes.

10 Q. The number 16 team, the upset of the -- of all time being
11 number one, you're going to tell this Court you don't know it
12 was on your network. Are you going to tell us that, sir,
13 today?

14 A. I'm not a basketball fan, sir.

15 Q. You're not a basketball fan.

16 A. I haven't seen one game.

17 Q. Okay. We saw the number 11, excuse me, Loyola, Chicago
18 team beat Kansas State just the other day, true?

19 A. Yes, I believe that's true.

20 Q. All right. The Cinderella story with Sister Jean and the
21 Loyola Ramblers, right?

22 A. Uh-huh.

23 Q. It's in the press, correct?

24 A. Yes, I read it in the press.

25 Q. It's a big deal, right? It all unfolded on TBS; isn't

1 that true?

2 A. Again, I don't know which network that upset was on.

3 Q. And moving forward in this tournament, it's going to be on
4 your networks, right, because you've the final four in the
5 finals this coming week, right?

6 A. Yes, for this year, yes.

7 Q. So we'll see what happens there, and it's exciting for
8 these teams, especially Loyola, in terms of what they're doing,
9 and it's exciting for the distributors that carry these games,
10 isn't it?

11 A. We think it's popular programming.

12 Q. And it's also profitable for Turner, isn't it?

13 A. There's a lot that goes into profitability. It costs a
14 lot to secure these rights. And we believe we had a lot of
15 value to the distributors by virtue of caring these rights.

16 Q. Is it your testimony here today to this Court that it's --
17 that business is not profitable?

18 A. There are many different ways to look at profitability as
19 it relates to March Madness.

20 Q. We'll come back and talk more about March Madness in a
21 minute. Turner carries major league baseball games, right?

22 A. Yes.

23 Q. You don't carry all games, do you?

24 A. No, we do not.

25 Q. You secure the playoff games, right?

1 A. We share the playoff games with Fox.

2 Q. Okay. So Turner carries premium sports, correct?

3 A. I would characterize those sports as premium, absolutely.

4 Q. In your deposition, though, you didn't want to
5 characterize it as premium sports, right, do you remember that?

6 A. Well, popular sports. There's a lot of sports out there,
7 and whether it's premium or not is depending upon whether
8 you're a fan of that particular sport. There's a lot of
9 leagues that I think would also be considered premium sports
10 that we have no involvement in.

11 Q. But today you're okay with it saying premium sports, and
12 the NCAA, the NBA playoff games, the NCAA tournament games,
13 rather, March Madness, the NBA playoff games, major league
14 baseball playoff games, those are premium sports, right?

15 A. I believe they are.

16 Q. All right. And premium sports are a key to Turner's
17 programming and business strategy, true?

18 A. Yes, it's one component of it, but yes.

19 Q. Well, it's not just one component, it's the strategy for
20 your business, right?

21 A. Strategy is to have a portfolio programming that includes
22 sports and other premium scripted and non-scripted entertainment
23 shows.

24 Q. But as to TBS and TNT and True TV, sports, your premium
25 sports, they are the key to Turner's programming business

1 strategy, correct?

2 A. I'm not sure I would agree with that characterization.

3 MR. WELSH: Your Honor, I've just handed to defense
4 counsel something we've identified as PX 521 and 522. 521 is a
5 CD that contains a video clip of Mr. Martin from January of
6 2016, January 6th, 2016.

7 We've also handed to defense counsel as PX 522 a
8 transcript of the portion of the videotape that we have
9 recorded on 521. May I hand these to Your Honor?

10 MR. PETROCELLI: May I approach, Your Honor?

11 THE COURT: Yes. Step down, sir. There's a chair
12 right over there you can sit in.

13 THE WITNESS: Thank you.

14 (Witness withdrew from the witness stand.)

15 (Sealed bench conference.)

16 THE COURT:

17 MR. PETROCELLI:

18

19

20 THE COURT:

21 MR. WELSH:

22

23 MR. PETROCELLI:

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. WELSH:

THE COURT:

MR. WELSH:

MR. PETROCELLI:

MR. WELSH:

MR. PETROCELLI:

MR. WELSH:

MR. PETROCELLI:

MR. WELSH:

MR. PETROCELLI:

MR. WELSH:

THE COURT:

MR. WELSH:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. PETROCELLI :

MR. WELSH :

MR. PETROCELLI :

MR. WELSH :

THE COURT :

MR. PETROCELLI :

THE COURT :

MR. WELSH :

MR. PETROCELLI :

MR. WELSH :

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. PETROCELLI :

THE COURT :

MR. WELSH :

THE COURT :

MR. WELSH :

THE COURT :

MR. WELSH :

THE COURT :

MR. WELSH :

1 THE COURT:

2

3

4

5 MR. PETROCELLI:

6 THE COURT:

7

8

9

10

11

12

13

14 MR. WELSH:

15

16 THE COURT:

17 MR. WELSH:

18

19 THE COURT:

20

21 MR. PETROCELLI:

22 (Open Court.)

23 THE COURT: Come on back.

24 (Witness resumed the witness stand.)

25 THE COURT: You may proceed consistent with the

1 discussion at the bench when you find whatever you need to
2 locate there.

3 (Pause.)

4 MR. WELSH: May I approach, Your Honor?

5 THE COURT: You may.

6 BY MR. WELSH:

7 Q. Mr. Martin, I've handed you a binder that contains the
8 transcripts of your two depositions in this case. I'm going to
9 direct you to the second one, which is the deposition you gave
10 on January 26th, 2018, this year. Are you there, sir?

11 A. Yes, I'm at the tab.

12 Q. All right. And you look at page 80 of that transcript.

13 THE DEPUTY CLERK: Is there an exhibit number on
14 that?

15 MR. WELSH: I'm sorry, there's not.

16 THE DEPUTY CLERK: Thank you.

17 BY MR. WELSH:

18 Q. And at page 80, line 11, I asked you the question that
19 day:

20 "Do you use the term internally at Turner to
21 describe your sports content as either being premium
22 or marquee sports?"

23 Line 15, you answered: "I think we use many
24 terms to describe our sports. I would say they all
25 would fall under the umbrella of being popular." Do

1 you see that?

2 A. Yes, I see that.

3 Q. All right. Now, today you want to say -- you agree in
4 this court today that you have premium sports, right?

5 A. Yes, I see all of those words as describing something that
6 could mean premium.

7 Q. Okay. Now, put that question and answer to the side.
8 That was your testimony that day where you weren't going to say
9 it was premium, it's just popular sports. But you told this
10 Court earlier today that Turner sports are premium sports,
11 right?

12 MR. PETROCELLI: Your Honor, object.

13 THE COURT: I'm going to sustain the objection. You
14 can recast your question consistent with his testimony so far.
15 Break it down a little bit, too.

16 BY MR. WELSH:

17 Q. In January of this year you gave this testimony, correct?

18 A. Correct.

19 Q. All right. And then earlier today you told His Honor that
20 you thought Turner sports were premium sports, true?

21 A. Yes.

22 Q. Okay, thank you. You can put that to the side.

23 Now, Mr. Martin, Turner has had a strategy for years to not
24 try to replicate the volume of sports on ESPN, right?

25 A. Yes, that's true.

1 Q. Instead, Turner has followed a path to focus on sports
2 that matter, around events that matter, right?

3 A. Yes.

4 Q. That's been Turner's strategy and philosophy, true?

5 A. True.

6 Q. If you turn to PX 132 in your binder of exhibits.

7 A. (Witness complies.)

8 Q. Tell me when you're there, sir.

9 A. I'm there.

10 Q. All right. Now, PX 132 is a transcript of an interview
11 that you gave on February 23, 2016 with Jeffress media,
12 correct?

13 A. Yes, I believe that is correct.

14 Q. You gave that interview to Jeffress media as the chairman
15 and CEO of Turner, correct?

16 A. That's correct.

17 Q. And that was within your area of responsibility for the
18 company to speak to Jeffress media that day, correct?

19 A. Yes.

20 MR. WELSH: Your Honor, I move for admission of PX
21 132?

22 MR. PETROCELLI: No objection.

23 THE COURT: All right, be admitted.

24 (Plaintiff's Exhibit No. PX 132 was received in evidence.)

25 BY MR. WELSH:

1 Q. Mr. Martin, if you could look at PX 132 dash 010.

2 A. (Witness complies.)

3 Q. I'm going to direct you to the last paragraph, there's a
4 question that's asked of you, it starts off, "Let's stick with
5 the NBA for a second," do you see that?

6 A. I do see that.

7 Q. All right. It goes on to then say, "What's Turner's
8 philosophy and were you able to monetize to the point where you
9 can make money given the setup?" Do you see that whole
10 question there?

11 A. Yes, yes.

12 Q. Okay. And if we look at the next page, page 11. That's
13 your answer, correct?

14 A. May I have a moment to read it?

15 Q. Yes, please do.

16 (Witness perusing document.)

17 A. Okay.

18 Q. You responded to the interview question by saying in that
19 first paragraph on 011, "Oh, yeah, yes, resounding yes. Look,
20 Turner, and this preceded me, Turner for years and years has
21 been in the sports business in a very targeted way and not
22 trying to replicate the volume of sports of saying ESPN or a
23 regional sports network, but be in the business with sports
24 that matter around events that matter," correct?

25 A. Yes.

1 Q. That was your statement in that interview that day, right?

2 A. It appears that way, yes.

3 Q. All right. And that was a correct statement that you made
4 then, wasn't it?

5 A. Yes.

6 Q. And that's correct today?

7 A. Yes.

8 Q. So some sports matter more than others, right?

9 A. In our opinion, everything comes at a price.

10 Q. Some sports matter for Turner more than others and some
11 sports matter for distributors more than others, true?

12 A. Okay.

13 Q. And for Turner sports that matter are March Madness, the
14 NBA playoffs, major league baseball playoff games, right?

15 A. Well, they are the relationships that we have, yes.

16 Q. Okay. And you told me in your deposition in January that
17 table tennis championships are just not at the same level as
18 NCAA men's basketball games, right?

19 A. Yes.

20 Q. You haven't staked out your brand at Turner on the table
21 tennis championship matches, you've staked it out on March
22 Madness, NBA playoffs and major league baseball playoff games,
23 right?

24 A. That's correct.

25 Q. So some sports content is just more important than other

1 sports content, right?

2 A. That's true.

3 Q. Now you agree that distributors are in the business of
4 obtaining subscribers, aren't you?

5 A. Yes, that's correct.

6 Q. All right. And they would want -- the distributors would
7 want more subscribers rather than less to be a good business,
8 right?

9 A. Yes.

10 Q. And having sports content that matters in events that
11 matter, that would be of aid to distributors that are wanting
12 to add subscribers, true?

13 A. If they're looking for subscribers who like the popularity
14 of the sports we have.

15 Q. And conversely, if a distributor were to lose -- I'm
16 sorry. Conversely, distributors would lose subscribers if they
17 weren't able to distribute that important sports programming
18 like March Madness, right?

19 A. That's unclear.

20 THE COURT: Why don't we break for the day.

21 MR. WELSH: Thank you, Your Honor.

22 THE COURT: Mr. Martin, you're witness under oath in
23 the case.

24 THE WITNESS: Yes, yes, Your Honor.

25 THE COURT: What that means is that you're not at

1 liberty to discuss your testimony so far or what it might be
2 when you return tomorrow with anyone, including your own
3 lawyers.

4 THE WITNESS: Yes, Your Honor.

5 THE COURT: You can't discuss it with anyone, your
6 suppose, your lawyers, your friends, nobody.

7 THE WITNESS: Yes, Your Honor.

8 THE COURT: You have to be able to answer the
9 question under oath honestly: I have not discussed my
10 testimony so far or anything about it with anybody, okay?

11 THE WITNESS: Yes, Your Honor.

12 THE COURT: See you back tomorrow morning at 10:30.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: You can step down.

15 (Witness excused.)

16 THE COURT: Can I see counsel for a second?

17 (Sealed Bench conference.)

18 THE COURT:

19

20 MR. WELSH:

21 THE COURT:

22

23 MR. WELSH:

24 THE COURT:

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. WELSH:

THE COURT:

MR. WELSH:

THE COURT:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. WELSH:

THE COURT:

MR. WELSH:

THE COURT:

MR. WELSH:

THE COURT:

MR. WELSH:

MR. PETROCELLI:

THE COURT:

MR. WELSH:

THE COURT:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. WELSH:

THE COURT:

MR. WELSH:

MR. PETROCELLI:

THE COURT:

MR. PETROCELLI:

THE COURT:

MR. PETROCELLI:

THE COURT:

(Open Court.)

THE COURT: All right, counsel, any other issues for the record before we adjourn?

MR. CONRATH: One.

THE COURT: Mr. Conrath seems to have one, all right. That's all right, that's his prerogative.

MR. CONRATH: Always the guy with the housekeeping questions, Your Honor. We, of course, have been purchasing transcripts for our use which include the public portion. I wonder, and the court reporter appropriately wouldn't -- said

1 that we can't get the part that includes the bench conferences.
2 Obviously only the parties could get that, but if you would
3 confirm that that's okay for us to get it.

4 THE COURT: Okay.

5 MR. CONRATH: Only the parties, obviously.

6 THE COURT: Yes, but my concern is that they could
7 accidentally end up in the wrong hands. I mean, you all know
8 what you've been talking about here at the bench. And you're
9 in a position to brief whoever needs to know about it other
10 than you.

11 My concern is that accidental transmission. We've already
12 experienced accidental transmissions.

13 MR. CONRATH: Indeed.

14 THE COURT: And I'm not interested in dealing with
15 those problems certainly any more than I have to. Hopefully
16 not at all. I mean, again. So I think for the moment we're
17 going to keep the bench conferences off limits. You all know
18 what you talked about, you have recollections, and I realize
19 they're not perfect.

20 MR. CONRATH: That's the question.

21 THE COURT: But this is the old school way. There
22 wasn't anything like this years ago. There was no such a thing
23 as real time, it didn't exist. This is a luxury, frankly, that
24 only a case of this expense can afford. So I mean I think at
25 this point it's best to just keep it that way for now.

1 Now while I have you there, though, let's talk about
2 tomorrow. At least what you foresee.

3 MR. CONRATH: Right.

4 THE COURT: Mr. Welsh, your exam another hour, a half
5 hour, two hours, I mean, what do you think?

6 MR. WELSH: Probably somewhere between an hour to an
7 hour and half maybe.

8 THE COURT: Okay. So you'll probably pass the
9 witness in the morning at some point?

10 MR. WELSH: I believe so, Your Honor.

11 THE COURT: Two hours.

12 MR. PETROCELLI: (Indicating with two fingers.)

13 THE COURT: So probably it will go till after lunch,
14 we're not going to get all that done before lunch.

15 Okay, and then who will be the next witness, Mr. Conrath,
16 for the government?

17 MR. CONRATH: I'm refreshing my recollection, Your
18 Honor.

19 MR. WELSH: Henson.

20 THE COURT: Mr. Henson, and what's your estimate on
21 direct there?

22 MR. CONRATH: I think about an hour.

23 THE COURT: About an hour. Cross about the same?

24 MR. PETROCELLI: Probably a little less, Your Honor.

25 THE COURT: A little less. Well, actually, we

1 didn't -- yeah, you said two hours, that's right. So we might
2 get to, with any luck we'll get to Henson tomorrow and we'll
3 finish Henson tomorrow.

4 All right, so have him in the ready position so he'll know
5 what we're doing. Do you have any other issues?

6 MR. CONRATH: No, Your Honor.

7 MR. PETROCELLI: No, Your Honor.

8 THE COURT: Do you have any other issues?

9 Have a nice evening, counsel.

10 (Proceedings adjourned at 5:43 p.m.)

11 -oOo-

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE

1
2 I certify that the foregoing is a true and correct
3 transcript, to the best of my ability, of the above pages, of
4 the stenographic notes provided to me by the United States
5 District Court, of the proceedings taken on the date and time
6 previously stated in the above matter.

7 I further certify that I am neither counsel for, related
8 to, nor employed by any of the parties to the action in which
9 this hearing was taken, and further that I am not financially
10 nor otherwise interested in the outcome of the action.

11
12 _____
13 /s/Crystal M. Pilgrim, RPR, FCRR

_____ Date: March 28, 2018