

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CV No. 17-2511
vs.	:	
	:	Washington, D.C.
	:	Wednesday, April 4, 2018
AT&T, INC., ET AL.,	:	10:45 a.m.
	:	
	:	Day 8
	:	
Defendants.	:	
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MORNING SESSION
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT SENIOR JUDGE

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15 On behalf of the Plaintiff:

16 Exhibit No. PX 536 1416

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

2 THE DEPUTY CLERK: Good morning, Your Honor.

3 We are on the record in Civil Matter 17-2511. The
4 United States of America versus AT&T, Incorporated, et al.

5 If all counsel will please approach the lecturn and
6 identify yourselves for the record.

7 MS. SCANLON: Good morning, Your Honor, Lisa Scanlon
8 for the United States.

9 THE COURT: Good morning.

10 MS. LINDGRENSAVAGE: Good morning, Your Honor, Cerin
11 Lindgrensavage for the United States.

12 THE COURT: Welcome.

13 MR. KEMPF: Good morning, Your Honor, Don Kempf for
14 the United States.

15 THE COURT: Good morning.

16 MR. CONRATH: Good morning, Your Honor, Craig Conrath
17 for the United States.

18 THE COURT: Good morning.

19 MR. WELSH: Good morning, Your Honor, Eric Welsh for
20 the United States.

21 THE COURT: Good morning.

22 MR. SCHEELE: Good morning, Your Honor, Scott Scheele
23 appearing on behalf of the United States.

24 THE COURT: Good morning.

25 MR. PETROCELLI: Good morning, Your Honor, Daniel

1 Petrocelli for defendants.

2 THE COURT: Good morning.

3 MS. ROBSON: Good morning, Your Honor, Katrina Robson
4 for defendants.

5 THE COURT: Good morning.

6 MR. OPPENHEIMER: Good morning, Your Honor, Randy
7 Oppenheimer for the defendants.

8 THE COURT: Good morning.

9 MR. WALTERS: Good morning, Your Honor, Rob Walters
10 here for AT&T and DirecTV.

11 THE COURT: Good morning.

12 MR. BARBUR: Good morning, Your Honor, Peter Barbur
13 for Time Warner.

14 THE COURT: Good morning.

15 MR. ORSINI: Good morning, Your Honor, Kevin Orsini
16 for Time Warner.

17 THE COURT: Good morning.

18 Witness remains under oath. You may resume the
19 stand. Good morning, have a seat.

20 TOM MONTEMAGNO, PLAINTIFF WITNESS, PREVIOUSLY SWORN

21 THE COURT: Where's Walters? There you go. When
22 you're ready.

23 MR. WALTERS: May I proceed, Your Honor, thank you.

24 THE COURT: When you're ready.

25 CROSS-EXAMINATION (Cont'd)

1 BY MR. WALTERS:

2 Q. Good morning, Mr. Montemagno.

3 A. Good morning.

4 Q. Now, I just have a handful of things for you this morning.
5 But you know, don't you, that the DOJ and its economist have
6 put forward as a model that suggest the possibility of a price
7 increase stemming from an increased threat of blackout as a
8 consequence of the merger, you're aware of that; are you not?

9 A. Generally aware.

10 Q. Okay. And you understand that that is a key premise, it's
11 a point of departure of this model, you understand that as
12 well, don't you?

13 A. I do.

14 Q. Okay. But you know that given what we're dealing with
15 here, the real world facts that we're confronted with, you know
16 that's not right, don't you?

17 A. I don't.

18 Q. Well, you discussed yesterday the Turner arbitration and
19 standstill offer, didn't you?

20 A. Yes.

21 Q. Okay. And Turner has provided Charter this standstill and
22 arbitration agreement, it did so in November of 2017; did it
23 not?

24 A. Yes.

25 Q. Okay. And what I want to focus on is the standstill

1 aspect of it, okay?

2 A. Okay.

3 Q. And the standstill aspect of it, that's effectively a
4 content guarantee, it is a guarantee against blackouts; is it
5 not?

6 A. Yes.

7 Q. The standstill in the arbitration mechanism, it
8 effectively eliminates the ability of Turner to withhold
9 content from Charter, right?

10 A. If exercised by Charter.

11 Q. If exercised, and you have that right, don't you?

12 A. We do.

13 Q. Okay. And you can exercise it at any point, right?

14 A. I do, but there are lots of risks with exercising it.

15 Q. All right. And so therefore, and this is the important
16 point, to the extent that the government projects a Turner
17 price increase stemming from a threat of blackout, Turner
18 completely loses that ability with its standstill and
19 arbitration commitment. That's right, isn't it?

20 A. If exercised.

21 Q. If exercised, that's right.

22 A. Correct.

23 Q. So utterly loses the ability to raise prices stemming from
24 a threat of blackout by virtue of this arbitration and
25 standstill commitment, true?

1 A. I don't agree. They can still raise the price and it gets
2 arbitrated. They can't take the signal away from you during
3 the arbitration.

4 Q. They cannot take the signal away from you, right?

5 A. Right.

6 Q. And so to the -- here's the point. To the extent the
7 government projects a Turner price increase stemming from an
8 increased threat of blackout, Turner loses that ability with
9 its standstill and arbitration commitment, right?

10 A. Correct.

11 Q. Okay. And, in fact, Charter's position is it would rather
12 have a satisfactory standstill and arbitration agreement in a
13 post-merger environment, an environment after AT&T and Time
14 Warner come together than to not have either pre-merger, right?

15 A. Correct.

16 Q. That's your position?

17 A. That standstill would be helpful, yes.

18 Q. Okay. And, in fact, you at Charter have had a highly
19 satisfactory experience with having a standstill and
20 arbitration tool in your toolbox available to you as a
21 negotiating aid, haven't you?

22 A. Yes, once.

23 Q. And without getting into the date, Charter finalized not
24 that long ago a content agreement with NBCU, correct?

25 A. Correct.

1 Q. Okay. And NBCU, as part of that, agreed to lesser rate
2 increases after Charter advised NBCU that it would pursue
3 remedies, including its arbitration and standstill right,
4 correct?

5 A. I don't know if I'd categorize it as lesser increase, the
6 negotiations became more productive, and we ultimately
7 concluded an agreement.

8 Q. Well, let's look at, it's right in front of you, page 195
9 of your deposition. I want to make sure you and I are
10 connecting on it. And if you look at line 13, I asked you the
11 question about a sentence in a document.

12 MS. SCANLON: Your Honor, may I approach before
13 Mr. Walters begins?

14 THE COURT: All right.

15 (Sealed Bench Conference.)

16 MS. SCANLON:

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21 MR. WALTERS:

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25 THE COURT:

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MR. WALTERS:

THE COURT:

MR. WALTERS:

(Open court.)

THE COURT: You may proceed consistent with the discussion at the bench.

BY MR. WALTERS:

Q. Mr. Montemagno, why don't you just read that to yourself, if you wouldn't mind, on page 129 line 13 through line 24.

A. (Witness complies.)

Okay.

Q. And would you agree with me then that NBCU agreed to lesser rate increases, okay, less dramatic rate increases after Charter advised NBCU of the possibility of invoking arbitration?

A. Yes, the value exchange, which is complex and comes in many different forms, got improved for Charter.

Q. Okay. And, in fact, you yourself communicated this message to NBCU. You told NBCU that Charter would invoke arbitration unless NBCU came to the table and began to

1 negotiating more productively, right?

2 A. I did.

3 Q. And, in fact, Charter invoking arbitration was an impetus
4 in causing NBCU to negotiate more reasonably, fair?

5 A. We didn't exercise it, but the threat of it did improve
6 the situation.

7 Q. Right. Having it available to you, right, having the
8 specter of it caused NBCU to negotiate more reasonably, fair?

9 A. Correct.

10 Q. Okay. You didn't have to go to arbitration, right?

11 A. Correct.

12 Q. Okay. And so the Turner standstill in arbitration
13 offering commitment that you received, you know that the Turner
14 commitment of standstill and arbitration, you know that that's
15 modeled on the NBCU Comcast arbitration agreement, you know
16 that, don't you?

17 A. I'm familiar in concept, but I haven't compared the two
18 offers to validate that, but in concept, yes.

19 Q. But in concept, okay. And in your experience with the
20 NBCU arbitration agreement, you and Charter, you found nothing
21 deficient about the NBCU arbitration agreement, right?

22 A. I don't know if I'd say that. I, as I shared yesterday,
23 it's a very risky tool to exercise, in my opinion, and it's not
24 something that -- that I typically would comfortably go right
25 to, it's sort of a last resort tool, there's a lot of risk in

1 that for -- more for the distributor.

2 Q. Well, there's a lot of risk on both sides, isn't there?

3 A. I don't know if there's the same amount of risk for the
4 other party.

5 Q. Well, hang on, I thought that the programmers, if they met
6 bet wrong in arbitration, they have those MFN agreements, don't
7 they, most favored nations. They don't have this knock on,
8 this ripple effect if they bet wrong, true?

9 A. Possibly if they have --

10 Q. But let me just ask you, let's get back to what we were
11 talking about. Let me just ask you if you'll look at page 196
12 of your deposition. And if you'll go down to line 25, do you
13 see that?

14 A. Yes.

15 Q. And I asked you the question, "Was there anything about,
16 is there anything about the Comcast arbitration mechanism that
17 you injected in the conversation with NBC Universal that you
18 find deficient?" Do you see that?

19 A. Yes.

20 Q. And what was your answer?

21 A. My answer was, I didn't raise anything with NBC.

22 THE COURT: You got to give the answer that's in the
23 deposition.

24 BY MR. WALTERS:

25 Q. What was your answer in the deposition? Line 6.

1 A. "I did not."

2 Q. "I did not."

3 And you remember at the deposition, I mean, you understood
4 the gravity of the deposition, that you were there to tell the
5 truth just as you are here today?

6 A. Correct.

7 Q. I mean, there was -- nothing about that was lost on you,
8 right?

9 A. No, you asked me did I raise it, I didn't -- I said I did
10 not raise it, but I didn't make an assessment of whether the
11 arbitration was deficient or not. I just didn't raise anything
12 with NBC.

13 Q. All right. Now, let me ask you about another component of
14 this pricing model. Yesterday we talked a little bit about the
15 departures, you remember that?

16 A. I'm sorry?

17 Q. The departures, what kind of subscribers you might lose if
18 you didn't have Turner, do you remember that conversation?

19 A. Right.

20 Q. Okay. Now I want to focus on just another piece of it
21 which is where would they go, you with me?

22 A. Yes.

23 Q. Okay. Now, in your view, Mr. Montemagno, the video
24 distribution industry has never been more competitive in the 28
25 years you've been in the business than it is today, as we sit

1 and speak today, correct?

2 A. I agree.

3 Q. Okay. And consumers, they have many, many more options on
4 where to go to get their video then ever before, true?

5 A. True.

6 Q. And that's due to a whole variety of factors, but two big
7 ones are the ability to deliver high resolution video through
8 the Internet, that's one reason, isn't it?

9 A. Yes.

10 Q. And it's also the emergence of very wealthy entrants like
11 Google and Apple with deep pockets and the ability to be
12 disruptive, right?

13 A. Yes.

14 Q. And, in fact, today there are cost advantages that
15 Internet competitors enjoy because they don't have to spend as
16 much money on infrastructure to operate their systems, right?

17 A. Yes.

18 Q. Okay. And the result of those advantages is the cost of
19 entering into video distribution is substantially less than it
20 has ever been in the past, right?

21 A. I believe their infrastructure, their entrance capital is
22 less, but I believe that their content costs are higher and a
23 lot of these products are launching with no or negative
24 margins.

25 Q. Right, which is highly disruptive to the industry, isn't

1 it?

2 A. Correct.

3 Q. Okay. And this high speed Internet ability has created
4 competitors like Sony Vue and Dish Sling and Google YouTube,
5 hasn't it?

6 A. Yes.

7 Q. Okay. And these are formidable companies, aren't they? I
8 mean, you have Sony, you have Google, they're formidable
9 companies that have dived into this virtual MVPD world to
10 compete with you and DirecTV and the others, right?

11 A. Yes.

12 Q. And you're worried about the size and the resources of
13 these new entrants and their ability to make a big dent in the
14 video business, you're concerned about that, aren't you?

15 A. Yes.

16 Q. And when you're talking about those companies that you're
17 concerned about, you're thinking about the Googles and the
18 Amazons and the Netflix, the Fang, aren't you?

19 A. All of my competitors.

20 Q. All of them, but including those?

21 A. Sure.

22 Q. Okay. And, in fact, just since this merger was announced
23 16 months ago, this effort for Time Warner and AT&T to come
24 together to create a more competitive enterprise, just in that
25 time we've seen a tremendous slew of new entrants into the

1 business, haven't we?

2 A. There have been a few more.

3 Q. Well, let's just talk about the new direct to consumer
4 offerings and those are those vertical offerings, right, where
5 programmers are offering their products directly to consumers
6 like Fox News, Epics, Disney, CBS. The other day ESPN for 4.99
7 you can sign up and get it. Those have all come about in the
8 last year or so, haven't they?

9 A. Yeah, most of them have. Some of them are not content
10 that's on the channels that we license. It's -- ESPN has
11 announced that it's content that's not otherwise being produced
12 for television.

13 Q. But there are new entrants into video distribution that's
14 just direct to consumers, right?

15 A. I agree.

16 Q. And then there are these new -- there have been new
17 virtual MVPDs just since this merger was announced, YouTube TV,
18 Hulu Live, Filo, right, those are all announced in the last
19 year or 14 months or so, haven't they?

20 A. They're new, I don't know the timing of this.

21 Q. And there have been new over-the-top Internet video on
22 demand offerings like Facebook Watch, Amazon NFL streaming,
23 Disney, Facebook college football. Those have all come about
24 just from the last year or so, haven't they?

25 A. They're new as well, yes.

1 Q. Yeah, so there's been a veritable explosion of OTT
2 offerings just since we've had this high speed Internet
3 phenomenon in the last five, seven years, right?

4 A. Yes.

5 Q. Okay. And Charter, Charter, you're trying to adapt and
6 evolve in response to this intense new competitive environment,
7 aren't you?

8 A. Yes.

9 Q. In fact, you created your own streaming service, Spectrum
10 Stream to respond to the competitive threat of the lower price
11 Internet offerings, you have done that, haven't you?

12 A. We have, it's not an Internet offering, though.

13 Q. Okay. But it's certainly an offering to respond to these
14 lower price Internet offerings, correct?

15 A. Yes, it's an effort to offer similarly a lower price for
16 products.

17 Q. And so Charter, you have made the decision not only to
18 fight them, but to join them, right?

19 A. We are experimenting with a lower price point. I do have
20 constraints on my ability to sell them widely due to the
21 constraints in some of my programming agreements, including the
22 Turner networks.

23 Q. Right, you're talking about those penetration rights,
24 aren't you?

25 A. Yes.

1 Q. And those exist today, right?

2 A. They do.

3 Q. And they don't have anything to with this merger, you're
4 just dealing with those today, right?

5 A. Correct.

6 Q. Okay. And so what you're doing is exactly what Dish,
7 AT&T, Comcast, all the others are doing. They're evolving and
8 adapting to this new competitive environment, true?

9 A. Ours is an Internet product, but we are trying something
10 new, lower price offerings.

11 Q. All right. And you would agree with me, wouldn't you,
12 that although this intense new competition might be challenging
13 for Charter, if there was ever a time for us not to worry about
14 whether we had enough entrants for us not to worry about
15 whether we had enough competition and video distribution, it
16 would be right here today, right?

17 A. I don't understand the question.

18 Q. If there was ever a time, and we talked about this before
19 in your deposition, if there was ever a time not to worry about
20 whether we have enough entrants, whether we have enough
21 competitors and video distribution, it would be right now, the
22 most intense competitive environment you've participated in in
23 your career, fair enough?

24 A. I don't understand your double negatives, but it's more
25 competitive now than I've ever experienced in my career.

1 Q. All right.

2 THE COURT: Let's move on, you've made this point.

3 MR. WALTERS: All right.

4 BY MR. WALTERS:

5 Q. Now, let's go on to another component of this pricing
6 model and it concerns profitability, okay.

7 Now, at Charter, and you don't need to get into any of
8 the details, none of the specific numbers. But your margins at
9 Charter, they have considerably eroded over the past few years;
10 have they not?

11 A. Video, yes.

12 Q. Video margins, not broadband, I'm just talking about
13 video, okay?

14 A. Right.

15 Q. And your whole cost structure has outpaced your ability to
16 charge for the video services; have they not?

17 A. Yes.

18 Q. Okay. And you're not, as a consequence, you're not
19 passing on your full increased cost structure to your
20 consumers, right?

21 A. Correct.

22 Q. Okay. And you have no reason to think that that's not
23 occurring with DirecTV and the other traditional MVPDs as well,
24 that they're encountering the same kind of margin squeeze,
25 right?

1 A. I presume, yes.

2 Q. Okay. And you see on that phenomenon of a margin squeeze,
3 you see no relief in sight, do you?

4 A. I don't.

5 Q. Okay. One last item. HBO, Charter has articulated a
6 public position on HBO, hasn't it?

7 A. Can you be more specific?

8 Q. I can be more specific. What I have in mind in particular
9 is that your CEO, Tom Rutledge, has publicly taken the position
10 that Charter doesn't need HBO anymore in order to satisfy its
11 customers, you're aware of that, haven't you?

12 A. I'm aware of the quote before I joined Charter to that
13 extent. I don't know the context of how it was said, what he
14 meant, I wasn't there. But I don't personally agree that HBO
15 is important.

16 Q. But Charter and your chairman has taken that position,
17 hasn't he?

18 A. I don't know that he's taken that position. I don't know
19 how the context of how and why he said that.

20 Q. Well, you understand, don't you, that -- that
21 Mr. Rutledge's statement that Charter does not need HBO anymore
22 to satisfy its customers to be referring to the HBO direct to
23 consumer product, HBO Now, you understand that, don't you?

24 A. Yes.

25 Q. Okay. And the reason is, is because consumers can get HBO

1 directly today and they don't need to get it through a
2 distributor, they can just get on the Internet and pay 14.99
3 for it, right?

4 A. Yes, I believe it's more expensive to do it that way.

5 Q. All right. So at least according to your chairman,
6 Mr. Rutledge, HBO is not only not must have, it doesn't need
7 HBO at all in light of this direct availability of HBO Now,
8 that was his position, right?

9 A. That was a quote, I don't believe that that's his -- how
10 he feels and that's Charters's position relative to HBO.

11 Q. But that's certainly what he stated publicly, correct?

12 A. He did one time, yes, in the interview.

13 MR. WALTERS: All right. Thank you, Mr. Montemagno.

14 THE WITNESS: Thank you.

15 THE COURT: Redirect?

16 MS. SCANLON: May I proceed, Your Honor?

17 THE COURT: You may.

18 REDIRECT EXAMINATION

19 BY MS. SCANLON:

20 Q. Mr. Montemagno, I have a few topics to go back to.

21 The term "Fang," is that one you use in your work?

22 A. I don't.

23 Q. Have you heard that before you heard it from Mr. Waters?

24 A. No.

25 Q. Yesterday, Mr. Waters asked you some questions about the

1 importance of different Turner networks, do you remember that?

2 A. Yes.

3 Q. And I believe your testimony was essentially that some
4 Turner networks are more important than others for Charter?

5 A. In my opinion, yes.

6 Q. And so my question is, why does Turner take those --
7 sorry, why does Charter take those Turner networks that are not
8 as important to it?

9 A. We're forced to, I don't have an option. If I want the
10 important ones, I have take the ones that are less important to
11 me.

12 Q. So does that mean the important ones that are important
13 enough that you'll's take the less important ones?

14 A. Yes.

15 Q. And those are TBS and CNN and TNT?

16 A. Those are the three that are most important.

17 Q. And what is the content on those networks that make them
18 important enough to Charter that you'll take the other networks
19 as well?

20 A. The professional and important college live sports is one
21 component, and that's where they tend to put their higher
22 quality original programming and things of that nature.

23 Q. And CNN has exclusive news content, is that fair?

24 A. Correct.

25 Q. Mr. Walters asked you about some retention efforts that

1 Charter makes to keep customers when they call up to say
2 they're's going to leave, do you remember that?

3 A. Yes.

4 Q. And I think you mentioned that retention efforts vary in
5 success based on the programming that people are calling about;
6 is that right?

7 A. Yes.

8 Q. Could you just explain that to the Court?

9 A. Sure. There's's -- there's one World Series, there's one
10 Super Bowl, there's one MLB Playoffs, it's not replaceable. If
11 I don't have that content, reducing the rate or giving them a
12 free month of HBO or Showtime is not going to satisfy that
13 customer. They're going to go and find that -- go to a
14 different distributor to get that content. Whereas if it's
15 children's programming and there's other content in the
16 category that could be sufficient replacement, it's a different
17 outcome.

18 Q. Yesterday Mr. Walters asked you about whether you had done
19 any study of the harm that could happen from this merger, do
20 you remember that?

21 A. Yes.

22 Q. I just want to ask you, in your experience as a
23 negotiator, do you believe the leverage could change here after
24 the merger when you're negotiating with Turner for the next
25 time?

1 A. Sure.

2 Q. And could you explain to the Court why that would change?

3 A. I think, and there's a number of factors that could come
4 into play. You know, one I'll call bundling, they could
5 leverage other products into the negotiation. We talked about
6 products that I don't necessarily want to carry or pay for that
7 I have to. There could be more of that with HBO and AT&T
8 sports and other things that they may buy or develop.

9 The -- look, I mean, one of the things that if I don't --
10 if I lose one portfolio, if it's not the Turner networks and
11 it's a different important portfolio, my ability to lose a
12 second one and have a sort of first class video service is
13 greatly diminished, and then I'm really in a vulnerable spot,
14 and I feel like I sort of have to do the deal. I can't not
15 have the Disney ESPN networks and the Turner networks.

16 And so, you know, the environment is changing, and that
17 massive leverage and their ability to directly promote our
18 customers to move to their platform today. Before they, you
19 know, in the prior world, the customer had to disconnect. They
20 had to put a Dish on their house, now it's an instantaneous
21 click on the remote and that entry, you know, cost is not there
22 anymore. So it's easy and, you know, for the customer to just
23 make that move.

24 Q. And I think you said that they would have the ability to
25 directly reach out to your customers. Who are you talking

1 about there?

2 A. Turner networks.

3 Q. And is that today, they could do that today?

4 A. They could do that today to a degree.

5 Q. Do you think that changes if they're owned by AT&T?

6 A. My concern is today their ability to promote their
7 products, they buy advertising in the open marketplace and they
8 pay market dollars for advertising. In a world where they own
9 the Turner networks generally, Your Honor, there's like 16
10 minutes of advertising minutes per hour of programming. The
11 distributor takes about two minute and the programmer uses the
12 other 14 minutes.

13 And so you may find some smattering of promotion, but in
14 the new world, you know, when they own the networks, they could
15 use ten minutes, they could use twelve minutes of that time to
16 just flood ads, you know, Charter is no good, take DirecTV now.
17 It's a concern of mine that I would try to address
18 contractually, and I've raised that with Turner as a concern.

19 Q. Last series of questions about the arbitration offer that
20 Mr. Walters asked you about.

21 Now, my understanding is that if it was a satisfactory
22 arbitration offer, then the standstill would be of benefit; is
23 that right?

24 A. Yes.

25 Q. Is the -- the offer that they put to you, they sent to you

1 in November, does that meet that standard of being
2 satisfactory?

3 A. No, I don't believe so.

4 Q. And you testified yesterday about the reasons for that,
5 and could you just briefly remind the Court?

6 A. Sure, it didn't address services like HBO and AT&T sports,
7 it wasn't aspecific to the rates being sort of net rates
8 instead of gross rates. The, just nature of baseball
9 arbitration and the lack of transparency and the blind sort of
10 risk that I face in that process makes it difficult from a
11 business perspective. I think there were legal procedural
12 mechanical concerns that, you know, my lawyers have as well.

13 MS. SCANLON: No further questions, thank you, Your
14 Honor?

15 THE COURT: One minute to redirect.

16 MR. WALTERS: Your Honor, I just have a quick thing.

17 THE COURT: Yes.

18 RE-CROSS-EXAMINATION

19 BY MR. WALTERS:

20 Q. Mr. Montemagno, Turner bundles its channels today just
21 like other programs, doesn't it?

22 A. Yes.

23 Q. And bundlings is not unusual in the industry, is it?

24 A. It's not.

25 Q. Programmers have resisted breaking up their bundles, which

1 a phenomenon that you understand, don't you?

2 A. Yes.

3 Q. Okay. Today nothing would prohibit Turner and HBO or ROOT
4 SPORTS from bundling, there's absolutely nothing that would
5 prohibit it, right?

6 A. ROOT SPORTS, it's not the same company.

7 Q. I know, but there's nothing that would prohibit any of
8 these kinds of bundles from occurring in the marketplace today,
9 right?

10 A. Other than my ability to negotiate separate agreements for
11 the different buckets of services.

12 Q. But all of these issues, bundling, penetration packaging,
13 all those issues exist today, and you deal with those every
14 day, don't you?

15 A. Correct.

16 Q. Okay. And none of those issues are a result of this
17 merger, they all exist in the marketplace today, don't they?

18 A. Correct.

19 Q. And AT&T, DirecTV, if it wanted to buy ads on Turner or
20 anybody else in order to try to lure your customers away, they
21 could do that today, they could do that yesterday, couldn't
22 they?

23 A. They can buy them yes.

24 MR. WALTERS: Okay, all right. That's all I have,
25 Your Honor, thank you.

1 THE COURT: Let me ask you a question.

2 THE WITNESS: Sure.

3 THE COURT: It sounds like, and correct me if I'm
4 wrong, one of the problems you have with arbitration as it's
5 been proposed is this blind aspect to it; is that right.

6 THE WITNESS: Correct.

7 THE COURT: What if the arbitration were restructured
8 so that there was no blinding, but there was still arbitration.
9 Is there a way that you could envision arbitration could be
10 differently structured that would be mutually beneficial and
11 mutually fair?

12 THE WITNESS: Yes, I believe so.

13 THE COURT: Non-baseball style arbitration.

14 THE WITNESS: Yes, I even offered to Turner to engage
15 on that, but they never pursued that conversation with me.

16 THE COURT: Well, obviously they like the idea,
17 right?

18 THE WITNESS: Right.

19 THE COURT: And you don't like the idea.

20 THE WITNESS: Correct.

21 THE COURT: Others don't like it, but there's others
22 that don't think it's as bad as you think it is, obviously.
23 But you've obviously been in this business a long time.

24 THE WITNESS: I have.

25 THE COURT: That blind part is the part that sticks

1 in your throat, it sound like to me.

2 THE WITNESS: Yeah, as I said yesterday, you know,
3 these agreements, they're very complex, and you typically
4 tailor things for the uniqueness of your operation and your
5 packaging and things like that, and that would go out the
6 window, and there just could be handed to me terms that we
7 possibly couldn't even perform and we'd breach, and then the
8 whole result to the arbitration and agreement could just be
9 breached and null. So I've never -- I've never gone through
10 one.

11 THE COURT: But it sounds like you also know from
12 experience that threatening to go that route can have a
13 positive effect on a negotiation?

14 THE WITNESS: Yes.

15 THE COURT: You've seen that firsthand, right?

16 THE WITNESS: Yes.

17 THE COURT: You're free to go.

18 THE WITNESS: Thank you, Your Honor.

19 (Witness excused.)

20 THE COURT: Call your next witness.

21 MR. PETROCELLI: Your Honor, Mr. Oppenheimer is going
22 to be handling this examining.

23 THE COURT: Okay.

24 MR. WELSH: Good morning, Your Honor, Eric Welsh for
25 the United States. The United States calls Mr. Vince Torres as

1 an adverse party witness.

2 THE COURT: All right.

3 THE DEPUTY CLERK: Please remain standing and raise
4 your right hand.

5 VINCE TORRES, ADVERSE PARTY WITNESS, SWORN

6 THE DEPUTY CLERK: You can be seated.

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

8 THE COURT: You may.

9 MR. WELSH: Thank you.

10 THE COURT: And you may use leading questions to an
11 adverse party.

12 MR. WELSH: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 BY MR. WELSH:

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

16 A. Sure, Vincent Torres.

17 Q. Mr. Torres, good morning.

18 A. Good morning.

19 Q. Mr. Torres, I just have a few subjects to cover with you
20 this morning. I'd like to first start off with a little bit of
21 some discussion about your background, if we may, okay?

22 A. Sure.

23 Q. Great. Now, you are employed by AT&T is that correct?

24 A. I am.

25 Q. And you're the senior vice-president of planning, pricing

1 and promotions and go to market strategy for AT&T, true?

2 A. I am, that's essentially my responsibilities are to
3 acquiring customers and to retain existing customers.

4 Q. Okay. And you report today to David Christopher; is that
5 right?

6 A. That's correct.

7 Q. All right. And Mr. Christopher is the president of the
8 entertainment group at AT&T, right?

9 A. That's correct.

10 Q. And the entertainment group at AT&T, now this include the
11 company's video business; is that right?

12 A. It's the video business, the broadband business and our
13 wireless business.

14 Q. Okay. Now, you started working for DirecTV in 2011; is
15 that right?

16 A. November 2011.

17 Q. Okay. And over your time at DirecTV, so you started in
18 2011, you continued with DirecTV, then AT&T all the way until
19 today; is that right?

20 A. That's right.

21 Q. All right. And during that time you've had
22 responsibilities related to the pricing of the video products
23 for DirecTV and then AT&T, true?

24 A. At different times in my career, at my time there I was
25 responsible for pricing.

1 Q. Okay. And just so it's clear, when we're talking about
2 video products, we're talking about -- today we're talking
3 about AT&T's television distribution businesses, so DirecTV and
4 the universe product, correct?

5 A. That's right. I also work with DirecTV now.

6 Q. Okay. And for most of your time, so again looking at your
7 time at DirecTV and AT&T, for most of your time you have been
8 the person primarily responsible for setting the prices of the
9 company's video products, true?

10 A. I have.

11 Q. Okay. And you continue to have that responsibility today,
12 right?

13 A. I do today.

14 Q. Okay. Now, in 2014, you became the vice-president of
15 revenue, strategy and planning for DirecTV; is that true?

16 A. Yeah, I believe in the middle of 2014.

17 Q. Okay. And in that role you were also the leader of the
18 revenue, strategy and planning group for DirecTV, right?

19 A. That's correct.

20 Q. And I think you just referred to this a little bit ago,
21 but your job then was to have responsibility for new customer
22 acquisition and the strategies associated with that, true?

23 A. That is correct.

24 Q. And so what we're talking about here is DirecTV acquiring
25 new subscribers, new customers to its business, true?

1 A. It was our acquisition strategy and our retention
2 strategy.

3 Q. And the retention strategy, that involved, then, thinking
4 about how you're going to keep the customers that you have,
5 right?

6 A. That's right, what investments we were going to make and
7 to our customers and how we would manage that.

8 Q. Okay. Now, in the beginning of 2015, you took over the
9 leadership of the business analytics team at DirecTV; is that
10 true?

11 A. That's correct.

12 Q. All right. And the business analytics team, that conducts
13 the analyses that support the business decision that the
14 company makes as to the video products, right?

15 A. A number of different marketing, we support a number of
16 different marketing decisions.

17 Q. Okay. But one of the decisions that you're helping to
18 support is the business decision that the company makes when it
19 goes into its video negotiations, right?

20 A. That's right, we do some work to support that team.

21 Q. And one of the functions that your business analytics team
22 does is to help to measure the subscriber value for AT&T and
23 DirecTV; is that right?

24 A. We manage the LTVs of the business and the existing
25 customer values, which are called ACVs, so the values of

1 individual subscribers, yes.

2 Q. Okay. And LTV, I think the Court's heard a little bit
3 about it, but let's just make sure we're all talking the same
4 way here. That would be the lifetime value of the subscriber?

5 A. That's right. That's an estimate of the lifetime value of
6 the subscriber at the point of acquisition.

7 Q. And so what you're looking at is how much value that new
8 video subscriber contributes to the company, true?

9 A. It's a measure of the margin of that subscriber for their
10 estimated time with us, so what we estimate is how long they
11 would stay with us as a customer, and then you subtract out the
12 cost of acquiring that customer.

13 Q. Okay. And in addition to looking at the subscriber value
14 that you just talked about, the LTVs, another function that you
15 do in the business analytics team is to measure the impact of
16 potential programming disputes on the business; is that right?

17 A. That's right. We'd estimate the short-term impact on
18 churn, and to some extent gross ads, but to a much lesser
19 degree.

20 Q. Okay. And so what we're talking about here is that
21 there's a blackout in the negotiation resulting from a failed
22 negotiation or going dark, you look at that, that impact on
23 AT&T and DirecTV's business, correct?

24 A. That's right, just to understand to give us another data
25 point to our the programming acquisition team so that they know

1 what our potential exposure is for any type of short-term
2 dispute that we may have.

3 Q. Okay. And we'll come back and talk a little bit more
4 about this in a minute. So let's just finish off with your
5 background here.

6 So in your current role as the senior vice-president --
7 planning, pricing, promotions and the go to market strategy,
8 you have responsibilities related to AT&T's promotions; is that
9 right?

10 A. I do.

11 Q. And these would include the promotions for both the new
12 subscribers that you would bring in; is that right?

13 A. That's right.

14 Q. And it's also for the promotions directed at the existing
15 customers of AT&T, true?

16 A. That's true.

17 Q. Okay. So let's take these one at a time briefly if we
18 can. I want to talk first about the efforts to acquire new
19 customers, okay, for AT&T?

20 A. Got it.

21 Q. All right. Now, one way that AT&T uses promotions is to
22 get customers to sign up for multiple products; isn't that
23 right?

24 A. Very -- most of our promotions are product-centric, so
25 they focus on the success of the individual products. There

1 might be some elements of those promotions that where it
2 benefits to take multiple product, but we do both.

3 Q. All right.

4 MR. WELSH: Your Honor, I have the deposition
5 transcript if I may hand that up.

6 THE COURT: All right.

7 MR. WELSH: Your Honor, may I approach the witness?

8 THE COURT: You may.

9 MR. WELSH: Your Honor, we'll mark for identification
10 purposes the deposition transcript as 536.

11 THE COURT: All right.

12 MR. WELSH: PX 536.

13 (Plaintiff's Exhibit No. PX 536 was marked
14 for identification.)

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

16 THE COURT: You may.

17 BY MR. WELSH:

18 Q. Mr. Torres, you gave a deposition in this matter; is that
19 true?

20 A. I did.

21 Q. Okay. And you have in front of you the deposition
22 transcript. I'd like you to take a look at page 43 of that
23 transcript. And I'm going to direct you to line 16. The
24 question was asked of you that day, "Do you offer promotions to
25 people to get them to subscribe to multiple products with

1 AT&T?"

2 And your answer there was on line 19 was "Yes"; is that
3 correct?

4 A. That's correct.

5 Q. Okay. You can put that to the side.

6 Now, when you offer the promotions on multiple products,
7 this would include situations like TV and wireless cell phone
8 service; is that true?

9 A. That's correct.

10 Q. All right. And you offer them in multiple products, you
11 do that because there are benefits to AT&T if the customers
12 have multiple products with the company; isn't that true?

13 A. There are.

14 Q. All right. So customers with multiple products AT&T has
15 found they contribute more revenue to the company, right?

16 A. They do.

17 Q. Okay. And those customers AT&T has found, they tend to
18 stay longer with the company than those that just have a video
19 subscription, correct?

20 A. Those that can afford multiple products tend to stay
21 longer with us.

22 Q. And those that have the multiple products, those multiple
23 product customers that AT&T has, those tend to have much higher
24 margins than the video customers; isn't that true?

25 A. They do.

1 Q. So those customers that have the multiple products, they
2 tend to be a lot more valuable to AT&T and DirecTV; isn't that
3 right?

4 A. If a customer has multiple products, that relationship is
5 more valuable to us.

6 Q. Okay. Let's talk about AT&T's efforts to retain existing
7 customers, okay?

8 Now, you're familiar with the contempt of churn, right?

9 A. I am.

10 Q. And we've heard about that a little bit here. So I'm not
11 going to go into too much detail, but Churn is the term when
12 you have a disconnect where the customer leaves, in this case
13 AT&T or DirecTV, right?

14 A. It's when they disconnect the service with us.

15 Q. Okay. And you and your team are responsible at AT&T and
16 DirecTV for tracking that churn; is that correct?

17 A. I do, I track churn.

18 Q. And AT&T tries to reduce the rate of the churn, doesn't
19 it?

20 A. We do.

21 Q. And today at AT&T there is a plan underway to try to drive
22 that churn down; isn't that true?

23 A. Yes, churn has been increasing substantially over the last
24 couple of years. And so there are plans to at least control
25 it. I don't know if we'll be able to drive it down, but at

1 least control it.

2 Q. Well, there's a plan in place called driving to, and then
3 there's a number. I don't know whether that number is
4 confidential or not so I'm pausing on that. But there is a
5 plan called drive to a particular number; isn't that true?

6 A. There is, that's once you take away the impact of those
7 customers that pick over-the-top services. So it's a number
8 that accounts for taking that type of churn out of the
9 equation. It's an internal initiative.

10 MR. WELSH: Your Honor, if I may confer with defense
11 counsel for a second?

12 THE COURT: Go ahead.

13 (Pause.)

14 MR. WELSH: Thank you, Your Honor.

15 THE COURT: You may proceed.

16 BY MR. WELSH:

17 Q. Mr. Torres, I just conferred with defense counsel and was
18 told that the number is not confidential so I can talk openly
19 about this so it makes our lives and the Court's life here a
20 lot easier.

21 The plan that's in place is called drive to one five oh,
22 correct?

23 A. That's correct.

24 Q. Okay. And the idea of that plan is to actually drive the
25 churn down to 1.5 percent per month; is that right?

1 A. That's right. We had -- that's consistent with what the
2 churn was several years ago, and so the initiative is to
3 control for when you take all the core cutting out of the
4 equation for that that's not related to core cutting, can we at
5 least manage that a little bit better .

6 Q. The plan that's in place is one that your boss is working
7 on along with Jay Carey and you; is that correct?

8 A. There's a lot of people working on it.

9 Q. And the plan is one that's continuing to be implemented,
10 right?

11 A. It's one that we've had to fund and one that will take
12 time to get there. But yes, we're working on it.

13 Q. Okay. Now, let's -- So when AT&T, Mr. Torres, when AT&T
14 seeks to retain a customer, prevent them from leaving, prevent
15 this churn, AT&T might offer them a retention offer; is that
16 right?

17 A. Yes, it usually starts with -- well, retention credits is
18 what we call them. That's when we adjust, most customers are
19 calling us because of price concerns, and so we adjust their
20 bill down to something that they can better manage, and so
21 those are retention credits.

22 Q. And you go through the, initially the save desk at AT&T,
23 right, to try to retain these customers?

24 A. When the customers are calling to disconnect, they usually
25 call the save desk.

1 Q. Right. And when they call the save desk and they want to
2 disconnect and AT&T is trying to keep them with the service,
3 there are particular retention offers that are given to the
4 customer that are tailored to the particulars of that customer;
5 is that right?

6 A. That's right. It's the credits are tailored specifically
7 to what -- to who that customer is and what we know about that
8 customer.

9 Q. So among other things, the retention offers that are given
10 to the customers, they are based on the customer's tenure with
11 AT&T, true?

12 A. That's one of the several factors.

13 Q. And another factor that they're based upon is the
14 customer's margin that they have had with AT&T as well,
15 correct?

16 A. That's correct.

17 Q. So how much money AT&T is gaining from that customer,
18 correct?

19 A. That's correct.

20 Q. Now, one of the retention offers that's used by the save
21 desk here is to move customers from AT&T's traditional
22 satellite services to DirecTV now, right?

23 A. Yes.

24 Q. Okay, but DirecTV now is part of a save desk offer that
25 only has limited use at AT&T by the save desk; isn't that true?

1 A. It is, it's not something we focus on because if we can
2 keep the customer on DirecTV, which is what they're used to
3 using, it's the experience they're used to, that's the
4 preferred experience for most customers. And so that's what we
5 try to accomplish.

6 Q. Well, you're interested in keeping the customer on the
7 satellite business here rather than moving them over to DirecTV
8 now because the satellite business is one that's more
9 profitable to AT&T for that customer, right?

10 A. The reason we try to keep them on the satellite product is
11 you're trying to keep them from disconnecting. And so the
12 customer's used to using our service, there's no sense in
13 disrupting the experience that they're used to interacting with
14 if you can solve it with price. And price is usually the
15 primary reason they're calling to disconnect.

16 Q. Well, let's break this down so I want to make sure that
17 I'm understanding you.

18 DirecTV now as an offer, that's not the first offer, in
19 fact, that's the last offer that's typically made when a
20 customer is threatening to leave, true?

21 A. That's true, for the reasons I just mentioned.

22 Q. All right. And in your opinion, though, Mr. Torres, AT&T
23 should do everything it can to keep the customers on the
24 satellite platform versus migrating them to DirecTV Now because
25 on the satellite side there's a much better ability for AT&T to

1 up-sell those customers; isn't that true?

2 A. Well, there's a lot of different reasons. As I mentioned,
3 they're used to an experience, they're calling about price is
4 the primary reason, and so if they're calling about price you
5 address the price concern. There are things that we can't
6 offer on DirectTV Now, so if they had NFL Sunday ticket, for
7 instance, in the past, we don't offer that on DirectTV Now. And
8 so there's -- there are a lot of reasons why you want to keep
9 them on the platform they're used to and address their price if
10 you need to address their price.

11 MR. WELSH: Your Honor, I have a document which we've
12 marked for identification as 537, PX 537, for impeachment
13 purposes. May I hand it to the clerk?

14 THE COURT: You may.

15 MR. WELSH: May I approach the witness, Your Honor?

16 THE COURT: You may.

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

18 THE COURT: You may. It's a one-page document?

19 MR. WELSH: I'm sorry, Your Honor?

20 THE COURT: It's a one-page document?

21 MR. WELSH: It is, Your Honor.

22 THE COURT: Two sided?

23 MR. WELSH: Two sided, I'm sorry, yes, Your Honor.

24 BY MR. WELSH:

25 Q. Mr. Torres, you have Plaintiff's Exhibit 537, do you see

1 there, sir, that there's an e-mail from a Mr. Scott House which
2 you're copied on October 27th, 2016?

3 A. I do.

4 Q. Okay. Now, Mr. House works for you, correct?

5 A. He does.

6 Q. Okay. He's in your group?

7 A. Yes.

8 Q. And do you value Mr. House's opinions?

9 A. I do.

10 Q. All right. Mr. House was of the opinion on October 27,
11 2016, that --

12 MR. WELSH: I'm sorry, Your Honor, give me one
13 second.

14 THE COURT: Yes.

15 (Pause.)

16 MR. WELSH: Your Honor, I'll withdraw that exhibit
17 for the time being.

18 THE COURT: Okay.

19 MR. WELSH: I have binders if I may hand them up to
20 Your Honor?

21 THE COURT: Sure.

22 MR. WELSH: May I approach the witness, Your Honor?

23 THE COURT: You may.

24 MR. WELSH: Thank you.

25 Let's try this again, Your Honor, apologies.

1 THE COURT: All right.

2 MR. WELSH: May I proceed?

3 THE COURT: You may.

4 MR. WELSH: Thank you.

5 BY MR. WELSH:

6 Q. Now, Mr. Torres, if you'd look at your binder that's in
7 front of you, and I'd like you to look at Plaintiff's Exhibit
8 51 if you would.

9 A. (Witness complies.)

10 Q. Tell me when you're there, sir?

11 A. PX 0051?

12 Q. Correct, sir. On this page we have a series of e-mails.
13 The bottom e-mail is dated October 19, 2017. Do you see that,
14 sir?

15 A. October 19th, yes.

16 Q. Okay. And this is an email from you; is that right?

17 A. No, this is from Jay Carey to David Christopher and
18 myself.

19 Q. The bottom e-mail on October 19th at 1:58 says Vincent
20 Torres, and it says you wrote, do you see that?

21 A. I'm sorry? Oh, okay. This is from David to Jay, it's the
22 first -- I see an e-mail from David Christopher to Jay Carey
23 and me, and then I see a response from Jay Carey to David.

24 Q. Right. And I'll just direct you to the bottom of PX 51,
25 so the first page.

1 A. First page.

2 Q. On October 19, 2017 at 1:58 p.m., there's an e-mail from
3 you, correct?

4 A. That's correct.

5 Q. Okay. And this e-mail chain is related to the save
6 efforts at AT&T, correct?

7 A. That's correct.

8 Q. Okay. And the e-mail exchanges here are with your boss,
9 Mr. Christopher and Mr. Carey, who you mentioned earlier,
10 correct?

11 A. That's correct.

12 MR. WELSH: Your Honor, I move for admission of PX
13 51?

14 MR. OPPENHEIMER: No objection, Your Honor.

15 THE COURT: Be admitted.

16 (Plaintiff's Exhibit No. PX 51 was
17 received in evidence.)

18 BY MR. WELSH:

19 Q. Now, looking at your e-mail on October 19th, 2017, Mr.
20 Torres, you stated: "In my opinion we should do everything we
21 can to keep them on satellite with credits versus migrating
22 them to Now, given that we have the ability to up-sell and
23 offer a richer value product on satellite." Those were your
24 words that day?

25 A. They were.

1 Q. And Now is DirecTV Now, correct?

2 A. Now is DirecTV Now.

3 Q. Okay. You can put that to the side, thank you, sir.

4 MR. OPPENHEIMER: Your Honor, my apologies, that
5 should go in under seal.

6 THE COURT: Any objection?

7 MR. WELSH: No objection, I think we can hopefully
8 sort out if there's a small amount that needs to be addressed
9 in it.

10 THE COURT: All right, it will be admitted under
11 seal.

12 (Plaintiff's Exhibit No. PX 51 was
13 received in evidence under seal.)

14 BY MR. WELSH:

15 Q. Let's change topics a little bit if we can, Mr. Torres. I
16 want to talk about programming and programming disputes. You
17 mentioned that earlier in your testimony, okay?

18 A. (No verbal response.)

19 Q. Now, you testified earlier, Mr. Torres, that you became
20 the leader of the revenue, strategy and planning team in 2014,
21 right?

22 A. I did.

23 Q. And you took over responsibilities for the business
24 analytics team in 2015?

25 A. That's correct.

1 Q. And you still have responsibilities today with the
2 business analytics functions at AT&T, right?

3 A. I do.

4 Q. Now, one of the functions I think you testified about
5 earlier that the business analytics teams handles is the
6 impact, looking at the impact of programming disputes on the
7 business, correct?

8 A. That's correct.

9 Q. And this would include programming disputes that end up
10 resulting in blackouts themselves, correct?

11 A. That's right, there's been three instances of those in my
12 time.

13 Q. But regardless of how many, when there is a blackout or
14 potential blackout situation, your group will do the analytics
15 on that?

16 A. That's correct. Sorry, yes.

17 Q. Now, the business analytics team has a methodology which
18 it uses for forecasting the effect of a potential blackout on a
19 company, true?

20 A. Yes, we do.

21 Q. All right. And you use a methodology today at AT&T that
22 you -- is similar to what you used when you were with DirecTV
23 in that timeframe, correct?

24 A. Yes, it's evolved slightly, but it's very similar.

25 Q. Okay. Now, when your team is forecasting the effect of a

1 potential dispute, a carriage dispute, it looks at the
2 potential effect on churn, correct?

3 A. That is the primary focus of the conversation,
4 particularly for the weeks following around the negotiation.

5 Q. Okay. Well, you look at the loss of the existing
6 customers for that churn, right?

7 A. That's correct.

8 Q. Another metric, though, that you do look at, your team
9 looks at is the forecast of the effect of the programming
10 dispute on new subscribers, correct?

11 A. It's something that we look at. We don't put a lot of
12 science behind it, but we do look at it.

13 Q. Okay. And I think in your business you refer to them as
14 gross ads, right, or gross additions?

15 A. Gross ads are new customers.

16 Q. New customers, okay. And that's what we're talking about
17 is how many, in addition to how many you might lose in a
18 carriage dispute if there were the possibility of going dark,
19 how many AT&T customers we lost, but how many new subscribers
20 would not be gained during this period of time by AT&T and
21 DirecTV, correct?

22 A. That's right, assuming we did nothing, that's usually the
23 going in assumptions. If we did nothing, what is the potential
24 losses on gross ads over a short period of time.

25 Q. And the new subscribers of the gross ads, now, they're

1 among the most important metrics that your team tracks; isn't
2 that true?

3 A. I'm sorry, can you repeat that?

4 Q. Sure. The new subscribers or the gross ads here that
5 we're talking about, those are among the most important of the
6 metrics that your team tracks, right?

7 A. For the purposes of these disputes, it's actually the
8 disconnects that we're most focused on, but we do track gross
9 ads, but it's -- and disputes is disconnects.

10 Q. Well, if you look at your deposition transcript that you
11 have in front of you, sir?

12 A. Sure.

13 Q. Do you have it in front of you, sir?

14 A. I do.

15 Q. If you could open it up to page 30.

16 A. (Witness complies.)

17 Q. And I'm going to direct you to line 9. The question was
18 asked of you that day, "You have mentioned some of them, but
19 what are the most important metrics that you track?"

20 Your answer on line 12, "There's a variety, the gross ads,
21 disconnects and net ads across -- across our posts, our
22 wireless business, our premium TV business, our broadband
23 business, and our DirecTV Now business." Correct?

24 A. Those are the metrics we track in our business, yes, for
25 our business, that's what we track.

1 MR. OPPENHEIMER: Your Honor, for the completeness I
2 think the prior question should be read.

3 Oh, I have it already.

4 THE COURT: You'll get a chance to do that on cross.
5 Go ahead.

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

7 THE COURT: You may.

8 MR. WELSH: Thank you.

9 BY MR. WELSH:

10 Q. Now, I'd like to direct you to a document that's in the
11 other binder in front of you, if you'd look at that, please,
12 sir.

13 A. Sure.

14 Q. It's Plaintiff's Exhibit 108 for identification purposes.

15 MR. OPPENHEIMER: Your Honor, may we approach? We
16 will have an objection to this.

17 THE COURT: All right. Come on up.

18 Mr. Torres, step down, sit in that chair over there.

19 (Witness withdrew from the witness stand.)

20 (Sealed Bench Conference.)

21 THE COURT:

22 MR. OPPENHEIMER:

23 THE COURT:

24 MR. OPPENHEIMER:

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23 (Open court.)

24 THE COURT: Come on up, Mr. Torres.

25 (Witness resumed the witness stand.)

1 THE COURT: You may proceed consistent with the
2 discussion at the bench.

3 MR. WELSH: Thank you, Your Honor.

4 THE COURT: Yes.

5 BY MR. WELSH:

6 Q. Mr. Torres, you and your team in 2014 worked on a
7 presentation involving a Disney renewal; is that correct?

8 A. We did some work in advance of the Disney renewal.

9 Q. Okay. And that's part of what you do in the ordinary
10 course or did in the ordinary course back then for DirecTV,
11 right?

12 A. We did.

13 Q. Okay. And as part of that you looked at, again, these
14 economic impacts of what might happen with the loss of the
15 carriage of Disney, correct?

16 A. We did, we did some work to help inform the team that was
17 negotiating it.

18 Q. Okay. And you looked at the loss of the gross ads as well
19 as the churn that might result, correct?

20 A. We always include something in there for gross ads, but
21 the focus of the discussion and the attention around the
22 disconnects.

23 Q. And with this analysis you actually did, you and your team
24 did an analysis that went out for six years; isn't that true?

25 A. We, I think we ran out of calculation for multiple years

1 for some reason. But the analysis really was around the one
2 week, one month period.

3 Q. All right. The analysis that you did was based on one
4 week, one month. It also went for one year, and then went for
5 six years as well; isn't that true?

6 A. I don't remember specifically if -- I think that's
7 accurate. The calculation was extended for a period of time.
8 But if you could point me to the document, that would be
9 helpful.

10 MR. WELSH: Your Honor, may I point the witness to PX
11 108?

12 THE COURT: See if it refreshes his recollection.

13 MR. WELSH: I'll start with that, Your Honor, thank
14 you.

15 BY MR. WELSH:

16 Q. If you'd look at PX 108 in your binder.

17 A. Okay.

18 Q. And if you'd look at 046, which is a color copy -- the
19 page?

20 A. (Witness complies.)

21 Q. The numbers, I understand have been designated as
22 confidential, so I'm not going to --

23 THE COURT: Just read it to yourself, just read it to
24 yourself. Then he'll ask you a question.

25

1 BY MR. WELSH:

2 Q. If you'd take a look at that and tell me when you're done,
3 sir.

4 A. I'm done.

5 Q. And in looking at the document, does that refresh your
6 memory, sir, that DirecTV at the time looked at a one week, one
7 month and one year and six year calculations of the economic
8 impact from the drop of Disney?

9 A. Yeah, you can see by looking at this that some of these
10 numbers were simply multiplied out. So it's a very simple
11 calculation without any work done to understand mitigating
12 actions that we would take or countermeasures that we would
13 take. So the one month or one year is simply multiplied by
14 six. The one month is, I can see here is multiplied by twelve
15 for gross ads in particular. So it's a very simple, simplistic
16 extension of the calculation.

17 Q. My question was directed, and I'll just come back to it
18 again. But the analysis that your team did at that point
19 included a six year analysis, correct?

20 A. I just want to be clear. The analysis focused on the one
21 week and one month. The rest was just a calculation that was
22 extended out.

23 Q. Well, the number that's there for the six year term at the
24 bottom, which I can't talk about, that's also found on page 42
25 of this document; isn't that true?

1 MR. OPPENHEIMER: Your Honor, may we approach?

2 THE COURT: Yes.

3 Step down.

4 (Witness withdrew from the witness stand.)

5 (Bench Conference.)

6 MR. OPPENHEIMER:

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15 MR. WELSH:

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24 (Open court.)

25 BY MR. WELSH:

1 Q. Mr. Torres, let's move to one last subject if we can. I
2 want to talk about pricing with you, okay?

3 A. Sure.

4 Q. All right. Now, AT&T increases the prices for its TV
5 products, its video services on an annual basis, correct?

6 A. We do.

7 Q. And for most of the time at the company, you've been the
8 person responsible, primarily responsible for those pricing
9 recommendations, correct?

10 A. For most of my time with the company, yes.

11 Q. All right. And that was the case in -- for the price
12 increase for 2016, correct?

13 A. The price increase that was implemented in 2016, yes, I
14 was responsible.

15 Q. All right. If you'd look at your binder again at PX 12
16 for identification purposes. Are you there, sir?

17 A. PX 12?

18 Q. Yes.

19 A. Yes.

20 Q. Now, this is a cover e-mail from you, Mr. Torres, to Mr.
21 Bentley, Brad Bentley on October 16, 2015, correct?

22 A. That's correct.

23 Q. And what you're attaching here are the updated price
24 increase slides for AT&T, correct?

25 A. That's correct.

1 Q. And the attachment's titled "2016 A.E.I.S. pricing,"
2 right?

3 A. Yes.

4 Q. A.E.I.S. would be AT&T Entertainment and Internet
5 Services, correct?

6 A. That's correct.

7 Q. All right. And Mr. Bentley was your boss at the time; is
8 that right?

9 A. Yes, he was.

10 Q. You sent this presentation to Mr. Bentley for a meeting
11 that was to be had with Mr. John Stankey; is that correct?

12 A. That's correct.

13 Q. And Mr. Stankey at that time was the head of the
14 entertainment group for AT&T, right?

15 A. Yes, he was.

16 Q. All right. And your team made a recommendation to
17 Mr. Bentley that related to the 2016 price increase; is that
18 right?

19 A. We did.

20 Q. And that was in the attachment, correct?

21 A. That's correct.

22 MR. WELSH: Your Honor, I move to admit PX 12?

23 MR. OPPENHEIMER: Your Honor, no objection under
24 seal.

25 THE COURT: Be admitted under seal.

1 (Plaintiff's Exhibit No. PX 12 was
2 received in evidence under seal.)

3 MR. WELSH: Thank you, Your Honor. May I proceed?

4 THE COURT: You may.

5 BY MR. WELSH:

6 Q. Now, Mr. Torres, we look at PX 12-030. Tell me when
7 you're there, sir.

8 A. I'm there.

9 Q. Okay. Now, these are the guiding principles for the 2016
10 price increase, is that right?

11 A. That's right.

12 Q. And the number one guiding principle here was to aim to
13 cover the programming cost increases through price increases,
14 do you see that?

15 A. I do, that was one of the things we tried to accomplish.
16 It becomes more difficult, but that's a guiding principle.

17 Q. Right. That was the number one guiding principle for 2016
18 was to aim to cover the programming cost increases through
19 price increases, right?

20 A. That was the first one we listed here, yes.

21 Q. And the number two guiding principle was to align the
22 price increases with where we are experiencing the cost
23 increase, correct?

24 A. That's right.

25 Q. And the number three was to pass through cost increases on

1 our a la carte services, do you see that?

2 A. I do.

3 Q. All right. And these were the guiding principles that
4 went into the price increase recommendation that you were
5 making to your boss and ultimately to Mr. Stankey, correct?

6 A. Those were the principles that would help guide us through
7 how we would approach our recommendation. That's -- those are
8 the principles we used.

9 Q. And these were the principles that you and your team
10 followed when you were recommending this price increase to Mr.
11 Stankey ultimately in 2016, right?

12 A. We did.

13 Q. And those guiding principles were the ones that your team
14 advanced to Mr. Bentley and Mr. Stankey before this merger was
15 announced, correct?

16 A. This is a few years ago. Two years ago, but those were
17 the principles back then. As I mentioned, it's been hard to
18 deliver on those principles these days, but those were the
19 principles then.

20 Q. And those were the principles that were followed for the
21 2016 price increase that AT&T put out that was before this
22 litigation began as well, correct?

23 A. That's right.

24 Q. All right.

25 MR. WELSH: That's all I have, Your Honor, thank you.

1 THE COURT: All right. We're going to take the
2 morning recess.

3 You're a witness under oath in the case now. So
4 you're not at liberty to discuss your testimony so far or what
5 it might be when you return with anybody, even your own
6 counsel. You can't talk to anybody.

7 THE WITNESS: Got it.

8 THE COURT: You have to be able to say I haven't
9 discussed my testimony with anybody, okay?

10 THE WITNESS: Okay.

11 THE COURT: All right?

12 So we'll take a fifteen minute break, we'll see you
13 back here in fifteen. Step down.

14 THE WITNESS: Great, thank you.

15 (Witness excused.)

16 (Recess at 11:59 a.m.)

17 (Proceedings resumed at 12:21 p.m.)

18 THE DEPUTY CLERK: Your Honor, recalling Civil Action
19 Number 17-2511, the United States of America versus AT&T, Inc.,
20 et al.

21 THE COURT: All right, the witness remains under
22 oath.

23 (Vince Torres resumed the witness stand.)

24 THE COURT: Cross-examine.

25 MR. OPPENHEIMER: But perhaps for only a short time,

1 Your Honor, we have no further questions for this witness.

2 THE COURT: Okay. Well, that doesn't happen every
3 day. Maybe they're finally listening to me.

4 All right. Well, let's see if I have any questions.

5 (Pause.)

6 THE COURT: No, you're excused.

7 THE WITNESS: Thank you.

8 (Witness excused.)

9 THE COURT: All right, call your next witness.

10 MR. SCHEELE: Good morning, Your Honor, for the
11 record, Scott Scheele appearing on behalf of the United States.

12 THE COURT: All right.

13 MR. PETROCELLI: Your Honor, Mr. Barber is handling
14 this examination.

15 THE COURT: Okay.

16 MR. SCHEELE: Your Honor, the United States calls
17 Simon Sutton as an adverse party witness.

18 THE COURT: Simon?

19 MR. SCHEELE: Sutton.

20 THE COURT: All right.

21 THE DEPUTY CLERK: Sir, please raise your right hand.

22 SIMON SUTTON, ADVERSE PARTY WITNESS, SWORN

23 THE DEPUTY CLERK: Please have a seat.

24 THE COURT: You may begin with leading questions.

25 MR. SCHEELE: Thank you, Your Honor.

1 DIRECT EXAMINATION

2 BY MR. SCHEELE:

3 Q. Mr. Sutton, please state your name for the record.

4 A. Simon Sutton.

5 Q. Mr. Sutton, we haven't met. My name is Scott Scheele,
6 I'll be conducting the examination this morning.7 You're currently employed by Home Box Office; is that
8 correct?

9 A. That is correct.

10 Q. And that's otherwise known as HBO?

11 A. That is correct.

12 Q. And that's part of Time Warner, Inc., correct?

13 A. That is correct.

14 Q. And you're HBO's president of global distribution?

15 A. Actually my title was recently changed to president and
16 chief revenue officer of HBO.17 Q. Thank you. I'm going to talk a little bit about your
18 professional background. You have an MBA from Stanford
19 University?

20 A. That's correct.

21 Q. You've worked in the television industry for over 20
22 years; is that right?

23 A. That is correct.

24 Q. And you began working with HBO in 2005?

25 A. That is correct.

1 Q. And you had been the president of global distribution for
2 about two to three years before your recent title change?

3 A. That is correct.

4 Q. And with your title change, is there any change in your
5 roles and responsibilities?

6 A. I had the responsibility for some additional groups within
7 HBO, predominantly technology, consumer research, IT, and our
8 playing (sic) facilities.

9 Q. Congratulations on the promotion then.

10 A. Thank you.

11 Q. Your department is responsible for the relationship with
12 distributors that market HBO products to consumers, yes?

13 A. That is correct.

14 Q. And the distribution group has a staff of approximately
15 250 employees in the United States?

16 A. That is correct.

17 Q. And in your role you report directly to HBO's CEO and
18 chairman, Richard Plepler, right?

19 A. That is correct.

20 Q. You and your group are responsible for overseeing HBO's
21 relationships with its distributors?

22 A. That is correct.

23 Q. And the term "distributors," that includes anyone who
24 sells your product directly to consumers, right?

25 A. That is anybody, yes, who retails HBO or Cinemax on to its

1 customers.

2 Q. And you sometimes use the term "affiliate" instead of the
3 term "distributor"; is that right?

4 A. That is correct.

5 Q. They're essentially synonomous?

6 A. They're essentially synonomous.

7 Q. And HBO's product offerings consists of networks or
8 channels of premium programming, right?

9 A. That is correct.

10 Q. And would you define what we mean by premium programming
11 in that context?

12 A. Premium programming is programming the customers pay
13 discreet fee for on a subscription basis that doesn't contain
14 advertising.

15 Q. And the products that -- the premium programming products
16 that HBO offers are HBO and Cinemax, correct?

17 A. That is correct.

18 Q. And you're responsible for the revenue of the company,
19 right?

20 A. That is correct.

21 Q. Your group is responsible for negotiating HBO's contracts
22 with its distributors as well, right?

23 A. That is right.

24 Q. And in total, HBO has over 800 distributors in the United
25 States?

1 A. That is approximately correct, yes.

2 Q. And your three largest distributor are AT&T, Comcast and
3 Charter?

4 A. Yes, that is correct as of today.

5 Q. Under the HBO affiliate contracts, distributors can sell
6 HBO and Cinemax in two different ways, one would be a la carte
7 and the other would be part of a package or bundle of programs;
8 is that right?

9 A. Yes, that's right. You can divide it those two ways.

10 Q. And a la carte sales of HBO would be sales that are in
11 addition to the selling of a basic programming package; is that
12 right?

13 A. A la carte means you're buying that channel on its own
14 without anything else.

15 Q. And when it's being sold in a bundle or a package, it can
16 be bundled with other premium channels?

17 A. It can be bundled with almost anything.

18 Q. Or with basic channels, right?

19 A. Correct.

20 Q. HBO Now, that is a digital application that customers can
21 get through a digital distributor such as Apple or Amazon,
22 right?

23 A. That is correct.

24 Q. And HBO Now is what's often called an over-the-top
25 offering, right?

1 A. It is called that.

2 Q. And that's because it's offered over the Internet; is that
3 right?

4 A. That's right.

5 Q. Shifting gears just a little bit. The product that you
6 made available to consumers include HBO's movies and original
7 programming, right?

8 A. HBO Now consists of the same programming that is on the
9 HBO service.

10 Q. Okay. thank you. I'm just talking in general, the content
11 that you offer, the product that you offer. That's made
12 available to distributors, that you offer to distributors.
13 That includes movies and original programming, right?

14 A. It does.

15 Q. And this includes popular series like Game of Thrones and
16 West World, correct?

17 A. That is correct.

18 Q. And those are examples of original programming, right?

19 A. That is correct.

20 Q. And the programming that HBO offers includes movies from a
21 wide variety of movie studios, right?

22 A. That is also correct.

23 Q. You consider HBO's programming to be very compelling,
24 don't you?

25 A. I do.

1 Q. And HBO has been recognized as having very compelling
2 programming. It recently won in 2017 more prime time Emmies
3 than any other network; is that right?

4 A. That is correct.

5 Q. In fact, HBO has led all networks in prime time Emmies for
6 16 years in a row, right?

7 A. That is correct.

8 Q. HBO currently has about the same number of subscribers as
9 Starz and Showtime combined; isn't that right?

10 A. I actually haven't checked recently, but it sounds about
11 correct.

12 Q. In 2017, approximately 60 percent of the top fifty feature
13 films were exhibited exclusively on HBO, right?

14 A. Yeah, exclusively for the window that they come to HBO
15 for.

16 Q. And in 2017, HBO had fifty-four million domestic
17 subscribers including the HBO Now subscribers, right?

18 A. That's right.

19 Q. As a result, HBO was the most widely distributed domestic
20 multichannel premium paid television service in 2017; is that
21 correct?

22 A. That's correct.

23 Q. For 2017, HBO generated revenue of over six billion
24 dollars; is that right?

25 A. That is right.

1 Q. And in 2017, HBO had the highest subscriber growth rate in
2 its history; is that right?

3 A. That is correct.

4 Q. I want to move now to the topic of HBO's affiliate
5 agreements.

6 Other than possibly with some of the really small
7 distributors, there's not really any form contract used when
8 licensing HBO programming to affiliates; is that right?

9 A. That is correct.

10 Q. Each deal's a separately negotiated agreement?

11 A. That is correct.

12 Q. In negotiating these affiliate agreements, you seek to
13 address the affiliate's plans and needs while maximizing the
14 income to HBO, right?

15 A. That is correct.

16 Q. And affiliate agreements, they get complicated, right?

17 A. Sorry, could you repeat?

18 Q. The affiliate agreements, they can get complicated?

19 A. They can be complicated.

20 Q. They involve lots of different terms?

21 A. They do.

22 Q. And in negotiations, they can get so complicated that HBO
23 has even created computer models to project an impact on HBO's
24 revenues of proposed deal structures; isn't that right?

25 A. Yes, we do model each deal, that is correct.

1 Q. And your goal in that process is to maximize the revenue
2 to HBO?

3 A. That is -- that is my goal, yes.

4 Q. And the contract involved payment of a fee to you for
5 rights to the distributors to sell the programming to
6 consumers, right?

7 A. That is correct.

8 Q. And not all distributors pay the same rates for the HBO
9 programming; isn't that right?

10 A. That is correct.

11 Q. In general, larger distributors have more leverage over
12 you and they generally pay lower rates; is that correct?

13 A. In general larger distributors pay lower rates on average,
14 yes.

15 Q. And that's because they have more leverage over you?

16 A. It varies in the number of things we actually want to
17 incent [sic] them to grow, so what we do is in our deal
18 structure, as they add subscribers, they generally pay less on
19 the increment so larger subscribers who tend to be more
20 successful will be paying less on average because they're more
21 successful, not necessarily because they have more leverage.

22 Q. Okay. Well, we'll get back to the leverage point in a
23 little while.

24 But in addition to larger distributors, you also enter
25 affiliate agreements with new distributors such as the virtual

1 MVPDs, correct?

2 A. That is correct.

3 Q. And, for example, you've entered agreements with virtual
4 MVPDs such as Sony Vue, Amazon and Hulu; is that right?

5 A. Yes, we want to be as widely distributed as possible.

6 Q. And with new entrants, you generally negotiate a rate with
7 a discount structure; is that right?

8 A. Yes, again, it's very broad brush. But in general we'll
9 have a rate, and then we incent people to grow subscribers by
10 providing discounts as they add subscribers.

11 Q. But HBO looks for a guarantee for a minimum number of
12 subscribers before it applies that discount, right?

13 A. We will generally look for a guarantee, particularly if a
14 new entrant has no subscribers at all.

15 Q. And if they do meet that benchmark for a minimum number of
16 customers, if they don't meet that, then there's no discount
17 applied, right?

18 A. If they're under a guaranteed structure, that is correct.

19 Q. I need to be careful with my next questions because of
20 confidentiality issues. So I'm going to be very careful the
21 way I phrase it, and please listen to the way I phrase the
22 question.

23 At least one virtual MVPD contract had an initial
24 wholesale rate that is above the fifteen dollar retail price of
25 HBO Now; is that right?

1 A. That is correct.

2 Q. And that virtual MVPD planned on selling HBO for fifteen
3 dollars a month, right?

4 A. That MVPD which I believe you are referring to, I actually
5 can't speak to their plans on retail, but they were mainly
6 planning to sell HBO in bundles is my understanding.

7 Q. And you understood them to be selling it for a price of
8 about fifteen dollars a month?

9 A. For the a la carte price, yes.

10 Q. And that contract structure with that virtual MVPD, that
11 allowed the virtual MVPD to obtain a lower wholesale rate or
12 discounted rate if it achieved certain volume thresholds,
13 correct?

14 A. It had a lower wholesale rate if it bundled HBO, which was
15 predominantly as planned, and it, of course, achieved a lower
16 wholesale rate if it grew to a certain benchmark.

17 Q. Right. But you believe that, to use your words, that
18 virtual MVPD was unsuccessful in climbing into their discount
19 rates; is that right?

20 A. It turns out that, yes, it was unsuccessful into -- in
21 climbing into discounts.

22 Q. I want to shift gears a little bit and talk to you about
23 the HBO brand. You believe that the HBO brand is effective in
24 helping to market the product, don't you?

25 A. I do.

1 Q. And in their marketing and promotions distributors often
2 use HBO's art and trademarks; isn't that right?

3 A. They often do.

4 Q. And, for example, they use the HBO brand name or the HBO
5 logos, correct?

6 A. Yes, that is correct.

7 Q. And when they do, HBO has a role in approving the
8 distributor's advertisings of HBO; isn't that right?

9 A. That is correct.

10 Q. A distributor needs HBO's approval if they want to use the
11 HBO logo?

12 A. They need our approval if they're using our trademarks or
13 they're using our talent in any way.

14 Q. So if they're using -- they need HBO's approval if they
15 want to use a character or a scene from an HBO show?

16 A. That is correct because we are restricted in how we can
17 grant those rights.

18 Q. They need HBO's approval if they want to use HBO's art or
19 trademark in any way?

20 A. That is correct.

21 Q. And when distributors want to run an advertisement that
22 features HBO or its content, your distribution team determines
23 whether HBO will grant those approvals; is that correct?

24 A. Yeah, we work with them to create an ad or an approval
25 that works for both -- us.

1 Q. So the answer to my question is yes?

2 A. Yes.

3 Q. Sometimes HBO decides it cannot agree to the proposed
4 advertising; isn't that true?

5 A. That is correct.

6 Q. And in those cases HBO can work with a distributor to try
7 to find a way that meets HBO's criteria, right?

8 A. Yes, it makes us achieve what we're both trying to do
9 there.

10 Q. And that's done on a case by case basis, correct?

11 A. It is done by a case by case basis.

12 Q. So I want to ask you now some questions about HBO and
13 distributor marketing and promotional campaigns.

14 You think of acquisition, retention and upgrades as three
15 different types of marketing promotional campaigns, don't you?

16 A. Yes, that's one way to look at it.

17 Q. In that context acquisition is when HBO helps a
18 distributor to acquire new subscribers, correct?

19 A. That is correct.

20 Q. And retention is when HBO helps a distributor retain its
21 existing subscribers using HBO as a tool to keep them, right?

22 A. That is correct.

23 Q. And then upgrades would be when HBO helps a distributor
24 sell HBO to its existing customer base, correct?

25 A. That is correct.

1 Q. Okay. So regardless of which of these three a distributor
2 is focused on, HBO works with them to try to help them achieve
3 these goals, right?

4 A. Yes, we like to be in as many promotions as possible.

5 Q. And HBO tailors its campaigns to, depending upon which of
6 three goals you and a distributor are trying to accomplish,
7 right?

8 A. That is correct.

9 Q. You employ different tactics, depending on the type of
10 campaign?

11 A. That is correct.

12 Q. Let's focus on acquisition for a minute. HBO works with
13 distributors to help the distributors sell more HBO, right?

14 A. That is correct.

15 Q. And HBO helps distributors grow their underlying business,
16 correct?

17 A. We hope so.

18 Q. HBO works with distributors to help them grow their basic
19 subscribers, correct?

20 A. That is correct.

21 Q. And some of the new customers that a distributor may sign
22 up may be coming from other pay-TV providers, right?

23 A. That may be the case, yes.

24 Q. In fact, your department has noted that by leveraging the
25 HBO brand in marketing and packaging, distributors can

1 recapture video subscriber losses from other distributors;
2 isn't that right?

3 A. That is correct.

4 Q. Let's see if we can look at a document that talks about
5 this.

6 MR. SCHEELE: May I have a moment, Your Honor?

7 THE COURT: Yes, you may.

8 (Pause.)

9 MR. SCHEELE: May I approach, Your Honor?

10 THE COURT: You may.

11 MR. SCHEELE: May I approach the witness, Your Honor?

12 THE COURT: You may.

13 MR. SCHEELE: May I proceed, Your Honor?

14 BY MR. SCHEELE:

15 Q. I'd like you to turn in your binder to PX 61, please. I
16 believe it is the last tab.

17 MR. SCHEELE: Your Honor, PX 61 has been marked for
18 identification, and copies have been provided to defense
19 counsel.

20 BY MR. SCHEELE:

21 Q. Mr. Sutton, are you at PX 61?

22 A. I am there.

23 Q. You are there?

24 A. Yes.

25 Q. Okay. This is an e-mail from you, is that correct, at the

1 top?

2 A. Yes, that is correct.

3 Q. And you are e-mailing your boss, Richard Plepler; is that
4 correct?

5 A. That is correct.

6 Q. And you attach, there's an attachment about an HBO
7 affiliate, Altice; is that correct?

8 A. That is correct.

9 Q. And you sent it to him in preparation for a, I think the
10 word you used is chat about Altice; is that correct?

11 A. That is correct.

12 MR. SCHEELE: Your Honor, we would move the admission
13 of PX 61. There are material that's under seal so we move its
14 admission under seal.

15 THE COURT: All right.

16 MR. BARBUR: No objection, Your Honor.

17 THE COURT: Be admitted unseal.

18 (Plaintiff's Exhibit No. PX 61 was
19 received in evidence under seal.)

20 BY MR. SCHEELE:

21 Q. Mr. Sutton, I'd like to direct your attention to the
22 bottom of the second page to begin with. There's a heading
23 there that says footprint, which refers to the footprint of
24 Altice; is that right?

25 A. That is correct.

1 Q. And the last bullet point under the heading "footprint"
2 says Verizon. Now, Verizon is a video distributor; is that
3 correct?

4 A. That is correct.

5 Q. It says, "Verizon overlaps nearly sixty percent of CSC
6 territory." CSE, you understand that to be a subset of
7 Altice's territory; is that correct?

8 A. Yes.

9 Q. It refers to the old the cablevision systems; is that
10 right?

11 A. The cablevision systems, correct.

12 Q. So in other words a competitor overlaps nearly sixty
13 percent of a subset of Altice's territory; is that right?

14 A. That is correct.

15 Q. Okay. Now I'd like to call your attention up to about the
16 top third under the heading "HBO Opportunity." I'd like to
17 direct your attention to the third bullet point. And I'll read
18 that to you.

19 "By leveraging the HBO brand in marketing and packaging,
20 as other distributors have done successfully, Altice can drive
21 higher ARPU." And ARPU is average revenue per user?

22 A. That is correct.

23 Q. "And recapture video subscriber losses," parentheses,
24 "particularly from Verizon in the optimum systems." Do you see
25 that?

1 A. I do.

2 Q. And what's this intended to convey?

3 A. It's intended to convey that in the same footprint we had
4 affiliates with much higher HBO penetration. Altice,
5 particularly the next cablevision systems, we felt was much
6 lower penetrated than it could be, and by adopting a similar
7 strategy from Verizon it could become more competitive.

8 Q. And by a -- the similar strategy you're referring to is by
9 using HBO brand and marketing in its packaging, right?

10 A. That is correct.

11 Q. Thank you. I don't have any further questions on that,
12 you can set that aside.

13 A. (Witness complies.)

14 Q. In terms of how distributors use HBO to attract new
15 customers, they say they sometimes will offer, for example,
16 three months of free HBO to new customers; isn't that right?

17 A. That is correct.

18 Q. So I want to switch gears now to retention offers as
19 opposed to acquisition offers.

20 We touched on this point earlier in the trial with the
21 distributor. So I want to focus on the HBO side of the issue
22 instead of related to distributors.

23 HBO works with its distributors to help them improve their
24 customer retention; isn't that right?

25 A. That's correct.

1 Q. And one retention tactic that distributors use involves
2 offering a customer free HBO if they stay with that
3 distributor, right?

4 A. That is correct.

5 Q. And sometimes HBO extends discounts to those distributors
6 who use free HBO as a way to retain its customers, right?

7 A. Yes, we traditionally allow them to offer discounts up to
8 a certain period, and if they want to do it longer, they come
9 back to us and we'll discuss that with them.

10 Q. And the retention discounts that we're talking about are
11 different from the discounts for new customers, right, they're
12 not acquisition, they're retention?

13 A. Yeah.

14 Q. And often these retention discounts are in addition to the
15 arrangements HBO has made under its affiliation contract; isn't
16 that right?

17 A. That is correct.

18 Q. They're a supplement, it has nothing to do with the
19 contract, it's a supplement to the contract, right?

20 A. That is correct.

21 Q. And whether in the context of negotiating an affiliate
22 agreement or supplementing the funding that's part of an
23 affiliation agreement, these retention discounts are completely
24 at HBO's discretion, right?

25 A. That is correct.

1 Q. It's HBO's choice whether to grant the discounts or not?

2 A. Well, beyond what's already in the contract.

3 Q. Well, in the context of negotiating, HBO can choose
4 whether or not to grant the discounts, right?

5 A. Well, the discounts that are granted is a part of the
6 contract as a result of negotiation between the two parties.
7 When they come to us and want additional discounts beyond that,
8 then that is a further discussion about what they're trying to
9 achieve.

10 Q. Okay, thank you. HBO also helps distributors with
11 retention by increasing consumer engagement with their video
12 products; isn't that right?

13 A. Yes, we try to.

14 Q. And you know that because HBO has researched it, right?

15 A. We research, yes.

16 Q. During negotiations with your larger distributors, you
17 keep people from Time Warner Corporation in the loop, don't
18 you?

19 A. Generally yes, we do.

20 Q. And you sometimes meet with Jeff Bewkes, the CEO of Time
21 Warner Corp?

22 A. Occasionally, yes, we do.

23 Q. And sometimes you meet with Harold Averill, the CFO?

24 A. Harold Averill, yes.

25 Q. Thanks. And Mr. Bewkes and Mr. Averill sometimes provide

1 input into HBO negotiations; isn't that right?

2 A. They do sometimes.

3 Q. Let's talk a little bit about Turner. I'd like to ask you
4 to turn to PX 483 in your binder.

5 A. (Witness complies.)

6 MR. SCHEELE: Your Honor, PX 483 has been marked for
7 identification. A copy has been provided to defense counsel.

8 May I proceed?

9 THE COURT: You may.

10 BY MR. SCHEELE:

11 Q. Mr. Sutton, this is an e-mail exchange you had with
12 Richard Plepler and Tom Woodbury; isn't is that right?

13 A. That is correct.

14 Q. The e-mail concerns negotiations with directors?

15 A. That is correct.

16 Q. And the subject line of the e-mail is affiliate deals U.S.
17 and international, right?

18 A. That is the subject line, yes.

19 MR. SCHEELE: Your Honor, I move for the admission of
20 PX 483.

21 MR. BARBUR: No objection, Your Honor.

22 THE COURT: Admitted under seal?

23 MR. BARBUR: I don't believe this needs to be under
24 seal.

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

1 MR. SCHEELE: Thank you, Your Honor.

2 (Plaintiff's Exhibit No. PX 483 was
3 received in evidence.)

4 BY MR. SCHEELE:

5 Q. I want to direct first your attention to the bottom of
6 this e-mail chain. This is an e-mail Jeff Bewkes sent Richard
7 Plepler and the heads of other Time Warner divisions; isn't
8 that right?

9 A. That is correct.

10 Q. It's dated November 6th, 2015?

11 A. It is.

12 Q. And in that first paragraph Mr. -- I'm sorry, Mr. Bewkes
13 wrote with affiliate agreements he wanted Time Warner Corp to,
14 quote, coordinate our efforts; isn't that right?

15 A. Yes, that is correct.

16 Q. Now directing your attention to the second paragraph,
17 Mr. Bewkes designated two people in corporate to coordinate our
18 efforts; isn't that right?

19 A. That's correct.

20 Q. And in the third paragraph Mr. Bewkes said that Time
21 Warner corporate would work with the divisions to, quote,
22 figure out how to make this all work in practice, right?

23 A. That is correct.

24 Q. Mr. Plepler then forwarded the e-mail to you and Mr.
25 Woodbury, right?

1 A. That is correct.

2 Q. And Mr. Plepler wrote, "Oui."

3 A. That is correct.

4 Q. And you wrote, "Uh-oh."

5 A. That is correct.

6 Q. And you added that these instructions meant that you would
7 lose your ability to maximize HBO revenue; isn't that right?

8 A. That is correct.

9 Q. But you testified a few minutes ago that your goal in
10 negotiations is to maximize revenues for HBO, right?

11 A. That is my goal.

12 Q. But despite your concern that you stated in the e-mail
13 that the "uh-oh" concern, despite that concern you followed
14 Mr. Bewkes's instructions, didn't you?

15 A. I don't think he was actually giving instructions. He
16 said, Howard and Oloff (sic) will be in touch to coordinate.
17 But yes, we do what Time Warner asks us to do.

18 Q. And you do what Time Warner asks you to do in the context
19 of coordinating with Time Warner, right?

20 A. That's correct.

21 Q. I think that's all I'm going to have for that document,
22 you can set it aside, thank you.

23 A. (Witness complies.)

24 Q. Let's quickly walk through some examples of how this
25 coordination worked in practice since the time of that e-mail.

1 The Court has already heard about coordination of HBO with
2 Turner in the context of Dish and YouTube so I'll move straight
3 to Altice.

4 In the course of HBO's 2016 negotiations with Altice, HBO
5 disengaged from those negotiations; isn't that right?

6 A. If we did, it was very briefly.

7 Q. And the reason for disengaging was because Turner did not
8 have a new deal, right?

9 A. To be honest, once we started with Altice, we didn't
10 engage. I think we may have delayed an initial kickoff month
11 being a get-to-know-you meeting, but that's the extent of it.

12 Q. Well, let's take a look at a document that speaks to this.
13 Can you turn to PX 91 in your binder.

14 A. (Witness complies.)

15 Q. It should be the first tab.

16 MR. SCHEELE: PX 91 has been marked for
17 identification. And a copy has been provided to defense
18 counsel. May I proceed, Your Honor?

19 THE COURT: You may.

20 BY MR. SCHEELE:

21 Q. This is the e-mail exchange you had with Ed MacDonald; is
22 that right?

23 A. That is correct.

24 Q. And he's the senior VP and controller at HBO?

25 A. Yes, that is correct.

1 Q. He reports to the CFO, Joe Tarulli?

2 A. He does.

3 Q. And the context was a, quote, 2016 goal assessment, end
4 quote; is that right?

5 A. That's correct.

6 Q. And what does that mean in this context?

7 A. At the end of the year Ed compiles a list of things that's
8 whether the company has achieved certain goals that were set
9 out by Time Warner at the beginning of the year.

10 Q. So these are goals of HBO and reporting whether HBO has
11 achieved its goals to Time Warner; is that correct?

12 A. I believe this one was specifically Richard Plepler's
13 goals.

14 Q. Okay. So the goals of your boss?

15 A. Yes.

16 Q. And Mr. MacDonald was asking you about HBO collaboration
17 with other Time Warner divisions; isn't that right?

18 A. Yes, he's asking for examples to put next to the goal
19 requirement.

20 Q. And you provided the information listed here in the middle
21 e-mail; is that correct?

22 A. That's correct.

23 MR. SCHEELE: Your Honor, I move to admit under seal
24 because there is one confidential portion of the document, I
25 move to admit PX 91 under seal.

1 MR. BARBUR: No objection, Your Honor.

2 THE COURT: Be admitted under seal.

3 (Plaintiff's Exhibit No. PX 91 was
4 received in evidence under seal.)

5 BY MR. SCHEELE:

6 Q. Let me direct your attention to the heading, "affiliate,"
7 in the middle e-mail that you wrote.

8 There are three -- there are three bullets points there.
9 I'll read the first one to you.

10 "Coordination with Altice. We disengage with Altice as
11 Turner did not have a new deal. This has held up our own
12 deal." Do you see that?

13 A. I do.

14 Q. And was that accurate?

15 A. I realize I'm reading this, I wrote this. But in all
16 honesty once we started the Altice deal, there was no holdup.
17 I think what we did is we just stopped the first initial
18 kickoff meeting.

19 Q. So it's your testimony here today that you were making an
20 inaccurate report to your boss that was closer in time that it
21 is today?

22 A. This is not a report to my boss. This is a report to Ed
23 MacDonald in which we are trying to show that we achieved
24 various goals, so I'm including all examples where I can think
25 that they might look like they've been -- been achieved.

1 Q. Let's go to the next bullet point. "YouTube. Despite
2 YouTube agreeing with HBO on rates per carriage, we have held
3 off on a deal until Turner gets an offer." Paren, "Sacrificing
4 revenue for 2017." Do you see that?

5 A. I do.

6 Q. And that was accurate?

7 A. That is accurate.

8 Q. And then on the last bullet point, "On both AT&T and
9 Charter, we can coordinate it Turner's deal expirations." Was
10 that accurate?

11 A. I think it's referring to something more general than --
12 because our deal expirations are not the same as Turner and
13 AT&T and Charter, so that is not accurate. That is the process
14 of a negotiating Charter, for example, we have a follow-on
15 agreement, we coordinated that with Turner's deal expiration.

16 Q. So you coordinated with -- you ultimately coordinated with
17 Turner's deal expiration?

18 A. Not the expiration of our deals.

19 Q. The follow-on agreement?

20 A. Yeah, the process in the middle of negotiating.

21 Q. Okay. So the HBO agreements with those firms were synced
22 with the Turner agreements because that's what Time Warner
23 wanted?

24 A. Well, they were not synced. AT&T and Charter were not
25 synced with Turner.

1 Q. The follow-on agreement with respect to AT&T and Charter
2 were synced because that's what Time Warner wanted?

3 A. There was no follow-on agreements from AT&T, so to be
4 honest I can't remember what I was referring to there. In
5 Charter's case, there was a six month deadline because we were
6 under a lot of time pressure to get the main part of the deal
7 done. There was six months in which some additional technical
8 requirements needed to be negotiated. We synced that six month
9 deadline with Turner deal expiration. In fact, we never got
10 the deal done so the deal never was done.

11 Q. So you synced it because that's what Turner wanted to do.

12 A. We synced it because we thought it would help us in the
13 part two follow-on agreement.

14 Q. Then it wasn't something that Charter asked for?

15 A. They asked for follow-on agreement. We mutually agreed on
16 the deadline, and it turned out that it became irrelevant.

17 Q. Okay. Let's talk about going -- our last topic. You can
18 set that aside. Going dark with Charter.

19 HBO negotiated a contract with Charter in 2016; isn't that
20 right?

21 A. That is correct.

22 Q. And HBO wanted to finalize the deal?

23 A. Yes, we did.

24 Q. You wanted to finalize the deal before Charter completed
25 its merger with Time Warner, right?

1 A. We wanted a deal. We had not had a deal for two years
2 with Charter.

3 Q. But you were concerned about the merger being consummated;
4 isn't that right?

5 A. Yes, I was very concerned. We had gone for two years
6 without a deal with Charter. They were paying us what they
7 decided to pay us, not what was under the contract, and they
8 were about to buy a company three times their size. If they
9 applied what they were doing in the past to that larger
10 company, we would have been in trouble. So I very much wanted
11 to get a deal done before they applied Time Warner Cable.

12 Q. You were concerned that once the merger was consummated,
13 the merged firm would have increased the leverage from the
14 merger; isn't that right?

15 A. Yes, and they'd already shown us that they were not
16 abiding by the contract with us.

17 Q. And you believed that the merger of Charter and Time
18 Warner Cable would give the merged firm more leverage in
19 negotiations with HBO?

20 A. Not just more leverage, as I say, they were already not
21 paying us the correct amount of money. So when a larger firm
22 would not pay us the correct amount of money would be a bigger
23 problem.

24 Q. So when you say it's not just leverage, the answer to any
25 question is yes, that was part of --

1 A. Yes, that was part of it.

2 Q. HBO, in order to try to get the negotiations completed,
3 set a deadline of March 15, 2016; isn't that right?

4 A. Yes, at one point we did, yes.

5 Q. And HBO told Charter if the deal wasn't done by then, HBO
6 would go dark, right?

7 A. That is correct.

8 Q. You thought the threat to go dark would give Charter the
9 incentive to reach an agreement?

10 A. We certainly hoped it would bring them to the table
11 because we had tried everything else.

12 Q. And after HBO communicated this to Charter, your
13 distribution department made preparations to go dark on
14 Charter, didn't it?

15 A. Absolutely.

16 Q. Let's look a little bit at the HBO plan for the Charter
17 takedown in February and March of 2016.

18 HBO developed a marketing PR strategy in the event HBO
19 went dark on Charter, didn't it?

20 A. We did.

21 Q. Pursuant to the strategy HBO planned a marketing campaign
22 in Charter's top five DMAs right?

23 A. We didn't actually plan the campaign, we said what
24 campaign would be. It's not like we bought ad space or
25 anything like that.

1 Q. But you planned for it, you strategically decided how to
2 approach the campaign?

3 A. Yeah, we had to have a plan if we were going to do it.

4 Q. And HBO analyzed the video distribution competitors that
5 Charter faced in those areas, right?

6 A. That is correct.

7 Q. And the strategy involved the comprehensive marketing
8 effort to target Charter customers, right?

9 A. That is correct.

10 Q. Part of that campaign provided Charter subscribers with
11 information about Charter's competitors, where those subs could
12 turn to obtain HBO programming?

13 A. That is correct.

14 Q. And part of the marketing campaign contemplated providing
15 incremental marketing funding to Charter's competitors to help
16 those competitors lure subs seeking HBO programming from
17 Charter, right?

18 A. That is correct.

19 Q. And post-merger in the event of a blackout with a
20 distributor like Charter, HBO's marketing campaign could market
21 to that distributor's subs, right? There's nothing preventing
22 it?

23 A. Nothing preventing it.

24 Q. And post-merger such an HBO campaign could direct the
25 distributor's subs to HBO Now, right?

1 A. That is correct.

2 Q. HBO is -- going back to what happened in 2016. HBO
3 developed detailed marketing and advertising creative to use
4 once HBO went dark on Charter, right?

5 A. That is correct.

6 Q. It developed a web page called "Keep my HBO.com?"

7 A. We did.

8 Q. And this landing page had a box to click to switch
9 providers away from Charter, right?

10 A. Yes, I believe so.

11 Q. And HBO's advertising creative developed consumer print
12 ads for newspapers?

13 A. We did.

14 Q. And it developed digital display and social media
15 advertisements?

16 A. We did.

17 Q. These ads had boxes saying act now that links to the Keep
18 My HBO.com landing page, right?

19 A. That is correct.

20 Q. And you developed radio scripts?

21 A. We did.

22 Q. And you developed a story board for a TV advertisement,
23 correct?

24 A. That is correct.

25 Q. HBO -- but HBO did not end up taking down Charter, right?

1 A. Yes, we did not go dark on Charter, that is correct.

2 Q. And that didn't happen because you eventually had a
3 contract with them, right?

4 A. Yes, eventually we negotiated a contract.

5 Q. But you were preparing to do so, weren't you?

6 A. We were preparing to do so.

7 Q. You had the technical ability to go dark on Charter,
8 right?

9 A. We did.

10 Q. You have the technical ability to go dark on any
11 distributor today, right?

12 A. We do.

13 Q. Post-merger, if you're directed by your new AT&T
14 management to take an action regarding price or availability of
15 your product, you'll follow that direction, even if it doesn't
16 maximize HBO's revenue; isn't that right?

17 A. That is correct. I have to do what my boss asks me to.

18 MR. SCHEELE: No further questions, Your Honor.

19 THE COURT: All right, we'll take the luncheon
20 recess. You're a witness under oath in the case now,
21 Mr. Sutton, which means you're not at liberty to discuss your
22 testimony so far or what it might be when you return with
23 anyone, including your own counsel?

24 THE WITNESS: Okay.

25 THE COURT: You can't talk to anybody about it. Stay

1 independent of everyone else. So we're going take a break
2 until 2:30. Be back at 2:30 to continue your examination, all
3 right?

4 THE WITNESS: Okay, thank you, Your Honor.

5 THE COURT: You can step down.

6 (Witness excused.)

7 THE COURT: All right, we'll see counsel at the
8 bench.

9 (Sealed Bench conference.)

10 THE COURT:

11 MR. PETROCELLI:

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13 THE COURT:

14 MR. CONRATH:

15 THE COURT:

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17 MR. CONRATH:

18 MR. PETROCELLI:

19 THE COURT:

20 MR. CONRATH:

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22 MR. PETROCELLI:

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24 THE COURT:

25 MR. CONRATH:

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MR. PETROCELLI :

THE COURT :

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MR. PETROCELLI :

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MR. CONRATH:

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THE COURT:

MR. PETROCELLI:

MR. CONRATH:

MR. PETROCELLI:

MR. CONRATH:

THE COURT:

MR. PETROCELLI:

THE COURT:

MR. PETROCELLI:

THE COURT:

(Open court.)

THE COURT: All right, we'll stand in recess.

(Luncheon recess at 1:06 p.m.)

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CERTIFICATE

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the stenographic notes provided to me by the United States District Court, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

/s/Crystal M. Pilgrim, RPR, FCRR

Date: April 4, 2018