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

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

PLAINTIFF'S OPPOSITION TO
COX'S MOTION FOR JUDGMENT AS A MATTER OF LAW

Cox's motion for judgment as a matter of law (Docket No. 406) is largely a rehash of its unsuccessful motion for summary judgment (Docket No. 143). This is significant because the standard for a Rule 50(a) motion for judgment as a matter of law is the same as that for a Rule 56(c) motion for summary judgment. *Farthing v. City of Shawnee, Kansas*, 39 F.3d 1131, 1140 n.10 (10th Cir. 1994) ("As the Supreme Court made clear in *Anderson,* the standard for deciding whether there is a 'genuine' issue of material fact under Rule 56(c) 'mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a).'") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986));

Pendleton v. Conoco Inc., 23 F.3d 281, 286 (10th Cir.1994) (The standard for a directed verdict is identical to the standard for summary judgment under rule 56).[1]

The main difference between Cox's Rule 56 motion and its Rule 50 motion is that Plaintiff's evidence is now much stronger than it was on summary judgment, making judgment as a matter of law even more of an overreach now than it was then. While Cox raises a handful of new arguments, which Cox apparently did not think enough of to include in its motion for summary judgment, this does not change the fact that Plaintiff has offered more than enough evidence for a reasonable jury to find in his favor.

ARGUMENT

I. PLAINTIFF HAS PRESENTED AMPLE EVIDENCE IN SUPPORT OF EACH ELEMENT OF HIS CLAIM.

Cox argues that Plaintiff "failed to present evidence sufficient to get to a jury on at least three separate elements of [his] claim: (1) coercion, (2) substantial foreclosure of commerce and (3) market power." In reality, Plaintiff has presented documentary evidence and testimony from a number of witnesses that support coercion and market power, and substantial foreclosure is not a required element of Plaintiff's *per se* tying claim (and even if it were, Plaintiff has presented sufficient evidence on this purported element to reach the jury).

[1] Due to the short time available for completing this brief, Plaintiff has omitted the table of contents and table of authorities required by Local Civil Rule 7.1(e). If the Court wishes, Plaintiff is happy to file an amended version that includes the tables.

A. Plaintiff Has Proven Coercion.

Cox argues that the jury could not find that it coerced its subscribers into renting its own set-top boxes ("STBs") in order to get Premium Cable for two reasons. "First, plaintiffs offered no evidence that Cox's conduct forced consumers to lease a set-top box from Cox to get two-way services." (Docket No. 406 at 2.) "Second, where the tied product generally was not available for sale from another firm through no fault of the defendant, there cannot be any coercion as a matter of law." (*Id.*)

When Cox moved for summary judgment, it argued that it was entitled to judgment as a matter of law on the element of coercion. The Court denied summary judgment, stating that "[t]he evidence presented by Plaintiff establishes that access to Defendant's premium cable is conditioned upon rental of a set-top box." (Docket No. 198 at 4.) The evidence Plaintiff presented at trial is even stronger than the evidence submitted to oppose summary judgment, as described below, and Cox's Rule 50 motion adds nothing new to its argument on summary judgment.

Cox told its customers that they could not receive all the benefits of Premium Cable unless they rented an STB from Cox.

A number of Cox's own witnesses testified that in order to access all of the content and services of Cox's Advanced TV (Premium Cable), the customer was required to lease an STB from Cox. 10/13 PM Tr. 59:12-60:9 (Percy Kirk); 10/13 PM Tr. 64:22-65:17 (Percy Kirk); 10/15 AM Tr. 73:22-25 (Steve Necessary); Court Exhibit 1, Deposition of Colleen Langner, 61:3-63:25; Court Exhibit 2, Deposition of Charles Wise, 12:13-13:19. *See also* 10/20 AM Tr. 12:11-13:8 (Justine Hastings). In addition, Plaintiff

introduced Cox documents establishing this fact. *See, e.g.*, Cox's website (PX-032); Cox Video Oklahoma Product Definition (PX-033, p. 13).

Although Cox witnesses attempted to explain that at least some of these services (or their equivalents) were available through third-party STBs equipped with a CableCARD (or in the case of Pay Per View, by calling Cox), this evidence actually supports coercion. Even if this evidence is believed, it shows Cox coerced its customers by misrepresenting the capabilities of non-Cox STBs, specifically by exaggerating their disadvantages. Relatedly, while Cox informed customers in small print annual notices starting in 2009 that it would support Tru2Way when products came to market (*e.g.* DX-64), no such disclosure was provided through means by which customers would actually be likely to obtain information, such as the Cox website or calls with Cox customer service representatives.

The percentage of Cox's customers who did not rent a set-top box was minuscule.

Steve Necessary acknowledged that a "small percentage" of Cox's digital customers actually chose to lease a CableCARD instead of a set-top box from Cox. 10/15 AM Tr. 74:10-13; *see also* 10/13 PM Tr. 67:2-4 (Percy Kirk). Professor Hastings testified that less than one-half of one percent of Cox's digital cable subscribers lease a CableCARD instead of a Cox STB. 10/20 AM Tr. 13:2-8 (Justine Hastings). *See also* Cox's answers to interrogatories (PX-049, pp. 5-7). Evidence of such a high rate of compliance with the tie is by itself sufficient to avoid judgment as a matter of law on the coercion element of a tying claim. *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 915 (9th Cir. 2007) ("The fact that only … about 14% made a separate purchase

may indicate some degree of coercion, placing this issue in the realm of disputed facts that must be tendered to the jury.")

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

Cox's discussion of *Jarrett v. Insight Commc'ns Co.*, 2014 WL 3735193, (W.D. Ky. July 29, 2014) highlights why Plaintiff has offered sufficient evidence of coercion here. In *Jarrett*, the plaintiffs conceded that the third parties chose not to bring set-top boxes to retail. *Id.* at *4. Here, Plaintiff's theory has never been that third parties independently chose not to enter the market; on the contrary, Plaintiff has argued that Cox's tying foreclosed the development of a market. As the Supreme Court recognized in *Jefferson Parrish Hospital*, tying forecloses not only existing competitors but also may "create barriers to entry of *new competitors* in the market for the tied product." 486 U.S.

at 14 (emphasis added). *See also Coniglio v. Highwood Services, Inc.*, 495 F.2d 1286, 1291 (2d Cir. 1974) (no tying claim where there were "neither actual nor *potential* competitors to the Bills in the professional football market" in and around Buffalo, New York) (emphasis added)

Plaintiff's evidence at trial that Cox contributed to the very lack of competitors it now relies on in its coercion argument is stronger than it was when the Court denied summary judgment. To summarize:

Cox intentionally decided not to market CableCARD as an alternative to it STBs

Cox made a conscious decision at the very beginning of the class period to strangle CableCARD, and thus any incipient competition for its own leased STBs, in its cradle. According to a Cox internal document, "[n]o proactive marketing initiatives are planned for the launch of Cox One-Way Digital Plug-and-Play Services." (PX-034, p. 14).

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

Plaintiff presented Cox's internal analysis comparing the financial benefits of continued leasing of set-top boxes with Tru2Way retail market, which concluded that there was no compelling financial reason to push Tru2Way. PX-069. Cox acted accordingly. Plaintiff presented Cox's internal discussions of its resistance to a Tru2way retail market, which demonstrated that Cox sought only grudging "technical compliance" with the Tru2Way requirements it had agreed to – so it could say it had deployed Tru2Way with "straight face" while "holding our nose." PX-052.

Cox raised barriers to TiVo's entry into the market.

Both TiVo and Cox's witnesses testified that TiVo wanted to sell a set-top box at retail that provided access to Cox's two-way services and that the parties entered into an agreement in 2010 to do so. 10/15 PM Tr. 28:6-25 (Steve Necessary); Court Exhibit 9, Deposition Jeff Klugman, 153:5-155:5. Plaintiff presented evidence that this was technologically feasible, and yet there was no such product during the class period. 10/15 PM Tr. 28:10-12 (Steve Necessary); Court Exhibit 9, Deposition Jeff Klugman, 157:6-10 10/15 AM Tr. 29:12-18 (Lawrence Harte). Plaintiff presented testimony from TiVo that the reason no such product existed during the class period was because of an indemnification issue between Cox and Motorola and not any intrinsic technical constraint. Court Exhibit 9, Deposition Jeff Klugman, 157:6-161:8.

Cox shut down the development of a secondary market.

Mr. Kirk testified about Cox's policy to not support STBs purchased by a customer on eBay. 10/14 AM Tr. 28:16-46:13. This policy was set forth in PX-036, an internal Cox email. Thus, there was no possibility of a secondary market for Cox STBs that would have given subscribers an alternative to perpetually renting an STB from Cox.

There is ample evidence of potential competitors with Cox in STBs.

Brian Markwalter testified on behalf of the Consumer Electronics Association that it would like to see a robust two-way set-top box retail market and that consumer electronic companies are interested in manufacturing two-way set-top boxes for retail sale. Court Exhibit 8, Deposition of Brian Markwalter, 78:2-79:2, 98:10-100:4. Similarly, Cox's internal documents indicate that the consumer electronics industry generally

wanted to participate in the retail market for set-top boxes. *See* Tru2Way Friend or Foe (PX-066, p. 4); Navigating the Separable Security and OpenCable Waters! (DX-041, p. 7). And Jeffrey Cove testified via deposition designations for Panasonic that Panasonic wanted to market a two-way television for many years and that Panasonic tried to sell Tru2Way set-top boxes. Court Exhibit 4, Deposition of Jeffrey Cove, 26:8-27:18, 40:11-24.

From this evidence, a jury could reasonably infer that Cox contributed to the lack of a viable market for third-party set-top boxes and that several well-financed consumer electronics companies were poised to enter this market. Thus, the alleged lack of competitors does not excuse Cox's coercion.

B. Separate Evidence of Substantial Foreclosure of Commerce Is Not Required and, Even if It Were, Plaintiff Has Offered Sufficient Evidence on this Issue.

There is no requirement in the Tenth Circuit that a tying plaintiff prove substantial foreclosure of commerce. Rather, under Tenth Circuit law, if Plaintiff proves the first three elements of his claim (Premium Cable and set-top boxes are separate markets, Cox uses Premium Cable to coerce subscribers into leasing a Cox set-top box, and Cox has sufficient market power in the market for Premium Cable to restrain trade), the foreclosure element requires only that the *dollar value* of the affected commerce be "substantial"—nothing more. *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Pubs., Inc.*, 63 F.3d 1540, 1547 (10th Cir. 1995) ("A tie-in constitutes a per se section 1 violation if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in

the tied product market.”). *See also Nobody in Particular Presents, Inc. v. Clear Channel Communications, Inc.*, 311 F. Supp. 2d 1048, 1097 (D. Colo. 2004) (in a per se tying case, “once the defendant is found to have appreciable market power in the tying market, the ability to leverage this power to restrain trade in the tied market is presumed” and the “substantial volume of commerce” element requires only “greater than a *de minimis*” effect). There is no dispute that this element has been proven here.

Even if, contrary to clear Tenth Circuit precedent, the established element of “substantial volume of commerce” is replaced with “substantial foreclosure of commerce,” Plaintiff has proven such foreclosure. As Professor Hastings testified, the value of Cox’s STB revenues equates to the size of the market that was foreclosed from competitors as a result of the tie. 10/20 AM Tr. 23:6 – 24:16 (Justine Hastings). And as set forth above, there were numerous potential competitors ready, willing, and able to enter the STB market to compete for the large volume of commerce that was foreclosed because of Cox’s tie.

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

C. Plaintiff Has Presented Extensive Evidence of Cox’s Market Power.

This Court has already held that Plaintiff has offered enough evidence of market power for this issue to be submitted to the jury. In denying Cox summary judgment on

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

As Plaintiff previously argued in opposing summary judgment, an accepted method of determining market power is to analyze the structure of the relevant market, including the number of competitors, market share of each competitor, concentration, and barriers to entry. *Cohlmia v. St. John Medical* Center, 693 F.3d 1269, 1282 (10th Cir. 2012) ("Power over price and competition may depend on various market characteristics, such as market trends, number and strength of other competitors, and entry barriers.") (internal quotation omitted). The presumptive market share cut-off to establish "sufficient economic power" to support a tying claim is between thirty and forty percent. Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* § 7.6c (3d ed. 2005) (concluding that "the minimum market share" for successful tying claims "hovers in the range of 30-40%"); *see also Col. Interstate Gas Co. v. Natural Gas Pipeline of Am.*, 885 F.2d 683, 694 (10th Cir. 1989) (noting, in a Section 2 monopolization case, that "41% market share typically indicates that a firm has substantial economic power in the market").

Professor Hastings worked within this well-established framework and calculated that Cox's market share for Premium Cable in the Oklahoma City Market during the relevant time period ranged from 72.2% and 58.1%, which are well above the thresholds

described above. She also considered the competitors in that market, market concentration, and barriers to entry. *See* 10/20 AM Tr. 46:2 – 48:8 & 53:23 – 62:14 (Justine Hastings).

Beyond Professor Hastings's testimony, Plaintiffs presented significant evidence from which the jury could find that Cox itself believed it had market power in the relevant product and geographic market. Cox's presentations to its lenders provide evidence of Cox's strong market position. *See* PX-003-007 (Cox noting to lenders "we enjoy a first mover advantage and maintain a strong competitive position in the market.") Finally, other admitted documents show that Cox was undertaking pricing as a dominant firm in the market would. *See, e.g.*, PX-085 ("Pricing in an Oligopoly"). Taken together, these documents provide direct evidence that Cox viewed itself as the dominant player in the tying product market with the power to control the market and the prevailing prices in that market.

There can be no doubt that there is sufficient evidence of Cox's market power to reach the jury. To avoid this obvious conclusion, Cox moves the goalposts and relies (as it did on its motion for summary judgment) on effectively defining the relevant product market as two-way services. But Cox's own expert does not claim that this is the relevant product market and the Court has already held that Cox cannot advance this argument. (Docket No. 370 at 2-3.) And while Cox attempts to evade this ruling by claiming that Plaintiff is somehow required to prove that Cox has market power in just the *part* of the relevant product market that includes two-way services, this argument is nonsensical. Cox has offered no authority for requiring proof of market power in *part* of a relevant

product market and there is no evidence in the record that two-way services even exist as a product that can be purchased from an MVPD such as Cox apart from that provider's linear programming.

II. PLAINTIFF'S EVIDENCE SUPPORTS A *PER SE* INSTRUCTION.

A tying arrangement is unlawful per se if four elements are met: "(1) two separate products, (2) a tie-or conditioning of the sale of one product on the purchase of another, (3) sufficient economic power in the tying product market, and (4) a substantial volume of commerce affected in the tied product market." *Multistate Legal Studies, Inc.,* 63 F.3d at 1546. The first and fourth elements are undisputed here, and Plaintiff has offered enough evidence to prove the remaining two, as set forth above. Therefore, Plaintiff's evidence at trial supports a *per se* instruction.

A. Plaintiff Has Shown a Substantial Potential for Impact on Competition.

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

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

(Docket No. 198 at 4 (quoting *Fox Motors, Inc. v. Mazda Distribs. (Gulf) Inc.*, 806 F.2d 953, 957 (10th Cir. 1986)) (emphasis added). Because Plaintiff has offered enough evidence to support a finding in his favor on each of these elements, as explained above, a reasonable jury could find that a likelihood of exploitation exists. In fact, the case from which Cox takes the phrase "substantial potential for impact on competition," *Jefferson Parish Hospital District No. 2 v. Hyde*, held that "[w]hen the seller's share of the market is high, . . . the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate." 466 U.S. 2, 17 (1984) (citations omitted). Plaintiff's evidence easily meets this standard.

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

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

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

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

15 U.S.C. § 4302. The first time Cox raised the NCRPA as potentially controlling the rule of decision was in a letter sent to the Court and Plaintiff's counsel two days before the docket call, and eight days before the start of trial. (Docket No. 383-1.) Even then,

Cox didn't have its story straight. Cox argued that its own actions should be protected because it is a party to CableLabs, a "standards development organization." (*Id.* at 2.) But Cox either failed to realize or failed to disclose that the NCRPA states that "[t]he term 'standards development organization' shall not, for purposes of this chapter, include the parties participating in the standards development organization." 15 U.S.C. § 4301(a)(8). This was fatal to Cox's argument.

Having hit a brick wall, Cox changed its story in the middle of trial, arguing in its Rule 50 motion that "CableLabs is a joint venture . . . , and Cox has been a member of CableLabs since it was founded in the late 1980s." (Docket No. 406 at 10–11.)[2] The first problem with this argument is that the NCRPA does not apply to anything a joint venture's members might do; it only applies to conduct "in making or performing a contract to carry out a joint venture." 15 U.S.C. § 4302(1). Tying the purchase of Premium Cable to the rental of an STB is not "making or performing a contract to carry out a joint venture," and Cox has not claimed otherwise. Deceiving customers about whether they could access pay-per-view without an STB is not "making or performing a contract to carry out a joint venture," and Cox has not claimed otherwise. Dissuading subscribers from using CableCARD-compatible devices is not "making or performing a

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

contract to carry out a joint venture," and Cox has not claimed otherwise. In fact, Cox has never proffered any "contract to carry out a joint venture" or explained what provision in that contract is relevant to Plaintiff's case. The reason is obvious: this argument was made up on the fly sometime between October 5 and October 21.

Another problem with Cox's argument is that the NRCPA is not a "get out of jail free" card for activities that are otherwise unlawful *per se*. The Senate Report accompanying the National Cooperative Research Act of 1984, Pub. L. No. 98-462, which is the source of the provision on which Cox relies, states that "[t]he rule of reason analysis prescribed in Section [4302] does not affect or alter antitrust analysis of agreements not within the scope of this Act." S. Rep. 98-427, 1984 U.S.C.C.A.N. 3105, 3110; *see also id.* at 3114 ("Section [4302] clarifies existing legal standards solely with respect to joint R&D programs . . . ."). More recently, the Department of Justice and Federal Trade Commission issued guidance stating, "The NCRPA accords rule of reason treatment to certain production collaborations. However, the statute permits per se challenges, in appropriate circumstances, to a variety of activities, including agreements to jointly market the goods or services produced or to limit the participants' independent sale of goods or services produced outside the collaboration." Department of Justice and Federal Trade Commission, Antitrust Guidelines for Collaborations Among Competitors, at 13 n.37 (available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf). The type of tying that Cox has committed was unlawful *per se* for decades before the NCRPA was enacted, and it is unlawful *per se* today.

To shoehorn Plaintiff's claim into the NCRPA, Cox cites isolated instances of the word "problem" in descriptions of CableCARD in opening statements. (Docket No. 406 at 11.) In context, it is clear that each of these references was to the fact that CableCARD is not a reasonable substitute for a set-top box, not to CableCARD's "design parameters," as Cox describes it. (*Id.*) Similarly, Professor Hastings's testimony did not discuss any "design limitations" of CableCARD; she simply stated that CableCARD is not a reasonable substitute for a set-top box. None of this testimony remotely implicates the design of CableCARD. And even if it did, it would not trigger the rule of reason because Plaintiff has not alleged that there was anything unlawful about Cox's participation in that design.

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

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

> A. I also looked at other companies that were offering retail set-top boxes and the things that they did. And Cox didn't do those things.

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

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

III. PLAINTIFF'S EVIDENCE OF DAMAGES IS COMPELLING.

A. A Reasonable Jury Could Easily Infer Causation from Plaintiff's Evidence.

There is ample evidence that Cox's tie caused its subscribers to pay supra-competitive prices to rent STBs from Cox. As Professor Hastings explained, a tie forecloses competition on the merits because it takes customers out of the market for competing goods. 5/19 AM Tr., 19:15 – 20:15. And a market with competition would lead to competitive prices for consumers. 5/20 AM Tr., 16:13-16. As illustrated by Professor Hastings' discussion of the robust market for STBs in Canada, a STB market characterized by no tie leads to an abundance of options for consumers and lower prices (often through a retailer such as Best Buy). 5/19 AM Tr., 25:10 – 26:23 & PX-105. This is consistent with the testimony of Brian Markwalter of the CEA, who testified based on extensive experience with the consumer electronics industry that competition in that industry has led to constant innovation and lower prices for consumers. Court Exhibit 8,

Deposition of Brian Markwalter, 66:5-69:1. The STB market is a notable exception to this general rule: as Professor Hastings has observed, Cox has increased its rental prices for STBs while Cox's acquisition price for such STBs have steadily decreased. 5/21 Am Tr., 29:6 – 30:6 (Justine Hastings).

To be sure, other factors may have contributed to the lack of a competitive market for STBs. But Plaintiff is not required to prove that Cox's conduct was the *sole* cause of harm to consumers. *Law v. Nat'l Collegiate Athletic Ass'n*, 185 F.R.D. 324, 333 (D. Kan. 1999) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9 (1969)). And while Cox claims that it is too small to affect the STB market, the number of its subscribers is similar to the number of subscribers of Canada's largest cable companies, which as set forth above is sufficient to support a competitive STB market. 5/21 PM Tr., 11:20 – 12:4.

Furthermore, Plaintiff's theory of injury is that Cox's tie caused Cox customers to pay supra-competitive prices for STBs by preventing competition in the market for STBs. This is a paradigmatic example of antitrust injury. "The clearest case for antitrust damages is the purchaser who pays too much as a result of an antitrust violation. These overcharges are a classic form of antitrust injury." Herbert Hovenkamp et al, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW, § 6.3b1 PRIVATE DAMAGES ACTIONS UNDER § 4 OF THE CLAYTON ACT (2d ed.) (2014).

Finally, Professor Hastings' damages model is well-supported by precedent, as this Court implicitly found in rejecting Cox's *Daubert* challenge to that model.

Calculating the gross overcharge has been an accepted method of determining damages in antitrust cases since at least *Hanover Shoe, Inc. v. Hanover Shoe Machine Corp.*, 392 U.S. 481, 489, 88 S. Ct. 2224, 2229 (1968). *See also In re Relafen Antitrust Litig.*, 218 F.R.D. 337, 344 (D. Mass. 2003) ("Overcharges, the difference between the actual price and the presumed competitive price multiplied by the quantity purchased, provide what the Supreme Court has long recognized as the principal measure of damages for plaintiffs injured as customers, rather than as competitors.") In tying cases specifically, courts have upheld this same formula. *See, e.g., Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1347 (8th Cir. 1976) (in a tying case, damages are measured as "the amount of the overcharge, or the difference between the price paid for the tied items and the *fair market value* of the tied items at the time of purchase") (emphasis added).

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

Cox's final argument, that Plaintiff has offered no evidence of the "price of the tied and tying package absent the alleged anticompetitive conduct," is cut and pasted from its late-filed request to supplement the jury instructions. (Docket No. 381.) Plaintiff has briefed this issue extensively in his response, which is filed at Docket No. 388 and incorporated here by reference. Out of respect for the Court's time, Plaintiff will briefly summarize his position here.

This Court has already approved Professor Hastings's damages model, which calculates damages based on a competitive price for the tied product. While the "package price test" has been applied in some instances, here it belies economic reality because there is no evidence that Cox reduced the price of Premium Cable to offset its

overcharges for set-top boxes—in fact, this sort of subsidization is unlawful under Section 629 of the Communications Act of 1996. Moreover, the Tenth Circuit has never endorsed the package price test, and many courts have adopted an approach similar to Dr. Hastings's. There is no good reason to apply the package price test here.

Because the package price test should not apply, it does not matter that Professor Hastings never offered an opinion about the competitive price for Premium Cable. The jury can calculate damages from her opinions about the competitive price of set-top boxes.

CONCLUSION

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

DATED: October 23, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2015, I electronically transmitted the attached document to the Court Clerk using the ECF System for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to all ECF registrants.

/s/ Jason Kim