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

IN RE: **COX ENTERPRISES, INC., SET-TOP CABLE TELEVISION BOX ANTITRUST LITIGATION**	
This document relates to: RICHARD HEALY, **Plaintiff,** v. COX COMMUNICATIONS, INC., **Defendant.**	**Case No. 12-ML-2048-C**

COX COMMUNICATIONS, INC.'S REPLY IN SUPPORT OF RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE FOR A NEW TRIAL

Plaintiff's 33-page opposition to Cox's renewed motion for judgment as a matter of law does not respond to the legal arguments that Cox made in its Rule 50(b) motion at all. Instead, plaintiff spends pages and pages debating evidence and pretending that Cox is asking the Court to weigh evidence and the credibility of witnesses.

Cox's Rule 50 motion asks the Court to do no such thing. Cox's motion asks the Court to rule that, as a matter of law, there is no legally sufficient evidentiary basis from which a jury could find for plaintiff.

Plaintiff's opposition is largely based upon two erroneous legal premises that, he says, require the denial of Cox's Rule 50 motion. *First*, plaintiff is wrong that this Court

must decide the Rule 50 motion with reference to the jury instructions that it chose to give. Opp. (Doc. No. 435) at 3. This Court's jury instructions have nothing to do with the Rule 50 analysis.[1] Rule 50 does not ask the Court to decide whether the jury properly decided a question consistent with the manner in which it was instructed; rather, the Court must determine whether there was a sufficient *legal* basis to submit the case to the jury at all. Fed. R. Civ. P. 50. For this reason, it is well-settled that "[w]hen reviewing a post-verdict motion for judgment as a matter of law, . . . jury instructions are not the law of the case." *City of Blaine v. Golder Associates, Inc.*, No. 03-0813, 2006 WL 2882983 (W.D. Wash. Oct. 10, 2006); *cf.* 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 2537 (3d ed.) ("The failure of a party to object to the substance of one or more of the jury instructions does not make them the law of the case so as to preclude the entry of judgment as a matter of law if the evidence is in a posture to make that required by law."); *Geldermann Inc. v. Fin. Mgmt. Consultants, Inc.*, 27 F.3d 307, 313 (7th Cir. 1994) ("[W]here the reviewing court is determining whether a trial court has erred in denying a motion for directed verdict or a j.n.o.v. motion, it is the law which properly applies and not the law that the trial court announces to be appropriate in its jury instructions that governs.").[2]

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[1] The Court's erroneous jury instructions would come into play under Rule 59, if the Court does not grant Cox's motion under Rule 50. But they have nothing to do the with Rule 50 analysis in the first instance.

[2] Plaintiff's authority, *SEC v. Battenberg*, No. 06-14891, 2011 WL 3472619 (E.D. Mich. Aug. 9, 2011) (cited Opp. at 3), does not hold otherwise, nor could it consistent with the Federal Rules. Instead, it states only that the judge in that case believed the law had been appropriately summarized by his jury instructions. The opinion certainly does

Second, plaintiff is wrong that the Court's denial of Cox's motion for summary judgment prevents the Court from granting judgment for Cox under Rule 50 under the law of the case doctrine or otherwise. *E.g.*, Opp. at 2-3, 4, 13, 23. A trial court's denial of summary judgment does not constitute a final decision on that issue; rather, the trial court has simply found enough evidence to raise a fact issue as to whether the elements of the cause of action are present. *Feld v. Feld*, 688 F.3d 779, 782 (D.C. Cir. 2012). It is well settled that a trial court's denial of summary judgment does not preclude a later grant of a Rule 50 motion. *Abel v. Dubberly*, 210 F.3d 1334, 1337-38 (11th Cir. 2000) (holding that the "law of the case" does not bar the district court from granting judgment as a matter of law after having denied summary judgment earlier); *St. Louis Convention & Visitors Comm'n v. Nat'l Football League*, 154 F.3d 851, 860 (8th Cir. 1998) ("The court's prior decision on summary judgment did not control the outcome of the Rule 50 motion."); *Tesh v. U.S. Postal Serv.*, 349 F.3d 1270, 1272 (10th Cir. 2003) (affirming grant of a Rule 50 motion, after denial of a summary judgment motion on same issue); *Peralta v. Dillard*, 520 F. App'x 494, 495 (9th Cir. 2013) (court is free to grant a Rule 50 motion despite the denial of summary judgment earlier in the case); *cf. Unijax, Inc. v. Champion Int'l, Inc.*, 683 F.2d 678 (2d Cir. N.Y. 1982) (affirming grant of judgment as a matter of law in a tying case, despite the jury's return of a verdict for plaintiff, on insufficiency of evidence of coercion).

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not express the view that the judge was without power to revisit the law had he wanted to do so.

Since the premises upon which plaintiff's opposition is based are not true, the sole question presented by Cox's Rule 50 motion is whether the Court, having heard all of the evidence at trial, can conclude that there is no *legally sufficient* evidentiary basis from which a jury could conclude that Cox had violated the antitrust laws. Plaintiff's principal argument is that he has established a *per se* illegal tying arrangement because (he claims) he presented evidence that there were potential sellers capable of selling two-way set-top boxes at retail who did not do so. Opp. at 14-18. Of course, plaintiff presented absolutely no evidence of *causation*, i.e., that Cox controlled the decisions of consumer electronics manufacturers not to sell two-way boxes at retail.

But plaintiff's argument rests on an even more fundamental legal error. The Supreme Court has held that a tie is *per se* unlawful if and only if (1) coercion is probable and (2) the alleged tie actually forecloses "a **substantial** volume of commerce" to other sellers or potential sellers of the tied product. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984) (emphasis added), *abrogated on other grounds by Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). Without sufficient evidence to satisfy both of those elements, plaintiff was not entitled to have his case heard by a jury in the first place.

First, plaintiff failed to present legally cognizable evidence that Cox forced its subscribers to lease set-top boxes that they "might have preferred to purchase elsewhere," *Jefferson Parish*, 466 U.S. at 12, because he did not present evidence that Cox's conduct is the reason that there is no "elsewhere" that its subscribers could go to obtain set-top boxes capable of accessing Cox's two-way services. But relatedly, and independently

dispositive of plaintiff's case, plaintiff did not present any evidence of any *potential* seller of two-way boxes that the alleged tie actually foreclosed from selling at retail in Oklahoma City. Neither plaintiff nor the jury can speculate that there theoretically could have been potential sellers of two-way boxes. Plaintiff had to offer evidence not only that there were in fact real world potential sellers of two-way set-top boxes, but also that Cox's alleged tie actually foreclosed them from selling their devices in Oklahoma City. *Cancall PCS, LLC v. Omnipoint Corp.*, 2001 WL 293981, at *4-5 (S.D.N.Y. Mar. 26, 2001) (no tying violation where there was no other "willing and able seller" of tied product other than defendant). Plaintiff had an unquestionable failure of proof on both pieces of that burden.

Plaintiff's legal argument that an analysis of the tied product market is only necessary in "zero foreclosure" cases is made up out of whole cloth, and is actually an admission that he had the burden to identify actual or potential sellers of two-way boxes at retail that Cox's conduct foreclosed from the market. Plaintiff defines zero foreclosure cases as those in which the tied product is completely unwanted by the buyer, or where there are no possible sellers of the tied product other than the defendant. No case actually so holds; zero foreclosure cases are those in which there are neither actual nor potential sellers of the tied product through no fault of the defendant. Indeed, that is the holding in *Coniglio v. Highwood Servs., Inc.*, 495 F.2d 1286, 1291 (2d Cir. 1974), the case that plaintiff erroneously says supports his invented position that a court should only analyze foreclosure in a tying case if no one other than the seller of the tied product is capable of selling the tied product.

Here is the complete list of potential sellers of two-way set-top boxes identified at trial and in plaintiff's own brief: TiVo, Cisco, Samsung, Panasonic, Pace, Pioneer, Sony, LG and ADB.[3] The undisputed and uncontradicted evidence at trial as to each and every one of these potential sellers was that Cox (much less the alleged tie) had nothing to do with why any of them did not sell two-way boxes at retail during the class period. That means that plaintiff did not prove either probable coercion or substantial foreclosure of commerce—or frankly any impact on competition in set-top box market at all. And it means that Cox is entitled to judgment as a matter of law.

CONCLUSION

Cox respectfully requests that the Court find that plaintiff presented no evidence of probable coercion or substantial foreclosure of commerce as the Supreme Court requires for a *per se* tying claim to get to a jury, and he both disavowed, and did not present evidence of, any claim that Cox's conduct was an unreasonable restraint of trade. Therefore, the Court should enter judgment as a matter of law for Cox or, in the alternative, order a new trial.

DATED: November 9, 2015

Respectfully submitted,

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[3] In his 33-page brief, plaintiff devoted a total of two sentences to eBay. Opp. at 11. This is a tacit acknowledgement that evidence of one customer *outside of Oklahoma City* who bought a box on eBay could never meet plaintiff's burden to prove substantial foreclosure as a matter of law. *Jefferson Parish*, 466 U.S. at 16 (one customer could never be substantial foreclosure).

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CERTIFICATE OF SERVICE

The undersigned certifies that, on November 9, 2015, a true and correct copy of the foregoing Reply In Support Of Renewed Motion For Judgment As A Matter Of Law, Or In The Alternative For A New Trial, was served on all counsel of record by the Court's electronic filing system (CM/ECF).

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