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

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

PLAINTIFF'S MEMORANDUM REGARDING
FEDERAL RULES OF CIVIL PROCEDURE 50(a) AND 50(b)

Plaintiff Richard Healy submits this memorandum of law to support his argument that, having submitted this case to the jury, this Court may not direct judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). As set forth below, the Court effectively denied Defendant Cox Communications, Inc.'s ("Cox") Motion for Judgment as a Matter of Law (Dkt. No. 406) by declining to rule on that motion before the case was submitted to the jury. If the jury renders a verdict in favor of Plaintiff, the proper procedure is for Cox to renew its motion under Fed. R. Civ. Proc. 50(b) and for the Court to consider that motion after Plaintiff has been afforded a reasonable opportunity to respond.

I. The Structure of Rule 50 and the Tenth Circuit's Decision in *Murphy Oil* Do Not Allow the Court to Decide a Rule 50(a) Motion After the Case is Submitted to the Jury.

Rule 50(a) provides that a motion for judgment as a matter of law "may be made at any time before the case is *submitted to the jury*." (Emphasis added.) While this by itself does not resolve when such a motion must be *decided*, read in conjunction with Rule 50(b), it is clear that a Rule 50(a) motion must also be *decided* before the case is submitted to the jury.

Rule 50(b) is titled "*Renewing* the Motion *After Trial*; Alternative Motion for a New Trial." (Emphasis added.) Thus, everything in 50(b) necessarily relates to a renewed motion after trial (*i.e.* after the jury reaches a verdict or the jury is discharged for some other reason such as a mistrial).

The first sentence of Rule 50(b) provides that "[i]f the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have *submitted the action to the jury* subject to the court's later deciding the legal questions raised by the motion." (Emphasis added.) Thus, the action is "submitted" "to the jury" subject only to the court's later decision triggered by a subsequent Rule 50(b) motion, as explained further below. There is no provision for the case to be taken away from the jury once submitted but before the jury has reached a verdict.

The next sentence then explains when and how the court can exercise this reservation to later decide "the legal questions raised by the motion."[1] It provides that

[1] The phrase "legal questions raised by the motion" does not distinguish between issues of law and fact but rather reflects the holding of *Baltimore & Carolina Line v. Redman*,

"[n]o later than 28 days after the entry of judgment … the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59."

Read as a whole, Rule 50 contemplates two separate motions – one under (a) brought and decided before the issue is submitted to the jury and one under (b) brought and decided after the jury returns a verdict or is discharged for some other reason. There is no third alternative where a motion can be decided in the middle of jury deliberations.

Indeed, our research has not disclosed a *single case* where a federal court has discharged a deliberating jury because it granted a pending Rule 50(a) motion.

The Tenth Circuit's decision in *Murphy Oil USA, Inc. v. Wood*, 438 F.3d 1008 (10th Cir. 2006), supports this interpretation of Rule 50(a) and 50(b). That case originated in this Court. There, the plaintiff asserted a waiver defense to the defendant's counterclaim and sought judgment as a matter of law on the basis of this theory. This Court reserved ruling on that motion and submitted the case to the jury, but did not give the jury an instruction on waiver. The jury then returned a verdict in favor of the counterclaimant. Despite this, this Court granted judgment as a matter of law on the counterclaim on the basis of waiver.

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295 U.S. 654 (1935), that a directed verdict does not violate the Seventh Amendment because, at common law, it was an accepted practice for courts to submit a case to the jury subject to the court's later decision on legal issues, including whether the evidence was sufficient to support the eventual verdict. *See* Committee Notes on Rules – 2006 Amendment ("Automatic reservation of the legal questions raised by the motion conforms to the decision in *Baltimore & Carolina Line v. Redman*, 297 U.S. 654 (1935)."") Nothing in *Redman* governs the procedure under the Federal Rules for how such reservation is triggered and the Supreme Court in *Johnson* (discussed below) clarified that such reservation is only triggered by a Rule 50(b) motion.

The Tenth Circuit reversed because, among other things, the judgment as a matter of law on this issue was not granted before the case was submitted to the jury. In doing so, it described the submission of this issue to the jury as this Court "effectively deny[ing] Murphy's JMOL motion."

> Given the district court's decision to submit Trivental's breach of contract counterclaims to the jury (and *effectively deny Murphy's JMOL motion at the time* under Rule 50(b), *supra*), it was incumbent on Murphy to object to the instructions as incomplete (lacking Murphy's affirmative defense of waiver) and to provide a waiver instruction.

Murphy Oil USA, Inc., 438 F.3d at 1014–15 (emphasis added).

The Tenth Circuit's reference to effective denial "under Rule 50(b)" refers to an earlier part of the decision, in which the court explained:

> In response to Trivental's post-judgment motions, Murphy stood on its entitlement to JMOL, and argued that it was entitled to JMOL before the case was submitted to the jury. This argument, however*, ignores the plain language of Fed. R. Civ. P 50(b)*, which provides: "if, for any reason, the court does not grant a motion for judgment as a matter of law … the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion."

Id. at 1013 (omission in original and emphasis added). These passages combined demonstrate unequivocally that the Tenth Circuit has held – as Plaintiff argues here – that a 50(a) motion is effectively denied pursuant to 50(b) when the case is submitted to the jury.

Other courts understand that subsections (a) and (b) require the *court* to *decide* a 50(a) motion before the case is submitted to the jury.

> Rule 50(a) requires that, to be timely, the motion for judgment as a matter of law must be made "before submission of the case to the jury." Fed.R.Civ.P. 50(a)(2). The purpose of this timing requirement is "to give

> the claimant a fair opportunity to cure" any overlooked deficiencies in his proof. *Piesco v. Koch,* 12 F.3d 332, 340 (2d Cir.1993) (internal quotation marks omitted); *see, e.g., Baskin v. Hawley,* 807 F.2d 1120, 1134 (2d Cir.1986); Fed.R.Civ.P. 50 Advisory Committee Note (1991). *That purpose may well be thwarted if the district court does not permit the motion to be argued until the jury has begun deliberations.*

Pittman by Pittman v. Grayson, 149 F.3d 111, 120 (2d Cir. 1998) (emphasis added).

> Rule 50(a) provides that, *prior to submission of a case to a jury, a court* that "finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on [a given] issue," *may enter judgment as a matter of law on that issue*. Rule 50(a)'s language thus permits a party to make a motion for judgment as a matter of law prior to submission of the case to the jury, and Rule 50(b) provides that a party may renew this motion after a verdict. Rule 50 does not permit a party to move for judgment as a matter of law for the first time after a verdict has been entered.

Ramos v. Cnty. of Suffolk, 707 F. Supp. 2d 421, 426 (E.D.N.Y. 2010)(emphasis added).

> Indeed, the time at which the *court decides* a Rule 50 motion for judgment as a matter of law, whether under *Rule 50(a) before the case is sent to the jury*, or under *Rule 50(b) after the jury has returned a verdict (or failed to do so)* makes no difference in the standard used to review the evidence.

Stewart v. Walbridge, Aldinger Co., 882 F. Supp. 1441, 1443 (D. Del. 1995).

As explained below, the difference between a 50(a) motion and a 50(b) motion is more than a technicality. It affects substantial rights of the parties and may have a dispositive effect on appeal.

II. The Supreme Court Has Consistently Emphasized the Importance of a Separate Rule 50(b) Motion Even Where a Rule 50(a) Motion Was Previously Filed

In one of the earliest cases decided by the Supreme Court under Rule 50, *Johnson v. New York, New Haven & Hartford Railroad Co.*, 344 U.S. 48 (1952), the Court held that a Rule 50(a) motion on which a ruling was deferred was not a substitute for a Rule

50(b) motion. In that case, the defendant made a Rule 50(a) motion, which the court deferred ruling on until the jury reached a verdict. The jury found in favor of the plaintiff. The defendant then made a motion to set aside the verdict but did not expressly make a motion for judgment notwithstanding the verdict under 50(b). The appellate court nonetheless entered judgment for the defendant.

The Supreme Court reversed, holding that, in the absence of a separate Rule 50(b) motion, neither the district court nor the appeals court could direct entry of judgment in favor of the defendant. The only relief available was a new trial. This was because the deferred Rule 50(a) motion was not the equivalent of a Rule 50(b) motion:

> Respondent separately argues that a trial judge's express reservation of decision on motion for a directed verdict relieves a party from any duty whatever under 50(b) to make a motion for judgment after verdict. This contention not only flies in the teeth of the rule's unambiguous language but if sustained would undermine safeguards for litigants some of which have been pointed out in prior cases. The rule carefully sets out the steps and procedures to be followed by the parties as a prerequisite to entry of judgments notwithstanding an adverse jury verdict.

Id. at 51. It also explained the relationship between Rules 50(a) and 50(b):

> But Rule 50(b) departed from the New York and Pennsylvania procedures by making it wholly unnecessary for a judge to make an express reservation of his decision on a motion for directed verdict. The rule itself made the reservation automatic. *A court is always 'deemed to have submitted the action to the jury subject to a later determination'* of the right to a direct verdict *if a motion for judgment notwithstanding the verdict is made 'Within 10 days after the reception of a verdict* * * *.' This requirement of a timely application for judgment after verdict is not an idle motion. This verdict solves factual questions against the postverdict movant and thus emphasizes the importance of the legal issues. The movant can also ask for a new trial either for errors of law or on discretionary grounds. The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness. *See Cone v. West Virginia*

> *Pulp & Paper Co., supra,* 330 U.S. at pages 217–218, 67 S.Ct. at pages 755–756.

Id. at 52 (emphasis added).Thus, the Court recognized that the reservation of a Rule 50(a) motion is only made effective upon the timely filing of a Rule 50(b) motion, as explained above. In addition, this case illustrates the danger the Court and parties face here if the Court grants judgment pursuant to Rule 50(a). Failure to file a Rule 50(b) motion may render any directed verdict here invalid and limit the appeals court to ordering a new trial rather than affirming a judgment for Cox.

The Supreme Court again emphasized the importance of renewing a Rule 50(a) motion through a Rule 50(b) motion in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), another case which originated from this Court. There, this Court denied the defendant's motion for a directed verdict under 50(a). The defendant failed to make a motion for judgment as a matter of law under 50(b) or for a new trial after the court found in favor of the plaintiff. The Supreme Court held that, because the defendant had not made a 50(b) motion or a motion for a new trial, the defendant was precluded from seeking a new trial on the basis of insufficient evidence. The fact that the defendant could not seek judgment in its favor was already established by *Johnson* and later cases following *Johnson*.

Wright & Miller also agree that a reserved 50(a) motion is not a substitute for a 50(b) motion:

> Judgment cannot be had as a matter of law, either after verdict or after a *jury disagreement*, in *the absence of a motion for judgment*. The motion must be made *even though the trial court expressly has reserved decision on the motion at the close of the evidence*.

§ 2537 Renewed Motion for Judgment as a Matter of Law—When and How Made, 9B Fed. Prac. & Proc. Civ. § 2537 (3d ed.) (Emphasis added.) This quote is especially appropriate here because it references the need for a separate Rule 50(b) motion after a "jury disagreement" – and such jury disagreement is what at most is present here given that no verdict has been reached yet (although as explained below, there is no indication that the jury is deadlocked or will be unable to reach a verdict within a reasonable amount of time).

Based on these authorities, there can be no doubt that Cox's reserved Rule 50(a) motion would be a nullity after the jury reaches a verdict or is otherwise discharged unless Cox also files a timely Rule 50(b) motion after such verdict or discharge. If the jury had reached a verdict in favor of Plaintiff yesterday, for example, it would be undeniable that Cox would be required to file a Rule 50(b) motion. There is no reason for a different rule when the case has been submitted to the jury where the jury has not yet reached a verdict. Such a rule would lead to arbitrary results, because the issue of whether a separate Rule 50(b) motion is required would depend entirely on the relative timing of the jury's verdict and the court's decision on a pending Rule 50(a) motion.

Furthermore, granting the Rule 50(a) motion without requiring filing of a Rule 50(b) motion would hinder this Court and the appeals court from considering whether a new trial should be granted. This is contrary to subpart (c) of Rule 50, which provides that "[i]f the court grants a *renewed* motion for judgment as a matter of law, it *must* also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed." (Emphasis added.)

Deciding on an alternative motion for a new trial is a critical function for the district court that will aid the appellate court if it were to reverse judgment as a matter of law in favor of Cox. According to Rule 50(c), "[t]he court must state the grounds for conditionally granting or denying the motion for a new trial." As the Supreme Court noted in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947), the trial court is in a unique position to decide whether a new trial should be held because it has the best understanding of the evidence. "Determination of whether a new trial should be granted … calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart."

III. Granting a 50(a) Motion at This Time Would Prejudice Plaintiff, and Failing to Do So Would Not Prejudice Defendants or the Jury

Plaintiff was granted less than 42 hours to prepare his opposition to Cox's motion. Given the time the Court, counsel, and the jury have spent on this matter, the case should not be decided on this basis.

Furthermore, Plaintiff was only allowed to refer to evidence from his case-in-chief. But because the jury heard additional evidence (much of it that supported Plaintiff) during Cox's case before the court ruled on the Rule 50(a) motion, judgment as a matter of law should only be granted upon consideration of *all* the evidence. *See Peterson v. Hager*, 724 F.2d 851 (10th Cir. 1984) ("Even though the court may have erred in denying the initial [Rule 50(a)] motion, this error is cured if subsequent testimony on behalf of the moving party repairs the defects of his opponents case.") (quoting 9 Wright & Miller,

Federal Practice and Procedure: Civil § 2534 (1971)). In his opposition, Plaintiff was not able to address all the evidence the jury eventually heard.

Cox, by comparison, will suffer no prejudice from being required to file a Rule 50(b) motion. It can simply refile the Rule 50(a) motion it already filed.

There will be no prejudice to the jury from deferring a ruling until after it reaches a verdict. The jury has been empaneled for only two weeks and one day. This is substantially fewer days than they were told the trial would last. Furthermore, there is no evidence that the jury is at an impasse or that further deliberations will be excessively lengthy. The jury has only been deliberating for two and a half days – not long given the complexity of the case.

Granting the motion would in fact prejudice the jury. The jury's deliberation time would be wasted and they are likely to be left with a poor impression of their experience as jurors in this case. They may believe that judgment was entered in part because they spent too long deliberating, which may color any future jury service by them.

IV. The Court Should Exercise Its Discretion to Deny the Rule 50(a) Motion for Reasons of Judicial Economy and Instead Consider Cox's Challenges to the Sufficiency of the Evidence Under Rule 50(b)

Rule 50(a) does not *require* any action by the court, regardless of its view of the facts or the law. The Supreme Court made this clear in *Unitherm*: "while a district court is permitted to enter a judgment as a matter of law when it concludes that the evidence is legally insufficient*, it is not required to do so*. To the contrary, the district courts are, if anything, *encouraged to submit the case to the jury, rather than granting such motions*." 546 U.S. at 405 (emphasis added). Indeed, the Court held that failure to grant a Rule

50(a) motion (as opposed to a Rule 50(b) motion) cannot be error, because denial of such a motion is "merely an exercise of the District Court's discretion, in accordance with the text of the Rule and the accepted practice of permitting the jury to make an initial judgment about the sufficiency of the evidence." *Id.* at 406. In this discussion, the Court quoted the following passage from Wright & Miller, which explains the substantial benefits to judicial economy of allowing the jury to reach a verdict:

> Even at the close of all the evidence it may be desirable to refrain from granting a motion for judgment as a matter of law despite the fact that it would be possible for the district court to do so. If judgment as a matter of law is granted and the appellate court holds that the evidence in fact was sufficient to go to the jury, an entire new trial must be had. If, on the other hand, the trial court submits the case to the jury, though it thinks the evidence insufficient, *final determination of the case is expedited greatly*. If the jury agrees with the court's appraisal of the evidence, and returns a verdict for the party who moved for judgment as a matter of law, the case is at an end. *If the jury brings in a different verdict, the trial court can grant a renewed motion for judgment as a matter of law*. Then if the appellate court holds that the trial court was in error in its appraisal of the evidence, it can reverse and order judgment on the verdict of the jury, without any need for a new trial. For this reason the appellate courts repeatedly have said that it usually is desirable to take a verdict, and then pass on the sufficiency of the evidence on a *post-verdict motion*." 9A Federal Practice § 2533, at 319 (footnote omitted).

Unitherm, 546 U.S. at 405–06 (emphasis added).

These benefits apply fully here. But other considerations of judicial economy unique to this situation also favor deferring a ruling (if necessary) until Cox files a Rule 50(b) motion after verdict. The Tenth Circuit may well decide that it was improper for the court to grant a Rule 50(a) motion while the jury is deliberating. If this occurs, the parties and the Court will be compelled to conduct a new trial and, after trial, the entire appellate process will be repeated, this time considering whether Cox is entitled to judgment as a

matter of law under Rule 50(b). This would entail a massive amount of wasted effort by this Court, the appellate court, the parties, and a future jury that would have been avoided by simply allowing the jury a few more days to deliberate.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court: (1) deem Cox's Rule 50(a) motion to have been denied because the case was submitted to the jury; (2) require Cox to file a Rule 50(b) motion if and when the jury enters a verdict in favor of Plaintiff or in the event the jury is discharged before reaching a verdict,; and (3) allow Plaintiff a reasonable opportunity to oppose any Rule 50(b) motion Cox may file.[2]

DATED: October 29, 2015

Respectfully submitted,

/s/ Todd M. Schneider

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[2] Rule 50 was amended in 2009 to allow the moving party 28 days to prepare a motion for post-verdict motion for judgment as a matter of law because "in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days." Similarly, Plaintiff suggests that he be granted at least 28 days to prepare his opposition.

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 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/ Todd M. Schneider