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

IN RE: COX ENTERPRISES, INC., SET-TOP CABLE TELEVISION BOX ANTITRUST LITIGATION	)	
RICHARD HEALY, Plaintiff,	)	
vs.	)	Case No. ML-12-2048-C
COX COMMUNICATIONS, INC., Defendant,	)	

INSTRUCTIONS TO THE JURY

Instruction No. 1

OPENING

Members of the Jury, you have heard the evidence in this case and in a few minutes you will hear the arguments of counsel. It is now the duty of the Court to instruct you as to the law applicable to this case. You will be provided a written copy of these instructions for your use during deliberations.

You are the judges of the facts, the weight of the evidence, and the credibility of the witnesses. The weight of the evidence is not determined by the number of witnesses testifying on either side. In determining weight or credibility, you may consider the interest, if any, that a witness may have in the result of the trial; the relation of the witness to the parties; the bias or prejudice if any has been apparent; the candor, fairness, intelligence and demeanor of the witness; the ability of the witness to remember and relate past occurrences; the

witness's means of observation and the opportunity of knowing the matters about which the witness has testified; the inherent probability or improbability of the testimony; the extent to which the witness has been attacked by introduction of evidence that on a prior occasion the witness made an inconsistent statement; and the extent to which the witness has been supported or contradicted by other credible evidence. From all the facts and circumstances appearing in evidence and coming to your observation during the trial, and aided by the knowledge that you each possess in common with other persons, you will reach your conclusions.

The arguments and statements of the attorneys are not evidence. If you remember the facts differently from the way the attorneys state them, you should base your decision on what you remember.

It is my job to decide what rules of law apply to the case and all the applicable law is contained in these instructions. You must not follow some and ignore others. Even if you disagree or do not

understand the reasons for some of the rules, you are bound to follow them.

Instruction No. 2

CLASS ACTION

This case is what is referred to as a class action. It is a lawsuit brought by a group, or Class, rather than a single individual. The Court has made a determination that it would be more efficient for the claims made by the Class to be decided in a single lawsuit rather than many different lawsuits. The named Plaintiff, Richard Healy, is the class representative. In these instructions you will hear me refer to Plaintiff or he or his. You are instructed that these terms refer to the claims of the class as a whole, not just Mr. Healy. In the event you find Plaintiff has proved his claim and you decide to award damages, you are instructed that those damages will be apportioned among the members of the class and not distributed solely to Mr. Healy.

You are also instructed that the time period for the class is 2005 through 2012. I will refer to this time frame in these instructions as the

class period. Your consideration of the facts should be limited to actions relevant to Plaintiff during that time period.

Instruction No. 3

BURDEN OF PROOF

The burden is upon the Plaintiff in a civil action such as this to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of Plaintiff's claim by a preponderance of the evidence, the jury should find for Defendant.

To "establish by preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who

may have called them, and all exhibits received into evidence, regardless of who may have produced them.

Instruction No. 4

OPINION EVIDENCE - EXPERT WITNESS

Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matters in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

Instruction No. 5

CORPORATE PARTIES

The corporate party in this case is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

Corporations can act only through their officers and employees. Any act or omission of an officer or employee while acting within the scope of his or her employment is the act or omission of that corporation.

Instruction No. 6

TRIAL TRANSCRIPT

You have heard reference to the daily transcript made of the testimony in this case. You will not be provided a copy of this transcript but should instead rely on your memory of the testimony.

Instruction No. 7

DEMONSTRATIVE AIDS AND EXHIBITS

Many demonstrative aids that have been shown to you during the trial have not been admitted into evidence as exhibits. A "demonstrative aid" is prepared prior to trial, in order to avoid in-trial delays, and usually consists of a chart, graph, or drawing which illustrates the witness's testimony. Because the evidence is the witness's testimony, rather than the visual illustration, you must rely and refer to the testimony, not the demonstrative aid. These will not be available to you during deliberations, although all admitted exhibits will.

Instruction No. 8

DEMONSTRATIVE AIDS AND EXHIBITS

The charts labeled PX-184. 185, 186 and 187 are being provided to you for the sole purpose of memorializing what Dr. Hastings' damages calculations are on a month-by-month basis.

Instruction No. 9

CLAIMS

Plaintiff seeks relief for claims made pursuant to state and federal law. The federal law is Section 1 of the Sherman Act. The state law is Section 203 of Oklahoma's Antitrust Reform Act. The elements of a claim under the Oklahoma Antitrust Reform Act are the same as those under the Sherman Act. Thus, if you determine that Plaintiff has established each and every element of his Sherman Act claim against Defendant, you should also find that he has established a violation of the Oklahoma Antitrust Reform Act. Likewise, if you find in favor of Defendant on the Sherman Act claim, you must also find for Defendant on the Oklahoma law claim.

Plaintiff contends that Defendant took advantage of its market power in Oklahoma City in a product called "Premium Cable" to force or coerce Defendant's subscribers to lease a set-top box from Defendant, and that, in doing so, competition in the retail market for

set-top boxes was harmed. This alleged connection of two separate products is known in antitrust law as tying. Defendant denies it improperly tied the two products. Specifically, Defendant denies it forced or coerced any subscriber to lease a set-top box.

There are several elements for each claim. I will first read you the elements and then I will separately instruct you as to the meaning of each element.

Instruction No. 10

TYING DEFINED AND ELEMENTS

A tying arrangement is one in which the seller will sell one product (referred to as the "tying" product) only on the condition that buyers also purchase a different product (referred to as the "tied" product). Tying arrangements are unlawful if they preclude competitors from competing with the defendant to sell products in the tied product market on the basis of the seller's power in the tying product market.

In this case, Plaintiff alleges that the tying product is "Premium Cable" and that the tied product is a set-top box. To prevail on their tying claim, Plaintiff must prove each of the following elements by a preponderance of the evidence:

First: That "Premium Cable" and set-top boxes are separate and distinct products;

You are instructed to find that Plaintiff has established the First element.

Second: That, Defendant has sold "Premium Cable" in Oklahoma City only on the condition that Plaintiff also lease a set-top box from Defendant or Defendant coerced Plaintiff into leasing a set-top box;

Third: That "Premium Cable" is a relevant product market and, if so, that Defendant has had sufficient market power in Oklahoma City in the market for "Premium Cable" to enable it to restrain trade in the market for set-top boxes;

Fourth: That the alleged tying arrangement has foreclosed a substantial volume of commerce in Oklahoma City to other sellers or potential sellers of set-top boxes in the market for set-top boxes;

Fifth: That Plaintiff was injured in his business or property because of the alleged tying arrangement.

If you find that the evidence is sufficient to prove all five of these elements, then you must find for Plaintiff and against Defendant on Plaintiff's tying claim. If you find that the evidence is insufficient to prove any one of these elements, then you must find for Defendant and against Plaintiff on Plaintiff's tying claim.

Instruction No. 11

TYING PRODUCT DEFINED

Plaintiff alleges that the tying product is "Premium Cable." Throughout this case you have heard a portion of this tying product referred to as "interactive services" or "two-way services." These are services that require communication between a device and the provider of the services. The two-way services at issue in this case are Video on Demand, Interactive Program Guide and Pay-Per-View services. Both Plaintiff and Defendant agree that there are other aspects of "Premium Cable", that are one way services such as the ability to watch live TV on cable channels, and premium channels like HBO, Showtime and ESPN.

Instruction No. 12

COERCION - DEFINED

Coercion provides the essential characteristic of an unlawful tying arrangement. It exists where the seller exploits its control over the tying product to force or compel the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. Coercion is measured by objective evidence, not whether each individual class member subjectively believed he or she was coerced.

Instruction No. 13

NO DUTY TO SELL BOXES

The forcing aspect of a tie has to come from the seller's power over the tying product or there is no antitrust violation. Moreover, a company has no obligation to sell any particular product at all, much less in a particular way. Thus, the specific terms of sale for the tied product are not relevant to the coercion question, as the question is whether, not how, Plaintiff was forced or coerced to purchase from Defendant.

This means that Defendant's decision to offer set-top boxes for rental rather than for sale is irrelevant to the issue of coercion, and you may not find that Plaintiff has satisfied his obligation merely because Defendant chose to offer boxes for lease and not for sale.

Instruction No. 14

NO DUTY TO SUPPORT THIRD PARTIES

A company's failure to support or promote another company's product is not coercion. A company is under no legal obligation to assist other companies in entering or creating a market for a product, and a company does not violate the antitrust laws by failing to aid third parties. However, if you find that Defendant's conduct hindered the development of a market, you may consider this evidence of coercion.

Instruction No. 15

MARKET POWER

The third element Plaintiff must prove, by a preponderance of the evidence, is that Defendant has sufficient power in the market for "Premium Cable" to enable it to restrain trade in the market for set-top boxes. This is known as market power.

Before you can determine if Defendant had Market Power, Plaintiff must establish by a preponderance of evidence the "relevant market", and that "Premium Cable" constitutes a relevant product market. Relevant market is comprised of two components: "relevant product market" and "relevant geographic market." The next two instructions will explain these terms.

Instruction No. 16

RELEVANT PRODUCT MARKET

The "relevant product market" includes the specific product at issue, along with any other products that, though not necessarily identical, are reasonable substitutes from a buyer's point of view. In other words, the relevant market includes those products that compete meaningfully with each other. This is a practical test with reference to actual behavior of buyers and marketing efforts of sellers. Products need not be identical or precisely interchangeable as long as they are reasonable substitutes. The basic question is whether two products can be used for the same purpose and, if so, whether and to what extent purchasers are willing to substitute one product for the other.

In evaluating whether various products are reasonable substitutes for each other, you may also consider: (1) consumers' views on whether the products are interchangeable; (2) the relationship between the price of one product and sales of another; (3) the presence or

absence of specialized vendors; (4) the perceptions of either industry or the public as to whether the products are in separate markets; (5) the views of plaintiff and defendant regarding who their respective competitors are; and (6) the existence or absence of different customer groups or distribution channels.

Instruction No. 17

RELEVANT GEOGRAPHIC MARKET

The relevant geographic market is the area in which Defendant faces competition from other companies and to which customers can reasonably turn for purchases. Plaintiff contends that Defendant's Oklahoma City subsystem is the "relevant geographic market." In analyzing whether Defendant's Oklahoma City subsystem is the relevant geographic market for Premium Cable, you may consider whether Defendant itself considered the Oklahoma City subsystem to be a single market for purposes of competition, and whether customers in the Oklahoma City subsystem could reasonably turn to other providers for Premium Cable.

Instruction No. 16

EXISTENCE OF MARKET POWER

If you find that "Premium Cable" is a relevant product market, you must also find that, during the class period, Defendant has had sufficient market power in Oklahoma City in "Premium Cable" to enable it to restrain trade in the market for set-top boxes.

Market power is the power to force or coerce a purchaser to do something that it would not do in a competitive market. It is ordinarily found where a single seller has the ability to raise price or reduce output without fear that it will lose an appreciable amount of customers in that market.

You may find that Defendant has sufficient market power in Oklahoma City in the relevant market for "Premium Cable" if, by reason of some advantage, Defendant has the power to raise its price for "Premium Cable" without losing an appreciable amount of its business or otherwise to force or coerce a purchaser of "Premium

Cable" to do something that the purchaser would not do in a more competitive market.

In determining whether Defendant has sufficient market power in Oklahoma City in a relevant market for "Premium Cable", you should consider:

> whether purchasers have alternative sources of "Premium Cable" or a reasonably interchangeable substitute readily available;
>
> Defendant's share of the relevant market. If Defendant's market share of the market for "Premium Cable" is below 30 percent, Defendant does not have market power. But if Defendant's market share of the market for "Premium Cable" is above 30 percent, you may consider its market share in determining whether it has sufficient market power. If Defendant's market share is above 30 percent, you must then consider whether that is an indicator of its power to raise prices without loss of appreciable business;
>
> all relevant market conditions, including the uniqueness of the product, the ability of existing competitors to expand production, and the ease (or difficulty) with which new competitors can enter the market and make a price increase unprofitable; or
>
> the presence of any unique features or costs associated with "Premium Cable" that effectively prevent others from

offering a comparable product or facilitate customers' ability to switch to alternative service providers.

This list is not exhaustive and no one factor is dispositve, rather these are simply factors for your consideration.

Instruction No. 19

FORECLOSURE OF COMMERCE

The fourth element that Plaintiff must prove is whether, during the class period, Defendant has foreclosed a substantial amount of commerce to other sellers or potential sellers of set-top boxes in the market for set-top boxes. This occurs when the tying of two products either prevents competitors from selling the tied product or limits the choice available to consumers in the purchase of the tied product.

In determining whether Defendant has foreclosed a substantial amount of commerce in the relevant market for set-top boxes, you should first consider the total dollar amount of Defendant's leases of set-top boxes in Oklahoma City achieved by the tying arrangement in absolute terms. If the dollar amount of Defendant's leases of set-top boxes was substantial, then you should find that Defendant has foreclosed a substantial amount of commerce.

Instruction No. 20

INJURY AND CAUSATION

If you find that Defendant has violated the Sherman Act as alleged by Plaintiff, then you must decide if that violation caused Plaintiff injury. There are three elements of injury and causation:

First: That Plaintiff was in fact injured as a result of Defendant's alleged violation of the antitrust laws;

Second: That Defendant's alleged illegal conduct was a material cause of Plaintiff's injury; and

Third: That Plaintiff's injury is an injury of the type that the antitrust laws were intended to prevent.

The first element is sometimes referred to as "injury in fact" or "fact of damage." Proving the fact of damage does not require Plaintiff to prove the dollar value of his injury. It requires only that Plaintiff prove that Defendant's tying arrangement actually injured him. If you find that Plaintiff has established that he was in fact injured, you may then consider the amount of Plaintiff's damages. It is important to understand, however, that injury and amount of damage are different

concepts and that you cannot consider the amount of damage unless and until you have concluded that Plaintiff has established that he was in fact injured.

Plaintiff must also offer evidence that establishes as a matter of fact and with a fair degree of certainty that Defendant's conduct was a material cause of his injury. This means that Plaintiff must prove that some damage occurred to him as a result of Defendant's alleged antitrust violation, and not some other cause. Plaintiff is not required to prove that Defendant's alleged antitrust violation was the sole cause of his injury; nor need Plaintiff eliminate all other possible causes of injury. It is enough if Plaintiff has proven that the alleged antitrust violation was a material cause of his injury. However, if you find that Plaintiff's injury was caused primarily by something other than the alleged antitrust violation, then you must find that Plaintiff has failed to prove that he is entitled to recover damages from Defendant.

Finally, Plaintiff must establish that his injury is the type of injury that the antitrust laws were intended to prevent. This is sometimes referred to as "antitrust injury." If Plaintiff's injuries were caused by a reduction in competition, acts that would lead to a reduction in competition, or acts that would otherwise harm consumers, then Plaintiff's injuries are antitrust injuries.

If Plaintiff can establish that he was in fact injured by Defendant's conduct, that Defendant's conduct was a material cause of Plaintiff's injury, and that Plaintiff's injury was the type that the antitrust laws were intended to prevent, then Plaintiff is entitled to recover damages for the injury to his business or property.

Instruction No. 21

DAMAGES - INTRODUCTION AND PURPOSE

I am now going to instruct you on the issue of damages. The fact that I am giving you instructions concerning the issue of Plaintiff's damages does not mean that I believe Plaintiff should, or should not, prevail in this case.

If, for any reason, you reach a verdict for Defendant on the issue of liability, you should not consider the issue of damages, and you may disregard the damages instructions that I am about to give.

Instructions as to the measure of damages are given for your guidance in the event you should find in favor of Plaintiff based on a preponderance of the evidence in accordance with the other instructions I have given you. You should only consider calculating damages if you first find that Defendant violated the antitrust laws and that this violation caused injury to Plaintiff.

If you find that Defendant violated the antitrust laws and that this violation caused injury to Plaintiff, then you must determine the amount of damages, if any, the Plaintiff class is entitled to recover. The law provides that the Plaintiff class should be fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct that you have found to be unlawful.

The purpose of awarding damages in an antitrust action is to put an injured plaintiff near as possible in the position in which it would have been if the alleged antitrust violation had not occurred. The law does not permit you to award damages to punish a wrongdoer-what we sometimes refer to as punitive damages-or to deter Defendant from particular conduct in the future, or to provide a windfall to someone who has been the victim of an antitrust violation. You are also not permitted to award to Plaintiff an amount for attorneys' fees or the costs of maintaining this lawsuit. Antitrust damages are compensatory only. In other words, they are designed to compensate the Plaintiff

class for the particular injuries it suffered as a result of the alleged violation of the law.

Instruction No. 22

DAMAGES - SPECULATION NOT PERMITTED

Damages may not be based on guesswork or speculation. If you find that a damages calculation cannot be based on evidence and reasonable inferences, and instead can only be reached through guesswork or speculation, then you may not award damages. If the amount of damages attributable to an antitrust violation cannot be separated from the amount of harm caused by factors other than the antitrust violation except through guesswork or speculation, then you may not award damages.

You are permitted to make reasonable estimates in calculating damages. It may be difficult for you to determine the precise amount of damage suffered by the Plaintiff class. If Plaintiff establishes with reasonable probability the existence of an injury proximately caused by Defendant's antitrust violation, you are permitted to make a just and reasonable estimate of the damages. So long as there is a reasonable

basis in the evidence for a damages award, the Plaintiff class should not be denied a right to be fairly compensated just because damages cannot be determined with absolute mathematical certainty. The amount of damages must, however, be based on reasonable, non-speculative assumptions and estimates. Plaintiff must prove the reasonableness of each of the assumptions upon which the damages calculation is based. If you find that Plaintiff has failed to carry his burden of providing a reasonable basis for determining damages, then your verdict must be for Defendant. If you find that Plaintiff has provided a reasonable basis for determining damages, then you may award damages to the Plaintiff class based on a just and reasonable estimate supported by the evidence.

Instruction No. 23

CLOSING

After you retire to the jury room to deliberate, you should elect one person as your presiding juror. That person will preside over your deliberations and speak for you with the Court.

After you have elected your presiding juror, you may then begin your deliberations. You will then discuss the case with your fellow jurors to reach agreement, if you can do so. Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors. Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. However, nothing that I have said or done is intended to suggest what your verdict should

be -- that is entirely for you to decide. You must not use any method of chance in arriving at your verdict, nor let sympathy or prejudice affect the outcome.

A verdict form will be sent to the jury room with you, along with these written instructions of the Court and the exhibits admitted into evidence during the trial. I suggest you study the verdict form early in your deliberations so you know what you must decide. The verdict must be unanimous; that is, all of you must agree on a verdict, and when you do, the presiding juror will sign the verdict. Notify the bailiff when you have arrived at a verdict so that you may return it to open court.

No member of the jury should ever attempt to communicate with me except by a signed writing. If it becomes necessary during your deliberation to communicate with me, you may send a note through the bailiff, signed by your presiding juror. In the message do not tell me how you stand on your verdict.

You will note from the oath about to be taken by the bailiff that the bailiff, too, as well as other persons, is forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

In a few moments, you will go with the bailiff to the jury room to begin your deliberations. If any of you have cellular phones or similar devices with you, you are instructed to be sure that they are turned off and then to turn them over to the bailiff as you enter the jury room. They will be held by the bailiff for you and returned to you after your deliberations are completed and during any lunch break or similar period when you are not deliberating. The purpose of this requirement is to avoid any interruption or distraction during your deliberations and to avoid any question of outside contact with the jury during your deliberations.

Robin J. Cauthron 10/26/15

ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE