Nos. 15-6218 & 15-6222

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD HEALY,
Plaintiff/Appellant
vs.
COX COMMUNICATIONS, INC.,
Defendant/Appellee

ON APPEAL FROM THE ORDER GRANTING
DEFENDANT'S RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Case No. 5:12-ML-2048-C
The Honorable Robin J. Cauthron, United States District Judge

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THIRD BRIEF OF PLAINTIFF/APPELLANT ON CROSS APPEAL

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INTRODUCTION

Plaintiff/Appellant Richard Healy ("Plaintiff") proved every element of a claim for per se tying under applicable Supreme Court and Tenth Circuit precedents. As discussed below and in Plaintiff's Opening Brief, the jury specifically found that Defendant/Appellee Cox Communications, Inc. ("Cox") (1) offered two separate products for sale – Premium Cable and set top boxes (STBs); (2) conditioned the sale of Premium Cable (the tying product) on the lease of STBs (the tied product) from Cox; (3) had market power in the Premium Cable market in Oklahoma City; and (4) imposed a tying arrangement that impacted a substantial volume of commerce in the market for STBs. *See, e.g.*, *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof. Publ's*, 63 F.3d 1540, 1546 (10th Cir. 1995); *see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 10-17 (1984) ("*Jefferson Parish Hosp.*"). The jury instructions and verdict form tracked these black-letter elements of a claim for per se tying. (JA III: 573-612, Doc. 422; JA III: 613-14, Doc. 423.)

The Supreme Court, Tenth Circuit, and leading authorities on antitrust law have long recognized that where, as here, a company has a high degree of market power and ties two products together, and the tying arrangement impacts a substantial volume of commerce, the result is a restraint on competition and a per se violation of the Sherman Act. *Id.* Courts have held that such tying arrangements are highly likely to restrain competition without the need for detailed inquiry into market conditions because such a tie deters potential competitors from trying to enter a market. Potential competitors know that consumers are already buying the tied product from the company that has imposed the tying arrangement, and they are rightly concerned that it will be difficult (if not impossible) for them to compete for market share under those conditions. Indeed, courts (including the district court here) have recognized that such tying arrangements may be so powerful in deterring or hindering competition that no other potential competitors are willing to even try to enter the market at issue. *See, e.g.*, *Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia*, 815 F.2d 1407, 1417-18 (11th Cir. 1987); *In re Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litig.*, No. 12-MDL-2048-C, 2014 WL 2993788, *2 (W.D. Okla. July 3, 2014) (JA I: 165, Doc. 198); Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 1723d at 318-19 (3d ed. 2011) ("Areeda, *Antitrust Law*").

For these reasons, where as here the plaintiff has proven that a company with market power has imposed a tying arrangement that affects a large volume of commerce, a restraint of competition has been established within the meaning of the Sherman Act. Because the harm to competition has already been shown, the plaintiff is not required to make a further showing that particular competitors have been excluded from the market. Pl.'s Opening Br. 34-38.

The crux of Plaintiff's appeal is that, contrary to this governing law, the district court overturned the jury's verdict and entered judgment in favor of Cox because of Plaintiff's alleged failure to present evidence that specific competitors had been excluded from the market because of Cox's tying arrangement. *In re Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation*, No. 12-ML-2048-C, 2015 WL 7076418, at **1-2 (W.D. Okla. Nov. 12, 2015) (JA III: 675-79, Doc. 438.) The district court was unable to cite any authority for this novel requirement. *Id.* Likewise, Cox's brief also contains no authority for the proposition that the plaintiff in a per se tying claim is required to prove that particular competitors were excluded from the market as a direct result of the defendant's actions.

Cox's cross-appeal seeks to compound this error by requiring Plaintiff to meet a myriad of additional purported elements of proof for a per se tying claim, including proof that: (1) Cox prevented its customers from purchasing STBs from competitors and/or prevented its competitors from selling STBs; (2) Cox's tie had a specific anticompetitive impact on the tied product market; (3) Cox had no business justification for the tie; (4) the alleged antitrust injury mirrors exactly what the tied product market would have looked like absent the tie; (5) there was a particular relevant geographic market for the tied product; and (6) the combined price that Cox charged for Premium Cable and the STB exceeded what such combined price would be absent the tie. As set forth below, these requirements are contrary to the nature of a per se tying claim and not supported by precedent.

After considering all of the evidence that was proffered by both sides at trial and deliberating for three days, the jury concluded that Plaintiff had established every element of a claim for per se tying under applicable law. The jury was properly instructed on those elements. Accordingly, the judgment must be reversed, and judgment should be entered in favor of Plaintiff and the class in accordance with the jury's verdict.

To allow Cox and other cable providers to tie their products without consequence would contravene not only black-letter law but also public policy. Congress has recognized since the 1996 Telecommunications Act that consumers should have a choice to obtain equipment to access their cable services from someone other than their cable provider. 47 U.S.C. § 549. This is because such a choice would lead to competition and "competition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality." (JA XXXVI: 4912, PX-13, *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Third Further Notice of Proposed Rulemaking, CS Docket No. 97-80 (June 29, 2007), *quoting* H.R. Rep. No. 104-204, at 112 (1995).)

Because of the failure of Section 304 thus far to encourage competition in STBs, a failure thrown into high relief by the facts of this case, the Federal Communications Commission ("FCC") has recently renewed this call for competition. *In the Matter of Expanding Consumers' Video Navigation Choices: Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, CS Docket No. 97-80 (Feb. 18, 2016). In supporting the FCC's proposal, a statement from the Administration succinctly summarizes the issues at stake in this appeal:

> Until the early 1980s, the phone company had a monopoly – not just on the wire to your house but, in many cases, on the phone you plugged into that wire.
>
> And the result wasn't pretty.
>
> Phones had little variety … and only the most basic functionality. Worse still, households had to pay a fee each month to rent these phones that added up over time to many multiples of what they would have paid to purchase a similar (or fancier) phone themselves.
>
> ….
>
> A similar dynamic has taken hold elsewhere in American homes today: According to a recent study, 99 percent of all cable subscribers *lease* a set-top box to get their cable and satellite programming.
>
> It sits in the middle of our living rooms, and most of us don't think twice about it. But that same study found that the average household pays $231 per year to *rent* these often clunky boxes. And, while the cost of making these boxes are going down, their price to consumers has been rising.

> Like the telephones in 1980s, that's a symptom of a market that is cordoned off from competition. And that's got to change.

Jason Furman & Jeffrey Zients, *Thinking Outside the Cable Box: How More Competition Gets You a Better Deal*, White House Press Office (Apr. 15, 2016), *available at* https://www.whitehouse.gov/blog/2016/04/15/ending-rotary-rental-phones-thinking-outside-cable-box (last visited May 21, 2016).

RESPONSE TO DEFENDANT / APPELLEE'S STATEMENT OF FACTS

Cox's statement of facts omits critical facts about its conduct in creating, maintaining, and enforcing the anticompetitive tie the jury found in this case while at the same time highlighting extraneous and irrelevant facts. As such, this statement of facts falls far short of demonstrating that "the proof is all one way or so overwhelmingly in favor of the movant so as to permit no other rationale conclusion." *Crumpacker v. Kansas Dept. of Human Resources*, 474 F.3d 747, 751 (10th Cir. 1995).

First, although Cox claims that "Premium Cable" was purely an invention of Plaintiff that has no connection to reality, the term was clearly defined by the Court in the jury instructions:

> 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.

(JA III: 590, Doc. 422.) As Cox does not dispute, although it did not use the term "Premium Cable," it used synonymous terms such as digital cable and "Advanced TV." Steve Necessary, Cox's Vice President of Video Development & Management, confirmed that he understood that Plaintiff was using the terms digital cable and "Premium Cable" interchangeably. (JA XXX, Tr. 72:5-8 & 73:8-13.)

In any event, whether Cox used the precise term "Premium Cable" is irrelevant. As set forth below, what Plaintiff defined as "Premium Cable" is a valid tying product market definition under antitrust law. *See infra* 24-28. And Cox did not offer any alternative definition of the relevant tying product market and certainly never offered evidence from its expert that the relevant product market is only two-way services, as it now claims. *Id.*

Cox also misstates the record as to the practical availability of two-way services to Cox Premium Cable subscribers who do not rent an STB from Cox. Although Cox makes some pay-per-view ("PPV") programming available over the telephone, Cox made a deliberate decision not to publicize this fact to its customers. (JA XXXIX: 5177, PX-39.) ("We aren't planning any announcements or marketing around the new policy, but essentially customers with a tuning adopter in your market should be allowed to purchase PPV Events and Sports Packages."). And on its website and in its guidance to sales representatives, Cox emphasizes that PPV is *not* available without renting an STB from Cox. (JA XXXVI: 4952, PX-32.) ("In order to receive interactive TV services offered by Cox, such as the interactive programming guide (IPG), OnDEMAND, Pay-Per-View, and all digital programming options, you *must rent* a digital receiver.") (emphasis added); (JA XXXVII: 4971, PX-33) ("Cox Digital One-Way Plug & Play customers will not have access to the following services: Digital PPV (including movies, events and sports packages), Entertainment on Demand, [and] Interactive Program Guide.").

Similarly, with respect to Cox's interactive programming guide ("IPG"), Cox's representations to this Court are contrary to its representations to its subscribers. The website and guidance to sales representatives inform Cox subscribers that the IPG is simply not available without renting an STB from Cox. (JA XXXVI: 4952, PX-32 & JA XXXVII: 4971, PX-33.) There is no reference in these materials to the fact that an equivalent interactive programming guide may be available from other sources.

Cox also fails to address the evidence in the record that it imposed other barriers to the use of any alternative to a leased STB from Cox, such as delaying the launch of new channels to CableCARD customers and imposing installation fees on CableCARD customers that were not imposed on STB customers. (JA XXXIX: 5183, PX-42 ("[W]e are mandated by corporate to not launch new HD channels to cable card customers") and JA XXVII: 4031, CX-2, Wise Depo., 20:7-15.)

To be sure, there is no dispute that Cox Premium Subscribers could access a variety of linear channels without renting an STB from Cox. But this is far from dispositive in light of Mr. Necessary's testimony that all Premium Cable subscribers pay extra for the level of service that includes two-way functionality for which an STB is necessary and his admission that they should be able to access what they are paying for. (JA LI: 6414-15, Tr. 71:24-72:23.) Whether these two-way services are significant enough such that their deprivation constitutes coercion is a purely factual issue on which both the jury and the district court found in favor of Plaintiff. *See infra* 17-20.

Cox also attempts to make much of its conduct in supporting tru2way and purportedly assisting manufacturers to develop Cox-compatible two-way devices. Cox's expenditures on tru2way, however, were largely motivated by reasons besides remedying its tie, such as allowing Cox to avoid further regulation by the FCC and to standardize STBs across its markets. (JA LII: 6621, Tr. 56:7-25 & JA LI: 6536, Tr. 81:7-16 (Necessary).) The bottom line is that Cox "supported" tru2way with a "straight face" while "holding our nose" because it concluded that there was no "compelling financial reason to push tru2way." (JA XL: 5231, PX-52 & JA XLI: 5325, PX-69.)

With respect to Cox's efforts with TiVo, there was no technical constraint to allowing a TiVo STB to access Cox's two-way services. In fact, Cox and TiVo expected a product allowing such access would be available shortly after announcing their agreement to the FCC in 2010 (JA LI: 6484, Tr. 29:12-21 (Necessary).) Nonetheless the product was not available until the eve of trial some five years later, long after the relevant time period. (JA L: 6243, Tr. 61:5-24 (Kirk).) In the interim, as set forth below, over ninety-nine percent of Cox Premium Cable subscribers continued to lease STBs from Cox, many at supracompetitive prices, resulting in millions of dollars in revenue to Cox. The jury was entitled to conclude that Cox delayed the implementation of TiVo's devices on its system.

Similarly, with respect to Cox's efforts to suppress a secondary market in STBs, as Cox does not dispute, there was no evidence that the STB at issue had been stolen. (JA LVI: 7463, Tr. 50:9-12 (Prince).) And while Cox claims that this incident affected only one Tulsa customer, Cox omits the fact that the incident led to a call involving several Cox personnel that resulted in what was in effect a general policy against supporting STBs obtained from the secondary market. (*Id.* at 7461, Tr. 48:2-10.)

Given all these facts, in addition to those in Plaintiff's statement of facts in his Opening Brief, it is no surprise that almost all Cox Premium Cable subscribers in the Oklahoma City market complied with the tie. Although Cox seeks to exaggerate the number of subscribers who resisted the tie by citing the raw numbers of CableCARD subscribers without context, in fact less than *one-half of one percent* of Cox's Premium Cable subscribers leased a CableCARD instead of a Cox STB. (JA LIII: 6820, Tr. 13:2-8 (Hastings); JA XL: 5211-13, PX-049.) This led to Cox obtaining over $200 million in STB rental revenue during the class period. (JA L: 6173-74, Tr. 67:23-68:18 (Kirk); JA LI: 6461, Tr. 6:3-7 (Necessary); JA LIII: 6830-31, Tr. 23:6-24:19 (Hastings); JA XL: 5222-23, PX-49.) As set forth below, the fact that such a large percentage of customers complied with the tie (in fact, near total compliance) supports a finding of coercion, as the jury and district court concluded in finding in Plaintiff's favor on this issue.

ARGUMENT

I. PLAINTIFF WAS NOT REQUIRED TO PROVE THAT COX PREVENTED ITS CUSTOMERS FROM ACQUIRING A SET-TOP BOX FROM A COMPETITOR OR PREVENTED ANY COMPETITOR FROM SELLING STBS

As set forth above, in the Tenth Circuit, there are four – and only four – elements of a per se tying claim: (1) the existence of two separate products, (2) the conditioning of the sale of one product (the tying product) on the purchase of another (the tied product), (3) "sufficient economic power" held by the defendant in the tying-product market, and (4) a "substantial volume of commerce affected in the tied-product market." *Multistate Legal Studies*, 63 F.3d at 1547. Despite the unmistakable clarity of this enumeration of the elements, Cox seeks to impose additional elements of proof, none of which are supported by any applicable authority.

First, contrary to Cox's assertions, Cox Br. 26-32, Plaintiff is not required to prove that: (1) Cox prevented any of its customers from acquiring the tied product (the STB) from a competitor or (2) Cox prevented any competitor from selling the tied product. These have never been listed as an element of a per se tying claim by this or any other circuit. Furthermore, any such requirements would be contrary to the rationale for the rule against per se tying, which is to among other things prevent barriers to entry for competition. *See Jefferson Parish Hosp.*, 466 U.S. at 14 (tying "could either harm existing competitors or create barriers to entry of new competitors in the market for the tied product"). To be actionable, per se tying need not totally preclude competition, it need only "restrain[]" "competition on the merits in the market for the tied item." *Id.* at 12. The imposition of a tie by a company with substantial market power is a powerful barrier to entry that by itself discourages potential competitors from entering and thereby restrains competition on the merits. *Tic-X-Press*, 815 F.2d at 1417–18 ("[I]t is unlikely that any prospective competitor in the ticketing services market would be willing or able to invest the amount of money required to develop a computerized system in light of the virtual impossibility of ever getting any of the Omni business so long as there is a tying arrangement.")

To the extent Plaintiff was required to prove the existence of actual or viable potential competitors to Cox in the market for STBs, Plaintiff did so through evidence that: (1) there were no technological barriers to entry because of Cisco's willingness to license its security technology; (2) by Mr. Necessary's own admission, TiVo was an existing competitor to Cox in the market for STBs in Oklahoma City; (3) a number of companies obtained CableLabs certification to offer STBs; (4) Cox and the Consumer Electronics Association expected great interest in a retail market for STBs; and (5) STBs are sold at retail in Canada and other parts of the world. [1] Pl.'s Opening Br. 27-29.

[1] Canada provides an instructive example of the competition that prevails in an untied market. (JA LII: 6788-89, Tr. 25:10-26:23 (Hastings).) In contesting the relevance of information about the Canadian STB market, Cox grossly misstates the record and attempts to mislead the court. While the district court held that the expert witness's opinions regarding Canada in the *previous* version of this case seeking certification of a nationwide class were inadmissible, she made the opposite ruling in *this* case with respect to Dr. Hastings' opinions about the Canadian market in denying Cox's *Daubert* motion. (JA I: 153-54, Doc. 125.) Cox does not appeal that ruling. And while Cox offered an expert witness with a different view, the jury was entitled to credit Dr. Hastings' testimony.

Similarly, in a per se case, contrary to Cox' assertion, Cox Br. 37-41, there is no "threshold" requirement to prove that the challenged tie has a substantial impact on competition. Requiring such proof would be contrary to the very nature of a per se claim, which is to avoid the need for proof of anti-competitive effects in the market. *See Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1016 (10th Cir. 1998) ("Once a practice is identified as illegal *per se*, a court need not examine the practice's impact on the market … before finding a violation of antitrust law."); *Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc.*, 806 F.2d 953, 957 (10th Cir. 1986) ("[P]er se rules are designed to avoid potentially burdensome inquiries into market conditions where the likelihood of anticompetitive conduct is sufficiently great."). *See also Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1424-25 (9th Cir. 1995); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 477 (3d Cir. 1992); *Wells Real Estate, Inc. v. Greater Lowell Bd. Of Realtors*, 850 F.2d 803, 815 (1st Cir. 1988); Areeda, *Antitrust Law*, ¶ 1722 at 302 (per se tying claim requires only a "*minimal showing* that an alleged tie is of the type that *could cause* the kind of foreclosure that antitrust rules seek to prevent") (emphasis added).

Cox's citation to *Jefferson Parish Hosp.* to support the purported threshold requirement of anticompetitive effects takes a single phrase from that opinion out of context. Although the Court did state that "as a threshold matter there must be a substantial potential for impact on competition" to justify per se condemnation, the opinion makes clear that this could be shown (or disproven) in two specific ways rather than being a free-standing element of proof. 466 U.S. at 16. First is the requirement that the tie foreclose a "substantial volume of commerce." *Id.* As explained in Plaintiff's Opening Brief, this requirement relies simply on measuring the dollar volume of commerce subject to the tie, which in this case was $200 million. Pl.'s Opening Br. 33-39.

Second is the limitation that per se condemnation is not appropriate where the tie forces the purchaser to "buy a product he would not have otherwise bought even from another seller in the tied product market," *Jefferson Parish Hosp.*, 466 U.S. at 16, a condition that later courts and commentators have referred to as the "zero foreclosure" condition. This condition does not apply here because: (1) there is no dispute that an STB is useful and even necessary to access the full benefits of Premium Cable; and (2) the record is replete with evidence of competitors and potential competitors to Cox in the market for STBs. Pl.'s Opening Br. 39-41. And while Cox claims that *Jefferson Parish Hosp.* demonstrates that the fact that STBs are necessary does not negate the "zero foreclosure" condition, Cox Br. 39, the portion of the opinion cited by Cox relates to the Court's holding that the defendant hospital did not have sufficient market power to trigger the per se tying doctrine at all. 466 U.S. at 26.

Equally unavailing is Cox's reliance on *Fox Motors*. In that case, this Court found that the challenged tie "is unlike tying arrangements historically condemned under the antitrust laws" because availability of the tying product was tied to *prior* sales of a particular vehicle. 806 F.2d at 958. This case, by contrast, presents a classic tying situation where the purchase of one product (Premium Cable) is conditioned on the simultaneous purchase of another (the STB). Furthermore, *Fox Motors* was brought by automobile dealers rather than consumers and the court found that the "[u]ltimate consumers made their choices free of any tie, and dealers placed their orders to manufacturers accordingly." Here by contrast the Plaintiff class consists of the "ultimate consumers" and such consumers were certainly constrained by the tie because – according to Cox – they had no choice but to rent an STB from Cox if they wanted to receive the full benefits of Premium Cable.

Finally, Cox's argument that Plaintiff relied on evidence that Cox failed to do enough to support potential STB competitors, Cox Br. 33-34, misstates Plaintiff's position. Plaintiff never argued that Cox had an affirmative obligation to assist any competitor. Indeed, the jury was specifically instructed that Cox had no such obligation. (JA III: 593, Doc. 422.) Rather, Plaintiff pointed to affirmative conduct by Cox that created and enforced the tie, such as announcing the tie, misrepresenting the disadvantages of CableCARD, imposing barriers on the use of

CableCARD, and unjustifiably suppressing a secondary market. Pl.'s Opening Br. 17-26.

The significance of Cox's conduct with regard to tru2way and TiVo is not that Cox was obligated to enter into these agreements in the first instance but that, once it had, its consistent and continual efforts to delay implementation or to implement in a purely pro forma manner resulted in entrenchment of the tie. As the Supreme Court recognized in *Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), ("*Trinko*"), the right to refuse to deal with other firms is not unqualified. In discussing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the Court noted that it "found significance in the defendant's decision to cease participation in a cooperative venture" because "[t]he unilateral termination of a voluntary (*and thus presumably profitable)* course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko*, 540 U.S. at 409 (emphasis and alterations in original). Similarly, the jury here could reasonably infer that Cox's recalcitrance in carrying out its agreements, such as the tru2way MOU and the TiVo agreement, was further evidence of the tie and of Cox's efforts to restrain competition.

II. PLAINTIFF PROVED COERCION OR CONDITIONING BY COX

The "coercion" or "conditioning" element of a tying claim is proven by objective and not subjective evidence. *See* Areeda, *Antitrust Law*, ¶ 1754 at 313

("[T]here is no need to inquire into subjective belief once the tribunal is persuaded that the circumstances generate a reasonable belief that a tying condition exists, for subjective beliefs can be inferred from objective circumstances."). Thus, tying can be proved by, among other things, the defendant announcing or admitting the existence of the conditioning, *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 154 (S.D.N.Y. 2006), or where "the facts and circumstances surrounding the transaction as a practical matter forced the buyer into purchasing the tied product," *Tic-X Press*, 815 F.2d at 1418. The fact that a large percentage of customers comply with the tie is also evidence of coercion. *See 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.")

Here, the evidence at trial showed that: (1) Cox announced the tie between Premium Cable and rental of an STB from Cox; (2) Cox created circumstances that as a practical matter forced its customers to rent an STB from Cox; and (3) a large percentage of Cox Premium Cable subscribers complied with the tie.

First, as set forth in detail in Plaintiff's Opening Brief, Cox made numerous statements to its customers in the form of its website, guidance to customer service representatives, and procedures for accepting orders by telephone and Internet that customers were required to rent an STB from Cox to access all the services and benefits of Premium Cable. Pl.'s Opening Br. 17-18. Second, Cox created circumstances that as a practical matter required rental of an STB by exaggerating the limitations of CableCARD, imposing unnecessary burdens on CableCARD subscribers, failing to support tru2Way, delaying entry of TiVo as a competitor, and suppressing a secondary market for STBs. Pl.'s Opening Br. 18-26. Third, almost all (*i.e.*, over 99.5 percent) Cox Premium Cable subscribers complied with the tie and leased an STB from Cox. Pl.'s Opening Br. 26-27. This was more than sufficient evidence for the jury to find coercion or conditioning.

It is this detailed evidence of coercion or conditioning that distinguishes this case from *Konik v. Champlain Valley Physicians Hosp. Medical Center*, 733 F.2d 1007 (2nd Cir. 1984). There, the defendant hospital offered the opportunity for any qualified anesthesiologist to contract with that hospital on the same terms as the allegedly tied anesthesiology group and there was no evidence that the hospital announced the tie or acted in any way to create circumstances that as a practical matter required a consumer to purchase the tied product. *Id.* at 1017-18.

To the extent that district court cases such as *In re Time Warner Inc. Set-Top Box Cable Television Box Antitrust Litig.*, No. 08 MDL 1995, 2010 WL 882989 (S.D.N.Y. March 5, 2010) ("*Time Warner*") and the cases that have followed *Time Warner* fail to find coercion, the analysis of those cases is based on a fundamental misapplication of the relevant product market definition. *See infra* at 24-28.

Furthermore, as those cases fail to realize, preventing subscribers from accessing the two-way services that are necessary to fully enjoy the benefits of Premium Cable – even if they are able to access other services – can as a matter of common sense constitute coercion or conditioning or, at a minimum, raise a factual issue for the jury rather than an issue of law for the court. This is because customers may be forced to rent an STB to avoid a substantial degradation of the services they are paying for. Finally, such cases considered the coercion issue merely on the pleadings or on summary judgment. These courts were not confronted with the detailed evidence of coercion/conditioning presented to the jury here, as outlined above.[2]

III. COX WAS NOT ENTITLED TO A BUSINESS JUSTIFICATION DEFENSE

In the Tenth Circuit, there is no such thing as a "business justification defense" to a per se tying claim. The ABA model instruction cited by Cox admits that "[t]he Supreme Court has not expressly accepted the viability of a business justification defense," ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases (2005 ed.) at B-113, and Cox's only other authority consists of two opinions from other circuits. The business justification defense, as Cox

[2] Specifically, the factual record in *Jarrett v. Insight Communications Co., L.P.*, No. 3:09-cv-00093, 2014 WL 3735193 (W.D. Ky. July 29, 2014) was far different than the record here. In that case, the defendant's communications with its customers were substantially clearer about the availability of alternatives to leasing an STB from Insight than Cox's communications to class members. *Id.* at *2-3.

outlines it, is an expansion by some courts (but not the Tenth Circuit or any district court in the Tenth Circuit) of the Supreme Court's statement in *Standard Oil Co. of California v. United States* that "[t]he only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied." 337 U.S. 293, 306 (1949). There, the Court was referring to situations in which a manufacturer makes a device and also a product used in that device, and the proper specifications for that product are so detailed that no other manufacturer could practicably make it. *Id.* Cox cannot take advantage of this exception, however, because it did not manufacture STBs. Cox Br. 9. Cox also admits that "multiple consumer electronics companies made two-way set-top boxes that were fully compatible with Cox's system between 2005 and 2012." (JA III: 551, Doc. 417.)

Cox complains that it had to offer STBs itself because no one was offering them at retail, Cox Br. 45, but Plaintiff presented ample evidence that Cox's tie contributed significantly to the lack of such a market. *See* Pl.'s Opening Br. 23-24 & 27-29. Cox's proposed "business justification defense" would allow any defendant whose tying conduct completely eliminates competition in the market for the tied product to escape liability. The district court correctly declined to give Cox's instruction.

IV. PLAINTIFF PROVED ANTITRUST INJURY

As set forth in Plaintiff's Opening Brief, Plaintiff proved antitrust injury based on evidence that Cox's tie caused its customers to pay supra-competitive prices for STBs. This Court has recognized that this is a "classic form of antitrust injury." *Sports Racing Servs. v. Sports Car Club of Am., Inc.,* 131 F.3d 874, 884-85 (10th Cir. 1997). And there is no issue of causation because it is undisputed that Cox itself set the rental price for its STBs. More fundamentally, as Professor Hastings testified, a tie causes supra-competitive prices because it removes the tied customers from the market, thus discouraging entry and the resulting price competition. (JA LII: 6782-83, Tr. 19:14-20:15.) This is the link between the injury and the competition-reducing aspect of Cox's conduct required to find antitrust injury. *See also* Pl.'s Opening Br. 46-48 (describing additional evidence of the link between the tie and supra-competitive prices).

Nothing in *Jefferson Parish Hosp.* is to the contrary. Specifically, that opinion in no way held, as Cox would have it (Cox Br. 41), that a defendant's pricing cannot establish harm in a tying case. Rather, the Court stated that "the law draws a distinction between the exploitation of market power by merely enhancing the price of the *tying product*, on the one hand, and by attempting to impose restraints on competition in the market for the *tied product*, on the other. 466 U.S. at 14 (emphasis added). The antitrust injury Plaintiff proved in this case has nothing to do with Cox's pricing of Premium Cable (the tying product). Rather, it arises directly from its restraint on the market for STBs (the tied product) and the resulting lack of competition that would lead to lower, competitive prices.

And again contrary to Cox's argument, antitrust injury does not require Plaintiff to offer evidence of why specific competitors would or would not enter the market, which competitors would then enter the market, what such competitors would charge, or how consumers would respond to such competition. Cox Br. 42. Cox does not cite a single case for the proposition that such evidence is required to prove antitrust injury. And requiring proof of such an exhaustive trail of causation would be directly contrary to the fundamental rule that the defendant's conduct need not be the *sole* cause of the injury. *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)).

V. IF THE DISTRICT COURT'S JURY INSTRUCTIONS WERE INCORRECT, PLAINTIFF IS ENTITLED TO A NEW TRIAL

Nowhere in Cox's brief does Cox demonstrate that the jury's verdict was contrary to the instructions the district court actually gave the jury. To the contrary, Cox relies on principles of law that were not included in the district court's instructions. Even if – as Cox claims – the jury instructions were incomplete or incorrect, the remedy is a new trial under correct instructions and not judgment in favor of Cox. *See Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1242 (10th Cir. 2002).

Cox's assertion that incorrect jury instructions did not influence the way Plaintiff tried the case, Cox Br. 47, misses the point entirely.[3] The issue is not prejudice to Plaintiff's trial strategy but rather the fact that the jury was never given the opportunity to consider the evidence in light of the purportedly correct instructions.

VI. THERE ARE NO ALTERNATIVE GROUNDS FOR AFFIRMING THE DISTRICT COURT'S JUDGMENT

A. Cox Never Offered Evidence That the Tying Product was Anything Other Than "Premium Cable"

In a tying case, a plaintiff must prove that the defendant has market power in the tying product market. *Multistate Legal Studies*, 63 F.3d at 1547. This requires determination of the relevant product market and the relevant geographic market. *Id.*

According to Professor Hastings, the tying product market in this case is Premium Cable. This conclusion is based on her application of the widely-accepted "practical indicia" test of *Brown Shoe Co. Inc. v. United States*, 370 U.S. 294, 325 (1962), which looks to factors such as "industry or public recognition of the

[3] This argument also ignores the fact that all the district court's previous orders were entirely consistent with the foreclosure instruction the district court ultimately gave the jury. Pl.'s Opening Brief 9-11.

[market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Professor Hastings considered: (1) analysis of Cox data that demonstrates that the ratio of Premium Cable to Basic Cable subscribers increased while the ratio of the list prices for these two types of products remained constant; (2) industry analysis that finds that the features that differentiate products like Premium Cable from products like Basic Cable (*e.g.*, digital content, high definition, and interactive features) have become increasingly important to consumers; and (3) Cox documents that identify the firms and products that it views as its main competitors. (JA LIII 6833-38, Tr. 26:8 – 31:15.)[4]

Although Cox claims in its brief that "Premium Cable" cannot be a relevant tying product market, its own expert economist disclaimed any opinion as to the relevant tying product and certainly never opined that the only relevant product market could be two-way services. At her deposition, Dr. Burtis confirmed that she was offering no affirmative opinion as to the relevant tying product market:

> Q: Let me go to Page 48 of your report. And this is the area of your report that addresses the relevant product market.

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[4] As Cox does not dispute, Professor Hastings also found that Cox had substantial market power in the market for Premium Cable in the Oklahoma City market based on: (1) indirect evidence such as market shares, market concentration, and barriers to entry; and (2) direct evidence, including Cox's admissions that it possessed pricing power. (JA LII: 6851-55, Tr. 44:15 – 48:8 & JA LII: 6860-80, Tr. 53:23 – 73:21.)

> A: Yes.
>
> Q: And I take it what you [sic] you're talking about here is the claimed tying market. Is that correct?
>
> A: Yes.
>
> Q: And so with respect to the tying market, do you have a hypothesis as to what the relevant product market is in this case?
>
> A: I have a – So my conclusion is that in order to figure that out you have to take into account the actual services, the programming services, that proposed class members purchased, and that those services are different. And that it is important to consider the options, the services that are reasonably interchangeable with the services, that are actually purchased by the proposed class members.
>
> Q: And you're describing the analysis that one would do to reach a conclusion about the relevant product market, and you have not done that analysis, correct?
>
> A: Well, what I have done is I have explained the methodology and the importance of thinking about the product market in terms of the reasonable interchangeability of the products and the implications of doing that to the issue of product market and market power.

(JA XXIV: 3468-69, Doc. 297, Exh. 1 at 172:9 – 173:17.)[5]

As is clear from this testimony, the opinions disclosed by Dr. Burtis are confined to a general description of the methodology to determine the relevant product market, along with Dr. Hastings' alleged failure to properly apply this methodology, rather than her own application of this methodology to develop a

[5] Cox also claims that so-called "over the top" providers such as Netflix and Hulu are competitors for some aspect of Cox's services. Cox Br. 51. Dr. Burtis, however, disclaimed any opinion that such providers are part of the relevant tying product market. (JA XXIV: 3470-71, Doc. 297, Exh. 1 at 208:16 – 209:1.)

definition of the relevant tying product market. In short, Cox's theory that the relevant product market can only be two-way services is a recent fabrication that is not supported by its own expert economist.

The district court confirmed as much in granting Plaintiff's motion *in limine* prohibiting Cox from offering any affirmative opinions regarding the relevant product market, a ruling that Cox does not appeal. The basis for the district court's decision was Cox's concession that "it does not intend to offer a competing definition of the relevant tying market." (JA II: 352, Doc. 370.) Contrary to that concession before the district court and the district court's order, Cox is in substance arguing on this appeal that two-way services is the relevant product market. It is far too late for Cox to advance that argument here.

In any event, there is no evidence in the record (and Cox certainly does not cite any) that two-way services is an actual product sold by anyone. Specifically, there is no evidence that Cox itself sells two-way services apart from linear cable programming. And Cox offers no analysis based on any accepted economic or legal methodology to support its assertion that two-way services is the relevant product market.

Instead, Cox offers citations to various district court cases that considered this issue in the context of a motion to dismiss, such as *Time Warner*, 2010 WL 882989, and the cases that followed it. These cases were decided at the pleading stage, however, unlike this case where Plaintiff's product market definition was supported by expert testimony and other evidence. Furthermore, those cases are simply incorrect to the extent they assume or suggest that two-way services must be the relevant product market in STB tying cases since, as set forth above, this is a purely abstract "product" with no connection to products actually sold in the real world, contrary to *Brown Shoe*.

B. Plaintiff Was Not Required to Prove the Geographic Market for the Tied Product

Cox argues that Plaintiff failed to prove his case because he did not define a geographic market for the tied product, STBs. This has never been a requirement in tying cases, and Cox does not cite authority from any court saying otherwise.

The Areeda treatise on antitrust law clearly states that definition of the tied product market is unnecessary in a *per se* tying case. Areeda, *Antitrust Law*, ¶ 1721b. Areeda begins by describing three Supreme Court opinions in which the defendant's actions were held to have a substantial effect on the market for the tied product but which did not analyze the geographic extent of that market: *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958); and *United States v. Loew's*, 371 U.S. 38 (1962). *Id.* Areeda then explains that in *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495 (1969), the Supreme Court "[d]oubt[ed] that the lower court defined the market correctly, [but] declared market definition unnecessary." *Id.* According to Areeda, "The lower courts have fully understood this." *Id.* Summarizing this line of cases, Areeda states that "we need not know market boundaries in order to know the dollar volume of tied sales made by the defendant" and points out that "[t]he Supreme Court has repeated this requirement as recently as its 1992 Kodak decision." *Id.* (citing *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 462 (1992)).

In cases involving an alleged tie between cable services and STBs, six district courts have discussed market definition; none has even mentioned a definition of the geographic market for STBs separate from the geographic market for cable services. In each case, the court "determined that the relevant geographic market consists in the service area of the cable companies." *Marchese v. Cablevision Sys. Corp.*, 2012 WL 78205, at *4 (D.N.J. Jan. 9, 2012) (citing *In re Cox Enters., Inc. Set–Top Cable Television Box Antitrust Litig.*, 2010 WL 5136047 (W.D. Okla. Jan. 19, 2010); *Parsons v. Bright House Networks*, 2010 WL 5094258 (N.D. Ala. Feb. 23, 2010); *Bodet v. Charter Commc'ns, Inc.*, 2010 WL 5094214 (E.D. La. July 26, 2010); *Downs v. Insight Commc'ns Co.*, 2011 WL 1100456 (W.D. Ky. Mar. 22, 2011); *Time Warner*, 2010 WL 882989. If a tie is effective, it will affect sales of the tied product no matter where they are. In summary, under applicable law, there is therefore no requirement that a plaintiff define the geographic market in the tied product.

C. Dr. Hastings' Damages Theory Was Adequate to Support the Jury's Verdict

As an initial matter, Cox's arguments regarding the alleged inadequacy of Dr. Hastings' damages opinions are in substance a challenge to their admissibility pursuant to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Cox, however, does not address this standard. Nor does Cox challenge the district court's ruling that Dr. Hastings' damages theory is admissible pursuant to *Daubert*. (JA I: 151-60, Doc. 125.) Thus, Cox should be held to have waived any objection as to the admissibility of Dr. Hastings' testimony.

In any event, Dr. Hastings' testimony was sufficient to support the jury's verdict. As courts have recognized, the measure of injury in tying cases is simply the difference between the price charged for the tied product and the fair market value of the product or the price of the product on an open market. *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1054 (5th Cir. 1982); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1347 (8th Cir. 1976); *Pogue v. International Industries, Inc.*, 524 F.2d 342, 344 (6th Cir. 1975). *See generally In re Relafen Antitrust Litig.*, 218 F.R.D. 337, 344 (D. Mass. 2003) ("the difference between the actual price and the presumed competitive price … provide what the Supreme Court has long recognized as the principal measure of damages for plaintiffs injured as customers, rather than as competitors.")

By calculating the rental price for STBs in a competitive market, Professor Hastings' analysis was directly responsive to this legal test. To determine the "competitive" STB rental rate, and thus the overcharge, Professor Hastings relied on a well-established formula that calculates a competitive return on the capital invested by Cox to purchase the STBs, taking into account operational costs such as installation, repair, and maintenance costs. (JA LIII: 6885-88, Tr. 78:24-81:12.) This formula is based on the uncontroversial premise that, under conditions of competition, the rate of return for invested capital equals zero economic profit. (*Id*. at 6887, Tr. 80:2-20.) *See also* Pl.'s Opening Br. 46-47.

This formula is entirely consistent with *Comcast Corp. v. Behrend*, 569 U.S. __, 133 S. Ct. 1426 (2013) because, as the district court held in certifying the class, it "seeks to measures the harm suffered by class members as a result as a result of the single theory advanced by Plaintiff – illegally tying rental of an STB to the purchase of 'Premium Cable.'" (JA I: 145-46, Doc. 123.) This is not a case like *Behrend* where the plaintiff offered multiple theories of injury but a damages model that did not distinguish between them.

Cox makes much of the fact that Professor Hastings' injury opinion was purportedly based on a "perfectly competitive market." Cox Br. 42. She explained, however, that she used this framework as an accepted theoretical tool to benchmark the fair market price for an STB in an open market and this approach does not assume that an untied market for STBs would be perfectly competitive. (JA LIV: 7021-22, Tr. 6:10 – 7:16.)

Cox also challenges Professor Hastings' damages calculation on the basis of the "package approach," an approach adopted by some circuits (but not this Court) which looks to the difference between the sum of prices for the tying product (here, Premium Cable) and the tied product (here, STBs) and the fair market value of the two combined.

The application of the minority "package approach" here would belie the economic reality of the alleged anticompetitive conduct. Additionally, applying this approach to the cable industry pre-supposes an interdependency between the price of cable services and STBs contrary to the policy of Section 629 of the Communications Act of 1996.

As an initial matter, the "package approach" is the minority rule. It has been adopted by only two circuits (the Ninth and Eleventh).[6] The Fifth, Sixth, and Eight Circuits, by contrast, use the "tied product" approach, which compares the actual price of just the tied product to the fair market value of that product. *Kaiser Aluminum & Chem. Sales*, 677 F.2d at 1054; *Bell*, 660 F.2d at 1133; *Northern*, 542 F.2d at 1347.

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[6] Cox cites *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 (7th Cir. 1985) as support for the package approach. Discussion of the issue in that case was in the context of the defendant's market power rather than the measurement of damages and is therefore dicta.

Even if this Court were to adopt the package approach under certain circumstances, the specific facts and industry context of this case do not support its application here. The package approach has usually been adopted in situations where the tying product was "sold" for free or at a substantial discount. In *Siegel v. Chicken Delight, Inc.*, for example, Siegel (a franchisor) sued Chicken Delight and alleged that the provision of certain restaurant equipment was tied to the license to use Chicken Delight's trademarks. 448 F.2d 43, 46 (9th Cir. 1971). The Ninth Circuit applied the "package approach" in that case because the tying product (there, the trademark license) was given to Siegel and others *free of charge*. *Id.* at 52.

Similarly, in *Lakeland Regional Medical Center, Inc. v. Astellas US, LLC*, 763 F.3d 1280, 1284 (11th Cir. 2014), a hospital sued Astellas, a pharmaceutical manufacturer, for tying the purchase of its brand of a medication ("Adenoscan," a branded form of adenosine) to licenses for its patented surgical procedure (referred to as an "MPI"). The plaintiff alleged that Astellas was using the tie as an exclusionary tool, forcing consumers who wanted to perform MPIs to purchase Adenoscan rather than other forms of adenosine that would perform the same function. The tying product was, however, offered free of charge, making the "package approach" the appropriate measure of damages for the same reason it was appropriate in *Siegel*. *Id.* at 1284, n. 3.

The Second Circuit made a similarly fact-specific decision in *In Re Visa Check/Mastermoney Antitrust Litigation*, 280 F.3d 124, 143 (2nd Cir. 2001). In that case, the Second Circuit affirmed class certification without deciding whether to apply the "package approach" or the "tied product approach" as a general rule. *Id.* The Second Circuit reasoned that the choice between these approaches was irrelevant under the facts of the case at hand in light of evidence that the price of the tying product would not have risen absent the tie. *Id.*

There is no evidence here that Cox's (supra-competitive) rental price for STBs was in any way offset by a reduction in the price of Premium Cable. Cox's market power in the Premium Cable market was so substantial that there was no need to discount the price in order to incentivize the purchase of Premium Cable and the rental of Cox STBs. None of the "package approach" cases cited by Cox involves the high degree of market power that was proven at trial here.

Furthermore, the "package approach" depends on the assumption that the price of the tying product and the price of the tied product are fungible and the seller is free to choose whatever mix of such prices maximizes profit. Section 629 of the Communications Act of 1996 (47 U.S.C. § 549), however, sets forth a Congressional policy against cross-subsidization between the two to encourage competition in the market for STBs.

Section 629 governs the competitive availability of navigation devices (*i.e.*, STBs) by Multichannel Video Programming Distributors like Cox. Section 629 provides, in relevant part:

> The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor. Such regulations shall not prohibit any multichannel video programming distributor from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, to consumers, *if the system operator's charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.*

(Emphasis added.)

Relatedly, FCC regulations require cable companies to separately itemize the charge for cable service and equipment, such as STBs. 47 C.F.R. § 1619(a) (“Bills must be fully itemized, with itemizations including, but not limited to, basis and premium service charges and equipment charges.”) This requirement would be rendered meaningless if the itemized prices were purely arbitrary and the only relevant figure was the total.

Section 629 states Congress' intent that prices for cable services on the one hand and STBs on the other hand should be transparent, separate, and independent and Section 1619(a) expresses a similar intent from the FCC. The "package approach" advocated by Cox is contrary to the expressed intention of Congress and the FCC, as it would treat the distinction between the price of cable service and the STB as completely meaningless and allow for cross-subsidization between the two. These considerations make the "package approach" an inappropriate damages model in this case.

D. The National Cooperative Research and Production Act Has Nothing to Do With This Case

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 a court to apply 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.

Although this case had been pending for years, 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 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." 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.

Realizing its mistake, Cox changed its story in the middle of trial, arguing in its Rule 50(a) motion that "CableLabs is a joint venture . . . , and Cox has been a member of CableLabs since it was founded in the late 1980s." (JA III: 490, Doc. 406.) 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. 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.

Furthermore, 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 have 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. Cox

Br. 58. In context, it is clear that each of these references was to the fact that CableCARD is not a reasonable substitute for an STB, not to "allegations that the CableCARD had a defectively limited design." *Id.* Similarly, Professor Hastings' testimony did not discuss any "design limitations" of CableCARD; she simply stated that CableCARD is not a reasonable substitute for an STB. (JA LIII: 6843, Tr. 36:4-13.) And Mr. Harte's testimony related to his criticism of Cox's product launch, and its ability to deal with problems, not any problems with CableCARD itself. (JA LI: 6368-69, Tr. 25:14-26:5.) 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.

No court has ever relied on the NCRPA to hold that an otherwise per se violation of the antitrust laws should be judged under the rule of reason. This Court should not be the first.

VII. COX IS NOT ENTITLED TO A NEW TRIAL ON THE BASIS OF INCORRECT JURY INSTRUCTIONS

A. The Jury Instruction on Foreclosure was Correct

Cox believes it was entitled to an instruction requiring the jury to "consider whether there has been a substantial adverse effect on competition in the market for set-top boxes," even if Plaintiff proved that Cox had market power in the tying product and imposed a tie. (JA II: 225, Doc. 332.) The district court correctly rejected this instruction because it would violate governing black-letter law. In a per se tying case, a plaintiff is not required to prove anticompetitive effects in the tied product market. "Once a practice is identified as illegal per se, a court need not examine the practice's impact on the market . . . ." *Law*, 134 F.3d at 1016; *see also Town Sound & Custom Tops*, 959 F.2d at 477 ("[I]f the defendant is found to have market power [in the tying product market], the plaintiff is, in theory, relieved of proving actual harm to competition and of rebutting justification for the tie-in."). The requirement of a "substantial adverse effect" applies only to cases decided under the rule of reason: "A rule of reason analysis first requires a determination of whether the challenged restraint has a substantially adverse effect on competition." *Law*, 134 F.3d at 1017. The proposed instruction wrongly imposed a rule of reason requirement on a *per se* claim.

To be sure, a tie must "affect[] a substantial volume of commerce in the tied product market" to be unlawful *per se*. *Multistate Legal Studies* 63 F.3d at 1546. But this does not mean that a plaintiff must prove an additional adverse effect on competition:

> [T]he controlling consideration [in a per se tying case] is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie, for as we said in International Salt, it is "unreasonable, per se, to foreclose competitors from any substantial market" by a tying arrangement.

Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 501 (1969) (quoting *Int'l Salt Co. v. United States*, 332 U.S. 392, 396 (1947)). The Areeda treatise makes clear that "the dollar volume of tied sales made by the defendant" is the relevant measure of foreclosure and that the plaintiff is not required to make an additional showing of anti-competitive impact. Areeda, *Antitrust Law*, ¶ 1721b (citing *Eastman Kodak*, 504 U.S. at 462).

Cox's claim that its proposed jury instruction "comes directly from *Jefferson Parish*," Cox. Br. 59, is inaccurate and misleading. On the page of *Jefferson Parish Hosp.* that Cox cites, the Supreme Court stated that "when a purchaser is 'forced' to buy a product he would not have otherwise bought *even from another seller* in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed." 466 U.S. at 16 (emphasis added). In other words, there is no antitrust violation if the purchaser would not have purchased the tied product at all in the absence of the tie.

Cox's proposed instruction is completely different, stating that it is "not substantial foreclosure if you find that purchasers would not have bought set-top boxes from another seller in the absence of the alleged tying arrangement." (JA II: 225, Doc. 332.) The two tests—whether the purchaser would have purchased the tied product at all, and whether the purchaser would have purchased the tied product from other sellers—are not the same. If Cox's instruction were correct, a defendant could tie two products so completely that no competitor has an opportunity to sell the tied product, and then defend itself on the ground that no purchaser would have bought the tied product from another seller because no one else was selling the tied product at the time. Neither *Jefferson Parish Hosp.* nor any other authority supports this idea.

Finally, Cox's proposed instruction that "[i]t is not substantial foreclosure if only a small percentage of sales of set-top boxes were affected by the tying arrangement," (JA II: 225, Doc. 332) misstates the law. "For purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, therefore, the relevant figure is the *total volume* of sales tied by the sales policy under challenge . . . ." *Fortner Enters.*, 394 U.S. at 502 (emphasis added); *see also Tic-X-Press*, 815 F.2d at 1419 (same). Cox has never identified any authority stating that the percentage of sales of STBs (as a percentage of what, Cox doesn't say) is the relevant measure.

B. The Jury Instruction on Coercion Was Correct

Cox asked the district court to give an instruction on coercion that would have absolved Cox of anything it had done to prevent the development of a competitive market for STBs. The court correctly chose not to do so.

The district court instructed the jury that coercion could be found if subscribers "might have preferred to purchase [set-top boxes] elsewhere on different terms." (JA III: 591, Doc. 422.) This is a direct quotation from *Jefferson Parish Hosp.*:

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force 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*. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

466 U.S. at 12 (emphasis added).

Cox's proposed instruction would have added the following: "Proof of coercion requires, at a minimum, evidence that plaintiffs could have purchased the tied product from another seller of it." (JA II: 217, Doc. 332.) This instruction is contrary to *Jefferson Parish Hosp.*, which held that when a company's "power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures. This impairment could either harm existing competitors *or create barriers to entry of new competitors* in the market for the tied product." 466 U.S. at 14 (emphasis added) (footnote omitted). The existence of other sellers in the market for the tied product is not a requirement for antitrust liability because forcing customers to take the tied product in order to receive the tying product "impair[s] competition on the merits" and "create[s] barriers to entry of new competitors," *id.*, whether or not anyone else currently participates in the tied product market.

This Court has likewise held that harming *potential* competition is unlawful. *Fox Motors*, 806 F.2d at 957 ("Power in one market may not be employed to impair competition on the merits with existing *or potential* rivals in another market, nor may purchasers be denied the freedom to select the best buy in the latter market.") (emphasis added) (citing *Jefferson Parish Hosp.*, 466 U.S. at 15–16).

Similarly, the district court cited *Jefferson Parish Hosp.* when denying Cox's motion for summary judgment: "Contrary to Defendant's arguments, 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." (JA I: 165, Doc. 143.)

Other courts have also recognized that the existence of a tie itself discourages competition by raising barriers to entry by potential competitors. *See Tic-X-Press, Inc.*, 815 F.2d at 1417–18 ("[I]t is unlikely that any prospective competitor in the ticketing services market would be willing or able to invest the amount of money required to develop a computerized system in light of the virtual impossibility of ever getting any of the Omni business so long as there is a tying arrangement.”). Given this body of law, it would have been legal error to instruct the jury that Plaintiff failed to satisfy the coercion element unless he could show that “plaintiffs could have purchased the tied product from another seller of it.” (JA II: 217, Doc. 332.)

Cox also argues that the jury should have been instructed that “[t]he fact that the majority—or even 100%—of consumers purchase two products together is not sufficient, by itself, to establish the element of coercion.” (JA II: 216, Doc. 332.) But the district court’s instruction did not state or even imply that the share of consumers purchasing the tying and tied product together is enough to establish the element of coercion. (JA III: 591, Doc. 422.) The extent of compliance with the tie is, however, a relevant factor when determining whether coercion exists, *Cascade Health Solutions*, 515 F.3d at 915, and Cox’s instruction thus would have misleadingly downplayed relevant evidence to the jury.

Finally, Cox accuses the district court of instructing the jury that it “could consider any allegations regarding its insufficient assistance to [consumer electronics manufacturers], to the extent that it ‘hindered the development of a market.’” Cox Br. 62 (quoting JA III: 593, Doc. 422). This is the opposite of what the jury instruction said; the instruction made clear that failing to provide assistance to third parties is not coercion. The entire jury instruction read:

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.

(JA III: 593, Doc. 422.) It is unclear what Cox finds objectionable about this instruction taken as a whole. To the extent Cox is claiming that it may hinder the development of a market without violating the antitrust laws, it is wrong. As explained above, a tie creates a substantial barrier to entry that hinders the development of a market.

C. The Jury Instructions on Damages Were Sufficient

As Plaintiff has explained, the "package theory" is not the correct measure of damages in this case, and in any event, Plaintiff's theory of damages was based on an accepted methodology. *See supra* 30-26. Cox's assertion that "the jury was left to accept plaintiff's expert's damages model at face value," Cox Br. 63, is plainly incorrect because the jury did not award the full amount of damages that the expert calculated. Plaintiff's expert divided her estimated damages between the amount that Cox overcharged for rentals of its STBs and the amount Cox charged as a "DVR service fee," which Plaintiff claimed was also unlawful. (JA LIII: 69096, Tr. 102:4-20.) The jury awarded only the amount of the overcharges, showing that the jury examined the testimony on damages carefully and did not take it at face value. (JA III: 614.) There was nothing improper about this instruction.

D. Cox Was Not Entitled to a Jury Instruction on the Business Justification Defense

Cox was not entitled to a jury instruction on the business justification defense because no such defense exists in this circuit, as well as the other reasons stated above. *See supra* 20-21.

E. If Cox Is Entitled to a New Trial, It Is Premature to Decide Whether the Jury Must Be Instructed Under the Rule of Reason

Cox states that "if for some reason this Court reversed the Rule 50 judgment it could not reinstate the jury's verdict—which was produced by per se instructions that should never have been given. At a bare minimum, Cox would be entitled to a new trial under rule of reason instructions." Cox Br. 64 (citations omitted). Nothing in these two sentences is correct. If this Court reverses or vacates on grounds unrelated to whether the proper standard was per se or the rule of reason, then it would be inappropriate to direct the district court to instruct the jury on the rule of reason in a new trial. And even if the Court holds that Plaintiff failed to offer evidence sufficient to invoke the per se rule, Plaintiff will not necessarily fail to meet the per se standard at the second trial. Not until the close of evidence at the new trial can the district court determine whether to instruct the jury on the per se rule or the rule of reason.

VIII. Cox is Not Entitled to Judgment as a Matter of Law As to the DVR Fees

During the course of this litigation, Cox repeatedly asked the district court for a determination that DVR fees should not be included in the damage calculation as a matter of law. The district court repeatedly rejected Cox's requests, correctly finding that the decision of whether to include DVR fees as part of any damage award was a factual issue for the jury's determination. (JA I: 156, Doc. 198; JA I: 166, Doc. 125; JA II: 356-57, Doc. 370.)

Contrary to Cox's assertion, at trial, the parties presented competing evidence regarding whether the DVR fees should be included in the damage calculation. Plaintiff presented evidence that class members who leased a Cox DVR STB not only paid the DVR STB rental rate but also paid the DVR service fee. (JA XLI: 5318-5324, PX067; JA XLI: 5325-5328, PX-069; JA L: 6193-6194 (Kirk); JA LI: 6336 (Healy); JA LI: 6473 (Necessary); JA LIII: 6904-6907 (Hastings); JA LIV: 7060-7061, 7063-7064 (Hastings); JA LV: 7257-7258 (Andrews); JA LVI: 7554 (Burtis).) This fee was not charged for the ability to record Cox programming apart from the functionality of the STB: Ms. Andrews admitted that the fee was not charged to Cox customers who recorded such programming on non-Cox equipment. (JA XXVII: 4252-54 CX-7, Andrews Depo., 114:25 – 115:12 & 115:20 – 116:21.) And in conducting internal financial analysis, Cox added the DVR Service Fee to the rental price for a DVR-capable STB to determine the total revenue from such STBs. (JA XLI: 5328, PX-69.)

Furthermore, in a tying case, damages are based on what the plaintiff actually paid for the tied product, not what the plaintiff could have paid had he or she chosen a different or cheaper version of the tied product. *See, e.g., Kaiser Aluminum & Chemical Sales*, 677 F.2d at 1054 (in a tying case, damages are the difference "between the price *actually paid* for the tied product and the price at which the product could have been obtained on the open market") (emphasis added).

Accordingly, the jury could have reasonably concluded that the DVR service fee was part of the overcharge paid by Cox customers who leased a DVR STB. The fact that the jury did not do so provides no basis for this Court to enter judgment as a matter of law on this issue.

In reaching an award of $6.313 million, it appears that this jury weighed the facts and evidence and determined that DVR fees should not be included. Nevertheless, reasonable minds could differ, such that another jury could reach the opposite conclusion. Indeed, if this Court orders a new trial, that jury may weigh the evidence differently and conclude that the DVR fees should be included in the damage calculation.[7] There is no basis for a judgment as a matter of law finding that there can be no antitrust injury based on DVR service fees, as Cox requests. This is not an issue to be decided as a matter of law. Rather it is a factual question for the finder of fact.

Nor is it necessary to direct the district court to enter judgment on the jury's verdict for Cox against those class members claiming injury only from DVR fees. It is clear from the jury's verdict that they did not accept Plaintiff's evidence and damage model that included the DVR fees. If the Court reinstates the jury's verdict, the mechanics of distribution of the award will properly exclude any class members whose damage is solely from the DVR fees. However, no record has been made below on this issue, making it premature for this Court to address it for the first time on appeal. *See Tyson Foods, Inc. v. Bouaphakeo*, 578 U.S. _, 136 S. Ct. 1036, 1050 (2016).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and restore the jury verdict in favor of Plaintiff and the class. Alternatively, this Court should vacate the judgment of the district court and remand this case for a new trial.

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[7] For the same reasons, this Court should also reject Cox's invitation to direct the district court to exclude persons with DVR-only claims from the class definition in the event of a new trial. Furthermore, Cox has not appealed the district court's class certification order and thus the class definition is not before this Court.

Respectfully submitted,
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This brief complies with the type-volume limitation of Fed. R. App. Proc. 28.1(e)(2)(A)(i) because this brief contains 12,782 words, excluding the parts of the brief exempted by Fed. R. App. Proc. 28.1(e)(2)(B)(i). This brief also complies with the type style requirements of Fed. R. App. Proc. 32(a)(6) because this brief has been prepared in a proportionately-spaced typeface using Microsoft Word in size 14 Times New Roman font.

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The undersigned certifies on this 23rd day of May, 2016, that seven (7) hard copy filings were submitted to the clerk's office.

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