

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, :
 :
 : Plaintiff, : CV No. 17-2511
 vs. :
 : Washington, D.C.
 : Wednesday, March 28, 2018
 AT&T, INC., ET AL., : 2:40 p.m.
 :
 : Day 4
 Defendants. :
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AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT SENIOR JUDGE

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1	Table of Contents				
2		Direct	Cross	Redirect	Recross
3	On behalf of the Plaintiff:				
4	John K. Martin				
5	By Mr. Welsh			661	
6	By Mr. Petrocelli		622		
7					
8	Martin Hinson				
9	By Mr. Strong	688		721	
10	By Mr. Petrocelli		710		
11					
12	E-X-H-I-B-I-T-S				
13				Marked	Received
14	On behalf of the Plaintiff:				
15	Exhibit No. 456			669	
16	Exhibit No. 0523			710	
17					
18	On behalf of the Defendants:				
19	Exhibit No. 781			646	
20					
21					
22					
23					
24					
25					

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2
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P-R-O-C-E-E-D-I-N-G-S

(Sealed Bench conference.)

THE COURT:

MR. PETROCELLI:

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MR. PETROCELLI:

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MR. PETROCELLI :

THE COURT :

MR. PETROCELLI :

MR. CONRATH :

MR. PETROCELLI :

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MR. PETROCELLI :

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THE COURT:

MR. CONRATH:

MR. PETROCELLI:

(Open court.)

THE COURT: Our discussion at the bench had nothing
to do with this witness or his examination.

For those third parties, non-parties who are requesting

1 daily copy of transcripts, the Court for reasons I am not at
2 liberty to discuss at this point, is directing the Court
3 Reporters to provide daily copy to those who have requested it
4 who are not parties in the case by two o'clock in the
5 afternoon, not by ten something in the morning.

6 Let's go back to the witness.

7 (Witness resumes the stand.)

8 MR. PETROCELLI: Thank you, Your Honor.

9 GOVERNMENT WITNESS JOHN K. MARTIN, PREVIOUSLY SWORN

10 CROSS EXAMINATION (Continued)

11 BY MR. PETROCELLI:

12 Q. Mr. Martin, before the lunch break, I was asking you why
13 you couldn't take data from distributors and you said they
14 wouldn't give it to you.

15 Have you attempted to purchase data from distributors?

16 A. Yes.

17 Q. Have those efforts been successful?

18 A. Not to date with the one exception we have an agreement to
19 get a minor set of data from one of virtual MVPDs, but all of
20 the others for a variety of reasons we've been unsuccessful.

21 Q. Can you explain to the Court those reasons that you have
22 heard from distributors why they won't sell you data?

23 A. Either they think it's proprietary for their own business
24 and they don't want to be in the business of selling data or
25 the data that they have and the manner in which it is organized

1 is just not particularly useful to us at this time.

2 Q. Okay. Now with respect to the use of data for purposes of
3 advertising, can you explain to the Court what impact Facebook
4 and Google among others have had on that issue?

5 A. Well, they have a tremendous amount of data. They are
6 operating at a scale that we at Turner, we're not even playing
7 in the same league yet.

8 So what they can do is they can dynamically serve ads to
9 their users because they know who their users are, they know
10 what their likes are, they know what they're more likely to be
11 receptive to.

12 So if I like to buy sneakers and go on a sneaker ad, all of
13 a sudden I'm served another sneaker ad by Facebook.

14 By having access to that data they can demonstrate to the
15 marketers a big ROI on the advertising dollars that they're
16 putting into Facebook and Google.

17 Q. What is ROI?

18 A. I'm sorry, return on investment.

19 Q. What does that mean?

20 A. The effectiveness of the advertising.

21 So marketers know when they put a dollar into Facebook and
22 Google what they are getting back with respect to that dollar.
23 And so as a result of what has been happening over the last
24 number of years, if you look at the overall advertising market,
25 the digital advertising market is now larger than the

1 traditional TV ad market.

2 Those two companies, Facebook and Google, we believe, I
3 have seen, I've read various reports have taken anywhere
4 between 85 percent and a 100 percent of that shift in dollars.

5 Q. That shift from where to where?

6 A. From TV to digital.

7 Q. Does the merger with AT&T provide Turner an opportunity to
8 confront that challenge?

9 A. Yes, because for the first time we believe because of the
10 customer relationships that AT&T has through it's MVPD as well
11 as through its mobile relationships, they will have a
12 tremendous amount of first person data where we think we can
13 work together to build products where we can actually for the
14 first time since we've been wholesalers, we can get out of that
15 wholesale position and actually begin to market and advertise
16 directly to people in a much more effective and efficient way.

17 Q. You said you don't know the names of your viewers?

18 A. That's correct. We know the names of almost no one.

19 Q. Do you have their personal contact information?

20 A. No.

21 Q. Do you have their email addresses?

22 A. Very few.

23 Q. Do you know how much time they spend watching your shows?

24 A. We only get aggregate data from Nielsen, but nothing down
25 to the household or an individual level.

1 Q. How do you compare the ability to sell advertising based
2 on Nielsen ratings with what Google and Facebook are doing in
3 the world of digital advertising?

4 A. We are at a huge disadvantage. We are selling in TV what
5 they call demographics which is just adults, I'm making this
6 up, adults 18 to 49 for example.

7 We are selling advertising based on day parts where we
8 could pay more money if somebody is watching a television show
9 in prime time versus late night. We're getting paid different
10 amounts of money based on whether something appears on TNT,
11 TBS or TruTV.

12 Whereas Facebook and Google, it doesn't matter. It doesn't
13 matter if somebody engaged on an advertisement at two o'clock
14 in the morning or 8 p.m. They have got a much better sense of
15 who that individual is and they can personally serve those ads
16 to them. We don't have any ability to do that.

17 Q. AT&T through its DirecTV and U-Verse service, does it have
18 set top box data that could be useful to Turner?

19 A. Yes.

20 Q. What could you do with that set top box data that you
21 currently do not have?

22 A. Eventually it would be trying to replicate the best of
23 what Facebook and Google can do.

24 Q. Have you made efforts to buy companies that can provide
25 data? I think, I think the government lawyer asked you a

1 question to that affect.

2 Do you recall that question?

3 A. Yes, I recall the question.

4 Yes, we were in due diligence discussions with three
5 companies that had a particular technology that would have
6 helped but not have been a cure for what we were seeking.

7 Q. Would those companies have provided you the same type and
8 quality of data that for example would come from AT&T and the
9 merger?

10 A. No, it would have been a subset of that.

11 Q. Can you just briefly describe how it would not have been
12 as sufficient?

13 A. What these companies where they're called ACR companies,
14 automated content recognition and they have chip sets that are
15 embedded in what is referred to as smart TVs, TVs that are
16 connected to the internet.

17 They could have provided us sort of frame by frame analysis
18 of what shows were being watched down to the household level.
19 But we still would not have had personalized information of who
20 was in the household, who watched the data, and we wouldn't
21 have had any other information about what those individuals may
22 have been susceptible in terms of marketing or not.

23 Q. So if it wasn't going to be that adequate, why were you
24 pursuing buying those companies?

25 A. Because we're starting from a position where we are very,

1 very far behind. Those companies we thought would have
2 provided at least a step in the right direction.

3 Although we knew that that would not have been an end game
4 with respect to a comprehensive data strategy. We thought the
5 strategy would have had to involve a fair bit of acquiring
6 companies.

7 Q. Okay. Now you were asked some questions about various
8 research that your company does. You were shown various
9 exhibits, Exhibit 150, 151, 149 that Mr. Welsh showed you.
10 Those are all plaintiff exhibits. I'm not going to take the
11 time to walk you through all of them.

12 But have you made changes to the way you do research?

13 A. We just reorganized our entire research department.

14 Q. Why did you reorganize it?

15 A. Because I think before it was a very decentralized
16 organization. We have traditional myth and research that was
17 decentralized in each of our brands. We had recently hired a
18 chief analytics officer but we were finding that the brands
19 were hiring their own chief analytics officer. For the small
20 amount of data that we had, it was being used in very different
21 and ineffective ways.

22 So the reorganization was really meant to streamline
23 everything together and bring us more into the modern world of
24 advertising because we were stuck in the traditional world of
25 TV operators have been operating for years.

1 Q. Just as a quick example if you could turn to one of the
2 documents that Mr. Welsh showed you, Plaintiff's Exhibit 150,
3 should be in front of you at page 2. It was that graph that
4 had all of those dots on it if you recall?

5 A. Yes, I recall.

6 Q. He showed you several other documents related to this
7 topic comparing your cable networks to other cable networks.

8 Did the documents that he show compare your networks to all
9 networks or your networks to just cable networks?

10 A. This document that we're looking at PX 0150 is essentially
11 comparing us just to the advertising supported television
12 network universe. So it's a subset of everyone that we compete
13 against.

14 So for example, networks are not included here such as NBC,
15 CBS, Fox, ABC, HBO, Showtime, STARZ and now importantly our new
16 competitors, Facebook, YouTube, Hulu, Netflix. This was just a
17 subset of the universe that we're actually competing with.

18 Q. Okay, we can move forward then.

19 I want to ask you a couple of follow up questions on
20 sports. You were shown a couple of sports contracts.

21 Are you guys sort of late to the game in getting into
22 sports, premium sports as Mr. Welsh called it?

23 A. I don't know if I would characterize us as being late but
24 we're small.

25 So for example, in 2017 Turner represented five percent of

1 all sports viewing in the United States of America. All four
2 broadcast networks again the CBS, NBC, Fox, ABC networks, they
3 all have considerably more sports than we could do and
4 considerably more premium sports than we do.

5 For example, we are not in business with the NFL. The NFL
6 out ranks our highest rank March Madness show by five times.
7 That's a premium sport.

8 We don't do business with NASCAR. We don't do business
9 with college football. Even in golf we only have two rounds of
10 one of the major tournaments.

11 So we're, the sports we have are good sports and they
12 appeal to those individuals that want to watch them. But
13 there's plenty of other sports to watch in the world.

14 Q. Why don't you have more sports? Why don't you have NFL
15 football games?

16 A. We tried. We attempted twice. We were out bid, we
17 couldn't afford it.

18 Q. Did I hear you say that you spent about two billion
19 dollars annually?

20 A. That's correct.

21 Q. On these sports rights?

22 A. Yes.

23 Q. And is there any risks involved in making a contract or a
24 series of contracts that commits your company to two billion
25 dollars per year?

1 A. There are plenty of risks.

2 Q. Can you describe to the Court some of the risks your
3 company takes when it signs these contracts paying all this
4 money to the sports leagues?

5 A. So these contracts are fixed in terms of license costs in
6 the sense that whether we're penetrated on a network at 95
7 percent or 65 percent, we still have to pay the same amount of
8 money to the league.

9 Q. Can you stop right there. You used the word penetrating.
10 Can you explain what penetrating means in your business?

11 A. That means if there's a hundred million TV households, if
12 our network reaches 90 million of that hundred million,
13 penetration is really just meant as a fraction. It's 90 over
14 the hundred, we would say it's 90 percent penetrated.

15 So right now distribution is under pressure. Our networks
16 are not as fully distributed today as they were five years ago.
17 Because as we've gone through these contract renewals, the
18 distributors want more and more flexibility to move networks
19 around and carry them on skinnier bundles. That's something
20 that we try to protect against but we can only do it so far.

21 So one of the risks in sports is that we won't have enough
22 distribution in order to get paid for the sports that we're
23 airing.

24 The second risk goes without saying which is that maybe as
25 sports becomes less popular, ratings go down and we bear all of

1 the risk so that the sports league do not.

2 Q. So for example, if people continue to cut the cord or
3 they're not watching these games as much, you still have to pay
4 all of that money?

5 A. Yes.

6 Q. There's been a lot of talk about March Madness and
7 starting to become what I'll call it Madness in March. So I'm
8 not going to ask you too many questions about it but just very
9 briefly.

10 What percentage of all of your programming on the Turner
11 networks is comprised by March Madness?

12 A. I don't have a percentage off of the top of my head. It's
13 small. This is a tournament that runs for a few months.

14 Just to put it in perspective, the highest ranked March
15 Madness game that we had in terms of ratings without rank as
16 the 161st most popular sporting event that was viewed in the
17 United States.

18 To put that in perspective, if there are any dancing fans
19 in the court, that's the average rating of an ABC show called
20 Dancing With The Stars. And we had at Turner 12 percent of the
21 top 500 shows that aired in sports in the United States last
22 year.

23 So we're, we love the sports we have. We love the business
24 that we're in, but we're small.

25 Q. When you said the March Madness tournament lasted a few

1 months, did you mean a few weeks?

2 A. Yes. It spans a few months, but it's several weeks.

3 Q. Okay. Now moving forward then, beyond sports when you
4 took over as CFO, excuse me, chairman and CEO of Turner did
5 you, in 2014 did you conduct a kind of comprehensive review of
6 the business?

7 A. Yes.

8 Q. And as a result of that, did you prepare a memo to the
9 board making strategic suggestions and recommendations?

10 A. Yes, I did.

11 Q. And Mr. Welsh showed you that document. I think he marked
12 it as Plaintiff's Exhibit 153; is that right? Can you take a
13 look at that.

14 I'm going to, it's a lengthy document, we're not going to
15 take time to go through all of these pages, but I just want to
16 have you explain to the Court a couple of the observations that
17 he made about the state of the business, okay?

18 A. Okay.

19 Q. The memo is dated January 21, 2016?

20 A. Yes.

21 Q. And is that before there was any talk about merging with
22 AT&T?

23 A. Yes, I believe so, yes.

24 Q. So if you could turn to, I'm going to go by, because I
25 have a different copy than the Plaintiff's Exhibit. But I'm

1 going to go by the page numbers that you actually put on the
2 memo.

3 You see where it says page 3 of 16 at the bottom?

4 A. Yes.

5 Q. Okay. So I just want to take you through some of the
6 headings here and I'd like you to explain to the Court what you
7 intended to convey with respect to some of these topics.

8 So number one, changing the TV ecosystem and viewing
9 behaviors, what was that about?

10 A. That means that and keep in mind, this was in 2016 we've
11 seen an acceleration of all of the trends that were highlighted
12 here. But we're seeing a declining in subscriber level-ship in
13 the United States because of all of the alternatives that
14 people can, can now consume content that doesn't necessarily
15 have to be with an MVPD or a VMVPD.

16 In addition, the number of professionally produced
17 television shows in the United States has doubled in the last
18 five years alone. So in 2017, 487 new television shows were
19 premiered and aired. So there's an explosion of choice for
20 people to go and watch on different platforms. They don't have
21 to watch something on TNT. They could go watch Google, they
22 could go watch Hulu. They can go just watch Netflix and binge
23 all of their shows advertising free. So that was a significant
24 trend.

25 It wasn't just a trend for Turner. We're seeing declines

1 in viewership happen across almost the entire ad supported
2 television landscape.

3 Q. How did that analysis of that trend factor into your
4 thinking about what the company had to do going forward?

5 A. We needed to do a number of different things. We needed
6 to, the biggest fear that I have or concern that I have as the
7 CEO of Turner is we need to keep our brands relevant in the
8 next five and ten years against a backdrop that's going to
9 become only increasingly competitive.

10 So we had to dramatically improve our, the quality of the
11 original programming that we were making. We had to have
12 access to data so that it can form, not only improve our
13 advertising but also improve our ability to market our product
14 and services directly to people who we might know what they
15 would like. And then over time maybe even inform the programs
16 that we made themselves.

17 We also need to develop new revenue streams that are
18 outside of the ecosystem which is one of the reasons why we
19 completely embraced the virtual MVPDs and we realize that over
20 time we need to create more and more over-the-top products that
21 go directly to the consumer.

22 Q. Does the merger with AT&T enable Turner to further those
23 objectives?

24 A. Yes.

25 Q. How so?

1 A. Well again, coming back to the word data. All of the
2 customer relationships that AT&T has, the scale in which they
3 have in technology is significantly bigger than anything we can
4 do on our own.

5 And their ability to reach consumers in new and innovative
6 ways particularly in mobile is something that might allow us to
7 actually earn additional revenue streams outside of the
8 ecosystem and give consumers what they want.

9 Q. Take a look at the next topic and some of these you have
10 covered and so I don't want you to repeat yourself because the
11 Court only needs to hear it once.

12 But declining subscribers in viewership. What were you
13 intending to convey in that regard? What was the impact of
14 that?

15 A. This is a -- there's less and less video being consumed
16 live. So there's declining subscribers overall.

17 The reason why there's declining viewership is people don't
18 have to watch shows when they're live anymore. There's video
19 on demand. There is subscription video on demand. There is
20 advertising video on demand. There's alternative platforms.
21 More and more people are watching shows on a delayed basis.

22 The way we get paid in advertising, if someone doesn't
23 watch our show within the first seven days it's aired, we don't
24 get paid.

25 Q. Can you explain that?

1 A. Meaning that the contracts that we have with our
2 advertisers specifically states that the viewership has to be
3 done within the first seven days after it's aired live;
4 otherwise, the advertiser does not have to pay despite the fact
5 that their ad may have been viewed by a consumer.

6 Q. So does the advertiser get paid because the show was
7 distributed to let's say 90 percent of the homes? Is it based
8 on subscribers or is it based on viewership?

9 A. Viewership.

10 Q. What is the difference between those two?

11 A. Well, viewership is the actual eyeballs that are watching
12 the show. I tried to explain a little bit earlier. The number
13 of eyeballs that watch a show is a function of distribution
14 because we need to get our shows in front of people.

15 And then it's a function of how good and how effective is
16 the show that we can actually attract and retain people to come
17 and want to spend time with you.

18 Q. What happens if the viewership numbers don't add up to
19 what the advertiser was expecting within the seven day period?

20 A. We lose.

21 Q. What does that mean?

22 A. There's a term in the advertising business called make
23 good. In other words, we have to provide free inventory over
24 time to essentially get them up to the impressions that they
25 paid for.

1 But that's an opportunity cost. That means that's a piece
2 of inventory of advertising that we can't sell then to a third
3 party to make money.

4 Q. Again, does the merger with AT&T assist specifically on
5 this issue?

6 A. Yes.

7 Q. For the reasons you've described?

8 A. Yes.

9 Q. Okay. Your next item, large scale GE networks such as TNT
10 and TBS have been disproportionately affected by these viewing
11 trends.

12 What does GE stand for?

13 A. General entertainment.

14 Q. Can you explain to the Court what you meant by that?

15 A. That means that there has been, there has been, as this
16 gets back to the explosion of choice of available high quality
17 content on multiple platforms.

18 So in the past, I mean, if you think of the original
19 general entertainment networks with the broadcast networks.
20 There use to be only three of them, ABC, CBS and NBC.

21 Now that's broadened out. TNT and TBS would be considered
22 general entertainment. But where the audiences have migrated
23 more to are nichier, more branded environments that have a
24 better brand promise than GE, than TBS or TNT.

25 For example, a fantastic branded network is HBO. When

1 people talk about HBO, they have a general sense of the quality
2 of programming that they are going to be able to see on HBO and
3 it's delivered that for 15 years.

4 We thought TBS and TNT were going to have to have their
5 branded brands really sharpened up to be a better brand promise
6 to consumers; otherwise, they were in danger of just becoming
7 less and less relevant.

8 Q. By the way, how do ratings for television shows on the
9 broadcast networks compare to the top cable networks?

10 A. They are multiple times higher.

11 Q. Broadcast ratings are higher?

12 A. Considerably higher.

13 Q. Next item, changing consumer behavior and expectations.

14 What did you mean by that, on page 4, the bottom?

15 A. There it is, I'm sorry.

16 This is what I was saying before. Changing behavior.

17 People don't feel like they have to watch a schedule anymore.

18 If you love a TV show like The Alienist. We aired The Alienist

19 on TNT on Monday nights at ten o'clock, people feel like they

20 don't have to tune in on Monday at ten o'clock. They can catch

21 it on demand. They can catch it three weeks later on demand.

22 So that's a change in behavior. That's one version of that.

23 The second change in behavior is the expectations of the

24 quality of experience in television of consumers has

25 significantly increased. So new services like YouTube TV or

1 Netflix that have beautiful user inter-facers that are
2 available on any and all devices they work all the time. The
3 quality of the video is quite high and they have
4 recommendations.

5 They have abilities, they have better mouse traps than
6 traditional MVPDs who still have inferior user interface
7 guides. And it's a real impediment to the user experience.
8 Consumers now just expect better.

9 Q. That's what you also meant by the next item growth in on
10 demand viewing and viewing on unmeasured devices.

11 What's an unmeasured devices and what's that about?

12 A. Certain video content consumption that's happening on
13 devices such as iPads and phones, Nielsen doesn't even have
14 products to measure yet.

15 So we can tell that there's viewing happening on those
16 devices, but the advertisers aren't willing to pay for it.

17 Q. Again, does the AT&T data assist in this area?

18 A. Absolutely.

19 Q. What about this next one, potentially reduced tolerance
20 for advertising, what does that mean?

21 A. If you look at the explosive growth in viewership and
22 subscriber-ship in Netflix there's a chance we're habituating
23 an entire population to no longer expect or want to see ads.

24 Q. What are companies like your company doing about that or
25 trying to do about that?

1 A. We're trying to reduce the number of ads per hour which
2 gets back to what I said before lunch. The challenge for a
3 company like ours then is we need to make every advertising
4 unit that much more valuable. So that we can make up for lost
5 revenue because consumers will be seeing overall fewer ads on
6 our networks.

7 Q. Finally, you have increasing competition for original
8 programming. Explain to the Court what you meant by that?

9 A. I think the best example is the doubling of the
10 professionally produced shows in the last five years. There's
11 just an explosion of things for people to watch. That doesn't
12 even include all of the user generated content that goes up on
13 YouTube where my son doesn't watch Cartoon Network anymore. He
14 watches people playing video games and that to him is content.
15 It doesn't matter that it's not on a traditional network.

16 Q. After setting forth in detail these various observations
17 and more, you then identified a strategy for the company going
18 forward that you were recommending to the board and I won't
19 take the time to go over all of the things that you
20 recommended.

21 But if I could just turn to the first one, you indicate
22 transition from an advertiser and affiliate centric company to
23 a consumer centric company. And that's on page 7 of the
24 exhibit.

25 Do you see that?

1 A. Yes.

2 Q. And then you have different categories within that that
3 recommended strategy; content, marketing, monetization, user
4 experience and data.

5 Could you just speak to us about, about the strategy that
6 you recommended?

7 A. In it's simple form the history of Turner being a
8 wholesaler really was much more concerned about pleasing
9 advertisers and distributors and didn't really, because they
10 didn't know who their fans and viewers were, they didn't really
11 think about them.

12 Q. They being who?

13 A. Turner, let's say Turner Circa five, seven, eight years
14 back. When I came in I realized that we had to literally turn
15 the company on its ear. We had to put the fan or the consumer
16 in the center of every single decision that we do. Because if
17 we don't understand who our consumer is, who our fans are, then
18 we can't succeed over the longer term continuing to be a stuck
19 in the middle wholesaler. That's just not going to work
20 because the world is moving towards addressability. It's
21 moving towards the advertising of what Facebook and Google is
22 doing and so we're in an arms race to develop what makes them
23 unique and good and then hopefully we do it faster than they
24 can develop their own capabilities of building quality premium
25 content.

1 Q. You said addressability, can you explain to the Court what
2 you meant by that?

3 A. It's essentially a one to one advertising ability. So if
4 we were both watching the same television show, but I know that
5 you like Chevy and I like Ford, you could receive a Chevy ad
6 watching the same show and I can receive a Ford ad.

7 Q. Does the merger with AT&T enable that kind of addressable
8 advertising?

9 A. It should, yes.

10 Q. Is that because of the data that they have?

11 A. Yes.

12 Q. And then finally on your recommended strategy, it says
13 expand aggressively outside the traditional TV ecosystem.

14 Could you please speak to that?

15 A. Again, we need because we have so much pressure right now
16 on our distribution revenues and advertising revenues, we need
17 to build new revenue streams.

18 So we need to build products and services that can get
19 directly to consumers. We have this fantastic brand Adult Swim
20 that was mentioned earlier has been number one in the adults 18
21 to 34 demographic for the last decade.

22 It sounds incredibly impressive and it is. It's no small
23 feat, but that's the demographic of people. That's the age
24 group of people who are actively rejecting traditional TV right
25 now. They don't want to watch traditional TV.

1 So even though Adult Swim remains number one, it's number
2 one but its audience numbers are going down. And so this is a
3 brand that we need to figure out how can we develop products
4 and services that can live outside of the traditional
5 ecosystem, embrace new technologies through innovation and get
6 this brand directly into consumers in a manner in which they
7 want to consume it.

8 Q. For clarity, Adult Swim is the same channel as Cartoon
9 Network; is that right?

10 A. Yes, that's correct.

11 Q. When does it switch over to Adult Swim, in the evening?

12 A. Eight o'clock in the evening Eastern time.

13 Q. The rest of the day it's Cartoon Network?

14 A. Yes.

15 Q. Now with that work you did when you came in and surveyed
16 the situation and made your recommendations and you've already
17 discussed you signed these new big sports contracts with NCAA
18 and NBA, right?

19 A. Yes.

20 Q. Did you then set on a strategy to increase the prices of
21 Turner programming to the various distributors?

22 A. That was the strategy that we began. I believe the
23 strategy was begun to put, be put in place prior to me even
24 becoming the CEO because of the length of these contracts,
25 because they're typically years in length.

1 We had to set the strategy probably in 2013 for it to begin
2 to show up in '15, '16 and '17. And the strategy really was
3 one of in our mind Turner had fallen behind its peers and
4 competitors in terms of the price that it had been charging
5 relative to the strength of the network. So the strategy was
6 really one of catch up.

7 Q. You said Turner had fallen behind?

8 A. In the past.

9 Q. What do you mean by that?

10 A. In the past the price increases that Turner had sought
11 were less aggressive than that of it's competitors such as
12 Disney and Fox. So we decided that we had to try to catch up
13 the affiliate rates and also in understanding that we were
14 making big sports commitments and we needed to try to push our
15 rates back up to be competitive.

16 Q. How many years did it take to catch up?

17 A. I don't even know if we've completely caught up yet, but
18 it took about five years.

19 Q. And did you have let's say double digit rate increases
20 during those years?

21 A. Three of the five.

22 Q. For three of the five?

23 A. Yes.

24 Q. And what about for this upcoming year, have you caught up
25 basically?

1 A. Well, our rate increases are going to decline dramatically
2 now for the foreseeable future.

3 So we're going to go from rate increase or subscriber
4 revenue increases in 2017 that were approximately 13 percent.
5 We anticipate in 2018 it's going to be low single digits.

6 Q. Let me show you a document and you can just run that by
7 the Court again with the document in hand. That would be
8 Exhibit 781.

9 MR. PETROCELLI: May I approach, Your Honor?

10 THE COURT: All right, yes.

11 BY MR. PETROCELLI:

12 Q. Are you familiar with this document?

13 A. Yes.

14 Q. What is it?

15 A. This is our 2018 budget.

16 Q. Was this document prepared by people acting under your
17 direction and control?

18 A. Yes.

19 Q. This document contains your input and your review?

20 A. Yes, that's correct.

21 MR. PETROCELLI: Your Honor, I move this into
22 evidence.

23 THE COURT: All right, any objection?

24 MR. WELSH: No objection, Your Honor.

25 THE COURT: You want this under seal?

1 MR. PETROCELLI: Yes, Your Honor, thank you.

2 THE COURT: Be admitted.

3 (Defendant's Exhibit Number 781 received into evidence
4 under seal.)

5 BY MR. PETROCELLI:

6 Q. Can you turn to page, it would be these DX numbers, it
7 would be 19. Do you have that in front of you? The title of
8 it is domestic subscription-key assumptions. There's a box
9 called rate strategy.

10 You're looking at it, Mr. Martin?

11 A. Oh, yes, I'm sorry, yes.

12 Q. The first sentence says following completion of its prior
13 affiliate renewal cycle, 2017 was the final year of double
14 digit rate increases across Turner's top four networks.

15 Is that what you were just describing?

16 A. Yes.

17 Q. Okay. Can you then turn to the page, two pages later,
18 Page 21 of Defense Exhibit 781 and there's a chart entitled
19 domestic subscription revenue.

20 Tell me when you have that?

21 A. I see it.

22 Q. Now you see the line under domestic revenue subtotal U.S.
23 linear?

24 A. Yes.

25 Q. You indicated 13 percent, is that the number that's

1 reflected in 2017?

2 A. Yes.

3 Q. Now you see the numbers that are in the years 2018, '19,
4 '20, '21, and '22 without saying them out loud?

5 A. Yes, I see them.

6 Q. Okay, and do you see that those, are those the low single
7 digit numbers that you previously mentioned?

8 A. Yes, they are.

9 Q. And those single low digit numbers represent lower price
10 increases; is that right?

11 A. That's correct.

12 Q. Okay, thank you.

13 MR. PETROCELLI: We're actually turning, Your Honor,
14 to our last topic which is Dish in the Dish blackout.

15 BY MR. PETROCELLI:

16 Q. How many times can you recall Turner having been blacked
17 out by a distributor?

18 A. Twice, two times.

19 Q. Two times, what were the two times?

20 A. One preceded me when I was the CEO. I believe it was
21 2013.

22 Q. Okay.

23 A. And that was with a distributor and the dark period lasted
24 24 days.

25 The second time was with Dish which was in 2014 and that

1 lasted 31 days and that didn't include all of our networks.

2 Q. Okay. Now the Court has heard a lot of testimony about
3 this already. So I don't want to go through the whole story,
4 but I just want to hit on some particular parts of the story,
5 okay.

6 What happened on -- did you understand that there were
7 negotiations going on let's say in the summer of 2014 to get a
8 deal done with Dish on the various networks?

9 A. Yes.

10 Q. Okay. And did something happen to bring those discussions
11 to an abrupt stop?

12 A. Yes.

13 Q. What happened?

14 A. Time Warner never announced that it had plans to launch
15 HBO Now as an over-the-top stand alone product.

16 Q. Explain to the Court. Well, first of all, when did that
17 happen?

18 A. I believe it was the middle of October. I think it was
19 October 15th.

20 Q. October, 2015?

21 A. I believe that was --

22 Q. Excuse me, October 15, 2014?

23 A. Correct, yes.

24 Q. Okay. And explain to the Court what the launch of HBO Now
25 meant?

1 A. So this would have represented the first time in the
2 history of HBO that it would be available to consumers without
3 being part of a package of MVPD channels.

4 So a consumer could just pay let's just for the sake of
5 argument \$15 and receive over the internet directly an HBO
6 service without having to have any other channels attached to
7 it.

8 Q. Did you receive a reaction from Mr. Charlie Ergen of Dish
9 regarding that announcement?

10 A. Yes. He immediately expressed his disappointment and
11 frustration that we would be willing to launch a product like
12 that.

13 MR. WELSH: Objection, Your Honor.

14 THE COURT: Hold on. An objection?

15 MR. WELSH: Yes, Your Honor.

16 THE COURT: Come on up.

17 (Witness leaves the stand.)

18 (Sealed Bench Conference.)

19 MR. WELSH:

20 MR. PETROCELLI:

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24 THE COURT:

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MR. PETROCELLI :

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THE COURT:

MR. PETROCELLI:

THE COURT:

MR. PETROCELLI:

(Open court.)

THE COURT: All right, you may proceed consistent with the discussion at the bench.

(Witness resumes the stand.)

BY MR. PETROCELLI:

Q. Were you aware at the time of hearing from Mr. Ergen, by then were you already aware of the plans that he had to launch his over-the-top service called Sling?

A. Yes.

Q. Thereafter is that when or shortly thereafter the blackout occurred?

A. Yes. The blackout occurred I believe on October 21st.

Q. Now did you have any discussions with Mr. Ergen to try to stop the blackout?

A. Yes. Mr. Ergen called me about an hour before he took our signal dark and communicated to me that he was going to take us dark.

I immediately asked him not to do it and offered to get on an airplane, fly to Denver, have lunch with him tomorrow, try

1 to continue the conversation in a constructive way while the
2 service stayed on.

3 Q. When did you receive that phone call?

4 A. Eleven o'clock in the evening Eastern time.

5 Q. When did he say he was going to take you down?

6 A. Midnight.

7 Q. Okay. So when you offered to continue the discussions and
8 fly to Denver, what was the response?

9 A. He rejected the offer and took us down an hour later.

10 Q. And then you were dark for 31 days; is that right?

11 A. Yes, that's correct.

12 Q. Okay. And then we essentially heard from other witnesses
13 that there was a temporary agreement reached in November?

14 A. Yes. We had to make some accommodations in order to get
15 the signal put back up temporarily while we had an extension
16 that went out through the end of March.

17 Q. And then what then with this four month or so extension
18 that bought you time until the end of March, what then was
19 happening let's say after the holidays. Did you begin
20 discussions with Dish again to try to get these deals done?

21 A. Yes. The team started to renegotiate in more earnest
22 beginning I believe January of 2015.

23 Q. Now I believe you were shown, I'm just going to show you a
24 couple of documents. I think Mr. Welsh may have shown them to
25 you. They're all plaintiffs exhibits. One of them is

1 Plaintiff's Exhibit 4.

2 MR. PETROCELLI: Four is in already, Your Honor.

3 THE COURT: Yes.

4 BY MR. PETROCELLI:

5 Q. Do you have Plaintiff's Exhibit 4 in front of you?

6 A. Yes, I do.

7 Q. Okay. So what's going on with this? You talking about
8 plan A, plan B, and so forth.

9 What is plan A?

10 A. Plan A would be to get a deal done with Dish.

11 Q. Now the first sentence of the second paragraph says what?

12 A. We all agree -- do you want me to read it?

13 Q. Yes?

14 A. I can barely see it.

15 Q. Read slowly so the Court Reporter can get it?

16 A. "We all agree on the Turner side that doing a deal with
17 Dish is the best option, but we have to have a viable plan B
18 even if it's a long shot."

19 Q. Even if it's a long shot is in parentheses, right?

20 A. Yes.

21 Q. Did you try to develop a plan B?

22 A. We thought we needed to do a plan B because Charlie Ergen
23 had threatened to be out of business with us forever. That's
24 what he had said on numerous occasions.

25 Q. So?

1 A. So --

2 Q. I'm sorry, continue?

3 A. So as a business person if one of your large partners says
4 I may drop you and never be in business with you again, that
5 would be economically catastrophic.

6 So we started to brain storm only what might be
7 alternatives to try to make up those lost revenues. Remember,
8 not only on the subscriber side, but when you lose distribution
9 we would have lost a lot of advertising revenue as well.

10 One of the ideas that we internally circulated was perhaps
11 if we had gone to DirecTV and said you can be satellite
12 platform exclusive. Would that be something of interest to
13 you? Meaning that we would still be in business with the local
14 cable operator in any particular territory, but if someone in
15 that territory wanted to have a satellite, the only place they
16 could go would be DirecTV.

17 So we ran a math exercise on how much money we thought we
18 would lose from Dish and how much of a premium we would need to
19 get from DirecTV in order to make the economics even look close
20 to similar.

21 We quickly concluded the math just simply doesn't work. So
22 we never went anywhere with the plan which is why I called it a
23 math exercise. It was a silly idea.

24 Q. Did you ever discuss it with DirecTV?

25 A. No.

1 Q. So there was no plan B?

2 A. No.

3 Q. Okay. Let me show you now, let me make sure I've covered
4 this. Yeah, let me show you the next exhibit. Plaintiff's
5 205.

6 Do you have that?

7 A. Yes, I'm there.

8 Q. Okay. By the way, when you and Mr. Ergen spoke at 11 p.m.
9 an hour before he took you down, did you and he or did he make
10 any comment to you about any further negotiations?

11 A. Yes, he did. He said listen, in my experience going dark
12 is a way to actually put pressure on the teams to get together
13 and finally get a deal done.

14 Q. While you were dark, while he took you dark, did the team
15 --

16 MR. WELSH: Objection, Your Honor.

17 THE COURT: Yes, come on up.

18 (Witness leaves the stand.)

19 (Sealed Bench Conference.)

20 MR. WELSH:

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24 MR. PETROCELLI:

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THE COURT:

MR. PETROCELLI:

THE COURT:

MR. PETROCELLI:

THE COURT:

(Open court.)

THE COURT: You may proceed consistent with discussion at the bench.

(Witness resumes the stand.)

BY MR. PETROCELLI:

Q. After Mr. Ergen made that comment to you, did your teams attempt to continue to negotiate while you were dark?

A. Yes, after a brief, a brief breathing period I think, I believe, yes.

Q. Okay, and that's what led to that November agreement?

A. Yes.

Q. So going back to Exhibit 205, okay. Was there any issue that was affecting your negotiations with Mr. Ergen that had to do with Sony Play Vue?

A. I'm not sure I understand the question.

There wasn't an issue, but Mr. Ergen had had on several occasions communicated that he was particularly concerned about Sony becoming an extremely competitive force against his own

1 service.

2 Q. What did you understand that to refer to?

3 A. Meaning that he said of all of the potential virtual MVPDs
4 I fear Sony the most because they have embedded connected
5 devices, an incredibly engaged group of fans that come back and
6 use the Sony Playstation every day. They have credit cards.
7 They have information and he thought that they would have, that
8 the data would give them a big leg up against, against his
9 Sling product.

10 Q. Now when you write in this email and I'm referring now to
11 the end of the second paragraph.

12 As we discussed before, our Turner networks have to be
13 included in as many OTT packages as possible as the ecosystem
14 inevitably becomes dis-intermediated.

15 What does that refer to?

16 A. As there were going to be more and more entrants, the
17 bearer's entry of distribution were beginning to fall and are
18 continuing to fall and I wanted to make sure that there was
19 agreement that at least among the Turner and Time Warner side
20 that we need to embrace these new entrants because that's the
21 only way we can ensure that we can maintain adequate
22 distribution as the traditional ecosystem has the risk of
23 continuing to decline.

24 Q. What you wrote in the next paragraph. "He will not react
25 well to this. But I think we should press ahead with speed on

1 this." What did that refer to?

2 A. We knew that Mr. Ergen would not take kindly to us signing
3 up with Sony.

4 Q. Did you ultimately do the deal with Sony?

5 A. Yes.

6 Q. Okay, my final document is Plaintiff's Exhibit 120. Mr.
7 Welsh showed this to you.

8 Again, this is during the time in March prior to concluding
9 the deal with Dish, correct?

10 A. That's correct.

11 Q. And the email at the bottom says: "Draft came in last
12 night. They behaved on the MFN. Plenty of wood to chop given
13 new language in data and TBE and other issues such as Dish
14 still seeking protection against us as a distributor." And then
15 up above it says thanks you write: "We will never agree to that
16 protection. This is a go dark issue."

17 Can you describe to the Court what that issue was?

18 A. Mr. Ergen was trying to prevent the notion of in the
19 future any portion of Time Warner becoming its own distributor.

20 In other words, if we ourselves instead of, think of it as
21 we could ourselves become a virtual MVPD. If we took all of
22 the Turner networks and possibly HBO, we could have gone direct
23 to consumers ourselves and he was trying to prevent us from
24 doing that.

25 Q. Did you ultimately agree to that?

1 A. We never agreed to that.

2 Q. One final set of questions. During the blackout that did
3 occur, do you have any general understanding of the, of whether
4 Dish lost any subs?

5 A. We believe during the period with which they were dark
6 they lost subscribers that represented meaningful less than one
7 percent of their overall subscriber base.

8 But what was interesting when we looked at that, they lost
9 the same number of subscribers in the same period a year ago
10 when we were not dark on them.

11 So it was very unclear whether we had any affect whatsoever
12 during the period with which our networks were dark.

13 Q. And are you aware that in this case the government expert
14 economist named Professor Shapiro has predicted there will be a
15 price increase solely on account of the merger and he bases
16 that price increase on a 12 percent departure rate meaning that
17 if a distributor cannot have access to the Turner networks,
18 that distributor would lose 12 percent of its subscribers.

19 In your experience is that remotely possible?

20 A. That's preposterous. In my experience, again keeping in
21 mind that over the last decade we've only gone dark twice for a
22 month each because it's very bad for business to go dark.

23 I would think that any maximum loss from the Turner
24 networks being off would be low single digits at most. We
25 represent now six percent share of all video content viewing in

1 the United States. We're just not that big.

2 Q. And I'll represent to you that another government expert
3 fellow who does surveys named Professor Hauser said that if
4 there's a one month blackout of the Turner networks that there
5 would be a departure rate of eight percent. That's Professor
6 Hauser, eight percent meaning that a distributor would lose
7 eight percent of it's subscribers in the event of a one month
8 blackout.

9 In your experience and based on what actually happened with
10 the one month blackout, is that remotely possible?

11 A. No, that's absurd.

12 MR. PETROCELLI: Nothing further, Your Honor.

13 THE COURT: All right, we're going to take the
14 afternoon recess.

15 You remain a witness under oath in the case. Refrain from
16 discussing your testimony with anyone, with counsel or anyone
17 else. Be back in 15 minutes to do redirect, okay.

18 THE WITNESS: Thank you.

19 THE COURT: Step down.

20 (Witness excused.)

21 (Recess at 3:45 p.m.)

22 (Proceedings resumed at 4:07 p.m.)

23 THE COURT: All right.

24 You may do redirect when you're ready.

25 MR. WELSH: Thank you, Your Honor.

1 REDIRECT EXAMINATION

2 BY MR. WELSH:

3 Q. Mr. Martin, you were asked some questions by defense
4 counsel going back to your time when you were with Time Warner
5 cable. I want to come back to that setting, okay?

6 A. Okay.

7 Q. All right. And you were asked a bunch of questions about
8 whether you recall hearing this or that or learning this or
9 that about other cable companies and whether any business was
10 lost. And do you remember generally those questions that were
11 asked by Mr. Petrocelli?

12 A. Yes.

13 Q. Okay. Back in that time frame, sir, Time Warner cable did
14 not compete with Charter, with Cox or with Comcast, correct?

15 A. Directly compete, that's correct.

16 Q. Okay. Because your cable companies, you have franchise
17 areas, right?

18 A. Yes, that's correct.

19 Q. So you're not losing subscribers for Time Warner cable to
20 Comcast, for example, correct?

21 A. Correct.

22 Q. Okay. You testified, if I recall correctly, that I think
23 you said, and this may be a quote, that your distributor growth
24 has been decelerating, do you remember that, sir?

25 A. Yes.

1 Q. If you would look at PX 148, which has been admitted. And
2 I want to direct you to 033. This is the document that you
3 gave to AT&T in this get-to-know-you sort of meeting, and we
4 looked at PX 33. This is your distribution and content
5 licensing revenue growth; is that right?

6 A. Yes that's correct.

7 Q. And I think these figures are confidential so I won't say
8 them in open court. But if we look at the top. There's two
9 sets of figures on the bottom. There's a rate increase
10 percentage and then there's a revenue increase percentage; is
11 that correct?

12 A. Yes, that's correct.

13 Q. And did we see for the rate increase that it's moving from
14 a single digit number in 2012 going to a double digit number in
15 2016; is that right?

16 A. Yes, that's correct.

17 Q. Okay. And if we look at the revenue increase number, we
18 look at 2012 a single digit number and it's doubled in 2016; is
19 that right?

20 A. Yes, that's correct.

21 Q. Okay. Now, if you would look at PX 8. This is your
22 briefing strategy book that we talked about earlier. I want to
23 direct you to page PX 8-036. And under the title, "Executing
24 deals with affiliates," you told your board that terms on pays
25 to grow the domestic affiliate revenue by 13 percent in both

1 2016 and 2017; is that right?

2 A. Yes, that's correct.

3 Q. And a nine percent CAGR from 2015 to 2019; is that right?

4 A. Yes, at the time, that was the forecast.

5 Q. Okay. Out pacing the overall industry growth; is that
6 correct?

7 A. The forecast as of two years ago, yes.

8 Q. And CAGR is what?

9 A. Compound annual growth rate.

10 Q. Thank you.

11 Now, you were asked some questions about DX 781. Maybe you
12 can pull that in front of you.

13 I'm sorry, it may be loose, it's DX, Defendant's Exhibit
14 781, sir.

15 I think that's it.

16 A. Okay.

17 Q. This is the long-range plan document, correct?

18 A. Yes, that's correct.

19 Q. Now, the document, first off, it's -- this was prepared in
20 November of 2017; is that right?

21 A. Yes, that's correct.

22 Q. So we're looking at a year after this merger was
23 announced, right?

24 A. That's correct.

25 Q. Okay. So it's a post-merger related document.

1 And then on this one you talked about the revenue numbers.
2 I know this whole document has been marked confidential, so
3 we'll be careful. But despite all of what you're projecting
4 here, and you've had double digit growth in your affiliate
5 rates, isn't that true, during the time up till today, correct?

6 A. Up through the send of 2017.

7 Q. Okay. And throughout that time of double digit affiliate
8 rate growth, you haven't lost any MVPDs, have you, they haven't
9 terminated with you?

10 A. That's correct. Other than the go dark period with Dish.

11 Q. Okay. And you're still -- you've still got a network
12 streaming out to them, right?

13 A. That's correct.

14 Q. Okay. Now, if we look at this document, DX 781, and if
15 you look at their page number DX 781-0056.

16 A. My apologies. I'm having a hard time following the page
17 numbers.

18 Q. It's difficult, it's on the, sort of the bottom of this --
19 the side of the document, the bottom of the page, 8 and half by
20 11.

21 A. Oh, I see it. Would you repeat the page?

22 Q. Absolutely. 0056.

23 A. I'm at that page.

24 Q. I want to make sure we're on the same page. So I don't
25 think I'm going to be doing something out of hand, just to say

1 it's the 2018 budget and long-range plan, that's what it says
2 at the top. Are you on the same page as me?

3 A. Yes.

4 Q. Okay. And if we look down at the bottom and it has
5 percentages for margins, do you see that?

6 A. Yes, I do.

7 Q. And it's projecting that out to some years into the
8 future, correct?

9 A. Yes.

10 Q. Okay. And the margins, as it goes out, are pretty steady
11 aren't they?

12 A. Steady but tracking.

13 Q. Well, for example --

14 A. Oh, I'm sorry, you're going all the way at the bottom,
15 there's a line in there called the planning gap, which means we
16 have to go figure out how to make up earnings that we have no
17 idea how we can get them.

18 Q. And those numbers, though, are pretty steady on your
19 percentage margin as is the bottom figure straight across,
20 correct?

21 A. That's correct.

22 Q. Okay, thank you. You can put that to the side for now.

23 Now, you testified, and I think what you said was that you
24 didn't want to be a wholesaler that was stuck in the middle,
25 words to that effect?

1 A. Yes.

2 Q. Okay. Now, you do have film struck, is that right, so you
3 can go directly to the consumer with that?

4 A. Yes.

5 Q. And you have boomerang; is that right?

6 A. Yes, that's correct.

7 Q. And Time Warner has HBO now so it can go direct to
8 consumer with that product; is that right?

9 A. Yes.

10 Q. And you've also added -- Turner just added something
11 called B/R Live, Bleacher Report Live; is that right?

12 A. Yes.

13 Q. And that just was announced, I guess yesterday; is that
14 right?

15 A. Yes.

16 Q. And B/R Live is streaming some live sports programming; is
17 that right?

18 A. Yes, B/R Live will allow consumers to essentially purchase
19 portions of games.

20 Q. Okay. And in the news release that Turner issued on this,
21 it said that, "B/R Live is the latest move in Turner's overall
22 strategy to innovate beyond the traditional television
23 ecosystem." Do you recall that?

24 A. Yes, I do.

25 Q. And that's an accurate statement?

1 A. Yes.

2 Q. And again, in the press release that went out, Mr. Levy,
3 the president of Turner, said that, "With respect to Bleacher
4 Report, that it was acquired in 2012 and that we knew the
5 definition of a network was changing, and we anticipated a time
6 when Bleacher Report would become a virtual network. Today is
7 a significant step in that direction." Do you recall that
8 statement?

9 A. Yes, that's an ambitious statement.

10 Q. Okay. And that an accurate statement by Mr. Levy?

11 A. Accurate, but possibly ambitious.

12 Q. Okay. But that's where you are and that's what you
13 disclosed to the public that you're going to be taking your
14 programming, moving in that direction, taking it out to the
15 consumer directly; is that right?

16 A. Yes.

17 Q. So even though you say you're a trapped wholesaler, you
18 don't want to be a trapped wholesaler, you're actually taking
19 steps and have been taking steps for several years to move
20 directly to the consumer with your content, true?

21 A. With these nascent businesses, that's correct.

22 Q. And let's talk about advertising if we can. Now, I think
23 you talked about that and said that your advertising is getting
24 stressed, and I think you said that, in answer to some
25 questions, that when you're advertising dollars, when the

1 revenue from your subscription are up, your advertising dollars
2 can move down and vice versa. Did I get the gist of your
3 testimony correctly?

4 A. I'm not sure I understood the question.

5 Q. I think you testified that if you have more subscription
6 revenue, then you don't need as much advertising revenue, but
7 the same is not true if you had more advertising you could have
8 less subscription revenue, correct?

9 A. I think they're two different concepts if I might explain?

10 What I said was that to the extent that you have greater
11 distribution, you have a higher probability of having higher
12 advertising because you have the capability of being in front
13 of more eyeballs, which we can then monetize in advertising.

14 The second statement I made was to the extent that we
15 succeed at growing our advertising revenue on the overall
16 business model, it would put less pressure on the subscription
17 revenue.

18 Q. Okay. Well, let's look at PX 456 as to that latter point.

19 Tell me when you're there, sir?

20 A. I'm there.

21 Q. PX 456 is a 10K for Time Warner.

22 MR. WELSH: Your Honor, I understand there's no
23 objection to the admission of the document?

24 MR. PETROCELLI: Will you give me a second?

25 (Pause.)

1 MR. PETROCELLI: No objection.

2 THE COURT: All right, be admitted.

3 MR. WELSH: Thank you, Your Honor.

4 (Plaintiff's Exhibit No. 456 was received in evidence.)

5 BY MR. WELSH:

6 Q. If you would look, Mr. Martin, at page 065.

7 A. I'm there.

8 Q. Okay. Now, I think in your answers to Mr. Petrocelli's
9 questions you said that your rates were -- your advertising was
10 at one percent if I recall, you said one percent or flat. If
11 we look at the 2016, 2017 time frame, did we see that
12 advertising was at three percent?

13 A. 2016 versus 2015, that's correct.

14 Q. I'm sorry, 2016 versus 2015 was at three percent, thank
15 you for correcting me. Is that right?

16 A. Yes, that's correct.

17 Q. And during this same time period your subscriptions were
18 also up 12 percent, correct?

19 A. Yes.

20 Q. So both were up for that same timeframe, right?

21 A. Yes.

22 Q. Okay. Now, if you look at the next page which gives the
23 explanation for what's happened with your advertising for the
24 2016, 2017 timeframe. Do you see that at the top there?

25 A. Yes, at the very top, correct.

1 Q. Okay, yes, sir. And it says there that it's --

2 MR. PETROCELLI: Excuse me, I can't follow where he
3 is, Your Honor. Having trouble hearing.

4 THE COURT: Break it down.

5 MR. WELSH: Okay.

6 THE COURT: Page 65 of Exhibit?

7 MR. WELSH: 465, page 65.

8 THE COURT: 456, right?

9 MR. WELSH: 456, you're right.

10 THE COURT: Exhibit 456.

11 MR. WELSH: 456.

12 THE COURT: Page 65, 66.

13 MR. WELSH: Correct. I was directing him to page 66.

14 BY MR. WELSH:

15 Q. In the top paragraph on 66, it's talking about the
16 decrease in advertising revenues for December 31, 2017; is that
17 right?

18 A. Yes.

19 Q. And it says that the reasons why there was a decrease then
20 was primarily due to the lower audience delivery of Turner
21 Entertainment Networks and the comparison to the revenues
22 associated with the prior year when you had the Division One,
23 men's basketball championship tournament, this March Madness
24 we've been talking about, correct?

25 A. Yes.

1 Q. Okay. When the disclosure was made, there's no disclosure
2 in there about a decrease in advertising and having to do with
3 Google or Facebook, Apple, Amazon or Netflix, correct?

4 A. I don't see them in there, I think that's correct.

5 Q. That's what your employer put out to the FCC.

6 And I'm correct then from what was there that Turner gets
7 more advertising revenue when it airs the NCAA tournament for
8 the final four in the championship games than when it doesn't,
9 right?

10 A. Yes.

11 Q. When your advertising got stressed, as you put it, am I
12 correct that you didn't sit placidly, you actually did
13 something to try to work through that, right?

14 A. Yes, we're always actively trying to grow advertising.

15 Q. So among other things that you did, you engaged in these
16 innovative steps that we talked about earlier with your
17 addressable advertising; isn't that right?

18 A. Yes.

19 Q. And I think your testimony was that you're continuing and
20 would continue to do that even if this merger didn't occur,
21 correct?

22 A. Yes, although today addressable advertising represents a
23 very, very small percentage of our overall advertising dollars.

24 Q. But you're continuing. And, in fact, isn't it the case,
25 sir, that Turner, in 2016 Turner had over a hundred audience

1 driven deals in place for its addressable advertising?

2 A. I believe that's correct.

3 Q. Okay. And that was actually part of the self-assessment
4 that you had submitted so that you could get paid for the year,
5 right?

6 A. Well, I assumed that's accurate, yes.

7 Q. And something you're proud of so that you could get a
8 payment from your employer, right?

9 A. Yes.

10 Q. Okay. And you were making significant progress as well
11 during this time frame of 2016 in monetizing programmatic video
12 and mobile advertising business; isn't that true?

13 A. Yes.

14 Q. And you leveraged the Turner data cloud which you had at
15 the time as well for your sales efforts that I just mentioned,
16 right. That was something else that you were proud of that you
17 were doing, right?

18 A. Yes.

19 Q. All right. So you've been moving forward and innovating
20 in your advertising as well.

21 If you'll look back at PX 148. Tell me when you're there?

22 A. I'm there.

23 Q. Okay. And again, this is the presentation shared with
24 AT&T, and if I can direct you to PX 148 028.

25 A. Yes, I'm there.

1 Q. Okay. Now, this is a listing of the various, various
2 efforts undertaken at that time by Time Warner with respect to
3 data and advising, correct?

4 A. Correct.

5 Q. And it's Turner eight, nine capabilities and these are all
6 the various things that you were working on at that time,
7 right?

8 A. Yes.

9 Q. All right. And if we look at the next page, this is a
10 summary of the advanced advertising solutions that you again
11 presented to AT&T; is that right?

12 A. Yes.

13 Q. And in that you told AT&T, "We're able to bundle advance
14 advertising products"? Do you see that? The right side.

15 A. Yes, I see it.

16 Q. Okay. You can put that to the side, thank you.

17 I think you told us previously in a deposition that you
18 believed that AT&T was not in the business, the advertising
19 business and that Time Warner was, and so Time Warner was the,
20 in your view, the expert, not AT&T?

21 A. I don't recall those exact words. I would have to
22 understand the greater context, because I've been saying for a
23 long time that the two together should be complementary.

24 Q. Oh, let me see if I can help you out.

25 MR. PETROCELLI: Page number, please.

1 MR. WELSH: We'll come back to that.

2 BY MR. WELSH:

3 Q. I heard you talk in your examination with Mr. Petrocelli
4 about data. I think you said that wasn't available, wasn't
5 usable, that sort of thing, get you back to that testimony. Is
6 that your general testimony about it?

7 A. Who's that it wasn't available, I'm sorry.?

8 Q. Well, I think you said you need AT&T's data; is that
9 right?

10 A. Yes.

11 Q. Okay. And I think you said that the data that you have is
12 not -- or the data that's out there is just otherwise not
13 available or not usable today. Did I mishear you?

14 A. We do buy data from third party data companies and we have
15 some first party data, but we just don't have a lot of it.

16 Q. Okay. And what you, in fact, have told the investing
17 public as recently as May of 2016 is that Turner is leveraging
18 its data to power it's own marketing campaigns and user
19 experiences, but also to better enable advertisers to target
20 the right audiences, and there's more data available to us than
21 ever before. Do you recall that statement sir?

22 A. Yes.

23 Q. That was accurate in May of 2016?

24 A. Yes.

25 Q. If you would look at your CID deposition, which is the

1 first one in your binder there. I'm going to direct you to
2 page 163. And I'll just see if I can refresh your memory. If
3 you'd look at page 163, line 18, and read that through page
4 164.

5 MR. PETROCELLI: Which deposition?

6 MR. WELSH: The CID.

7 BY MR. WELSH:

8 Q. If you read that through page 164, line 15, and just tell
9 me when you're done?

10 A. (Reading document.)

11 I see that.

12 Q. Okay. Put that to the side, if you would.

13 Does reading that refresh your recollection that you
14 testified previously that AT&T is not in the ad business to the
15 extent that Time Warner is and Turner is and that you're the
16 advertising experts, they are not?

17 A. Yes.

18 Q. Okay. And that's the case, right?

19 A. Pardon?

20 Q. That's your view, right?

21 A. Yes.

22 Q. Now, Comcast offered you some data; is that right?

23 A. I believe back in 2015 there was a negotiation where there
24 was a discussion of us buying data.

25 Q. Okay. I think you told us in your deposition that Turner

1 wasn't interested in the Comcast data, correct?

2 A. As it was presented at the price it was presented at.

3 Q. Okay. And I asked you the question at your deposition
4 about whether the AT&T data was any different from the Comcast
5 data, and you replied that you had no knowledge one way or
6 another of that; is that --

7 A. That's correct.

8 Q. That's correct even today, correct?

9 A. That's correct.

10 Q. Okay. So you can't tell us whether it's bad or worse than
11 Comcast, right?

12 A. Right.

13 Q. Okay. You testified about a number of goals and
14 aspirations that you have for Turner regarding the use of data,
15 correct?

16 A. Yes.

17 Q. All right. And you testified that access to that data,
18 AT&T's data, would assist Turner in achieving these goals,
19 correct?

20 A. Yes.

21 Q. And am I correct, though, that that's not -- you're not
22 saying it's impossible to get to where you want to be without
23 AT&T, right?

24 A. I think AT&T would allow us to do it much more quickly
25 than if we were trying to go out and secure data from many

1 other sources. As I said, up until now no one has really been
2 willing to give it to us. And even Comcast, though they're a
3 large distributor, they're a regional distributor, not a
4 national distributor, and they no mobile data.

5 Q. And I want to be clear, and I appreciate your answer. But
6 I want to be clear. You're not saying that you can't get to
7 where you want to be without AT&T, you're just saying it's
8 going to take longer?

9 A. I believe it would take much longer. I don't have an
10 estimate of how much longer, but I believe that we -- that
11 Turner Time Warner working with AT&T would be able to
12 supercharge the time to creating a viable commercial ad
13 platform in a way that's a product that could benefit, not only
14 Turner, but the entire industry.

15 Q. You, about a month ago, I guess, had another one of your
16 interviews, and this one was with an outfit called Recode
17 Media; is that right?

18 A. Yes.

19 Q. And you went to a conference there, right?

20 A. Yes.

21 Q. That was in February of 2018, I think it was February 14;
22 is that right?

23 A. Yes.

24 Q. And you were asked a question there about, "Well, what
25 happens if the merger doesn't occur and you have to have a plan

1 B?" Do you remember that question?

2 A. I do.

3 Q. Okay. And did you respond in part that, "HBO is on fire
4 right now. Warner Brothers had it's most successful year in
5 its history in 2017, we did too." Do you remember responding
6 that way?

7 A. Yes.

8 Q. Okay. And you also responded, said, "Whatever happens
9 happens, you know, I actually think that, you know, the future
10 is really bright, no matter what happens."

11 A. Yes.

12 Q. You remember responding that way, too?

13 A. Yes.

14 Q. Continues to be your view today, right?

15 A. Well, I think I said we'd be fine. I would as prior to be
16 better than fine.

17 Q. Now, with this data, I think you said that things like --
18 Mr. Petrocelli asked you whether you got the user names, right?

19 A. Yes.

20 Q. And I think you said, no, you don't, right; is that
21 correct?

22 A. Yes, that's my understanding.

23 Q. And you don't have the e-mail addresses or other addresses
24 for those users; is that right?

25 A. I think we have e-mail addresses, just not that many.

1 Q. Okay. And you don't have other personal data about those
2 users, isn't that right, isn't that what you told
3 Mr. Petrocelli.

4 A. Yes.

5 Q. And what you're telling the Court is that what with this
6 merger is to be able to get access to all of that personal
7 data, right?

8 A. Yes.

9 Q. And then one of the things you told the Court is that you
10 want to get access to that personal data so that you can go out
11 and do what Facebook is doing with its data, right?

12 A. To -- I didn't make a direct comparison to Facebook is my
13 recollection. But what I would say is that having first party
14 data and actually understanding names and attributes and what
15 people might like will allow us to evolve over time to be able
16 to sell advertising in a way that's more similar to how
17 Facebook and Google does today.

18 Q. Okay. What you want is to be able to do what Facebook and
19 Google are doing in advertising and to get this data so that
20 you can use it the way they're using it, right?

21 A. Do you want me to repeat the answer I just repeated? I
22 think I just answered that question.

23 MR. WELSH: No further questions, Your Honor.

24 THE COURT: Redirect.

25 MR. PETROCELLI: Just a couple.

REDIRECT EXAMINATION

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BY MR. PETROCELLI:

Q. Do you have data for -- of any -- withdrawn.

Your advanced advertising that you were being asked about, does it have any scale at all?

A. No, it represents less than five percent of our advertising revenues?.

Q. Okay. Mr. Welsh showed you the 10K, do you recall that?

A. Yes.

Q. And he pointed you to a page, if I can find it. It's Exhibit 456-065, 456, Plaintiff's Exhibit, page 65. He pointed you to the column of 2016 versus '15 with a three percent uplift in advertising. Do you see that?

A. I'm sorry, Mr. Petrocelli, you got there faster. What page again?

Q. It's Exhibit 456.

A. I'm at the exhibit, just remind me of the page number, please?

Q. Sixty-five.

A. Now I'm there.

Q. Okay. He pointed you out the 2016 versus 2015 uplift of three percent. What does it say for the following year, 2017 versus 2016?

A. It's down two percent.

Q. He indicated to you that there was no disclosure regarding

1 Google and Facebook in the page to which you directed you,
2 correct?

3 A. Yes.

4 Q. Could you turn to page 24 of that same exhibit, 456.

5 A. (Witness complies.)

6 Q. Tell me when you're there?

7 A. I'm there.

8 Q. Do you see where it says, "The company's results of
9 operation could be adversely affected if there are further
10 declines in television advertising spending which could be
11 caused by a number of factors. Do you see that?

12 A. Yes.

13 Q. And do you see that, and I won't read the whole thing
14 because it's too long. But do you see the sentence that says,
15 "The advantages of digital advertising and the increased amount
16 of consumer time spent on line and on mobile activities have
17 resulted in advertisers shifting more of their advertising
18 budgets away from traditional television advertising to digital
19 advertising, and Google and Facebook with their large user
20 base, high consumer engagement and ability to use their data to
21 target customers and consumers," and it goes on and on.

22 I won't bother repeating it, I'll spare the reporter. But
23 do you see that's specific disclosure of risk factors related
24 to Google and Facebook?

25 A. Yes.

1 Q. You were asked about some over-the-top services, one of
2 them was Boomerang. Do you know how many subs Boomerang has?

3 A. I believe it's, I'm going to estimate, but I'll be close,
4 it's between a hundred and two hundred thousand.

5 Q. And what about Film Struck?

6 A. Probably two hundred thousand.

7 Q. And that's what you meant by nascent?

8 A. Yes.

9 Q. Okay. And he asked you, I think this first set of
10 questions about whether when you were at Time Warner cable,
11 Time Warner cable competed with other cable companies, do you
12 recall that?

13 A. Yes.

14 Q. Did Time Warner cable, during the years that you were
15 there while it was owned by Time Warner compete with Dish?

16 A. Yes.

17 Q. Did it compete with DirectTV?

18 A. Yes.

19 Q. Did it compete with any of the Telcos that started selling
20 video?

21 A. Yes.

22 MR. PETROCELLI: No further questions.

23 THE COURT: All right.

24 Let me ask you a question, Mr. Martin.

25 THE WITNESS: Yes, Your Honor.

1 THE COURT: When you were testifying earlier, you
2 were talking about how you wanted to get this more data as part
3 of the merger so that you could have more targeted
4 advertisements, right?

5 THE WITNESS: Yes.

6 THE COURT: Do you remember that?

7 THE WITNESS: Yes.

8 THE COURT: Yes, at one point you were talking about
9 how you don't know -- you don't know, for example, what people
10 are actually watching, how much of their watching, and your
11 advertisers are requiring you to somehow demonstrate that
12 they -- the show has to be watched, it's not real time, within
13 seven days. Do you remember that testimony?

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: How is it you know it's been watched in
16 seven days?

17 THE WITNESS: We rely on an outside service called
18 Nielsen Measurement System.

19 THE COURT: Okay. And is there concern, the
20 advertisers' concern that people are taping your shows, and
21 then when they watch it later, not in real time, but later,
22 they just sort of go over, go past the ads. They don't even
23 look at their ads.

24 THE WITNESS: Yes, that is --

25 THE COURT: Is that what their major concern is, that

1 they're skipping the ads?

2 THE WITNESS: There's two concerns. One concern
3 would be that they're skipping the ads altogether. And the
4 second concern is that by the time they're finally getting
5 around to watching the show, it's so late that the
6 advertisement is not relevant.

7 So just by way of example, if I'm a movie studio and I
8 want to launch a movie, it's very important for me that my
9 advertisement is reviewed on a timely basis.

10 THE COURT: Right.

11 THE WITNESS: Because if someone watches the show 30
12 days later, it's too late, and that person doesn't provide any
13 value.

14 THE COURT: Right. Now, if you have one of those, I
15 think you call it top of the TV box systems?

16 THE WITNESS: Cable set-top box.

17 THE COURT: Cable set-top box. If you have one of
18 those systems, you're in a better position to know when
19 something is watched and whether they watch the ads or no?

20 THE WITNESS: To a certain extent yes. To a
21 certainly extent no. But at least you know within a household
22 which channel was tuned in to, and you can better because a lot
23 of the cable set-top boxes are actually connected to other
24 devices in the home.

25 THE COURT: Um-hum.

1 THE WITNESS: You can start to understand that
2 somebody who owns an iPhone watched the TV show, and then they
3 went to a Chevy ad, and so through decision sciences, you can
4 begin to put together a pattern of behavior that might make you
5 smarter, but it's still somewhat limited.

6 THE COURT: And, of course, in a situation like the
7 one you were describing, say, for example it's a sports event,
8 which is live TV.

9 THE WITNESS: Yes.

10 THE COURT: The ad could come on, the person could be
11 watching the program, but when the ad came on, he could go to
12 the restroom.

13 THE WITNESS: Right.

14 THE COURT: Or he could go to the kitchen and get a
15 beer or something and not watch the ad at all.

16 THE WITNESS: Yes, Your Honor.

17 THE COURT: There's no way to prove, is there, or is
18 there a way to prove that someone actually watched the ad?

19 THE WITNESS: I believe that's correct, Your Honor.
20 I'm smiling because there's been a long saying in the
21 advertising industry where the advertiser would always say, I
22 know I'm wasting half of my money, I just don't know which
23 half. So there's always been this term called "waste and
24 imperfection." And so with the addition of knowledge, through
25 customer information, we're trying to reduce, we'll never be

1 able to eliminate it entirely.

2 THE COURT: No.

3 THE WITNESS: But we're trying to reduce the amount
4 of inefficiency while at the same time improve the quality of
5 the ad so that hopefully people will be more receptive to them.

6 THE COURT: So when you talk about having fewer
7 minutes of ads, but better quality ads, is that kind of the
8 concept behind the Super Bowl ads which everybody, they talk
9 about the next day.

10 THE WITNESS: Yes.

11 THE COURT: It's the subject of water cooler
12 discussions.

13 THE WITNESS: Yes, same concept.

14 THE COURT: To make them interesting, make them
15 more --

16 THE WITNESS: Make the creative better.

17 THE COURT: -- vital.

18 THE WITNESS: But even that is not personalized.
19 Those are just meant to be entertaining ads that would hit a
20 huge audience.

21 THE COURT: Right. So it's not as targeted as you
22 ideally would like it to be.

23 THE WITNESS: Those are not targeted, no.

24 THE COURT: No, okay. Thanks, you're excused.

25 THE WITNESS: Thank you, Your Honor.

1 (Witness excused.)

2 THE COURT: You can just leave all that there, we'll
3 come and get it.

4 All right, who's your next witness? Mr. Conrath?

5 MR. CONRATH: Your Honor, our next witness is Marty
6 Hinson. My colleague, Curtis Strong, will be presenting this
7 witness. We anticipate --

8 THE COURT: What's the last name again?

9 MR. CONRATH: I'm sorry, Hinson, H-I-N-S-O-N.

10 THE COURT: All right.

11 MR. CONRATH: I note Mr. Hinson is from Cox, but
12 we've taken care to make sure that with the possible exception
13 of a setup question here and there, we're talking about
14 specifics and Ms. Fenwick did not talk about their four
15 specific facts that are more detailed. And we anticipate about
16 a half an hour of direct.

17 THE COURT: And his first name is Marty?

18 MR. CONRATH: Marty, Martin I presume.

19 This is Mr. Strong, Your Honor.

20 THE COURT: All right.

21 MR. STRONG: Good afternoon, Your Honor.

22 THE COURT: Good afternoon.

23 MR. STRONG: May it please the Court, the United
24 States calls Marty Hinson to the stand.

25 THE COURT: All right.

1 MR. STRONG: I've been asked to speak a little bit
2 louder, Your Honor.

3 THE COURT: All right.

4 MR. STRONG: So the United States calls Marty Hinson
5 to the stand.

6 THE COURT: Okay, all right.

7 THE DEPUTY CLERK: Please raise your right hand.

8 MARTIN HINSON, PLAINTIFF WITNESS, SWORN

9 THE DEPUTY CLERK: Please be seated.

10 MR. STRONG: Your Honor, may I proceed?

11 THE COURT: You may.

12 DIRECT EXAMINATION

13 BY MR. STRONG:

14 Q. Mr. Hinson, where do you work?

15 A. Cox Communications.

16 Q. And what is your position at Cox?

17 A. I'm the vice-president of marketing; responsible for
18 pricing, consumer analytics, and competitive intelligence.

19 Q. How long have you been in that role?

20 A. Six years.

21 Q. What did you do before joining Cox?

22 A. So I was a pricing consultant for the Boston Consulting
23 Group.

24 Q. How long were you there?

25 A. About six and a half years.

1 Q. And could you explain to the Court what your current
2 responsibilities are with respect to video products?

3 A. So for video products my team is responsible for pricing.
4 We do acquisition pricing, retention pricing, as well as
5 determining the list price, which is the maximum price for the
6 service.

7 Q. You mentioned that you were -- you had some responsibility
8 with respect to intelligence and analytics. Can you explain to
9 the Court what you meant by that?

10 A. Sure. So consumer analytics uses advanced statistical
11 analysis to determine insights for specific business questions.
12 So things like who's mostly likely to churn, who's most likely
13 to buy certain products, like video packages. And the
14 competitive intelligence team looks at competitive landscape
15 data as to what's happening to our competitors on a weekly
16 basis, for their offers, for their products. Changes that
17 happen in the marketplace.

18 MR. STRONG: Your Honor, I'd like to mark Plaintiff's
19 Exhibit, it's got some confidential information that Mr. Hinson
20 can point to. So that will be Plaintiff Exhibits PX 0523.

21 MR. PETROCELLI: May we approach, Your Honor?

22 THE COURT: Yes.

23 You can step down. There's a chair on the side that you
24 can sit down in.

25 (Witness withdrew from the witness stand.)

1 (Bench conference under seal.)

2 MR. STRONG:

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6 THE COURT:

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10 MR. PETROCELLI:

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MR. STRONG :

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MR. PETROCELLI :

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THE COURT :

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5 MR. PETROCELLI:

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7 MR. STRONG:

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9 THE COURT:

10 (Open court.)

11 THE COURT: Come on back up, sir.

12 (Witness resumed the witness stand.)

13 THE COURT: All right, we're going to try to --

14 government's counsel has got this choreographed approach here

15 to get this information from you under oath without revealing

16 it to the public in an executive session where we have to close

17 the doors and take everyone out because it's confidential,

18 okay.

19 THE WITNESS: Okay.

20 THE COURT: So let's see how this works. We'll give

21 it a try.

22 MR. STRONG: May I proceed, Your Honor?

23 THE COURT: You can try.

24 BY MR. STRONG:

25 Q. Mr. Hinson, can you describe for the Court what this

1 exhibit is?

2 A. So this contains confidential information that I have
3 provided.

4 Q. And are these facts and figures that exist in the ordinary
5 course of your business?

6 A. Yes.

7 Q. And would the public disclosure of these facts and figures
8 be harmful to Cox?

9 A. It would.

10 Q. Okay. What percentage of Cox customers currently receive
11 Turner programming?

12 A. It's a large percentage, that percentage who has Turner
13 programming is in Exhibit A.

14 Q. When you say "Exhibit A," do you mean PX 0523 on page A?

15 A. Yes.

16 Q. Okay. If you had to replace Turner channels in your
17 packaging, what would you replace it with?

18 A. So Turner Broadcasting our content is not replaceable.
19 There's unique content, if you look at CNN, TBS and TNT are
20 frequently in the top 20 channels that are viewed by our
21 customers. As well as CNN offers unique news content that is
22 irreplaceable. Turner offers sports content such as March
23 Madness basketball, NBA basketball and baseball that is
24 irreplaceable, and consumers are looking for that specific
25 content.

1 Q. You mentioned sports. Have you ever gone dark with a
2 station that had popular sports before?

3 A. We have about two years ago, there was a local broadcast
4 affiliate which we went dark on for four weeks leading up to
5 the Super Bowl.

6 Q. And could you just explain for the Court what a local
7 affiliate is?

8 A. So a local broadcast affiliate is owned by a smaller
9 company than the parent company. So, for example, they would
10 offer ABC, CBS, NBC in a local market. So you're probably
11 familiar with those having local news, local weather
12 broadcasting and still be owned by the parent company.

13 Q. So those are the stations you can get with an antenna?

14 A. Correct.

15 Q. How long were you dark for?

16 A. Four weeks.

17 Q. And did you come to an agreement to get the channel up
18 before the Super Bowl came on?

19 A. We did go back live before the Super Bowl.

20 Q. And when you went dark, what happened?

21 A. There was a significant increase in churn for the entire
22 four weeks as well as a churn increase even after we brought
23 the channel back up.

24 Q. And how much did Cox churn increase during the month that
25 you were dark?

1 A. So that increase is confidential, so the increase in churn
2 during the four week period is in Exhibit PX 0523 dash B.

3 Q. And did you try to mitigate that churn in any way?

4 A. We did. So customers were informed widely that they could
5 go to our Cox retail stores to pick up free antenna which would
6 give them the Super Bowl without any interruption.

7 Q. And so the churn increase that you indicated before, that
8 was even with this free offer?

9 A. That's correct.

10 Q. Could you just explain to the Court what conclusions you
11 draw from that experience about your ability to exclude Turner
12 in your packages?

13 A. So given that Turner also has popular sports content, like
14 I mentioned before with March Madness, NBA basketball and
15 baseball, it has similarities as far as must have sports
16 content that our consumers demand.

17 Q. Have you ever done a drop analysis for Turner?

18 A. Not specifically for Turner, no.

19 Q. And why not?

20 A. We don't need to because we've done similar analysis for
21 another large content provider. Also about two years ago it
22 was a request by the content acquisition team.

23 Q. And what network group was that?

24 A. That is confidential, and is -- the network is listed in
25 exhibit PX 0523 dash C.

1 Q. What did you conclude in that analysis without giving any
2 confidential information away?

3 A. So the conclusion was, you know, we looked at customer
4 relationship churn, video churn, acquisition impact, so
5 acquiring new customers as well as substitutes for content. So
6 we actually looked at set-top box to see what other channels
7 are these consumers watching that were watching the potential
8 dropped content. And the conclusion was that financially it
9 did not make sense for Cox to drop the content even with a
10 increase in price.

11 Q. And how does Turner compare to that other -- to that other
12 company in terms of viewership?

13 A. So Turner's content based on the viewership data from
14 set-top boxes is higher than the other large company that we
15 did the analysis on. And actually with Turner having three
16 channels in the top 20 viewed, whereas this other company only
17 had one.

18 Q. When you say that other company only had one, is it always
19 in the top 20?

20 A. It is not.

21 Q. And how do you know that?

22 A. So I on a regular basis look at what's called rent track
23 data, it's a consolidated or aggregated set of data from cable
24 companies like Cox, so it includes other large MSOs. That data
25 is available, since we subscribe to it, to see actual

1 viewership data which is highly accurate.

2 Q. And what conclusions do you draw from that analysis with
3 respect to Turner?

4 A. So with Turner, it's similar because Turner has actually
5 more popular content given more viewed channels, higher rated
6 channels that would actually lead to higher churn. So if
7 there's higher churn, if we had to drop Turner content or
8 didn't have access to Turner content, it would result in higher
9 churn in this example, and we would come to the same logical
10 conclusion that it doesn't make sense because of the churn to
11 drop the content or there's definite bad consequences from both
12 a current customer churn perspective as well as acquiring new
13 customers. We would not the ability to compete.

14 Q. So do you believe you could compete with your competitors
15 without Turner?

16 A. We could, but it would be very difficult. We wouldn't
17 have a level playing field because customers are looking for
18 specific content. And that's something if we didn't have
19 access to, they would go somewhere else.

20 Q. So let's talk about HBO for just a bit. How important is
21 HBO to Cox's ability to compete for customers?

22 A. So HBO is also very important. It's highly popular with
23 consumers. We use HBO often to acquire new customers, so it's
24 part of our bundles, and we also use HBO as a retention
25 mechanism.

1 Q. How much of your total customer base purchases HBO?

2 A. So that is also confidential, it's in Exhibit PX 0523 dash
3 D, item number 1.

4 Q. And of your customers that purchase premium networks, how
5 many of them take HBO?

6 A. So that's in Exhibit PX 0523 dash D, item number two, and
7 again, that's the total premium customer mix that has HBO.

8 Q. Okay. And are those figures higher or lower than other
9 premiums?

10 A. HBO is the highest.

11 Q. How much does Cox pay per subscriber per month for HBO?

12 A. So what we pay to HBO from a cost perspective is in
13 Exhibit PX 0523 dash D, item number 3.

14 Q. Do any other premiums cost more than that?

15 A. No, they do not.

16 Q. Does HBO own any other premiums?

17 A. Yes, Cinemax.

18 Q. And of your premium subscribers, how many subscribe to
19 Cinemax?

20 A. So the subscription for Cinemax, the percentage is in
21 Exhibit PX 0523 dash D, item number 4.

22 Q. And is that in addition to the number that you just gave
23 the Court for HBO?

24 A. Correct. So the combined HBO plus Cinemax would be
25 Exhibit PX 0523 dash D, item number 1, plus item number 4.

1 Q. In terms of popularity, which premium is the highest after
2 HBO?

3 A. Actually, can I make a correction? It's item number 2
4 plus item number 4.

5 Q. Okay. That was in response to my last question?

6 A. Correct, sorry about that.

7 Q. Okay. In terms of popularity, which premium is the next
8 highest after HBO?

9 A. So the next most popular is Showtime.

10 Q. And what percentage of Cox's premium sales does Showtime
11 represent?

12 A. So Showtime represents the percentage in Exhibit PX 0523
13 dash E, item number 1.

14 Q. And how much does Cox pay per subscriber per month for
15 Showtime?

16 A. So the Showtime cost per subscriber per month is in
17 Exhibit PX 0523 dash E, item number 2.

18 Q. Can you explain to the Court how Cox offers HBO today?

19 A. So we include HBO in bundles. We've included it
20 historically in the bronze bundles, silver bundle and gold
21 bundle. So that's what we advertise to acquire new customers.
22 We currently have it included in silver and gold, not in
23 bronze. As well as in retention, so for customers who call in
24 asking questions about their bill, we have HBO as a retention
25 offer as well.

1 Q. Do you offer HBO a la carte as well?

2 A. We do, so it is always available a la carte. We also
3 sometimes -- which means selling it individually, right, at any
4 time. That's often at list price, but for current customers we
5 will sometimes have like a one for -- one premium for \$10, two
6 for fifteen, that sort of thing.

7 Q. Are those customers that take HBO, where does HBO rank in
8 terms of viewership?

9 A. So based on consumer research and our own data, HBO rates
10 in the top ten for the viewed, our viewership data for those
11 consumers with HBO.

12 Q. And how consistently is it rated in the top ten?

13 A. Consistently, based on our consumer research internally
14 and third party research, it's always in the top ten.

15 Q. Do you keep abreast of the competitive offerings of your
16 competitors involving HBO?

17 A. We do. So the competitive intelligence team who reports
18 to me, as part of that weekly update is looking at when HBO is
19 included in our competitors' acquisition offers, when it's
20 included in advertising so we know when our competitors are
21 using it.

22 Q. And how common is the use of HBO amongst your competitors?

23 A. It's extremely common. So AT&T has frequently used HBO,
24 as an example, in advertising for many months. It hasn't
25 changed. It's also with our other competitors like Verizon

1 Fios and CenturyLink, they all have HBO and use it for
2 advertising purposes and offers.

3 Q. Are there any of your competitors that do not offer HBO to
4 your knowledge?

5 A. No, they all do.

6 Q. How much does Cox charge its customers for premiums?

7 A. So premiums are either at the list price, which is 15.99
8 per premium or they're occasionally the promotional offer is
9 like one for ten, two for fifteen.

10 Q. You mentioned you currently offer HBO in your silver and
11 gold bundles. Could you tell the Court if you've observed any
12 benefits of having HBO in those bundles?

13 A. We have. So I mentioned that we previously had HBO in the
14 bronze bundle, which was the lowest price advertised bundle of
15 the most advanced TV or contoured advanced TV. That's -- we
16 saw when we removed HBO from the bronze bundle, but kept it in
17 silver and gold. We saw a significant increase in silver and
18 gold. Some customers with choosing silver and gold because of
19 HBO, that was the only change that we made to the offers.

20 Q. And how much did demand increase as a result for your
21 silver and gold packages?

22 A. So the increase for the silver and gold packages is
23 confidential and it's in Exhibit PX 0523 dash F.

24 Q. What effect does the use of HBO have on Cox's retention
25 rates?

1 A. So we've done advanced analytics, so the consumer
2 analytics team has an ongoing basis looked at what helps retain
3 customers. One of those recently has actually been conducted
4 in the past two months shows that there's a significant
5 reduction in churn, so there's retention benefit of current
6 customers adding HBO.

7 Q. How much does your churn go down when you add HBO?

8 A. So that information is confidential. It's in Exhibit PX
9 0523 dash G. So that's the number of the percentage of
10 improvement in retention for customers who add HBO. And I just
11 want to point out that advanced analytics corrects for other
12 things, like demographics, product combinations, to isolate
13 what the actual impact from HBO.

14 Q. Have you done a drop analysis for HBO?

15 A. We have not.

16 Q. And why not?

17 A. We haven't really needed to because we know from other
18 analytics, the importance of HBO from an acquisition
19 perspective, I mentioned the example earlier about the bronze
20 bundle and silver and gold, as well as we know the benefit for
21 retention purpose is highly significant. So there's no reason
22 for us to have to do a drop analysis for HBO.

23 Q. Do you have to get HBO approval before using HBO for
24 certain promotional offers?

25 A. Yes, we do have to have HBO's approval for any promotional

1 offers so if we want to discount it at all or to advertise HBO,
2 we have to have permission for every single offer and
3 advertisement.

4 Q. And without providing any confidential information, does
5 HBO impose any restrictions on your ability today to offer or
6 otherwise promote HBO?

7 A. So in addition to what I just mentioned about the approval
8 process, we do have restrictions on the amount of free trials
9 we can provide so the time that HBO can be free. As well as
10 certain terms are not allowed in advertising, so there's a few
11 terms that we cannot use.

12 Q. Can you provide -- let me back up. Do you have any
13 flexibility in offering HBO today?

14 A. We do have flexibility, but we have to go through that
15 approval process.

16 Q. And can you provide some examples of HBO offers, public
17 HBO offers that Cox has used to obtain or retain customers?

18 A. So the examples I gave earlier was including HBO and the
19 bronze, silver and gold bundles, and which are our most popular
20 bundles.

21 Q. And do you use it in retention?

22 A. Yes, in retention we do have a set of HBO offers, some of
23 them very deeply discounted to reward our most highly valued
24 customers.

25 Q. If one of your competitors, say AT&T, were to own HBO, are

1 there ways in which it could restrict your flexibility to offer
2 HBO to customers?

3 A. Yes, so the most extreme would be if we didn't have access
4 to HBO at all, which would be detrimental, given how popular
5 the content is with our consumers. If we did have access to
6 HBO, there could be restrictions on when we had access to the
7 content. So "Game of Thrones" is highly popular. If we can't
8 get that when it's live and it's delayed by a week, two weeks,
9 et cetera, that is a feasible restriction as well.

10 Penetration requirements, so I don't know if you're
11 familiar with those, but I can explain that penetration
12 requirements require so many of our video customers have to
13 have that product without a penalty. So that could be added
14 for HBO as well. And the most immediate change, which doesn't
15 even require a new contract with HBO, is going back to my point
16 around we have to have approval to use HBO in offers and
17 advertising, and AT&T could simply say no, that we can't
18 provide HBO in our offers, in our bundles and our advertising.

19 Q. And do those concerns also apply to Cinemax?

20 A. They do.

21 Q. What impact would those restrictions have on Cox and your
22 customers?

23 A. Given how popular HBO is, there would be significant
24 increases in churn. Given the information as far as how many
25 of our subscribers have HBO and they're looking for that

1 content.

2 Q. But couldn't HBO already restrict your flexibility today?

3 A. They could, there's no real reason to because HBO wants as
4 many customers, whether they're our customers or anyone's
5 customers, to have the service. They're very cooperative when
6 we go and present offers in advertising to come to a common,
7 common ground.

8 Q. But wouldn't that be the same after the merger that we're
9 talking about between AT&T and Time Warner?

10 A. Well, if AT&T owns Time Warner or HBO, both, there would
11 be a shift in the economics. So from a AT&T perspective, the
12 leverage would change because they'd be looking at, well,
13 what's the value of the customer relationship.

14 THE COURT: Well, that's not what they think. That's
15 what you think, right?

16 THE WITNESS: My understanding of the economics of
17 the industry.

18 THE COURT: You need to be clear about that.

19 BY MR. STRONG:

20 Q. Yeah, let me be clear on the question.

21 THE COURT: Hold on, whoa.

22 MR. STRONG: I'm sorry, Your Honor.

23 THE COURT: Don't interrupt me, please.

24 MR. STRONG: I'm sorry.

25 THE COURT: My reporter can't take us both down at

1 the same time.

2 MR. STRONG: Understood.

3 THE COURT: You have to be clear when you testify as
4 to what you think someone else thinks. You can't represent
5 what someone else thinks.

6 THE WITNESS: Okay, that makes sense.

7 THE COURT: Unless you know for certain, then you
8 have a basis to say, you know, okay. So keep that straight.

9 THE WITNESS: Will do.

10 THE COURT: Go ahead, you may answer.

11 THE WITNESS: So based on the information I have, a
12 customer relationship is highly valuable. So I work in the
13 world of economics to determine the margin of customers, the
14 lifetime value of customers. And I understand how much a
15 customer is worth. And I know how much we pay for license fees
16 for HBO. So those license fees are significantly less than the
17 value of the customer relationship.

18 So my understanding of the industry would say the
19 negotiation leverage changes if now HBO is owned by a
20 competitor who is looking at it from that perspective to say,
21 well, I can acquire or use HBO to acquire new customers, and
22 the whole relationships, the whole bundle versus just getting a
23 license fee.

24 BY MR. STRONG:

25 Q. So I've got just a few more questions about pricing to

1 customers.

2 We talked about acquisition a moment ago. Without
3 disclosing any confidential information, what is your general
4 process for creating promotional prices?

5 A. So for acquisition promotional prices we look at the
6 competitive information that I mentioned, so on a weekly basis
7 we see what our competitors are offering. We look at
8 historical data, so we analyze what's worked in the past, what
9 hasn't worked as far as drive and demand and connects.

10 And then we occasionally, we also use consumer research so
11 we want to understand what's popular with consumers, not just
12 based on the viewership data, but what do they really want in
13 terms of prices and offers.

14 Q. And again, without viewing any confidential information,
15 how do you set prices for your existing customer base, your
16 list price customer base?

17 A. So as a reminder, the list price is the maximum price we
18 charge for our service, which affects most of our current
19 customers. That price is determined based on looking at the
20 historical cost increases over the past twelve months, and we
21 would factor that in. So we need to make sure that we can
22 cover costs through some of our price increases.

23 Q. Has Cox ever faced content cost increases in the past?

24 A. Every single year.

25 Q. And what do you do in response to those cost increases?

1 A. So we increase the list price.

2 Q. And what percentage of your cost increase do you typically
3 add to your customers' bills as a result of the cost increase?

4 A. So that's confidential, it's part of our pricing strategy.
5 So that percentage which we pass on to our customers is on
6 Exhibit PX 0523 dash H, item number 1.

7 Q. And when your account for retention credits that you offer
8 customers, what percentage of your cost increase gets passed
9 through, does it go down from the number that you just gave?

10 A. It does. So looking at what happens to consumers, some
11 respond to their bill and ask questions about the bill. There
12 are specific targeted retention discounts that we can provide,
13 and that brings the previous number I gave down, which is
14 confidential, and in Exhibit PX 0523 dash H, item number 2.

15 Q. And how do you know that information?

16 A. So we do analysis working with our finance team to look at
17 the impact of how many customers call after a bill increase,
18 what percentage of those get retention discounts and how much
19 that discount is.

20 Q. Now, Cox does not realize all that's passed through, how
21 does that affect your margins?

22 A. So every year as video content costs continue to increase
23 and all it doesn't go to the bottom of the bill or the bottom
24 of the line, sorry, bottom line for Cox, our video margin does
25 continue to decline.

1 Q. And does that affect your ability to compete in the
2 marketplace at all?

3 A. It does for a couple of reasons. The first is our video
4 costs are not necessarily the same as our competitors. So
5 there isn't always a level playing field as far as cost is
6 concerned.

7 But secondly, we use part of our profit margin to reinvest
8 into the experience. So whether it's DVR service, advanced
9 navigation, there's other features to the video product the
10 consumers are looking for. That if we continued to lower
11 margins, there's less that we can invest in to improve the
12 customer experience.

13 Q. I just have one more question. I'm going to use an
14 average figure that the Court has heard before even though this
15 figure may be higher for Cox. But if Cox were to increase its
16 price to customers by say 45 cents per subscriber per month.
17 More than it otherwise would as a result of this merger, what
18 would be the impact to Cox and its customers?

19 A. So our consumers would end up paying tens of millions of
20 dollars more per year for the exact same content.

21 MR. STRONG: I have no further questions at this
22 time, Your Honor.

23 THE DEPUTY CLERK: Mr. Strong, did you move in 523?

24 MR. STRONG: Oh, thank you for the reminder. May I
25 move into evidence PX 0523 under seal, Your Honor?

1 MR. PETROCELLI: No objection.

2 THE COURT: All right, admitted under seal.

3 (Plaintiff's Exhibit No. PX 0523 was received in evidence
4 and under seal.)

5 CROSS-EXAMINATION

6 BY MR. PETROCELLI:

7 Q. In your role at Cox as VP of marketing you are not
8 responsible for actual marketing or advertising to customers;
9 is that correct?

10 A. When you say actual marketing, that covers a lot of
11 ground. Can you clarify?

12 Q. Is it correct that your group, you're responsible for the
13 promotional pricing sign, but there's another team that you
14 work with who actually does the marketing and advertising; is
15 that true, sir?

16 A. The advertising piece is true, we work with the team on
17 marketing our offers to perspective customers.

18 Q. So my statement is true then. There's another team that
19 you work with who actually does the marketing and advertising.
20 Is that true?

21 A. For advertising, but marketing covers many things,
22 including my function.

23 Q. Well, let me show your deposition then.

24 MR. PETROCELLI: May I approach, Your Honor?

25 THE COURT: You may.

1 BY MR. PETROCELLI:

2 Q. Please turn to page 10, line 25.

3 A. (Witness complies.)

4 Q. Are you there?

5 A. I am.

6 Q. "Question: Is your group responsible for
7 marketing to new customers?

8 "Answer: We're responsible for the promotional
9 pricing side, but there's another team that we work
10 with who actually does the marketing and advertising."

11 Is it also true, sir, that you do not have anything to do
12 with the use of premium programming, premium content for
13 promotional purposes; is that also true?

14 A. Please repeat the question.

15 Q. Is it correct that you do not have anything to do with use
16 of premium programming and premium content for promotional
17 purposes; is that true?

18 A. No, I've already given examples. We do use HBO and
19 promotional pricing.

20 Q. And could you please turn to page 97 of your deposition,
21 line 3.

22 A. (Witness complies.)

23 Q. Tell me when you're there.

24 "Question: Do you have anything to do with use
25 of premium programming, premium content for

1 promotional purposes?

2 "Answer: I do not."

3 Now, you haven't participated directly in any of the prior
4 negotiations for Turner or HBO over licenses, correct?

5 A. Not directly in the negotiation, but I'm familiar with the
6 leverage in those negotiations.

7 Q. Well, sir I didn't ask you if you were familiar with the
8 leverage of the negotiation, can you please just answer my
9 questions? I'll ask you one more time then.

10 Have you -- it is true, sir, that you have not participated
11 in any of the prior negotiations for Turner, or HBO over
12 licenses; is that true?

13 A. Yes, not directly in the negotiation.

14 Q. Thank you.

15 Is it also true, sir that your group has never conducted a
16 drop analysis for HBO?

17 A. That is true, we didn't see the need to.

18 Q. Again, just try to answer my question. The government's
19 lawyer can ask you to explain your answers. Let me ask you
20 again then.

21 You have not conducted a drop analysis for HBO; is that
22 true?

23 A. That is true.

24 Q. You have not conducted a drop analysis for any of the
25 Turner Networks; is that true?

1 A. True, given that we have similar analysis, we didn't need
2 to do that.

3 MR. PETROCELLI: Your Honor, I move to strike his
4 explanatory answers, he's not answering my questions.

5 THE COURT: All right. Answer the question. If you
6 need to explain it further, your counsel will do redirect.
7 We'll strike the end of the last answer.

8 Go ahead.

9 BY MR. PETROCELLI:

10 Q. You haven't done any quantitative analysis of the relevant
11 importance of different content to Cox subscribers, correct?

12 A. Of any content? Can you please clarify?

13 Q. Yes. Other than the one example that you described
14 confidentially, you've not done any other quantitative analysis
15 of the relative importance of different content to Cox
16 subscribers; is that correct?

17 A. The content includes many different things, so we have
18 done additional analysis for HBO as an example.

19 Q. Can you please turn to page 94 of your deposition, line
20 24. Tell me when you're there.

21 A. Yes.

22 "Question: You're not, you're not, you haven't
23 done any quantitative analysis of the relative
24 importance of different content to Cox subscribers,
25 right?

1 "Answer: The exception was the one blank
2 example."

3 You've seen no documents that would indicate that
4 post-merger Turner content is not going to be available to Cox,
5 correct?

6 A. Please restate the question.

7 Q. You've seen no documents that would indicate that post
8 merger, Turner content is going to be unavailable to Cox, true?

9 A. True.

10 Q. You've seen no documents post merger to, you seen no
11 documents that would indicate post merger that HBO is going to
12 be unavailable to Cox, correct?

13 A. Correct.

14 Q. You've seen no documents to indicate that post merger
15 there's going to be a price increase in Time Warner content
16 that is different from resent history, correct?

17 A. Correct.

18 Q. And you've never had -- Cox has never had a blackout of
19 Turner, correct?

20 A. Not to my knowledge. I've been in at Cox six years.

21 Q. Since you've been there?

22 A. Correct.

23 Q. And never been a blackout of HBO correct?

24 A. Correct, as far as I'm aware during that six-year period.

25 Q. And you've seen no documents to indicate that post merger

1 AT&T is going to somehow restrict the use of HBO as a
2 promotional tool, correct?

3 A. Correct, I haven't seen a document like that.

4 Q. And you haven't spoken to anybody who told you that's
5 going to happen, correct?

6 A. Correct.

7 Q. Now, did I hear you say that Turner was replaceable? Is
8 that what you said?

9 A. Yes, from a consumer perspective.

10 Q. Well, you said Turner. So I'm not quite sure what you
11 meant by Turner. So let me follow up on that for a second.

12 Is Boomerang irreplaceable? Is that your testimony?

13 A. For some customers, no, it's not replaceable.

14 Q. How many -- have you done any studies to determine whether
15 Boomerang is irreplaceable?

16 A. For Boomerang, no.

17 Q. What about Headline News, is that irreplaceable?

18 A. It's still popular for certain consumers.

19 Q. Have you done any studies to determine if that is
20 irreplaceable?

21 A. I had actual set-top box data that I'm basing this on.

22 Q. Well, does it tell you that it's absolutely irreplaceable?

23 A. No, but it's still popular.

24 Q. Okay. A lot of channels are popular, right?

25 A. Of course.

1 Q. Outside of Turner, right?

2 A. They are, but.

3 Q. You're not saying that Turner stands above all other
4 networks and Turner alone is irreplaceable, that's not what
5 you're telling the Court, are you?

6 A. The examples you gave are not --

7 Q. You're not telling the Court that, are you, that only
8 Turner is irreplaceable?

9 A. That only Turner is irreplaceable?

10 Q. Yes.

11 A. Other content is irreplaceable as well.

12 Q. A lot of channels, right?

13 A. For some consumers, yes.

14 Q. Okay. And so you haven't done any studies that would
15 distinguish among the various Turner Networks to determine
16 their irreplaceability, correct?

17 A. All networks have different ratings, and there are three
18 of the Turner Networks in the top 20, which makes them more
19 important than the examples you gave, which are far less in the
20 viewership.

21 Q. Does that include, by the way, all of the broadcast
22 stations?

23 A. It does.

24 Q. Are they above Turner?

25 A. Yes.

1 Q. Who are the broadcast stations?

2 A. ABC, NBC, CBS, Fox.

3 Q. Who else is above Turner?

4 A. It varies every month.

5 Q. Give me some examples?

6 A. Well, CNN is number 7, so we mentioned the broadcast
7 channels, ESPN, sometimes depending on the content, is above
8 Turner for that month.

9 Q. Now, your company, I think you said uses HBO as a
10 promotional tool, right?

11 A. Correct.

12 Q. But it uses other things for promotional purposes too in
13 order to retain or acquire subs, right?

14 A. Yes.

15 Q. Can you give the Court examples of the many, many
16 different options that your company uses for promotions?

17 A. So the examples, consumers are looking for many different
18 things, so examples of promotional offers include the price
19 itself, so a discounted price. We have included other premiums
20 like Showtime. We've included gift cards in the past, as our
21 competitors do as well. And things like free install.

22 Q. Free receiver rentals?

23 A. That is included in some of our bundles, yes.

24 Q. Prepaid gift cards?

25 A. Gift cards have been used in the past, yes.

1 Q. Have you ever done a study that would show how affected
2 the bundle promotion for silver and gold would be with the
3 three premiums, but without HBO?

4 A. The example I gave shows the impact of removing HBO from
5 the bronze bundles.

6 Q. Can I refer you to your deposition at page 79 -- at page
7 5, excuse me, line 5.

8 Five to 15, are you with me?

9 A. Sorry, to clarify --

10 Q. I'll start at line 9.

11 A. -- page 78, did you say?

12 Q. Seventy-nine.

13 A. Seventy-nine.

14 Q. I'll start at line 9 to shorten it.

15 "Have you ever done a study that would show how
16 affected the bundle promotion for silver and gold
17 would be with the three premiums, but without HBO?

18 "Answer: We have not because again, we're
19 contractually required to include HBO in Silver and
20 gold bundles."

21 Now, did I hear you also say that you need to get HBO's
22 permission every single time you want to use HBO in a
23 promotion?

24 A. That's my understanding.

25 Q. Well, is it your understanding or do you know?

1 A. Based on what I've been informed by the content
2 acquisition team, that is --

3 Q. Well, so your testimony then was based on what somebody
4 told you?

5 A. It's an important source given that they work on the
6 negotiations in contracts.

7 Q. Did you read the contract?

8 A. I have read parts of the contract, yes.

9 Q. So you haven't even read the whole contract before you
10 came into court to tell the Judge that you can't do any of
11 these promotions without getting HBO's permission every single
12 time?

13 A. That's what we have as a guiding principle based on what's
14 in the contract.

15 Q. Do you think the contract is the best evidence of whether
16 permission is required every single time?

17 A. Given that HBO and our content acquisition team is heavily
18 involved in the contract writing, they know what's in the
19 contract.

20 Q. But you don't know what's in the contract?

21 A. They have informed me what our contract restrictions are.

22 Q. But they're not testifying, you are?

23 A. Correct.

24 Q. Okay. Now, are you aware that in the contract there's
25 actually pre-approval given for certain promotional uses? Are

1 you aware of that, yes or no? Did they tell you that, these
2 folks that work in your company that supposedly read the
3 contract?

4 A. Yes, that's part of the approval process that some things
5 are preapproved.

6 Q. Now, do you understand that if, for example, your company
7 wanted to do an HBO promotion where you used a scene or even an
8 image from, let's say "Game of Thrones" or an actor, that that
9 might involve intellectual property rights with respect to the
10 people depicted in the image. Are you aware of that
11 circumstance?

12 A. Yes.

13 Q. And so -- do you think in that circumstance you might, you
14 might have to go back to HBO so they can make sure that they
15 have clearance to allow you to use the image of somebody else?

16 A. That's --

17 Q. Are you familiar with those kinds of details?

18 A. That is one area we have to get approval, but I know my
19 team also has to get pro approval for promotional offers.

20 Q. An you only know that because that's what they told you?

21 A. I know that based on what we have in our contracts based
22 on who works on those contracts.

23 Q. You've done no analysis of the impact to Cox if HBO were
24 only available through HBO now, the over-the-top service; is
25 that true?

1 A. Correct. Most consumers prefer to get HBO directly from
2 Cox.

3 Q. Again, you're adding all kinds of things that I'm not
4 asking you about, but I'll move forward.

5 MR. PETROCELLI: In fact, I won't move forward, Your
6 Honor. I have nothing further.

7 THE COURT: Was kind of hoping you'd say that.

8 MR. STRONG: May I, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. STRONG:

11 Q. Do you have your deposition there with you?

12 A. I do.

13 Q. Could open back up to page 10, line 25?

14 A. (Witness complies.)

15 THE COURT: Can you do this in five minutes?

16 MR. STRONG: I think so Your Honor, yep.

17 BY MR. STRONG:

18 Q. So let's turn to page 11 where it says your answer. Am I
19 right that you told Mr. Frackman during your deposition, "We're
20 responsible for the promotional pricing side in response to
21 that question whether you're responsible for marketing?"

22 MR. PETROCELLI: What line, please?

23 MR. STRONG: There's some lines that you read, so
24 we're on page 10, 25, and then starting on page 11.

25 MR. PETROCELLI: Thank you.

1 MR. STRONG: With the answer at line 3.

2 THE WITNESS: Right, so we're responsible for the
3 promotional side of marketing, it's part of marketing.

4 BY MR. STRONG:

5 Q. Well, let's turn to page 97. So the question at the top
6 of the page where do you have anything to do with the use of
7 premium programming, premium content for promotional purposes.

8 And if you look down at the bottom there's some explanation
9 there in the middle of the page that if we look at line 21 on
10 page 97. Can you just read what you said there in your
11 deposition?

12 MR. PETROCELLI: Will he please read the question,
13 Your Honor.

14 MR. STRONG: Yep, I can do that.

15 BY MR. STRONG:

16 Q. If you can read the question also, that begins on line 19.

17 A. So on line 19 the question is, "Either to promote Showtime
18 or to promote Cox."

19 And line, 21 which is my answer. "My team does make
20 decisions on bundles like the bronze, silver, gold bundle
21 although contractually we're required to include the premiums
22 in silver and gold but my team is not involved in the actual
23 advertising."

24 Q. So is that what you meant, your team is not involved in
25 the actual advertisement, but as far as promotion of this

1 silver and gold packages, you're involved with the marketing
2 there?

3 A. Correct. On line 4 the word "promotional" was related to
4 advertising.

5 Q. Okay. Great.

6 Mr. Petrocelli asked you about whether you had done any
7 quantitative analysis for your testimony today with respect to
8 Turner?

9 A. Correct.

10 Q. Are you aware of any requests from the defendants in
11 discovery of this litigation that has asked Cox for a
12 quantitative analysis?

13 A. I do not.

14 Q. Okay. And the testimony that you are giving the Court
15 today, is that -- what is that based on?

16 A. So it's based on the prior analysis we have done in
17 similar situations. We have done a drop analysis for a large
18 content provider. We have done analysis for a broadcast
19 station that has popular sports content that resulted in high
20 churn.

21 Q. Is that information that's available to you in the
22 ordinary course of business?

23 A. It is.

24 Q. Okay.

25 Mr. Petrocelli asked you about certain network programs

1 like Boomerang for Turner. Do you recall that?

2 A. I do.

3 Q. Do you know if Cox is able to purchase just Boomerang on
4 its own?

5 A. No, we cannot. Our contracts require multiple channels
6 from Turner.

7 Q. Okay. Mr. Petrocelli also asked you about the contract
8 for HBO.

9 A. Yes.

10 Q. And the information that -- you said that you had read
11 some of the contract; is that right?

12 A. That's correct.

13 Q. Okay. And is it part of your job to understand what you
14 can and cannot do in terms of promotional pricing with HBO?

15 A. Yes.

16 Q. Okay.

17 MR. STRONG: I think that's all I've got, Your Honor.

18 THE COURT: You're excused.

19 (Witness excused.)

20 THE COURT: Mr. Conrath.

21 MR. CONRATH: Yes, Your Honor.

22 THE COURT: What's on deck for tomorrow?

23 MR. CONRATH: An expert. Professor Hauser, who is
24 talking about his survey based analysis.

25 THE COURT: He's your next expert witness?

1 MR. CONRATH: Yes.

2 THE COURT: Professor Hauser.

3 MR. CONRATH: Right.

4 THE COURT: What's your estimate on direct?

5 MR. CONRATH: Between an hour and hour and fifteen
6 minutes, Your Honor.

7 THE COURT: An hour, an hour and fifteen minutes.
8 Any challenge to his expert status or is that conceded?

9 MR. PETROCELLI: We're not challenging it, Your
10 Honor.

11 THE COURT: Okay, so an hour and a quarter?

12 MR. CONRATH: I have been wrong before, but that's
13 what I understand.

14 THE COURT: You're not alone.
15 What's cross?

16 MR. PETROCELLI: Mr. Barbur.

17 THE COURT: Mr. Barbur's going to do it?

18 MR. BARBUR: Approximately an hour, Your Honor.

19 THE COURT: Okay, so that's the morning pretty much.
20 What have you got in the afternoon?

21 MR. CONRATH: Mr. Rigdon.

22 THE COURT: Hold on now, I've got to look this person
23 up. Rigdon?

24 MR. CONRATH: Yes.

25 THE COURT: R-I-G-D-O-N?

1 MR. CONRATH: That's right.

2 THE COURT: Comcast?

3 MR. CONRATH: Yes.

4 THE COURT: What's your estimate on that person?

5 MR. CONRATH: I believe that's an hour, Your Honor.

6 MR. PETROCELLI: Same.

7 THE COURT: Hour each?

8 MR. PETROCELLI: Yeah.

9 MR. CONRATH: Your Honor, there will be -- we will, I
10 believe, need to raise a confidentiality issue with respect to
11 Mr. Rigdon.

12 THE COURT: Okay. In advance?

13 MR. CONRATH: Yes.

14 THE COURT: That might take the rest of the
15 afternoon.

16 MR. CONRATH: It's possible. It may be predictable.

17 THE COURT: Okay. Well, who would be your third if
18 you got to a third?

19 MR. CONRATH: Mr. Breland.

20 THE COURT: Mr. Breland?

21 MR. CONRATH: Yes.

22 THE COURT: What's the length of direct on that?

23 MR. CONRATH: Hour and a half to two hours.

24 MR. PETROCELLI: One and a half.

25 THE COURT: Well, that takes care of this week.

1 MR. CONRATH: Yes.

2 THE COURT: All right.

3 MR. PETROCELLI: Your Honor, we need more witnesses.
4 I've been asking the government. We only have witnesses
5 through next Tuesday, and we would like to know the balance of
6 the witnesses and the order because we've been moving our folks
7 schedules around. With respect to a couple of people they've
8 moved them two or three times already. And these people live
9 out of state. And I can't keep, you know, yo-yoing them like
10 that. So I need to get a list that we can depend on for the
11 balance of the government's case.

12 MR. CONRATH: Your Honor, we have made adjustments in
13 response to snow and other reactions, and I think in my
14 experience in trials like this is there are adjustments, and we
15 obviously try to minimize them. They affect our witnesses as
16 well, who, as the Court knows, other than experts we do not
17 control. And we work very hard both to -- to minimize the
18 inconvenience to third parties and to defendant witnesses and
19 not put ourselves --

20 THE COURT: Let's put it this way. I think what's
21 going to happen is this weekend both sides are going to sit
22 back and reevaluate how many witnesses they need to make this
23 case. Because as I indicated before, if this trial goes to
24 May, there will be no opinion probably doable of the quality
25 and quantity expected by the Court of Appeals by June 21st. It

1 can't get done that fast. This is going to be a probably
2 somewhere between the finding of fact and conclusions of law is
3 going to be somewhere in the order of a two hundred page
4 opinion.

5 And with the level of detail and the level of accuracy
6 that's understandably expected by all sides and the Court of
7 Appeals, you can't do something like that in four weeks, five
8 weeks. It's just not -- it's not doable. So if we're going to
9 get this case done prior to that deadline, we've got to move.
10 And my tolerance to date has been very high for redundancy,
11 it's going to become increasingly lower. Which means that
12 counsel is going to find themselves at the short end of the
13 stick, they're's going to start getting whipped.

14 So I mean, I think this weekend both sides are going to
15 need to go to their respective tables and sit down with their
16 clients, their teams, and make some hard decisions about what
17 they need versus what they want. So that we can bring this
18 case to fruition sooner rather than later so.

19 MR. CONRATH: Your Honor, we reevaluate in the middle
20 of cases regularly, and we'd already identified that that was
21 one of our tasks this weekend and probably next weekend and the
22 weekend after. Our assessment is that there should be no risk
23 of going into May, that's our assessment. And if we can, we
24 will make it substantially shorter.

25 THE COURT: Remember, you've got two sides to this

1 coin.

2 MR. CONRATH: Of course.

3 THE COURT: And you're going to need a week to do the
4 proposed findings of fact and conclusions of law. And you're
5 going to need with good reason a couple days to prepare for the
6 closings.

7 MR. CONRATH: Yes.

8 THE COURT: So you've got to build all that into this
9 process. Certainly I'm building it into this process. So a
10 word to the wise is sufficient.

11 MR. PETROCELLI: Thank you, Your Honor.

12 MR. CONRATH: Thank you, Your Honor.

13 THE COURT: See you tomorrow.

14 (Trial adjourned at a 5:45 p.m.)

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CERTIFICATE

1
2 I certify that the foregoing is a true and correct
3 transcript, to the best of my ability, of the above pages, of
4 the stenographic notes provided to me by the United States
5 District Court, of the proceedings taken on the date and time
6 previously stated in the above matter.

7 I further certify that I am neither counsel for, related
8 to, nor employed by any of the parties to the action in which
9 this hearing was taken, and further that I am not financially
10 nor otherwise interested in the outcome of the action.

11
12 _____
13 /s/Crystal M. Pilgrim, RPR

_____ Date: March 29, 2018