

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	CV No. 17-2511
)	
vs.)	Washington, D.C.
)	April 4, 2018
)	2:39 p.m.
AT&T, INC., ET AL.,)	
)	Afternoon Session
Defendants.)	
<hr/>		Day 8

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES SENIOR DISTRICT JUDGE

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1 P R O C E E D I N G S

2 DEPUTY CLERK: The United States District Court
3 for the District of Columbia is again in session, the
4 Honorable Richard J. Leon presiding. God save the United
5 States and this Honorable Court. Please be seated and come
6 to order.

7 THE COURT: Come on back up.

8 DEPUTY CLERK: Your Honor, re-calling Civil Action
9 No. 17-2511, the United States of America v. AT&T, Inc.,
10 et al.

11 THE COURT: All right. Witness remains under
12 oath.

13 MR. BARBUR: May I proceed, Your Honor?

14 THE COURT: Mr. Barbur, whenever you're ready.

15 SIMON SUTTON, WITNESS FOR THE GOVERNMENT, HAVING BEEN
16 PREVIOUSLY SWORN, RESUMED THE STAND AND TESTIFIED FURTHER AS
17 FOLLOWS:

18 CROSS-EXAMINATION

19 BY MR. BARBUR:

20 Q Good afternoon, Mr. Sutton. You were asked a
21 number of background questions about HBO in the prior
22 session, and I just want to follow up on a couple of points.

23 Does HBO distribute its services direct to
24 consumer?

25 A Yes, we do.

1 Q How does that work?

2 A Thru HBO Now, you can go to the Apple store or the
3 Amazon platform or a number of places, download the app and
4 subscribe directly.

5 Q In that situation, is HBO a wholesaler?

6 A We're -- we a -- we act as -- the platforms act as
7 our agent.

8 Q The customer actually deals with Apple; is that
9 what you're saying.

10 A Yes. They pay Apple, and then Apple remits the
11 money to us.

12 Q And for the HBO linear service, does HBO
13 distribute that directly to customers?

14 A The traditional service is wholesaled to cable and
15 satellite and Telecom companies that send out directly.

16 Q Mr. Scheele had asked you about a distribution
17 staff of 150 people.

18 Do you recall that?

19 A I do.

20 Q Could you describe in a little more detail what
21 that staff is and what it does?

22 A Yes. In the vast majority of the staff that were
23 referred to earlier, they're to encourage our affiliates to
24 promote HBO and Cinemax as much as possible. They are going
25 out to our affiliates' call centers, encouraging the agents

1 there to push HBO and Cinemax to customers who call in.

2 They're visiting the marketing and management
3 staff of our various affiliates and making arguments as to
4 why HBO and Cinemax should be included in promotions and
5 bundles to encourage them to sell as much HBO and Cinemax as
6 possible.

7 Q Why does HBO have a staff of 150 people devoted to
8 that task?

9 A Because we find being included in promotions and
10 bundles and marketing campaigns across our many of different
11 affiliates. We have about 800 affiliates domestically. It
12 is a highly effective way of increasing HBO's penetration
13 and, therefore, HBO's subscriber numbers and revenue.

14 Q Do basic cable networks have the same sort of
15 organizations?

16 A No. They don't have the same kind of organization
17 because they're not a separate purchase; they're included in
18 the basic tier.

19 Q Who are HBO's competitors?

20 A We compete directly with a number of video
21 subscription services. So most immediately, Netflix, but
22 also Prime Video, Hulu, Showtime, Starz, Epix. Disney is
23 about to launch a service. Apple looks like it's about to
24 launch a service.

25 Q Just slow down a little bit.

1 A There are a lot of competitors in the premium
2 video space.

3 But indirectly, we compete really with anything
4 that takes up people's time. We're an entertainment
5 product. If people want to entertain themselves in other
6 ways, in some ways that worse for us.

7 So to the extent people are playing video games or
8 using Facebook, they're less likely to subscribe to us. So
9 anything that's an entertainment product can be a competitor
10 to us.

11 Q HBO is what is sometimes referred to as a premium
12 network, correct?

13 A That's correct.

14 Q What does that mean?

15 A It means we're not supported by advertising, and
16 we are -- can be bought as a separate product. It's a
17 separate, discrete purchase.

18 Q And in what way does a premium network like HBO
19 compete with an SVOD like Netflix?

20 A We compete in many different ways. We bid for the
21 same programming when we make our shows. Netflix is often
22 trying to get the talent to make the same shows.

23 We compete for our customers' time. People can
24 sometimes decide whether they're subscribing to Netflix or
25 to HBO.

1 And Netflix is in many of our affiliates' set-top
2 boxes now. So we're actually competing for distribution as
3 well.

4 Q You referred to Prime. What does Prime mean.
5 Prime is Amazon's video product.

6 And is HBO distributed through Prime?

7 A So HBO is distributed through Amazon. If you buy
8 Prime, you can buy HBO on top of Prime Video.

9 Q You also consider Prime to be a competitor, is
10 that --

11 A Yes. Prime also offers its own programming. They
12 make their own shows.

13 Q And how has the competitive landscape that HBO
14 faces changed in the last ten years?

15 A It's become much more competitive.

16 There was a time when very few people were making
17 the kind of shows we make. Now, it seems that almost every
18 week, there's an announcement of somebody else making it.

19 But the Internet has allowed a number of new
20 competitors to come into the space, as I've mentioned,
21 Netflix; Hulu makes shows and so does Prime Video.

22 But it looks like even more people will be
23 entering the space soon.

24 I mentioned Disney has announced it's going to do
25 a premium product. And Apple is commissioning programming,

1 will announce, we believe, a competitor as well in the
2 future.

3 Q So HBO competes for viewers, right?

4 A That's correct.

5 Q Does HBO also compete for programming?

6 A We compete for programming. And so we're
7 competing for the sourcing of our programming on our
8 service, and then we're competing for distribution and for
9 viewers as well.

10 Q And how has competition for programming changed in
11 recent years?

12 A So the cost it takes to make shows, shows like the
13 shows we make, has escalated significantly.

14 Q Why is that?

15 A Because more people are bidding for the talent
16 involved.

17 Q Mr. Scheele reminded you that HBO has won a number
18 of Emmys.

19 Do you recall that?

20 A That is correct.

21 Q Have services like Netflix and Amazon also won
22 Emmys and other awards?

23 A Yes. Many of those services have won Emmys.

24 Q And do you view Emmy awards as closely related to
25 viewership of HBO?

1 A No. They can frequently not be related to
2 viewership. But they provide a halo for the brand. It gets
3 us talked about in the press, so that's good.

4 Q And do you know whether Turner has won any Emmys?

5 A I actually do not, do not know.

6 Q You were asked a number of questions also about
7 the use of HBO as a promotional tool by distributors.

8 Do you recall that?

9 A I do.

10 Q Does HBO benefit when distributors use HBO as a
11 promotional tool?

12 A Absolutely. We want to be included. We want to
13 be promoted as much as possible. Because we're a discrete
14 purchase, we rely on our affiliates to promote and sell us
15 as much as they can.

16 Q Does HBO's business model depend on promotions?

17 A Absolutely.

18 Q There's been testimony previously in the case
19 about "penetration rate."

20 Are you familiar with that term?

21 A I am.

22 Q And does HBO track its penetration rate with its
23 distributors?

24 A We do.

25 Q Do promotions affect HBO's penetration rate?

1 A Yes, they can. Promotions, packaging,
2 marketing -- all these things affect the penetration rate.

3 Q Do you know whether your distributors use all
4 tools other than HBO for promotions?

5 A Yes, they certainly do. They're using more and
6 more tools than they used to. They use not just our direct
7 competitors, but they bundle their video services with
8 anything from gift cards to devices. I think Verizon had a
9 promotion where it bundled with iPads. There's a lot of
10 different promotions out there.

11 Q Do your distributors use Netflix as a promotional
12 tool?

13 A Yes, they do.

14 Q And who decides which promotional tools a
15 distributor will use?

16 A The affiliate, the distributor decides.

17 Q And are all distributors promoting HBO all the
18 time?

19 A No, they're not. We would hope that they are, but
20 they're not.

21 Q There was also some testimony or questions this
22 morning about getting approvals for promotions.

23 Do you recall that?

24 A I do.

25 Q Under what circumstances does a distributor need

1 HBO's approval in order to use HBO as a promotional tool?

2 A There are few circumstances. So there is when
3 they're using our trademark and brand, when they're using
4 talent from our shows, and also when they're asking, as they
5 frequently are, for us to allow them to use the HBO
6 subscribers for free.

7 Q Why is HBO's approval required where a distributor
8 wants to use imagery or talent from HBO?

9 A So we're under certain restrictions about how our
10 talent can be used in promotions. Our talent, by which
11 I mean the cost of our programs, they don't want to look
12 like they're endorsing a product that they haven't signed up
13 to.

14 And we have in the past been sued by talent who
15 have felt that they have been used in promotions
16 incorrectly. So we like to make sure that the promotions
17 won't cause any legal issues for us.

18 Q And you also mentioned that sometimes HBO gives
19 free HBO as part of promotions, right?

20 A That is correct.

21 Q Why does HBO do that?

22 A Because we want to be included in a promotion.
23 And an affiliate will come to us and say, we've had this
24 promotion. We would like to include HBO if you give us
25 license fee waivers; in other words, if you don't charge us

1 for this. So as we want to be included and the implication
2 is they might not include us if we didn't, we will agree to
3 that.

4 Q So if a distributor is not asking for free HBO or
5 using HBO imagery or talent, does it need approval from HBO
6 in order to promote HBO?

7 A It doesn't.

8 Q Does HBO frequently deny approval for promotions?

9 A No. I can't think of one.

10 Q I'm sorry. I didn't hear you.

11 A I can't think of one where we've denied. If it
12 there is an issue, we try to work with our affiliate to
13 create a promotion that does work.

14 Q Would it be in HBO's interest to prevent a
15 distributor from promoting HBO?

16 A It is not in our interest to prevent it.

17 Q Are you familiar with the term "marketing funds"?

18 A Yes.

19 Q What does that mean in the context of HBO?

20 A So sometimes with our contracts with our
21 affiliates, we will agree to provide certain marketing funds
22 to enable them, which is a discrete amount of money, which
23 we will contribute to their advertising and marketing
24 campaigns in order for them to market and promote HBO.

25 Q And does HBO work with the distributor in figuring

1 out how to use the marketing funds?

2 A Yes, we do.

3 Q And why does HBO provide these marketing funds?

4 A Because we want to be promoted as much as
5 possible.

6 Q You also got some questions from Mr. Scheele about
7 coordinating with Turner.

8 Do you recall that?

9 A I do.

10 Q And there's one situation involving YouTube TV
11 that he mentioned, I recall?

12 A That's correct.

13 Q How was it, how did it come about that HBO
14 coordinated with Turner with respect to YouTube TV?

15 A So what happened with YouTube TV was we were in
16 negotiations with YouTube TV to carry HBO as a product
17 I believe at the same time Turner was.

18 Time Warner corporate requested that we cease our
19 conversations with YouTube until Turner had reached a deal,
20 because I think there was a concern that Turner might not be
21 able to.

22 YouTube subsequently then went ahead and launched
23 its service without either of this and then, subsequent to
24 that, did a deal with Turner. So Turner is now carried on
25 YouTube TV, but we are not.

1 Q So the original idea from Time Warner was to use
2 HBO as leverage to get YouTube to take Turner?

3 A That was the original idea, yes.

4 Q And did that work?

5 A Not really.

6 Q Why not?

7 A Well, because they launched without Turner; and
8 subsequently, it's pretty clear that we weren't that much
9 leverage because they never -- have not carried us to this
10 date.

11 Q So as of today, does YouTube TV carry Turner?

12 A They do.

13 Q Does it carry HBO?

14 A It does not.

15 Q And why not?

16 A We're still in negotiations with them, and there
17 are a number of discussion points we have around the
18 presentation of HBO within the YouTube environment.

19 We like HBO to look very distinctly as if it's a
20 premium service and not have advertising or anything else
21 around it. So that's been a sticking point in the
22 negotiation.

23 Q I want to switch gears and talk about blackouts.
24 There have been lot of testimony in this case so far about
25 blackouts, and I think you were questioned by Mr. Scheele

1 about a potential blackout with Charter.

2 Do you recall that?

3 A I do.

4 Q Has HBO ever, in fact, had a blackout with a
5 distributor?

6 A No, we have not.

7 Q Why not?

8 A Because it's such a devastating step for us,
9 because we're a discrete purchase that relies on being
10 promoted to our affiliates' customers.

11 If we bent dark on an affiliate, we would
12 immediately have zero subscribers; and then we would have to
13 start again from the bottom climbing our way up. So it is a
14 drastic step to have to take.

15 Q If HBO did have a blackout with a distributor and
16 then subsequently reached an agreement, would HBO
17 automatically go back into all of the same packages it was
18 in before the blackout?

19 A Well, it entirely depends on what negotiation
20 agreement we came back to.

21 Some affiliates have very simple packaging, and
22 some do not. Some don't really have much packaging at all.

23 So it really depends on the agreement. So it's
24 not necessarily true that we would go back in the same
25 packages.

1 Q And as I mentioned, you were asked by Mr. Scheele
2 about a potential blackout with Charter.

3 Do you recall that?

4 A I do.

5 Q Just describe the circumstances that led to the
6 threatened blackout with Charter.

7 A So Charter had -- a deal with Charter had expired,
8 and they continued to pay us but not pay us the amount that
9 we thought they should pay us under the contract. And that
10 had gone on for a considerable amount of time.

11 During that period, they had sent us letters
12 saying, if you disagree with the amount you are paying us,
13 you should de-authorize us; in other words, we should go to
14 a blackout.

15 And then they announced that they were acquiring a
16 much bigger company, so we had a problem where we had an
17 affiliate, a sizable affiliate, that wasn't paying us the
18 amount that we felt they should, was sending us letters
19 saying, if you disagree, you should take us dark, and had
20 announced that it was buying a much bigger company.

21 So we felt we had to say -- to negotiate a deal,
22 we had to send a letter saying, we will go dark with you.

23 Q And you'd mentioned buying a larger company. That
24 was another cable company; is that right?

25 A Yeah. That was Time Warner Cable.

1 Q So it was a horizontal merger?

2 A That's correct.

3 Q Ultimately, you didn't have a blackout with
4 Charter, correct?

5 A That is correct.

6 Q And what effect did threatening to have a blackout
7 have on the negotiations with Charter?

8 A Well, we started negotiating.

9 The effect of the letter was, we actually ended up
10 having a negotiation.

11 Q And I think you mentioned that there's a two-year
12 period. During that two-year period, was there a binding
13 contract between HBO and Charter?

14 A There were these extension letters. So there was
15 a disagreement as to what the terms were.

16 Q You were also asked some questions about Sony.
17 Do you recall that?

18 A I do.

19 Q Just describe the negotiations at the -- between
20 HBO and Sony at the launch of the Sony Vue product.

21 A So this was fairly soon, I believe, after I had
22 taken over responsibility for the domestic part of HBO's
23 business. Previous to that, I had been responsible for the
24 international side.

25 And I came into a role where a significant number

1 of our affiliates, 80 percent of our domestic distribution
2 deals were up.

3 So I was focused on Charter, the upcoming Comcast,
4 AT&T, and Altice deals. And so we had a number of new
5 entrants, like the one you mentioned.

6 And so we had a team in my group working on that,
7 and they seemed to be doing a pretty good job.

8 Subsequent to reaching that deal, I came to the
9 conclusion that our wholesale rates in general were too
10 high. It was forcing our retail price to be too high and
11 discouraging people from subscribing to the service.

12 In order to maximize revenue, I thought we needed
13 to in some ways lower our prices so we would increase
14 volume.

15 We subsequently did lower our wholesale rates for
16 a lot of our smaller affiliates. And the Sony deal was kind
17 of one of the last ones we did at those higher rates, and it
18 was always on my list of, we should really go back and
19 adjust that. And we are actually discussing a new rate
20 structure for them at the moment.

21 Q But under the current deal, are there any
22 discounts available to Sony?

23 A Yes. They can -- if they bundle HBO -- and they
24 do offer a number of packages. If they bundle HBO in those
25 packages, they have a significantly discounted rate.

1 Q Do they get volume discounts?

2 A They do.

3 Q There has also been some testimony in the case
4 about a de-packaging by Comcast in 2016.

5 Are you familiar with that?

6 A I am familiar with that.

7 Q Could you describe what happened from HBO's
8 perspective.

9 A So what happened was, before we came up to our
10 deal expiration, Comcast deliberately excluded us from a
11 number of their double- and triple-play packages, really
12 just a number of their packages. And they started shedding
13 HBO subscribers at a pretty substantial rate.

14 Q Was this part of the negotiating strategy?

15 A Well it was to sort of flex their muscles in a
16 way, show how powerful they are, how we depend on them
17 for -- HBO depends on them to be packaged. And they were
18 just showing by removing us from their packages, that
19 we would significantly see subscriber drops.

20 Q These lost subscribers, was Comcast paying for
21 them at that time?

22 A They were in a -- most of their subscribers, those
23 subscribers were free to Comcast.

24 Q And what was the effect on HBO of this
25 de-packaging?

1 A So we had to report lower subscriber growth in
2 aggregate than we would have liked because of this action,
3 but it did not affect our revenue.

4 Q Do you care about your reported subscriber
5 numbers?

6 A It's important to us, yes.

7 Q And are you aware of something called the
8 Watchathon at Comcast?

9 A I am.

10 Q What is that?

11 A That is a yearly promotional period where they
12 allow all of their subscribers to see all their channels and
13 encourage people to sample channels that they don't
14 necessarily subscribe to. They do lot of promotion and
15 marketing around it, and it really is a good tool to
16 encourage subscriptions to premium services.

17 Q Has HBO traditionally participated in the
18 Watchathon?

19 A We have traditionally participated in it, yes.

20 Q What happened in 2017?

21 A They excluded us from it.

22 Q Do you know why?

23 A Oh, because they wanted, again, to show that they
24 were a powerful affiliate and that they could punish us.

25 Q What about Netflix? Was Netflix in the

1 Watchathon?

2 A Netflix was their lead product in the Watchathon.

3 Q For 2017?

4 A That's right.

5 Q Do you understand that the government in this case
6 is taking the position that if AT&T and Time Warner are
7 permitted to merge, then AT&T would have the incentive and
8 ability to prevent competing distributors from using HBO as
9 a promotional tool?

10 A I understand that.

11 Q Does that make any sense to you?

12 A It would be devastating to our business.

13 Q Why is that?

14 A Because we rely -- our whole business is relying
15 on our affiliates to promote us. If we can't do that, then
16 our entire business model is destroyed.

17 Q And if AT&T were to suggest to you that they were
18 thinking about doing that -- that is, preventing
19 distributors from promoting HBO -- what would you tell AT&T?

20 A I would strongly argue against it.

21 MR. BARBUR: Thank you. I have no more questions.

22 THE COURT: All right.

23 Redirect?

24 MR. SCHEELE: Yes, Your Honor, very briefly.

25 THE COURT: All right.

REDIRECT EXAMINATION

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BY MR. SCHEELE:

Q Mr. Sutton, you testified a moment ago in response to the questions from Mr. Barbur about Netflix. I just want to confirm, you talked with Mr. Joyce in your deposition about Netflix. And I believe you said then -- correct me if I am wrong -- that you believe that HBO price incentives are more compelling to large distributors than Netflix's are; isn't that right?

A That's correct.

Q And you believe that HBO going head to head against Netflix on Comcast boxes would gain more subscribers and be more valuable to Comcast; isn't that right?

A That is correct, because I thought our price incentive was compelling to Comcast.

Q And in terms of competing with Netflix and other premium channels, you believe HBO has better theatrical movies, don't you?

A I believe they have, yes, more recent movies.

Q And you believe the HBO brand, I think you described it as having a halo from all its Emmys, right?

A I do.

Q And you believe it resonates more with subscribers, don't you?

A I do.

1 Q And when distributors offer customers a choice
2 between HBO, Showtime, and Starz at the same price, your
3 research shows that most customers choose HBO, don't they?

4 A Yes; between those three, yes.

5 MR. SCHEELE: No further questions.

6 THE COURT: Let me ask you a question.

7 You talked about, earlier in your examination
8 about your goal of maximizing revenue --

9 THE WITNESS: Yes, Your Honor.

10 THE COURT: -- in the negotiation setting and how
11 your rates adjust depending upon who the distributor is and
12 how big a customer base they have, that kind of thing. You
13 were talking about that.

14 THE WITNESS: That's correct, yeah.

15 THE COURT: What's your impression when you're
16 doing these negotiations as to how much the distributor
17 knows about what other people's rates are?

18 THE WITNESS: That is a good question.

19 I think, amongst the large distributors, they have
20 a sense, because a number of the senior executives move
21 between distributors and they move fairly frequently. So I
22 certainly know that Altice, for example, knows the Comcast
23 rates. Charter --

24 THE COURT: They're supposed to be confidential,
25 aren't they?

1 THE WITNESS: Well, if it's the same employee who
2 moves around -- they move around a lot, so I think it's hard
3 for them to forget.

4 THE COURT: But in theory --

5 THE WITNESS: In theory, they're confidential.

6 THE COURT: When you're doing a deal, say, with
7 someone, some distributor, the terms of the deal are to keep
8 these numbers confidential, right?

9 THE WITNESS: That is correct.

10 THE COURT: We've been going through quite an
11 exercise here to keep certain information confidential. And
12 that's --

13 THE WITNESS: I appreciate that.

14 THE COURT: That's fine.

15 But I kind of have the impression -- and I think
16 you're confirming it. Tell me if I'm wrong -- that there's
17 an information out -- there's information out there among
18 the distributors where they have a good reason to think they
19 know what the other rates are and how the deal is comparing
20 to the one that they're negotiating with you.

21 THE WITNESS: So you're correct; the information
22 is confidential. We certainly try to keep it confidential.
23 Because employees at our distributors move around a lot and
24 because they merge frequently, I think some of that
25 information does leak, to our disappointment. And sometimes

1 they think they know when actually they don't, so it's a
2 mixture.

3 THE COURT: They also pick up some intelligence,
4 do they not, about those situations where other distributors
5 are getting, in your situation, an HBO -- a free HBO
6 offering for a promotion, right? They know about those,
7 right.

8 THE WITNESS: They do.

9 THE COURT: And they know in those situations, the
10 distributor is not paying you anything, because it's free;
11 there's credits of some kind.

12 THE WITNESS: They will make an assumption, but
13 they will track in the press if there's an ad. And they may
14 call us and say, hey, how does this one work?

15 THE COURT: Okay.

16 As other people are tracking that as to other
17 distributors, whatever, you have your own people doing your
18 tracking of what's going on out there too, right?

19 THE WITNESS: That's correct.

20 THE COURT: And you're using that in your
21 negotiation setting, right?

22 THE WITNESS: That's correct.

23 THE COURT: You can step down.

24 THE WITNESS: Thank you, Your Honor.

25 THE COURT: Thank you.

1 Call your next witness.

2 MR. CONRATH: Your Honor, Mr. Schwingler will be
3 handling the next witness for us.

4 THE COURT: All right.

5 MR. PETROCELLI: Your Honor, Mr. Oppenheimer will
6 be handling the witness.

7 THE COURT: Okay.

8 MR. SCHWINGLER: Good afternoon, Your Honor.
9 United States calls Hanny Patel, an adverse party
10 witness.

11 THE COURT: What was the first name?

12 MR. SCHWINGLER: Hanny Patel.

13 Your Honor, we have a very brief preliminary
14 matter we were hoping to call to your attention if we can
15 have a moment.

16 THE COURT: All right. Well, let's get him in
17 here and get him sworn, and then we'll deal with it.

18 Adverse witness, you say?

19 MR. SCHWINGLER: Adverse witness, yes.

20 DEPUTY CLERK: Please raise your right hand.

21 (Witness is placed under oath.)

22 THE WITNESS: I do.

23 DEPUTY CLERK: Okay. You may have seated over
24 here.

25

1 THE COURT: All right. We're going to start off
2 with a bench conference. So see that chair on the ground
3 over there? You just need to sit on that, okay? Thank you.

4 (Sealed bench conference)

5 MR. SCHWINGLER:

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MR. OPPENHEIMER:

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THE COURT:

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(Open court)

19

THE COURT: Come on up.

20

MR. SCHWINGLER: May I proceed, Your Honor?

21

THE COURT: You may.

22

HANNY PATEL, ADVERSE WITNESS FOR THE GOVERNMENT, HAVING BEEN

23

DULY SWORN, TESTIFIED AS FOLLOWS:

24

DIRECT EXAMINATION

25

1 BY MR. SCHWINGLER:

2 Q Good afternoon, Ms. Patel. Could you please state
3 your name for the record.

4 A Hanny Patel.

5 Q And you are AT&T's vice president of video
6 marketing; is that correct?

7 A Correct.

8 Q Yes.

9 And you've had that job for just over two years,
10 right?

11 A Yes.

12 Q Before that, you were senior director of revenue
13 marketing for DirecTV; is that right?

14 A Yes.

15 Q And so combined, you've worked in marketing for
16 AT&T and DirecTV for about seven years total?

17 A Yes, that's right.

18 Q And in your current role, part of your job is to
19 evaluate content strategy; is that right?

20 A Yes, that's right.

21 Q And what that means is you're responsible for
22 evaluating the value of a particular network to AT&T's
23 business; is that fair?

24 A Yes, that's fair.

25 Q And in your role as vice president of video

1 marketing, you interact with a number of teams within AT&T's
2 marketing department; is that right?

3 A Yes, I do.

4 Q And one team you interact with is the offers team,
5 correct?

6 A Yes, on occasion.

7 Q The offers team puts together offers to attract
8 new customers to AT&T's video platforms; is that right?

9 A Yes, that's their responsibility.

10 Q And you also work with the retention marketing
11 group, is that correct?

12 A On occasion.

13 Q Their job is to keep customers from leaving,
14 right?

15 A Yes, that's right.

16 Q And for both the offers team and the retention
17 team, you assist with content-based offers; is that right?

18 A Yes, on occasion.

19 Q And a content-based offer means a promotional
20 offer using video content that AT&T licenses from a
21 programmer like an HBO, correct?

22 A Yes, that's right.

23 Q And so now, I believe DirecTV is offering a
24 promotion for three months of free HBO, Showtime, Starz, and
25 Cinemax for new subscribers; is that right?

1 A Yes. That's been going on for quite a while now.

2 Q And that's an example of the type of content-based
3 offer that you deal with?

4 A Yes, that's right.

5 Q And in addition to acquisitions and retentions,
6 your work also involves upgrades, correct?

7 A Yes. That's primarily my role.

8 Q And an upgrade just means taking a current
9 subscriber to a higher-paying package, correct?

10 A Yes.

11 MR. SCHWINGLER: Your Honor, I have a binder of
12 documents for the witness. May I approach?

13 THE COURT: Sure.

14 MR. SCHWINGLER: May I approach the witness,
15 Your Honor?

16 THE COURT: Yes.

17 MR. SCHWINGLER: May I proceed, Your Honor?

18 THE COURT: You may.

19 BY MR. SCHWINGLER:

20 Q Ms. Patel, I have a few questions for you about
21 AT&T's relationship with HBO outside of the context of the
22 proposed merger.

23 You were involved in the renewal of AT&T's
24 contract with HBO leading up to August 2016, correct?

25 A Yes, I was.

1 Q And in that process, your team helped AT&T's
2 finance team analyze whether HBO's proposals would be
3 profitable for AT&T, correct?

4 A Yes, we did.

5 Q And in the summer leading up to the renewal in
6 2016, you were also involved in internal discussions within
7 AT&T about partnering with a premium network; is that right?

8 A Yes. I was involved in those conversations.

9 Q Basically, AT&T was looking to pick a premium
10 network like an HBO or Showtime to have a deeper
11 relationship, correct?

12 A Yes, that's right.

13 Q And this internal discussion with HBO involved
14 John Stankey, the CEO of AT&T entertainment group, correct?

15 A Yes, that's right.

16 Q It also involved Dan York, who was in a charge of
17 content acquisition?

18 A Yes.

19 Q If you could, I'll direct your attention to PX10
20 in your binder.

21 MR. SCHWINGLER: Your Honor, PX10 has been marked
22 for identification and provided to opposing counsel, and
23 this is the document we discussed.

24 May I proceed?

25 THE COURT: Yes.

1 BY MR. SCHWINGLER:

2 Q Ms. Patel, this is an email from you to Mr. York
3 and several others in June of 2016, correct?

4 A Yes.

5 Q And the email was sent also to Lydia Zapata, and
6 she was Mr. Stankey's administrative assistant;
7 is that right?

8 A I believe that's right.

9 Q And you understand that this email or at least the
10 presentation attached to it made its way to Mr. Stankey,
11 correct?

12 A I believe so, yes.

13 Q And the attachment to your email is a presentation
14 for a meeting to occur to discuss premium networks; is that
15 right?

16 A Yes.

17 Q Your team within AT&T was involved in creating
18 this presentation?

19 A Yes, amongst other teams.

20 Q And you personally reviewed this presentation
21 before you sent it to Mr. Stankey and Mr. York, correct?

22 A Yes.

23 MR. SCHWINGLER: Your Honor, we offer PX10 into
24 evidence under seal.

25 MR. OPPENHEIMER: No objection under seal.

1 THE COURT: Admitted under seal.

2 (Government's Exhibit PX10
3 received into evidence under seal.)

4 BY MR. SCHWINGLER:

5 Q Ms. Patel, there's some difficulty reading one of
6 the slides. And so if you turn to PX10A in your binder.

7 This has been marked for identification as PX10A.

8 Can you confirm that this is the same presentation
9 that was attached to PX10?

10 A Yes, it is.

11 Q And I'll keep you on PX10A if that's okay. That's
12 a little bit more legible.

13 Looking at the first slide in the presentation,
14 the very cover actually, this is entitled "Going Big with
15 Premiums"; is that right?

16 A Yes, that's right.

17 Q And right on the front page there, it says "Video
18 Marketing." That's your department, correct?

19 A Yes.

20 Q And this presentation, the meeting that this
21 presentation was for was part of this discussion within AT&T
22 about picking a premium to partner with, correct?

23 A Yes. It was the beginning of the evaluation
24 process.

25 Q If you could turn to slide 3.

This is entitled "Pros and Cons of Each Premium to

1 Push Broadly."

2 Do you see that?

3 A I see that.

4 Q And the premiums listed on this page, those are
5 the premiums that AT&T was evaluating as candidates to have
6 a partnership with, correct?

7 A Yes, evaluating and that we carried at the time.

8 Q And you reviewed this specific slide before you
9 sent the presentation to Mr. Stankey, correct?

10 A Yes.

11 Q Let's take a look at the pros for HBO.

12 It says here that HBO has the best brand name and
13 is the most recognized.

14 Do you see that?

15 A Yes, I see that.

16 Q It then says HBO has the best overall collection
17 of content.

18 Do you see that on the page?

19 A Yes.

20 Q The next bullet says HBO is a proven acquisition
21 driver.

22 Do you see that?

23 A I see that.

24 Q And then the last pro for HBO refers to motivating
25 other premiums, correct?

1 A Yes.

2 Q Under cons for HBO, it says HBO's the most expense
3 of the premiums.

4 Do you see that?

5 A Yes, I do.

6 Q That was true at the time, correct?

7 A Yes, it was true.

8 Q And that's still true today?

9 A It is true from a per-sub basis; but from a growth
10 perspective, it's not true anymore.

11 Q If you look under Showtime, the next premium, it
12 describes, under pros, Showtime is an acquisition helper,
13 not an acquisition driver, correct?

14 A That's what it says.

15 Q Under cons, showtime is described as nice to have
16 but not "Must-See TV," correct?

17 A Yes.

18 But I think I could say that about all the
19 premiums.

20 Q But the document says that about Showtime
21 specifically, correct?

22 A That's right.

23 Q And if you look at the other premiums on the page,
24 under pros, none of them are identified as acquisition
25 drivers, are they?

1 A No, they're not.

2 Q In fact, none of them -- none of their
3 descriptions in the pro column mentions acquisitions at all
4 except for HBO and showtime, correct?

5 A That's correct.

6 Q During the meeting where this presentation was
7 made, Mr. Stankey instructed the group in attendance,
8 including yourself, to make a decision on which premium to
9 partner with; is that right?

10 A Yes. That's what we were asked to do.

11 Q Your team recommended HBO, correct?

12 A Yes, we did.

13 Q Your team viewed HBO as providing high value to
14 AT&T; is that right?

15 A We felt that HBO was a high-value option for us to
16 explore, as would all the premiums be.

17 Q You personally recommended partnering with HBO,
18 didn't you?

19 A Yes, I did.

20 Q And, in fact, AT&T did select HBO as its partner,
21 correct?

22 A Yes. Ultimately, we chose that HBO would be the
23 partner that we would approach first to go big with.

24 Q And then over the course of the summer, you
25 reached a deal with HBO that resulted in this partnership

1 relationship, correct?

2 A Yes, ultimately, we reached that deal.

3 Q At the beginning of your examination, we
4 discussed -- and just one thing to be clear for the record.

5 All of these discussions with HBO about being a
6 partner, that occurred outside the context of this merger,
7 correct?

8 A Yes, that is correct.

9 Q At the beginning of your examination, we discussed
10 acquisition offers, retention offers, and upgrades. And
11 isn't it the case that this new relationship with HBO in
12 late 2016 provided AT&T opportunities in all three of those
13 areas?

14 A Yes, that's correct.

15 MR. SCHWINGLER: Your Honor, I apologize; I forgot
16 to move PX10A into evidence, so I'll do that now.

17 THE COURT: It doesn't have the emails.

18 MR. SCHWINGLER: That's correct.

19 THE COURT: You don't care about that?

20 MR. SCHWINGLER: Well, we've moved PX10 in, so
21 we would ask for 10A to be admitted so the record has the
22 legible version.

23 THE COURT: Okay. All right.

24 MR. OPPENHEIMER: We have no objection, still
25 under seal.

1 THE COURT: All right. It will be admitted under
2 seal.

3 (Government's Exhibit PX10A
4 received into evidence under seal.)

5 MR. SCHWINGLER: I have no further questions for
6 this witness.

7 THE COURT: All right.

8 Cross-exam.

9 MR. OPPENHEIMER: Your Honor, with the Court's
10 permission, I thought I might actually ask a few questions.

11 THE COURT: Please.

12 MR. OPPENHEIMER: Thank you.

13 CROSS-EXAMINATION

14 BY MR. OPPENHEIMER:

15 Q Good afternoon, Ms. Patel.

16 A Good afternoon.

17 Q Let's talk briefly about this negotiation in 2016,
18 which was to pick a premium channel to be your -- what was
19 the term that was used in the discussions?

20 A Our preferred partner.

21 Q Your preferred partner.

22 Before we do that, I'd like to just very quickly
23 go into your background a little bit more, because you've
24 actually seen this, I think, from both sides.

25 How long have you been in the video business?

A Just a little over 25 years.

1 Q So you've been an executive here for 25 years.
2 Would you tell the Judge what you did -- when did you get to
3 DirecTV?

4 A 2011.

5 Q And what did you do in the years before that?

6 A So for the 19 years before that, I used to work at
7 Showtime Networks.

8 Q And in that capacity, you were on the programmer
9 side; would that be correct?

10 A Yes. I was on the side of distribution and
11 working to sell Showtime to our affiliate partners.

12 Q All right. So in effect, you would have been in
13 the HBO position vis-à-vis DirecTV?

14 A Yes, that's right.

15 Q All right.

16 So let's talk briefly about this 2016 negotiation.

17 First and foremost, when you ultimately decided to
18 choose HBO as your preferred partner, was it because it was
19 absolutely the single best subscriber acquisition mechanism
20 that you could imagine?

21 A No. We could have partnered with any of the
22 premiums.

23 Q So there were other factors that went into your
24 decision?

25 A Yes, there were a number of factors.

1 Q All right.

2 So let's start, first, with, why did AT&T decide
3 to pick a preferred premium partner in 2016 to begin with?

4 A So early 2016, we had just merged the video,
5 entertainment, broadband, and voice businesses with the
6 mobility businesses. And so at the time, we were looking
7 and John Stankey's ask was we think about how we distribute
8 content across all of our platforms, including mobile.

9 And so we were looking for a new grant of rights
10 from our programmers. So that was an opportunity for us to
11 look to one partner to start a relationship with, and that
12 was what prompted this whole thing.

13 Q Okay. Now, before you made the decision to pick a
14 preferred premium, what premium channels did AT&T offer its
15 video subscribers?

16 A At the time AT&T carried, Starz, Showtime, HBO,
17 Cinemax. And on U-verse, we also had Epix.

18 Q And during that time, was HBO AT&T's most popular
19 premium?

20 A No, it was not. It was our third most popular
21 premium.

22 Q And what were the first two most popular premiums?

23 A Starz was the most popular, followed by Showtime.

24 Q Now, why did AT&T sell more Starz and Showtime
25 subscriptions than HBO or other premiums in 2016?

1 A We'd had a longstanding history with Starz. They
2 have always been good partners.

3 Showtime and Starz both had more favorable deal
4 terms and offered better incentives for us to sell them than
5 HBO did at the time.

6 Q Now, just on the subject of giving you incentives
7 to promote, a suggestion has been made that distributors
8 such as DirecTV and its competitors need HBO, desperately
9 need HBO to attract and retain subscribers, and that the
10 distributors need HBO more than HBO needs the distributors.

11 You've been on both sides of this. Is that your
12 perception of the situation after 25 years as an executive?

13 A No, not at all.

14 Q Would you explain to the Judge what your
15 perception is.

16 A Sure.

17 So while at Showtime for my 19 years, my job every
18 day was to work with my partner, and for the last 12 years,
19 which was DirecTV, to get them to sell Showtime to their
20 customers on my behalf. And so I needed DirecTV to make
21 sure they were selling to their customers.

22 Q And why was it important to Showtime, to a
23 programmer like Showtime or HBO to have the distributor
24 working on their behalf like that?

25 A Because the distributor, DirecTV, AT&T, owns the

1 relationship with the customer. So without that partnership
2 with DirecTV, we, Showtime, would not have access to the
3 customers. So we relied on them to talk to the customers
4 and market on our behalf.

5 Q All right. So let's go back to this 2016
6 negotiation.

7 At the time you were considering H -- well, at the
8 time you were considering whom to pick as a preferred
9 partner, what was HBO's penetration on DirecTV's video
10 platform like with respect to the rest of the industry?

11 A We under-indexed relative to the rest of the
12 industry.

13 Q And what does that mean?

14 A What that means is at the time HBO had
15 approximately 30 million households with about 90 million to
16 100 million pay-TV households. So nationally, around a
17 30 percent penetration, and we were well under that number.

18 Q So of all the people that watch HBO, about -- have
19 video on these systems, about 30 percent HBO, and you were
20 below that.

21 A We were, yes.

22 Q All right. And why? What was your understanding
23 of why?

24 A A lot of it had to do with our financial terms
25 with HBO, which were not favorable and did not have strong

1 incentives for us to grow.

2 And the incentives we did have were kind of out of
3 our reach. And so we were unable to take advantage of any
4 of the incentives that were even offered.

5 Q So how is it you chose to go to HBO -- well, first
6 of all, were you considering all of these premium channels
7 as potential preferred partners?

8 A Yes. All of them were under consideration.

9 Q And how did you decide to go to HBO first to start
10 the negotiation?

11 A A few factors, but because we didn't have
12 favorable terms with HBO, this was an opportunity, if we
13 were looking for someone to partner with and put first, to
14 fix the economic situation with HBO. So we had a lot of
15 upside, we felt, I felt, on the economics to approach HBO.

16 And then also because of its brand awareness. So
17 there were two components that were the major components
18 amongst other things. But I thought if we can pick that
19 partner and fix the financial terms, that would be great.

20 And then the final factor is we had some deals on
21 the table already, and HBO had shown a willingness to work
22 with us on the wireless and OTT products. And we did not
23 have the wireless component offered to us by Starz and
24 Showtime at the time.

25 Q All right. Now, the government has suggested HBO

1 is AT&T's only real choice as a preferred premium in this
2 context; is that right?

3 A No, that's not right.

4 Q So ultimately, what tipped your decision in favor
5 of going with HBO as a preferred partner?

6 A To -- I'd say to fix the economic situation that
7 we had with HBO to try to get a better deal from them. This
8 is our opportunity to do it, because we had something to
9 offer them, which is preferred positioning, since they were
10 No. 3 for us in terms of penetration.

11 And then also because they had very good, strong
12 brand awareness that I thought it would make a good starting
13 point.

14 Q And does HBO want to be your preferred partner?

15 A HBO did -- at the time, once we started the
16 conversations, they did want to be our preferred partner.

17 Q And did all of the other premium channels also
18 want to be a preferred partner?

19 A You know, we really focused on HBO while we were
20 having conversations with the others. But if we had really
21 focused on either one of Showtime or Starz, I'm sure they
22 would have wanted the same thing and the same opportunity.

23 Q And why is that? What's the benefit to the
24 premium channel for being a preferred partner?

25 A Because if they're a preferred partner, they're

1 positioned first in everything we do; and they get more
2 opportunities in front of our customers, for promotions, and
3 so it helps drive their customer base up.

4 Q Do you have something called a national offer?

5 A We do.

6 Q And what is that?

7 A The national offer is the offer that we use to
8 drive customers to activate to DirecTV, to sign new
9 customers up for DirecTV.

10 And the national offer usually consists of a price
11 point for programming; a hardware offer, so how many rooms
12 would we install for a certain period of time. And that's
13 the main focus.

14 Sometimes, there's cash gift cards that we add on
15 top of that.

16 So that's the base of the national offer.

17 And then for customers that come in at a certain
18 base package and above, they also get four free months --
19 sorry, three free months of all four premiums, and that's
20 the -- those are the components of the national offer.

21 Q Then your national offer, is it very beneficial to
22 an HBO Showtime to be showcased in that national offer?

23 A Yes, very beneficial.

24 Q So as a result of all that, did you get an offer
25 from HBO?

1 A Yes, we did.

2 Q And how would you describe that offer?

3 A Their offer was very aggressive.

4 Q And aggressive in what way?

5 A In a very --

6 Q Aggressive good or aggressive bad?

7 A It was very aggressive good. It was very
8 aggressive. In my 25 years, I've never seen an offer that
9 strong in terms of incentive for growth.

10 Q Incentive to you to take them?

11 A Incentive for us to grow them.

12 Q Would you tell the Court briefly what were the
13 components of that offer that made it so aggressive in a
14 good way.

15 A Sure.

16 The components were they lowered our rate per
17 subscriber. They offered us a promotional band for growth
18 and also lowered the benchmark for which we needed to get to
19 that. So we were immediately within the promotional band.

20 They gave us --

21 Q Before you leave promotional band, would you
22 explain that in a little more detail. Is that a band where
23 you do not have to pay for each subscriber.

24 A So it can work differently with different
25 programmers.

1 But the concept is you have a benchmark to which
2 you pay a certain number, which is the full rate. And then
3 above that, there are -- any subscriber above that number,
4 there are discounts. And that could be free or it could be
5 50 percent off or whatever. And for HBO, that band was
6 free, free growth for us.

7 Q So you could add subscribers while you were in
8 that free band and not have to pay HBO any additional fee
9 for doing so?

10 A That's right. We get to keep 100 percent of that
11 margin.

12 Q That improves your margins, does it not?

13 A Yes, it does.

14 Q You mentioned previously in response to a question
15 by the government that HBO is expensive and it didn't have
16 some of the best margins you had.

17 Did their offer give you an opportunity to improve
18 that situation?

19 A Yes, it did.

20 Q Okay. I'm sorry I interrupted you. But if you go
21 on with the other aspects of this offer from HBO to DTV.

22 A Sure. There was a significant marketing budget
23 that they offered to us to grow their subscribers.

24 They also gave us the grant of rights that we were
25 looking for for delivering our over-the-top service, as well

1 as distribution via wireless.

2 And they also included the Cinemax, Cinemax as
3 part of the deal. So we were able to complete two premiums
4 at the same time.

5 Q And did they also give you a rate reduction?

6 A Yes, they did.

7 Q Okay. Now, I don't want to throw around the
8 specific numbers, but can you give us a sense of the
9 magnitude of how valuable it was to DirecTV to have that
10 free band that they were offering?

11 A It's very valuable. It not only gives us
12 marketing flexibility to do the types of offers we would
13 want to, but it also, from a value perspective, equates to
14 hundreds of millions of dollars a year.

15 Q What about the rate reduction; can you give us an
16 idea of the magnitude of that value to DirecTV?

17 A Also, over the course of the deal, it's over --
18 it's hundreds of millions of dollars.

19 Q And these were all things that HBO put on the
20 table in order for you to pick them as the preferred partner
21 in 2016?

22 A Yes, that's right.

23 Q The government in this case has suggested that
24 after the merger in this case, that AT&T would be less
25 willing to allow HBO to be used in offers to attract new

1 subscribers. So I'd like to ask you about that.

2 How does a distributor like DirecTV attract new
3 subscribers? And how important is HBO or another premium
4 channel to that effort?

5 A So I would say that from an acquisition
6 perspective of a new DirecTV customer, price point is the
7 most important thing, which is why -- and I don't work in
8 this area, but we know that we focus on that initial price
9 point that a customer sees to bring them onto the platform.

10 And we use that as a vehicle to attach the
11 premiums. And so it's really beneficial for the premiums to
12 be included in the national offer, because that, for
13 DirecTV, is actually the biggest source of new premium
14 additions to our platform.

15 Q So the government has also suggested that, after
16 the merger, it might be beneficial for the combined company
17 to withhold HBO in some way from programs and promotionals
18 that would attract new customers but allow it to be used in
19 what you do, which is to upgrade existing customers, and
20 that that might happen.

21 From your experience in 25 years, does that make
22 sense either?

23 A No, it doesn't make any sense.

24 Acquisition -- being attached to acquisition is
25 the best way for a premium to get onboard. There just

1 aren't enough leads and customer touchpoints to do it all
2 through upgrades.

3 So, for example, acquisition represents two-thirds
4 of all new premium units that are added onto the DirectTV
5 platform each year.

6 Q Last couple of questions, Ms. Patel.

7 If, in your business, you did not have HBO to work
8 with, in terms of promotions, what would you do?

9 A We would turn to the other premiums because
10 they're all willing and eager to work with us. And so
11 that's how we would respond to that.

12 Q And do you believe, based on your experience, that
13 that would be a significant detriment or any detriment in
14 the work of securing and retaining subscribers?

15 A I do not believe that would be the case.

16 MR. OPPENHEIMER: Thank you very much.

17 THE COURT: Redirect.

18 MR. SCHWINGLER: Just a few questions, Your Honor.

19 THE COURT: Yes.

20 MR. SCHWINGLER: May I proceed?

21 THE COURT: You may.

22 REDIRECT EXAMINATION

23 BY MR. SCHWINGLER:

24 Q Ms. Patel, you were asked a question about what's
25 most important in an acquisition offer from the perspective

1 of the customer; is that correct?

2 A Yes.

3 Q And you stated, in the midst of your answer, that
4 you don't work in that area, correct?

5 A That's right.

6 Q That's a different part of the company, different
7 personnel, correct?

8 A Yes.

9 Q You mentioned one reason that you recommended
10 choosing HBO as the preferred premium is brand awareness,
11 correct?

12 A Yes, I did.

13 Q As someone who works in marketing, you would agree
14 that brand is very important, wouldn't you?

15 A Brand is very important, yes.

16 Q And in the information that you provided to
17 Mr. Stankey, PX10A on slide 3, the very first pro under HBO
18 was best brand name and most recognized, correct?

19 A Yes.

20 Q When you were discussing national offers, you said
21 they're intended to drive customers to sign up for DirecTV,
22 correct?

23 A Yes.

24 Q And right here in the materials provided to
25 Mr. Stankey, next to HBO, it says it's a proven acquisition

1 driver, correct?

2 A It says that. But in this context, in my world,
3 acquisition is acquisition of a premium.

4 So we use it to discuss upgrades. And so that's
5 what this is referring to, which is acquisition of an HBO
6 from an existing DirecTV customer.

7 Q Are you suggesting that the word "acquisition"
8 means "upgrade"?

9 A Acquiring a new HBO subscriber, we use that term
10 in the upgrade business as well.

11 Q Could you turn to tab PX261 in your binder.

12 MR. SCHWINGLER: Your Honor, this has been marked
13 for identification as PX261 and provided to counsel.

14 May I proceed?

15 THE COURT: You may.

16 BY MR. SCHWINGLER:

17 Q Ms. Patel, this is an email from Benjamin Jack to
18 Julia Thomas and copying you in September of 2016, correct?

19 A Yes, it is.

20 Q And this is transmitting your final slides for an
21 ops review meeting with Mr. Stankey for around that time
22 frame, correct?

23 A Yes.

24 However, the meeting didn't actually happen.

25 Q The meeting didn't occur, but you prepared these

1 slides as -- in anticipation that you may present them to
2 Mr. Stankey, correct?

3 A Yes, that's right.

4 Q And can you turn to slide 12.

5 This is PX261-013.

6 And this, these slides were prepared after AT&T
7 renewed its contract with HBO in August of 2016, correct?

8 A Yes, that's right.

9 MR. SCHWINGLER: And, Your Honor, United States
10 offers PX261 into evidence under seal.

11 MR. OPPENHEIMER: No objection, Your Honor.

12 THE COURT: It will be admitted under seal.

13 (Government's Exhibit PX261
14 received into evidence under seal.)

14 BY MR. SCHWINGLER:

15 Q So you've recently entered this new relationship
16 with HBO, and you have these slides to present to the CEO of
17 AT&T Entertainment, correct?

18 A Yes, that's right.

19 Q And on slide 12 under "Video Opportunity," it
20 discusses three ways that AT&T might use HBO programming
21 under this new deal, correct?

22 A Yes, that's right.

23 Q And one way is upgrades, correct?

24 A Yes.

25 Q And another way is acquisitions?

1 A Yes.

2 Q And in this context on this slide, upgrades and
3 acquisitions are two different things, aren't they?

4 A They are two different things.

5 On this slide, the upgrades is what we discussed
6 before, which was something we could do under the old deal.

7 The new deal allowed us more flexibility on the
8 acquisition side as well, so that is referring to new
9 DirecTV acquisitions.

10 Q Ms. Patel my only question is on this slide
11 upgrades and acquisitions are two different things, correct?

12 A Yes, they are.

13 MR. SCHWINGLER: No further questions, Your Honor.

14 MR. OPPENHEIMER: Your Honor, just briefly, if I
15 may.

16 THE COURT: Okay. Limited to redirect.

17 RE-CROSS-EXAMINATION

18 BY MR. OPPENHEIMER:

19 Q Ms. Patel, just very briefly, the last document
20 you were just shown, Plaintiff's Exhibit 261, the slideshow
21 that you were just shown --

22 A Yes.

23 Q -- was that ever, in fact, presented to the ops
24 meeting?

25 A No, it wasn't presented, and it was never really

1 executed. These were ideas that we were sharing with
2 Mr. Stankey to say that the new deal now affords us these
3 opportunities, and so this was our way of listing out some
4 of the new opportunities that we had.

5 MR. OPPENHEIMER: Thank you very much.

6 THE WITNESS: You are welcome.

7 THE COURT: So you were just spitballing?

8 THE WITNESS: A little more than spitballing.

9 These are things that we could do, putting in front of the
10 other teams to see if they wanted to use it. If the
11 acquisition team felt it was worthwhile, then they could do
12 that. But we now had this flexibility with the deal.

13 THE COURT: Okay.

14 You can step down.

15 Call your next witness.

16 MR. PETROCELLI: Your Honor, may we approach?

17 (Sealed bench conference)

18 MR. PETROCELLI:

19 THE COURT:

20 MR. PETROCELLI:

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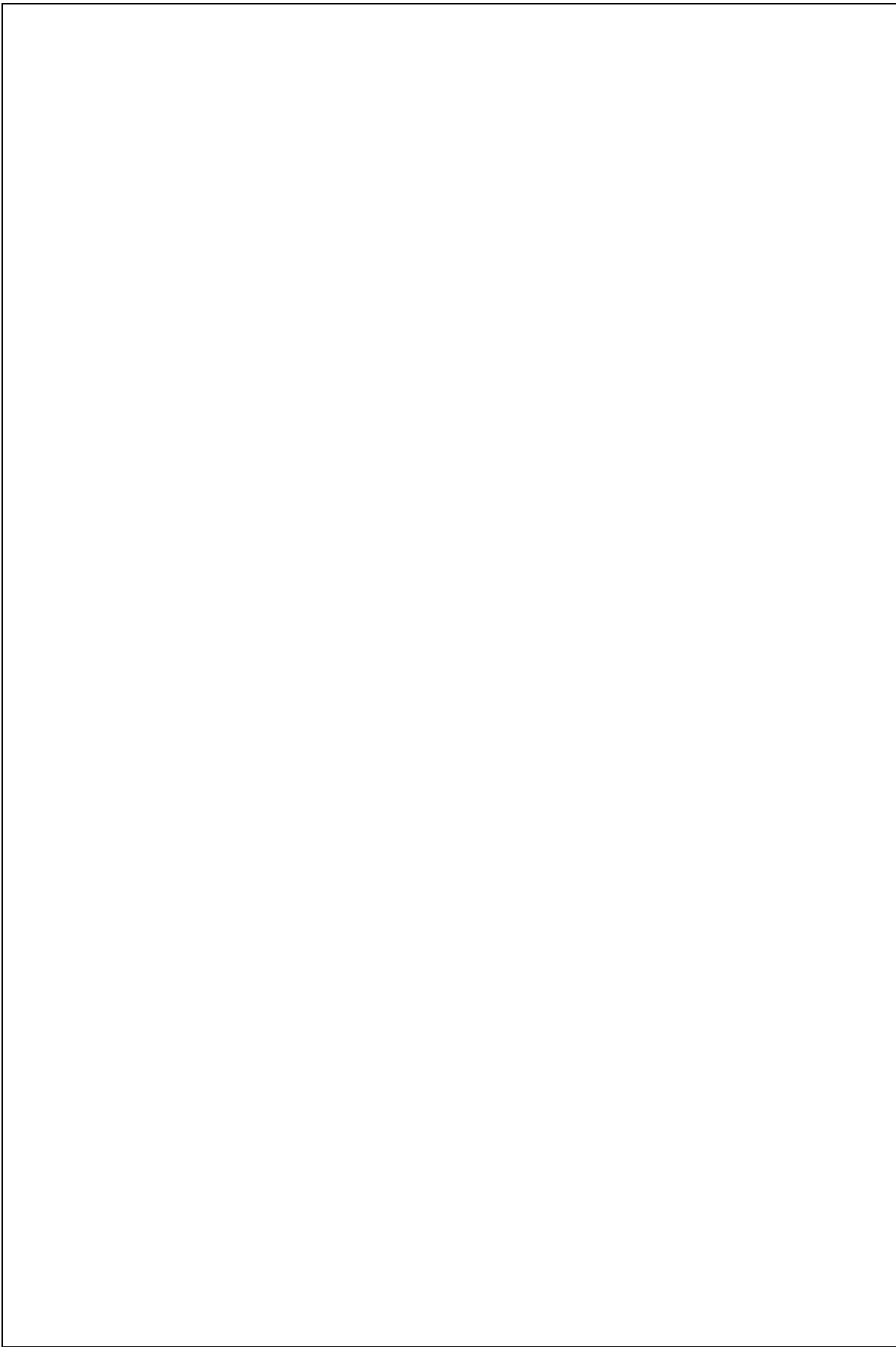
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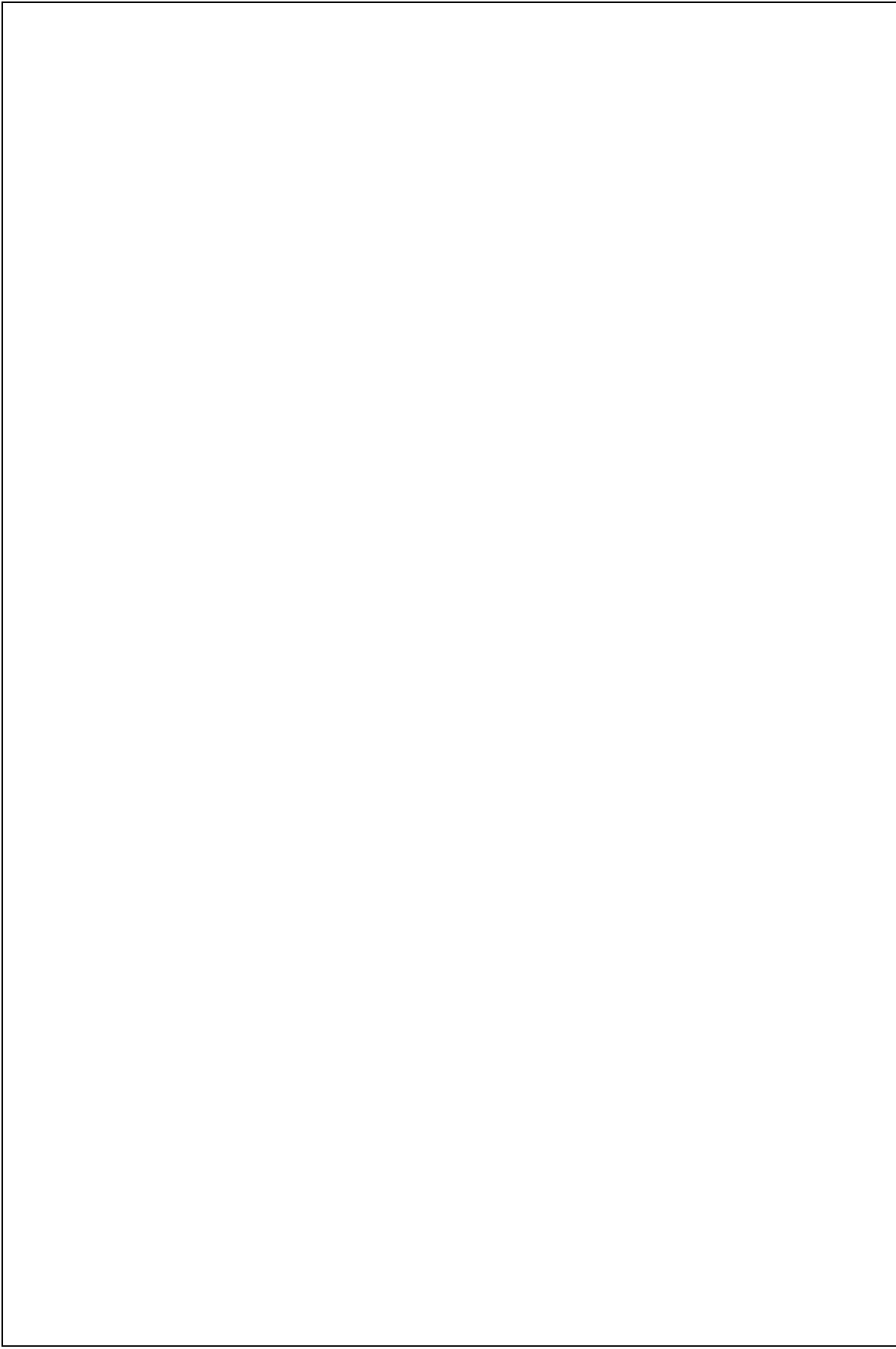
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5 MR. WELSH:

6 (Open court)

7 THE COURT: All right. Well, that took up more
8 time than I thought it would.

9 So we're going to take -- my reporter has been
10 working awfully hard for a long time here. We're going to
11 take a 15-minute recess. When we return, the government
12 will call its next witness. And we'll be going until 5:30.
13 We'll stand in recess.

14 DEPUTY CLERK: All rise.

15 (Recess from 3:58 p.m. to 4:22 p.m.)

16 DEPUTY CLERK: The United States District Court
17 for the District of Columbia is again in session, the
18 Honorable Richard J. Leon presiding. God save the United
19 States and this Honorable Court. Please be seated and come
20 to order.

21 Your Honor, re-calling Civil Action No. 17-2511,
22 the United States of America v. AT&T, Inc., et al.

23 THE COURT: Ready to call your next witness?

24 MR. WELSH: May we approach, Your Honor.

25 MR. PETROCELLI: Is it the same issue?

1 MR. WELSH: It is.

2 (Sealed bench conference)

3 THE COURT:

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17 MR. WELSH:

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19 THE COURT:

20 (Pause)

21 (Open court)

22 MR. WELSH: Your Honor, the United States calls

23 Daniel York as an adverse party witness.

24 THE COURT: All right.

25 DEPUTY CLERK: Please raise your right hand.

1 (Witness is placed under oath.)

2 DEPUTY CLERK: Please be seated.

3 THE COURT: You may proceed.

4 MR. WELSH: May I proceed?

5 THE COURT: You may use leading questions.

6 MR. WELSH: Thank you, Your Honor.

7 DANIEL YORK, ADVERSE WITNESS FOR THE GOVERNMENT, HAVING BEEN
8 DULY SWORN, TESTIFIED AS FOLLOWS:

9 DIRECT EXAMINATION

10 BY MR. WELSH:

11 Q Could you please state your name for the record.

12 A Daniel York.

13 Q Good afternoon, Mr. York. Good to see you again.

14 A Good to see you.

15 Q Mr. York, you've been with AT&T or DirecTV for
16 about 14 years, is that correct, in total?

17 A Yeah, about 13 and a half.

18 Q You have had, I guess, a number of different
19 stints with AT&T and DirecTV; is that true?

20 A Yes, straight through, from late 2004.

21 Q Okay. So let's just go back briefly and talk
22 about your background here.

23 So in 2004, you started with AT&T; is that right?

24 A Yes. At the time, it was SBC.

25 Q And then you worked there, if my recollection is

1 correct, about seven and a half years, right?

2 A Correct.

3 Q And at that time, you left AT&T, that company, and
4 you went to DirecTV; is that correct?

5 A Correct.

6 Q All right. And then that was about 2012, right,
7 when you went to DirecTV?

8 A Correct.

9 Q And when you started at DirecTV in 2012, you were
10 the executive vice president, chief content officer for the
11 company; is that right?

12 A At DirecTV?

13 Q Yes, sir.

14 A Yes.

15 Q And you reported to Mike White, correct?

16 A That's correct.

17 Q Mike White was the CEO of DirecTV, true?

18 A True.

19 Q Then in 2015, AT&T and DirecTV merged, correct?

20 A Correct.

21 Q AT&T acquired DirecTV in that?

22 A Merged, acquired.

23 Q Okay. And then at that point, you joined AT&T,
24 true?

25 A True.

1 Q You were the executive vice president and chief
2 content officer of AT&T, DirecTV at that point in time,
3 correct?

4 A Correct.

5 Q And you held that position from 2015 until August
6 of 2017, right?

7 A True.

8 Q And you reported, during that time, to
9 John Stankey?

10 A Correct.

11 Q And Mr. Stankey, you've heard a little bit about
12 in this court already. Mr. Stankey at the time was the CEO
13 of AT&T Entertainment Group; is that right?

14 A Yes.

15 Q And you were, more recently, promoted within the
16 organization, right?

17 A I have a different title, but my job hasn't
18 changed.

19 Q Okay. Your title is now senior executive vice
20 president and chief content officer at AT&T-DirecTV;
21 is that right?

22 A Yes.

23 Q Now, since the merger between DirecTV and AT&T
24 back in 2015, that time frame, you've had responsibility
25 over the content and programming group at AT&T and DirecTV,

1 right?

2 A Correct.

3 Q And that group is responsible for contract
4 negotiations with programmers for linear content for
5 DirecTV's satellite business and for U-verse, right?

6 A Yeah, amongst other things, yes.

7 Q Okay. And at both AT&T and DirecTV, you were and
8 are today the chief content negotiator with the programmers
9 for AT&T and DirecTV?

10 A I would say I oversee the group, but I'm not
11 necessarily the chief negotiator.

12 Q But you oversee the group in terms of those
13 contract negotiations, right?

14 A The deal folks, not the legal team, yes.

15 Q And if this merger were to be consummated, if it
16 went forward, you expect to continue to remain in your
17 position with AT&T-DirecTV, right?

18 A I'm not certain. I would hope so.

19 Q You told me, I think, in your deposition, no one's
20 told you otherwise at this point, right?

21 A That's correct.

22 Q Now, Mr. York, you're generally aware, aren't you,
23 of the allegations in this lawsuit, why we're here today?

24 A Generally, yes.

25 Q Okay. You're aware of the allegation that if this

1 merger were to be consummated, AT&T and DirecTV would have
2 greater leverage and negotiations with distributors for
3 Turner content. You're aware of that, aren't you?

4 A I'm aware of that allegation, yes.

5 Q And you're aware of the allegation that with that
6 merger, that AT&T and DirecTV could increase the costs of
7 Turner content by threatening permanent blackouts of that
8 content?

9 You're generally aware of that?

10 A I'm aware of that allegation, yes.

11 Q And that by doing so, that that would be
12 profitable to AT&T-DirecTV because new and existing
13 customers of AT&T-DirecTV, faced with that blackout, they
14 would go to AT&T, right?

15 A I believe that's an assumption that some of them
16 may, yes.

17 Q Now, the concepts that we've just talked about
18 here, those aren't new to you, are they?

19 A What concept are you referring to?

20 Q Well, the concepts and the points we just talked
21 about, that if the merger were to occur, that AT&T and
22 DirecTV would have greater leverage in the negotiation of
23 distributors for Turner -- for content, that's not a new
24 point to you, is it?

25 A I understand the concept. I don't necessarily

1 agree with it.

2 Q And the point that I made and in the concept here
3 that it would increase the cost of Turner to rivals and
4 that, that's not a concept that's foreign to you, is it?

5 A The concept that a programmer could increase their
6 prices?

7 Q In a situation where there's an acquisition here,
8 a vertical integration, an acquisition, that that could
9 cause the cost of Turner content to be increased to rivals,
10 that's something that's not -- that concept right there is
11 not foreign to you, is it?

12 A It is. In my experience, ownership or affiliation
13 of the content company doesn't really have an impact on the
14 price of the content.

15 MR. WELSH: Your Honor, I have some binders, if I
16 may approach?

17 THE COURT: You may.

18 MR. WELSH: May I approach the witness,
19 Your Honor?

20 THE COURT: You may.

21 BY MR. WELSH:

22 Q Mr. York, you have a binder in front of you. I'd
23 like to direct your attention to PX231. It's been marked
24 for identification.

25 MR. WELSH: It's also been given to defense

1 counsel, Your Honor.

2 May I proceed?

3 THE COURT: You may.

4 BY MR. WELSH:

5 Q Mr. York, I'd like you to look at it PX231, and
6 I'm going to direct you to page 231-13.

7 MR. WALTERS: Your Honor, may we approach?

8 THE COURT: Step down. Sit in that chair over
9 there, okay?

10 THE WITNESS: Sure.

11 (Sealed bench conference)

12 MR. WALTERS:

13 THE COURT:

14 MR. WELSH:

15 MR. WALTERS:

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19 MR. WALTERS:

20 THE COURT:

21 MR. WELSH:

22 THE COURT:

23 (Open court)

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

1 MR. WELSH: Thank you, Your Honor.

2 BY MR. WELSH:

3 Q Mr. York, you have Exhibit PX231 in front of you.
4 And that's a deck from January of 2013 called "DirecTV
5 Content Project Workshop on Strategic Moves," correct?

6 A That's what it's titled, yes.

7 Q And you were with DirecTV at the time in January
8 of 2013, correct?

9 A Yes.

10 Q And I think we looked at this document in your
11 deposition. This document came from your file, didn't it?

12 A I believe so.

13 Q And -- excuse me.

14 Back in that time frame of January 2013, DirecTV
15 was looking at a number of different strategic options, one
16 of which was acquiring a content producer or programmer.
17 That was an option that was being discussed, true?

18 A I wouldn't say that that topic at all was actively
19 discussed, no.

20 Q Well, it was discussed in the context of this
21 PowerPoint deck that we have here; isn't that fair?

22 A It is one of the items on one of the pages in this
23 PowerPoint that McKinsey did five years ago, yes.

24 Q And that -- the pages that we're talking about
25 would be 012 and 013, right?

1 A I'm sorry. Can you repeat the question.

2 Q Yes.

3 The pages that talk about DirecTV acquiring a
4 content programmer, those would be on PX0231-012 and the
5 next page, 013, correct?

6 A Correct.

7 MR. WELSH: Your Honor, I move for admission of
8 the document if I've laid sufficient foundation.

9 MR. WALTERS: May we approach?

10 THE COURT: Yeah.

11 (Sealed bench conference)

12 MR. WALTERS:

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20 MR. WELSH:

21 MR. WALTERS:

22 THE COURT:

23 (Open court)

24 THE COURT: Come on back up, Mr. York.

25 Let's try this again.

1 BY MR. WELSH:

2 Q Mr. York, I'm going to direct you to 231-012, and
3 the top of that just says "Acquired Content, Producer
4 Programmer." I just want to make sure we're on the same
5 page. Same page?

6 A Yes.

7 Q So I'm going to direct you down to the first
8 bullet -- or second bullet point, excuse me. It begins with
9 "influence." Just take a look at that. Read that to
10 yourself, with the two sub bullet points, if you would.

11 A Are you talking about in the yellow box here?

12 Q It starts in the yellow dashed box and then looks
13 like it carries down further. There's two bullet points,
14 sub bullet points below that.

15 A The dash says, "Influence new distribution
16 platforms"?

17 Q Yeah, that's the line we're talking about. If
18 you'd read that and then the content that's right below
19 that.

20 A Underneath that it says, content partner --

21 Q Read it to yourself.

22 THE COURT: Read it to yourself.

23 THE WITNESS: Oh, sorry.

24 I see that, yes.

25

1 BY MR. WELSH:

2 Q Now, the language that's there, that was something
3 that you and your colleagues at DirecTV were thinking about
4 in this time frame of January 2013, right?

5 A I wouldn't say we were -- I wouldn't say we were
6 really thinking about this at all.

7 Q Well, you had this deck, and you had these two
8 pages that we're looking at here of 012 and 013, right?

9 A Correct.

10 Q Okay .and what we just looked at here and the
11 language that you just read to yourself, now, that involves
12 a situation where the concept was DirecTV buying a content
13 programmer, right?

14 A That is the concept in these bullet points, yes.

15 Q Okay. And that's what's going on in this merger
16 here, is that AT&T-DirecTV wants to buy a content
17 programmer, right?

18 A Correct.

19 Q And back in this time frame of 2013, you said
20 McKinsey did this. McKinsey was a big consultant that you
21 worked with at that time, right?

22 A Mr. White used McKinsey from time to time, yes.

23 Q Well, McKinsey was actually very much involved in
24 this business and worked on the AT&T-DirecTV merger, right,
25 on the efficiencies? You know that.

1 A I'm not sure what role they played in that merger.

2 Q Jonathan Dunn is with McKinsey?

3 A Yes, at least he was then, yes.

4 MR. WELSH: Your Honor, we have marked for
5 identification PX538. We want to try to use it for
6 refreshing the witness' recollection.

7 THE COURT: Yes. Show it to Mr. Walters.

8 MR. WELSH: May I approach?

9 May I approach the witness?

10 THE COURT: You may.

11 BY MR. WELSH:

12 Q Mr. York, you have PX538. I'd like you to take a
13 look at that. And I'm going to ask you to look at -- the
14 email at the top is from you to Jonathan Dunn. And then
15 there's an email below that from Mr. Dunn to you in July of
16 2015. If you would please read that to yourself and tell me
17 when you're done.

18 A Okay. I've read it.

19 Q Put that to the side.

20 Does that, looking at PX538, help to refresh your
21 recollection that McKinsey had been working on the
22 AT&T-DirectTV merger back in July of 2015 with you?

23 A Yeah. I recall they were involved. I didn't know
24 that they were working on synergies per se.

25 Q But you know that they were involved and have done

1 ongoing work for AT&T and DirecTV over the years, right?

2 A I first encountered them when I joined DirecTV,
3 because Mr. White used them from time to time.

4 Q He used them, the CEO of the company, used
5 McKinsey, right?

6 A Occasionally, yes.

7 Q And they were trusted.

8 And AT&T continued to use DirecTV even after the
9 merger or as part of this merger, correct?

10 A I didn't make that decision but somebody decided
11 to use them, yes.

12 Q In any event, back in this time frame of January
13 2013, the proposition of DirecTV possibly buying a content
14 programmer and what the impact of that is that the content
15 partner could influence content availability and pricing
16 into the future of new platforms, that was something that
17 was aired and you were aware of back in that time frame,
18 true?

19 A I see it on this page. I don't have any
20 recollection of discussing that as part of this subset of a
21 much bigger project.

22 Q Well, back in 2013, again, in the concept of
23 DirecTV acquiring a content programmer, similar to what
24 we're talking about here, the concept that that would give a
25 greater advantage to DirecTV in competitors' carriage

1 disputes by prolonging negotiations when beneficial to it,
2 that was something that was discussed and something that was
3 raised internally at DirecTV; isn't that true?

4 A I don't recall that being discussed and raised,
5 other than seeing it here under the column entitled "What
6 you'd have to believe" on this page by McKinsey.

7 Q But these are the very concepts -- on these pages
8 that we're looking at, these are the types of concepts that
9 are being raised today and that we're all talking about in
10 this litigation; isn't that right?

11 A Other than the filing, I'm not sure exactly what's
12 being talked about. I'm sorry.

13 Q You can put that to the side.

14 MR. WELSH: Your Honor, I would renew, if we could
15 move for admission of those two pages that we talked about,
16 012 and 013.

17 MR. WALTERS: Objection, Your Honor; no
18 foundation.

19 THE COURT: Yeah. I'm going deny the request, for
20 the reasons given at the bench.

21 BY MR. WELSH:

22 Q All right. Mr. York, let's talk about your
23 contract negotiations with programmers for linear
24 programming, okay?

25 A Okay.

1 Q All right. Now, in contract negotiations, you
2 think about the concept of leverage; isn't that's true?

3 A It's a phrase that everybody throws around, yes.

4 Q And I think in your deposition you said that you
5 like to talk about it more in terms of negotiating power,
6 right?

7 A I think that's in the context of any business
8 of -- doing a negotiation. If somebody uses the phrase
9 "leverage," it probably would equate to something like that,
10 yes.

11 Q So we can use those interchangeably? Is that okay
12 with you? Leverage, negotiating power, you consider those
13 to be the same?

14 A Not by definition, but they're similar, yes.

15 Q You agree that in contract carriage negotiations
16 that you've worked on, that the more must-have that the
17 programmer has, the more must-have content that a programmer
18 has, the greater the leverage that programmer has in the
19 negotiations; isn't that's true?

20 A Yes. That's a concept that's probably true.

21 Q So all content is not created equal, right?

22 A Just as all people aren't, no.

23 Q And the economic impact to AT&T of losing a
24 network is not the same from network to network; isn't that
25 fair?

1 A It's really hard to predict exactly what the
2 impact would be with any one piece of content, but I would
3 assume that it would be different by the channel, yes.

4 Q All other things being equal, if you were to lose
5 a programmer, that the harm, the economic harm impact, if
6 you will, to AT&T-DirectTV, that's going to differ based on
7 programmer to programmer; isn't that a fair statement?

8 A I think that's fair, yes.

9 Q And some programmers simply have better, stronger
10 content than other programmers. In your deposition, you
11 talked about something called DOGTV.

12 Do you remember that?

13 A I do.

14 Q That was the example you threw out, right?

15 A I think I did, yes.

16 Q And DOGTV, if I understood -- I've never heard of
17 it before that day?

18 A You should check it out.

19 Q Okay. I'll put it on my bucket list.

20 But DOGTV is, I guess, a channel or a network
21 where it's designed for dogs to actually watch TV;
22 is that right?

23 A That's what it is, yes.

24 Q And we talked about that in comparison to --

25 MR. WELSH: I had the same reaction, Judge.

1 THE COURT: Bizarre.

2 THE WITNESS: So did I when we got the pitch.

3 BY MR. WELSH:

4 Q We talked about that in relationship to TBS and
5 TNT, for example.

6 Do you remember that?

7 A I do.

8 Q I think you'll disagree with us, but the economic
9 impact to DirecTV or AT&T of dropping DOGTV, fair to say
10 it's going to be far less of an impact than if you were to
11 drop Turner, right?

12 A That's fair to say, yes.

13 Q Because the Turner content across America is going
14 to be a heck of a lot stronger and more valuable than DOGTV?

15 A Than DOGTV, yes.

16 Q Thank you.

17 Now, you have also grouped, in the past, you've
18 grouped programmers in tiers by their importance to DirecTV;
19 isn't that right?

20 A We may have, yes.

21 Q Well, if you'd look at your binder, and I'm going
22 to direct you to PX154.

23 Tell me when you're there, sir.

24 A Yes, I see it.

25 MR. WELSH: PX154 is for identification purposes,

1 Your Honor. It's been provided to defense counsel.

2 BY MR. WELSH:

3 Q Mr. York, this is an email from you to Mike White
4 on April 3, 2015, right?

5 A Yes.

6 Q And, again, this is the CEO of DirecTV, correct?

7 A Correct.

8 Q And the purpose of this email was you were
9 preparing a list of programmers for Mr. John Stankey,
10 correct?

11 A Yes, I believe so.

12 Q You wanted to -- the merger was going to go
13 through. You wanted to let Mr. Stankey have a list of who
14 the programmers were so that he could introduce himself or
15 become better acquainted with them, correct?

16 A No.

17 Q Well, you were providing this list and you got it
18 to your boss, Mike White, for purposes of getting it
19 Mr. Stankey, true?

20 A What happened was Mr. White requested from me a
21 list of some of the content CEOs that he thought Mr. Stankey
22 may want to know if he didn't already.

23 Q Okay. That's fine.

24 But it was ultimately going to go to Mr. Stankey?

25 A I'm not sure what Mr. White did with it.

1 Q All right. But you understood that he wanted the
2 list from you, Mr. White did?

3 A That was his request to me.

4 Q And you went ahead and you put together this list.
5 And you, in putting it together -- and you
6 provided it to Mr. White, right?

7 A Yes, I did.

8 Q Correct?

9 MR. WELSH: Okay. Your Honor, I move for
10 admission of PX154. I believe there's some personal
11 information in it that's been designated as confidential, so
12 we'll file this under seal and deal with that issue later.

13 MR. WALTERS: Your Honor, briefly, may we
14 approach?

15 (Sealed bench conference)

16 THE COURT:

17 MR. WALTERS:

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22 THE COURT:

23 MR. WALTERS:

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MR. WELSH:

THE COURT:

MR. WELSH:

(Open court)

THE COURT: You may proceed when you're ready.

MR. WELSH: Thank you, Your Honor.

BY MR. WELSH:

Q Mr. York, when you look at the programmers, you do consider Turner to be the top tier -- in the top tier of programmers, don't you?

A I wouldn't necessarily put it that way in the context of this. I mentioned that there are five programmers that are more tier B, which I guess that would leave out of 16, Time Warner, one of the top 11 that isn't -- that's not as much tier B, if that answers your question.

Q Well, I'm asking the question separate from this document right now, which is you consider Turner and HBO to be in a top tier, the tier A of programmers; isn't that true?

A I think that depends. Depends on the context.

1 They're important programmers to us.

2 Q You put them at a much higher level than you do
3 programmers such as AMC, Discovery, Scripps, Showtime, and
4 Starz; isn't that the fact?

5 A No.

6 Q Look at PX154. This is an email that you wrote to
7 your boss, April 3, 2015, true?

8 A Yes.

9 Q And down below, you list Turner networks,
10 Time Warner, and HBO, among other companies, don't you?

11 A Yes, among 16.

12 Q And what you listed here when you -- up above that
13 in the paragraph beginning with "obviously," you said,
14 "Obviously, companies like AMC, Discovery, Scripps,
15 Showtime, and Starz are more tier B."

16 Did I read that correctly?

17 A Yes. More tier B, yes.

18 Q You can put that to the side.

19 Now, when you go into negotiations with
20 programmers, one of the things that you do is you consider
21 the economic loss to DirecTV or AT&T if you're unsuccessful
22 in those negotiations, and the network or networks go down,
23 go dark; isn't that right?

24 A Out of the hundreds of license agreements that we
25 do every year, we rarely do some analysis on projected

1 subscriber churn if we lose the content.

2 Q And you talk about them being drop analysis, churn
3 analysis or drop analysis, right?

4 A That's what they're -- when they're done, that's
5 what they're sometimes referred to.

6 Q And you do them for some of the more important of
7 your programmers in terms of the content and the dollar
8 values that are at stake; isn't that fair?

9 A Not necessarily.

10 We don't do them much, if at all, anymore. It
11 just really depends on how the bid and the ask look as we go
12 into the negotiation.

13 Q Well, you did them at DirecTV, true?

14 A We did them more at DirecTV than we certainly have
15 done in the last few years.

16 Q And you've also done them at AT&T?

17 A I think we've done a couple in the last couple
18 years.

19 Q And let's look at an example of a drop analysis.
20 If you'd look at PX74 in your binder.

21 Tell me when you're there, sir.

22 A I'm there.

23 Q Now, PX74 is your December Board of Directors
24 deck; isn't that's true?

25 MR. WALTERS: Your Honor, may we approach?

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THE COURT: You may.
(Sealed bench conference)

MR. WALTERS:

MR. WELSH:

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1 MR. WALTERS:

2 THE COURT:

3 MR. WALTERS:

4 (Open court)

5 BY MR. WELSH:

6 Q Mr. York, I want to come back and talk to you
7 about PX74 a bit, okay? We're going to talk just generally
8 about it, all right?

9 A Yes.

10 Q I just want to be clear, that this is a deck that
11 you presented to the Board of Directors of DirecTV, right?

12 A I don't recall if I actually presented this deck
13 at the meeting.

14 Q Well, all right.

15 "Presented" is probably the wrong way of talking
16 about it.

17 You prepared decks in advance of the board
18 meetings at DirecTV, right?

19 A Not for every board meeting, from content, no.

20 Q But you did do a board deck here for December of
21 2014 for the Board of Directors; isn't that true?

22 A It appears so, yes.

23 Q And the board deck here is talking about a number
24 of different renewals, one of which is the -- some of the
25 programmers, right?

1 A They're -- yeah. There are multiple renewals that
2 each have a page in this deck, yes.

3 Q And back in this time frame of 2014, you were
4 having renewal negotiations and discussions, DirecTV was,
5 with Disney, correct?

6 A Yes. Their deal expired in December of '14.

7 Q And as part of those discussions, impact analyses
8 were done internally at DirecTV so that you could get a
9 better understanding -- you and your team could get a better
10 understanding of what it would mean if the company were to
11 go dark with Disney; isn't that the case?

12 A I wouldn't say that they gave us much of an
13 understanding on what might happen in the future. We didn't
14 place much stock in these drop analyses. We were just
15 trying to work off the deal that just was expiring.

16 Q But you did have the analysis so that you had some
17 input, whatever weight you wanted to give it, that you would
18 have that input into the -- what would happen if it went
19 dark, that carriage went dark; isn't that a fact?

20 A That work product created a future-looking
21 estimate.

22 Q And you had that estimate. That's what I'm trying
23 to establish. You said that estimate?

24 A It was created, yes.

25 Q And the -- your understanding is, if you were to

1 lose Disney back in that time frame, the negotiations didn't
2 work out the way that you hoped and you lose Disney, there
3 would be an economic loss to DirecTV associated with that;
4 isn't that true?

5 A There would.

6 There would also be a substantial content cost
7 savings as a result of that as well.

8 Q But the loss would be the loss of the revenues
9 coming in for the subscribers of that constant, the loss,
10 the churn that results in the loss of the gross ads; isn't
11 that true?

12 A Theoretically, yes.

13 Q And that loss, with a company, programmer such as
14 Disney, that type of content, the loss of the subscribers,
15 the churn and the gross ads, that could be very significant
16 in terms of a dollar value looking out over -- year over
17 year to DirecTV?

18 A It could be significant.

19 We never really looked at it on a year-over-year
20 basis. It was really a short-term view that we focused on.

21 Q So you never looked at it over a year --
22 I'm sorry, year-over-year basis?

23 A Occasionally, we would -- whoever did this in the
24 marketing group, they would take -- I've never seen a really
25 long view. Occasionally, they would do one.

1 But the purpose of it, the use of it was really
2 what would happen if it were off for a day or a week or a
3 couple weeks, maybe a month. That's about as long as drops
4 usually are in our experience at DirecTV.

5 Q For York, I'm going to ask you to look at PX108,
6 and I'm going to direct you to page -- this is for
7 identification and impeachment, Your Honor. I'm going to
8 have you look at page 46, which is a color copy of this
9 PowerPoint.

10 Are you there?

11 A Yes.

12 Q The top of it says "Economic Impact Summary,"
13 correct?

14 MR. WALTERS: Your Honor, we need to approach.

15 THE WITNESS: Correct.

16 THE COURT: All right.

17 (Sealed bench conference)

18 MR. WALTERS:

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23 MR. WELSH:

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MR. WELSH:

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MR. WALTERS:

THE COURT:

(Open court)

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

3 MR. WELSH: Thank you, Your Honor.

4 BY MR. WELSH:

5 Q Mr. York, you have page 46 in front of you,
6 correct?

7 A Yes.

8 Q And do you see there, sir, that the analysis there
9 goes out -- this economic impact analysis goes out six
10 years, right?

11 A Yes.

12 Q Okay. Thank you.

13 Now, let's move to a different topic, if we can,
14 Mr. York. It's a related topic, though, involving carriage
15 disputes, okay?

16 A Okay.

17 Q Now, you look at going dark for your contract
18 negotiations sometimes. But you also look at the
19 distributors going dark with a programmer as a potential
20 opportunity for AT&T-DirecTV; isn't that true?

21 A It's something that we've noted that others have
22 disputes, yes.

23 Q If a distributor, one of your competitors, has a
24 dispute, loses the programming, goes dark, then the consumer
25 that they have, if they want that programming that's gone

1 dark, they're going to be looking for another way of getting
2 that programming, right?

3 A They may.

4 Q Okay. And in that case -- again, we hear about
5 churn. They would leave that competitor, that distributor,
6 and they would go to another distributor who carries the
7 content, right?

8 A If they're disconnecting because that content is
9 not available, they'll have a multitude of places to switch
10 to, yes.

11 Q And one of those places, though, would be DirecTV
12 or AT&T, assuming that you have the content, right?

13 A Depending on the content, that would be true of
14 about eight or nine or ten.

15 Q Now, in 2014, Dish was in a contract dispute with
16 Fox. His Honor's heard some about this, so I'm not going to
17 spend too much time on it. But do you remember that
18 situation?

19 A What year was that?

20 Q 2014.

21 A I vaguely recall it.

22 Q And do you recall, sir, that, as a result of that
23 dispute, Fox went dark with Dish?

24 A I vaguely recall Dish having a dispute with Fox.

25 Q Let me see if I can help your recollection a

1 little bit. If you look at the binder at PX24.

2 Are you there, sir?

3 A Yes.

4 MR. WELSH: PX24 has been marked for
5 identification purposes, Your Honor. And provided to
6 defense counsel.

7 BY MR. WELSH:

8 Q Mr. York, this is an email from you December 18,
9 2014, to Paul Guyardo and Ed Balcerzak; is that right?

10 A Yes.

11 Q And Mr. Guyardo is the head of revenue for DirecTV
12 at the time?

13 A Yeah, marketing.

14 Q Marketing, revenue, okay.

15 And you copied this to a couple people, but one of
16 them is Mr. White, your boss, right?

17 A Correct.

18 Q Now, this email here is talking about a
19 programming dispute that Dish was involved with at the time;
20 is that right?

21 A Yes.

22 MR. WELSH: Your Honor, I move for admission of
23 PX24.

24 MR. WALTERS: No objection, Your Honor.

25 THE COURT: It will be admitted.

1 MR. WELSH: Thank you.

2 (Government's Exhibit PX24
3 received into evidence.)

4 BY MR. WELSH:

5 Q Now, look at this e-mail, if you would, sir,
6 because I know a minute ago you were a little bit fuzzy on
7 some of the details back in that time frame.

8 So here we're talking about a carriage dispute
9 between Dish and Fox; isn't that true?

10 A Yes. You said Fox. This is really Fox News.

11 Q All right. Fox News.

12 A It's a different deal.

13 Q Okay. So there was a carriage dispute between
14 Fox News and Dish, correct?

15 A I don't know if this came to dispute. I don't
16 recall where this ended up.

17 Q But the email that you wrote to the folks at
18 DirecTV, including your boss, was talking about Dish
19 programming disputes, possible drops.

20 Do you see that?

21 A Yes.

22 Q And the point that you're making to your
23 colleagues and your boss at DirecTV was that you wanted to
24 give them a quick heads-up on some upcoming gross ad
25 opportunities, right?

A That's what the sentence says, yes.

1 Q Okay. And the gross ad opportunities would be the
2 potential for DirecTV adding subscribers that might fall off
3 from Dish should Dish go dark with Fox News, correct?

4 A Yes. I say we may get a lift in inbound calls as
5 a result of these disputes, yes.

6 Q So you saw that as being an opportunity when one
7 of your competitors goes dark with popular programming?

8 A I wouldn't call it an opportunity. I was giving
9 the folks responsible for call centers a heads-up that the
10 phone may ring a bit more if these channels come off.

11 Q Sure.

12 You saw it as an opportunity for DirecTV, and
13 that's why you told the call center to have their ears out
14 and open for calls from customers because they would want to
15 leave Dish and come to DirecTV?

16 A I wouldn't phrase it that way.

17 THE COURT: Put it in your own words.

18 THE WITNESS: I was giving them a heads-up that
19 Dish was -- publicly reported these disputes were looming
20 and just letting the folks know who handle the inbound
21 calls, Ed Balcerzak and his boss, Mike, and Paul, who does
22 marketing and revenue, and his boss, Mike, hey, heads-up,
23 these channels may come off; you may get some calls -- may
24 get some calls.

25 Q But you saw it, again, as an opportunity for

1 DirectTV to pick up customers, subscribers?

2 A Yeah, you described it as hoping. I didn't
3 describe it that way in this document or ever.

4 Q Let's change subjects, if we can.

5 So the Court's heard about traditional pay TV, the
6 traditional pay-TV system. I want to come back and talk
7 about this subject a bit.

8 So when I think of traditional pay TV, I think
9 about the companies like the cable companies, the satellite
10 companies with these, the big bundles of channels and
11 networks is. That also your understanding?

12 A Traditional pay TV isn't about big bundles,
13 per se, if that's what you're referring to.

14 Q Well, traditional pay TV is the cable companies
15 and the satellite companies and the TelCo companies; isn't
16 that true?

17 A In most sizable markets, there would be a cable
18 operator, multiple in a DMA, in a market.

19 There would be a TelCo. There would be two
20 satellite companies. In a lot of markets, there's another
21 private entity that would be kind of considered another
22 over-builder. So those would be five kind of traditional
23 MVPDs, if that's the question.

24 Q All right. Let's talk and refer to -- talk about
25 and refer to them as being traditional MVPDs for discussion

1 purposes.

2 So AT&T U-verse and DirecTV's satellite business,
3 you would put those into the traditional pay-TV category?

4 A Yes. That's how they're typically defined in the
5 industry, yes.

6 Q And then distributors that are trying to get their
7 programming out over the Internet, we've heard some about
8 that. They would not be part of this traditional pay-TV
9 ecosystem, the virtual MVPDs?

10 A You're talking about, you said programmers or --

11 Q I'm talking about the distributors are trying to
12 get the program, the content out, that are going over the
13 top, over the Internet. The virtual MVPDs, you don't put
14 that into the category of the traditionals?

15 A Aside from the category I just defined, there is
16 something that's considered a virtual MVPD, which is a
17 company that offers linear channel bundles and other things
18 over the Internet, over wireless, without owning the
19 satellite infrastructure or the closed network with a local
20 franchise agreement. Some of those virtual MVPDs also
21 happen to be owned by traditional MVPDs.

22 Q But in terms of your, the way you described it a
23 moment ago, you didn't put the virtual MVPDs into that
24 grouping of the traditionals; isn't that a fair statement?

25 A You asked me, what is a traditional MVPD? And

1 that's basically how the industry has come to define them.

2 Q So you accept the definition that traditional is
3 separate from the virtual MVPDs? You accept that for
4 purposes of today?

5 A I think the industry as a rule, that's how they're
6 defined.

7 Q Let's go with that. Let's go with the industry
8 definition here.

9 And then programmers who were trying to go direct
10 to consumer, that would also be outside the traditional,
11 wouldn't it, based on the industry?

12 A Typically, yes.

13 Q Now, in the past, you and your colleagues at AT&T
14 have not been too keen when the programmers have tried to go
15 around AT&T or DirecTV with their offerings; isn't that
16 true?

17 A Depending on the nature of what was going on, were
18 we getting offered parity for our business and our
19 customers, we may have been unhappy.

20 Q Well, Starz is a premium channel. We've heard a
21 little bit about them in this case. They're a premium
22 channel, correct?

23 A They are.

24 Q And DirecTV --

25 A Can I amend that answer?

1 They're considered a premium, but their channels
2 are often packaged much like a basic cable network in some
3 instances. They're kind of a mix from time to time.

4 Q Okay.

5 Now, DirecTV distributed Starz in 2016; is that
6 true?

7 A Yes.

8 Q And Starz came out with a direct-to-consumer app
9 at that time, didn't it?

10 A It did.

11 Q And with that app, the way it worked, a consumer
12 could bypass DirecTV-AT&T and could go directly to the
13 consumer; isn't that true?

14 A Much like many programmers do direct to consumer,
15 yes.

16 Q And you and your content group became aware of
17 this app, and you talked with or you sent an email off to
18 your boss, Mr. Stankey, talking about it, right?

19 A I don't recall. I may have.

20 Q All right. Let's see if I can help you with your
21 recollection on it.

22 MR. WELSH: May I approach, Your Honor?

23 THE COURT: You may.

24 MR. WELSH: May I approach the witness,
25 Your Honor?

1 THE COURT: You may.

2 BY MR. WELSH:

3 Q Mr. York, if you look at PX539, which has been
4 marked for identification purposes, it's a single page with
5 the two emails, one from Mr. Stankey to you, on April 22,
6 with your response on April 22. If you could read that to
7 yourself, sir.

8 A Okay.

9 Q Now, looking at 539, sir, does that help to
10 refresh your recollection as you had an email exchange with
11 your boss, Mr. Stankey, in 2016 regarding Starz, with their
12 app going directly to the consumer?

13 A It does.

14 Q And in responding to Mr. Stankey's email to you
15 about what we're doing, you see his email there?

16 A Yes.

17 Q Then you responded back on April 22, commenting to
18 him about what you and the content group believed, true?

19 A What we believed?

20 Q What you and the content group felt about this,
21 correct?

22 A Yes.

23 Q And what you told Mr. Stankey was, in preview,
24 that you and -- and the content, that's reference to the
25 content group, isn't it, your group?

1 A Yes.

2 Q That you hate it, meaning the app that Starz had,
3 correct?

4 A Let me be clear. What we hated was not the
5 existence of this direct-to-consumer app.

6 What Starz did, they took two channels, Starz and
7 Encore, which we offer two different ways to 25 million
8 customers, and blended them into one experience. And we
9 didn't have the ability to do that.

10 So our customers, if they wanted to get
11 authorized, over TV Everywhere, would be incredibly confused
12 as to what service they were actually getting. That's what
13 we hated.

14 Q You didn't say any of that in the email back to
15 Mr. Stankey, did you?

16 A If you read the app, that's exactly what the -- or
17 read the news and what we had been discussing to the
18 company, that's all this was about.

19 Q My question was, I think, simple, so we'll try it
20 again.

21 You didn't say that to Mr. Stankey in the email
22 that you wrote to him that day, true?

23 A I didn't need to. It had already been discussed.

24 Q Now, in 2016, Mr. York, you found out that Turner
25 had offered split-screen viewing to Apple TV, right?

1 A Yes.

2 Q And it wasn't offered to AT&T-DirectTV; isn't
3 that's true?

4 A It was available to our customers on someone
5 else's devices and platforms but not ours.

6 Q And you would agree with me that Apple TV would
7 not be in the industry definition of traditional pay TV,
8 right?

9 A Yes.

10 Q Okay. So I'd like you to look at PX0228 in your
11 binder. It's been marked for identification. 228, yes.

12 Are you there, sir?

13 A I am.

14 Q Now, 228 is an email, starts off from Mr. Stankey
15 to you, March 8th, 2016, raising this issue about the split
16 screen that's offered to Apple TV for March Madness, right?

17 A Again, it was offered for customers of DirectTV and
18 other affiliates to experience it that way on Apple TV.

19 Q Mr. Stankey writes you about this split screen,
20 correct?

21 A Yes.

22 Q And then you responded back to Mr. Stankey on
23 March 9, 2016, as well, right?

24 A Correct.

25 MR. WELSH: Your Honor, I would move for admission

1 of PX228.

2 MR. WALTERS: No objection, Your Honor.

3 THE COURT: It will be admitted.

4 (Government's Exhibit PX228
5 received into evidence.)

6 BY MR. WELSH:

7 Q Now, Mr. Stankey in his email to you about the
8 split screen, he writes to you, I feel like we should start
9 writing letters to the top every time they intro a feature
10 that deteriorates the value of a bundle and don't pass it
11 through to us.

12 Do you see that?

13 A I do.

14 Q And the top he's referring to, that would be the
15 top CEOs of the companies to which he would want the letters
16 written and complained, correct?

17 A I didn't write it, but I would assume so.

18 Q And he goes on to say, after he talks about it
19 deteriorating the value of the bundle -- you understand the
20 bundle to be the type of channels and networks that DirecTV
21 has with its bundle on DBS satellite, right?

22 A I'm not sure. It may be that. It may be other
23 kind of bundles as well.

24 Q But what he then goes on to say is, "It sets me on
25 fire," right? That was Mr. Stankey's words to you?

A That -- he wrote that, yes.

1 Q And in response, he wrote, "You had the same
2 visceral reaction, didn't you?"

3 A I did.

4 Q And then you went on and you actually prepared a
5 draft letter that would go to the top of Time Warner, didn't
6 you?

7 A I believe I did.

8 Q And that was going to go to Jeff Bewkes, the CEO
9 of Time Warner, right?

10 A I believe so.

11 Q If you look at PX40.

12 Now, PX40, which is for identification purposes,
13 PX40 is your email to Mr. Stankey on March 9, 2016, right?

14 A Yes.

15 Q And here, consistent with the other email we just
16 looked at, this exchange about the dual screen for
17 March Madness, here, you're providing your draft letter to
18 Mr. Jeff Bewkes on this Apple TV exclusivity point, correct?

19 A I don't know if it was about exclusivity, no, but
20 this is a draft note, but not necessarily about exclusivity.

21 Q But it's a draft note in response to the other
22 email we just looked at about the split-screen Apple TV
23 issue that set Mr. Stankey on fire and you had the same
24 visceral reaction about; isn't that connected to this?

25 A That this is a draft note, yes.

1 THE COURT: You'll be asked probably, tomorrow
2 morning, under oath, have you discussed your testimony?

3 You have to be able to say no.

4 THE WITNESS: Absolutely.

5 THE COURT: So see you back at 10:30 tomorrow
6 morning. You can step down.

7 THE WITNESS: All right. Thank you.

8 THE COURT: I'll see counsel.

9 (Sealed bench conference)

10 THE COURT:

11 MR. WELSH:

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16 MR. PETROCELLI:

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(Open court)

THE COURT: I'll see you at 10:30, Counsel.

DEPUTY CLERK: All rise.

This Honorable Court now stands in recess until
the return of court.

(Proceedings concluded at 6:00 p.m.)

C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: April 4, 2018 /S/ William P. Zaremba

William P. Zaremba, RMR, CRR