Case Nos. 15-6218 and 15-6222

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

In re: Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation

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Richard Healy,

Plaintiff-Appellant/Cross-Appellee,

v.

Cox Communications, Inc.,

Defendant-Appellee/Cross-Appellant.

On Appeal from the United States District Court for the
Western District of Oklahoma, Case No. 12-ML-02048-C
Hon. Robin J. Cauthron, United States District Judge

REPLY BRIEF OF DEFENDANT-APPELLEE/CROSS-APPELLANT COX COMMUNICATIONS, INC.

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Plaintiff's most recent brief confirms that his theory would take the tying entirely out of tying law. In plaintiff's view, it is enough to establish a *per se* violation of the antitrust laws that:

(1) Cox sold or leased two products (so-called "Premium Cable" and two-way set-top boxes ("STBs"));

(2) consumers cannot fully access all of the features of so-called "Premium Cable" unless they also have a two-way STB; and

(3) Cox was the only supplier of two-way STBs in Oklahoma City.

That is it. In plaintiff's world, it is irrelevant that Cox had nothing to do with the absence of other STB suppliers. Plaintiff asserts in the heading of the first section of his argument that he "was not required to prove that Cox prevented its customers from acquiring a set-top box from a competitor or prevented any competitor from selling STBs." Third Brief of Plaintiff/Appellant on Cross Appeal, at 11, May 23, 2016 ("Third Br.").

Plaintiff's entire argument rests on sleight of hand. As he acknowledges, "tying" is a refusal to sell one product unless the consumer also agrees to purchase a second product. *Id.* at 11-12. But plaintiff never proved that Cox refused to sell something unless consumers bought (or leased) an STB. In fact, Cox would sell any cable package to anyone who wanted to buy it, whether they also chose to

lease an STB or not. Of course consumers could not *access* two-way cable services without a two-way STB, for technological reasons. Plaintiff pretends that is somehow equivalent to a refusal by Cox to sell its cable services, but it is not. Cox sells consumers the right to access its network. Of course a consumer who purchases a cable plan but does not have a television, or an internet plan when he does not have a computer, will not get much out of his purchase. A consumer who buys a digital cable package but does not have a two-way STB similarly will not be able to use all that he has purchased. But in none of those scenarios has Cox refused to sell anything, or "conditioned" the sale of product A on the purchase of product B. An antitrust case has to be about some allegedly anticompetitive act *by the defendant*. The fact that consumers cannot use certain services unless they have the right equipment does not mean that Cox's sales policy is unlawful. It reflects basic technological realities, and choices that *consumers* have made.

At bottom, plaintiff's position is simply that if Cox has market power in digital cable services it cannot also offer STBs to consumers unless an STB manufacturer also chooses to do so. This has nothing to do with conventional "tying" precedents and is, frankly, absurd. As Cox explained, plaintiff's theory would subject Ford to treble damages if it offered a trailer hitch option for its trucks—if Ford had market power in trucks, and no one else was making compatible trailer hitches. Plaintiff conspicuously has no response, because that is

indeed his position. Plaintiff knows that cannot be the law. It would punish Cox for nothing more than offering a product that consumers want, when no one else will. So plaintiff sprinkles his brief with allegations that Cox somehow sabotaged other potential competitors or discouraged them from entering the (unproven) market. Those allegations are irrelevant under plaintiff's actual legal theory, and the instructions he procured below did not require the jury to find that Cox did anything of the sort.

Cox proposed a series of jury instructions in this case that would have focused the jury on the central question: did Cox take any action that deprived consumers of any choice or any benefits of competition that they otherwise would have had in the STB market? Cox's proposed coercion instructions would have required a finding that Cox's actions, rather than independent decisions of third parties combined with technological necessity, were the reason that subscribers leased an STB from Cox. Cox's proposed foreclosure instructions would have ensured that the jury found some likelihood of a competitive impact in the STB market. Its proposed "business justification" instruction would have given the jury a framework for incorporating into its deliberations the crucial reality that Cox was providing a product (two-way STBs) that consumers needed, when no one else was. And Cox's proposed damages instructions would have required the jury to

measure any overcharge in a way that matched the anticompetitive injury alleged in this case.

The district court erred by refusing to give these instructions, and by giving instructions—those that plaintiff requested—that allowed the jury to find coercion and foreclosure purely on the basis that a two-way STB is *technologically* necessary to access certain cable services. If this Court were to reverse the district court's judgment as a matter of law for Cox, then Cox is at a minimum entitled to a new trial under proper instructions.

ARGUMENT

I. THE DISTRICT COURT'S INCOMPLETE AND IMPROPER INSTRUCTIONS ALLOWED THE JURY TO FIND LIABILITY WITHOUT ANY UNLAWFUL CONDUCT BY COX

A. Plaintiff's Radical Legal Theory And The Instructions He Procured Below Do Not Require Proof Of Tying

The gist of plaintiff's entire brief is that, since Cox supposedly "imposed a tying arrangement," coercion of consumers is self-evident, and the court and jury can presume anticompetitive foreclosure in the STB market merely from the fact that Cox leased a lot of STBs. Third Br. at 2. Plaintiff also asserts that the existence of a "tying" arrangement excuses him from needing to define the supposedly "tied" geographic market or prove anything about the characteristics of that market. *Id.* at 29. As plaintiff would have it, because this is supposedly a "classic tying situation" where Cox "conditioned" the purchase of a tying product

on the "simultaneous purchase" of a tied product, he need not even show that any other seller actually had an interest in providing the allegedly tied product, *id.* at 16, and this Court should *presume* that Cox caused the absence of other STB options, *id.* at 12, 22. Those contentions underlie all of plaintiff's arguments about the jury instructions.

The many flaws embedded in that line of reasoning are irrelevant to this case, however, because plaintiff *did not* prove a "refusal to sell two products separately," *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11-12 (1984), or that Cox "conditioned" the sale of any product on the purchase of another. To the contrary, there is no evidence of Cox refusing to sell anything to Oklahoma City subscribers who did not also lease an STB. Indeed, plaintiff has *conceded* that Cox would sell any cable package to anyone, whether they leased an STB or not—and has criticized Cox for the fact that those customers sometimes could not access all of the potential services they were paying for, because they did not have the necessary equipment. Third Br. at 9.

Plaintiff's repeated assertions that Cox "tied" or "conditioned" the sale of Premium Cable to the lease of an STB are therefore at best an elaborate exercise in misdirection. Plaintiff is not talking about any conduct on Cox's part, but instead about the acknowledged *technological* fact that certain two-way services cannot be accessed without a two-way STB. The ability to access two-way services is

necessarily and functionally "tied" to a two-way STB in that colloquial sense, just as the ability to tow a trailer is "tied" to the presence of a trailer hitch. But that is not what antitrust law means by "tying," and it bears no resemblance to the classic tying fact patterns in which plaintiff labors to wrap himself.

Plaintiff's radical reinvention of tying law allowed the jury to find liability without proof that Cox did anything improper or coercive, merely on the basis that Cox offered consumers the *option* to lease a second product that they wanted when no one else would. That would violate all sorts of settled antitrust principles. For example, it is black letter law that selling two products together does not violate the antitrust laws, *see Jefferson Parish*, 466 U.S. at 11-12, but plaintiff's theory would require any company with market power to risk liability for offering complementary products—*expanding* consumer choice—unless some other competitor was offering an alternative option. And it is settled law that businesses have no obligation to assist their competitors, *see, e.g.*, *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410-11 (2004), but plaintiff's theory makes it somehow Cox's responsibility to ensure that some other company offers STBs for sale or lease in Oklahoma City. Moreover, the result of plaintiff's version of tying law would be to punish Cox simply for being large. But it is beyond dispute that a party does not violate the antitrust laws simply by being large—it must also engage in some wrongful conduct. *See, e.g.*, *Pacific Bell Tel.*

Co. v. Linkline Commc'ns Inc., 555 U.S. 438, 447-48 (2009); *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

Because plaintiff's theory does not require any showing that Cox was responsible in any way for the absence of other retail suppliers of two-way STBs, the only way Cox could avoid liability under plaintiff's argument and the district court's jury instructions would have been to stop leasing STBs. This would have prevented Cox from offering all of its "Premium Cable" features and deprived consumers of these benefits. Plaintiff's legal framework would set antitrust law at war with itself.

B. The Jury Instructions Improperly Watered Down Plaintiff's Burden Of Proof

The instructions proposed by plaintiff and given by the district court did not require the jury to find that Cox "conditioned" the sale of "Premium Cable" services on the concurrent lease of an STB, or that Cox was responsible in any way for the absence of other marketplace options. Those instructions systematically watered down plaintiff's burden of proof under the law, to the point that the jury was permitted to issue a verdict for "tying" in the absence of any tying behavior by Cox whatsoever. Cox is entitled, at a minimum, to a new trial under instructions that correctly explain what tying is, and is not.

1. The District Court's Coercion Instructions Permitted The Jury To Find Coercion Based Purely On Consumer Preferences And Without Any Improper "Conditioning" Or Refusal To Sell By Cox

The district court instructed the jury that it could find coercion if subscribers "might have preferred to purchase [STBs] elsewhere on different terms." JA591. That instruction might be sufficient in an ordinary tying case where it is separately proven or conceded that the defendant refused to sell product A without product B. But here it allowed the jury to find coercion *by Cox* based on nothing more than the fact that consumers wished they had more choices.

Cox's proposed instruction would have solved this problem by making sure that the jury would not hold Cox responsible for limited consumer choices that result from third parties' independent decisions. Specifically, Cox proposed instructions that "[p]roof of coercion requires, at a minimum, evidence that plaintiffs could have purchased the tied product from another seller of it," and that "[t]he fact that the majority—or even 100%—of consumers purchase two products together is not sufficient, by itself, to establish the element of coercion." JA216-17. Those proposals were consistent with a line of case law recognizing that, in circumstances analogous to these, neither a court nor a jury can infer coercion merely from the absence of choices—but must look more closely in order to avoid punishing a company for market characteristics that are beyond its control. *See* Brief of Defendant-Appellee/Cross-Appellant Cox Communications, Inc., at 38-39,

43-44, Apr. 4, 2016 ("Second Br.") (citing *Konik v. Champion Valley Physicians Hosp. Med. Ctr.*, 733 F.2d 1007 (2d Cir. 1984), and *Jarrett v. Insight Commc'ns Co.*, No. 09-00093, 2014 U.S. Dist. LEXIS 103079 (W.D. Ky. July 29, 2014)).

Contrary to plaintiff's argument, Third Br. at 45, Cox's proposed instruction would not have required the jury to find anything about any specific competitor. It merely would have required the jury to find that, but for something that Cox did, there would have been at least one alternative source for two-way STBs. Without an alternative supplier, the distortion of consumer choice that tying law seeks to prevent simply cannot occur.

Plaintiff offers no objection to the legal accuracy of Cox's proposed instruction that coercion cannot be inferred simply from the percentage of consumers who purchase both products, instead claiming that Cox's instruction would have "misleadingly downplayed" this evidence. *Id.* To the contrary, the instruction was essential to redress a misunderstanding that plaintiff deliberately cultivated. Plaintiff placed strong weight on the fact that the majority of Cox's subscribers also leased an STB from Cox. Counsel's first statement to the jury after introducing himself was that "[o]ver 99 percent of Cox cable customers end up buying – leasing a set-top box from Cox." JA6119. That number was also a prominent theme in his closing statements. JA7632. Without further guidance the jury could have concluded that this evidence was sufficient, by itself, to carry

plaintiff's burden, even though the evidence (as the district court recognized) showed that there simply was no other supplier of STBs in Oklahoma City, for reasons that were not Cox's fault.

Plaintiff cannot resist salting his brief with assertions that Cox coerced consumers by, for example, "delaying entry of TiVo as a competitor, and suppressing a secondary market for STBs." Third Br. at 19. But the instructions gave the jury no guidance about how to consider that sort of evidence—and allowed it to find coercion *whether or not* Cox had anything to do with TiVo's delays or the absence of a secondary market. And in these circumstances, those allegations also have nothing to do with *tying* law. If they were true (and they are not), they would at most suggest a potential claim that Cox abused monopoly power under § 2 of the Sherman Act—a claim that would require very different instructions than the jury was given here.

Finally, in any new trial plaintiff at least should be required to identify the supposedly "tying" product in a coherent way. Most of the bundle that plaintiff calls "premium cable" can be accessed *without* a two-way STB, and therefore cannot possibly coerce consumers in the manner that plaintiff suggests and that the jury found under the district court's instructions. *See* Second Br. at 48-52.

2. The Instructions Improperly Relieved Plaintiff Of His Burden To Prove Foreclosure

The district court's instruction correctly informed the jury that it must find that Cox "foreclosed a substantial amount of commerce to other sellers or potential sellers of set-top boxes." JA601. But it then effectively nullified that requirement by telling the jury that "[i]f the dollar amount of Defendant's leases of set-top boxes was substantial, then you should find that Defendant has foreclosed a substantial amount of commerce." *Id.* That instruction allowed the jury to *assume* that some competitor was limited or disadvantaged in some way by Cox's conduct, if Cox leased a lot of STBs.

Cox's proposal would have focused the jury on the important questions by asking what purchasers would have done "in the absence of the alleged tying arrangement," and whether "absent the alleged tie, plaintiffs would have purchased a substantial volume of set-top boxes from some other seller." JA225-26. Plaintiff protests that there is no requirement that he identify a specific competitor that was excluded from the market. But this is not what Cox's proposed instruction requests. And the jury certainly needs to find that *some* alternative supplier would have provided options for two-way STBs, but for something Cox did. Cox cannot have *foreclosed* substantial alternative channels of STBs if, as the evidence demonstrated, Cox did nothing to discourage other suppliers and they all decided

not to enter the market for their own reasons that had nothing to do with Cox. *See* Second Br. at 14-17.

Indeed, even in cases involving a genuine tying arrangement (*i.e.*, a refusal to sell two products separately) *Jefferson Parish* makes clear that the plaintiff must separately show a substantial potential for impact on competition as a "threshold" element of any *per se* tying claim. *Jefferson Parish*, 466 U.S. at 16. In *Jefferson Parish*, surgical patients needed anesthesia. Here, individuals who wanted to access two-way services from Cox needed to lease an STB. Contrary to plaintiff's argument, Third Br. at 15, the fact that a consumer needs the second product to accompany the first simply does not allow the plaintiff to ignore (or assume) the foreclosure requirement.

Plaintiff's contrary citations are misleading, incomplete, and irrelevant. First, plaintiff repeatedly cites *Law v. National Collegiate Athletic Association*, 134 F.3d 1010 (10th Cir. 1998). But *Law* is not a tying case at all; it addresses horizontal price fixing, and the Supreme Court has warned that tying is significantly different from other *per se* antitrust theories and requires closer analysis. *See, e.g.*, *Jefferson Parish*, 466 U.S. at 34 (O'Connor, J., concurring) ("The Court has never been willing to say of tying arrangements, as it has of . . . other agreements subject to *per se* analysis, that they are always illegal, without proof of market power or anticompetitive effect."). Second, plaintiff claims that

Fox Motors somehow supports his position that a *per se* tie does not require inquiry into a tied product market. But that court held that "tying arrangements may have procompetitive justifications which make condemnation inappropriate *without considerable market analysis*," and that a plaintiff must provide evidence on "the elements which would establish a presumption of forcing." *Fox Motors, Inc. v. Mazda Distribs. (Gulf), Inc.*, 806 F.2d 953, 957 n.2 (10th Cir. 1986) (emphasis added). Plaintiff also claims that *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 63 F.3d 1540 (10th Cir. 1995), provides support for his interpretation of the foreclosure element. Third Br. at 40. Yet, *Multistate* explicitly stated that it was reviewing "only the two-product and conditioning requirements" of a tying claim because the parties had not challenged whether there was a "substantial volume of commerce affected in the tied product market." 63 F.3d at 1546-47. None of plaintiff's cases offers any support for his contention that a court or a jury can simply presume foreclosure in the allegedly tied product market. (And, of course, all of the cases he cites involved an allegation of *actual tying*, in which the defendant refused to sell one product without another. *See* Second Br. at 36-37.)

These same principles also defeat plaintiff's opposition to the instruction that "[i]t is not substantial foreclosure if only a small percentage of sales of set-top boxes were affected by the tying arrangement." Third Br. at 42. Yet again, this

portion of Cox's proposed foreclosure instruction follows directly from the Supreme Court's *Jefferson Parish* opinion: "If only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law. It is for this reason that we have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby." 466 U.S. at 16.

3. The District Court's Instruction Failed To Require Plaintiff To Prove A Relevant Geographic Market For STBs

Plaintiff also argues that Cox's proposed instruction that "[i]t is not substantial foreclosure if only a small percentage of sales of set-top boxes were affected by the tying arrangement," JA225, is inappropriate because Cox never identified what the denominator should be for that fraction. Third Br. at 42. Cox agrees that it is impossible to say whether or not there has been "substantial" foreclosure unless there is some basis for comparison. What is substantial in Oklahoma City may not be substantial nationally. This is precisely why *plaintiff* must define a relevant geographic market for his claimed tied product before any foreclosure analysis can occur, and why the jury must be given instructions about how to determine the relevant market.

Plaintiff ignores the numerous Supreme Court and Tenth Circuit cases from the 1980s and 1990s that require a plaintiff to prove a "relevant market" for a tied product, *see* Second Br. at 52, and does not dispute that a "relevant market"

requires defining both the product and geographic scope. Instead, plaintiff relies on Supreme Court precedent from the 1940s, 1950s, and 1960s—the most recent of which the Supreme Court recently brushed aside as espousing a view of tying law that "has not been endorsed in any opinion since." *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 34-36 (2006). The jury must understand what constitutes foreclosure and where that foreclosure should be examined, and the district court's instruction failed to provide this direction.

4. The District Court Improperly Failed To Correct Its Deficient Coercion Instruction With A Business Justification Defense Instruction

The unusual facts of this case also required an instruction on the business justification defense, to tell the jury that Cox does not violate the antitrust laws merely by supplying a product that consumers want when no one else will do so. Plaintiff ignores the actual requirements of the business justification defense to claim that Cox's proposed instruction "would allow any defendant whose tying conduct completely eliminates competition in the market for the tied product to escape liability." Third Br. at 21. Nonsense.

The business justification defense requires the defendant to show "a legitimate purpose" and that "no less restrictive alternative is available." *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1349 (9th Cir. 1987); *see also* JA237. The defendant bears the burden of proof on those issues, as with any

affirmative defense. JA236. In an actual, conventional tying case the defendant would have to justify its decision to refuse to sell product A without product B. But again, plaintiff never showed that Cox refused to sell "Premium Cable" without an STB lease. Cox was entitled to explain to the jury that it had a legitimate purpose and no less restrictive alternative for offering STBs as an option—because a two-way STB was technologically essential to allow its customers to access the full potential benefits of Cox's network, and no one else was offering those devices to consumers. Plaintiff's observation that Cox cannot point to "protection of good will" as a justification for a tying arrangement since it did not make both products is a complete strawman. *See* Third Br. at 21 (quoting *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 306 (1949)). Again, Cox never tied anything to anything—and it certainly has never suggested that it wanted to argue the kind of business justification that the Supreme Court discussed in *Standard Oil*. Nor is there any conceivable argument for limiting the business justification defense to that particular sort of argument. In *Mozart*, for example, the court made clear that many of the purportedly tied products were made by "other original equipment manufacturers" and not directly by Mercedes-Benz or any of its corporate affiliates. 833 F.2d at 1350-51. Nonetheless, the court found that defendant satisfied the requirements for the business justification defense.

Cox presented substantial evidence that it offered STBs for lease because nobody else would do so and its two-way services required this technology. JA6252-53 (70:4-71:2); JA6528 (73:11-22); JA6537-38 (82:24-83:25); JA7166 (21:5-23). Cox also presented substantial evidence that the fact that it offered STBs did not influence the decisions of third parties in whether or not to also offer STBs.[1] Second Br. at 13-17. Instructions on the business justification defense would have given the jury a proper framework to evaluate that evidence, to ensure that Cox was not punished for the decisions of these other companies.

5. The Jury Should Have Been Told That Cox Had No Duty To Assist Competitors

Throughout his brief, plaintiff illustrates his discomfort with his own legal theory by pointing to various allegations that Cox interfered with competitors' efforts to offer competing STBs. Again, these allegations are false, the district court correctly recognized that there was no evidentiary substance to them, and the instructions gave the jury no proper way to incorporate those allegations into its analysis. But in addition to all those defects, most of plaintiff's allegations simply accuse Cox of being insufficiently helpful to potential competitors. For example, plaintiff points to evidence that Cox decided "not to publicize" consumers' ability

[1] Indeed, if plaintiff's theory were correct, Cox's alleged supracompetitive lease pricing would have created a price umbrella that would have spurred entry by retail competitors (who, unlike Cox, actually manufactured STBs and had every right to sell them).

to order PPV programming over the phone even if they lacked a two-way STB. Third Br. at 7. He faults Cox for failing to highlight the potential benefits of competing STBs while selling its own product. *Id.* at 8. And he blames Cox for being "recalcitrant" in carrying out its tru2way implementation and its agreement with TiVo. *Id.* at 17. None of this can be the basis of an antitrust claim, as a matter of law, and the jury should have been told so.

Plaintiff does not dispute the basic legal point that Cox cannot be liable for failing to provide sufficient assistance to third parties. Plaintiff cites no cases to the contrary other than *Aspen Skiing v. Aspen Highland Skiing Corp.*, 472 U.S. 585 (1985), which the Supreme Court has subsequently limited to situations where there is a withdrawal of a prior, longstanding, profitable course of dealing between the parties. *See Trinko*, 540 U.S. 398, 409. Plaintiff claimed no such course of dealing in this case. Nor does he rebut the extensive case law that Cox cited in its opening brief. *See* Second Br. at 33-34. Instead, plaintiff claims that the jury instruction "made clear that failing to provide assistance to third parties is not coercion." Third Br. at 45. This would be true if the jury only received the first two sentences of the instruction. But the final sentence of the district court's instruction said the opposite and could only confuse the jury. Over Cox's objection and at plaintiff's invitation, the district court instructed the jury as follows:

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

JA593. By allowing the jury to conclude that Cox's allegedly insufficient support of its competitors "hindered" the development of a market, the instruction allowed liability based on precisely the type of conduct that cannot violate the antitrust laws.

Trinko is dispositive. In that case, the plaintiff alleged that the incumbent providers' failure to comply with their statutory obligations "imped[ed] the competitive [companies'] ability to enter and compete in the market." *Trinko*, 540 U.S. at 404. But the Court held that it could not use the antitrust laws to compel Verizon to support its competitors, particularly not by offering products or services that it did not ordinarily market to consumers in the regular course of business.[2] *Id.* at 409-10. It is therefore unsurprising that plaintiff cites no support for his statement that "[t]o the extent Cox is claiming that it may hinder the development of a market without violating the antitrust laws, it is wrong." Third Br. at 46. To the contrary, in informing the jury that it could find Cox's alleged insufficient

[2] That Court also held that the Telecommunications Act of 1996—the same Act that plaintiff now asserts is somehow relevant to whether Cox violated the antitrust laws, *see* Third Br. at 4-6—"does not create new claims that go beyond existing antitrust standards." *Trinko*, 540 U.S. at 407.

assistance to be the type of "hindrance" that could support antitrust liability, the district court erred and Cox is entitled to a new trial with proper instructions.

C. The District Court's Incorrect Instructions Prejudiced Cox

This Court cannot uphold a jury's verdict "if the jury might have based its verdict on the erroneously given instruction." *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1154-55 (10th Cir. 2012). It is obvious in this case that the jury might have rendered a different verdict if the instructions had given it an appropriate framework to evaluate Cox's proof that Cox had nothing to do with the absence of other STB options. The instructions given watered down plaintiff's burden of proof to the point that the jury was permitted to find *per se* unlawful "tying" based on little more than Cox's market power, the technological fact that accessing two-way services requires a two-way STB, and (perhaps) allegations that Cox was insufficiently enthusiastic about helping potential competitors.

Indeed, the district court recognized that had the jury properly understood what it was supposed to consider it *could not* have found in favor of plaintiff. JA675-79. Plaintiff is remarkably silent about the district court's opinion in both of his briefs. The district court saw the evidence, heard from the witnesses, and concluded that, under an appropriate instruction, no reasonable jury could have found that Cox foreclosed anything. We direct the Court's attention to that point not to reargue the issues briefed on the primary appeal, but simply because the

district court's observations clearly demonstrate *at a minimum* that a jury instructed (in some fashion) that it had to find that Cox was responsible for the absence of other options *might* have ruled for Cox. That observation by itself requires a new trial.

II. COX IS ENTITLED TO A NEW TRIAL BECAUSE THE DISTRICT COURT INCORRECTLY REFUSED TO GIVE A RULE OF REASON INSTRUCTION

A. Plaintiff Did Not Submit Evidence Entitling Him To A *Per Se* Instruction

Plaintiff now concedes that it is "[n]ot until the close of evidence" that the court can decide "whether to instruct the jury on the per se rule or the rule of reason." Third Br. at 47-48. As explained above, at the close of the evidence in this case, plaintiff had not established the threshold element of likely foreclosure. *See supra* § I.B.2; *see also* Second Br. at 34-41. This means that this Court cannot sustain a verdict in plaintiff's favor based on these instructions, and even if this Court reverses the district court's judgment, Cox is entitled to a new trial.

B. The NCRPA Prohibited A *Per Se* Instruction In This Case

The NCRPA could not be clearer: "[C]onduct of . . . any person in making or performing a contract to carry out a joint venture . . . shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness." 15 U.S.C.

§ 4302.[3] Plaintiff attacked the CableCARD joint venture for not enabling access to two-way services; in other words, CableLabs (and Cox) should have designed the CableCARD to do more, and its failure to do more purportedly was one way that Cox prevented third party manufacturers from launching retail STBs. *See* Second Br. at 57-59. Plaintiff pressed that argument before the jury and must live with the consequence that the NCRPA therefore required a rule of reason instruction. The court's failure to give one entitles Cox to a new trial. Plaintiff has no serious argument that the statue does not apply by its plain language and so he urges this Court to simply ignore the statute because there are no opinions applying it. Of course that is not the law.

C. The Jury Could Not Have Found For Plaintiff With A Rule Of Reason Instruction

Plaintiff offered no evidence on several elements of a rule of reason claim. *See* Second Br. at 40-41. Had the district court properly instructed the jury, the result would have been different, and the district court's instructions are therefore reversible error.

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[3] Plaintiff tries to distract from the substance of the NCRPA with the baseless accusation that Cox changed its position on how this statute applies. Third Br. at 36-37. Cox never claimed that CableLabs was a "standard setting organization" rather than a "joint venture," and plaintiff cites nothing for his claim. But this issue is also irrelevant. The statute either applies or it does not apply. And based on the facts that plaintiff placed in evidence in this case, it applies.

III. THE DISTRICT COURT'S REFUSAL TO PROVIDE AN INSTRUCTION ON HOW TO MEASURE DAMAGES ABDICATED TO THE JURY THE COURT'S DUTY TO DECIDE THE APPLICABLE LAW

Over Cox's objection, the district court refused to instruct the jury on how to measure the alleged overcharge at issue in this case. JA7604 (13:4-13). "[I]t is the inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for the truth." *Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1238 (10th Cir. 2002).[4] The Court gave the jury no guidance about how to evaluate damages in a tying case. Plaintiff argues that the jury must have been properly instructed because it did not simply rubber stamp his expert's overcharge analysis, awarding only $6.3 million in damages. Third Br. at 46-47. But "[a] trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." *Kelly v. South Carolina*, 534 U.S. 246, 256 (2002). Moreover,

[4] Plaintiff cites this case for the proposition that he is entitled to a new trial if this Court determines that the jury instructions were incorrect. But *Townsend* did not address an appeal from a district court's grant of judgment as a matter of law, and it provides no support for the proposition that plaintiff is entitled to a second bite at the apple because the jury instructions were too favorable to him. The district court held that, even if properly instructed, there was no evidence from which a reasonable jury could have returned a verdict in plaintiff's favor. Plaintiff therefore suffered no prejudice from the instructions, and there is no basis for plaintiff to receive a new trial.

plaintiff's argument misconstrues the jury's verdict. As plaintiff concedes, the damages award was the result of the jury deciding that DVR fees were not recoverable. Third Br. at 49. The fact that the jury understood the *facts* well enough to exclude the DVR fees does not prove that it understood the *law* governing damages in a (supposed) tying case, without any appropriate instructions.

The jury should have been instructed, as Cox proposed, that the proper measure of damages is the difference in the combined price of the tied and tying product package versus the price that the two products purchased individually would have commanded in the absence of the alleged anticompetitive conduct. *See* Second Br. at 55-56. Plaintiff claims that the "package damages" test has no application here due to industry realities, Third Br. at 34-35, but plaintiff misreads the law he cites. The statute that plaintiff quotes prevents a cable operator from subsidizing its STBs with video programming revenues. *See* 47 U.S.C. § 549(a). It does not, however, prevent Cox from subsidizing its video programming services with STB revenue. It would be perfectly lawful for Cox to charge more than the competitive price on STBs and charge less than the competitive price on its cable services.[5] This is why the package damages test exists—to make sure that there

[5] This was necessarily true at all relevant times in this case, as the district court granted summary judgment for any period during which the FCC regulated Cox's video programming rates. JA167-68.

was an overcharge on the total amount that the customer was allegedly forced to pay. Plaintiff also argues that a package damages instruction would not fit the facts of this case because Cox's market power in "Premium Cable" was too high for it to bother discounting its price. *See* Third Br. at 34. But this argument ignores the extensive evidence of Cox's competitive market environment and history of promotional pricing. JA6257-60 (75:24-78:2); JA7178-79 (33:20-34:11); JA7196-7204 (51:23-59:17); JA7214-18 (69:3-73:18). Contrary to plaintiff's argument, the background law and facts of this case make the package damages test particularly appropriate.

Finally, plaintiff tries to flip the burden to Cox to show that there was interdependent pricing between cable services and STB rentals before it can receive a package damages instruction. Third Br. at 34. But it is *plaintiff's* burden to prove impact and damages in an antitrust case. When a plaintiff claims that products were somehow tied together and that the tie led to an overcharge, there is no impact or damage unless the total price was elevated. The district court erred in refusing to instruct the jury on this subject and prevented it from returning a verdict based on a permissible damages calculation.

IV. COX IS ENTITLED TO A JUDGMENT AS TO THE PORTION OF THE CLASS WITH DAMAGES BASED SOLELY ON DVR FEES

Plaintiff's appeal asks solely for this Court to reinstate the verdict rendered by the jury, which he concedes did not include damages for DVR fees. *See id.* at

49-50. Plaintiff has no issue on appeal relating to the jury's damages award.[6] And plaintiff admits that the jury found that an entire subset of the class suffered no injury. Yet plaintiff claims that he is somehow entitled to retry the claims of those class members if a new trial is ordered on unrelated grounds.[7] Supreme Court precedent prohibits that result.

In *Tyson Foods* the Supreme Court warned courts not to "ignore the Rules Enabling Act's pellucid instruction that use of the class action device cannot 'abridge . . . any substantive right.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016) (quoting 28 U.S.C. § 2072(b)). In determining whether the lower court in that case used Rule 23 to enlarge any party's rights, the Supreme Court analyzed how it would answer the same question if it was posed in a series of individual cases versus in a class action. *Id.* at 1047. The Court concluded that the Rules Enabling Act did not permit it to reach a different answer in the class

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[6] Nor is there any dispute as to the facts on this issue. All of plaintiff's evidence, *see* Third Br. at 48, is solely that if a subscriber purchased DVR capability, he or she paid a fee for DVR services. Indeed, plaintiff concedes that some subscribers purchased Cox's "Premium Cable" but used a non-leased STB to provide their DVR functionality and were not charged by Cox for any DVR service. *Id.* The jury reached the only possible conclusion from this evidence and found that DVR fees had nothing to do with this case and refused to award any purported "overcharge" on these fees as a portion of damages.

[7] As with the rest of the issues raised in this brief, this Court need not reach this question at all if it affirms the district court's judgment. It is only if this Court grants a new trial that it must take steps to ensure that it does not resurrect claims that are not before it on appeal.

action context than it would in individual actions brought by individual class members. *Id.* at 1048 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)).

Plaintiff concedes that the jury found that tens of thousands of members of the class suffered no injury. If these tens of thousands of class members had brought individual actions and lost on that basis, there is no dispute that their cases would be over and they would be bound by *res judicata*. Proving an injury is an element of plaintiff's claim, and a finding that the evidence is insufficient to prove this element requires a verdict for the defendant. *See* JA589. No issues plaintiff has raised on appeal would relieve those class members from that basic failure of proof, if this were an appeal limited to their individual cases. But plaintiff asserts that because these individuals are part of a class, he should have a second shot at convincing a different jury that they are entitled to damages. It is hard to imagine a more straightforward violation of the Rules Enabling Act and due process. Cox is therefore entitled to a judgment against those class members whose claimed injury derived solely from DVR fee overcharges even if this Court directs a new trial as to the remaining individuals in the class.[8]

[8] Plaintiff's claim that Cox did not appeal the class certification order misconstrues Cox's requested relief. Cox does not ask the Court to revisit whether it was appropriate to allow the class as defined to proceed to trial, but simply asks this Court to recognize that if a new trial is ordered this subset of the class has already lost and must be bound by the result. If resolving that issue required this Court to

CONCLUSION

For all of the reasons previously identified, this Court should affirm the district court's judgment in favor of Cox. If, however, the Court reverses the district court's judgment as a matter of law, the numerous errors in the jury instructions entitle Cox to a new trial. Should this Court order a new trial, it should direct the entry of judgment as to those class members whose alleged damages are solely the result of DVR fees, as permitting these individuals a second bite at the apple simply because they are part of a class would violate the Rules Enabling Act and Supreme Court precedent.

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Respectfully submitted,

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consider the class certification decision for some reason, that order is properly before this Court on appeal. *See* Preliminary Record On Appeal, Case No. 15-6222, at p. 142, Nov. 24, 2015 (Cox's Notice of Conditional Cross-Appeal); JA122-47.

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This brief complies with the type-volume limitations of Fed. R. App. P. 28.1(e)(2)(C) because this brief contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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This brief complies with the privacy-redaction requirements contained in Federal Rule of Appellate Procedure 25 as well as in Tenth Circuit Rule 25.5. No material that must be redacted is included in this brief.

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The undersigned certifies that the foregoing ECF submission was scanned for viruses with the most recent version of Microsoft System Center Endpoint Protection, updated on June 23, 2016, and according to the program is free of viruses.

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