

30 CFR 250, subpart I regulations. The regulation also informs the public that they may comment at any time on the collections of information and provides the address to which they should send comments. We received no comments in response to the **Federal Register** notice, nor did we receive any unsolicited comments.

**Public Availability of Comments:** Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Information Collection Clearance Officer:** Nicole Mason, (703) 787-1607.

Dated: February 15, 2017.

**Eric Miller,**

*Acting Deputy Chief, Office of Offshore Regulatory Programs.*

[FR Doc. 2017-07479 Filed 4-12-17; 8:45 am]

**BILLING CODE 4310-VH-P**

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-988]

### Certain Pumping Bras: Issuance of a General Exclusion Order; Termination of the Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has issued a general exclusion order (GEO) denying entry of certain pumping bras. The investigation is terminated.

#### FOR FURTHER INFORMATION CONTACT:

Cathy Chen, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-2392. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation

may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on March 14, 2016, based on a complaint filed on behalf of Simple Wishes, LLC ("Simple Wishes") of Sacramento, California. 81 FR 13419-20 (Mar. 14, 2016). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, by reason of infringement of certain claims of U.S. Patent Nos. 8,192,247 ("the '247 patent") and 8,323,070 ("the '070 patent"). The complaint further alleges that a domestic industry exists. The Commission's notice of investigation named Buywish, TANZKY, BabyPreg, and Deal Perfect, all of China, as respondents. Simple Wishes asserted the '247 patent only against respondent Buywish. The Office of Unfair Import Investigations (OUII) is also a party to the investigation.

The Commission previously determined not to review an initial determination finding respondents TANZKY, BabyPreg, and Deal Perfect in default pursuant to 19 CFR 210.16 and 210.17. *See* Commission Notice (Jul. 8, 2016); Order No. 8. The Commission also previously determined not to review an initial determination terminating the investigation as to the last remaining respondent, Buywish, based on withdrawal of the complaint. *See* Commission Notice (Aug. 9, 2016); Order No. 9. As a result of the termination of the investigation as to Buywish, the '247 patent is no longer at issue in this investigation.

On August 30, 2016, Simple Wishes filed a motion for summary determination on domestic industry and violation of section 337 by the defaulting respondents. On October 31, 2016, the ALJ issued an ID (Order No. 11) granting Simple Wishes' motion for summary determination and recommending that the Commission issue a GEO and set a bond of 100 percent during the Presidential review period. On December 14, 2016, the Commission determined to review the ID in-part, and on review, to modify the ID to set aside the patent and trademark prosecution and maintenance expenses from the domestic industry analysis. *See* 81 FR 92852-53 (Dec. 20, 2016). The Commission's determination resulted in a finding of a section 337 violation. *See id.* The Commission requested written

submissions on remedy, the public interest, and bonding. *See id.*

On January 3, 2017, Simple Wishes submitted a brief on remedy, the public interest, and bonding, requesting that the Commission issue a GEO and set a bond of 100 percent during the Presidential review period. On January 4, 2017, the Commission Investigative Attorney ("IA") also submitted a brief on remedy, the public interest, and bonding, supporting the ALJ's recommended GEO and bond of 100 percent. The IA further filed a response brief on January 11, 2017.

The Commission finds that the statutory requirements for relief under section 337(g)(2) and section 337(d)(2) (19 U.S.C. 1337(g)(2) and 1337(d)(2)) are met with respect to the defaulting respondents. In addition, the Commission finds that the public interest factors enumerated in section 337(d)(1) (19 U.S.C. 1337(d)(1)) do not preclude issuance of the statutory relief.

The Commission has determined that the appropriate remedy in this investigation is a GEO prohibiting the unlicensed entry of certain pumping bras that infringe one or more of claims 10, 12, 14, and 27-37 of the '070 patent. The Commission has also determined that the bond during the period of Presidential review pursuant to 19 U.S.C. 1337(j) shall be in the amount of 100 percent of the entered value of the imported articles that are subject to the GEO. The Commission's order was delivered to the President and to the United States Trade Representative on the day of its issuance.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.

Issued: April 7, 2017.

**Katherine M. Hiner,**

*Acting Supervisory Attorney.*

[FR Doc. 2017-07450 Filed 4-12-17; 8:45 am]

**BILLING CODE 7020-02-P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### United States v. DIRECTV Group Holdings, LLC, and AT&T, Inc., Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), that a proposed

Final Judgment, Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the Central District of California (Western Division) in *United States of America v. DIRECTV Group Holdings, LLC, and AT&T, Inc.*, Civil Action No. 2:16-cv-08150-MWF-E. On November 2, 2016, the United States filed a Complaint alleging that DIRECTV unlawfully shared confidential, forward-looking information with competitors during the companies' negotiations to carry the SportsNet LA "Dodgers Channel," in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The proposed Final Judgment, filed on March 23, 2017, requires the Defendants to stop illegally sharing competitively-sensitive information with their rivals, to monitor certain communications their programming executives have with their rivals, and to implement antitrust training and compliance programs.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at <http://www.justice.gov/atr> and at the Office of the Clerk of the United States District Court for the Central District of California (Western Division). Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be directed to Scott A. Scheele, Chief, Telecommunications and Media Section, Antitrust Division, Department of Justice, 450 Fifth Street NW., Suite 7000, Washington, DC 20530 (telephone: 202-514-5621).

**Patricia A. Brink,**  
*Director of Civil Enforcement.*

JONATHAN SALLET (DC Bar No. 336198)

JUAN A. ARTEAGA (NY Bar No. 4125464)

PATRICIA BRINK (CA Bar No. 144499)

SCOTT SCHEELE (DC Bar No. 429061)

LAWRENCE FRANKEL (DC Bar No. 441532)

JARED HUGHES (VA Bar No. 65571)

CORY BRADER (NY Bar No. 5118732)

PATRICIA CORCORAN (DC Bar No. 461905)

MATTHEW JONES (DC Bar No. 1006602)

JONATHAN JUSTL (NY Bar No. 4928222)

DAVID LAWRENCE (CT Bar No. 430642)

ANNA SALLSTROM (CA Bar No. 300281)

U.S. DEPARTMENT OF JUSTICE  
ANTITRUST DIVISION

450 5th Street NW., Washington, DC

20001, Telephone: 202-514-5621,

Facsimile: 202-514-6381, E-mail:

[scott.scheele@usdoj.gov](mailto:scott.scheele@usdoj.gov)

*Additional Counsel Listed on Signature Page*

Counsel for Plaintiff,

#### UNITED STATES OF AMERICA

#### UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
*Plaintiff*, v. DIRECTV GROUP  
HOLDINGS, LLC and AT&T, Inc.  
*Defendants*.

Case No. 2:16-cv-08150

#### COMPLAINT

Hon. Michael W. Fitzgerald

The United States of America, by its attorneys acting under the direction of the Attorney General of the United States, brings this civil antitrust action against Defendants DIRECTV Group Holdings, LLC ("DIRECTV") and AT&T, Inc. ("AT&T") to obtain equitable relief to prevent and remedy violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

#### I. NATURE OF THE ACTION

1. For almost 60 years, the Los Angeles Dodgers have been a beloved professional sports team in Los Angeles ("LA"). During this time, LA Dodgers fans have seen their team win five World Series championships, closely followed the Hall of Fame careers of baseball greats such as Sandy Koufax and Tommy Lasorda, and listened to the play-by-play calls of broadcast legend Vin Scully. But a significant number of Dodgers fans have had no opportunity in recent years to watch their team play on television because overlapping and competitive pay television providers did not telecast Dodgers games. Those consumers were deprived of a fair competitive process when DIRECTV unlawfully exchanged strategic information with three competitors during their parallel negotiations concerning carrying Dodgers games.

2. This Complaint focuses on DIRECTV, the ringleader of information sharing agreements with three different rivals that corrupted the Dodgers Channel carriage negotiations and the competitive process that the Sherman Act protects. DIRECTV was the one

company that unlawfully exchanged information with multiple rivals, and without it competition would not have been harmed and none of the violations would have occurred. Accordingly, the United States seeks declaratory and injunctive relief against DIRECTV and its corporate successor AT&T.

3. In early 2013, SportsNet LA (the "Dodgers Channel"), a partnership between the LA Dodgers and Time Warner Cable ("TWC"), acquired the exclusive rights to telecast almost all live Dodgers games in the LA area. Beginning in January 2014, TWC offered various multichannel video programming distributors ("MVPDs"),<sup>1</sup> including satellite pay television provider DIRECTV, the opportunity to purchase a license to telecast the Dodgers Channel to their customers in the LA area. Distributing live local sports, like the Dodgers Channel, is a significant characteristic of competition between MVPDs, because MVPDs directly compete for subscribers who want to watch that content.

4. During negotiations with TWC and as he prepared for those negotiations, DIRECTV's Chief Content Officer, Daniel York, exchanged information with his counterparts at Cox, Charter, and AT&T about their carriage plans for the Dodgers Channel. These unlawful exchanges were intended to reduce each rival's fear that competitors would carry the Dodgers Channel, thereby providing DIRECTV and its competitors artificially enhanced bargaining leverage to force TWC to accept their terms. Through each of these information sharing arrangements, Mr. York disclosed non-public information about the status of DIRECTV's negotiations with TWC and DIRECTV's future carriage plans and, in return, learned similar non-public information from each of these competitors.

5. The sharing of this competitively sensitive information among direct competitors made it less likely that any of these companies would reach a deal because they no longer had to fear that a decision to refrain from carriage would result in subscribers switching to a competitor that offered the channel. As each company's contemporaneous business documents show, the elimination of this risk was valuable because each company identified a competitor's decision to telecast the Dodgers Channel as a significant

<sup>1</sup> MVPD is an industry acronym standing for multichannel video programming distributor, and it applies to a variety of providers of pay television services, including satellite companies (such as DIRECTV), cable companies (such as Cox and Charter), and telephone companies (such as AT&T).

development that could force it to reach a deal with TWC.

6. These competitor information exchanges took place against the backdrop of limited competition among pay television providers. Most residential consumers in the LA area had a choice of only three or four pay television providers: the incumbent cable company (like Charter, Cox, or TWC); the two national satellite pay television providers (like DIRECTV) and sometimes a telephone incumbent (like AT&T).

7. Among the small group of competitors, DIRECTV stood apart. Unlike its cable company rivals such as Cox and Charter, which have concentrated geographic footprints within the LA area, DIRECTV directly competes for subscribers with every MVPD in the LA area. Consequently, DIRECTV—which has sought to distinguish itself from other MVPDs by offering subscribers the broadest range of live sports content—was more susceptible than other MVPDs to pressure to reach a deal with TWC. In addition, DIRECTV had the most subscribers that could watch the Dodgers Channel on TWC.

8. Conversely, as the largest direct competitor of every MVPD in the LA area, a DIRECTV plan to carry the Dodgers Channel would have increased the pressure on other MVPDs to do the same in order to avoid the risk of losing subscribers to DIRECTV. As one senior DIRECTV executive noted, with its competitors “sit[ting] on the sidelines,” the company was the “first domino in the sequencing of deals.” This potential domino effect made DIRECTV a central player in the Dodgers Channel negotiations. Indeed, Cox, Charter, and AT&T all viewed DIRECTV as the competitor whose decision to carry the Dodgers Channel could force them to reach a deal with TWC, even if doing so meant paying a price above the one targeted in their internal financial analyses.

9. DIRECTV executives expressly acknowledged that they would be in a stronger bargaining position if DIRECTV’s competitors stayed on the sidelines and did not launch the Dodgers Channel. For instance, DIRECTV’s CEO Mike White told Mr. York that he believed the distributors “may have more leverage if we all stick together” and Mr. York “[a]greed” that “others holding firm is key.” A DIRECTV content executive believed that TWC would “become more creative to improve [DIRECTV’s] deal” as the rest of the industry was “waiting for us to launch.” In May of 2014, while the negotiating process was ostensibly

proceeding, Mr. White spoke publicly—and proudly—about what DIRECTV had achieved, telling the audience for a large telecommunications and media industry conference that it was important that “the distributors start to stand together, like most of us have been doing in Los Angeles for the first time ever, by the way, with the Dodgers on outrageous increases and excesses.”

10. Mr. York—the DIRECTV executive who orchestrated these bilateral information sharing agreements—regularly communicated with his counterparts at Cox, Charter, and AT&T during their Dodgers Channel negotiations with TWC. Many of these communications occurred at important points in the negotiations with TWC, such as within days of each company receiving TWC’s initial offer and when Mr. York and his counterparts were preparing to make recommendations to their CEOs.

11. During some of these communications, Mr. York assured his counterparts at Cox, Charter, and AT&T that DIRECTV would not be launching the Dodgers Channel any time soon and received similar assurances.

12. For example, when informed by Cox’s senior content executive that TWC had indicated that it was close to reaching a deal with another MVPD, Mr. York told this executive that DIRECTV was *not* the MVPD that was supposedly close to signing a deal with TWC—which was important because DIRECTV was the largest competitor to Cox in Cox’s LA service area.

13. Mr. York and his counterpart at AT&T exchanged texts and voice messages that improperly discussed non-public information about their content negotiations and future plans, including the Dodgers Channel. For example:

- In March 2014, AT&T’s most senior content executive, who was in frequent contact with Mr. York, left Mr. York a voicemail: “I had three things to catch up with you on, ah, two sports and one news.” A few days later, they spoke on the phone for twelve minutes. That same AT&T executive recommended not launching the Dodgers Channel to AT&T’s CEO the following day.

- Later that month, TWC told AT&T it was unlikely to lower its initial offer for Dodgers Channel carriage rights. That same AT&T executive—who has referred to content offers as “pitches”—again texted Mr. York: “Forgot to tell you but we got a [##] mph pitch yesterday,”<sup>2</sup> and “Consistent with what

you got?” Mr. York responded, “Hope u hit it out!”

14. Mr. York and his counterpart at Charter also communicated at key points in the Dodgers Channel negotiations. During those communications they shared non-public strategic information about their Dodgers Channel negotiations and future plans for the channel. For example, Charter’s most senior content executive recommended a Dodgers Channel strategy to his CEO for the first time the day after a phone call with Mr. York. The executive told the CEO he thought Charter should “sit[] [the Dodgers Channel] out until at least if and when Direct does a deal.” He testified that he based his recommendation on a “gut feeling” rather than a formal financial analysis. When a subordinate pushed back against his choice of strategy, the executive declined to change course, explaining “I think Direct will not be there at launch.” The Charter executive also texted Mr. York to ask to speak with him the day that he and Charter’s CEO met to set Charter’s 2014 content budget, including for the Dodgers Channel. Later in the negotiations, Mr. York and the Charter executive spoke in person about “the high price that TWC paid for the rights to SportsNet LA and was demanding for carriage.” The Charter executive testified that they discussed that the price TWC offered their respective companies for carriage was “outrageous.”

15. Based on these private communications and a series of public communications, Mr. York and his counterparts at Cox, Charter, and AT&T knew they were unlikely to lose subscribers to each other while they waited to carry the Dodgers Channel. For example, when Mr. York’s counterpart at Charter recommended that Charter delay launching the Dodgers Channel because “I think Direct will not be there at launch,” he explained that as a result there would be “nowhere to get the games in [Charter’s] markets.” Similarly, Mr. York assured DIRECTV’s CEO, Mr. White, that DIRECTV’s competitors appeared “in no rush to do a deal” for the Dodgers Channel, which was a “strategic consideration” against DIRECTV launching the channel itself.

16. The information that was exchanged as part of this scheme had an anticompetitive effect on DIRECTV’s and its competitors’ decision-making about whether to carry the Dodgers Channel. DIRECTV’s unlawful

<sup>2</sup> The actual price figures have not been included throughout the Complaint to protect competitively sensitive information. The speed of the quoted

pitch in this text matched the cents in TWC’s offer to AT&T.

information exchanges harmed competition by corrupting the competitive process that should have resulted in each company making an independent decision on whether to carry the Dodgers Channel, subject to competitive pressures arising from independent decisions made by other, overlapping MVPDs. Instead, key competing executives knew that they were safer than they should have been under a competitive process; safer because they had reason to believe that they would not lose subscribers to other MVPDs if they opted not to telecast Dodgers games. The information they shared was a material factor in their companies' Dodgers Channel decisions, with the effect of making each company less likely to reach a deal. The ultimate result: Many consumers in LA had fewer—or no—means by which to watch the Dodgers Channel. DIRECTV's unlawful information exchanges harmed consumers by making it less likely that they would be able to watch Dodgers games on television and, in the TWC territory, on the MVPD of their choice.

17. DIRECTV and each of Cox, Charter, and AT&T, respectively, agreed to share forward-looking strategic information about the Dodgers Channel, and did share that information. Their information exchanges demonstrate their agreements and reflect concerted action between horizontal competitors.

18. DIRECTV's unlawful information exchanges with Cox, Charter, and AT&T concerning carriage of the Dodgers Channel lack any countervailing procompetitive benefits and should therefore be condemned as unlawful.

19. The United States, through this action, asks this Court to declare Defendants' conduct unlawful and to enjoin Defendants from sharing strategic competitive information with other MVPDs and their executives in order to prevent further harm to competition and consumers.

## II. DEFENDANTS

20. Defendant DIRECTV is a Delaware corporation with headquarters located in El Segundo, California, offering direct broadcast satellite service nationwide. As of 2014, DIRECTV had approximately 1.25 million video subscribers in the LA area. In 2015, Defendant AT&T acquired DIRECTV in a transaction valued at approximately \$49 billion.

21. Defendant AT&T is a Delaware corporation with headquarters located in Dallas, Texas. AT&T is a multinational telecommunications company offering mobile telephone service, wireline Internet and television service, and satellite television service

through its 2015 acquisition of DIRECTV. AT&T offers wireline television service through its U-verse video product, which distributes video content using AT&T's telecommunications infrastructure. Following its acquisition of DIRECTV, AT&T is now the largest pay television provider in the United States with more than 25 million video subscribers nationwide. As of 2014, AT&T had approximately 400,000 video subscribers in the LA area.

## III. JURISDICTION, VENUE, AND INTERSTATE COMMERCE

22. The United States brings this action pursuant to Section 4 of the Sherman Act, 15 U.S.C. § 4, to obtain equitable and other relief to prevent and restrain Defendants' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

23. This Court has subject matter jurisdiction over this action under Section 4 of the Sherman Act, 15 U.S.C. § 4, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

24. This Court has personal jurisdiction over each Defendant and venue is proper in the Central District of California under 28 U.S.C. § 1391 and Section 22 of the Clayton Act, 15 U.S.C. § 22. Each Defendant transacts business in this District. Each Defendant provides pay television services to customers in this District and has substantial contacts in this District. DIRECTV committed acts in furtherance of unlawful concerted action in this District.

25. Both DIRECTV and AT&T are engaged in, and their activities substantially affect, interstate trade and commerce. Each Defendant sells video distribution services throughout the United States to millions of consumers. These sales substantially affect interstate commerce. In 2014, U.S. consumers spent a total of about \$26 billion on DIRECTV's video distribution services, and a total of about \$6.8 billion on AT&T's video distribution services. Each Defendant also purchases television content from numerous content providers in the flow of interstate commerce. In addition, each Defendant's decision not to carry the Dodgers Channel substantially affected interstate commerce. DIRECTV and AT&T could have acquired the right to offer the channel to thousands of subscribers outside of California, including subscribers in parts of Nevada and Hawaii. Moreover, each Defendant's decision not to carry the Dodgers Channel affected the sale of advertisements on that channel to companies based outside of California that would run during Dodgers games.

26. AT&T is DIRECTV's successor in interest, including for purposes of this action. When AT&T acquired DIRECTV, it acquired all of DIRECTV's stock (by merging DIRECTV into a subsidiary company wholly owned by AT&T), and thereby acquired all of DIRECTV's assets. AT&T proceeded to fully integrate DIRECTV's operations into its own, with the result that DIRECTV's operations have been continued within AT&T. Additionally, the merger agreement did not expressly limit AT&T's liabilities. These circumstances indicate AT&T's intent to assume DIRECTV's liability for these Sherman Act violations.

27. The Chief Content Officer of AT&T negotiates and supervises the negotiation of content agreements for DIRECTV, as well as for AT&T's other video platforms. These contracts may be negotiated across all AT&T's video platforms; in fact, when AT&T acquired DIRECTV, it noted that the combined companies' scale would give them greater leverage with content providers. The presence of AT&T is therefore necessary in order to effectuate the requested relief.

## IV. DIRECTV UNLAWFULLY EXCHANGED INFORMATION WITH COX, CHARTER, AND AT&T WHEN NEGOTIATING CARRIAGE OF THE DODGERS CHANNEL

### A. MVPDs Are Motivated to Seek Bargaining Leverage When Negotiating With Video Programmers

28. MVPDs spend billions of dollars on sports content each year. Over the years, MVPDs have complained about the rising cost of such content. The desire to depress the cost of sports content—often a key component of competition between MVPDs—provides MVPDs a strong incentive to obtain bargaining leverage. MVPDs may seek to unlawfully obtain bargaining leverage by engaging in collusive action designed to force sports content providers—such as TWC in this case—to accept different terms than they otherwise would in a negotiating process where MVPDs make carriage decisions independent of each other. Such collusive activity harms competition by corrupting the competitive process and ultimately harms consumers by causing likely reductions in quality and output, as happened with respect to the blackout of the Dodgers Channel, which has now covered three baseball seasons.

### **B. TWC Successfully Employed a Divide and Conquer Strategy When Negotiating Carriage of the Lakers Channel**

29. In 2011, TWC acquired the rights to locally telecast and distribute LA Lakers basketball games in the LA area.<sup>3</sup> As it would later do with the Dodgers Channel, TWC launched a new regional sports network (“RSN”) to serve as the exclusive channel telecasting these games (the “Lakers Channel”).

30. DIRECTV initially declined to carry the Lakers Channel, reasoning that TWC’s asking price was too high and that it could negotiate a better rate than its smaller competitors if it held out. However, TWC sought to increase the competitive pressure on DIRECTV, realizing that DIRECTV would be more likely to carry the Lakers Channel if its smaller competitors carried the channel because such a move would expose DIRECTV to the risk of losing subscribers to these competitors. Accordingly, TWC approached the smaller MVPDs with a time-sensitive offer: in exchange for an early agreement to carry the Lakers Channel, the smaller distributors would receive a size-insensitive most favored nation clause (“MFN”) in their carriage agreements. This clause would guarantee the smaller distributors that they would get the same price for the Lakers Channel as a larger distributor, such as DIRECTV (although it is common industry practice that larger companies with more subscribers pay a lower price per subscriber than their smaller competitors).

31. During the negotiations over carriage of the Lakers Channel, Mr. York heard a “rumor” about TWC’s size-insensitive MFN offer. Mr. York was concerned that if the smaller distributors buckled under the pressure of the MFN offer and agreed to carry the Lakers Channel before the larger distributors negotiated a deal, it would “empower[] TWC to hold firm on their price.” Mr. York was right.

32. Charter signed a Lakers Channel carriage agreement on October 25, 2012, just before the NBA season started. At that time, Mr. York told a colleague that he believed Charter agreed to TWC’s rates in order to get the MFN protection.

33. Two days later, on October 27, 2012, AT&T signed a Lakers Channel carriage deal.

34. The Lakers season tipped off on October 30, 2012.

35. The MVPDs that had already launched the Lakers Channel aggressively marketed against their competitors that had not reached a deal with TWC. They sensed an opportunity to win subscribers who wanted to watch Lakers games live on television but could not due to their video provider’s lack of carriage. For example, Charter ran radio advertisements targeting AT&T before AT&T’s U-verse video service launched the Lakers Channel. Similarly, after launching the Lakers Channel, AT&T began using a marketing campaign in its stores targeting Cox subscribers: “See both Padres and Lakers on U-verse TV but not Cox.”

36. TWC succeeded in its strategy. On November 7, 2012, less than one week after the NBA season started, Cox agreed to carry the Lakers Channel. Cox had intended to hold out, but AT&T—which offers its U-verse video service inside the Cox local market—was offering the Lakers Channel. Cox agreed to pay TWC’s full asking price despite internal analyses estimating the Lakers Channel was worth significantly less. Indeed, Cox paid nearly 60% higher than its analyses had initially suggested the Lakers Channel was worth.

37. DIRECTV faced a similar dilemma. Most of its competing video distributors in the LA area had launched the Lakers Channel, and it was losing hundreds of customers per week to them. Consequently, on November 14, 2012, ten days after Cox agreed to carry the Lakers Channel, DIRECTV agreed to pay TWC’s initial asking price, even though DIRECTV’s internal analyses estimated that carriage of the Lakers Channel was worth significantly less. DIRECTV agreed to pay almost 50% more than its internal financial analysis suggested.

38. Moreover, TWC was able to point to the size-insensitive MFNs in the smaller distributor carriage agreements as a reason not to offer DIRECTV a lower per subscriber fee for the Lakers Channel.

39. Thus, DIRECTV rolled the dice during the Lakers Channel negotiations but lost because TWC was able to pursue a divide-and-conquer strategy by offering DIRECTV’s smaller competitors financial incentives to sign a deal early in the negotiating process. Having been burned by this experience, DIRECTV approached the Dodgers Channel negotiations determined not to allow TWC to successfully employ such a strategy again.

### **C. DIRECTV Was Intent on Ensuring That Its Competitors Stood With It Against TWC When Negotiating Carriage of the Dodgers Channel**

40. A few months after successfully outmaneuvering DIRECTV during the Lakers Channel negotiations, TWC acquired, in January 2013, the local telecast rights for Dodgers baseball games beginning in the 2014 season. As it had with the Lakers, TWC launched a new RSN—the Dodgers Channel—to serve as the exclusive home for Dodgers games. Media reports at the time suggested that TWC would likely seek monthly distribution rates close to \$5 a month per subscriber for the Dodgers Channel.

41. In January 2014, TWC began discussing carriage of the Dodgers Channel with other LA area video distributors. In doing so, TWC sought a higher per subscriber rate from each distributor for carriage in the LA area (“Zone 1”), and lower per subscriber rates in other zones, located in regions further from LA.

42. But, unlike TWC’s experience with the Lakers Channel, none of TWC’s competitors agreed to carry the Dodgers Channel that year.

43. Hundreds of thousands of LA area residents—essentially, everyone living outside of TWC’s service area—were unable to watch most televised Dodgers games during the 2014 baseball season.<sup>4</sup>

44. To this day, TWC and its affiliates remain the only LA area video distributors that carry the Dodgers Channel, following a negotiation process corrupted by DIRECTV’s orchestration of unlawful information sharing agreements with Cox, Charter, and AT&T.

*i. DIRECTV, Cox, Charter, and AT&T Acknowledged That Their Competitors’ Carriage Decisions Would Significantly Influence Whether They Decided to Launch the Dodgers Channel*

45. In assessing whether to carry the Dodgers Channel, DIRECTV conducted financial analyses indicating that DIRECTV’s decision not to carry the Dodgers Channel would cause it to lose tens of millions of dollars in subscriber revenues in 2014 and each year thereafter. These financial analyses also indicated that this anticipated loss would be reduced by approximately

<sup>3</sup> The Lakers ownership sold TWC the rights to telecast certain Lakers games to the local LA television market. This type of local, team-based rights deal, exemplified in TWC’s acquisition of the rights to both the Lakers and the Dodgers Channels, is distinct from the broadcasting deals negotiated by the leagues themselves, such as the NBA or MLB. Those national deals convey the rights to broadcast a certain number of league games on nationwide networks, such as ESPN or the Turner channels.

<sup>4</sup> Bright House Networks, which is affiliated with TWC but does not operate in the LA area, carried the Dodgers Channel in its first season. Charter reached an agreement to carry the Dodgers Channel in 2015, after signing a deal to acquire TWC. Champion Broadband reached a deal to carry the Dodgers Channel in 2014, but had only about 3,000 video subscribers in Arcadia and Monrovia, California, and has since gone out of business.

40% if none of DIRECTV's competitors (other than TWC) carried the Dodgers Channel. Thus, DIRECTV calculated exactly how much money it would save if other MVPDs in the LA area did not launch the Dodgers Channel. Moreover, DIRECTV understood that, in order to reduce the likelihood that its subscribers would switch providers, it might have to pay more than its financial analyses suggested it should pay if any of its competitors decided to carry the Dodgers Channel, which is precisely what had happened with the Lakers Channel.

46. Similarly, Cox, Charter, and AT&T each concluded that the decision of a competitor to carry the Dodgers Channel would be a significant development that could force each of them to reach a deal with TWC. For example, on September 18, 2013, Charter's head of content acquisition suggested to Charter's CEO that "we discuss sitting this one out until at least if and when Direct does a deal." Similarly, an undated Cox "Dodgers Discussion" document states that Cox should "consider a rate MFN'd deal only in the event DirecTV, Dish or AT&T do a deal, accept any related rate penalty if we are forced to." In addition, a February 26, 2014 Dodgers Channel presentation by AT&T's President of Content recommended to his direct supervisor that a "key decision point[ ]/risk factor[ ]" would be "carriage decisions by DirecTV."

#### **D. DIRECTV Orchestrated and Implemented Dodgers Channel Carriage Information Exchanges With Cox, Charter, and AT&T**

47. Given that TWC's negotiating strategy had forced DIRECTV to pay more for the Lakers Channel than it thought the channel was worth, DIRECTV and its Chief Content Officer, Mr. York, were determined not to let that happen again. To achieve this objective, Mr. York orchestrated a series of unlawful bilateral information sharing agreements with three of DIRECTV's MVPD competitors: Cox, Charter, and AT&T.

48. In numerous phone calls and other private conversations, Mr. York and his counterparts at DIRECTV's rivals Cox, Charter, and AT&T discussed non-public information about the status of their negotiations with TWC and their

future plans about whether to carry the Dodgers Channel. For instance:

- Cox's senior content executive, the Senior Vice President of Content Acquisition, testified under oath that he and Mr. York discussed their companies' Dodgers Channel carriage plans on multiple occasions. During one of these conversations, the Cox executive inquired about the status of DIRECTV's negotiations with TWC because TWC had indicated to him that it was close to reaching a deal with a video distributor. Mr. York responded that DIRECTV was not close to signing a deal and the two executives agreed to give one another a "heads-up" before launching the Dodgers Channel.

- Mr. York also offered to give this Cox executive an opportunity to sign a Dodgers Channel deal with TWC first before DIRECTV and thus protect any MFN terms.

- Charter's senior content executive, the Senior Vice President of Programming, testified under oath that he and Mr. York discussed that the price TWC offered their respective companies for the right to carry the Dodgers Channel was "outrageous."

- In a two-hour span the day after DIRECTV received TWC's initial Dodgers Channel offer, Mr. York spoke or attempted to speak with his counterparts at Cox, Charter, and AT&T. Mr. York later recommended against launching the channel because "other MVPDs appear in no rush to do a deal." At that point in time, no distributor had made public statements about its Dodgers Channel carriage negotiations or plans.

- AT&T's senior content executive, the President of Content and Advertising Sales, called Mr. York on the day that he presented his recommendation against AT&T carrying the Dodgers Channel to his direct supervisor. Over the course of the next few weeks, this AT&T senior executive attempted to speak with Mr. York on multiple occasions and did speak to him the day before he presented his recommendation to AT&T's CEO.

49. Despite reservations about the carriage price TWC would request for the Dodgers Channel, DIRECTV's content team indicated in October 2013 that the company should "Plan to Launch" the Dodgers Channel and directed DIRECTV's technical staff to

allocate sufficient satellite capacity to accommodate the network.

50. On January 21, 2014, TWC presented its first formal Dodgers Channel carriage offer to a group of DIRECTV content executives, including Mr. York.

51. The next day, Mr. York spoke with his Cox counterpart for twenty minutes and his Charter counterpart on a call or voicemail lasting about thirty seconds. Later that day, Mr. York and his AT&T counterpart spoke for twelve minutes. Mr. York spoke with his Charter counterpart for twenty minutes on January 29, 2014.

52. Around this time period, a senior DIRECTV content executive emailed Mr. York to discuss the disagreement between DIRECTV's marketing and content groups about whether to carry the Dodgers Channel. He asked for Mr. York's "thoughts about having a meeting" with the marketing team before the groups met with DIRECTV's CEO, Mr. White, on February 4, 2014 about carrying the Dodgers Channel, because the content team "think[s] don't do a deal," while the marketing team "want[s] to do a deal." The DIRECTV marketing team had calculated that TWC's asking price was higher than financial analysis suggested it was worth—but nonetheless recognized that other factors not captured in that calculation made the Dodgers Channel worth carrying.

53. In preparing for the meeting with DIRECTV's CEO, the marketing team put together a draft presentation deck that emphasized the Dodgers' iconic reputation and the fact that carrying the Dodgers Channel was important to DIRECTV's marketing strategy of being a leader in sports content. For example, the deck listed as reasons for doing a deal that "LA is our largest subscriber market" and that "not offering a marquee franchise will significantly diminish our sports leadership claim." Mr. York edited this deck before it was presented to DIRECTV's CEO. Notably, on a slide listing strategic considerations for and against carrying the Dodgers Channel, Mr. York, having spoken with his counterparts at Cox, Charter, and AT&T added that one reason DIRECTV should not carry the channel at TWC's asking price was that "[o]ther MVPDs appear in no rush to do a deal."

**Against Deal**

- Carriage of Dodgers and the associated high rates will set a precedent and embolden other rights holders, and lead to higher sports costs over time; Will require other trade offs <sup>all other CPs</sup>

- Other MVPDs appear in a rush to do a deal, Dish very unlikely
- ~~Dish very unlikely~~ others? worse than Houston, which we don't carry

54. At the time that Mr. York made this edit, no other distributor had made public statements about its Dodgers Channel carriage negotiations or plans.

55. On February 4, 2014, Mr. York, along with members of his content team

and DIRECTV's marketing team, met with Mr. White to discuss their strategy for responding to TWC's offer. At this meeting, Mr. York and his colleagues recommended against carrying the Dodgers Channel at TWC's asking price.

To support this recommendation, Mr. York used the presentation deck mentioned above, which incorporated his edit indicating that "[n]o other MVPD appears to be in a rush to do the Dodgers deal" in the final text.

**Against Deal**

- Carriage of Dodgers and the associated above market rates will set a bad precedent and embolden all other rights holders (not just confined to sports) and will lead to higher content costs over time
- No other MVPD appears to be in a rush to do the Dodgers deal; Dish very unlikely to ever carry network
- Dodgers deal is a more expense, off-market deal than either the PAC-12 or CSN Houston which DTV chose not to carry

56. Based on the information he was provided, Mr. White "planned to carry the channel" and "budgeted to carry the channel," but hoped to negotiate TWC down from its initial asking price. Following the February 4, 2014 meeting with Mr. White, DIRECTV informed TWC that its initial asking price was too high.

57. About one month later, Mr. White sent an email to Mr. York declaring that the MVPDs "may have more leverage if we all stick together" on the Dodgers Channel. Mr. York "[a]greed" that "others holding firm is key." This email exchange occurred right before the start of the 2014 baseball season and during the heart of TWC's Dodgers Channel negotiations.

58. Two months later, Mr. White made a similar pronouncement during an industry conference, stating that MVPDs should "start to stand together, like most of us have been doing in Los Angeles for the first time ever, by the way, with the Dodgers on outrageous increases and excesses." At the time that Mr. White made this public statement, Mr. York had already been having discussions with his counterparts at Cox, Charter, and AT&T and, unsurprisingly, none of them had

reached a deal with TWC to carry the Dodgers Channel.

59. During DIRECTV's negotiations with TWC, at least one person informed DIRECTV that Mr. York had exchanged strategic information with competitors in order to facilitate a Dodgers Channel blackout in the LA area. In April 2014, an anonymous complaint filed on the DIRECTV ethics portal claimed that Mr. York had been "[s]peaking with other satellite, cable, and telco companies about NOT carrying the Dodgers on DIRECTV." Similar internal ethics complaints about Mr. York's exchanges of information with competitors were filed in May and September 2014.

60. Publicly messaging its opposition to TWC's initial offer for Dodgers Channel carriage also helped DIRECTV to further its information sharing scheme. A DIRECTV executive told Mr. York and others that DIRECTV's competitors were emboldened to "sit on the sidelines" because they had not "seen any 'not if, but when' rhetoric from DTV" regarding carriage of the Dodgers Channel, and encouraged DIRECTV employees to "message internally and externally alike that we are NOT doing the Dodgers deal." A DIRECTV executive testified that if

DIRECTV had "started messaging that we are going to do a deal, that probably would have spurred on others to do the deal" and that such a scenario "wouldn't benefit [DIRECTV] in any way." This testimony further reflects the fact that DIRECTV understood that its expected carriage plans would have a domino effect on competitors in the Dodgers Channel negotiations with TWC.

61. Accordingly, DIRECTV employees regularly touted their opposition to carrying the Dodgers Channel in the press. For instance, in March 2014, Mr. York was quoted in the press stating that it was "highly unlikely that anybody of any real merit will be carrying that network soon." The same article also reported that Mr. York "predict[ed]" that the Dodgers carriage "logjam will not break before the first week of the new season is over and perhaps not for a long time after that." In April 2014, Mr. York was quoted as stating that DIRECTV had an obligation to "not say[] yes to everything that's proposed" to it when he was asked about carriage of the Dodgers Channel.

62. At the beginning of the 2014 baseball season, on March 29, 2014, TWC offered DIRECTV incentives and



other terms of value that significantly improved its offer. DIRECTV did not accept the offer, but rather, on April 16, 2014, responded by counter-proposing a lower rate structure and several free months.

63. After no MVPD agreed to carry the Dodgers Channel, TWC offered in August 2014 to allow immediate carriage of the Dodgers Channel by any video distributor that agreed to binding arbitration. Specifically, TWC proposed that both it and any interested distributor submit their best-and-final offer to a mutually agreed-upon arbitrator, who would then decide which proposal reflected the most fair carriage terms. This offer had no price floor, but no video distributor agreed to arbitration, even though arbitration would have allowed each MVPD to present its valuation analysis to a neutral party who could order TWC to accept that valuation without regard to TWC's previous bargaining position.

64. DIRECTV still does not carry the Dodgers Channel even though it has otherwise sought to distinguish itself from competitors by offering consumers the broadest range of sports content.

*ii. DIRECTV and Cox Shared Non-Public Competitively Sensitive Information About Their Future Dodgers Channel Carriage Plans*

65. Mr. York and his counterpart at Cox, the Senior Vice President of Programming, agreed to share forward-looking strategic information about the Dodgers Channel, and did share that information. Their exchanges of information demonstrate their agreement and reflect concerted action between horizontal competitors.

66. On October 2, 2013, Cox's then-incoming Senior Vice President of Programming and his colleagues met to discuss their carriage plans for the Dodgers Channel. They concluded that Cox should decline carrying the network unless one of the video distributors that overlapped with Cox's service area, such as DIRECTV or AT&T, reached a deal with TWC, at which point Cox would need to reassess its position.

67. Eight days later, on October 10, 2013, Cox's incoming Senior Vice President of Programming met Mr. York for breakfast in New York City. That executive has admitted that he and Mr. York discussed the "rising sports costs" their competing companies faced, including the Dodgers Channel.

68. On January 21, 2014, TWC presented its initial formal Dodgers Channel carriage offer to DIRECTV. The next day, Mr. York called his Cox counterpart and they spoke for twenty

minutes. That same day, Mr. York also spoke or attempted to speak with his counterparts at Charter and AT&T.

69. On January 27, 2014, TWC presented its formal Dodgers Channel carriage offer to Cox. TWC asked for the same rate structure as it had sought from DIRECTV and other video distributors.

70. On February 4, 2014, Cox decided that it was interested in pursuing an *a la carte* carriage deal under which Cox would only pay a rate based on subscribers that watched the Dodgers Channel instead of a rate based on all its subscribers. That same day, Mr. York gave DIRECTV's CEO a presentation reflecting Mr. York's knowledge that DIRECTV's competitors "appear[ed] in no rush to do a deal."

71. During the first quarter of 2014, Cox increased its monthly fees for all subscribers in the LA area. Cox increased its prices in part to recoup the anticipated cost of carrying the Dodgers Channel, which it never launched.

72. Mr. York spoke with his Cox counterpart, the Senior Vice President of Programming, on at least ten separate occasions between March and July 2014 as the baseball season began and the companies' Dodgers Channel carriage negotiations continued. At least seven of their phone conversations were more than ten minutes long.

73. Cox's Senior Vice President of Programming has admitted under oath that he and Mr. York shared strategic information about their companies' non-public, future Dodgers Channel carriage plans on at least two calls.

74. During one call, which took place between March and June of 2014, Cox's Senior Vice President of Programming reached out to Mr. York after TWC told him that "an agreement between another distributor and SportsNet LA was imminent." The Cox executive called Mr. York to ask "if DIRECTV was the other distributor." Mr. York told the Cox executive that DIRECTV was not close to launching. During this conversation, they expressly agreed to "give each other a heads-up if their respective MVPDs were going to launch" the Dodgers Channel "before it was public knowledge."

75. In another call during the same time period, Mr. York called his Cox counterpart and said that "before DIRECTV were to sign a deal [to carry the Dodgers Channel], Mr. York would let [him] know, in case [he] wanted to sign a deal and protect any MFN terms, so [Cox] could choose to sign first." Mr. York's offer to forgo a first-mover advantage was contrary to DIRECTV's own economic interest as his plan could risk the terms DIRECTV would have negotiated with TWC and could also

reduce the costs of one of DIRECTV's competitors.

76. Cox did not carry the Dodgers Channel in 2014 and has still not reached an agreement to carry the channel. Consumers located in the Cox service territory in the LA area did not have regular access to most televised Dodgers games during the 2014, 2015, and 2016 baseball seasons.

*iii. DIRECTV and Charter Shared Non-Public Competitively Sensitive Information About Their Future Dodgers Channel Carriage Plans*

77. Mr. York and his counterpart at Charter, the Senior Vice President of Programming (the most senior content executive at Charter), agreed to share forward-looking strategic information about the Dodgers Channel, and did share that information. Their exchanges of information demonstrate their agreement and reflect concerted action between horizontal competitors.

78. Charter conducted no formal analysis to assess the value of offering the Dodgers Channel. Instead, Charter's Senior Vice President of Programming recommended a strategy—that Charter hold out until DIRECTV carried the Dodgers Channel and then reevaluate. Charter's senior content executive testified that his recommendation on this important carriage decision was based on a "gut feeling early on in the process" that Charter should not be the first MVPD to launch the Dodgers Channel, which "sort of solidified, came together by the end of summer, fall of 2013." Mr. York and his counterpart at Charter spoke on the phone at least twice during that time period.

79. Mr. York and his Charter counterpart had a history of sharing information with one another about strategic negotiations and plans while negotiations were ongoing. In January 2014 (as discussions about the Dodgers Channel began to heat up), DIRECTV's carriage negotiations with The Weather Channel failed and the channel went into a blackout on DIRECTV. During the blackout, The Weather Channel sought to run advertisements attacking DIRECTV over Charter's service. Charter's Senior Vice President of Programming left a voicemail for Mr. York. In the voicemail, this Charter senior executive assured Mr. York that he would stop The Weather Channel from running such an ad over Charter's service, calling the favor "my little bit for the planet earth."

80. Similarly, in September 2014, Charter's Senior Vice President of Programming left Mr. York several voicemails concerning Charter's negotiations with the co-owner of Hulu



about Hulu's online subscription video service, letting him know that Charter was not inclined to allow its video subscribers to access Hulu's service using their Charter accounts, and asking if DIRECTV planned to reach a deal concerning Hulu. Charter's Senior Vice President of Programming left Mr. York at least one voicemail speaking in coded language about Charter's ongoing negotiations with Hulu's co-owner: "I was going to get doing it if I had to, but then I remembered a little birdie saying that you were busy with my heavyweight friend perhaps."

81. On September 17, 2013, Mr. York and his counterpart at Charter spoke to one another on the phone. The day after this conversation, Mr. York's Charter counterpart proposed for the first time to Charter's CEO that Charter adopt a strategy of waiting for DIRECTV to carry the Dodgers Channel. Specifically, this senior executive "[s]uggest[ed] we discuss sitting this one out until at least if and when Direct does a deal."

82. On October 24, 2013, Charter's Senior Vice President of Programming met with his CEO to set Charter's content budget for 2014, including estimated costs for carrying the Dodgers Channel. This senior executive proposed that Charter "hold tight, see where we are in July . . . if Direct goes in May/June we can still get that deal. But let it play out." Later that day, this senior executive texted Mr. York: "Can I call you now? Funny had something for u. Where can I call."

83. On November 5, 2013, a subordinate of Charter's Senior Vice President of Programming suggested that Charter take a "first in strategy" with the Dodgers Channel that would "guarantee[] carriage and put[] pressure on others" while affording Charter "solid MFN" protection, such as the MFN protection Charter received from TWC during the Lakers Channel negotiations. Charter's Senior Vice President of Programming declined to pursue the same strategy that Charter had used for the Lakers Channel, explaining that "I think Direct will not be there at launch. Maybe AT&T will but if no [satellite] carriage at launch there is nowhere to get the games in our markets." At the time, DIRECTV had not made any public statements about its Dodgers Channel carriage plans.

84. On January 21, 2014, TWC made its initial offer to DIRECTV. Mr. York called his counterpart at Charter the following afternoon (and spoke with both his Cox counterpart and AT&T counterpart). On January 23, 2014, TWC sent Charter its Dodgers Channel offer. After playing phone tag for several days, Mr. York and his Charter counterpart

had a twenty-minute call on January 29, 2014.

85. Charter's Senior Vice President of Programming consistently told TWC that Charter would not consider carrying the Dodgers Channel unless DIRECTV launched first.

86. Charter's Senior Vice President of Programming admitted that, on April 30, 2014, about one month after the baseball season began but while negotiations were still continuing, he and Mr. York discussed "the high cost of sports programming, including the high price that TWC paid for the rights to SportsNet LA and was demanding for carriage." He also testified that he and Mr. York discussed that the price TWC offered their respective companies for carriage was "outrageous."

87. Charter did not carry the Dodgers Channel during the 2014 baseball season. Subscribers located in the Charter service territory in the LA area did not have regular access to most televised Dodgers games during the 2014 baseball season or at the start of the 2015 season.

88. Charter announced that it would acquire TWC in May 2015. Soon thereafter, Charter agreed to carry the Dodgers Channel.

*iv. DIRECTV and AT&T Shared Non-Public Competitively Sensitive Information About Their Future Dodgers Channel Carriage Plans*

89. Mr. York and his counterpart at AT&T, the most senior content executive there, agreed to share forward-looking strategic information about the Dodgers Channel, and did share that information. Their exchanges of information demonstrate their agreement and reflect concerted action between horizontal competitors.

90. Mr. York's AT&T counterpart became President of Content and Advertising Sales ("President of Content") in June 2013 and Mr. York, who previously had worked at AT&T, cultivated a close relationship with this person. Mr. York offered to "show [him] around [LA] and help meet the players in this crazy content world." Thus, as AT&T's President of Content testified, Mr. York "helped [him] get a lay of the land in the industry" and introduced him to "various players in the industry."

91. AT&T's President of Content understood the importance of developing relationships with AT&T's direct competitors. In a handwritten note taken a few weeks after assuming his new position, he wrote that he "need[ed] to go meet industry peers," including DIRECTV. Mr. York organized a one-on-one breakfast with his AT&T

counterpart several weeks later at a hotel near AT&T's offices.

92. On January 16, 2014, TWC presented its formal Dodgers Channel carriage offer to AT&T. TWC asked for the same rate structure as it later sought from DIRECTV and other video distributors.

93. On January 21, 2014, AT&T's President of Content met with other members of his content team to discuss TWC's offer. Like Charter's Senior Vice President of Programming, AT&T's President of Content indicated that his "gut" instinct was to "sit on sidelines," but noted that the possibility that "DIRECTV may move" was a factor that could cause AT&T to revisit its position.

94. On January 22, 2014, Mr. York and his AT&T counterpart spoke for twelve minutes. At the time of this call, DIRECTV and AT&T had both recently received Dodgers Channel offers from TWC.

95. On February 25, 2014, an AT&T Vice President expressed concern that his earlier public comments to Bloomberg News about the Dodgers Channel were "too vanilla" and stated that AT&T might "need to take more of a stand." Ten days later, the executive suggested that AT&T publicly communicate its Dodgers Channel carriage "position more aggressively to influence other MVPD's strategy."

96. On February 26, 2014, AT&T's President of Content and his content team recommended to his direct supervisor that AT&T decline to launch the Dodgers Channel at TWC's asking price. They described AT&T's "initial implementation strategy" as "[h]old-out as long as DirecTV does not carry." The day of this presentation, AT&T's President of Content left a voicemail for Mr. York. He then tried to reach Mr. York on February 28, 2014, texting "Just tried you. I am around if you free up. I will try u tomorrow if not." Then, the next day, AT&T's President of Content left another voicemail for Mr. York, this time stating "I had three things to catch up with you on, ah, two sports and one news."

97. After leaving this message, AT&T's President of Content went to AT&T's Dallas headquarters for a series of strategy meetings and kept trying to reach Mr. York. This AT&T senior executive and Mr. York finally spoke for twenty minutes on March 4, 2014. The next day, this same AT&T executive met with AT&T's CEO to discuss TWC's Dodgers Channel offer. AT&T's President of Content "recommend[ed] not launching [the Dodgers Channel] unless TWC reduces the rate materially," but noted that DIRECTV launching was an "outstanding risk

factor.” This AT&T executive’s handwritten notes explained that AT&T’s “intent [was] to message but hold, pivot if we have to—DTV!”

98. On March 11, 2014, TWC told an AT&T negotiator that it “was unlikely to move off [its] initial asking price of \$[##] now because [TWC] wouldn’t be able to offer [AT&T] a lower rate and not offer it to a larger distributor.”

99. The next day, Mr. York texted AT&T’s President of Content “Got a sec to talk?” and Mr. York’s AT&T counterpart responded “Yep. You on cell or work?” Mr. York responded “Work.” The following day, AT&T’s President of Content—who has referred to carriage offers as “pitches”—again texted Mr. York “Forgot to tell you but we got a [##] mph pitch yesterday.”<sup>5</sup> A few hours later, AT&T’s President of Content continued “Consistent with what you got?” and Mr. York responded “Hope u hit it out!” This exchange occurred only two days after TWC had informed AT&T that it was unlikely to change its initial asking price.

100. AT&T acquired DIRECTV in July 2015. AT&T still does not carry the Dodgers Channel. AT&T subscribers outside of TWC’s service territory in the LA area did not have regular access to most televised Dodgers games during the 2014, 2015, or 2016 baseball seasons.

## V. DIRECTV’S INFORMATION EXCHANGES HAD THE LIKELY EFFECT OF HARMING COMPETITION

### A. Defendants Have Market Power—the Ability to Harm Competition—in the Market for Video Distribution Services

101. One tool that courts use to assess the competitive effects of concerted action is defining a relevant market—the zone of competition among the agreeing rivals in which the agreement may affect competition. A relevant market contains both a product dimension (the “product market”) and a geographic dimension (the “geographic market”). This case concerns the distribution of professional video content (especially sports content) by MVPDs in multiple geographic markets.

#### i. Video Distribution Service Is a Relevant Product Market

102. Video distributors acquire the rights to transmit video content from programmers, then aggregate that content and distribute it to subscribers who pay for the service. For example,

<sup>5</sup> As explained above, although the actual price figures have been omitted to protect competitively sensitive information, the speed of the quoted pitch in this text matched the cents in TWC’s offer to AT&T.

subscribers to an MVPD’s pay television service typically purchase access to a sizeable array of channels, including for example news, dramas, and reality television programs, as well as the type of sports content at issue in this case. Subscribers, as well as industry participants, view these services as reasonably interchangeable with each other. Moreover, subscribers and industry participants view video distribution services as distinct from—and not reasonably interchangeable with—other forms of entertainment, such as attending live sports games or a music concert. The distribution of professional video programming services to residential or business customers (“video distribution services”) is a relevant product market.

103. Video distributors compete with each other on price and programming content to attract and retain paid video customers. MVPDs, especially DIRECTV, often attempt to distinguish themselves from their competitors on the basis of sports content. DIRECTV bills itself as the “undisputed leader” for sports content among video distributors and, to support that claim, spends over \$1 billion each year to obtain the exclusive rights to provide NFL Sunday Ticket and features it prominently in its marketing materials.

104. Local sports content is a crucial component of competition between video distributors. Sports are often telecast locally on RSNs, and DIRECTV has publicly identified the availability of RSNs as vital to its ability to compete. In filings submitted to the Federal Communications Commission (“FCC”) regarding its program access regulations, which had previously reduced DIRECTV access to local RSNs, DIRECTV described local sports content on RSNs as “some of the most popular and expensive in the market” and questioned whether a video distributor could compete at all without access to this programming. DIRECTV even complained that a cable company’s decision to deny DIRECTV access to an RSN “caused a 33 percent reduction in the households subscribing to [satellite TV] service.”

#### ii. The Cox and Charter LA Service Areas Are Relevant Geographic Markets

105. Consumers seeking to purchase video distribution services must choose from among those providers that can offer such services directly to their home or business. Direct broadcast satellite providers, such as DIRECTV, can serve customers almost anywhere in the United States. In addition, online video distributors are available to any consumer with internet service

sufficient to deliver video of an acceptable quality. In contrast, wireline video distributors such as cable and telephone companies, which include Cox, Charter, and AT&T, serve only distinct geographic areas where they have deployed network facilities. A customer cannot purchase video distribution services from a wireline distributor that does not operate network facilities that connect to the customer’s home or business.

106. Thus, from a customer’s perspective, the relevant geographic market for video distribution services is whatever services are available on an individual location-by-location basis. For ease of analysis, however, these markets can be aggregated to portions of the local franchise areas, or footprints, of the various video distribution service providers where consumers face similar service-provider choices.

107. In the Dodgers Channel carriage area in 2014, three cable companies offered video distribution services to a significant area: TWC, Cox, and Charter.<sup>6</sup> The service areas of these three cable providers did not overlap.

108. Cox’s service area within the LA area is a relevant geographic market. As discussed further below, consumers within this area generally faced the same service-provider choices. Customers within the Cox service area could choose from Cox, DIRECTV, DISH, and nationwide online providers. Some customers within the Cox service area might have AT&T or Verizon as an additional competitive option, but not both. Nevertheless, because a small but significant price increase by a hypothetical monopolist of video distribution services in this area would not be made unprofitable by consumers switching to other services offered outside of the area, the Cox LA service area is a relevant geographic market.

109. Charter’s service area within the LA area is also a relevant geographic market. As discussed further below, consumers within this area generally faced the same service-provider choices. Customers within the Charter service area could choose from Charter, DIRECTV, DISH, and nationwide online providers. Some customers within the Charter service area might have AT&T or Verizon as an additional competitive option, but not both. Nevertheless, because a small but significant price

<sup>6</sup> Mediacom and Suddenlink also operated in the LA area in 2014, but each had fewer than 5,000 video subscribers. With less than 0.5% of LA area total subscribers, neither was competitively significant for purposes of this case. For comparison, TWC (30%), Charter (6.3%), and Cox (5.3%) each had at least 200,000 video subscribers in the LA area.

increase by a hypothetical monopolist of video distribution services in this area would not be made unprofitable by consumers switching to other services offered outside of the area, the Charter LA service area is a relevant geographic market.

*iii. There Are High Barriers to Entry, Expansion and Repositioning in Local Video Distribution Services Markets*

110. Local video distribution service markets are characterized by high barriers to entry. Providers seeking to expand their geographic reach or reposition themselves to offer such services in a particular area face high entry barriers as well.

111. In order to offer video distribution services, wireline and direct broadcast satellite providers must incur enormous upfront investment to construct a distribution infrastructure. Wireline distributors must construct network facilities that reach every home or business that they wish to serve. Likewise, satellite companies such as DIRECTV must launch satellites and deploy earth stations to receive signals from those satellites.

112. Providers may also need to obtain the proper regulatory authority prior to offering video distribution services. Wireline providers generally must obtain a franchise from local, municipal, or state authorities. Direct broadcast satellite providers must obtain approval from the FCC prior to operating the satellites and earth stations that comprise their networks.

113. Online video distributors represent the most likely prospect for successful and significant competitive entry, but they face significant barriers that limit their ability to compete with MVPDs in the short-to-medium term. One such barrier is the need to obtain access to a sufficient amount of content to become viable substitutes. Online video distributors generally offer less content than MVPDs and fewer live sports telecasts of local games. Due in part to these limitations, online video distributors account for only 5% of total video distribution service revenues.

*iv. DIRECTV, Cox, and AT&T Have Market Power in the Highly Concentrated Cox LA Service Area*

114. Consumers in the Cox service area faced limited choices for video distribution services in 2014. In many parts of this area, customers could access video distribution services from only three providers: Cox, DISH, or DIRECTV. In some areas within the Cox footprint, customers could also access video services from either AT&T or Verizon (but not both) where those

companies had upgraded their telephone networks to offer video service as a fourth alternative for consumers.

115. DIRECTV acted in concert with Cox and, therefore, it is appropriate to consider the combined market power of the two firms in the relevant geographic market. DIRECTV and Cox combined account for a greater than 70% share of the Cox local market. By acting in concert under these circumstances, DIRECTV and Cox had the ability to reduce output and product quality to subcompetitive levels.

116. DIRECTV also acted in concert with AT&T in Cox's service area. DIRECTV, Cox, and AT&T combined account for a greater than 75% share of the Cox local market. By acting in concert under these circumstances, the three companies had the ability to reduce output and product quality to subcompetitive levels.

*v. DIRECTV, Charter, and AT&T Have Market Power in the Highly Concentrated Charter LA Service Area*

117. Consumers in the Charter service area also faced limited choices for video distribution services in 2014. In many parts of the Charter service area, customers could access video services from only three providers: Charter, DISH, or DIRECTV. In some areas within the Charter footprint, customers could also access video services from either AT&T or Verizon (but not both) where those companies had upgraded their telephone networks to offer video service as a fourth alternative for consumers.

118. DIRECTV acted in concert with Charter and, therefore, it is appropriate to consider the combined market power of the two firms in the relevant geographic market. DIRECTV and Charter combined account for a greater than 50% share of the Charter local market. By acting in concert under these circumstances, DIRECTV and Charter had the ability to reduce output and product quality to subcompetitive levels.

119. DIRECTV also acted in concert with AT&T in Charter's service area. DIRECTV, Charter, and AT&T combined account for a greater than 55% share of the Charter local market. By acting in concert under these circumstances, DIRECTV, Charter, and AT&T had the ability to reduce output and product quality to subcompetitive levels.

**B. The Information Exchanges Orchestrated by DIRECTV Are of the Type That Is Likely to Harm Competition When Carried Out by Parties With Market Power**

120. The market for video distribution services in the LA area is highly concentrated. The local markets for video distribution services are characterized by high barriers to entry, just three to four entrenched competitors, and a history of interdependent price and output.

121. Competition is likely to be harmed when competitors with market power in concentrated markets, such as the markets at issue, directly exchange strategic information about current and forward-looking plans for product features on which they compete. Here, the information exchanged directly concerned the negotiating positions that were being taken by competitors leading up to and during their negotiations with a common programming supplier. That supplier had every legitimate reason to believe that the companies were viewing each other warily and calculating the risk that the other might move first.

122. The strategic information that DIRECTV exchanged with Cox, Charter, and AT&T was competitively sensitive and a material factor to their decisions not to carry the Dodgers Channel. Like price, content carriage—and particularly local sports content carriage—is a crucial aspect of competition between video programming distributors to attract and retain subscribers. Just as a subscriber might switch away from a distributor in order to obtain a lower price, a subscriber might switch away from a distributor in order to watch programming that the subscriber's current distributor does not offer. But if the subscriber has no alternative video programming distributor from which to obtain the desired content, the possibility that this subscriber might switch to a competitor is eliminated. When video distributors that are competing for the same subscribers exchange their strategic carriage plans, comfort replaces uncertainty and reduces their incentives to launch that content. After all, if no competitor offers particular content, there is no risk current subscribers would switch to a competitor in order to watch that content on another distributor's video service.

123. Information regarding sports content is particularly significant, as sports are an important aspect of the video distribution that customers in the LA region purchase. As noted above, DIRECTV has recognized that RSN

content is “some of the most popular and expensive in the market” and it has attempted to differentiate itself as “the undisputed leader in sports.”

124. The direct competitor communications at issue here took place between DIRECTV’s Chief Content Officer and his counterparts at Cox, Charter, and AT&T. These high-level executives had direct authority over their respective companies’ content carriage negotiations and significant influence over their companies’ content carriage decisions, thereby allowing them to act on the information that they learned and steer their companies’ decisions and negotiation strategies for the Dodgers Channel.

125. These direct communications took place in private settings and involved the exchange of confidential, non-public information. The information was at times exchanged in coded language intended to mask the content of the communications. In addition to the direct communications, DIRECTV executives consistently messaged DIRECTV’s opposition to carriage of the Dodgers Channel through the press.

### **C. DIRECTV’S Information Exchanges Corrupted the Competitive Process and Contributed to the Blackout of Dodgers Games**

126. The information sharing agreements that DIRECTV orchestrated with its direct competitors at Cox, Charter, and AT&T tainted the competitive process for carriage of the Dodgers Channel. They dampened the incentives of the companies to negotiate for and carry the Dodgers Channel, reduced their responsiveness to customer demand, and deprived LA area Dodgers fans of a competitive process that took into full account market demand for watching Dodgers games on television.

127. The information shared between DIRECTV and its competitors was a material factor in their decisions about whether and when to offer the Dodgers Channel in competition with one another.

128. During the Dodgers Channel carriage negotiations, DIRECTV learned valuable strategic information from Cox, Charter, and AT&T that reduced the uncertainty that DIRECTV should have faced from not knowing whether its subscribers would have the option of switching to these competitors in order to watch Dodgers games on television. This knowledge was a material factor in DIRECTV’s decision not to launch the Dodgers Channel. Mr. York testified that other MVPDs not appearing to be in any rush to do the Dodgers Channel deal

was a strategic consideration against DIRECTV doing the deal. Indeed, he edited a presentation given to DIRECTV’s CEO to make sure the presentation included that important factor. One of Mr. York’s subordinates testified that information about competitors’ plans could lead DIRECTV to be less aggressive in its proposals because the company would be “less inclined to engage more meaningfully if everybody was going to collectively sit on the sidelines.”

129. Cox, Charter, and AT&T each used strategic information obtained from DIRECTV to reduce the uncertainty that they each should have faced from not knowing whether their respective subscribers would be able to switch to DIRECTV in order to watch Dodgers games on television. This strategic information was a material factor in their decisions not to launch the Dodgers Channel. Thus, this knowledge tainted what should have been their independent decisions about whether to launch the Dodgers Channel.

130. Because the information sharing agreements made it less likely that DIRECTV and its major MVPD competitors would carry the Dodgers Channel, those agreements had the tendency to reduce the quality of the video distribution services DIRECTV, Cox, Charter, and AT&T provided in the LA area. They likewise had the tendency to reduce output by delaying the day when, if ever, the Dodgers Channel will be widely carried. These effects were ultimately felt throughout the Dodgers Channel broadcast territories where these companies offer service. The reduction in quality and output was felt acutely in the spring of 2014, when the actions of these MVPDs contributed to the Dodgers Channel not being carried during the first weeks of the new season, a time when DIRECTV believed ratings would peak. It continues to be felt by consumers today.

### **VI. DIRECTV’S UNLAWFUL INFORMATION EXCHANGES HAVE NO PROCOMPETITIVE JUSTIFICATION**

131. DIRECTV’s unlawful information exchanges with Cox, Charter, and AT&T were not reasonably necessary to further any procompetitive purpose. The information directly and privately shared between high-level executives was disaggregated, company specific, forward-looking, confidential, and related to a core characteristic of competition between them.

### **VII. VIOLATIONS ALLEGED**

#### **Count 1: DIRECTV Violated Section 1 of the Sherman Act by Entering Into an Unlawful Information Sharing Agreement with Cox**

132. DIRECTV and Cox have engaged in an information sharing agreement in unreasonable restraint of interstate trade and commerce, constituting a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. This offense is likely to continue and recur unless the requested relief is granted.

133. This information exchange scheme consisted of an agreement between DIRECTV and Cox to share strategic information about their companies’ Dodgers Channel carriage negotiations and plans in order to limit the competitive pressure on either of them to carry the Dodgers Channel.

134. The information sharing agreement between DIRECTV and Cox has harmed competition. Their exchange of strategic information blunted the companies’ competitive incentives and corrupted the competitive process, which had the likely and foreseeable result of decreasing quality and reducing output by contributing to a blackout of the Dodgers Channel in part of the LA area.

#### **Count 2: DIRECTV Violated Section 1 of the Sherman Act by Entering Into an Unlawful Information Sharing Agreement with Charter**

135. DIRECTV and Charter have engaged in an information sharing agreement in unreasonable restraint of interstate trade and commerce, constituting a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. This offense is likely to continue and recur unless the requested relief is granted.

136. The information exchange scheme consisted of an agreement between DIRECTV and Charter to share strategic information about their companies’ Dodgers Channel carriage negotiations and plans in order to limit the competitive pressure on either of them to carry the Dodgers Channel.

137. The information sharing agreement between DIRECTV and Charter has harmed competition. Their exchange of strategic information blunted the companies’ competitive incentives and corrupted the competitive process, which had the likely and foreseeable result of decreasing quality and reducing output by contributing to a blackout of the Dodgers Channel in part of the LA area.

**Count 3: DIRECTV Violated Section 1 of the Sherman Act by Entering Into an Unlawful Information Sharing Agreement with AT&T**

138. DIRECTV and AT&T have engaged in an information sharing agreement in unreasonable restraint of interstate trade and commerce, constituting a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

139. The information exchange scheme consisted of an agreement between DIRECTV and AT&T to share strategic information about their companies' Dodgers Channel carriage negotiations and plans in order to limit the competitive pressure on either of them to carry the Dodgers Channel.

140. The information sharing agreement between DIRECTV and AT&T has harmed competition. Their exchange of strategic information blunted the companies' competitive incentives and corrupted the competitive process, which had the likely and foreseeable result of decreasing quality and reducing output by contributing to a blackout of the Dodgers Channel in part of the LA area.

**VIII. REQUEST FOR RELIEF**

141. WHEREFORE, the United States requests that final judgment be entered against DIRECTV and AT&T declaring, ordering, and adjudging that:

a. The aforesaid bilateral information sharing agreements unreasonably restrain trade and are unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1;

b. DIRECTV and AT&T be permanently enjoined from transmitting non-public information concerning DIRECTV's and/or AT&T's negotiating position, strategy, or tactics concerning potential agreements for video programming distribution with any other MVPD when DIRECTV and/or AT&T and another MVPD anticipate negotiating, or are negotiating, with a common programming provider, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

c. DIRECTV and AT&T be required to monitor communications or other contacts between, on the one hand, the executives involved in these unlawful information sharing agreements and others who may take their place in the future, and on the other hand, their horizontal competitors, and to periodically report the time, place, participants, and substance of any such communications to the Department of Justice;

d. DIRECTV and AT&T be required to implement training and compliance programs to instruct their executives

that exchanging non-public strategic information about competitive offerings with competitors when not necessary to further a procompetitive purpose is a violation of the antitrust laws and report on these programs to the Department of Justice; and

e. The United States be awarded its costs of this action and such other relief as may be appropriate and as the Court may deem just and proper, and such other relief as may be appropriate and as the Court may deem proper.

*/s/Jonathan Sallet*

JONATHAN SALLET,  
Deputy Assistant Attorney General for  
Litigation

*/s/Juan A. Arteaga*

JUAN A. ARTEAGA,  
Deputy Assistant Attorney General for  
Civil Enforcement

*/s/Patricia Brink*

PATRICIA BRINK,  
Director of Civil Enforcement

*/s/Scott Scheele*

SCOTT SCHEELE,  
Chief, Telecommunications & Media  
Enforcement Section

LAWRENCE FRANKEL,  
Assistant Chief

JARED HUGHES,  
Assistant Chief

*/s/Patricia C. Corcoran*

PATRICIA CORCORAN  
CORY BRADER  
DYLAN CARSON  
PETER GRAY  
DANIEL HAAR  
MATTHEW JONES  
JONATHAN JUSTL  
DAVID LAWRENCE  
ANNA SALLSTROM  
KRISTINA SRICA

Attorneys for the United States  
U.S. Department of Justice  
Antitrust Division  
450 5th Street N.W.

Washington, D.C. 20001

Telephone: 202-598-2529

Facsimile: 202-514-6381

E-mail: [patricia.corcoran@usdoj.gov](mailto:patricia.corcoran@usdoj.gov)

Dated: November 2, 2016

FOR PLAINTIFF UNITED STATES OF  
AMERICA:

FREDERICK S. YOUNG (DC Bar No.  
421285)

*frederick.young@usdoj.gov*

CORY BRADER (NY Bar No. 5118732)  
*cory.brader@usdoj.gov*

U.S. DEPARTMENT OF JUSTICE  
ANTITRUST DIVISION

450 5th Street N.W.  
Washington, D.C. 20530  
Telephone: 202-307-2869  
Facsimile: 202-514-6381

Counsel for Plaintiff,  
UNITED STATES OF AMERICA

**UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF  
CALIFORNIA WESTERN DIVISION**

UNITED STATES OF AMERICA,  
Plaintiff, v. DIRECTV GROUP  
HOLDINGS, LLC, et al., Defendants.

Case No. 2:16-cv-08150-MWF-E  
COMPETITIVE IMPACT STATEMENT  
Hon. Michael W. Fitzgerald

Plaintiff United States of America  
("United States"), pursuant to the  
Antitrust Procedures and Penalties Act  
("APPA" or "Tunney Act"), 15 U.S.C.  
§ 16(b)-(h), files this Competitive  
Impact Statement relating to the  
proposed Final Judgment against  
Defendants DIRECTV Group Holdings,  
LLC ("DIRECTV") and its corporate  
successor AT&T, Inc. ("AT&T")  
submitted for entry in this civil antitrust  
proceeding.

**I. NATURE AND PURPOSE OF THE  
PROCEEDING**

On November 2, 2016, the United States filed a civil antitrust Complaint alleging that DIRECTV acted as the ringleader of a series of unlawful information exchanges between DIRECTV and three of its competitors—Cox Communications, Inc., Charter Communications, Inc. and AT&T (prior to its 2015 acquisition of DIRECTV)—during the companies' parallel negotiations to carry SportsNet LA, which holds the exclusive rights to telecast almost all live Dodgers games in the Los Angeles area. The Complaint alleges that DIRECTV unlawfully exchanged competitively sensitive information with Cox, Charter and AT&T during the companies' negotiations for the right to telecast SportsNet LA (the "Dodgers Channel").

Specifically, the Complaint alleges that DIRECTV and each of these competitors agreed to and did exchange non-public information about their companies' ongoing negotiations to telecast the Dodgers Channel, as well as their companies' future plans to carry—or not carry—the channel. The Complaint also alleges that each company engaged in this conduct in order to obtain bargaining leverage and reduce the risk that the company's rival would choose to carry the Dodgers Channel (while the company did not), resulting in a loss of subscribers to that rival. The Complaint further alleges that the information learned through these

unlawful agreements was a material factor in the companies' decisions not to carry the Dodgers Channel, harming the competitive process for carriage of the Dodgers Channel and making it less likely that any of these companies would reach a deal because they no longer had to fear that a decision to refrain from carriage would result in subscribers switching to a competitor that offered the channel.

The Complaint alleges that these agreements amounted to a restraint of trade in violation of Section 1 of the Sherman Act, which outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. The Complaint seeks injunctive relief to prevent DIRECTV and AT&T from sharing non-public information with any other multichannel video programming distributor ("MVPD")<sup>7</sup> about Defendants' negotiating position, strategy, or tactics concerning potential agreements for video programming distribution.

The Defendants filed a motion to dismiss the Complaint for failure to state a claim on January 10, 2017 (ECF No. 16), and the United States filed its corrected memorandum in opposition to that motion on February 8, 2017 (ECF No. 23). The Defendants filed their reply brief in support of their motion on February 21, 2017 (ECF No. 24), and the motion was due to be argued at a hearing set for March 13, 2017 (ECF No. 18). Prior to the hearing, the United States and the Defendants filed a stipulation seeking a two-week continuance of the motion hearing because the parties were engaged in productive settlement negotiations (ECF No. 27), and the Court granted the requested continuance (ECF No. 28).

The United States today filed a Stipulation and Order and proposed Final Judgment which would remedy the violation alleged in the Complaint by prohibiting Defendants from sharing or seeking to share competitively sensitive information with any MVPD. Such information includes without limitation non-public information relating to negotiating position, tactics or strategy, video programming carriage plans, pricing or pricing strategies, costs, revenues, profits, margins, output, marketing, advertising, promotion, or research and development.

The United States and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

## II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

### A. Defendants and the Parties to the Alleged Agreements

Defendant DIRECTV is a Delaware corporation with headquarters located in El Segundo, California, offering direct broadcast satellite television service nationwide. As of 2014, DIRECTV was the second largest MVPD in the United States, selling subscriptions to pay television services to approximately 20 million consumers. As of 2014, DIRECTV had approximately 1.25 million video subscribers in the Los Angeles area. In 2015, Defendant AT&T acquired DIRECTV in a transaction valued at approximately \$49 billion. Following that acquisition, AT&T is now the largest pay television provider in the United States with more than 25 million video subscribers nationwide.

Cox Communications ("Cox") is a privately held Delaware corporation with its headquarters in Atlanta, Georgia. Cox is currently the third-largest cable provider in the United States. As of 2014, Cox was the fourth-largest cable provider in the United States and had approximately 500,000 subscribers in the Los Angeles area.

In 2014, Charter Communications ("Charter") was the third-largest cable company in the United States and had approximately 270,000 subscribers in the Los Angeles area. In 2016, Charter merged with Time Warner Cable ("TWC"), which owns the rights to the Dodgers Channel. As of 2014, TWC was the second-largest cable company in the United States with approximately 1.3 million subscribers in the Los Angeles area.

AT&T, a Delaware corporation with headquarters located in Dallas, Texas, is a defendant in this action as the corporate successor to DIRECTV. AT&T is a multinational telecommunications company offering mobile telephone service, wireline Internet and television service, and satellite television service through its 2015 acquisition of DIRECTV. AT&T offers wireline television service through its U-verse video product, which distributes video

content using AT&T's telecommunications infrastructure. As of 2014, AT&T had approximately 400,000 U-Verse video subscribers in the Los Angeles area.

In early 2013, TWC announced that it had partnered with the Los Angeles Dodgers to acquire the exclusive rights to telecast almost all live Dodgers games in the Los Angeles area. The Dodgers Channel was set to launch at the beginning of the 2014 baseball season. TWC approached MVPDs in Los Angeles—including DIRECTV, Cox, Charter and AT&T—and attempted to negotiate agreements for carriage of the Dodgers Channel. TWC failed to reach agreement with any other MVPD. Currently, apart from TWC itself (and Charter following its 2015 agreement to acquire TWC), no MVPD in the Los Angeles area carries the Dodgers Channel, leaving hundreds of thousands of area consumers without access to live telecasts of Dodgers games.

### B. The Relevant Markets and Market Power

MVPDs acquire the rights to transmit content from video programmers and then distribute that content to subscribers who pay for the service. MVPDs compete with each other to attract and retain paying subscribers, both through the prices they charge and the programming content they offer. The Complaint alleges that the distribution of professional video programming services to residential or business customers is a relevant product market in which to evaluate the effects of the alleged antitrust violations.

MVPDs particularly depend on sports content as a way to distinguish themselves from their competitors. For example, DIRECTV refers to itself as the "undisputed leader" for sports content and spends over \$1 billion annually to obtain the exclusive rights to provide its Sunday Ticket package of live National Football League games. MVPDs also consider offering local, live sports content to be a crucial component of competition between them. Telecasts of local sports games are often available only through a regional sports network ("RSN"), like the Dodgers Channel. DIRECTV has publicly highlighted the popularity of RSNs and considers offering RSN content to be essential to its ability to compete. Similarly, MVPDs will purchase the right to telecast certain sports events and create an RSN to carry the telecasts, as TWC did with the Dodgers Channel. Residential and business consumers in the Los Angeles area can only watch Dodgers telecasts by subscribing to a video distribution

<sup>7</sup> MVPD is an industry acronym standing for multichannel video programming distributor, and it applies to a variety of providers of pay television services, including satellite companies (such as DIRECTV and DISH Network), cable companies (such as Cox and Charter), and telephone companies (such as AT&T and Verizon).

service that carries the Dodgers Channel.

The Complaint alleges that Cox's and Charter's Los Angeles service areas are relevant geographic markets in which to evaluate the effects of the alleged antitrust violations. The availability of video distribution services is controlled by which MVPDs offer services to a given location. In the Los Angeles area in 2014, the market for purchasing video distribution services was highly concentrated and consumers could choose from only a handful of providers. Direct broadcast satellite providers, like DIRECTV, can serve customers almost anywhere in the United States. But wireline video distributors, including cable companies like Cox and Charter and telephone companies like AT&T, serve only geographic areas where they have installed infrastructure that reaches a consumer's home or business.

Consumers thus can purchase video distribution services only from those providers that offer services to their location. In 2014, only three cable companies—TWC, Charter, and Cox—offered video distribution services to a significant portion of the Los Angeles area.<sup>8</sup> Their service areas did not overlap.

The Complaint alleges that the relevant market is represented by the competitive choices for video distribution services faced by a consumer at a given location. For ease of analysis, these markets can be aggregated to geographic areas where consumers face similar competitive choices. In the Cox and Charter areas, many consumers could access video programming services only from the cable provider (Cox or Charter) or one of the two satellite providers, DIRECTV and DISH Network. In some areas within these footprints, consumers could choose from four MVPD providers because they could also access video services from either AT&T or Verizon (but not both). The Complaint alleges that these markets are highly concentrated and that, by acting in concert, DIRECTV, Charter, Cox, and AT&T had market power in these geographic markets.

<sup>8</sup> Mediacom and Suddenlink also operated small service areas in the LA area, although neither had more than 5,000 subscribers and neither was competitively significant. Champion Broadband reached a deal to carry the Dodgers Channel in 2014, but had only about 3,000 video subscribers in Arcadia and Monrovia, California, and has since gone out of business.

### *C. The Alleged Agreements To Share Information*

As detailed in the Complaint, during the negotiations with TWC regarding carriage of the Dodgers Channel, DIRECTV orchestrated a series of agreements with Cox, Charter and AT&T to exchange competitively sensitive, forward-looking, strategic information about whether or not they would carry the Dodgers Channel. DIRECTV competes with every other MVPD in the Los Angeles area, making it the natural ringleader of these anticompetitive agreements. By contrast, cable companies serve discrete geographic areas and do not compete with each other for subscribers. Likewise, legacy telephone companies also serve limited territories and compete with the cable companies but not with each other. This meant that if DIRECTV did not carry the Dodgers Channel, it risked losing subscribers to any MVPD in the Los Angeles area that chose to carry the channel. If DIRECTV chose to carry the Dodgers Channel, it stood to gain subscribers from any MVPD that did not. Cox, Charter, and AT&T understood that if DIRECTV decided to carry the Dodgers Channel, competitive pressure could force them to carry it too. DIRECTV also recognized that it would lose leverage with TWC and risk losing subscribers each time any other MVPD chose to carry the channel.

In January 2013, TWC acquired the rights to telecast Dodgers games starting with the 2014 season. DIRECTV, Cox, Charter, and AT&T formed their strategies for the channel in fall 2013, and negotiations with TWC began in January 2014 and continued past the start of the 2014 Major League Baseball season in the Spring. Throughout this period, Dan York—DIRECTV's Chief Content Officer—exchanged strategic information about the Dodgers Channel with rival executives at Cox, Charter, and AT&T.<sup>9</sup> All told, during the period when each MVPD formed its strategy and negotiated for the Dodgers Channel, Mr. York and his rival executives had over 30 communications, some of which explicitly related to carriage plans and some of which coincided with key moments in each companies' negotiations.

For example, Mr. York agreed with his Cox rival to give each other a "heads-up" "before it was public knowledge" if either company was

<sup>9</sup> The Complaint alleges that Mr. York's agreements to exchange confidential information about content negotiations went further than just those about the Dodgers Channel, as Mr. York and his counterpart at Charter also agreed to exchange competitively sensitive information about non-sports programming deals.

going to launch the channel. On another occasion, Mr. York offered to give Cox advance notice before DIRECTV signed a Dodgers Channel deal so that Cox could choose to sign first. Mr. York told his competitor this would help Cox "protect any MFN terms"—that is, it would enable Cox to sign a contract with a most favored nation term and thereby gain the benefit of any better bargain DIRECTV subsequently could extract from TWC due to its larger size. In making this offer, Mr. York was likely sacrificing the benefits of the better deal he could negotiate because of DIRECTV's size and undercutting DIRECTV's claim to be the "undisputed leader" for sports content.

Mr. York and Charter's senior content executive also discussed their respective Dodgers Channel negotiations while they were ongoing. Charter's executive and Mr. York discussed "the high price" that TWC had paid for the Dodgers Channel and the "outrageous" price that TWC "was demanding for carriage." Charter's executive spoke to Mr. York the day before recommending to his CEO that Charter wait for DIRECTV to launch, and he relied on his knowledge of DIRECTV's plans, telling a colleague "I think Direct will not be there at launch." The Charter executive tried to speak with Mr. York again the day Charter set its content budget for the 2014 fiscal year. The two executives checked in after each company had received TWC's offer, and as negotiations continued, the Charter executive maintained to TWC that Charter would not carry the channel unless DIRECTV launched first.

Mr. York also agreed to exchange competitively sensitive Dodgers Channel information with the senior content executive at AT&T. Mr. York and the AT&T executive exchanged text messages that discussed the price of the Dodgers Channel. After the AT&T executive sent Mr. York a coded text message with Time Warner Cable's latest asking price, Mr. York responded by suggesting that he would not want AT&T to accept that offer. The AT&T executive tried to contact Mr. York the same day the AT&T executive recommended that AT&T adopt a Dodgers strategy that depended on DIRECTV. The AT&T executive continued to reach out, leaving Mr. York a voicemail asking to catch up on "three things . . . two sports and one news." The two connected over the phone the day before the AT&T executive met with AT&T's CEO and recommended that AT&T not carry the channel.

The Complaint alleges that Mr. York instigated and continued these information exchanges with his



counterparts at rival MVPDs in order to benefit DIRECTV's own Dodgers Channel negotiations. In a two-hour span the day after DIRECTV received TWC's first Dodgers Channel offer, Mr. York spoke or attempted to speak with all three of his co-conspirators, ultimately connecting with each of them. After those conversations, Mr. York informed DIRECTV's CEO that none of DIRECTV's competitors "appear[ed] in a rush to do a deal" with TWC for the Dodgers Channel, even though it was early in the negotiations and none of the distributors had made public statements about their plans. In April 2014, DIRECTV received an anonymous complaint that Mr. York had been speaking with competitors "about NOT carrying the Dodgers on DIRECTV." In May 2014, DIRECTV CEO Mike White told investors that distributors were "start[ing] to stand together, like most of us have been doing in Los Angeles for the first time ever, by the way, with the Dodgers on outrageous increases and excesses." With uncertainty reduced, the co-conspirators could comfortably resist TWC's offers to carry the Dodgers.

#### *D. Anticompetitive Effects of the Alleged Information-Sharing Agreements*

The Complaint alleges that DIRECTV's information-sharing agreements with its direct competitors at Cox, Charter, and AT&T harmed competition by making it less likely each competitor would carry the Dodgers Channel and by disrupting the competitive process. These agreements dampened the incentives of the companies to negotiate for and carry the Dodgers Channel, reduced their responsiveness to customer demand, and deprived Los Angeles area Dodgers fans of a competitive process that took into full account market demand for watching Dodgers games on television. The harm to competition and consumers stems from the basic principle that an MVPD need not worry about losing subscribers to a competitor over content if it has learned the competitor will not carry that content.

The sharing of competitively sensitive information among direct competitors made it less likely that any of the MVPDs would reach a deal for the Dodgers Channel because it increased their confidence that a decision to refrain from carriage would not result in subscribers switching to a competitor that offered the channel. The reduction of this uncertainty was valuable because each company identified a competitor's decision to telecast the Dodgers Channel as a significant development that could force it to reach a deal with TWC.

Indeed, the information shared between DIRECTV and its competitors was a material factor in their decisions not to launch the Dodgers Channel. These unlawful exchanges were intended to reduce—and did reduce—each rival's uncertainty about whether competitors would carry the Dodgers Channel, thereby providing DIRECTV and its competitors artificially enhanced bargaining leverage.

Because the information sharing agreements made it less likely that DIRECTV and its major MVPD competitors would carry the Dodgers Channel, those agreements had the tendency to reduce the quality of the co-conspirator video distribution services in the Los Angeles area and to reduce output by delaying the day when, if ever, the Dodgers Channel will be widely carried. These effects were ultimately felt throughout the Dodgers Channel broadcast territories where these companies offer service. DIRECTV's unlawful information exchanges harmed consumers by making it less likely that they would be able to watch Dodgers games on television, and this harm continues to be felt by consumers today. DIRECTV's unlawful information exchanges also harmed competition by corrupting the competitive process that should have resulted in each company making an independent decision on whether to carry the Dodgers Channel, subject to competitive pressures arising from independent decisions made by other, overlapping MVPDs.

DIRECTV's three bilateral agreements to share forward-looking strategic information concerning carriage of the Dodgers Channel lacked any countervailing procompetitive benefits and were not reasonably necessary to further any legitimate business purpose. The information directly and privately shared between high-level executives was disaggregated, company specific, forward-looking, confidential, and related to a core characteristic of competition between them.

### **III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT**

The terms of the proposed Final Judgment closely track the relief sought in the Complaint and are intended to provide prompt, certain and effective remedies that will ensure that Defendants and their executives will not impede competition by sharing competitively sensitive information with their counterparts at rival MVPDs. The requirements and prohibitions provided for in the proposed Final Judgment will terminate Defendants' illegal conduct, prevent recurrence of

the same or similar conduct, and ensure that Defendants establish a robust antitrust compliance program. The proposed Final Judgment protects consumers by putting a stop to the anticompetitive information sharing alleged in the Complaint, while permitting certain potentially beneficial collaborations and transactions as detailed below.

The proposed Final Judgment does not and is not intended to compel any MVPD to reach an agreement to carry any particular video programming, including the Dodgers Channel. Negotiations between video programmers and MVPDs are often contentious, high-stakes undertakings where one or both sides threatens to walk away, or even temporarily terminates the relationship (sometimes called a "blackout" or "going dark") in order to secure a better deal. The proposed Final Judgment is not intended to address such negotiating tactics, or to impose any agreement upon TWC, which owns rights to the Dodgers Channel, or any MVPD that is not the result of an unfettered negotiation in the marketplace. Rather, the Final Judgment is intended to prevent the competitive process for acquiring video programming from being corrupted by improper information sharing among rivals and to prevent harm to consumers when such collusion taints that competitive process and makes carriage on competitive terms less likely.

#### *A. Prohibited Conduct*

The proposed Final Judgment broadly prohibits Defendants from sharing strategic competitive information with direct competitors and thus protects the competitive process for negotiating video programming. Specifically, Section IV ensures that Defendants will not, directly or indirectly, communicate a broad array of competitively sensitive, non-public strategic information (such as negotiating strategy, carriage plans or pricing) to any MVPD, will not request such information from any MVPD, and will not encourage or facilitate the communication of such information from any MVPD.

#### *B. Permitted Conduct*

Section IV makes clear that the proposed Final Judgment does not prohibit Defendants from sharing or receiving competitively sensitive strategic information in certain specified circumstances where the information sharing appears unlikely to cause harm to competition.

Section IV(D) allows the communication of competitively

sensitive information with rival MVPDs when counsel and the Antitrust Compliance Officer required by Section V of the proposed Final Judgment (see Paragraph IV.C., below) determine that such communication is reasonably related to a lawful purpose, such as a lawful joint venture, due diligence for a potential transaction, or enforcement of a most-favored-nation term.

Section IV(E) permits the communication of competitively sensitive information pursuant to negotiations with another MVPD to sell video programming to that MVPD, or to buy video programming from it.

Likewise, Section IV(F) permits Defendants to communicate competitively sensitive information with video programmers, including those affiliated with MVPDs, so long as the information pertains only to the potential or actual carriage of the programmer's content by Defendants.

Section IV(G) permits Defendants to respond to news media questions about programming distribution and carriage negotiations, provided Defendants' negotiating strategy is not disclosed.

Finally, Section IV(H) confirms that the proposed Final Judgment does not prohibit petitioning conduct protected by the Noerr-Pennington doctrine.

#### *C. Antitrust Compliance Obligations*

As outlined in Section V, Defendants must designate an Antitrust Compliance Officer, who is responsible for implementing training and antitrust compliance programs and achieving full compliance with the Final Judgment. Among other duties, the Antitrust Compliance Officer will be required to distribute copies of the Final Judgment; ensure training related to the Final Judgment and the antitrust laws is provided to Defendants' directors, officers, and certain other executives; certify annual compliance with the Final Judgment; and maintain and submit periodically a log of all communications relating to competitively sensitive information between Defendants' covered executives and employees of other MVPDs. The Defendants are subject to these compliance obligations for the five-year term of the proposed Final Judgment. This compliance program is necessary considering the extensive communications among rival executives that facilitated Defendants' agreements.

#### **IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS**

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws

may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against Defendants.

#### **V. PROCEDURES AVAILABLE FOR APPROVAL OR MODIFICATION OF THE PROPOSED FINAL JUDGMENT**

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's website and, under certain circumstances, published in the **Federal Register**.

Written comments should be submitted to:

Scott A. Scheele, Chief,  
Telecommunications and Media  
Enforcement Section Antitrust  
Division, United States Department of  
Justice, 450 Fifth Street, N.W., Suite  
7000, Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

#### **VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT**

The United States considered, as an alternative to the proposed Final Judgment, seeking injunctive relief against Defendants' conduct through a full trial on the merits. The United States is satisfied, however, that the relief in the proposed Final Judgment will terminate the anticompetitive conduct alleged in the Complaint and prevent its recurrence, preserving competition for the acquisition and carriage of video programming in the United States. Thus, the proposed Final Judgment would protect competition as effectively as would any remedy available through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

#### **VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT**

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). "The APPA was enacted in 1974 to preserve the integrity of and public confidence in procedures relating to settlements via consent decree procedures." *United States v. BNS Inc.*, 858 F.2d 456, 459 (9th Cir. 1988) (noting that the APPA "mandates public notice of a proposed consent decree, a competitive impact statement by the government, a sixty-day period for written public comments, and published responses to the comments" (citations omitted)). In making that "public interest" determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint

including consideration of the public benefit, if any, to be derived from a determination of the issues at trial. 15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); see generally *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08–1965, 2009 U.S. Dist. LEXIS 84787, at \*3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").<sup>10</sup>

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See *Microsoft*, 56 F.3d at 1458–62; see also *BNS*, 858 F.2d at 462–63 ("[T]he APPA does not authorize a district court to base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint."); *United States v. Nat'l Broad. Co.*, 449 F. Supp. 1127, 1144 (C.D. Cal. 1978) ("[I]n evaluating a proposed consent decree, one highly significant factor is the degree to which the proposed decree advances and is consistent with the government's original prayer for relief." (citation omitted)). With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief

would best serve the public." *BNS*, 858 F.2d at 462 (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); see also *Microsoft*, 56 F.3d at 1458–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at \*3. As the Ninth Circuit has explained: [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. See *United States v. Nat'l Broad. Co.*, 449 F. Supp. 1127 (C.D. Cal. 1978). The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

*Bechtel*, 648 F.2d at 666 (emphasis added) (additional citations omitted).<sup>11</sup> In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; see also *U.S. Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees

than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); see also *U.S. Airways*, 38 F. Supp. 3d at 75 (noting that "room must be made for the government to grant concessions in the negotiation process for settlements" (quoting *SBC Commc'ns*, 489 F. Supp. 2d at 1461) (citing *Microsoft*, 56 F.3d at 1461)); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17 (citation omitted).

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; see also *U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at \*20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged."). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself" and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60. As the United States District Court for the District of Columbia confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to

<sup>10</sup> The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. Compare 15 U.S.C. § 16(e) (2004), with 15 U.S.C. § 16(e)(1) (2006); see also *SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

<sup>11</sup> Cf. *BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *Nat'l Broad. Co.*, 449 F. Supp. at 1142 (under the APPA, "a court's power to do very much about the terms of a particular decree, even after it has given the decree maximum, rather than minimum, judicial scrutiny, is a decidedly limited power" (citation omitted)); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). See generally *Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

make a mockery of judicial power.” *SBC Commc’ns*, 489 F. Supp. 2d at 15.<sup>12</sup>

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that “[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.” 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: “[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.” 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court’s “scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.” *SBC Commc’ns*, 489 F. Supp. 2d at 11. “A court can make its public interest determination based on the competitive impact statement and response to public comments alone.” *U.S. Airways*, 38 F. Supp. 3d at 76 (citation omitted).

## VIII. DETERMINATIVE DOCUMENTS

No determinative documents or material within the meaning of the APPA were considered by the Department in formulating the proposed Final Judgment.

This document will also be made available on the Antitrust Division’s website at <https://www.justice.gov/atr/case/us-v-directv-group-holdings-llc-and-att-inc>.

<sup>12</sup> *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the “Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone”); *United States v. Mid-Am. Dairymen, Inc.*, No. 73–CV–681–W–1, 1977 U.S. Dist. LEXIS 15858, at \*22 (W.D. Mo. May 17, 1977) (“Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.”); S. Rep. No. 93–298, at 6 (1973) (“Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.”).

Dated: March 23, 2017

Respectfully submitted,  
PLAINTIFF

UNITED STATES OF AMERICA

By: /s/FREDERICK S. YOUNG

FREDERICK S. YOUNG

CORY BRADER

DYLAN M. CARSON

PATRICIA CORCORAN

MATTHEW JONES

DAVID LAWRENCE

LAWRENCE A. REICHER

ANNA SALLSTROM

SEAN SANDOLOSKI

CURTIS STRONG

Attorneys for the United States

U.S. Department of Justice

Antitrust Division

450 5th Street N.W.

Washington, D.C. 20530

Telephone: 202–307–2869

Facsimile: 202–514–6381

Email: [frederick.young@usdoj.gov](mailto:frederick.young@usdoj.gov)

## ATTACHMENT A

FREDERICK S. YOUNG (DC Bar No.

421285)

[frederick.young@usdoj.gov](mailto:frederick.young@usdoj.gov)

CORY BRADER (NY Bar No. 5118732)

[cory.brader@usdoj.gov](mailto:cory.brader@usdoj.gov)

U.S. DEPARTMENT OF JUSTICE

ANTITRUST DIVISION

450 5th Street N.W.

Washington, D.C. 20530

Telephone: 202–307–2869

Facsimile: 202–514–6381

Counsel for Plaintiff,

UNITED STATES OF AMERICA

## UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, v. DIRECTV GROUP

HOLDINGS, LLC, et al., Defendants.

Case No. 2:16–cv–08150–MWF–E

PROPOSED FINAL JUDGMENT

Hon. Michael W. Fitzgerald

WHEREAS, Plaintiff, United States of America, filed its Complaint on November 2, 2016, alleging Defendants’ violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Plaintiff and Defendants, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prohibition of

certain alleged information sharing between Defendants and their competitors;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

## I. JURISDICTION AND VENUE

This Court has jurisdiction over the subject matter of and the parties to this action. Venue is proper in the Central District of California. For the purposes of this Final Judgment only, Defendants stipulate that the Complaint states a claim upon which relief may be granted against Defendants under Section 1 of the Sherman Act (15 U.S.C. § 1).

## II. DEFINITIONS

A. “AT&T” means AT&T, Inc., a Delaware corporation with its headquarters in Dallas, Texas, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

B. “Communicate,” “Communicating,” and “Communication” means any transfer or dissemination of information, whether directly or indirectly, and regardless of the means by which it is accomplished, including without limitation orally or by printed or electronic means.

C. “Competitively Sensitive Information” means any non-public information of Defendants or any competing MVPD relating to Video Programming distribution services in the United States, including without limitation non-public information relating to negotiating position, tactics or strategy, Video Programming carriage plans, pricing or pricing strategies, costs, revenues, profits, margins, output, marketing, advertising, promotion, or research and development.

D. “Defendants” means DIRECTV and AT&T.

E. “DIRECTV” means DIRECTV Group Holdings, LLC, a Delaware corporation with its headquarters in El Segundo, California, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

F. “MFN Clause” means a contractual provision that entitles an MVPD to modify a programming agreement to incorporate more favorable rates, contract terms, or conditions that the Video Programmer agrees to with another MVPD.

G. “MVPD” means a multichannel video programming distributor as that

term is defined on the date of entry of this Final Judgment in 47 C.F.R. § 76.1200(b).

H. "Person" means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

I. "Video Programmer" means any Person that provides Video Programming for distribution through MVPDs.

J. "Video Programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable network, regardless of the medium or method used for distribution.

### III. APPLICABILITY

This Final Judgment applies to Defendants, as defined above, and all other Persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

### IV. PROHIBITED CONDUCT

Defendants shall not, directly or indirectly:

- A. Communicate Competitively Sensitive Information to any MVPD;
- B. Request Competitively Sensitive Information from any MVPD; or
- C. Encourage or facilitate the Communication of Competitively Sensitive Information to or from any MVPD.

Notwithstanding the foregoing, nothing in this Final Judgment shall prohibit Defendants from:

- D. After securing advice of counsel and in consultation with the Antitrust Compliance Officer, Communicating Competitively Sensitive Information to or requesting Competitively Sensitive Information from any MVPD when such communication is reasonably related to a lawful purpose, such as a lawful joint venture or legally supervised due diligence for a potential transaction, or the enforcement of MFN clauses;
- E. Communicating Competitively Sensitive Information to or requesting Competitively Sensitive Information from an MVPD if such Competitively Sensitive Information pertains only to either (a) Defendants' supply of Video Programming to that MVPD, or (b) that MVPD's carriage or potential carriage of Defendants' Video Programming;
- F. Communicating Competitively Sensitive Information to or requesting Competitively Sensitive Information from a Video Programmer, including

one affiliated with an MVPD, if such Competitively Sensitive Information pertains only to either (a) that Video Programmer's supply of Video Programming to Defendants, or (b) Defendants' carriage or potential carriage of that Video Programmer's Video Programming;

G. Responding to any question from any news organization related to the distribution of Video Programming or to any actual or proposed transaction with any MVPD, provided that response does not disclose Defendants' negotiation strategy; or

H. After securing advice of counsel and in consultation with the Antitrust Compliance Officer, engaging in conduct in accordance with the doctrine established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and their progeny.

### V. COMPLIANCE PROGRAM

A. Defendants shall implement a training and antitrust compliance program to instruct their executives and employees responsible for, or participating in, content carriage negotiations that Communicating Competitively Sensitive Information with competing MVPDs when not reasonably related to a lawful purpose may be a violation of the antitrust laws. This compliance program shall include designating, within thirty (30) days of entry of this Final Judgment, an Antitrust Compliance Officer with responsibility for implementing the training and antitrust compliance program and achieving full compliance with this Final Judgment.

B. The Antitrust Compliance Officer shall, on a continuing basis, be responsible for the following:

- 1. Distributing, within thirty (30) days from the effective date hereof, a copy of this Final Judgment to (i) each of the officers of Defendants who has duties or responsibilities related to the acquisition of Video Programming or to Video Programming carriage plans and decisions; (ii) each of the other employees and agents of Defendants who has duties or responsibilities related to the acquisition of Video Programming or to Video Programming carriage plans and decisions; and (iii) each of the other employees or agents of Defendants who has duties or responsibilities related to reviewing any submissions to Defendants' ethics portal or to any other anonymous suggestion or complaint vehicle available to Defendants' employees or agents.
- 2. Distributing within thirty (30) days a copy of this Final Judgment to any

person who succeeds to a position described in Section V(B)(1).

3. Briefing annually those persons identified in Sections V(B)(1) and (2) on the meaning and requirements of this Final Judgment and of the antitrust laws, and advising them that Defendants' legal advisors are available to confer with them regarding compliance with both the Final Judgment and the antitrust laws.

4. Obtaining from each person identified in Sections V(B)(1) and (2) an annual written certification that he or she: (i) has read, understands, and agrees to abide by the terms of this Final Judgment; (ii) is not aware of any violation of this Final Judgment that has not been reported to the Antitrust Compliance Officer; (iii) has been advised and understands that his or her failure to comply with this Final Judgment may result in an enforcement action for civil or criminal contempt of court against Defendants or any other person who violates this Final Judgment; and (iv) has maintained and submitted a record of all Communications of Competitively Sensitive Information with any MVPD, other than those consistent with Sections IV(D), (E), (F), (G) and (H).

5. Maintaining (i) a record of all certifications received pursuant to Section V(B)(4); (ii) a file of all documents in existence at the commencement of and related to any investigation by the Antitrust Compliance Officer of any alleged violation of this Final Judgment; and (iii) a record of all communications generated after the commencement of any such investigation and related to any such alleged violation, which shall identify the date and place of the communication, the persons involved, the subject matter of the communication, and the results of any related investigation.

6. Maintaining, and furnishing to the United States, on a quarterly basis for the first year and annually thereafter, a log of all Communications, between or among any person identified in Sections V(B)(1) and (2) and any person employed by or associated with any other MVPD, relating, in whole or in part, to Competitively Sensitive Information, excluding those communications consistent with Sections IV(D), (E), (F), (G) and (H). The log shall include but not be limited to an identification (by name, employer and job title) of all participants in the communication; the date, time, and duration of the communication; the medium of the communication; and a description of the subject matter of the communication.

C. If Defendants' Antitrust Compliance Officer learns of any allegations of a violation of any of the terms and conditions contained in this Final Judgment, Defendants shall immediately investigate to determine if a violation has occurred and appropriate action is required to comply with this Final Judgment. If Defendants' Antitrust Compliance Officer learns of any violation of any of the terms and conditions contained in this Final Judgment, Defendants shall immediately take appropriate action to terminate or modify the activity so as to comply with this Final Judgment. Defendants shall report any such investigation or action in the annual compliance statement required by Section VI(B).

D. If Defendants' Antitrust Compliance Officer learns any Competitively Sensitive Information has been communicated from an MVPD to any person identified in Sections V(B)(1) and (2), excluding those communications consistent with Sections IV(D), (E), (F), (G) and (H), the Antitrust Compliance Officer shall instruct that person that he or she must not consider the Competitively Sensitive Information in any way, shall advise counsel for the MVPD which communicated the Competitively Sensitive Information that such information must not be communicated to Defendants, and report the circumstances of the Communication of the Competitively Sensitive Information and the response by the Antitrust Compliance Officer in the annual compliance statement required by Section VI(B).

## VI. CERTIFICATION

A. Within sixty (60) days after entry of this Final Judgment, Defendants shall certify to Plaintiff whether they have designated an Antitrust Compliance Officer and have distributed the Final Judgment in accordance with Section V(B) above. This certification shall include the name, title, business address, email address, and business phone number of the Person designated as Antitrust Compliance Officer.

B. For the term of this Final Judgment, on or before its anniversary date, Defendants shall file with the Plaintiff an annual statement as to the fact and manner of its compliance with the provisions of Section V, including the record(s) created in accordance with Section V(B)(4) above.

## VII. COMPLIANCE INSPECTION

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether this Final Judgment should be modified

or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

1. access during Defendants' office hours to inspect and copy, or at the United States' option, to require Defendants and their members to provide copies of all books, ledgers, accounts, records, and documents in their possession, custody, or control, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Defendants' officers, employees, or other representatives, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports and interrogatory responses, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to the United States, Defendants identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall give ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

## VIII. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

## IX. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire five (5) years from its date of entry.

## X. PUBLIC INTEREST DETERMINATION

The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

SO ORDERED:

Dated: 2017

Michael W. Fitzgerald

United States District Judge

[FR Doc. 2017-07463 Filed 4-12-17; 8:45 am]

BILLING CODE P

## DEPARTMENT OF JUSTICE

[Docket No. OLP 160]

### Notice of Public Comment Period on Advancing Forensic Science

**AGENCY:** Department of Justice.

**ACTION:** Request for public comment.

**SUMMARY:** It is the Department's mission to ensure public safety and provide federal leadership in preventing and controlling crime. Advancing the practice of forensic science is an important part of that effort. The more effective a forensic system we have, the better equipped we are to solve crimes, more swiftly absolving the innocent and bringing the guilty to justice. The second term of the National Commission on Forensic Science (NCFS) is set to expire on April 23, 2017. As part of the Department's continued efforts to advance the practice of forensic science following NCFS's expiration, the Department is seeking comment on how the